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Instantie Rechtbank Den Haag

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Zaaknummer 09/748003-18V

Rechtsgebieden Strafrecht

Bijzondere kenmerken Eerste aanleg - meervoudig

Inhoudsindicatie

Prison sentence of seven years and six months for participating in the Islamic State terrorist organization, preparatory acts for committing a terrorist crime and a war crime.

The suspect travelled to Syria on 24 October 2014 and stayed there until 3 September 2016, the moment he joined the Free Syrian army. There is a payroll from IS, which states that the suspect is employed by a so-called sniper battalion. The suspect's mother stated that he received a salary from IS. There are many photos of the suspect on which he can be seen armed and in combat clothing. There are also incriminating chats in the file. During his stay in Syria, he posed next to a deceased man hanging on a cross and had his photograph taken. He then distributed this photo via Facebook. With this, he violated the personal dignity of the deceased, which resulted in a war crime.

Acquittal for two other war crimes, concerning distribution of photographs showing deceased people. For one photo there is insufficient evidence that he has distributed it and the distribution of the other photo is indeed a continuation of the humiliation and degradation of the deceased, but in itself not of such a nature and seriousness that this is simply seen as a violation of the personal dignity of the deceased person.

No ne bis in idem, despite conviction in Turkey, since the sentence was not fully enforced in Turkey. The court does take into account, the time the suspect has been detained in Turkey. Unofficial translation of ECLI:NL:RBDHA:2019:7430.

Vindplaatsen Rechtspraak.nl

Uitspraak

THE HAGUE DISTRICT COURT

Criminal law section

Criminal Court of Three Judges

Verdict pronounced on 23 July 2019

Contradictory

(Promis verdict)

Based on the Indictments and following the examination at the hearing, the The Hague district court issued the following verdict in the case of the Public Prosecutor against the suspect:

[suspect],

Born in [POB] on [DOB],

Currently detained in the penitentiary facility 'Vught' in Vught.

Operation name: 26Nashville

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1 Preamble

During the spring of 2011, an uprising against the regime of President Bashar al-Assad (hereinafter: Assad) started in Syria. The regime tried to suppress the call for reforms with blunt violence; this did not silence the resistance, however. Fairly quickly, this resulted in violent incidents on both sides. During the following years, these violent incidents kept on occurring and partly expanded to (parts of)

Iraqi territory. Already in the course of 2012, it became clear that several jihadist battle groups were increasingly involved in the uprising. Many of these jihadist battle groups are considered to be terrorist organisations. Several battle groups made global calls to participate in the armed battle. The consequence of these calls was that a large number of people left – including from the Netherlands – to the battle fields in Syria and Iraq in order to participate in the battle as so-called '*foreign fighters*'. In June 2014, the group Islamic State in Iraq and the Levant (hereinafter: ISIL) controlled several parts of Syria and Iraq and renamed itself on 29 June 2014 as Islamic State (hereinafter: IS). After 2016, IS started to lose more and more territory and at the end of 2018, the IS stronghold finally fell.

In short, the suspect is believed to be guilty of having travelled from the Netherlands and having participated in a terrorist organisation, i.e. one of the jihadist battle groups, that in those days were active in Syria and Iraq. Furthermore, the suspect is believed to be guilty of having committed war crimes – in the context of his participation in a terrorist organisation.

The investigation was adjourned at the hearing of 15 October 2018 (pro forma), of 9 January 2019 (pro forma), of 18 February 2019 (pro forma), of 13 May 2019 (pro forma) and of 8 and 9 July 2019 (examination of the substance of the case). The District Court then learnt about the application of the Public Prosecutors *mr. N. Vogelenzang* and *mr. L.B. Haneveld* (hereinafter: the Public Prosecutors) and of what the suspect and his defence counsel *mr. Y. Özdemir* put forward.

Although the suspicions are interrelated, the District Court will deal with them in separate chapters. It is inevitable that, due to this, some repetition will occur in relation to the context.

Reference to evidence is made in footnotes. Furthermore, in the final notes, reference is made to literature and case law. These references will be, as best as possible, made in accordance with the *Leidraad voor juridische auteurs*.

In this verdict, the District Court will frequently use quotes and terms in English. This is because of the international nature of the war crimes that the suspect is believed to be guilty of.

2 The Indictment

After the more detailed description of the Indictment at the hearing, as stipulated in Article 261, Paragraph 3 of the Dutch Code of Criminal Procedure, the suspect was told what he was suspected of, under the Indictment with Public Prosecutor's Office Ref. No. 09/748003-18 (Indictment I) and the Indictment with Public Prosecutor's Office Ref. No. 09/748003-19 (Indictment II), which was added at the trial. The text of the Indictment is attached to the verdict as Annex I and is part of this verdict.

Count 1 of Indictment 1 charges the suspect with having participated in a terrorist organisation, such as IS in Syria and/or Iraq and/or Turkey and/or the Netherlands, together and in association with one or more other persons or not, in the period from 1 August 2014 to 1 November 2016 and/or that in the same places as where crimes were committed, he conducted preparatory acts for terrorist crimes, together and in association with one or more other persons or not, in the period from 1 August 2014 up to and including 1 November 2016.

In Count 2 of Indictment I and in the offences 1 and 2 of Indictment II, the suspect is charged with being guilty of having posed during his stay in Syria and/or Iraq next to a deceased person and distributed this photograph as well as two other photographs of deceased persons.

In short, this suspicion comes down to an outrage upon personal dignity, by treating someone in an extremely humiliating and dishonouring way, as prohibited by virtue of as prohibited by virtue of the common Article 3, Paragraph 1, introduction and under (c) of the Geneva Conventions 1949. In the Netherlands, this is punishable as a war crime by virtue of Article 6, Paragraph 1, introduction and under (c), last sentence of the International Crimes Act (hereinafter: WIM), a stipulation inspired on Article 8, Paragraph no. 2 introduction and under (c) sub ii of the Rome Statute.

3 Admissibility of the Public Prosecutor's Office

3.1 Position of the defence

3.1.1 Ne bis in idem

The defence takes the position that the Public Prosecutor's Office is inadmissible in the prosecution of the suspect, since it is in breach of Article 68 of the Dutch Criminal Code. In that context, the defence argues – in short and insofar as important here – as follows: Prosecution of the same offence as for which the suspect was convicted in Turkey. Furthermore, the appeal case/the appeal in cassation (the defence uses both terms) was withdrawn by the suspect; therefore, the Turkish verdict has become final. The requirement of irrevocability has, therefore, be complied with. In addition, the suspect has served his sentence in Turkey. Although Turkey has not stated that the suspect served his sentence completely or refrains from further execution; this, however, leaves aside the fact that the Public Prosecutor's Office has not requested Turkey to take over the execution of the verdict (the District Court understands: to transfer) nor has it asked for any information on the remaining sentence. Finally, the Public Prosecutor's Office could have chosen to further execute the verdict in the Netherlands. Prosecution on the ground that the suspect has not fully served his sentence yet, therefore, contravenes the spirit of the law, given Article 6 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the principles of the European Court of Human Rights (hereinafter: ECtHR).

3.1.2 Jurisdiction

The defence argues (as the District Court understands, with respect to the charged offences in Count 1 of Indictment I) that the Netherlands has no jurisdiction, based on Article 2 of the Dutch Criminal Code, since the offences are believed to have been committed outside the Netherlands; and based on Article 3 of the Dutch Criminal Code, since there is no Dutch vessel or aircraft, where a crime allegedly occurred; nor based on Article 5 of the Dutch Criminal Code, since there are no Dutch victims or based on Article 7 of the Dutch Criminal Code, since there is no double criminality, because, under Syrian law, the suspect meets the requirement to be exempt from any sanctions. This is because the suspect has, after having defected to the Free Syrian Army, provided information on IS members. Regarding the question whether the Netherlands has jurisdiction under Article 6 of the Dutch Criminal Code, the defence leaves the District Court to decide on this.

Regarding the question whether the Netherlands has jurisdiction over the charged war crimes, the defence has not taken any position.

3.2 Position of the Public Prosecutor

3.2.1 *Ne bis in idem*

The Public Prosecutor takes the position that there is no double prosecution in the sense of Article 68 of the Dutch Criminal Code. The Public Prosecutor holds it that context that Article 68 of the Dutch Criminal Code is a tight rule, according to which it doesn't result from the case law that the scope of this Article of law is to be seen in broader terms than the text of the article of law. According to the Public Prosecutor a number of requirements of Article 68 of the Dutch Criminal Code have not been met. In the first place, it is the question whether we are dealing with the same offence, given the charged period of time in the Turkish verdict. Furthermore, it is not clear yet whether the Turkish verdict has become irrevocable; nor are we dealing with a matter of complete execution of the sentence. A large part of the imposed sentence has not been served yet and the Turkish authorities have informed us in an unambiguous way that the sentence has been fully executed.

3.2.2 Jurisdiction

The Public Prosecutor takes the position that the Netherlands has jurisdiction to proceed with prosecution. In that context, it was argued that the charged terrorist crimes date from after the coming into force of the Decision on international obligations re. extraterritorial jurisdiction, meaning that the Netherlands has jurisdiction to proceed with prosecution. In relation to the war crimes there is jurisdiction under Article 2 Paragraph 1 sub (c) of the WIM, since the suspect has the Dutch nationality. Double criminality is not a requirement for this.

3.3 Opinion of the District Court

3.3.1 *Ne bis in idem*

The District Court holds that the question whether the *ne bis in idem* principle has been violated can merely relate to the charged participation in a terrorist organisation (Count 1 of Indictment I, first cumulative /alternative), since the suspect merely was convicted in Turkey for participation in a armed terrorist organisation.

The *ne bis in idem* principle or the prohibition of double prosecution, as laid down in, inter alia, Article 68 of the Dutch Criminal Code, means that a person can not be prosecuted and sentenced for having committed the same offence. The principle only applies if there is a *criminal charge*, as laid down in Article 6, Paragraph 1 of the ECHR. The District Court determines that the suspect was convicted by the Full Court of the District Court in Kilis (Turkey) on 17 May 2018 and sentenced to a term of imprisonment of six years and three months for participation in an armed terrorist organisation. Thus, the requirement of *criminal charge* has simply been met.

In order to subsequently answer the question whether the principle of *ne bis in idem* is at stake, it needs to be examined in the present case to what extent we are dealing with the same offence, whether we are dealing with an irrevocable conviction and whether the imposed sanction was followed by full execution, pardon or prescription.

The same offence

The Supreme Court gives in its verdict of 1 February 2011, with reference to European case law, a review criterion for the term the same offence.¹ The Supreme Court explains in the said verdict that, when assessing the question whether something is a case of 'the same offence', in a situation, as set out in Article 68 of the Dutch Criminal Code, the judge must compare the accusations described in both Indictments.

When reviewing, the following details must be taken into account as relevant comparison factors.

(A) The legal nature of the offences.

If the charged offences do not fall under the same definition of the criminal offence, the extent of the difference between the punishable offences may be important, particularly in relation to (i) the rights of protection in the context of the definition of the criminal offences and (ii) the maximum penalties that may be imposed for the different offences, where the maximum penalties, *inter alia*, describe the nature of the accusation and the qualification as a serious offence or a violation.

(B) The conduct of the suspect.

In the event that the Indictments do not describe the same conduct, the level of difference between the conducts may be important; not only with regard to the nature and the apparent purport of the conducts, but also with regard to the time in which, the place where and the circumstances under which they were carried out.

From the term 'the same offence' results that the answer to the question what is meant by it, also depends on the circumstances of the case.

The District Court is of the opinion that the present case deals, in relation to the indicted participation in a terrorist organisation, with the same offence in the sense of Article 68 of the Dutch Criminal Code. From the Turkish verdict of 17 May 2018 follows that the conviction relates to the fact that the suspect travelled to Syria where he subsequently took a ten-day *sharia* course, registered in Raqqa and then left to Kobani, where IS members were in order to fight the PKK/PYD. The conclusion of the full court in said verdict is that the suspect went to Syria in order to join the terrorist organisation IS. Given the complex of offences, on which the Turkish verdict is based, the District Court is of opinion that it is inevitable that this complex of offences falls under the conduct that the Public Prosecutor's Office accused the suspect of in Count 1 of Indictment I first cumulative/alternative. The fact that the verdict mentions

1 November 2016 as the date the offence was committed, does not alter his, given the content of the verdict.

Irrevocability

Not under discussion is the fact that the suspect has withdrawn his appeal against the verdict of 17 May 2018. Insofar as the defence argues that, therefore, the verdict has become final, the District Court dismisses that argument. The defence itself shared at the trial that no confirmation had yet been received from the lawyer in Turkey, stating that the case had become irrevocable, given the withdrawal of the appeal. The Public Prosecutor's Office also stated that it had never received a message from the Turkish authorities to that effect. At the trial of 9 July 2019, the Public Prosecutor also said she was still waiting for a message that the Turkish judges confirm that the conviction is now irrevocable. On this basis, the District Court is of the opinion that the requirement of irrevocability, as stipulated in Article 68 of the Dutch Criminal Code, has not been fulfilled. Even if the verdict is/would have become irrevocable, this does not mean that this is a case of inadmissible double prosecution. An additional requirement applies if the judgment was rendered by a different judge than the judge referred to in Paragraph 1 of that Article of law. The District Court will give its comments on that in the next paragraph.

Conviction in Turkey

The District Court is of the opinion that the wording of Article 68 of the Dutch Criminal Code re the full execution of the sentence leaves no room for a different or wider interpretation. On the contrary, the fact that the requirement of full execution applies in full, can be deduced from a recent verdict of the Supreme Court.²

As mentioned earlier, the District Court in Turkey sentenced the suspect to a term of imprisonment of six years and three months. Both the dossier and the proceedings at the

trial show that the suspect was arrested in Turkey on 2 November 2016 and released on 17 May 2018, the day of the judgment. The suspect has not yet served one third of the whole sentence that was imposed on him. Therefore, the District Court does not follow the defence in its argument that the suspect has served his sentence in Turkey. Furthermore, no documentation has been produced, showing any objective and verifiable information that confirms that Turkey waives execution of the remainder of the sentence that was imposed on the suspect or has granted him a pardon or that the imposed sentence is prescribed. In addition, the documentation produced in this case does not give reason for a (direct and serious) presumption that this requirement has been met.

The requirement that the sentence must have been fully executed is furthermore, opposed to the opinion of the defence, not against the principles of the in breach of the ECHR regarding Article 4 of the Seventh Protocol to the ECHR. In that context, the District Court considers in the first place that the Netherlands has not ratified the Seventh Protocol, so this protocol has no effect on Dutch law. Nonetheless, case law of the ECHR on this stipulation may be important for ideas about the application of Article 68 of the Dutch Criminal Code. However, precisely from the ECHR case law quoted by the defence follows that there needs to be an irrevocable conviction before violation of the *ne bis in idem* principle could be the case; which, in the present case, is not an issue.

Furthermore, it needs to be born in mind that a foreign may only be executed in the Netherlands by virtue of Article 3, Paragraph 1, introduction and under (a) of the Law on Transfer of Execution of Foreign Criminal Sentences [Wet Overdracht Tenuitvoerlegging Strafvonnissen] (hereinafter: WOTS) insofar as the judicial decision is enforceable in that country. Already given the fact that at the time the prosecution of the suspect in the Netherlands was set up, the Turkish verdict was not irrevocable. Hence, the Public Prosecutor's Office could not opt for taking charge of the execution of that verdict, instead of prosecuting the suspect for the same offence in the Netherlands.

Conditional request of re-opening

Given the above, it is not necessary to become aware of (the answer to) the question whether the appeal has been permanently withdrawn. Therefore, the District Court dismisses the conditional request to re-open the investigation in order to get a confirmation of the irrevocability from the Turkish authorities.

Conclusion

The aforesaid considerations mean that the present prosecution is not in breach of the principle that a person can not be prosecuted and sentenced for the same offence, as stipulated in Article 68 of the Dutch Criminal Code. To that extent, the Public Prosecutor's Office was declared admissible.

3.3.2 Jurisdiction

The suspect has been charged with participation in a terrorist organisation and preparatory acts for the commission of a terrorist crime, committed in Syria and/or Iraq and/or Turkey and/or Nederland. On 1 July 2014, the amended scheme of the applicability of the Dutch criminal legislation came into force, in particular the new Article 6 of the Dutch Criminal Code and Article 4, Paragraph no. 2 of the Decision international obligations extraterritorial jurisdiction (hereinafter: the Decision).³ By virtue of the last stipulation, Dutch criminal legislation applies on Dutch nationals (or foreigners) having a fixed abode in the Netherlands) who are guilty of a terrorist crime outside the Netherlands. The charged offences were committed after the entry into force of this Decision, so, in that context, there is no obstacle for the Public Prosecutor to proceed with prosecution.

The three charged war crimes are believed to have been committed in Syria and/or Iraq.

Under Article 2 of the WIM, the Netherlands has jurisdiction over (inter alia) any person who is guilty of a serious offence, committed outside the Netherlands, as set out in the aforesaid Act, insofar as the suspect is in the Kingdom of the Netherlands, as well as over Dutch nationals who are guilty of a serious offence, committed outside the Netherlands, as set out in the Act. This suspect has the Dutch nationality and is in the Netherlands as well; there is, thus, no bar for the Public Prosecutor to proceed with prosecution for this offence.

The aforesaid considerations mean that the Netherlands has jurisdiction re all offences charged. The Public Prosecutor's Office is admissible.

4. Participation in a terrorist organisation and preparatory acts for terrorist crimes

4.1 Position of the Public Prosecutor

The Public Prosecutor takes the position that there is sufficient conclusive evidence that the suspect participated in the terrorist organisation IS and that he made preparatory acts for terrorist crimes.

4.2 Position of the defence

The defence takes the position that the suspect is to be acquitted of the charges of Count 1 of Indictment I first alternative/cumulative as well as the second alternative/cumulative. To that end it is argued – by referring to page numbers that have been replaced by the final dossier, for that matter – that the suspect did travel to IS, but that he did so for humanitarian purposes and that he merely worked in the medical sector during his stay.

4.3 Judgment of the Indictment

4.3.1 Introduction

The suspect is charged with acts that are believed to have been committed as of 1 January 2014 up to and including 1 November 2016. For anyone who followed the news, it must have been completely clear long before that timeframe that the jihadist battle groups systematically committed serious crimes at a large scale. Many of the crimes committed by the jihadist battle groups bore no relation whatsoever with the fight against (the army of) President Assad, but emerged from the desire of these groups to impose their radical version of the sharia in a violent way on the civilian population in the regions conquered by them. On top of that, many of these crimes were committed with the express intention to intimidate the population in these regions. Therefore, executions, decapitations and crucifixions took quite consciously place in public. The population was called up or forced to assist at these events, and sometimes videos of them were posted on the internet. The Independent International Commission of Inquiry on the Syrian Arab Republic of the Human Rights Council of the United Nations (hereinafter: IICIS) reported in its report of 12 February 2014 that ISIS carried out executions in public *'to assert their presence after taking control of an area and to instil fear among the population'*.

In paragraph 4.3.2, the District Court will come to some general statements. In the next paragraph, the Assessment framework for the charged offences will be described, after which the District Court will apply that framework on this case.

4.3.2 General statements

The District Court will set out below which documents are in the dossier and to which statements it will be able to come. In the footnotes, references to evidence are included. When a reference is made to an official report, this is – unless otherwise specified – an official report in the legal form, drawn up by (a) qualified investigator(s).

The police drew up an official report stating that the suspect's mother reported him as missing on 26 November 2014. From further conversations, the suspicion arose that the suspect had left for Syria and had linked up there with IS. The police then asked Corendon Int. Travel for historical data, that revealed that the suspect flew from Cologne to Antalya on 24 October 2014.⁴ At the trial, the suspect stated that he flew to Antalya around his twentieth birthday and then crossed the Syrian border, after which he stayed with IS.⁵ However, the suspect denied that he linked up with IS as a fighter and stated that he merely worked as a car-park attendant at a hospital and later as a humanitarian relief worker.

The suspect stated that he had left for Syria (via Antalya) for the first time in August 2014 but that he came back shortly afterwards, because, according to his statement, he found it dirty over there.

Early 2019, the Militaire Inlichtingen- en Veiligheidsdienst [the Military Intelligence and Security Service] (MIVD) provided an official report about personal details obtained by the United States of America – consisting of a payroll – of approximately 40,000 *foreign fighters* of IS. On this IS payroll, details are listed that seem to correspond with those of the suspect, i.e. his full name, '*kunya*', nationality and date of birth. Furthermore, under the heading '*Assignment*' it reads '*Sniper Battalion*', next to the '*Mu'atah Division*'.⁶ At the trial, the suspect stated that these are effectively his details⁷ but the mention '*Sniper Battalion*' is wrong.

On the payroll it is further registered that '[name suspect]' received a salary for the periods from 7 June to 6 July 2016, 7 July to 4 August 2016 and 5 August to 3 September 2016, and the salary was divided in the amounts '30' and '80'.⁸ The suspect's mother stated, when interviewed by the Examining Magistrate, that the suspect had told her he was given a salary \$30 or \$80.⁹

On 1 July 2016, a call was made to the tip-off telephone number of the Dutch police by the suspect. In this conversation, the suspect said that he was in IS and wanted to know what the Netherlands held against him.¹⁰

Furthermore, the dossier contains several photographs of the suspect, in which he can be seen carrying arms and wearing combat clothing. Plus, in one of those photographs the suspect wears a bandana with an IS logo, in several photographs the suspect makes the Muslim salute, pointing his (right) index finger up, The so-called *Tawhid* gesture.¹¹ At the trial, the suspect stated that during his stay in Syria and Iraq he in fact had his photograph taken with arms,¹² but that this was done in order to show off and be tough.

The police carried out an investigation of the mobile phone of [person 2], who was suspected of planning to leave for Syria and Iraq in order to participate in the armed combat. Investigation of the chat conversations showed that [person 2] was in contact with a certain Niya. In a chat conversation that occurred in the period between 11 October 2015 up to and including 7 December 2015, Niya says, inter alia, that:

- he stayed with IS in October 2015 and had then already been associated with IS for one year;
- he had been given an assault rifle from a person, who on behalf of IS had been designated the leader of the Wilayat Al-Furat province;
- he was in Aleppo and Kobani;
- he shot at '*Kuffaar*' during his stay on the front;
- he has forty bullets in his magazine, that sniping is the greatest thing there is but also the most dangerous;
- he went along on patrol with the police of IS and that he helped investigating the suspects;

- he had gone to Iraq with the nephew of [person 6];
- he is going to Raqqa tomorrow, to hand in 'Taskia';
- he had registered himself 'istishadie' and wants to become saheed in ribaat;
- he is not a 'mujahid' now;
- that 'ribaat' is the front line is and that the beginning is terribly difficult when attacking/when under attack;
- it is difficult in the city when attacking/when under attack, because there are a lot of houses there, and you have to manage to hit them; that it is easy to snipe them in the Sahara;
- with Bashar, when he knew where they were, he always used to throw a grenade;
- a car is driving around him the whole time and that he thinks he is going to stop it; maybe it's driving past in order to throw a grenade; they are at war and he's in a village where the weirdest things are happening;
- he always shoots at windows because he's afraid of those snipers;
- he signed up for the 'button';
- in Ribaat, everybody is just where they are supposed to be and show that you're there with a grenade or by shooting with a mortar.

In the framework of this conversation, several of the afore described photographs were sent as well.¹³ This also goes for the conversations with [person 3].¹⁴

At the trial, the suspect stated that he had chatted with [person 2] and had told her these things,¹⁵ but that he did so in order to show off and act tough.

The father of the co-suspect had frequent contacts with the police. During one of these contacts, the father showed part of a conversation on Facebook Messenger on 13 July (the District Court understands: 2016) between his zoon and [person 4]. In this conversation [person 4] says that [kunya] is back from 'riba'.¹⁶

Finally, the dossier contains a chat conversation of 3 September 2016 between [person 2] and a user who is believed to be the suspect, in which he says that he had 'left' and is no longer with ISIS but joined a different group.¹⁷ At the trial of 8 July 2019, the suspect stated that after he left IS, he joined the Free Syrian Army.¹⁸

The District Court determines that the following meaning may be attributed to the following terms:

Taskia: (*tazkiya of tazkiyah*): guarantee or certificate for those who want to join IS.¹⁹

Istishadie: (*Istishadi*): the term used by IS for those who carry out a martyr operation.²⁰

Saheed: (*shahid*) martyr.²¹

Mujahid: Islamic fighter.²²

Ribaat: Border control.²³

4.3.3 Participation in a terrorist organisation and preparation and facilitation of terrorist crimes

4.3.3.1 Assessment framework

In Article 83 of the Dutch Criminal Code, the legislator laid down which crimes must be considered terrorist crimes. What they have in common, is that they must have been committed with a terrorist objective. In Article 83a of the Dutch Criminal Code, this is described as 'the objective to seriously intimidate the population or part of the population of a country, or to illegally force a government or international organisation to do something, not to do it or to tolerate it, or to seriously disrupt or destroy the fundamental political,

constitutional, economical or social structures of a country or of an international organisation.

Participation in a (terrorist) criminal organisation

To prove an offence of an Indictment under Article 140a of the Dutch Criminal Code, it needs to be established that the organisation involved intends to commit crimes with a terrorist objective. An organisation refers to a form of collaboration with a certain endurance and structure between the suspect and at least one other person. It is not required to establish that they collaborated with, at least were familiar with all other persons, participating in the organisation or that the composition of the organisation is always the same.²⁴ Indications for the existence of such an organisation may for example be: common rules, holding consultations, joint decisions, task allocation, a certain hierarchy and/or echelons.²⁵

Terrorist crimes are crimes focused on seriously frightening the population or illegally forcing a government or an international organisation to do or not to do something or to tolerate something, or to seriously disrupt or destroy the fundamental political, constitutional, economical or social structures of a country or of an international organisation. The District Court deduces from the way the legislator wanted to make participating in a terrorist organisation punishable and the following wording of Article 140a of the Dutch Criminal Code that when assessing the question whether an organisation has a terrorist objective, the series of concerted practices of the organisation and the extent of the intended effects included therein are to be assessed.²⁶ In order to prove the objective, serious offences, *inter alia*, that were already committed in the context of the collaboration may be considered important, as well as the more sustainable and structured nature of the collaboration, that may be revealed by the mutual division of tasks or the mutual streamlining of activities of participants in the organisation with a view to reach the common goal of the organisation, and, more in general; but it may also be considered important how methodical or systematic the activities are that participants in the organisation carry out in view of the objective.²⁷

First of all, it needs to be said that participation in a criminal (terrorist) organisation can only be the case if the person involved belongs to the association and takes part in it or provides assistance to it, conducts, going as far as being directly connected to the realisation of the objective.²⁸ Every such contribution, also referred to as participation act, to an organisation may be punishable. A participation act may consist of (co-)commission of any serious offence, but also of carrying out odd jobs and (thus) performing acts that, *per se*, are not punishable, as long as they can be qualified as an aforementioned participation or support.²⁹ Examples are offering financial attribution or other material support as well as recruiting of funds or for the organisation.³⁰

For participation it is sufficient that the person involved in general knows (in the sense of unconditional intention) that the organisation has as its objective to commit (terrorist) crimes. Any form of intention in relation to the concrete crimes specifically intended by the organisation is not required.³¹

Preparation and facilitation of terrorist crimes

Conspiracy to arson, causing an explosion, murder and/or manslaughter, (to commit) committed with a terrorist objective are punishable by virtue of Article 176b and 289a of the Dutch Criminal Code. In these Articles of law, it is stipulated that that Article 96, Paragraph no. 2 of the Dutch Criminal Code applies accordingly. The Article is a *lex specialis* in comparison with Article 46 of the Dutch Criminal Code.

Under Article 96, Paragraph no. 2 of the Dutch Criminal Code acts are punishable as preparatory and facilitating acts if a person:

1° tries to induce someone else to commit the crime, to have it committed or to co-commit it, to provide assistance in this context or to provide the occasion, means or information;

2° tries to provide himself or others with the occasion, means and/or information to commit the crime;

3° possesses items, of which he knew that they were intended to commit the crime;

4° makes or possesses plans for the execution of the crime that are intended to inform others thereof;

5° tries to prevent, to hinder or to defeat any measure undertaken by the government to prevent or suppress the execution of the crime.

These acts are punishable, despite of their results. A conditional intent re. preparation or facilitation of a terrorist serious offence is not sufficient. It is required that the perpetrator carries out the conduct with the objective to prepare or to facilitate the terrorist serious offence. The serious offence that is prepared or facilitated, must be fixed to the extent that it is possible to determine whether this is a serious offence of which preparation and facilitation, as set out in Article 96, Paragraph no. 2 of the Dutch Criminal Code are punishable. Time, place and method of execution must in some way have been specifically established. If the preparatory acts that – in the absence of extraordinary circumstances – may be considered as daily, non-criminal activities, it is required to very strictly review them. The preparatory and facilitation acts that the suspect is accused of can be reviewed in conjunction with one another. Also, in the event that separate acts do not constitute an offence of punishable preparation, the combination of all acts together with the ideas of the subject, the objective to prepare a serious offence may be deducted. The preparation and facilitation are separately punishable as completed offences. No voluntary withdrawal from that is possible.³²

4.3.3.2 Opinion of the District Court

Participation in a terrorist organisation

Based on the afore described evidence, the District Court comes to the opinion that the suspect left for Syria on 24 October 2014 and was an IS member both over there and in Iraq of IS. He was such a member up to and including 3 September 2016, when he joined the Free Syrian Army. The many chat conversations, the photographs on which the suspect is depicted (together with others or not) in combat clothing and/or carrying arms and/or making the *Tawhid* gesture, the fact that he was in places that were under the control of IS and managed by IS, as well as the fact that his position was mentioned on the payroll do not allow any other conclusion than that the suspect did link up with IS, actually made a contribution to the armed fight and, thus, participated in IS. The District Court rejects the statement of the suspect that the chat conversations and photographs were simply meant to act tough; the same goes for his statement, in which he claims that he merely worked as a car-park attendant or a humanitarian relief worker all the time.

The fact that IS (formerly known as ISIL or ISIS) is a terrorist organisation is certain, given the fact that IS was put on the UN and EU sanction lists of terrorist organisations on 30 May and 1 July 2013 respectively. After the proclamation of the caliphate, the suspect left for Syria and linked up with IS. It must have been perfectly clear to him at his first departure but in any case, at his second departure that IS a terrorist organisation that mercilessly commits atrocities at a large scale.

The District Court deems that co-commission has not been legally and convincingly proven since the dossier does not consist any material evidence for the suspect having acted in close and conscious collaboration with others.

Preparation and facilitation of terrorist crimes

Based on all the evidence mentioned, the District Court also believes that the suspect was

guilty of preparation and facilitation of terrorist crimes. In his chats, the suspect showed that he was prepared to commit (suicide) attacks, was in the battlefield in Syria and Iraq, joined IS, contributed to the jihad, carried out by IS and possessed firearms. In this context, the District Court assumes that, prior to his departure to Syria and with the objective to commit terrorist crimes, the suspect started to study the radical, extremist ideas and adopted these ideas with the said objective. At the time of departure, the suspect must have been aware of what IS stood for and for what atrocities they were already responsible then. Since the suspect is on the IS payroll as a member of a 'sniper'-battalion' he provided information to others and tried to create the possibility for himself to commit terrorist crimes.³³

The District Court will acquit the suspect of part B, since there is no material evidence available on acquiring information about the departure and/or staying in the battlefield in Syria and/or Iraq.

The District Court deems co-commission not legally and convincingly proven since the dossier does not contain any material evidence of the suspect having acted in close and conscious collaboration with other people.

4.4 Conclusive evidence

The District Court declares proven to the detriment of the suspect that:

Public Prosecutor's Office Ref. No. 09/748003-18, Count 1

in Syria and Iraq, in the period from *24 October 2014* to *3 September 2016*

he participated in a (terrorist) organisation, such as Islamic State (hereinafter: IS), which organisation had and/or has as its objective to commit terrorist crimes, i.e.,

A. Intentionally setting fire and/or causing an explosion, while collective danger for goods and/or danger for serious bodily injuries and/or mortal danger for another person are to be feared because of this and/or this offence results in the death of someone (as set out in Article 157 of the Dutch Criminal Code), to commit/committed with a terrorist objective (as set out in Article 176a of the Dutch Criminal Code), and/or

B. manslaughter to commit/committed with a terrorist objective (as set out in Article 288a of the Dutch Criminal Code), and/or

C. murder to commit/committed with a terrorist objective (as set out in Article 289a in conjunction with Article 83 of the Dutch Criminal Code), and/or

D. The conspiracy and/or intentional preparation and/or facilitation of the earlier mentioned crimes (as set out in Article 176a and/or 288a and/or 289a and/or 96, Paragraph 2 of the Dutch Criminal Code), and/or

E. Possession of several arms and/or ammunition of categories II and/or III (as set out in Article 26, Paragraph 1 of the Arms and Ammunition Act) to commit/committed with a terrorist objective and/or with the objective to prepare or facilitate a terrorist serious offence (as set out in Article 55, Paragraph 1 and/or, Paragraph 5 of the Arms and Ammunition Act)

and

in Syria and Iraq and Turkey and the Netherlands, in the period from *1 August 2014* to *3 September 2016*

with the objective to prepare and/or facilitate the commission of crimes:

- Intentionally setting fire and/or causing an explosion, while collective danger for goods and/or danger for serious bodily injuries and/or mortal danger for another person are to be feared because of this and/or this offence results in the death of someone (as set out in Article 157 of the Dutch Criminal Code), to commit/committed with a terrorist objective (as set out in Article 157 in conjunction with 176a of the Dutch Criminal Code), and/or
- manslaughter to commit/committed with a terrorist objective (as set out in Article 288a of the Dutch Criminal Code), and/or
- murder to commit/committed with a terrorist objective (as set out in Article 289 in conjunction with 83 of the Dutch Criminal Code)
- provided himself or other persons an occasion, means and/or information to commit the serious offence and
- possessed items of which *he* knew that they were meant to commit the serious offence

since he, the suspect,

A. adopted the radical, extremist ideas of the armed Jihads with a terrorist objective, carried out by the (terrorist) organisation, such as Islamic State (hereinafter: IS), and

C. made the trip to Syria and Iraq in order to go to the battlefield, at least to the (combat) zone where the terrorist organisation IS stayed (for some time) in said (combat) zone in Syria and Iraq, and

D. joined IS, and

E. participated in and contributed to the armed Jihad in Syria, carried out by the (terrorist) organisation IS, and

F. used, carried and possessed (fire) arms in Syria,

committed murder and/or manslaughter and/or arson and/or causing explosions in this armed Jihad, each time with a terrorist objective.

Insofar as there are typing and language errors present in this Indictment, they were corrected in the conclusive evidence. As appears from the proceedings at the trial, the suspect was not harmed in his defence due of that.

5 War crimes

5.1 Position of the Public Prosecutor

The Public Prosecutor pleads for a judicial finding of facts in relation to the three war crimes charged. In that context, it is argued that there is sufficient conclusive evidence that the suspect posed next to a deceased person who had been crucified, had a photograph taken and subsequently posted this photograph on Facebook (photograph no. 1), that he disseminated a photograph of a deceased woman on whose body a foot was placed (photograph no. 2) and that he disseminated a photograph of a man, holding a woman's head that had been separated from the body (photograph no. 3). By doing so, the suspect consciously accepted the chance that the photographs would be further disseminated. In the charged periods, there was a non-international armed conflict going on in Syria and Iraq, and the deceased people were protected because they did not participate (any longer) in the hostilities. The suspect was aware of this. The deceased person in photograph no. 1 was seriously humiliated and dishonoured because of the

way he was exhibited fixed to the crucifix and the suspect captured and shared this humiliation – by taking a photograph, or having a photograph made, in which he smiles. Ook the deceased people op photograph no. 2 and 3 were seriously humiliated and dishonoured by the fact that the victory was symbolised by a foot that was placed on the body of the person in photograph no. 2 and by decapitating and disseminating the person in photograph no. 3. There is a nexus between those humiliating and dishonouring treatments and the armed conflict since the suspect was a member of IS; the deceased people were apparently associated with the opponents and the conducts apparently served to scare people and to display the victory of IS.

5.2 Position of the defence

Primarily, the defence holds the opinion that the suspect must be acquitted of the three charged war crimes. To that end it is argued in relation to all three photographs – by referring to page numbers that have been replaced by the final dossier, for that matter – that there is insufficient legal and convincing evidence that it was the suspect and not somebody else who distributed the photographs. In the event that it can be proven that the suspect himself distributed the photographs, he should still be acquitted. In that context, it is argued in relation to photograph no. 1 that the suspect felt forced to have his photograph taken with the deceased person but that he did not treat this person in a humiliating and/or dishonouring way since he was not responsible himself for the person's death nor his crucifixion. With regard to photograph no. 2 it is argued that the suspect shared this photograph with [person 3] to warn [person 3] for the fate of Kurdish women, while the suspect furthermore did not humiliate and/or dishonour the deceased person himself since he was not involved in the fate of the woman and the coming about of the photograph. With regard to photograph no. 3, it is argued that, in this aspect, it is relevant that the suspect did not humiliate and/or dishonoured the deceased person himself, since he was not involved in the fate of this person, the beheading nor the realisation of the photograph.

5.3 Judgment of the Indictment

5.3.1 Introduction

The District Court says it must decide on the question whether the charged war crimes can be deemed proven.

To answer this question, the District Court will – after having established a number of offences in 5.3.2 – consider in 5.3.3 whether the international humanitarian law was applicable at the time of the established offences and, if so, which rules of this law were applicable then because a war crime can only take place if the international humanitarian law is applicable and violation of the Common Article 3 of the Geneva Conventions that the suspect is charged with, can only be the case in a non-international armed conflict.

Subsequently, the District Court will assess whether the established offences fall under the Dutch criminalisation. To that end, the District Court will refer itself to the *Elements of Crime* of the International Criminal Court (hereinafter: ICC), since the legislator considered, in the context of the creation of the WIM, that a Dutch judge may orient himself towards this. Under the *Elements of Crime* conclusive evidence must satisfy five elements. First of all, it must be established that the suspect humiliated, dishonoured or otherwise violated the dignity of one or more persons. The seriousness of that humiliation, dishonouring or other violation must be of such a nature that they are generally considered to be an outrage upon personal dignity. The person(s) who gave become a victim of (one of) these acts, were either *hors de combat* or citizens, medical staff or religious staff no longer taking part in the hostilities, and the suspect must have been aware of the factual circumstances that had led to the coming about of that status. In 5.3.4, the District Court will elaborate on these elements. In 5.3.5, the District Court will, finally, assess whether it can be established that the events took place in the context of and are associated with the armed conflict, plus whether the suspect was aware of the factual circumstances that made the armed conflict come into existence.

5.3.2 General establishments

The police carried out investigations of three photographs that are associated with the suspect. The District Court will set out below which documents are in the dossier and to which statements it will be able to come. In the footnotes, references to evidence are included. When a reference is made to an official report, this is - unless otherwise specified - an official report in the legal form, drawn up by (a) qualified investigator(s).

A photograph of a person posing next to a deceased person who was crucified (photograph no. 1)

The police reported that on 13 July 2015, a photograph was shown to a community police officer in Utrecht, showing a man standing next to a bloodstained and presumably dead man crucified and wearing an orange coloured overall (hereinafter: photograph no. 1). The person who showed the photograph stated that the photograph came from a Facebook page with username '[kunya]' and that the photograph showed a from [plaats in Nederland], is called [first name suspect] and is active is on the aforesaid Facebook account.³⁴

In a mobile phone that was seized on 2 July 2015 in possession of [person 3] the same photograph (inter alia) was discovered by the police.³⁵ As a result, [person 3] was interviewed by the police and she stated that [kunya] was standing next to the person in the orange coloured overall and that he had told her that he hadn't done it himself.³⁶

[Person 3] stated in relation to the person [kunya] that he had told her that he was 20 years old, had lived in Utrecht and that the name [kunya] was his 'kunya'.³⁷ At the trial, the suspect stated that he had had contact with [person 3].³⁸

Photograph 1 was (partly) shown to [person 5], the suspect's father, who recognised his son in the photograph.³⁹ The police also recognised the suspect as the person standing next to the deceased person.⁴⁰

In a report of a conversation that a representative of the Ministry of Foreign Affairs had with the suspect, it reads that he was worried about a photograph he had posted on Facebook. On his way from Mosul to Raqqa he had taken a photograph at a bus stop with a crucified man (who smelled horribly, due to decomposition). At the time, he thought that was tough but now he fears that people might think he was the one who did it, as we can read in the report of the conversation. He would have added: 'via my FB, they can see that I was on my way and that I had no time at all to kill that man.'⁴¹

In a chat conversation between [person 2], the person identified by the police as the suspect on 19 September 2016, asked [person 2] whether she has 'this crucifixion photograph' because the suspect would like to have 'a good profile photo'.⁴²

The suspect stated at the trial that he in fact had his photograph taken with the deceased,⁴³ but that he felt forced to do so by other people, because otherwise he would get into trouble with IS. With regard to the chat conversation with [person 2], the suspect stated at the trial that he did ask her whether she had the photograph had,⁴⁴ but that it was a test question because he wanted to make sure she didn't have the photograph any longer.

With the assistance of geo locating, the police concluded that the photograph was taken in Abu Kamal in Syria.⁴⁵ Abu Kamal is a border town, through which a main road runs to, inter alia, Raqqa. A different, shorter way from Mosul to Raqqa was not safe early July 2015.⁴⁶

The police carried out investigations of the (presumably) deceased person in photograph no. 1. In that context, other photographs of this person were discovered, belonging to a series of photographs published on the internet.⁴⁷ The police reported that the person in photograph no. 1 presumably is Naser Khalef Zowid who is believed to have been executed by IS in Abul Kamal in Syria and subsequently crucified.⁴⁸ The documents don't reveal the

date of execution and crucifixion but the earliest publications of execution and crucifixion on the internet discovered by the police date from 26 June 2015. However, tweets have been discovered dating from 15 June 2015 that may relate to the same execution.⁴⁹

Given the above, the District Court establishes that in Abu Kamal in Syria between 15 June 2015 and 2 July 2015, the suspect had a photograph (photograph no. 1) taken, on which he is seen standing with a smile on his face, next to a deceased person (presumably Nesar Khalef Zowid) who was crucified, dressed in an orange coloured overall. The District Court dismisses the argument of the suspect that he had to pose in this photograph next to the deceased against his will, since he has not made this plausible in any way; since the photograph shows that the suspect actively poses with a big smile. In addition, the fact that he was proud to pose was also confirmed by his question to [person 2] whether she still has the photograph available, because he would like to use it as his profile photo. Finally, at the trial he made a statement about some force for the first time, although he did not even bring this up in his conversation with a staff member of the Ministry of Foreign Affairs.

In addition, the District Court establishes that the suspect posted this photograph on the Facebook account with the name [kunya]. The statement made by the person who initially showed the photograph to a Utrecht police officer confirms this, as well as the report of the conversation of the Ministry of Foreign Affairs, that shows that the suspect stated that he had posted a photograph of himself with a crucified man on his Facebook account. The fact that the suspect distributed the photograph is corroborated by the chat conversation with [person 2], in which he asks whether she still has the 'crucifixion photograph'.

A photograph of a deceased woman and a foot standing on top of her (Photograph no. 2)

In the mobile phone that was seized on 2 July 2015 in possession of [person 3], a photograph (hereinafter: photograph no. 2) of a (deceased) woman lying on the ground was found; a foot dressed in a sandal, standing on her body, is shown. [Person 3] was interviewed about this photograph, too. She stated that the photograph had been sent to her by [kunya] and that [kunya] said that the leg in the photograph is not his leg. At the trial, the suspect stated that he sent photograph no. 2 to [person 3],⁵⁰ but that he had done so in order to warn her for the fate of Kurdish women.

Photograph no. 2 was discovered online by the police in a series of tweets. The tweet of which photograph no. 2 is a part, has the following wording 'WARNING. #ISIS savages glorify in showing the #Kurdish #woman soldiers they slaughtered. #Syria #Iraq' and is of 12 July 2014.

Given the above, the District Court establishes that in the period from 12 July 2014 to 2 July 2015 the suspect sent a photograph (photograph no. 2) of a deceased woman (presumably a Kurdish female fighter killed in Syria or Iraq) to [person 3]. There are no leads indicating that the suspect is in the photograph or that the photograph was taken by him; he was not charged with this, for that matter.

A photograph of a person posing with a chopped off head (photograph no. 3)

The police reported that when investigating the mobile phone of [person 2], a photograph (hereinafter: photograph no. 3) was discovered in a chat conversation that took place on 12 November 2015 between 'Niya 2' and '[chatname person 2]'. In this photograph a man is depicted holding the head of a woman that had been separated from the body. The police reported that the suspect participated in the conversation as Niya 2. [Person 2] stated at the Examining Magistrate that she doesn't have any memory of the photograph but that she did receive a post of a photograph once that was dark and seemed to be a photograph of a head. The police reported that the photograph message does not fit in the context of the chat message and that [person 2] did not respond to it. The suspect denied that he had sent the photograph and stated that he used a mobile phone that belonged to someone else,

which he had borrowed from that person.

The police reported that photograph no. 3 could be found on the internet at least as of 5 October 2014 and was frequently posted and shared there. According to a message on Twitter, the photograph could possibly show the head of a female Kurdish fighter, known as 'Rehana' and 'Angel of Kobane', who was killed by IS.

Given the above, the District Court establishes that there is insufficient legal and convincing evidence that the suspect was the one who sent a photograph (photograph no. 3) on 12 November 2015 in the course of a chat conversation with [person 2], showing a man who holds the head of a woman, which was separated from her body. The woman (presumably a Kurdish female fighter, possibly called 'Rehana' or 'Angel of Kobane', who had been killed by IS). The documents reveal that it was a chat conversation between the suspect and [person 2] but it has not become clear to the District Court whether the suspect sent the photograph during the conversation or whether this was done by someone else. The photograph message does not fit in the context of the conversation and it can not be excluded that the mobile phone was also used by someone else.

Therefore, the suspect will be acquitted from the charges of Count 2 of Indictment II and the District Court will not comment this offence any further.

5.3.3 Applicability of international humanitarian law

5.3.3.1 Assessment framework

Types of conflict

The international humanitarian law is applicable in the event of an armed conflict. In that context, a distinction can be made between international armed conflicts and armed conflicts '*not of an international character*'.⁵¹ The latter are generally called non-international armed conflicts. In the Tadić case, the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) gave 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 organized groups or between such groups within a State.'*⁵²

The rules for international armed conflicts and non-international armed conflicts differ in components. In general, the rules in relation to non-international armed conflicts are less detailed than the rules in relation to international armed conflicts.⁵³ For instance, the status of combatants is formally acknowledged during international armed conflicts.

The Geneva Conventions, except their Common Article 3, entirely focus on international armed conflicts, as well as the First Additional Protocol to the Conventions. The common Article 3 of the Geneva Conventions focuses on non-international armed conflicts. This also goes for the Second Additional Protocol, provided that it must be a conflict between a state and an organised armed group and not between two or more organised armed groups.

The rules from the Additional Protocols only apply when the states concerned are parties to them. As stated earlier, some rules from the Additional Protocols, however, are customary law. Furthermore, some rules from the Geneva Conventions on international armed conflicts are also customary law for non-international armed conflicts.

It is possible - and very common - that in a certain area several conflicts take place, of which some take place between states and others between states and organised armed groups and mutually between organised armed groups. The scope of applicability of the international humanitarian law extends to '*[...] the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat*

takes place there.⁵⁴

In order to establish the existence and the nature of an armed conflict for a certain period, an analysis of the actual situation is required, based on the nature and extent of the hostilities, their objective as well as the basis, on which the acts are carried out.⁵⁵

Since the charged suspicion only deals with violation of the rules of the international humanitarian law in relation to a non-international armed conflict, the District Court will not explicitly comment any further on international armed conflicts.

Non-international armed conflicts

Where there are no requirements for the intensity of the armed violence in an international armed conflict, this is different for non-international armed conflicts. The Tadić case shows that there must be *'protracted armed violence'*, plus, the armed group(s) involved must be sufficiently organised.⁵⁶ These criteria were further developed in this and later case law. The criteria distinguish situations of non-international armed conflicts from situations of, for instance, internal unrest and riots.

In the Limaj case, the ICTY still considered the question whether there is, in addition to the requirement of intensity and organisation, a specific objective requirement as well. The ICTY, however, found:

*'[T]he 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.'*⁵⁷

In the Haradinaj case, the ICTY argued that *'protracted armed violence'* refers more to the intensity than the duration of the conflict. Also, it listed the relevant factors in that case, with which the intensity of the armed violence can be tested:

'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.'

⁵⁸

These factors are not exhaustive. In addition, they are merely indicative and one single factor is not decisive.⁵⁹

Regarding the degree of organisation of the armed group(s), the ICTY mentions two factors in the Tadić case that 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 military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accord.'*⁶⁰

Again, the factors are indicative and the list is not exhaustive.⁶¹

A State is supposed to have armed forces that satisfy the requirement of organisation.⁶²

5.3.3.2 Opinion of the District Court

The conflict in Syria and Iraq

In the Context case, this District Court established that in Syria in the period between 1 January 2012 and 31 October 2014 there was a non-international armed conflict in Syria between Syrian government forces on the one hand and fighters of the armed groups ISIL/ISIS/IS and Jabhat al Nusra (hereinafter: JaN) on the other hand. However, the war crimes that the suspect is charged with, were (partially) dated later, so that the District Court will have to establish whether there was also a non-international armed conflict at a later date. To that end, the District Court will first briefly describe the developments in Syria from Spring 2011. The District Court builds mainly on the (successive) knowledge documents that are part of the criminal dossier and are entirely based on open sources, such as reports drawn up by IICIS, by Human Rights Watch and by Amnesty International, journalist's sources as well as on social media, documents and footage of jihadist organisations active in Syria. Subsequently, the District Court will address the intensity of the conflict and the organization degree of the armed groups involved.

In the Spring of 2011, the uprising in Syria started with protests to demand the regime of president Assad for reforms. The regime tried to crack down the call for reforms in an extremely violent way, but this did not silence the resistance.

After the beginning of the uprising, the world community responded judgemental to president Assad's reaction to it. The Secretary-General of the United Nations, Ban Ki-moon, concluded in the Summer of 2011 that president Assad had lost all legitimacy. Western countries insisted on his departure from office and implemented sanctions against his regime.

Towards the end of 2011, the opposition started to resist the acts of violence of the regime by force. The opposition carried out retaliations against government forces, and areas in large cities as well as rural areas were conquered. The Syrian regime opposed this even more harsh. Air strikes carried out by the Syrian air force caused many civilian casualties. Human rights violations took place at the side of the government forces and the paramilitary militias but also at the side of the armed oppositions. In 2013 and 2015, the Syrian regime was going to carry out chemical attacks that would cause a large number of victims. In the last months of 2013 and the first months of 2014, it seems that the Syrian regime increased attacks with so-called '*barrel bombs*'. And also, in the course of 2014 and the first half of 2015, air strikes and attacks with *barrel bombs* carried out by the Syrian regime in several parts of Syria, caused many casualties, in particular among the citizens. The armed oppositions were, inter alia, guilty of summary executions, kidnapping, torture of captured government soldiers, members of pro-Assad militias and people who were considered to be informants of the Assad regime. IS, JaN and other armed forces are believed to be guilty of illegally keeping large number detainees in captivity, torturing them and regularly carrying out executions.

In December 2015, the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) estimates the number of people fleeing in Syria itself at 6.6 million and the number of people who have fled their country at 4.3 million. 13.5 million inhabitants, the organisation submits, are in need of humanitarian aid. In November 2015, the number of fatalities was around 250,000.

Also, in the neighbouring country Iraq, frequent hostilities took place since January 2014 between, inter alia, Iraqi government armed forces (as of August 2014 supported by an international coalition) and IS. In the course of 2014, the hostilities expanded to the remainder of the country. And in the following year, the hostilities also carry on. Thousands of citizens die, due to the hostilities; many thousands of them got injured and over a million of people had to flee.

Until this very day, the fight continues on the soil of, inter alia, Syria and Iraq.

The aforementioned armed groups are involved in this conflict, but several states as well.⁶³

As the combat in Syria and Iraq progressed, the influence of jihadist groups increased more and more. Islamism was the mainstream in the resistance movement. The objective of these battle groups was not only to bring down the regime of Assad, but also to establish a strong Islamic State on Syrian soil, where the version of the sharia they advocate would be implemented.⁶⁴

One of those jihadist groups is a group that was initially affiliated to Al-Qa`ida that had been active in Iraq before. We are talking about the Islamic State in Iraq (hereinafter: ISI), aka al-Qa`ida in Iraq (AQI), which would have had a long-standing basis in Syria, which was at the time (still) supported by the Assad regime. The group claimed an attack on 11 March 2013 that had taken place on 4 March 2013. 48 Syrian soldiers and nine Iraqi guards would have died in that attack. This would be the first action, in which ISI confirmed its involvement in the Syrian conflict. ISI, which was under the command of Abu Bakr al-Baghdadi, changed its name in ISIL in April 2013 in order to emphasise the enlargement of its activities to Syria. On 29 June 2014, ISIL proclaimed the Islamic caliphate in the area of Syria and Iraq that had been conquered by the organisation and the organisation changed its name in IS. In 2014 and 2015, the territory of IS was located in Syria and Iraq.

The number of fighters that had joined IS was estimated at between the 20,000 and 31,500 in 2014. In 2014, it was stated that the leadership of IS was subdivided into different councils: a commando council, a so-called *majlis al-shura* (advisory council) a legal council, a security council, a military council, an intelligence council, a support council for fighters, a council for the media and a financial division. The support council for fighters would make the arrangements for foreign fighters to come to IS and to, inter alia, help them to find accommodation. The *majlis al-shura* would consist of nine to eleven members and be responsible for passing on the orders of Abu Bakr al-Baghdadi to the lower command structures and for checking whether these orders were being obeyed. In addition, it makes decision on legislation and its application and, by doing so, has tasks that have an overlap with those of the *sharia* council (that makes decision on religious matters). By establishing the caliphate and conquering territory in 2014, IS converted parts of the organisation, so it seems, into ministries or committees, which also had to manage territories conquered by IS. In different locations in Syria and Iraq, there are IS training camps, where lessons are being taught in knowledge of legal rules and the Islamic doctrine, and where the recruit is also trained in fighting techniques and handling weapons. The army of IS would consist of, inter alia, special units, air defence forces, a sniper brigade and an administration.⁶⁵

The District Court establishes based on the documents, which were earlier mentioned in the footnote, that in Syria there was, inter alia, a non-international armed conflict going on between the Syrian government army and a number of organised armed groups, including ISIL/ISIS/IS, as of July 2012. In addition, the District Court establishes that also in Iraq there was a non-international armed conflict going on between the Iraqi government army and ISIS/IS as of January 2014.

According to the District Court, the requirement of *protracted armed violence* was satisfied - in any case for that period of time. Frequently, there were largescale military operations between the parties involved, in which context military arms and vehicles, such as tanks and artillery, were deployed. By the end of 2015, the number of fatal was over 250,000 people and 4.3 million people fled from Syria and Iraq. A very considerable number of people needs humanitarian aid and several towns and villages in Syria and Iraq were destroyed. Also, a peace plan was negotiated; the Security Council of the United Nations convicted the Syrian regime and the conducts of IS. Therefore, the requirement of a certain level of intensity of the conflict has been met.

In addition, the District Court is of the opinion that the requirement of a sufficient

organisation of the armed groups ISIL/ISIS/IS has also been met, since this organisation had arms and vehicles, such as tanks and artillery, at its disposal in the aforementioned period of time, and it could carry out large scale military operations. Furthermore, the organisation possessed an organisation structure and even exercised control over a territory. In addition, there were several collaboration forms with other organisations in place.

The applicable rules of international humanitarian law

Since the District Court established that there was a non-international armed conflict going on in Syria and Iraq at the time of the charged offences, it can be concluded that the rules of the international humanitarian law in relation to non-international armed conflicts were applicable. This, in any event, concerns Common Article 3 of the Geneva Conventions. Since the suspect was merely charged with violation of the Common Article 3 of the Geneva Conventions, the District Court does not need to address the question which rules of the international humanitarian customary law are applicable, nor does it have to assess whether the Second Additional Protocol to the Geneva Conventions is at issue.

5.3.4 Outrages upon personal dignity

5.3.4.1 Assessment framework

Common Article 3 of the Geneva Conventions

The Common Article 3, Paragraph 1, introduction and under (c) of the Geneva Conventions a - insofar as important in this case - prohibits outrages upon personal dignity by treating someone, who is not directly engaged in the hostilities, in an extremely humiliating and dishonouring way.

Persons not directly engaged in the hostilities

When referring to people not directly engaged in the hostilities, the Common Article 3 of the Geneva Conventions means citizens but also, inter alia, staff or armed forces who laid down the weapons plus people who have been placed *hors de combat* by sickness, wounds, detention or any other cause.

The victim does not need to be personally aware of his conduct.⁶⁶

In the *Elements of Crime* of the ICC, it is stated that dead people may also be victims of this crime.⁶⁷

Outrage upon personal dignity

Neither in the Geneva Conventions nor in the Second Additional Protocol to them, a definition can be found of 'outrages upon personal dignity'. However, the ICTY did interpret 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, dishonouring or otherwise be a serious attack on human dignity'.⁶⁸

Later, in the Haradinaj case, mention was made of '*severe humiliation*' instead of '*serious humiliation*'.

When assessing the question if this is a case of an outrage upon personal dignity, in addition to subjective criteria, related to the vulnerability of the victim - objective criteria, related to the gravity of the conduct, need to be examined.⁶⁹

The element takes the relevant aspects of the cultural background of the victim into account.⁷⁰ This means that conducts that are, for instance, humiliating for a person of a specific nationality, culture or religion, where others not necessarily experience them similarly, also fall under the scope of the term outrages upon personal dignity.⁷¹

With regard to violation of the personal dignity of deceased people, prosecution on suspicion of war crimes has taken place in several European countries.⁷² In these cases, convictions for mutilation of deceased people⁷³ and posing with a head of a deceased person and subsequently sharing parts of photographs or videos thereof were pronounced.⁷⁴

5.3.4.2 Opinion of the District Court

Outrage upon personal dignity in relation to photograph no. 1

As appears from the evidence mentioned in paragraph 5.3.2, photograph no. 1 shows a deceased and bloodstained man who was crucified by the side of the road, wearing an orange coloured overall. The circumstance that the deceased had not been buried but was exhibited in this manner, without any doubt entails an outrage upon personal dignity. However, the District Court must assess whether the conduct of the *suspect* - i.e. posing for the photograph with the deceased and the distributing the photograph - entails an outrage upon personal dignity. By posing next to the deceased while he smiles and taking a photograph (or having it made), the suspect contributed to further deepening the humiliation and/or dishonouring of the deceased. Thus, the suspect expressed that the body of the deceased had to be considered a trophy and that he is superior compared to the deceased. This humiliating and/or dishonouring conduct is of such gravity that it is simply considered to be an outrage upon personal dignity of the deceased person.

By subsequently posting the photograph on his Facebook account, the suspect ensured that a large number of people had the opportunity to take cognisance of the photograph. By doing so, seen in cohesion with the fact that he himself posed for the photograph and had it made, he further continued the outrage upon personal dignity of the deceased person.

Outrage upon personal dignity re photograph no. 2

As appears from the documents mentioned in paragraph 5.3.2, photograph no. 2 shows a deceased woman in a pool of blood. A foot in a sandal is placed on top of the woman. Although it is a simple fact for the District that - especially given its meaning in the Islamic culture - placing a foot on a deceased person lying in a pool of blood is an outrage upon personal dignity, this is not a matter for the District Court to take action on. In the present case, the District Court must merely answer the question whether by *forwarding* the photograph, the suspect violated the dignity of the deceased woman. The District Court is of the opinion that, although the suspect further continued the humiliation and/or dishonouring but his conduct is, under the circumstances, - meaning that it has not been proven that he sent the photograph to more than one person nor that he took the photograph himself and that he is not in the photograph himself - this is in itself not of such a nature and gravity that this can simply be viewed as an outrage upon personal dignity of the deceased person.

Therefore, the suspect will be acquitted from the charges of Count 1 of Indictment II and the District Court will not comment this offence any further.

Protected person

It is not under discussion that the person in photograph no. 1 was already dead when the photographs were taken. Because of this, he was, given the aforesaid assessment framework - irrespective of the answer to the question whether he was considered an enemy of IS while alive - protected under international humanitarian law.

The District Court is of the opinion that the suspect must have been aware of the circumstances that arranged for the protected status. With regard to the person in photograph no. 1, the report of the conversation between the suspect and the Ministry of Foreign Affairs staff member shows that, when the photograph was taken, the suspect knew that the man in the orange coloured overall was dead, since the suspect now stated that the body of the deceased smelled horribly, due to decomposition.

5.3.5 The nexus

5.3.5.1 Assessment framework

There must be a certain relationship between the conduct and the armed conflict, which is also called 'nexus'. The nexus requirement serves to distinguish war crimes from serious offences under general criminal law and other international crimes, such as genocide and crimes against humanity.⁷⁵ The tribunals have made the necessary considerations about when exactly the nexus requirement has been met.

From the Tadić case follows that it is not required that the conducts were performed in the course of the fights nor in the area where the fight actually took place, insofar as *'the crimes were closely related to the hostilities'*.⁷⁶

Furthermore, 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 of in the actual interest of a party to the conflict'*.

The Appeals Chamber of The ICTY considered in the Kunarac case in 2002:

*'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.'*⁷⁷

In the same case, the ICTY mentioned indicative factors that may be taken into account when testing if the requirement was met that the perpetrator acted *'in furtherance or under the guise of the armed conflict'*:

*'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'*⁷⁸

In the Rutaganda case, the Appeals Chamber of The International Criminal Tribunal for Rwanda (hereinafter: ICTR) assessed the question what exactly is meant by the wording used by the ICTY in the Kunarac case *'under the guise of the armed conflict'*. The following considerations were made:

'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 neighbor he has hated for years, that would not, without more, constitute a war crime by virtue of Article 4 of the Statute.'*⁷⁹

The Trial Chamber of the ICTR was of the opinion in the Akayesu case that criminal liability for war crimes is limited to the parties to the conflict and those who are in a close relationship with one of these 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.'*⁸⁰

The assessment whether the existence of a nexus is casuistic and creates the opportunity to come - in the same case - to different outcomes.⁸¹ The circumstance that - despite the factors provide by the ICTY that may help when assessing - the definition of the nexus requirement is open to different interpretations, is contributing to this. In the case against Joseph M., for instance, the The Hague District Court chose a restrictive interpretation, which resulted in acquittal; in the appeal case, the Court of Appeal opted for a broader interpretation, which resulted in a conviction.⁸²

5.3.5.2 Opinion of the District Court

The District Court sees itself faced to the question whether the events took place in the context of and are associated with the armed conflict and whether the suspect was aware of the factual circumstances that caused the armed conflict to come into existence. The District Court stresses that this is a case of nexus between the conduct of *the suspect* - i.e. posing next to a deceased person, having a photograph made of this and subsequently dispersing this photograph via Facebook - and the armed conflict in Syria.

The District Court is of the opinion that there is a nexus between the conducts of the suspect in relation to photograph no. 1 and the conflict in Syria. Posing with the deceased and making a photograph (or having it made) and subsequently posting it on Facebook and sending it to someone could not have taken place without the armed conflict because the deceased person in photograph no. 1 was killed in the armed conflict in Syria by or on behalf of IS for being an alleged opponent and was then exhibited by affixing him to a crucifix. The suspect was in the area as a member of IS and, thus, had the occasion to (further) injure the personal dignity of the deceased.⁸³ It is, therefore, not up for discussion that the suspect was aware of the factual circumstances that caused the armed conflict to come into existence. Distribution of the photograph could contribute to the display and glorification of the power of IS.

5.4 Conclusive evidence

The District Court declares proven, to the detriment of the suspect, that:

Public Prosecutor's Office Ref. No. 09/748003-18, Count 2

in Abu Kamal (Syria) and on his way from Mosul (Iraq) to Raqqa (Syria), in the event of a non-international armed conflict on Syria soil, in breach of the stipulations of the common Article 3 of the Geneva Conventions 12 August 1949, at some point in time in the period from 1 June 2015 up to and including 19 July 2015,

he assaulted a person who (then) did not (no longer) directly participate in the hostilities, i.e. a person placed hors de combat by any other cause, in his personal dignity and (in particular) treated him humiliating and/or dishonouring,

because he, the suspect,

- posed (smiling) next to the said (deceased) person, while the latter was tied to a wooden cross, and
- had his photograph taken with the said (deceased) person, while the latter was tied to a wooden cross, and
- subsequently posted this photograph on social media, i.e. Facebook, and thus distributed it (in this manner) and made it public;

Insofar as there are typing mistakes and language errors present in this Indictment, they were corrected in the conclusive evidence. As appears from the proceedings at the trial, the suspect was not harmed in his defence due of that.

6 Criminality of the conclusive evidence

The conclusive evidence is punishable according to the law, because no offences or circumstances have become plausible, excluding the offences from being punishable.

7 Criminality of the suspect

According to the law, the suspect is punishable, because no offences or circumstances have become plausible, excluding him from being punishable.

8 Sentencing

8.1 Application of the Public Prosecutor

The Public Prosecutor demands that the suspect is convicted for Count 1 and Count 2 of Indictment I to a term of imprisonment of seven years and eight months, less the time the suspect spent in pre-trial detention in Turkey and the Netherlands. The Public Prosecutor deems that an unconditional term of imprisonment is consistent with the gravity of the demand for the charges of Count 2 of Indictment I (photograph no. 1). For the charged offences of Indictment II, no sanction was demanded.

8.2 Position of the defence

The defence takes the position that – in the event that and insofar as conclusive evidence is reached – the sanction of an unconditional term of imprisonment to be imposed should not be any longer than the time the suspect has currently been staying in pre-trial detention. The defence, therefore, requests, his immediate release.

8.3 Opinion of the District Court

The sanction below is consistent with the gravity of the committed offences, the conditions, under which they were committed, and based on the person and the personal circumstances of the suspect, as they have come across during the hearing. The District Court particularly takes the

following matters into account.

Battels in Syria and Iraq

As briefly described earlier in this verdict, the regime of president Assad tried in an extremely violent way to crack down peaceful protests. Therefore, there was a widely spread sympathy in the Netherlands for resistance against this dictatorial regime.

This does not apply to (participation in) jihadist terrorist battle groups, such as IS. The purpose that these groups have in mind is not only to bring down the regime of Assad, but also to establish an Islamic State. These battle groups commit serious violations of human rights at a large scale, plus war crimes, such as torture, deportation, mutilation, rape, murder and summary executions of prisoners of war and citizens, after which the bodies of these people are brutally exposed, for instance by hanging them at the side of the road. Many of the crimes described above arise from the religiously motivated wish of these groups to violently impose their radical version of the sharia on the civilian population of regions conquered by them, where the rights of people who think differently – Christians, Jews, Shiites, Alawites and also non-fundamentalist Sunnis – are violated in an extremely violent way.

In addition, many of these crimes are committed with the express purpose to scare the population in these areas. They are, thus, undeniably terrorist crimes.

Terrorism is internationally considered one of the most serious crimes. Therefore, the Netherlands has an international obligation to fight terrorism, also if it takes place in a different country. Travelling to Syria and/or Iraq in order to take part in the armed Jihad must, therefore, be discouraged. This also goes for any war crimes committed over there. Precisely because it is not possible to prevent that there are any victims, it is all the more important that international humanitarian law is being complied with and that people who do not or do no longer participate in the fight are protected. Each individual must comply with international humanitarian law, also if others don't do it.

The suspect's conduct

The suspect travelled to Syria in October 2014 and linked up over there with the prohibited jihadist terrorist organisation IS for the duration of approximately two years. By acting in the same way, the suspect committed preparatory acts with a view to commit, inter alia, murder and manslaughter with a terrorist objective. The suspect travelled – compared to other travellers, who have already been convicted – at a late stage. In those days, there was already much common knowledge about the serious human rights violations and other atrocities committed by IS. In addition, the caliphate was already proclaimed on 29 June 2014; this message had spread over the whole world. The suspect must have been aware of all of this but left for Syria all the same, which the District Court takes extremely ill of the suspect.

During his stay within the caliphate, the suspect posed on his trip through Syria next to a man who had been executed by IS and was hanging bloodstained and wearing an orange coloured overall, fixed to a crucifix. The suspect is smiling in this photograph and seems to be proud of the humiliating and dishonouring situation, in which the deceased was. Subsequently, the suspect posted this photograph on his Facebook account, in order for people to be able to take note of it. The photograph was subsequently – as the dossier demonstrates – actually distributed to a large group of youngsters in Utrecht and it can't be excluded that it also landed outside that group. It must be terrible for bereaved of the deceased that they may be confronted on the internet with images of their beloved, who was crucified in a humiliating way. That now, in addition, a photograph circulates, in which the suspect stands proud next to him, may seriously hurt the bereaved.

The District Court believes that there is no other reply to the aforesaid serious offences than with an unconditional term of imprisonment of a considerable part of time.

When determining the duration of the punishment, the District Court looked at the duration of punishments imposed in somewhat similar cases and, on this basis, took for a starting point for participating in a terrorist organisation and preparatory acts an unconditional term of imprisonment of six years. In the sense of an increase in the sentence it is taken into consideration that the suspect apparently was a member of a sniper battalion, so that the District Court certainly does not exclude that the suspect actually used violence against human lives or threatened to use it during his participation in the armed battle.

As a starting point for the war crime of an outrage upon personal dignity of a deceased person, the District Court takes – unlike the Public Prosecutor's Office – a term of imprisonment of thirty months as a starting point.

In the sense of moderation of punishment, the District Court takes into consideration that the suspect has already spent eighteen months in pretrial detention in relation to the criminal proceedings in Turkey for participation in a terrorist organisation, the same offence, as for which the suspect will currently be convicted (as well). The District Court takes this period into account in the sentence to be imposed, since there is no lawful support for offsetting the period of pre-trial detention, advocated by the Public Prosecutor. The District Court notes unnecessarily that the remaining part of the Turkish sentence can not be executed in the Netherlands, since this is in violation of Article 7, Paragraph 1, WOTS. Otherwise, the District Court does not apply Article 63 of the Dutch Criminal Code because sentencing by a foreign court does not yield a conviction in the sense of that Article.⁸⁴

Personal circumstances

The details of the criminal record of 16 April 2019 of the suspect show that the suspect has had dealings with law enforcement before. However, it was a different type of offences and, besides, they were committed longer than five years ago and are, therefore, not relevant for the sentence to impose.

In addition, the District Court considered the *pro justitia* triple report of 20 May 2019 regarding the suspect. The suspect collaborated in a limited way with the study, in the sense that he did not want to comment on the charges. The reporters came to the conclusion – insofar as relevant – that the suspect has an average level of intelligence. The suspect has a faulty development of his intellectual abilities in the form of a personality disorder with narcissistic and antisocial characteristics. This personality disorder was also present when the offences were committed. Although they were not able to fully understand the considerations and choices of the suspect prior to and during the charged offences, they do believe that the impulsivity, suggestibility, indigence and little empathic power of the suspect, in connection with his personality disorder, restrained him from consideration and comprehension of the consequences of his acts. Therefore, the reporters advise to attribute the charged offences to a (somewhat) lesser extent to him. The psychiatrist has come to a slightly reduced attribution because he feels that situational factors also had a relevant influential affect and the suspect did also make conscious choices. The psychologist has come to reduced attribution because he believes that the personality problems played a slightly more prominent role, since narcissistic characteristics had been triggered prior to his decision to leave.

The District Court goes along with the conclusions on the limited development of the mental abilities in the sense of a personality disorder and adopts them. In addition, the District Court assumes, like the psychiatrist, that the offences may be held against the suspect to a slightly lesser extent. Regarding that opinion, what is said in the *pro justitia* report about the influence of the situational factors combined with the conscious choices of the suspect for his acts and the way the suspect presented himself at the trial is of crucial importance.

The District Court has also taken the Reclassering advise of 1 July 2019 of Reclassering [Rehabilitation] Nederland re the suspect into consideration. According to the Reclassering there

are indications that the suspect is still an adherent of the Jihadist-Salafistic ideology. The District Court sees this confirmed in the attitude of the suspect at the trial and more specifically when he stated that he does not recognize the democratic Dutch constitutional state.

OXREC and Reclassering assess the risk of violence recidivism to be high. They advise, in the event of a conviction, to impose a partly conditional sentence, with the specific conditions, as indicated in the report. The District Court does not follow this advise. For terms of imprisonment of four years or more, it is impossible for the District Court to impose part of the sentence conditionally. The specific conditions advise may be dealt with at a later stage, in the context of a possible conditional release.

Conclusion

All circumstances taken into consideration, the District Court is of the opinion that an unconditional term of imprisonment of seven years and six months less the time spent in pre-trial detention is appropriate and needed.

Given the sentence that is to be imposed, the District Court dismisses the argument for his immediate release.

9 Applicable articles of law

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

- 57, 83, 96, 134 a, 140a, 157, 176a, 176b, 288a, 289, 289a of the Dutch Criminal Code;
- 6 of the International Crimes Act.

These legal provisions were applied as they were considered in force when the proven offences were committed.

10 Decision

The District Court:

declares that it has not been legally and convincingly proven that the suspect committed the offences charged in Count 1 and Count 2 of Indictment II, Public Prosecutor's Office Ref. No. 09/748003-19, and acquits the suspect of these offences.

declares been legally and convincingly proven that the suspect committed the offences charged in the first and second alternative cumulative and in Count 2 of Indictment I, Public Prosecutor's Office Ref. No. 09/748003-18, as was declared proven in paragraph 4.4 and 5.4 and that the considered proven offences consist in:

regarding Count 1, first alternative/cumulative: participation in an organisation that has the commission of terrorist crimes as its objective;

with regard to Count 1, second alternative/cumulative: with het objective to intentionally set fire and/or cause explosions where a collective danger for goods and/or danger for serious bodily injuries and/or mortal danger for another person are to be feared and/or this offence results in the death of someone and/or murder and/or manslaughter, each time committed with a terrorist objective, to prepare and to facilitate, he provided himself and others with an occasion, means and information to commit and try to commit the offence plus he possessed objects, of which he knew that they were destined to commit the crime

with regard to Count 2: in the event of a non-international armed conflict he made himself guilty of violation of the common Article 3 of the Geneva Conventions, i.e. an outrage upon personal dignity, especially humiliating and dishonouring treatment of people placed hors de combat by any other cause;

declares the considered proven offences as well as the suspect punishable;

declares not considered proven what the suspect was charged with additionally or different from the considered proven offences and acquits the suspect thereof;

sentences the suspect to:

a term of imprisonment of 7 (SEVEN) years and 6 (SIX) months;

determines that the time the convicted person spent in custody and pre-trial detention, prior to the execution of this verdict, will be fully deducted in the context of the execution of the imposed term of imprisonment, insofar as that time has not been deducted from a different sentence.

This judgment was rendered by

mr. M.T. Renckens, President,

mr. N.S.M. Lubbe, Judge,

mr. J. Holleman, Judge,

in the presence of *mr.* M.R. Ekkart and *mr.* M. Sepmeijer-Kovacevic, Clerks,

and announced at the public trial of this District Court on 23 July 2019.

ANNEX I: INDICTMENT

at one or several points in time in the period between 1 August 2014 and 1 November 2016, in one or more place(s) in Syria and/or Iraq and/or Turkey and/or the Netherlands,

together and in association with another person/other persons, at least alone,

he participated in a (terrorist) organisation, such as the Islamic State (hereinafter: IS), at least in a Jihadist battlegroup, associated with one or several aforesaid organisation (s), at least in (an) organisation that advocates the armed Jihad and had and/or has as its objective the commission of terrorist crimes, i.e.,

A. Intentionally setting fire and/or causing an explosion, where a collective danger for goods and/or danger for serious bodily injuries and/or mortal danger for another person are to be feared because of this and/or this offence results in the death of someone (as set out in Article 157 of the Dutch Criminal Code), to commit/committed with a terrorist objective (as set out in Article 176a of the Dutch Criminal Code), and/or

B. Manslaughter to commit/committed with a terrorist objective (as set out in Article 288a of the Dutch Criminal Code), and/or

C. Murder to commit/committed with a terrorist objective (as set out in Article 289a in conjunction with Article 83 of the Dutch Criminal Code), and/or

D. The conspiracy and/or intentional preparation and/or facilitation of the aforesaid crimes (as set out in Article 176a and/or 288a and/or 289a and/or 96, Paragraph 2 of the Dutch Criminal Code) and/or

E. Possession of one or more arms and/or ammunition of categories II and/or III (as set out in Article 26, Paragraph 1 of the Arms and Ammunition Act) to commit/committed with a terrorist objective and/or with the objective to prepare or facilitate a terrorist crime (as set out in Article 55, Paragraph 1 and/or, Paragraph 5 of the Arms and Ammunition Act) (art. 140a of the Dutch Criminal Code)

and/or

at one or several points in time in the period of 1 August 2014 up to and including 1 November 2016, in one or more place(s) in Syria and/or Iraq and/or Turkey and/or the Netherlands,

together and in association with another person/other persons, at least alone,

with the objective to prepare and facilitate the (repetitive) commission of the crime(s):

- he intentionally set fire and/or caused an explosion, while collective danger for goods and/or danger

for serious bodily injuries and/or mortal danger for another person were to be feared because of this and/or this offence results in the death of someone (as set out in Article 157 of the Dutch Criminal Code), to commit/committed with a terrorist objective (as set out in Article 176a of the Dutch Criminal Code) and/or

- manslaughter to commit/committed with a terrorist objective (as set out in Article 288a of the Dutch Criminal Code) and/or

- murder to commit/committed with a terrorist objective (as set out in Article 289jo 83 of the Dutch Criminal Code)

- tried to induce someone else to commit the crime, to have it committed or to co-commit it, to provide assistance in this context or to provide the occasion, means or information and/or

- provided himself or others the occasion, means and/or information to commit the crime and/or

- possessed items, of which she knew that they were intended to commit the crime

since she, the suspect and/or her co-perpetrator(s)

since she, the suspect and/or her co-perpetrator(s)

A. adopted the radical extremist ideas of the armed Jihad with a terrorist objective of the (terrorist) organisation, such as the Islamic State (hereinafter: IS), or Islamic State of Iraq and Shaam (ISIS) or Islamic State of Iraq and Levant (ISIL) or Al Qaida (hereinafter: AU) of Ha'yat Tahrir al-Sham (HTS) Jabhat Fateh Al-Sham (both formerly known as Jabhat al Nusra, JaN), at least a Jihadist combat group associated with the aforesaid organisation (s), at least (an) organisation in favour of the armed Jihad, and/or

B. had herself/themselves informed about leaving to and/or staying in the battlefield in Syria and/or Iraq and/or

C. made the journey to Syria and/or Iraq in order to go to the battle field, at least to an area controlled by the terrorist organisation IS(IS/IL) or Al Qaida or Jabhat al Nusra and/or stayed (for some time) in said (combat) area in Syria and/or Iraq and/or

D. joined one or more co-perpetrator(s) and/or IS(IS/IL) and/or Al Qaida and/or Jabhat al Nusra fighter(s), at least a person(persons associated with (a) terrorist organisation(s) in favour of the armed Jihad, at least one person or more persons who (also) participated in a terrorist organisation in favour of the armed Jihad and/or

E. participated in Syria in and/or contributed in Syria to the armed Jihad, carried out by the (terrorist) organisation IS(IS/IL) and/or Al Qaida and/or Jabhat al Nusra, at least by terrorist organisations associated with IS and/or Al Qaida, at least a terrorist organisation in favour of the armed Jihad, and/or

F. used and/or carried and/or possessed (fire) arms in Syria, where in the armed Jihad murder and/or manslaughter and/or arson and/or causing explosions were committed, each time with a terrorist objective

Public Prosecutor's Office Ref. No. 09/748003-18, Count 2

at some point in time in or around the period from 1 October 2014 up to and including 19 July 2015, in Abu Kamal (Syria) and/or on his way from Mosul (Iraq) to Raqqa (Syria), at least (elsewhere) in Iraq of Syria, in the event of a non-international armed conflict on Syrian soil, in breach of the stipulations in the common Article 3 of the Geneva Conventions of 12 August 1949,

he assaulted a person who (then) did not (no longer) directly participate in the hostilities, i.e. a citizen and/or personnel of armed forces, who had laid down his arms and/or a person placed *hors de combat* by sickness and/wounds and/or detention and/or by any other cause, in his personal dignity (and/or) (in particular) treated him humiliating and/or dishonouring,

because he, the suspect,

- posed (smiling) next to the said (deceased) person, while the latter was tied to a wooden cross and/or

- had his photograph taken with the said (deceased) person, while the latter was tied to a wooden cross and/or tied to a wooden cross and/or

- subsequently posted this photograph on social media, i.e. Facebook, and thus distributed it (in this manner) and/or made it public;

Public Prosecutor's Office Ref. No. 09/748003-19, Count 1

at some point in time in or around the period from 1 October 2014 up to and including 2 July 2015, in Raqqa (Syria) and/or Mosul (Iraq), at least (elsewhere) in Iraq of Syria, in the event of a non-international armed conflict on Syria soil, in breach of the stipulations in the common Article 3 of the Geneva Conventions of 12 August 1949,

he assaulted a person who (then) did not (no longer) directly participate in the hostilities, i.e. a citizen and/or personnel of armed forces, who had laid down his arms and/or a person placed *hors de combat* by sickness and/wounds and/or detention and/or by any other cause, in his personal dignity (and/or) (in particular) treated him humiliating and/or dishonouring,

because he, the suspect,

distributed a photograph of the said (deceased) person, while the latter was lying on the ground and a person had put his or her foot on her body;

Public Prosecutor's Office Ref. No. 09/748003-19, Count 2

on or around 12 November 2015 in Raqqa (Syria) and/or Mosul (Iraq), at least (elsewhere) in Iraq of Syria, in the event of a non-international armed conflict on Syria soil, in breach of the stipulations in the common Article 3 of the Geneva Conventions of 12 August 1949,

he assaulted a person who (then) did not (no longer) directly participate in the hostilities, i.e. a citizen and/or personnel of armed forces, who had laid down his arms and/or a person placed *hors de combat*

by sickness and/wounds and/or detention and/or by any other cause, in his personal dignity (and/or) (in particular) treated him humiliating and/or dishonouring,

because he, the suspect,

distributed a photograph of an (IS) fighter set (holding) the decapitated head of said (deceased) person.

ANNEX II: FINAL NOTES

¹ Supreme Court, 1 February 2011, ECLI:NL:HR:2011:BM9102, r.o. 2.9.1.

² Supreme Court, 2 April 2019, ECLI:NL:HR:2019:472

³ Decision international obligations extraterritorial jurisdiction, *Stb.* 2014, 47.

⁴ Official report van findings of 26 February 2019 ref. no. LERCA15069-97, (annexed to the official report of findings re. the association of the suspect [suspect] with the terrorist organisation IS and Participation in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 1 - 3.

⁵ Statement of the suspect made at the trial on 8 July 2019.

⁶ Official report van findings of 26 February 2019, official report no. LERCA15069-101, (annexed to the official report of findings re. the suspects association [suspect] with the terrorist organisation IS and Participation in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 174 - 176 in conjunction with a document, a letter from the Defence Ministry of 4 February 2019 with an annex to the National Public Prosecutor Counterterrorism, p. 520-522.

⁷ Statement of the suspect made at the trial on 8 July 2019.

⁸ Official report van findings of 26 February 2019, official report no. LERCA15069-101, (annexed to the official report of findings re. the suspects association [suspect] with the terrorist organisation IS and participation in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 178, last page in conjunction with the annex to the document mentioned in footnote 3.

⁹ Official report of witness interview [person 1] by the Examining Magistrate, p. 4.

¹⁰ Official report of findings of 3 November 2016, official report no. 1611031322.AMB with annexes (annexed to the official report of findings re. the suspects association [suspect] with the terrorist organisation IS and Participation in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 134 - 148.

¹¹ Inter alia: official report of 19 February 2019 with a photograph annexed, official report of findings 3 November 2016, official report of findings re investigation image of data carrier of 20 December 2018 (annexed to the official report of findings on the fact that the suspect [suspect] joined the terrorist organisation IS and participated in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 5-8, 110-133, p. 662-663.

¹² Statement of the suspect made at the trial on 8 July 2019.

¹³ Official report van findings chat 167 [suspect] and [person 2] of 23 October 2018 (annexed to the official report of findings on the fact that the suspect [suspect] joined the terrorist organisation IS and participated in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 205, p. 212, p. 214, p. 215, p. 220, p. 225, p. 243, p. 245, p. 246, p. 250, p. 267, p. 275.

¹⁴ Official report of interrogation of suspect [person 3] of 17 July 2005 with Annexes, official report no.

V01.04 (annexed to the official report of findings on the fact that the suspect [suspect] joined the terrorist organisation IS and participated in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 65 - 109.

¹⁵ Statement of the suspect made at the trial on 8 July 2019.

¹⁶ Official report van findings 30 August 2016 (annexed to the official report of findings on the fact that the suspect [suspect] joined the terrorist organisation IS and participated in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 439 and p. 448, paragraph 3 upwards from the bottom of the page.

¹⁷ Official report of findings of 28 January 2019, official report no. 49 (annexed to the official report re the fact that the suspect [suspect] joined the terrorist organisation IS and participated in the armed battle in Syria and/or Iraq, ref. no. LERCA15069-98), p. 368 - 369 and p. 372.

¹⁸ Statement of the suspect made at the trial on 8 July 2019.

¹⁹ Official report re Organisation that has the objective to commit terrorist crimes: Islamic State, p. 18 in 2.2.5.2.

²⁰ Knowledge annex 140a - official report on Islamic State, p. 99 in 6.4.1.

²¹ Knowledge annex 140a - official report on Islamic State, p. 169.

²² Knowledge annex 140a - official report on Islamic State, p. 168.

²³ Knowledge annex 140a - official report on Islamic State, p. 169.

²⁴ Supreme Court, 2 February 2010, ECLI:NL:HR:2010:BK5193, r.o. 4.3.

²⁵ Supreme Court, 15 May 2007, ECLI:NL:HR:2007:BA0502, r.o. 3.4.

²⁶ Supreme Court, 8 January 2019, ECLI:NL:HR:2019:12.

²⁷ Supreme Court, 15 May 2007, ECLI:NL:HR:2007:BA0502, r.o. 3.4.

²⁸ Supreme Court, 10 February 2015, ECLI:NL:HR:2015:264, r.o. 4.3.

²⁹ Supreme Court, 3 July 2012, ECLI:NL:HR:2012:BW5132, r.o. 2.2.3 and 2.4.

³⁰ See: Article 140a, Paragraph 3 of the Dutch Criminal Code in conjunction with Article 130, Paragraph 4 of the Dutch Criminal Code

³¹ Supreme Court, 8 October 2002, ECLI:NL:HR:2002:AE5651, r.o. 3.3.

³² Also see The Hague District Court, 10 December 2015, ECLI:NL:RBDHA:2015:14365, r.o. 15.3 to 15.9.

³³ The Hague Court of Appeal, 23 October 2018, ECLI:NL:GHDH:2018:2765.

³⁴ Official report of findings of 28 July 2015, official report no. PL0900-2014338864-3, page 1, paragraph 5 and 6, with Annex (just like Annex 2 annexed to the official report of violation of Article 6 Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177).

³⁵ Official report of findings on the investigation of the data carrier of 20 December 2018, document ref. no. LERCA15069-110 (annexed to the official report of findings of 26 February 2019, official report no. LERCA15069-98).

³⁶ Official report of suspect interrogation [person 3] of 17 July 2015, document ref. no. V01.04, page 2, paragraph 15 with Annexes (annexed to the official report of violation of Article 6 Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177 as Annex 4).

³⁷ Official report of interrogation [person 3] of 17 July 2015, document ref. no. V01.04, p. 22, paragraph 5 and 6, map 4 (annexed to the official report of findings of 26 February 2019, official report no. LERCA15069-98 as Annex 4).

³⁸ Statement of the suspect made at the trial on 8 July 2019.

³⁹ Official report of findings of 2 August 2015 with official report no. PL0900-2014338864-4, page 1, last paragraph with Annex (annexed to the official report of violation of Article 6 Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177 as Annex 5).

⁴⁰ Official report of violation of Article 6, Paragraph 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177, p. 2, paragraph 3.

- ⁴¹ Document, i.e. a consular document, report of visit [suspect] of 16 December 2016 (annexed to the official report of violation of Article 6 Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177 as Annex 6).
- ⁴² Official report of findings chat 1 Tymi E-86 of 10 December 2018, official report no. 109 (annexed to the official report of findings of 26 February 2019, official report no. LERCA15069-98), p. 294.
- ⁴³ Statement of the suspect made at the trial on 8 July 2019.
- ⁴⁴ Statement of the suspect made at the trial on 8 July 2019.
- ⁴⁵ Official report of findings of 6 February 2019, official report no. LERCA15069-111 (annexed to the official report of violation of Article 6, Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177) as Annex 8.
- ⁴⁶ Official report of violation of Article 6, Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177, p. 6, third paragraph.
- ⁴⁷ Official report of findings of 6 February 2019, official report no. LERCA15069-111 (annexed as annex 8 to the official report of violation of Article 6, Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177).
- ⁴⁸ Official report of findings of 6 February 2019, official report no. LERCA15069-111 (annexed to the official report of violation of Article 6, Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177) as Annex 8, official report no. LERCA15069-177); document, i.e. a report made by CIJA (annexed as Annex 10 to the official report of violation of Article 6 Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177).
- ⁴⁹ Official report of violation of Article 6, Paragraph no. 1c International Crimes Act [WIM] of 27 March 2019, official report no. LERCA15069-177, p. 5, seventh paragraph.
- ⁵⁰ Statement of the suspect made at the trial on 8 July 2019.
- ⁵¹ See the common Article 3 of the Geneva Conventions.
- ⁵² ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.
- ⁵³ D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmschurst (ed), *International Law and the Classification of Conflicts*, Oxford: Oxford University Press, 2012, p. 34.
- ⁵⁴ ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Decision on the Defence motion for interlocutory appeal on jurisdiction, paragraph 70.
- ⁵⁵ *Parliamentary papers II*, session year 2001-2002, 28 337, no. 3, p. 12.
- ⁵⁶ ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.
- ⁵⁷ ICTY, *Prosecutor v. Limaj et al*, Trial Chamber Judgement, IT-03-66-T, 30 November 2005, paragraph 170.
- ⁵⁸ ICTY, *Prosecutor v. Haradinaj*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 49.
- ⁵⁹ 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.
- ⁶⁰ ICTY, *Prosecutor v. Haradinaj et al*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paragraph 60.
- ⁶¹ 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.
- ⁶² 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 et al, '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.
- ⁶³ Document, i.e. a knowledge document titled 'From Uprising to Jihad' of 18 January 2018, chapter 2.

- ⁶⁴ Document, i.e. a knowledge document titled 'From Uprising to Jihad' of 18 January 2018, chapter 2.
- ⁶⁵ Document, i.e. a knowledge document titled 'From Uprising to Jihad' of 18 January 2018, chapter 4, paragraph 2.
- ⁶⁶ ICC Elements of Crime, 2011, Article 8(2)(c)(ii) footnote 49.
- ⁶⁷ ICC Elements of Crime, 2011, Article 8(2)(c)(ii), footnote 49.
- ⁶⁸ 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.
- ⁶⁹ 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.
- ⁷⁰ ICC Elements of Crime, 2011, Article 8(2)(c)(ii), footnote 49.
- ⁷¹ 'Article 3: Conflicts not of an international character', ICRC, Commentary on the First Geneva Convention, 2016, paragraph 669.
- ⁷² Of a part of these rulings, an English translation is annexed to this criminal dossier.
- ⁷³ See: European Network of the 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 State of the European Union, February 2018, in which the reader is referred to, inter alia, the Higher Regional Court of Frankfurt am Main, 8 November 2016.
- ⁷⁴ European Network of the 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 State of the European Union, February 2018, in which the reader is referred to, inter alia, the District Court of Pirkanhaa (Finland), Judgement, 18 March 2016, R 16/1304; District Court of Kanta-Häma (Finland), Judgement, 22 March 2016, R 16/214; Higher Regional Court Frankfurt am main (Germany), Judgement, 12 July 2016, case reference 5-3 StE 2/16 - 4 - 1/16;
- ⁷⁵ 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.
- ⁷⁶ ICTY, *Prosecutor v. Tadić a/k/a "Dule"*, Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70.
- ⁷⁷ ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 57 and 58.
- ⁷⁸ ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paragraph 59.
- ⁷⁹ ICTR, *Prosecutor v. Rutaganda*, Appeals Chamber Judgement, ICTR-96-3-1, 26 May 2003, paragraph 570.
- ⁸⁰ ICTR, *Prosecutor v. Akayesu*, Appeals Chamber Judgement, ICTR 96-4-A, 1 June 2001, paragraph 444.
- ⁸¹ 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.
- ⁸² The Hague District Court of 23 March 2009, ECLI:NL:RBSGR:BI2444; The Hague Court of Appeal, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686.
- ⁸³ See the opinion of the District Court on the charged participation in a terrorist organisation.
- ⁸⁴ Supreme Court, 31 March 2009, ECLI:NL:HR:2009:BG9198.
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