

Syria/Germany, Conviction for taking photographs

INTRODUCTORY TEXT: The German Federal Court of Justice confirmed the sentence of two years of imprisonment for a man who had joined ISIS in Syria in 2014. He was found guilty of having committed a war crime by taking photographs with the severed heads of two members of the Syrian government armed forces. The case discussion addresses the protections regarding the dead in armed conflicts as well as the criminal repression of IHL violations.

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N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic

purposes.

A. Germany, International Criminal Code

[Source: Germany, Code of Crimes against International Law of 26 June 2002, Federal Law Gazette Part I p. 2254, available in German at <http://bundesrecht.juris.de> ^[2], available in English at <http://www.icrc.org/ihl> ^[3], footnotes omitted]

[...]

[See for further extracts Germany, International Criminal Code ^[4]]

Article 1:

Code of Crimes against International Law (CCAIL)

PART 1: GENERAL PROVISIONS

Section 1: Scope of application

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany. [...]

PART 2: CRIMES AGAINST INTERNATIONAL LAW

[...]

Section 8: War crimes against persons

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. kills a person who is to be protected under international humanitarian law,
2. takes hostage a person who is to be protected under international humanitarian law,
3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,

[...]

9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner

shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

[...]

(6) Persons who are to be protected under international humanitarian law shall be

1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions [...], namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;
2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;
3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

[...]

B. Germany, Federal Court of Justice, Judgement of the 3rd Criminal Division of 27 July 2017, 3 StR 57/17

[**Source:** Germany, Federal Court of Justice, Judgement of the 3rd Criminal Division of 27 July 2017, 3 StR 57/17, available in German at <https://www.bundesgerichtshof.de> ^[5], unofficial translation]

[...]

Reasons for Verdict

1 The Higher Regional Court in Frankfurt sentenced the defendant to two years imprisonment for a war crime against persons protected under international law. The accused appealed against the conviction. The appeal was unsuccessful.

2 I. The findings of the Higher Regional Court were as follows:

3 At the end of 2013, the defendant decided to join the "armed Jihad" in Syria to help "Muslim brothers" fight against the Assad regime and contribute to building an Islamic theocracy. After arriving in Syria by 8 March 2014 at the latest, the defendant stayed at the home of his friend V in the city of Binnish, in Idlib province.

4 Like many other parts of Syria, Idlib province was (and still is) caught up in civil war, with Syrian government troops fighting a large number of – mostly Islamist - armed groups. Some of these groups, in particular the Free Syrian Army, Jabhat al-Nusra and the group then known as Islamic State in Iraq and Syria, had a hierarchical military structure and a large number of fighters. These groups controlled significant portions of the country, especially in the north.

5 Between 8 March and 16 April 2014, a group of armed Jihadist fighters, including V, attacked a so-called "checkpoint" near Binnish, held by Syrian government forces. During the subsequent conflict, the group captured at least two enemy soldiers and killed them. During or after the killings, members of the group beheaded the two soldiers, spiked their severed heads onto metal poles with weights attached at the bottom, and placed them side by side in front of a school in Binnish.

6 The defendant considered himself to be a member of this armed group; he viewed the dead men, who he knew were members of the Syrian government forces, as "infidel" Alawis. He decided to mock the two victims, to denigrate the dead and to be photographed with their severed heads displayed like trophies.

8 On 16 April 2014, V posted a photograph on the Internet in which he, the defendant and another unidentified person, posed with one of the victims. The defendant had been aware

at the time the photographs were taken that the images might be posted on the Internet, and had given his consent.

9 II. A comprehensive review of the judgement, following an appeal, revealed no errors in law to the detriment of the defendant.

10 The court's verdict, which was legally sound, included a conviction for a war crime against persons protected under international humanitarian law. The Higher Regional Court had correctly ruled that the defendant, within the context of a non-international armed conflict, had gravely humiliated and degraded a person protected under international humanitarian law, as stipulated in Section 8 (1)(9) of the Code of Crimes against International Law (Völkerstrafgesetzbuch, hereinafter VStGB).

11 1. At the time the offence was committed, the fighting between the Syrian army and opposition groups in Syria, especially in Idlib province, was classified as a non-international armed conflict under Section 8 (1) of the VStGB. A decisive aspect of confirming the existence of an armed conflict is the use of armed force by one of the parties. While an international armed conflict presupposes the use of armed force between States, a non-international armed conflict involves either State armed forces fighting against organized armed groups or such groups fighting against each other, providing that the hostilities are of a certain duration and intensity. The groups concerned must be organized and the armed conflict must be of a certain intensity and duration in order to ensure that mere internal disturbances, tensions, riots, sporadic acts of violence or other similar acts are not classified as armed conflicts.

12 The fighting in Syria between the Syrian armed forces and armed opposition groups, especially in Idlib province, went far beyond mere domestic turmoil, rioting or sporadic acts of violence. In the spring of 2014, the conflict was ongoing and had spread to almost

the entire country. The parties to the conflict, including groups such as the Free Syrian Army, Jabhat al-Nusra, and the group known as Islamic State in Iraq and Syria, were highly organized with a hierarchical structure and a large amount of military equipment; they controlled large swathes of the country, provided their militants with military training and carried out coordinated attacks. At the time that the crime was committed, the conflict was still considered to be non-international in nature.

13 2. The victims were persons protected under international humanitarian law. This follows from Section 8 (6)(2) of the VStGB, which stipulates that in a non-international armed conflict, persons not directly involved in hostilities and those in the power of the enemy are protected under international humanitarian law. The category includes enemy fighters who are hors de combat.

14 This was indeed the status of the two dead soldiers. As members of the Syrian armed forces who had been captured by a group of armed Jihadist fighters, they were in the hands of an enemy group and not actively involved in hostilities.

15 3. The two soldiers were classified as protected persons under Section 8 (1)(9) of the VStGB, even after their deaths.

16 a) A deceased person can be the victim of a crime involving grievously humiliating or degrading treatment of a person protected under international humanitarian law. In this context, the provision serves to protect the dignity of the dead, or human dignity extending beyond death.

17 In legal literature, the argument has sometimes been used that Section 8 (1)(9) of the VStGB does not cover the desecration of corpses, based principally on the view that lawmakers only intended to codify the provisions of customary international law where

there was consensus; the criminal status of the desecration of corpses in armed conflicts did not fall into that category. Its accepted status as a crime under international customary law does not arise either from what is codified in the Geneva Conventions and Protocols or in international case law, in particular what is known as the Elements of Crimes.

18 However, this argument is flawed.

19 aa) First and foremost, it does not correspond to the intentions of the legislators. The VStGB was intended to implement the criminal provisions of the Rome Statute of the International Criminal Court and to ensure that the German courts are able to prosecute crimes within the jurisdiction of the International Criminal Court. In taking the Rome Statute and the Elements of Crimes formulated therein as guidance, the legislator sought to take a significant step towards integrating established customary international law into national law, essentially considering the provisions of customary international law as enshrined in the Rome Statute.

20 Section 8 (1)(9) of the VStGB is based on Article 8 (2)(b)(xxi) and Article 8 (c)(ii) of the 1998 Rome Statute of the International Criminal Court, which classify the humiliating and degrading treatment of protected persons in international and non-international armed conflicts as war crimes. The concept of Elements of Crimes under Article 9 of the Statute is used to interpret the provisions contained in Article 8 thereof. A footnote on the Elements relating to Article 8 (2)(b)(xxi) and Article 8 (c)(ii) stipulates that these provisions also cover treatment after death.

21 bb) Given that Article 8 (2)(b)(xxi) and Article 8 (c)(ii) of the Rome Statute of the International Criminal Court also classifies the humiliating and degrading treatment of deceased persons as a war crime, it also follows that it is incorrect to conclude that the status as a punishable offence of the desecration of corpses during armed conflicts does not

form part of customary international law on which there is consensus. The ICC Statute is itself a key source of international criminal law and largely confirms and clarifies the provisions of criminal law applicable under customary international law.

22 (1) It cannot be argued that the Elements of Crimes are merely "non-binding interpretive aids".

24 Finally, there is no reason to treat war crimes involving grievously humiliating or degrading treatment differently in international armed conflicts and non-international armed conflicts.

25 (2) The prohibition under customary international humanitarian law of the desecration of corpses in armed conflict stems from the rules of international humanitarian law in international and non-international armed conflicts published by the ICRC. The incorporation into international customary law of the rules summarized by the ICRC is based on relevant global practice by nation States. Rule 113 stipulates that parties to a conflict must take all possible measures to prevent the desecration of dead bodies and to prohibit the mutilation of corpses.

26 Rule 113 of customary international humanitarian law published by the ICRC is in accordance with Article 8 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977. This provision stipulates that, "whenever circumstances permit, and particularly after an engagement", all possible measure shall be taken, without delay, to "search for the dead, prevent their being despoiled, and decently dispose of them".

27 (3) The criminal status, under customary international law, of the desecration of corpses in armed conflicts has also been reflected in the decisions of international courts.

28 cc) Treating the deceased as persons protected under international humanitarian law within the scope of Section 8 (1)(9) of the VStGB does not contravene the prohibition under German law to draw analogies. The term "person" is generally synonymous with "human" and refers to both living and dead people; whether the person concerned is alive or dead is made clear by adding the appropriate adjective. The same is true in international criminal law, as an analysis of the Elements of Crimes relating to Article 8 (2)(b)(xxi) and Article 8 (c)(ii) of the Rome Statute of the International Criminal Court makes clear. The original English version states that: "For this crime, 'persons' can include dead persons". This is made clear by adding the appropriate adjective to indicate a deceased person.

32 b) In this case, Section 8 (1)(9) of the VStGB applies even though the actions of the defendant only pertained to the severed heads of the soldiers. The humiliating or degrading treatment of a deceased person is still considered a crime in cases where the offence concerns only a part of the victim's body. This is certainly true in cases involving the head of the deceased.

33 It is irrelevant in this case that Section 8 (1)(9) of the VStGB does not explicitly designate body parts as potential objects of offence. They fall within the scope of the intention and purpose of the provision which, along with Article 8 (2)(b)(xxi) and (c)(ii) of the Rome Statute of the International Criminal Court, seeks to protect human dignity. The provisions of the Rome Statute express this to a certain degree by emphasizing "outrages upon personal dignity " and simply citing humiliating and degrading treatment as an example.

34 The personal dignity of a deceased person may also be affected by actions that pertaining exclusively to his or her severed head, as that part of the body constitutes the primary identifying feature of a person and determines the external perception of that person the most.

35 4. The actions of the accused thus constitute gravely humiliating and degrading treatment of the two dead soldiers.

36 A) The accused (mis)treated the victims by photographing himself with their severed heads staked on poles.

37 Aa) Under the provisions of Section 8 (1)(9) of the VStGB, “treatment” includes any conduct directly relating to the victim in question. In this respect:

38 (1) It is not necessary for the offender to have a physically impact on the person concerned; verbal abuse may also classify.

44 (2) “Treatment”, within the meaning of Section 8 (1)(9) of the VStGB, does not presuppose a psychological impact on the person concerned.

45 (3) The actions of the perpetrator must relate directly to a person, because then there can be no question that such actions involve a victim.

46 bb) The actions of the accused related directly to the dead soldiers in that he posed and allowed himself to be photographed with their severed heads. However, the subsequent publication of the photographs on the Internet was not an action directly relating to the soldiers, and “treatment” in this case involved the photographs, rather than the soldiers themselves.

47 b) The humiliating and degrading treatment of the deceased soldiers by the defendant was classified as “grave” under Section 8 (1)(9) of the VStGB.

49 This conclusion stems from the English-language original wording of Article 8

(2)(b)(xxi) and (c)(ii) Rome Statute of the International Criminal Court, on which the German legislator sought to base Section 8 (1)(9) of the VStGB. In that text, the term "outrage" is used to describe humiliating and degrading treatment classified as a war crime. It is important to have an objective benchmark that, as set out in the Elements of Crimes, takes into account the cultural background of the victim.

53 The accused repeatedly posed, in a manner highlighting his position of power and lack of mercy, next to the severed heads of the soldiers speared on metal poles and displayed as trophies. His actions followed the previous humiliating and degrading treatment of the soldiers at the hands of the armed group, which involved mounting the soldiers' heads on poles and displaying them in front of a school. There is no doubt that failing to bury the dead or to hand them over to the enemy, and instead spearing their heads on metal poles and displaying them publicly as trophies, constituted grievously humiliating and degrading treatment of deceased persons.

54 Likewise, displaying the soldiers' severed heads constituted a humiliating and degrading act, although those actions did not directly involve physical harm. The accused took advantage of the previous, severely degrading treatment of the victims to further desecrate their bodies. To an objective observer, the fact that the accused allowed himself to be photographed, in a pose reflecting his position of power and lack of mercy, next to the impaled and exposed heads of the victims appears just as horrific — considering the cultural background of the victims — as the act of impaling and displaying the soldiers' heads. The actions of the accused demonstrated that, for him, the degrading situation of the victims aroused neither sympathy nor shame. By staging a photo opportunity with the severed and impaled heads of the soldiers, the accused and his accomplices made it clear that the heads were mere trophies to hold up to display. Viewed objectively, the fact that the defendant did not actually cause the victims any bodily harm is irrelevant.

55 5. The defendant committed the crime in the context of an armed conflict. The functional nexus required by law exists if the armed conflict is of material importance to the perpetrator's ability and decision to commit the crime, the method used and the purpose of the crime. The act must be directly linked to the armed conflict. Nonetheless, the crime does not necessarily have to be committed during ongoing combat operations, or in particularly close proximity to them.

56 The actions of the defendant would have been practically unthinkable outside of the context of an armed conflict: he had travelled to Syria to join a group of Jihadist fighters and to contribute to the creation of an Islamic theocracy through combat against Syrian government forces; the deceased were government soldiers who had been captured and killed during an attack on their checkpoints; the soldiers' severed heads were subsequently put on display and the defendant posed alongside them for photographs in order to demonstrate his position of power and his lack of mercy.

Discussion

I. Classification of the Situation and Applicable Law

1. (*Document B, paras 4, 11 – 12*) How does the German Federal Court classify the situation in Syria in early 2014? What criteria does the Court consider in its classification? Is it necessary that the non-State armed groups have control over territory for the conflict to be considered a NIAC? Which rules of IHL apply in Syria? (GC I-IV, Art. 3 ^[6]; P II, Art. 1 ^[7])

2. (*Document B, paras 55 – 56*) Does IHL of NIACs apply to all conduct on the territory of the State party to a NIAC? Or is a certain nexus with the armed conflict necessary? What indicative factors for the existence of a sufficient nexus does the German Federal Court

identify? Which one does it apply in this case?

II. Treatment of the Dead

3. (*Document A; Document B, paras 13 – 14*) Who is protected by IHL of NIACs? Does your answer correspond to the persons listed in Section 8 (6) of the German CCAIL? (GC I-IV, Art. 3 ^[6])

4. (*Document B, paras 15 – 34*) Treatment of the dead:

a. What obligations does IHL of NIACs impose on belligerents regarding the treatment of the dead? Does it matter for these obligations whether the dead were civilians or fighters? (CIHL, Rules 112 ^[8] – 116 ^[9])

b. Does the prohibition of outrages upon personal dignity, in particular of humiliating and degrading treatment, apply to dead persons? (GC I-IV, Art. 3 ^[6]; CIHL, Rule 90 ^[10]; see Rome Statute, Art. 8 (2) (b) (xxi) and (c) (ii) ^[11])

5. (*Document B, paras 32 – 54*) Outrages upon personal dignity as a war crime:

a. Is it a war crime to mutilate a dead body? Is the otherwise humiliating and degrading treatment of a dead body a war crime? (Rome Statute, Art. 8 (2) (b) (xxi) and (c) (ii) ^[11])

b. How would you define the notion of humiliating and degrading treatment of a person, living or dead? How does the German Federal Court interpret this notion? Is a physical impact on the victim necessary? Does the victim have to be aware of the act? Is it necessary that the perpetrator has an intention to humiliate or degrade the victim through their acts? How does the Court justify the application of this notion to conduct

concerning only the severed heads of the victims, not their dead bodies as a whole? In your opinion, can the prohibition of humiliating and degrading treatment of a person be applied to any severed part of the body?

c. In the case at hand, what conduct constitutes humiliating and degrading treatment in the eyes of the German Federal Court? The decapitation of the victims? The taking of photographs with the severed heads of the victims? Or the later publication of the photographs? Do you agree with the interpretation of the Court that the publication of the photographs as such is not a humiliating and degrading treatment of the victims, also considering that they were identifiable in the photographs? For which of the acts was the accused convicted?

III. Criminal Repression of IHL Violations

6. What legal regime would allow a State to exercise jurisdiction over war crimes in the absence of a territorial or personal link with the perpetrator or the victim? Does customary international law establish a mandatory or a permissive universal jurisdiction regime over war crimes? Under which circumstances does an obligation to investigate and prosecute war crimes exist in the absence of territorial or personal jurisdiction? Is your answer the same for acts committed in IACs and those committed in NIACs? Why not? (GC I, Art. 49 [12]; GC II, Art. 50 [13]; GC III, Art. 129 [14]; GC IV, Art. 146 [15]; P I, Art. 85 (1) [16]; CIHL, Rules 157 [17], 158 [18])

7. (*Document A*) Is the German legislation merely an expression of its obligation to prosecute war crimes under IHL, or does it go beyond this? Compare the German legislation to Article 8 Rome Statute: does the German legislation differentiate between war crimes committed in IACs and those committed in NIACs, like the Rome Statute does? In your opinion, why did the German legislator choose not to transpose this differentiation? What are the advantages and disadvantages of such a single regime?

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