

# ECLI:NL:GHDHA:2021:103

Court Court of Appeal, The Hague

Date of appeal judgment 26 January 2021

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Case number 2200392619

Areas of law Criminal law

Special features Appeal

Indication of content

Section 68 Dutch Criminal Code; section 96(2) of the Dutch Criminal Code; section 140a of the Dutch Criminal Code; section 6 *Wet Internationale Misdriften* (WIM) [International Crimes Act]; common Article 3 of the Geneva Conventions; European Convention on the Transfer of Proceedings in Criminal Matters. Conviction for participation in Syria in an organisation with a terrorist aim (IS) and preparatory acts for that and the war crime consisting of assault on personal dignity, in particular humiliating and degrading treatment of persons placed *hors de combat* for any other cause (posting a photograph on Facebook of the defendant posing next to a man who had been executed by IS dressed in orange overalls and tied to a cross). Appeal on the *ne bis in idem* principle.  
Jurisdiction.

Websites Rechtspraak.nl

## Judgment

Roll number: 22-003926-19

Public prosecution reference numbers: 09-748003-18 and 09-748003-19

Date of appeal judgment: 26 January 2021

DEFENDED CASE

### Court of Appeal, The Hague

three-judge chamber for criminal cases

### Judgment

delivered in the appeal against the decision of the District Court, The Hague, of 23 July 2019 in the criminal case against the defendant:

**[defendant],**

born in [place of birth] on [day of birth] 1994,  
currently detained in PI [*Penitenciaire Inrichting* (prison)] Vught, Terrorist Department, in Vught.

Examination of the case

This appeal judgment has been delivered as a result of the examination at the hearings at first instance and the examination at the hearing of this appeal court on 27 January 2020 (case direction), 7 October 2020 (review), 23 November 2020 (review) and 12 January 2021 (review).

The appeal court has taken note of the request made by the advocate-general and the arguments put forward by and on behalf of the defendant.

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## I Procedure

At first instance, the defendant was acquitted of counts 1 and 2 of the indictment in the case with public prosecution reference number 09-748003-19 and sentenced to a term of imprisonment of 7 years and 6 months, less the period spent in pre-trial detention, in connection with the cumulative/alternative sections of count 1 and count 2 of the indictment in the case with public prosecution reference 09-748003-18.

On behalf of the defendant, an appeal was filed against the lower court decision.

## II Admissibility of the defendant in the appeal

At first instance, the defendant was acquitted of counts 1 and 2 of the indictment in the case with public prosecution reference 09-748003-19. The appeal was filed on behalf of the defendant without limitation and is therefore also directed against the acquittal decisions made at first instance. In view of the provisions of section 404(5) of the Code of Criminal Procedure, the defendant cannot appeal against these decisions. Therefore, the appeal court will declare the defendant's appeal inadmissible insofar as it is directed against the acquittal in the judgment under appeal regarding counts 1 and 2 of the indictment with public prosecution reference 09-748003-19.

## III Indictment

The charges brought against the defendant – insofar as submitted for review to the appeal court and after amendment of the indictment description pursuant to section 314a of the Code of Criminal Procedure and amendment of the charges during the hearing at first instance – are as follows:

Public prosecution reference number 09-748003-18:

1.

that he at one or more times during the period from 1 August 2014 to 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 one or more person(s), or at least alone, participated in a terrorist organisation such as the Islamic State (IS), or at least (an) Organisation that supports the armed Jihad struggle, whereby said Organisation had and/or has as its purpose the commission of terrorist offences, namely

A. intentionally setting on fire and/or intentionally causing an explosion, whereby such act is likely to generally endanger property and/or likely to endanger the life of another person or to cause a risk of grievous bodily harm to another person and the offence results in the death of a person (as referred to in section 157 of the Dutch Criminal Code), with terrorist intent (as referred to in section 176a of the Dutch Criminal Code) and/or

B. committing manslaughter with terrorist intent (as referred to in section 288a of the Dutch Criminal Code) and/or

C. committing murder with terrorist intent (as referred to in section 289a in conjunction with 83 of the Dutch Criminal Code) and/or

D. conspiring and/or intentionally preparing and/or promoting the aforementioned serious offences (as referred to in section 176a and/or 288a and/or 289a and/or 96(2) of the Dutch Criminal Code) and/or

E. possessing one or more weapons and/or ammunition in categories II and/or III (as referred to in section 26(1) of the *Wet wapens en munitie* [Weapons and Ammunition Act]) for the commission with terrorist intent and/or with the intention of preparing or facilitating a terrorist offence (as referred to in section 55(1) and/or (5) of the *Wet wapens en munitie*)

and/or

he, at one or more times during the period from 1 August 2014 to 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 one or more persons, or at least alone,

with the aim of preparing and/or promoting the commission (once or repeatedly) of the following serious offence(s):

- intentionally setting on fire and/or intentionally causing an explosion, whereby such act is likely to generally endanger property and/or likely to endanger the life of another person or to cause a risk of grievous bodily harm to another person and the offence results in the death of a person, with terrorist intent (as referred to in section 157 in conjunction with 176a of the Dutch Criminal Code), and/or
- committing manslaughter with terrorist intent (as referred to in section 288a of the Dutch Criminal Code) and/or
- committing murder with terrorist intent (as referred to in section 289 in conjunction with section 83 of the Dutch Criminal Code)
- attempting to induce another person to commit the serious offence, or to procure the offence to be committed, or to assist in the commission of the offence, or to provide the opportunity, means or information to do so, and/or
- providing himself or others with the opportunity, means and/or information to commit the serious offence, and/or
- possessing objects which it was known were intended for the commission of the serious offence

he, the defendant and/or his co-perpetrator(s)

A. familiarised himself/themselves with the radical extremist ideology of the armed Jihad struggle with a terrorist aim, waged by the (terrorist) Organisation such as the Islamic State (IS), or the Islamic State of Iraq and Shaam (ISIS), or the Islamic State of Iraq and Levant (ISIL), or Al-Qaeda (AQ), or Ha'yat

Tahrir al-Sham (HTS), or Jabhat Fateh Al-Sham (both previously Jabhat al Nusra, JaN), or at least any Jihadist fighting group affiliated to the aforementioned Organisation(s), or at least any organisation which supports the armed Jihad struggle, and/or

B. obtained information about travelling to and/or staying in the conflict zone in Syria and/or Iraq and/or

C. made the trip to Syria and/or Iraq with the purpose of going to the combat zone, or at least to an area controlled by the terrorist organisation IS(IS/IL) or Al-Qaeda or Jabhat al Nusra, and/or staying (for some time) in said (combat) zone in Syria and/or Iraq and/or

D. joined forces with one or more co-perpetrators and/or IS(IS/IL) and/or Al-Qaeda and/or Jabhat al Nusra fighters, or at least one or more persons affiliated to a terrorist organisation or organisations advocating the armed Jihad struggle, or at least one or more persons who (also) took part in a terrorist organisation advocating the armed Jihad struggle, and/or

E. participated in and/or contributed to the armed Jihad struggle waged by the (terrorist) organisation IS(IS/IL) and/or Al-Qaeda and/or Jabhat al Nusra, or at least terrorist organisations affiliated to IS and/or Al-Qaeda, or at least (a) terrorist organisation which supports the armed Jihad struggle, and/or

F. used and/or carried and/or possessed weapons/firearms in Syria,

whereby, in said armed Jihad struggle, murder and/or manslaughter and/or arson were committed and/or explosions were caused, in each case with terrorist intent;

2.

he, at a time in or around the period from 1 October 2014 to 19 July 2015, in Abu Kamal (Syria) and/or en route from Mosul (Iraq) to Raqqa (Syria), or at least (elsewhere) in Iraq or Syria, in the case of armed conflict not of an international character occurring in the territory of Syria, in violation of the provisions of common Article 3 of the Geneva Conventions of 12 August 1949,

committed outrages upon personal dignity, in particular, humiliating and/or degrading treatment, on persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause,

because he, the defendant,

- (laughing) posed next to the said (deceased) person while that person was crucified and/or tied to a wooden cross and/or
- had a photograph taken of himself with the aforementioned (deceased) person while that person was crucified and/or tied to a wooden cross and/or
- subsequently posted this photo on social media, namely Facebook, and thereby (thus) distributed it and/or made it public.

#### IV Admissibility of the Public Prosecution Service

The defence argued that the Public Prosecution Service should be declared inadmissible in the prosecution of the defendant, because the defendant cannot be prosecuted twice for the same offence. The defence put forward several arguments that will be discussed below.

The appeal court proceeds on the basis of the following established facts:

a. The defendant was arrested in Turkey on 2 November 2016 and subsequently detained by the Turkish authorities. On 17 May 2018, the defendant was sentenced to imprisonment for a term of 6 years and 3 months by the Turkish court. On the same day, the defendant was released. On 3 July 2018, the defendant was arrested at Schiphol Airport. Since then, he has been remanded in custody in the Netherlands.

The trial court in Kilis (Turkey) declared that the defendant was guilty of the offence of membership of the armed terrorist organisation IS, committed with intent. The defendant's conviction is based on the *Wet op Terrorismebestrijding* [Counter Terrorism Act] number 3713 and the offence is classified as a terrorist offence.

On 6 March 2020, the Supreme Appeal Court of Turkey (16th Criminal Chamber) issued a 'declaration of res judicata', which implies that the 'res judicata date' of this judgment is 24 December 2019, after the 18th Criminal Chamber of the Gaziantep appeal court (Turkey) had issued a decision on 11 April 2019 and the 16th Criminal Chamber of the Supreme Appeal Court on 24 December 2019. The appeal court understands that the aforementioned judgment became final on 24 December 2019.

In summary, the defendant is currently being prosecuted in the Netherlands for participating in an organisation whose purpose is to commit terrorist offences in Syria in the period from 1 August 2014 to 1 November 2016, performing preparatory acts for the commission of terrorist offences, and committing a war crime in Iraq or Syria in the period from 1 October 2014 to 19 July 2015 by allowing himself to be photographed next to a deceased person tied to a wooden cross.

The advocate-general does not dispute the existence of these same circumstances in this Turkish decision and the indictment in the present case regarding the allegation of participating in an organisation whose purpose is to commit terrorist offences.

The appeal court establishes – following the viewpoints of the advocate-general and the defence – that this is same offence within the meaning of section 68 of the Dutch Code of Criminal Procedure, for which the defendant was convicted in the Turkish decision and the allegations made in the current case, namely participating in an organisation whose purpose is to commit terrorist offences.

#### *European Convention on the Transfer of Proceedings in Criminal Matters.*

The counsel for the defendant relies primarily on the provisions of Articles 30, 31, 35 and 36 of the European Convention on the Transfer of Proceedings in Criminal Matters and concludes that

- in view of the provisions of Article 30 European Convention on the Transfer of Proceedings in Criminal Matters, the Public Prosecution Service should have refrained from instituting proceedings in the Netherlands, or should have notified Turkey of its intention to prosecute the defendant in the Netherlands;
- there is a judicial pardon within the meaning of Article 35(b)(ii) European Convention on the Transfer of Proceedings in Criminal Matters;
- Article 35 of the European Convention on the Transfer of Proceedings in Criminal Matters precludes a new prosecution in this situation;
- Article 36 of the European Convention on the Transfer of Proceedings in Criminal Matters has not been correctly applied.

Both the Netherlands and Turkey are parties to this Convention. The appeal court finds that the file does not show any request from Turkey to the Netherlands based on this Convention, nor any request from the Netherlands to Turkey. There is no evidence that documents from the aforementioned Turkish criminal case form part of the case documents, other than the decision of 17 May 2018 and the 'declaration of res judicata', both submitted by counsel.

The appeal court derives from this that it cannot be established that there has been judicial cooperation between the Netherlands and Turkey concerning the transfer of criminal proceedings based on this Convention. The appeal court notes that the European Convention on the Transfer of Proceedings in Criminal Matters does not create an obligation to transfer criminal proceedings, but only creates a power to do so. The defences based on that Convention therefore fail. This means that this Convention does not preclude the conclusion that this is not a situation in which a reasonable prosecutor would have decided not to prosecute.

The appeal court rejects the appeal to the European Convention on the Transfer of Proceedings in Criminal Matters in all its parts.

### *Section 68 of the Dutch Criminal Code*

#### *Legal framework*

Section 68 of the Dutch Criminal Code, insofar as relevant, contains the following provisions:

- 1. Except for cases in which judgments are eligible for review, no person may be prosecuted twice for an offence for which a final judgment has been rendered against him by a court in the Netherlands, Aruba, Curaçao, St. Maarten or the public bodies Bonaire, St. Eustatius and Saba.*
- 2. If the final judgement was rendered by another court, the same person may not be prosecuted for the same offence in the case of*

*1st acquittal or dismissal of the charge(s);*

*2nd conviction, if a punishment is imposed, followed by complete enforcement, remission or commutation or immunity from punishment by reason of lapse of the period of limitation.*

The appeal court has established before that the decision of the Turkish trial court concerning the conviction for participation in a terrorist organisation is final and that this conviction relates to the same circumstances as the charges appearing in the present indictment.

The appeal court notes that the defendant was sentenced in Turkey to a term of imprisonment of 6 years and 3 months, or 75 months. The defendant spent time in pre-trial detention in Turkey from 2 November 2016 to 17 May 2018. The defendant has therefore served 18 months and 15 days in Turkey of the sentence imposed in Turkey.

- *Pardon/remission?*

The aforementioned trial court in Kilis, in its decision dated 17 May 2018, considered, inter alia, the following: *'Taking into account the nature of the offence with which the defendants have been charged, the available evidence, the length of time in detention in relation to the sentence imposed the defendants are RELEASED and that a report on their release will be sent to the prosecutor if there are no other offences for which they are detained or have been convicted;'*

This document has been anonymised. The translation has been provided by GNS and Eurojust and is not an official translation.

From this sentence, the counsel deduced that the Turkish trial court had remitted the remaining custodial sentence of the defendant and that to that extent it was a pardon, so that the remaining condition for the applicability of section 68 of the Dutch Criminal Code was also fulfilled. The counsel points out that explicit reference is made to the circumstances and strength of the evidence.

The advocate-general disputes that it can be inferred from this wording that the Turkish court granted a pardon for the remainder of the custodial sentence.

The appeal court notes based on the wording of this passage that the trial court decided that the defendant should be released. This is not in dispute.

There is no objective and verifiable information other than this passage that appears in the decision about the reason for release.

The appeal court wishes to point out that this passage does not refer to the Turkish legal regulations concerning the execution of sentences and security measures, as discussed during the hearing, which among other things provide for supervision of the behaviour of the convicted person and create conditions for reintegration into society during the period in which the defendant has been released early.

The appeal court also notes that the wording of this passage does not mention remission (or similar wording) of the extensive remaining sentence length, whereas the trial court earlier, in the extensively substantiated decision, sentenced the defendant to a prison term of considerable duration and explicitly accounted for punishment-increasing and punishment-reducing circumstances.

Thus the appeal court comes to the conclusion that a reasonable interpretation of this wording, viewed against the background of the decision as a whole and all other evidence, does not lead to the interpretation advocated by the counsel that there has been a remission of the sentence or a pardon by the Turkish court.

The defence is rejected.

- *Serving of entire sentence?*

The counsel argued on various grounds that the defendant had indeed served the entire sentence imposed in Turkey, and for that purpose submitted legal opinions from the Turkish lawyers [name of lawyer 1] and [name of lawyer 2].

Insofar as the counsel argues on the basis of these opinions that the period spent in pre-trial detention in Turkey should be added to the period spent in pre-trial detention in the Netherlands when answering the question whether the sentence was completely enforced within the meaning of the provisions of section 68(2) of the Dutch Criminal Code, the appeal court considers the following.



not be added to the period spent in pre-trial detention in Turkey when answering the question whether the provisions in section 68(2) of the Dutch Criminal Code (Supreme Court of Appeal 4.2.1969, NJ 1970, 325 with annotations by Enschedé and Supreme Court of Appeal 26.5.2009, NJ 2009/348).

In view of the fact that the defendant spent a period of 18 months and 15 days in pre-trial detention in Turkey out of the 75-month sentence imposed by the Turkish court, the provisions of section 68(2) under 2 of the Dutch Criminal Code, that the sentence imposed must have been served in full, have not been met

Insofar as the counsel argues that the defendant has served the entire sentence in Turkey in view of the Turkish regulation concerning conditional release applicable in this case, this defence is rejected on the ground that this is not evident in view of the pleadings at the appeal court hearing.

The appeal court adds to this that this likewise does not follow from the legal opinions of the Turkish lawyers [name of lawyer 1] and [name of lawyer 2], who calculate the actual custodial sentence to be imposed under Turkish law at respectively 44.25 months or 3 years, 8 months and 10 days.

The appeal court rejects the defence.

This does not alter the fact that in determining the length of the sentence, this appeal court will take into account the time that the defendant spent in pre-trial detention in Turkey. This will be discussed further in the appeal judgment.

#### *Diligence and principles of due process*

The defence argues that enforcement of the remaining part of the sentence could have been taken over by the Public Prosecution Service, provided that the latter had acted with due diligence.

#### *Legal framework*

Section 3(1) of the *Wet Overdracht Strafvonnissen* [Transfer of Criminal Sentences Act] (hereinafter: WOTS) reads (insofar as relevant here) as follows:

*1A sentence imposed in a foreign state may only be enforced in the Netherlands insofar as:*

*a. the judicial decision is enforceable in that State;*

Section 7 WOTS reads (insofar as relevant here) as follows:

*1 A sentence imposed in a foreign State may not be enforced in the Netherlands if the sentenced person is prosecuted for the same offence in the Netherlands.*

#### *Opinion of the appeal court*

The appeal court has established the following facts and circumstances in the foregoing and adds some findings.

The defendant – as already considered above – was sentenced to imprisonment by the Turkish court in Kilis on 18 May 2018 and released on the same day. The defendant arrived in the Netherlands on 3 July 2018. He was also arrested that day. The district court pronounced its decision in this case on 23 July 2019. On the same day, an appeal was filed against this decision on behalf of the defendant. It was not until 24 December 2019 that the decision of the Kilis trial court became final.

Until 24 December 2019, the provisions of sections 3 and 7 of the WOTS, and after 24 December 2019, section 7, precluded taking over and enforcing the remaining term of the sentence.

The public prosecutor and the advocate-general have also indicated that they will take into account the period spent in pre-trial detention in Turkey in their recommendation on the length of the sentence.

After all, the decision whereby the sentence imposed by the Turkish court became final has a much later date than the decision to prosecute made by the Dutch Public Prosecution Service and, moreover, the defendant was prosecuted in the Netherlands for the same offence for which he had been convicted in Turkey. Under these circumstances, it cannot be seen that the Public Prosecution Service acted negligently in this respect when taking the decision to prosecute.

Contrary to counsel's arguments, the remaining part of the sentence in Turkey could not be taken over by the Netherlands in view of the provisions laid down in WOTS.

Seen in the light of the defence's arguments and in view of the considerations above, the provisions of Article 4 of Protocol No 7 to the European Convention on Human Rights, do not lead to a different opinion on the diligence of the Public Prosecution Service's actions.

Likewise, the appeal to the *Alcoholslotprogramma* (Alcohol ignition interlock programme) appeal judgment (Supreme Court 3.3.2015, ECLI:NL:HR:2015: 434) cannot lead to a different opinion on the diligence of the Public Prosecution Service's actions. In this case, an irrevocable obligation to participate in the alcohollock programme had been imposed on a defendant, whereas afterwards the public prosecutor also prosecuted this defendant and wanted him to be sentenced for the same underlying offence.

In the present case, the defendant was prosecuted and convicted in Turkey, while the sentence imposed there was not fully served and that conviction did not become final until 24 December 2019, long after 3 July 2018 and the decision to proceed with prosecution by the Public Prosecution Service in the Netherlands.

When making their request for sentencing with respect to participation in an organisation whose purpose is to commit terrorist offences and the other counts of the indictment, the public prosecutor and the advocate-general also took into account the part of the sentence that the defendant had served in Turkey.

Viewed against the background of the above considerations, the appeal court is of the opinion that the members of the Public Prosecution Service did not act contrary to the principles of due process in this respect, because otherwise the prosecution would be at odds with the *ne bis in idem* principle.

Counsel's defences are rejected.

### *Conclusion*

The foregoing leads to the following conclusion. Section 68 of the Dutch Criminal Code does not preclude the prosecution of the defendant for his alleged participation in an organisation whose purpose is to commit terrorist offences.

Nor can it be assumed that no reasonable prosecutor could have decided to prosecute or that the principles of due process have been violated when assessing the prosecution in the light of the *ne bis in idem* principle.

The advocate-general's prosecution of the defendant is therefore admissible.

### V Jurisdiction

In the case with public prosecution reference 09-748003-18, the defendant is charged under count 2 with acting in contravention of the provisions of common Article 3 of the Geneva Conventions of 12 August 1949, as punishable under section 6 of *Wet Internationale Misdrijven* (hereinafter: WIM). It is not disputed that this appeal court has jurisdiction to take cognisance of these facts pursuant to section 2 WIM. This will be the starting point.

The defence contests the fact that the Dutch judge has jurisdiction with regard to count 1 of the indictment against the defendant with public prosecution's reference 09-748003-18. The Public Prosecution Service argues that there is indeed jurisdiction with respect to these charges. The following refers only to jurisdiction for those charges.

In summary, and insofar as relevant at this time, the defendant is charged – under the cumulative/alternative sections of counts 1 and 2 – with having participated in Syria and/or Iraq and/or Turkey and/or the Netherlands in the period 1 August 2014 until 1 November 2016 in a terrorist organisation whose purpose is to commit terrorist offences, as well as having carried out preparatory acts with the intention of committing terrorist offences in Syria and/or Iraq and/or Turkey and/or the Netherlands in the period from 1 August 2014 until 1 November 2016.

It is an established fact that the defendant also had Dutch nationality during the entire period when the charges were committed.

Furthermore, it is not in dispute that Dutch criminal law is applicable in any case, insofar as the defendant has been charged with criminal offences committed in the Netherlands. This will be the starting point.

Since 1 July 2014, section 4 of the Dutch Criminal Code, as far as relevant, reads as follows:

*The criminal law of the Netherlands shall apply to any person who commits outside the Netherlands:*

*a. any of the serious offences defined in sections 92–96 (...);*

Since 1 July 2014, section 6 of the Dutch Criminal Code reads as follows:

1. *The criminal law of the Netherlands shall apply to any person who commits outside the territory of the Netherlands an offence over which jurisdiction must be conferred by a treaty or decision of an international legal organisation designated by an order-in-council.*
2. *The order-in-council, as referred to in the first paragraph, describes the facts in respect of which the treaties or decisions of international legal organisations designated by the order-in-council must confer jurisdiction.*

The *Besluit internationale verplichtingen extraterritoriale rechtsmacht* [Decision on international obligations in extraterritorial jurisdiction], which came into force on 1 July 2014, includes:

#### Section 1

*For the purposes of this Decision, the following definitions shall apply:*

- a) *the Code: the Dutch Criminal Code*
- b) *a terrorist offence: a serious offence as referred to in section 83 of the Code*
- c) *a serious offence for the preparation or facilitation of a terrorist offence: a serious offence referred to in section 83b of the Code.*

#### Section 2

1. *The criminal law of the Netherlands shall apply to any person who commits outside the Netherlands: (...)*

*e. a terrorist offence or any of the serious offences, defined in sections 115, 117, 117b, 121 to 123 inclusive, 157, 161, 161 bis, 161quater, 161sexies, 162, 162a, 164, 166, 168, 170, 172, 173a, 285, 287, 288, 289, 350, 350a, 351, 352, 354, 385b and 385d, insofar as the offence falls within the definitions of Article 2 of the International Convention for the Suppression of Terrorist Bombings concluded in New York on 15 December 1997 and either the offence is committed against a Dutch national, or the suspect is in the territory of the Netherlands;*

*(...)*

#### Section 4

*(...)*

2. *The criminal law of the Netherlands shall apply to the Dutch national or the foreign national who has his permanent place of residence or abode in the Netherlands and commits any of the serious offences defined in sections 131(2), 132(3), 134a, 205(3), 225(3), 311(1)(6°), 312(2)(5°), 317(3) in conjunction with*

312(2)(5°) and 421 of the Code, outside the territory of the Netherlands. (...)

Article 2 of the Convention for the Suppression of Terrorist Bombings, concluded in New York on 15 December 1997 (hereinafter: the Convention) provides the following:

1. *Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:*

a. *With the intent to cause death or serious bodily injury; or*

b. *With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.*

2. *Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.*

3. *Any person also commits an offence if that person:*

a. *Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or*

b. *Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or*

c. *In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.*

*Cumulative/alternative sections of count 1 of the indictment*

The definition of a terrorist offence is provided in section 83 of the Dutch Criminal Code. Section 83(3) of the Dutch Criminal Code also mentions the term of imprisonment provided for in section 140a of the Dutch Criminal Code. Section 140a of the Dutch Criminal Code, to which the present indictment is tailored, is therefore also a terrorist offence.

Article 2(3)(c) of the Convention also brings within the scope of the Convention contributing to the commission of one or more of the offences described in paragraph 1 – commission/participation in the discharge or detonation of an explosive or other lethal device – (or an attempt thereto pursuant to paragraph 2) by a group of persons acting with a common purpose under the conditions described therein.

The counts in the indictment against the defendant include participation in an organisation whose purpose is to commit terrorist offences, including:

'A. intentionally setting on fire and/or intentionally causing an explosion, whereby such act is likely to generally endanger property and/or likely to endanger the life of another person or to cause a risk of grievous bodily harm to another person and the offence results in the death of a person (as referred to in section 157 of the Dutch Criminal Code), with terrorist intent (as referred to in section 176a of the Dutch Criminal Code).'

This part of the indictment is covered by the provisions of section 2(1) in conjunction with section 2(3)(c) of the Convention. Therefore, jurisdiction exists for this part.

Furthermore, the defendant is charged with the following under B up to and including D in the indictment:

'B. committing manslaughter with terrorist intent (as referred to in section 288a of the Dutch Criminal Code) and/or

C. murder committed with terrorist intent (as referred to in section 289 in conjunction with 83 of the Dutch Criminal Code) and/or

D. conspiracy and/or intentional preparation and/or facilitation of the aforementioned serious offences (as referred to in sections 176b and/or 289a and/or 96(2)), and/or ...'

In the Explanatory Memorandum concerning implementation of the Convention, the following was noted:

'The Dutch Criminal Code has a large number of criminal provisions of a general and specific nature and which cover the aforementioned offences, namely terrorist bombings. First of all we have the following – mostly specific – offences, which have been made punishable in Title VII of Book II, which details offences that endanger the general safety of persons or goods. The crimes in question are the following:

- intentionally sets on fire or intentionally causes an explosion (section 157); (...)
- intentionally and unlawfully causes the destruction of a vessel or aircraft (section 168); (...)

The aforementioned offences are punishable by severe penalties if they involve a serious risk to property or life or limb and result in a person's death. (...)

Furthermore, some generic serious offences against life from Title XIX of Book 2 are mentioned:

- manslaughter (section 287)
- qualified manslaughter (section 288)
- murder (section 289).<sup>1</sup>

In view of the criminal provisions from the Dutch Criminal Code listed in the Explanatory Memorandum that can give effect to the punishable conduct described in Article 2(1) of the Convention in conjunction with Article 2(3)(c) of the Convention (insofar as directed at committing/participating in 'terrorist bomb attacks'), the criminal law of the Netherlands applies to the opening passage of the indictment and counts B to D. These criminal provisions give effect to the provisions of Article 2 of the Convention.

As of 1 July 2014, the text of the first paragraph of what is now section 7 Dutch Criminal Code, reads:

*1. The criminal law of the Netherlands applies to a Dutch national who is guilty outside the Netherlands of an offence which is considered a serious offence under Dutch criminal law and which is punishable under the law of the country where it was committed.*

Finally, the defendant is charged with the following under count E:

'E. possessing one or more weapons and/or ammunition in categories II and/or III (as stipulated in section 26(1) of the *Wet wapens en munitie*) or committing such a crime with terrorist intent and/or with the intention of preparing or facilitating a terrorist offence (as stipulated in section 55(1) and/or (5) of

the *Wet wapens en munitie*)’.

Under Dutch law, this description constitutes one or more serious offences.

The offences to which this section of the indictment refers are not covered by the provisions of Article 2(1) of the Convention.

#### *Iraq and Turkey*

Based on the case file and the discussions during the appeal court session, the appeal court cannot establish whether Iraqi and Turkish legislation punishes (and possibly punished) the allegations brought against the defendant under count E of the indictment. Therefore, in that respect the provisions of section 7(1) of the Dutch Criminal Code have not been met and consequently there is no jurisdiction based on this provision.

In the present case, jurisdiction over the indictment is limited to the opening words of the indictment and sections A–D. There is no jurisdiction for section E of the indictment with respect to these aforementioned countries. Therefore, the Public Prosecution Service will be declared inadmissible in the prosecution of the defendant to that extent.

#### *Syria*

The Dutch-language text of the **Syrian Dutch Criminal Code** (statutory ordinance number 148, 22-06-1949), submitted by counsel at first instance, states:

Article 216:

1. *Any person who incites or attempts to incite another to commit a criminal offence shall be regarded as an instigator.*
2. *The liability of the instigator will be different from that of the person induced to commit the criminal offence.*

Article 217:

1. *The instigator is liable for the punishment imposed for the offence he intended to commit, whether the offence was completed, attempted or failed*
2. *If the incitement to commit a crime or offence was without effect, the sentence shall be commuted in accordance with Article 219(2), (3) and (4)*
3. *Incitement to commit an offence is not a criminal offence if it is not followed by a positive response;*
4. *Preventive measures are imposed on the instigator as if he were the perpetrator of the offence.*

Article 218:

*The following persons shall be considered accomplices to a serious offence or misdemeanour:*

1. *Any person who provides instructions for committing, even if such instructions do not facilitate the act;*
2. *Any person who perpetuates the perpetrator's intention in any way;*
3. *Any person who, for material or moral gain, accepts the offender's proposal to commit the crime;*
4. *Any person who aids or abets the offender in acts preparatory to the crime;*
5. *Any person who, after having previously agreed with the perpetrator or an accomplice for the commission of the offence, has helped to remove traces, hide or dispose of the resulting objects, or to conceal one or more of the participants from the eyes of justice;*

6. *Any person who is aware of the common criminal conduct of perpetrators of robbery on public roads or acts of violence against state security, public safety, persons or property, and who provides said perpetrators with food, shelter, a place of refuge or a meeting place.*

Article 219:

1. *An accomplice without whose assistance the offence would not have been committed shall be punished as if he were the offender himself.*
2. *All accomplices shall be punished to hard labour for life or hard labour for a period of 12 to 20 years if the perpetrator is sentenced to death.*
3. *If the perpetrator is sentenced to hard labour for life or life imprisonment, then the accomplices will be sentenced to the same penalty for a term of at least 20 years. (...)*

Article 325:

1. *If two or more persons conspire or enter into an agreement to commit crimes against persons or property, they shall be sentenced by hard labour for a determinate period. The term of this punishment will be at least 7 years if the acts of the offenders are directed against the lives of other persons.*
2. *However, a person who discloses the existence of a conspiracy or agreement and discloses the information he possesses in relation to the other offenders will be exempt from punishment.*

Article 326:

1. *Members of a group of three or more who operate on public roads and in rural areas as an armed gang with the intent to rob passers-by, attack persons or property, or commit other robberies will be sentenced to hard labour for a minimum term of 7 years.*
2. *They will be sentenced to hard labour for life if they have actually committed any of the above acts.*
3. *The death penalty shall be imposed on any member who, in the commission of the crime, kills or attempts to kill the victims or subjects them to torture or barbaric cruelty.*

Article 535:

*Homicide will result in the death penalty if committed in the following circumstances:*

1. *Premeditated;*
2. *To prepare, facilitate or carry out a crime or offence, to facilitate the escape of instigators, perpetrators or accomplices of such a crime or to prevent the execution of their sentence;*
3. *Against an ancestor or descendant of the perpetrator.*

Article 573:

*Any person who intentionally sets fire to buildings, factories, workshops, warehouses or other residential or non-residential buildings in a town or village, or sets fire to railway vehicles or vehicles carrying one or more persons, shall be sentenced to hard for a term of at least 7 years.*

Article 575:

*If arson results in the death of a person, the perpetrator will be sentenced to death in the cases*

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*provided for in Articles 573 and 574 and to hard labour in the cases provided for in Articles 575 and 576. The penalties specified in these Articles will be increased if a person suffers permanent disability.*

It is known to the appeal court ex officio that Article 315(1) of the Syrian Criminal Code makes punishable the possession of weapons of war, (see Court of Appeal, The Hague, 26.6.2019, ECLI:NL:GHDHA:2019:1676 under 7).

The above leads the appeal court to the conclusion that the counts under E are punishable not only according to Dutch law, but also according to Syrian law, in particular Articles 315, 325, 326, 535, 573 and 575 of the Syrian Criminal Code.

#### *Cumulative/alternative sections of count 1 of the indictment*

The appeal court has jurisdiction for the cumulative/alternative sections of count 1, with the exception of section E regarding Iraq and Turkey.

#### *Cumulative/alternative sections of count 2 of the indictment*

Regarding cumulative/alternative sections of count 2 of the indictment, the appeal court has jurisdiction based on the provisions in section 4, opening words and sub 1, Dutch Criminal Code, read in conjunction with sections 157, 176b, 288a, section 289 and section 289a of the Dutch Criminal Code.

#### *Conclusion on all counts of the indictment*

The appeal court has jurisdiction for the cumulative/alternative sections of count 1 and count 2 of the indictment, with the exception of the cumulative/alternative sections of count 1 in section E concerning the countries Iraq and Turkey.

#### Opinion of the advocate-general

The advocate-general has requested that the judgment under appeal be set aside and that in respect of the cumulative/alternative sections of count 1 and count 2 in the case with public prosecution reference number 09-748003-18, the defendant be sentenced to a term of imprisonment of 7 years and 6 months, less the period spent in pre-trial detention. In his request, the advocate-general has taken into account the time that the defendant spent in pre-trial detention in Turkey.

#### The judgment under appeal

The judgment under appeal cannot be upheld because the appeal court does not agree with it.

#### VI Evidence statement

The appeal court considers it legally and convincingly proven that the defendant has committed the charges set out in the cumulative/alternative sections of count 1 and count 2 of the indictment in the case with public prosecution reference 09-748003-18, on the understanding that

Public prosecution reference number 09-748003-18:

1.

he, ~~at one or more times~~ during the period from ~~01 August~~ 24 October 2014 to ~~01 November~~ 3 September 2016, ~~in one or more place(s)~~ in Syria and/or Iraq and/or Turkey and/or the Netherlands,

~~together and in association with one or more person(s), or at least alone,~~ participated in a terrorist organisation such as the Islamic State (IS), ~~or at least (an) Organisation that supports the armed Jihad struggle,~~ whereby said Organisation had and/or has as its purpose the commission of terrorist offences, namely

A. intentionally setting on fire and/or intentionally causing an explosion, whereby such act is likely to generally endanger property and/or likely to endanger the life of another person or to cause a risk of grievous bodily harm to another person and the offence results in the death of a person (as referred to in section 157 of the Dutch Criminal Code), with terrorist intent (as referred to in section 176a of the Dutch Criminal Code) and/or

B. committing manslaughter with terrorist intent (as referred to in section 288a of the Dutch Criminal Code) and/or

C. committing murder with terrorist intent (as referred to in section 289a in conjunction with 83 of the Dutch Criminal Code) and/or

D. conspiring and/or intentionally preparing and/or promoting the aforementioned serious offences (as referred to in section 176a and/or 288a and/or 289a and/or 96(2) of the Dutch Criminal Code) and/or

E. possessing one or more weapons and/or ammunition in categories II and/or III (as referred to in section 26(1) of the *Wet wapens en munitie* [Weapons and Ammunition Act]) for the commission with terrorist intent and/or with the intention of preparing or facilitating a terrorist offence (as referred to in section 55(1) and/or (5) of the *Wet wapens en munitie*)

~~and/or~~

he, ~~at one or more times~~ places in Syria and/or Iraq and/or Turkey and/or the Netherlands ~~at one or more locations during the period from 1 August 2014 to 1 November~~ 3 September 2016,

~~together and in association with one or more persons, or at least alone,~~

with the aim of preparing and/or promoting the commission (once or repeatedly) of the following serious offence(s):

- intentionally setting on fire and/or intentionally causing an explosion, whereby such act is likely to generally endanger property and/or likely to endanger the life of another person or to cause a

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risk of grievous bodily harm to another person and the offence results in the death of a person, with terrorist intent (as referred to in section 157 in conjunction with 176a of the Dutch Criminal Code), and/or

- committing manslaughter with terrorist intent (as referred to in section 288a of the Dutch Criminal Code) and/or

- committing murder with terrorist intent (as referred to in section 289 in conjunction with section 83 of the Dutch Criminal Code)

~~- attempting to induce another person to commit the serious offence, or to procure the offence to be committed, or to assist in the commission of the offence, or to provide the opportunity, means or information to do so, and/or~~

- *attempting* to provide himself or herself or others with the opportunity, means and/or information to commit the serious offence, ~~and/or~~

- having in his possession items which he knew were intended for the commission of the offence;

after all, ~~he~~, the defendant and/or her co-perpetrator(s)

~~A. familiarised himself/themselves with the radical extremist ideology of the armed Jihad struggle with a terrorist aim, waged by the (terrorist) Organisation such as the Islamic State (IS), or the Islamic State of Iraq and Shaam (ISIS), or the Islamic State of Iraq and Levant (ISIL), or Al-Qaeda (AQ), or Ha'yat Tahrir al-Sham (HTS), or Jabhat Fatah Al-Sham (both previously Jabhat al-Nusra, JaN), or at least any Jihadist fighting group affiliated to the aforementioned Organisation(s), or at least any organisation which supports the armed Jihad struggle, and/or~~

~~B. obtained information about travelling to and/or staying in the conflict zone in Syria and/or Iraq, and/or~~

~~C. made the trip to Syria and/or Iraq with the purpose of going to the combat zone, or at least to an area controlled by the terrorist organisation IS (IS/IL) or Al-Qaeda or Jabhat al-Nusra, and/or staying (for some time) in said (combat) zone in Syria and/or Iraq and/or~~

~~D. joined forces with one or more co-perpetrators and/or IS (IS/IL) and/or Al-Qaeda and/or Jabhat al-Nusra fighters, or at least one or more persons affiliated to a terrorist organisation or organisations advocating the armed Jihad struggle, or at least one or more persons who (also) took part in a terrorist organisation advocating the armed Jihad struggle, and/or~~

~~E. participated in and/or contributed to the armed Jihad struggle waged by the (terrorist) organisation IS (IS/IL) and/or Al-Qaeda and/or Jabhat al-Nusra, or at least terrorist organisations affiliated to IS and/or Al-Qaeda, or at least (a) terrorist organisation which supports the armed Jihad struggle, and/or~~

~~F. used and/or carried and/or possessed weapons/firearms in Syria,~~

whereby, in said armed Jihad struggle, murder and/or manslaughter and/or arson were committed and/or explosions were caused, in each case with terrorist intent;

he was at a time in or about the period from 1 ~~October 2014~~ June 2015 to 19 July 2015 inclusive, in Abu Kamal (Syria) ~~and/or en route from Mosul (Iraq) to Raqqa (Syria), or at least (elsewhere) in Iraq or Syria,~~ in the case of armed conflict not of an international character on the territory of Syria, in violation of the provisions of common Article 3 of the Geneva Conventions of 12 August 1949,

committed outrages upon personal dignity, in particular, humiliating and/or degrading treatment, ~~on persons taking no active part in the hostilities, including members of armed forces who have laid down their arms~~ and those placed *hors de combat* by sickness, wounds, detention, or any other cause,

because he, the defendant,

- posed ~~(smiling)~~ next to the said (deceased) person while that person ~~was crucified and/or~~ tied to a wooden cross ~~and/or~~
- had a photograph taken of himself with the aforementioned (deceased) person while that person ~~was crucified and/or~~ tied to a wooden cross ~~and/or~~
- subsequently posted this photo on social media, namely Facebook, and thereby (thus) distributed it ~~and/or~~ made it public.

Any other charges have not been proven, and the defendant should be acquitted of them.

Insofar as the indictment contains language and/or typographical errors, these have been corrected in the evidence. As appears from the pleadings during the hearing, the defendant's defence has not been impaired as a result of this.

## VII Further (evidential) considerations

### Further (evidential) consideration with regard to the proven facts under count 1

Based on the examination at the hearing and the legal evidence, the appeal court establishes the following facts and circumstances.

The defendant's mother reported him missing to the police on 26 November 2014. Investigations revealed that he had flown from Cologne to Antalya on 24 October 2014. At the hearing on appeal, the defendant stated that he went directly from Antalya to Syria.

According to an official notice from the Military Intelligence and Security Service (hereinafter: MIVD) dated 4 February 2019, the MIVD had received information from the United States Department of Defense. This was personal data obtained by the United States, consisting of a payroll list of approximately 40 000 *foreign fighters* of ISIS<sup>2</sup>. This ISIS payroll list mentions the full name of the defendant [name defendant], with the '*kunya*' [kunya name], that he is a Dutch national and his date of birth [date of birth] 1994. The defendant's cousin has stated that '[the kunya name]' is the name the defendant used in Syria.

Furthermore, on this payroll list, under the heading '*Assignment*', there appears '*Sniper Battalion*' with the '*Mu'atah Division*'. The payroll list further records that this person received salary for the periods 7  
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June to

6 July 2016, 7 July to 4 August 2016, and 5 August to 3 September 2016, where the salary was broken down into the amounts '30' and '80'. The defendant's mother testified to the magistrate that the defendant told her he was paid a salary of 30 dollars or 80 dollars. The appeal court finds that this payroll list relates to the defendant.

On 1 July 2016 – as he also stated during the appeal hearing – the defendant telephoned the hotline operated by the Dutch police. In this call, the defendant said that he had been in the Islamic State for 2 years, and that he wanted to know what the Netherlands had against him.

The defendant can be seen with a weapon on the profile photograph of the defendant's Facebook account (with the name [name of Facebook account]). In the file there are several other photographs in which the defendant can be seen with weapons and/or in combat clothing. During the appeal hearing, the defendant stated that he made use of the Facebook account mentioned above, and that during his stay in Syria and Iraq he is indeed shown in photographs wearing combat gear and/or carrying a weapon.

The police examined the telephone of [name of person 1], who was suspected of planning to travel to Syria and Iraq to take part in the armed struggle.

This showed that she was having chats with [name of person 2]. The investigation revealed that this was the defendant. In long chats during the period from 11 October 2015 to 7 December 2015, [name of person 2] said, among other things in summary, as follows:

- *that he was with IS in October 2015 and had been affiliated with IS for a year by then*
- *that he had been given an assault rifle by the leader of Wilayat Al-Furat province appointed on behalf of IS*
- *that he's been in Aleppo and Kobani*
- *that 'allah azzawadjal' (Allah/God the Almighty) had killed someone by his hands and was very happy about it*
- *that he wants nothing more than to fight at the front*
- *that he shot 'Kuffaar' during his time at the front*
- *that he has forty bullets in his magazine, that sniping is the most fun, but also the most dangerous*
- *that he went on patrol with the IS police force and that he helped interrogate suspects*
- *that he's going to Raqqa tomorrow, to hand in 'Taskia'*
- *that he has signed up for 'istishadie', wants to become a 'saheed' in ribaat*
- *that 'ribat' is the front line, that the beginning is very difficult to attack*
- *that in the city it is difficult when attacking because you have a lot of houses there and you have to hit them, but in the sahara you can easily snipe them*
- *that he used to do things with Bashar, that if he knew where they were, he'd throw a grenade*
- *that a car was circling around him all the time and he thinks he's going to stop it, it could be that it's driving past to throw a grenade, they're at war and he's in a village where the craziest things happen*
- *that he's always shooting at windows because he's afraid of those snipers*
- *that he signed up for the 'knoppie' [little button]*
- *that in Ribaat everyone just shows up and lets you know you're there with a grenade or shooting with a mortar.*

During this chat, several of the aforementioned photos were also sent. At the appeal hearing, This document has been anonymised. The translation has been provided by GNS and Eurojust and is not an official translation.

the defendant stated that he had conducted these chats via the internet with [name of person 1].

The appeal court notes that the following words used can be given the following meaning:

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

*Istishadie (Istishadi)*: the designation by IS of those who practise martyrdom.

*Saheed (shahid)*: martyr.

*Mujahid*: Islamic fighter.

*Ribaati*: Border Control<sup>3</sup>

The father of [name of co-defendant] has been in frequent contact with the police about his son's suspected stay in IS territory. During one of these contacts, the father showed part of a chat on Facebook Messenger on 13 July (the appeal court understands: 2016) between his son and [name of person 3]. In this chat, [name of person 3] says that [the defendant's kunya name] is back from 'riba'. As considered above, [the defendant's kunya name] is the defendant's nickname (kunya).

Finally, the file contains a chat dated 3 September 2016 between [person 1] and the defendant in which he says that he has 'crossed over' and is now no longer with ISIS but with another group. At the hearing on appeal, the defendant stated that it may be true that he had been staying with the Free Syrian Army from about 3 September 2016.

#### *Participation in an organisation whose purpose is to commit terrorist offences*

##### *Legal framework*

Participation in an organisation which has as its purpose the commission of terrorist offences within the meaning of section 140a of the Dutch Criminal Code is only possible if the person involved belongs to the group and participates in or supports acts that are intended to achieve or are directly related to the realisation of the purpose. An act of participation may consist of the (co-)commission of any offence, but also the provision of assistance and support, and (therefore) the performance of acts that are not punishable in themselves, as long as it is possible to talk of the aforementioned participation or support. For participation it is sufficient that the person involved has general knowledge (in the sense of unconditional intent) that the organisation has as its purpose the commission of (terrorist) offences. Any form of intent to commit the crimes specifically intended by the organisation is not required.

#### *Preparing and promoting terrorist offences*

##### *Legal framework*

The acts of preparation and promotion described in section 96(2) of the Dutch Criminal Code are punishable regardless of their result. It is required that the perpetrator undertakes the conduct with the intent of preparing for or facilitating the terrorist offence in question. Conditional intent to prepare or promote a terrorist offence is not sufficient.

The serious offence that is prepared or promoted must be established to the extent that it can be determined whether it is a serious offence whose preparation and promotion is punishable as referred to in section 96(2) of the Dutch Criminal Code. The time, place and method of implementation will therefore have to be established in some detail. The alleged acts of preparation and promotion may be considered jointly. Even if isolated acts do not constitute punishable preparation, the combination of all

acts and the defendant's thoughts together may lead to the conclusion that the defendant had  
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the intention of committing a serious offence.

### *Opinion of the appeal court*

#### *Participation in an organisation whose purpose is to commit terrorist offences*

IS (formerly ISIL or ISIS) was one of the jihadist militant groups in Syria that sought to violently impose a pure Islamic society and/or state based on sharia law – as perceived by them – on the civilian population. In doing so, they intended to destroy the fundamental political structure of Syria as referred to in section 83a of the Dutch Criminal Code. The crimes committed by these armed groups, such as murder, manslaughter, arson, causing explosions and the like, were therefore committed with terrorist intent and are therefore terrorist offences. Participation in the armed struggle in Syria on the part of these armed groups therefore implies at all times the commission of terrorist offences.<sup>4</sup>

IS has been on the UN and EU terrorist sanctions lists since 30 May and 1 July 2013, respectively, and has been designated a terrorist organisation in consistent case law.<sup>5</sup>

Based on the case file, the appeal hearing and the evidence presented above, the appeal court concludes that the defendant travelled to Syria shortly after 24 October 2014, via Turkey. He was then a member of IS until 3 September 2016, when he switched to the Free Syrian Army. The numerous chats, the photographs in which the defendant can be seen (whether or not together with others) in combat clothes and/or with firearms, the fact that he has been in places controlled and ruled by IS, as well as the mention of his name and position on the ISIS payroll list, do not allow any other conclusion than that the defendant joined IS and actually fought. In doing so, he made an actual contribution to the armed struggle.

The appeal court does not believe the statement made by the defendant that the chats and the photographs were nothing more than acting tough, especially not in combination with the photographs that he sometimes posted as well. In view of the above, the appeal court does not find his statement that he had only been a parking attendant or humanitarian aid worker credible either. Moreover, there is no objective data to support this claim. It is true that during the appeal hearing the defendant phonetically mentioned the name of a hospital in Mosul, but the appeal court considers this insufficient to substantiate the plausibility of his claim.

Based on the above, the appeal court finds that the defendant has committed acts that have contributed to the realisation of the aim of the terrorist organisation IS, which the defendant joined as a fighter and of which he remained a member for more than 2 years.

In general, the defendant knew that this organisation had the intention of committing terrorist offences. After all, it is a generally known fact that at the time when the charges were alleged to have taken place, but also some time before that period, jihadist armed groups systematically committed serious crimes on a large scale, terrorising the resident population in Syria. This cannot have escaped the defendant during his stay in Syria.

The appeal court agrees with the trial court that co-perpetration has not been legally and convincingly proven, because the case file does not contain any specific evidence that the defendant acted in close and conscious cooperation with others.

### *Preparing and promoting terrorist offences*

Based on the aforementioned items of evidence, the appeal court also concludes that in the same period the defendant was guilty of preparing and promoting terrorist offences.

The defendant travelled to Syria and Iraq, was in the combat zone there and joined IS. In his chats he demonstrate that he was prepared to commit attacks and suicide attacks and had firearms at his disposal. He actually contributed to the jihad struggle conducted by IS, for instance by going on patrol with the IS police force and 'interrogating suspects'.

In doing so, he made an attempt and induced another person to commit terrorist offences, by affording himself/the other person with the opportunity or means. Because the defendant registered himself as a member of a sniper battalion, he has provided other persons with information and attempted to give himself the opportunity to commit terrorist offences. The defendant also did this with the intention of preparing or promoting the proven terrorist offences.

The appeal court will acquit the defendant of sections A and B, as there is no specific evidence regarding the appropriation of the radical extremist ideas and informing himself about travelling to and/or staying in the combat zone in Syria and/or Iraq.

The appeal court agrees with the trial court that co-perpetration has not been legally and convincingly proven, because the case file does not contain any specific evidence that the defendant acted in close and conscious cooperation with others. He will be acquitted of that too.

### Further (evidentiary) consideration with regard to the proven charges under count 2

#### *Legal framework*

The defendant is charged – with reference to the indictment as appended as Annex 1 to this appeal judgment – in summary, with the commission of a war crime.

#### *Section 6 Wet internationale misdrijven*

Section 6 of the *Wet internationale misdrijven* (hereinafter: WIM), which deals with the criminalisation of committing war crimes – insofar as relevant here – reads as follows:

*1 Any person who, in the case of armed conflict not of an international character, is guilty of violating common Article 3 of the Geneva Conventions, namely against persons not taking part directly in hostilities, including personnel of armed forces who have laid down their weapons, or against persons who have been taken out of action due to illness, injury, imprisonment or any other cause, any of the following acts:*  
(...)

*c. outrages upon personal dignity, in particular, humiliating and degrading treatment; (...) shall be sentenced to life imprisonment or a term of imprisonment not exceeding 30 years or a fine of the sixth category.*



The appeal court has to judge – after establishing the facts – whether on that basis there is armed conflict not of an international character within the meaning of the common Article 3 of the Geneva Conventions (hereinafter referred to as: common Article 3)<sup>6</sup>, an assault on the personal dignity of a person within the meaning of common Article 3 by the defendant falling within the protection of common Article 3 and finally whether there is a sufficient connection between the identified conduct and the armed conflict (nexus) to constitute a war crime.

To interpret the elements of what constitutes a war crime, the appeal court orientates itself on international law, such as the Rome Statute of the International Criminal Court and the Elements of Crime drawn up on the basis of Article 9 of the Statute of the Criminal Court, which serve as an aid in interpreting the serious offences and guiding statements of the international tribunals, such as the ICTY, in view of the international character of this crime.<sup>7</sup>

#### *Armed conflict not of an international character*

International humanitarian law applies when there is armed conflict on the territory of one of the treaty parties.

A distinction is made between international armed conflicts and armed conflicts not of an international character. The rules for these two types of conflicts differ in parts. An important distinction is that in case of international armed conflict, there are no requirements for the intensity of the armed conflict, contrary to determining the existence of armed conflict of a non-international character.

Over the years, the ICTY has elaborated on the notion of 'armed conflict of a non-international character' in its jurisprudence and developed criteria for assessing whether this is the case. Firstly, the intensity of the conflict must be of the level of protracted armed violence and secondly, the armed groups involved must be sufficiently organised.<sup>8</sup>

Factors that may be important in determining the intensity of a conflict include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment; the number and calibre of ammunition fired; the number of persons and the type of armed groups participating in the fight; the number of casualties; the extent of material damage; and the number of refugees from the combat zone. The involvement of the UN Security Council can also be an indication of the intensity of the conflict.<sup>9</sup>

The following factors are important in determining the degree of organisation of armed groups: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the circumstance that the group controls a particular territory; the ability to provide the group with access to weapons and other military equipment, recruitment, and military training; the ability to plan, coordinate, and conduct military operations, including troop movement and related logistics; the ability to determine a unified military strategy and the use of military tactics; and the ability to speak with one voice and to negotiate and enter into agreements such as a cease-fire or a peace pact. This is not an exhaustive list.<sup>10</sup>

A state is assumed to have armed forces that meet the requirement of organisation.<sup>11</sup>

The determination of whether there is armed conflict not of an international character is largely a factual assessment that depends on the circumstances of the case.<sup>12</sup>

Furthermore, the perpetrator must be aware of factual circumstances that established the existence of an armed conflict.

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## *Outrage upon personal dignity*

### *common Article 3*

Common Article 3(1), opening words and under c, of the Geneva Conventions – insofar as relevant in this case – contains a prohibition on outrages upon personal dignity, in particular, humiliating and degrading treatment, of persons taking no active part in the hostilities.

### *Persons taking no active part in the hostilities*

International humanitarian law – including common Article 3 – determines, among other things, which persons fall under the protection of this legal regime in times of international conflict and conflict not of an international character.

With the phrase 'persons taking no active part in hostilities', common Article 3 refers to civilians, also including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.<sup>13</sup>

The ICC's Elements of Crimes states that the victim need not personally be aware of the existence of the conduct and that dead persons can also be victims of this crime.<sup>14</sup>

The perpetrator must have been aware of factual circumstances that established the person's protected status.<sup>15</sup>

### *Notion of 'outrage upon personal dignity'*

Neither the Geneva Conventions nor the Second Additional Protocol define 'outrages upon personal dignity'. The ICTY's case law has considered in this regard, inter alia, that this definition is conduct intentionally committed or participated in by the defendant that would *generally* be recognised as severely humiliating or degrading treatment or would otherwise be an outrage upon personal dignity.<sup>16</sup>

In assessing whether there have been outrages upon personal dignity, objective criteria relating to the severity of the conduct must be taken into account, in addition to subjective criteria relating to the vulnerability of the victim.<sup>17</sup>

The ICC's Elements of Crime take into account relevant aspects of the cultural background of the victim.<sup>18</sup> As a result, conduct that, for example, is humiliating to someone of a certain nationality, culture or religion, while not necessarily being so to others, also falls within the scope of the concept of outrages upon personal dignity.<sup>19</sup>

### *Nexus*

There must be a sufficient connection between the conduct and the armed conflict – in (international) case law also called 'nexus'<sup>20</sup> After all, the criminalisation of war crimes aims to offer protection against crimes that are (closely) related to war. The nexus requirement serves in that context to distinguish war crimes from common crimes and other international crimes such as genocide and crimes against humanity.

In the ICTY case law, the interpretation of the concept of nexus has been further elaborated on in various appeal judgments. Insofar as relevant for assessing the nexus in the present case, the appeal court reproduces the legal framework below.

In the case law of the ICTY, indicative starting points have been mentioned for answering the question whether there is a nexus in the case at hand. This does not alter the fact that the assessment of the existence of a nexus must be made on an individual basis. These links start from the principle that the law on war crimes applies to the entire territory of the fighting parties, irrespective of where actual fighting takes place at that moment in time, and applies until such time as a peaceful solution has been found. The existence of an armed conflict must have played at least (i) a substantial role in the perpetrator's decision to commit the crime, (ii) his ability to do so, (iii) the manner in which the crime was committed, or (iv) the purpose for which it was committed. The appeal court understands these points of departure in the sense that they are neither 'hard' nor exhaustive criteria.<sup>21</sup> Furthermore, in assessing whether conduct is sufficiently related to the armed conflict, the appeal court 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 belongs to the opposing side; the fact that the conduct can be said to serve the ultimate purpose of the military campaign; and the fact that the offence was committed as part of or in the context of the performance of the perpetrator's official duties.<sup>22</sup>

Criminal responsibility for war crimes is not limited to the belligerents and those who are in a special relationship with one of the parties<sup>23</sup>

The perpetrator must have been aware of the factual circumstances that established the existence of the armed conflict.<sup>24</sup>

#### *Opinion of the appeal court*

For the opinion as to whether the above mentioned charges can be legally and convincingly proven, the appeal court must answer the following questions.

- (1) Has there been armed conflict not of an international character in Syria and Iraq?
- (2) Was the defendant aware of the factual circumstances that established the existence of the armed conflict?
- (3) Is the victim protected by international humanitarian law, in particular common Article 3?
- (4) Was the defendant aware of the factual circumstances that established the victim's protected status?
- (5) Did the defendant commit an outrage upon the victim's personal dignity and/or humiliate and degrade the victim?
- (6) Is there a nexus between the alleged conduct of the defendant and the aforementioned armed conflict?

Re 1) Is there a conflict not of an international character?

The appeal court establishes below that in the period from 1 January 2012 to 31 December 2015, and therefore also on or about 12 November 2015, there was armed conflict not of an international character in

Syria between Syrian government forces on the one hand and the fighters of (among others) the armed groups ISIL/ISIS and Jabhat al-Nusra (hereinafter: JaN) on the other hand.

For the purpose of substantiating this conclusion, an explanation of the events in Syria is given below, insofar as relevant for the provenance of the above-mentioned count in the indictment on this point from 2011 onwards. In this respect the appeal court will in particular also address the intensity of the conflict and the degree of organisation of the armed groups involved, especially IS, as this is relevant for the question of a conflict not of an international character.

The appeal court mainly bases itself on the background documents that form part of the criminal file and are completely based on open sources, such as the reports published by the Independent International Commission of Inquiry on the Syrian Arab Republic, the Human Rights Council of the United Nations, reports by Human Rights Watch and Amnesty International, reports by UNAMI, by the OHCHR, the United Nations Security Council, journalistic sources as well as websites, social media, documents and photographic material of jihadist organisations active in Syria.<sup>25</sup>

### *Syria*

The uprising in Syria began in the spring of 2011 with protests to force reforms on the regime of President Assad. The regime tried to suppress the calls for reform with brute force, but this did not silence the resistance. After the start of the uprising, the violent reaction to it by President Assad was condemned by the world community. United Nations Secretary-General Ban Ki-moon noted in the summer of 2011 that President Assad had lost all legitimacy. Western states urged his resignation and issued sanctions against his regime. At the end of 2011, in response to the regime's brutality, the opposition began to engage in armed resistance. This involved retaliating against government troops and capturing districts in major cities and areas in the countryside from government troops. The Syrian regime took an even tougher line against this. Air strikes carried out by the Syrian Air Force caused many civilian casualties. Human rights violations took place on the side of government forces and paramilitary militias fighting on the side of the government, but also by armed opposition fighting the Assad regime, such as IS and JaN. In early 2013, there was talk of an outright war. The Syrian regime was accused of carrying out chemical attacks in 2013 and 2015 resulting in a large number of casualties. In the last months of 2013 and the first months of 2014, the Syrian regime seems to have stepped up attacks with barrel bombs<sup>26</sup>. Likewise, during 2014 and the first half of 2015, air strikes and attacks with *barrel bombs* by the Syrian regime in various parts of Syria cost many lives, especially the lives of civilians. At the same time, the armed groups fighting against the Assad regime carried out summary executions, kidnappings, torture of captured government soldiers, members of the pro-Assad militias and people identified as informants of the Assad regime. IS, JaN and other militant groups were guilty of illegal detention, torture and execution during this period.

In December 2015, *United Nations Office for the Coordination of Humanitarian Affairs* (UNOCHA) estimated the number of people fleeing Syria itself at 6.6 million and the number of people fleeing the country at 4.3 million. 13.5 million inhabitants, the organisation says, were in need of humanitarian aid. In November 2015, the death toll was around 250,000.

### *Involvement of jihadist groups, particularly IS*

As the struggle in Syria and Iraq progressed, so did the influence of jihadist groups in that struggle. The aim of these militant groups was not only to topple the Assad regime, but also to establish a strict Islamic state on the territory of Syria and possibly on a wider area, where a very strict version of the sharia would apply. One of these is a jihadist group originally affiliated with Al-Qaeda and previously active in Iraq. This is the Islamic State in Iraq (hereinafter: ISI), also known as Al Qaida in Iraq (AQI), which allegedly had a base in Syria for some time, still supported by the Assad regime. On 11 March 2013, the group claimed responsibility for an attack which had occurred on 4 March 2013. Forty -

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eight Syrian soldiers and nine Iraqi guardsmen are reported to have been killed. This was the first action in which ISI confirmed its involvement in the Syrian conflict. ISI, which was led by Abu Bakr al-Baghdadi, renamed itself ISIL in April 2013 to highlight the expansion of its activities into Syria.

#### *The organisation of IS*

On 29 June 2014, ISIL declared the Islamic caliphate in the territory it conquered in Syria and Iraq and the organisation was renamed IS with its supreme leader, Abu Bakr al-Baghdadi. In 2014 and 2015, Syria and Iraq were IS-controlled territory. The number of fighters who joined IS in 2014 is estimated to be between 20,000 and 31,500.

In the first half of 2014, it is stated that IS was organised as follows. The leadership of IS is reported to have been divided into several councils, which were the command council and furthermore, the advisory council whose members were responsible for transmitting orders from Abu Bakr al-Baghdadi to the lower chains of command and checking that these orders were followed; it was this council that decided on laws and their application. Furthermore, there was reportedly the sharia council, that decided on religious matters. Other councils were reportedly the law council, the security council, the military council, the intelligence council and the fighter aid council which regulated the arrival of foreign fighters to IS and their accommodation, as well as the media council and a finance department.

After establishment of the caliphate and the conquest of territory in 2014, IS transformed parts of the organisation, it seems, into ministries or committees, which were also supposed to govern the territory conquered by IS.

At various locations in Syria, there were IS training camps where lessons were given in knowledge of legal rules and Islamic religious doctrine, and where recruits were also taught fighting techniques and how to handle weapons.

IS's army was made up of special forces, air defence forces, a sniper brigade and a back office, etc.

At the time mentioned above, the requirement for the intensity of the conflict to match the level of persistent armed violence had in any case been met. There were frequent large-scale military operations between the parties involved, using military weapons and vehicles such as tanks and artillery.

The number of fatalities exceeded 250,000 by the end of 2015, and 4.3 million people had fled Syria and Iraq by then. A very significant number of people were in need of humanitarian aid at the time and several towns and villages in Syria and Iraq had been destroyed. A peace plan had also been negotiated; furthermore, the United Nations Security Council condemned the Syrian regime and the conduct of IS.

#### *Conclusion on IS's degree of organisation*

Based on the above, in the opinion of the appeal court the requirement of sufficient organisation of the armed groups ISIL/ISIS has also been met. In the aforementioned period, this organisation had military weapons and vehicles at its disposal, such as tanks and artillery, and could carry out large-scale military operations. It also had an organisational structure and even exercised control over a territory. Additionally, there were several collaborations with other organisations.

Re 2) The defendant must have been aware of the factual circumstances that established the

existence of the armed conflict.

The appeal court finds, based on the defendant's own statement, that he was aware of the armed conflict in Syria and Iraq.

Re 3) The victim should be protected by international humanitarian law, in particular common Article 3.

It is not in dispute that the person in photo 1<sup>27</sup> was already deceased at the time the photographs were taken. This means that – regardless of whether or not he was seen as an opponent of IS during his lifetime – he enjoyed protection under international humanitarian law.

Therefore the appeal court establishes that the conduct was committed against a person who contrary to the statements in the indictment, did not directly participate in the hostilities.

Re 4) The defendant must have been aware of the factual circumstances that established the protected status of the victim.

The appeal court finds that the defendant was aware of the factual circumstances that established the protected status. After all, with regard to the person in photograph 1, the report of the interview between the defendant and the Ministry of Foreign Affairs employee shows that the defendant knew at the time when the photograph was taken that the man in the orange overalls had died, because the defendant stated that the body of the deceased smelled because it had decomposed and that he was worried that it would be thought on the basis of the photograph that he had killed the man.<sup>28</sup>

#### *Defence*

At the appeal hearing, the defendant stated that the person from Foreign Affairs who drew up the interview report did not summarise his remarks properly and that this referred to other photos that he reportedly posted on Facebook and/or the Internet, but not this photo.

#### *Appeal court's opinion of the defence*

According to the interview report, the following was noted with regard to the defendant's statements:

'He's also worried about a photo he posted on FB. On the way from Mosul to Raqqa, he is supposed to have taken a photograph at a bus stop with a crucified man (who, according to him, smelled very bad because of decomposition). He thought that was cool at the time, but is afraid that people will think he did it.

He said, they can see via my FB that I was travelling en route and hadn't had time to kill the guy at all.'<sup>29</sup>

The appeal court sees no indication that there was a misunderstanding about which photo the defendant discussed. The appeal court has taken into account that the details about the photo that the defendant provided according to the interview report, actually correspond to the photo concerned. The interview report does not indicate in any way that several photographs were discussed. The appeal court has also found no other indications in the file that could support the defendant's interpretation. The appeal court rejects the defence.

Re 5) The defendant must have committed an outrage upon the victim's personal dignity and/or This document has been anonymised. The translation has been provided by GNS and Eurojust and is not an official translation.

treated the victim in a humiliating and degrading manner.

#### *Establishment of the facts*

The appeal court notes that between 15 June 2015 and 2 July 2015 in Abu Kamal, Syria, the defendant had a photograph (photo 1)) taken showing him standing next to a deceased person (presumably [name of victim])<sup>30</sup>, who was dressed in orange overalls and hung from a cross.

The defendant has acknowledged being depicted in the photograph and he has also been identified from the photograph by his father.

The appeal court notes that the kunya of the defendant is [defendant's kunya name], in view of the defendant's chat with [person 1] (hereinafter referred to as: person 1)).<sup>31</sup> The defendant posted photo 1 on the Facebook account with the name [name of defendant's Facebook account]. The appeal court bases this conclusion on the interview report drawn up by an employee of the Ministry of Foreign Affairs summarising an interview conducted with the defendant. This interview report states that the defendant said he had posted a photograph of himself with a crucified man on his Facebook account. The fact that the photograph was subsequently further shared via Facebook is confirmed by an official report of findings in which a police officer from Utrecht stated that he had heard from his contact person about the situation with regard to the young people in the district of Kanaleneiland that the photograph in question had been shared on Facebook and that it had also been shown and sent to him.<sup>32</sup> That the defendant distributed the photograph is supported by the already mentioned chat with [name of person 1], in which the defendant asks whether she still has the 'crucifixion photo'<sup>33</sup> and by an official report of findings drawn up by the same district police officer. In the official report of findings, he mentions a key figure who, in connection with photograph 1, stated that the man in the photograph was called [name of defendant] and that he was active under the name '[name of defendant's Facebook account]'. And that the photos shown were also from this Facebook account.<sup>34</sup>

#### *Discussion of the defence concerning the taking of the photograph under duress*

The appeal court rejects the defendant's defence that he, against his will and under pressure, took a photograph with the deceased, as this has not been plausibly argued. The appeal court finds that this photo shows the defendant actively posing. That he is proud of posing is evident from his question to [person 1] whether she still has the photo in question, because he wanted to use it as his profile photograph. It was not until the court hearing at first instance that the defendant mentioned coercion for the first time, although he had not mentioned this when interviewed by an employee of the Ministry of Foreign Affairs.

#### *Opinion of the appeal court*

Photo 1 shows a deceased and bloodied man in an orange jumpsuit hanging from a cross that stands by the side of the road. The circumstance that the deceased was not buried but was displayed in this way certainly constitutes an outrage upon personal dignity.

The appeal court has to assess whether the defendant's conduct – namely posing for a photograph with the deceased and distributing that photograph – constitutes an outrage upon personal dignity.

By posing next to the deceased person and taking or having a photograph taken, the defendant contributed to the further deepening of the humiliation and/or degradation of the deceased person. In doing so, the defendant expressed the sentiment that the deceased's body should be viewed as a trophy and that he was superior to the deceased. That humiliating and/or degrading conduct is of such severity that it is unquestionably considered to be an outrage upon the personal dignity of the

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

Re 6) There must be a nexus between the defendant's alleged conduct and the aforementioned armed conflict.

#### *Establishment of the facts*

The appeal court notes that the defendant, as a member of IS, posed with the deceased and had a photograph taken of himself together with the deceased. The defendant then posted this photo on Facebook and also sent it to someone.

#### *Opinion of the appeal court*

In the opinion of the appeal court, there is a nexus between the defendant's conduct in relation to photo 1 and the armed conflict in Syria. Posing with the deceased and having a photo taken and then posting it on Facebook and sending it to someone took place in the context of the armed conflict in Syria. After all, the deceased person in photo 1 was killed in the armed conflict in Syria as an alleged opponent by or on behalf of IS and then displayed by hanging him to a cross. The defendant was in that area as a member of IS and thus had the opportunity to (further) affect the personal dignity of the deceased person in the way that has been established above. Distributing the photo helped to showcase and glorify IS's power over the prisoners it created.

#### Evidence

The appeal court is certain that the defendant committed the proven facts based on those facts in the evidence that give reason for declaring the facts as proven.

In those cases where the law requires an appeal judgment to disclose or – insofar as section 359(3), second sentence, of the Code of Criminal Procedure is applied – provide a summary of the evidentiary material, this will be appended as a supplement to this appeal judgment in the form of appendix.

#### Punishability of the proven facts

The proven facts in the case with public prosecution reference 09-748003-18, count 1, result in:

**participation in an organisation whose purpose is to commit terrorist offences**

**and**

**with the intent to deliberately set fire to and/or cause explosions, while this may present a danger to property and/or danger of serious bodily harm and/or danger to the life of another person, and/or this offence results in someone's death and/or murder and/or manslaughter, in each case to be committed with terrorist intent, to prepare and promote the commission**



**of the offence, to provide himself and others with the opportunity, means or information to commit the offence and to attempt to do so, and to have in his possession objects which he knows are intended for the commission of the offence.**

The proven facts in the case with public prosecution reference 09-748003-18, count 2, result in:

**In the case of armed conflict not of an international character, violation of common Article 3 of the Geneva Conventions consisting of outrages upon personal dignity, in particular humiliating and degrading treatment of persons who have been placed *hors de combat* by any other cause.**

#### Punishability of the defendant

There is no credible circumstance to exclude the criminal responsibility of the defendant. The defendant is therefore punishable.

#### VIII Sentencing considerations

The appeal court has determined the punishment to be imposed on the basis of the seriousness of the facts and the circumstances under which these were committed and on the basis of the person and the personal circumstances of the defendant, as these have appeared from examination at the hearing.

In doing so, the appeal court took into account the following in particular.

The defendant travelled to Syria in October 2014 and joined IS, a banned jihadist organisation, as a fighter with the aim of committing terrorist offences, for a period of approximately 2 years. By these same actions, the defendant was also guilty of acts of preparatory acts aimed at committing, inter alia, murder and manslaughter with terrorist intent.

Jihadist groups like IS have been structurally guilty of bloody and terrifying violence as well as gross human rights violations. They have countless deaths on their conscience and are partly responsible for the terrible destruction of homes, agriculture and infrastructure. Their acts of terror have had a disruptive effect on society, fuelled sectarian strife and contributed to unbearable suffering and anguish for many. Terrorised residents have fled because of this violence and have had to leave everything behind.

At the time when the defendant travelled, a lot was known about the serious human rights violations and other outrages committed by IS. Moreover, the caliphate had already been declared on 29 June 2014 and this message went around the world. The defendant must have been aware of this, but nevertheless he left the country, for which the appeal court, together with the trial court, finds highly repugnant.

Participation in an organisation whose purpose is to commit terrorist offences should therefore be strongly discouraged. Retribution and general prevention must be the main focus when considering the type and length of sentence. Therefore, in the opinion of the appeal court, it is appropriate to give a long, non-suspended custodial sentence.

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During his stay within the caliphate while in transit from Iraq to Syria, the defendant posed in Abu Kamal (Syria) next to a blood-covered man who had been executed by IS and was dressed in orange overalls hanging on a cross. The defendant then posted this photograph on his Facebook account for people to see. The photo was then distributed to a large group of young people in Utrecht, thereby making public these shocking photos of the man who was hung on a cross in a degrading way.

The appeal court is, just like the trial court, of the opinion that the only way to respond to the proven facts is with a non-suspended custodial sentence of considerable length.

In determining the length of the sentence, the appeal court considered the length of sentences in cases similar to the present case. The starting point for participation in a terrorist organisation and preparatory acts is a non-suspended custodial sentence of 6 years.

The fact that the defendant was apparently part of a sniper battalion was considered when increasing the sentencing term, and the chats indicate that the defendant actually used or threatened to use violence against people during the time of his participation in the armed struggle.

As a starting point for the war crime of outrage upon the personal dignity of a deceased person, the appeal court, like the trial court, takes as its starting point a custodial sentence of 2 years and 6 months.

The appeal court will also take into account as sentencing mitigation, as did the trial court, that the defendant spent more than 18 months in pre-trial detention in connection with criminal proceedings in Turkey for the same offences for which the defendant is being sentenced today and will – in compliance with the request made by the advocate-general – consider this when sentencing.

The appeal court has taken into account an excerpt from judicial documentation concerning the defendant, dated 28 December 2020, showing that the defendant had previously been given a final conviction, albeit some time ago in 2013 and in 2012, of committing other types of offences, but not previously for similar offences.

Furthermore the appeal court has taken into account the Pro Justitia report, triple examination, dated 20 May 2019 regarding the defendant. The defendant provided limited cooperation with the investigation, in the sense that he did not or hardly wanted to elaborate on the charges. The rapporteurs have – as far as relevant – concluded that the defendant is of average intelligence level. The defendant has a defective development of mental abilities in the form of a personality disorder with narcissistic and antisocial characteristics. This personality disorder was also present in the period when the charges were committed. Despite the fact that the assessor did not get a complete view on the deliberations and choices made by the defendant prior to and during the alleged offences, they are of the opinion that, in connection with his personality disorder, his impulsiveness, suggestibility, neediness and limited empathic capacities, his capacity to assess and ability to foresee the consequences of his actions was limited. The assessor therefore advise that the defendant has a diminished/slightly diminished degree of responsibility for the alleged charges. The psychiatrist has arrived at a slightly diminished degree of responsibility, being of the opinion that situational factors also had a relevant influence and that the defendant also made conscious choices. The psychologist has arrived at a reduced degree of responsibility, being of the opinion that the personality problems played a somewhat larger role because narcissistic traits were triggered prior to the decision to travel.

The appeal court agrees with the conclusions regarding the defective development of mental abilities in the sense of a personality disorder and adopts these conclusions as its own. Furthermore, the appeal court assumes, just like the psychiatrist, that the defendant has a slightly diminished degree of responsibility with respect to the charges.

Like the court of first instance, the appeal court has also considered the probation advice of 1 July 2019 provided by *Reclassering Nederland* [Dutch Probation Service] concerning the defendant. According to the probation service, there are indications that the defendant still adheres to the jihadist Salafist ideology. The risk of re-offending is assessed as high by the probation service. Although the probation officers see only limited possibilities for effecting a positive change in the defendant's behaviour, they still advise imposing special conditions as stated in the report.

The appeal court is – all things considered – of the opinion that a completely non-suspended, custodial sentence of the duration to be mentioned is an appropriate and necessary response. Given the length of this sentence, it is not possible to impose the recommended special conditions.

#### Applicable legal requirements

The appeal court has considered sections 57, 83, 96, 134a and 140a of the Dutch Criminal Code and Section 6 of the *Wet internationale misdrijven*, as they apply or applied in law.

#### IX Decision

The appeal court:

Declares the defendant's appeal inadmissible, insofar as it is directed against the decision with regard to counts 1 and 2 of the indictment in the case with public prosecution reference 09-748003-19.

Annuls the judgment which is the object of the appeal and hands down a new appeal judgment:

Declares that the Public Prosecution Service is inadmissible in prosecuting the defendant in respect of section E of count 1 with public prosecution reference number 09-748003-18, insofar as this concerns Iraq and Turkey.

Declares proven, as stated above, that the defendant has committed the charges set out in the cumulative/alternative sections of count 1 and count 2 of the indictment in the case with public prosecution's office number 09- 748003-18.

Declares any other charges brought against the defendant as not proven and acquits the defendant of them.

Declares that the proven facts under the cumulative/alternative sections of count 1 and count 2 in the case with public prosecution reference number 09-748003-18 punishable, and qualifies this as stated above and declares the defendant punishable.

Sentences the defendant to **imprisonment** for a term of **7 (seven) years**.

Orders that the time spent by the defendant before enforcement of this appeal judgment in any form of pre-trial detention, as referred to in section 27(1) of the Dutch Criminal Code, shall be deducted from the term of imprisonment imposed, unless this time has already been deducted from another sentence.

This appeal judgment was handed down by Th.W.H.E. S.,  
M.I. V-F. and L.C. van W., in the presence of M.J.J. vdB., Registrar.

It was pronounced at the appeal court's public hearing on 26 January 2021.

M.I. V-F. is unable to sign this appeal judgment.

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<sup>1</sup> Lower House, session year 2001–2002, 28 028, no. 3, p. 3.

<sup>2</sup> The background document *Van opstand naar jihad, (Jihadi-)Salafistische groepen en de strijd in Syria en Irak* (From revolt to jihad, (Jihadi-)Salafist groups and the struggle in Syria and Iraq), p. 159 shows that the abbreviations IS (Dutch) and ISIS (in English texts and sometimes also in Dutch) (cf. p. 295) are used alongside each other. The different use of the abbreviations IS and ISIS will not be given relevant significance below (in these evidentiary considerations). The organisations are all affiliated with each other.

<sup>3</sup> See Official Report, Organisation whose purpose is to commit terrorist offences: the Islamic State, p. 18 under 2.2.5.2, background document 140a official report on Islamic State, pages 99, 168 and 169.

<sup>4</sup> The Court of Appeal, The Hague, has already ruled in this sense: 10 March 2017, ECLI:NL:GHDHA:2017:642 and Court of Appeal, The Hague, 6 October 2017, ECLI:NL:GHDHA:2017:2855.

<sup>5</sup> See, inter alia, The Court of Appeal, The Hague, 25 May 2018, ECLI:NL:GHDHA:2018:1249

<sup>6</sup> Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

<sup>7</sup> See explicitly in this sense: Parliamentary Papers II, 2001-2002, 28 337, no. 3, Explanatory Memorandum, p. 5.

<sup>8</sup> ICTY, Prosecutor v. Tadić a/k/a 'Dule', Appeals Chamber Decision, IT-94-1-AR72, 2 October 1995, paragraph 70; ICTY, Prosecutor v. Limaj et al, Trial Chamber Judgement, IT-03-66-T, 30 November 2005, paragraph 170.

<sup>9</sup> ICTY, Prosecutor v. Haradinaj, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, para. 49.

<sup>10</sup> ICTY, Prosecutor v. Haradinaj et al, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, para. 60.

<sup>11</sup> ICTY, Prosecutor v. Haradinaj et al, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, para. 60.

<sup>12</sup> In this sense, too: Parliamentary Papers II 2002-2003, 28 337, Memorandum following the report, no. 6, p. 7.

<sup>13</sup> Elements of Crimes, 2011, Article 8(2)(c)(ii), No 3.

<sup>14</sup> Elements of Crimes, Article 8(2)(c)(ii), note 57. See <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>15</sup> Elements of Crimes, Article 8(2)(c)(ii), No 4.

<sup>16</sup> ICTY, Prosecutor v. Kunarac, Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 514 and confirmed in ICTY, Prosecutor v. Kunarac, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, paras 161 and 163, ICTY, Prosecutor v. Haradinaj, Trial Chamber Judgement, IT-04-84-T, para. 132 ('severe humiliation' instead of 'serious humiliation'). Likewise along these lines, the Elements of Crimes, Article 8(2)(c)(ii) at No 2.

<sup>17</sup> ICTY, Prosecutor v. Aleksovski, Trial Chamber Judgement, IT-95-14/1-T, 25 June 1999, para. 56 and Prosecutor v. Kunarac, Trial Chamber Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 504 and Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, para. 162 and para. 163.

<sup>18</sup> Elements of Crimes, 2011, Article 8(2)(c)(ii) note 57.

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<sup>19</sup> Elements of Crimes, 2011, Article 8(2)(c)(ii) note 57. Article 3: Conflicts not of an international character', ICRC, in: Commentary on the First Geneva Convention, 2016, paragraph 669.

<sup>20</sup> See also Elements of Crimes, Article 8(2)(c)(ii), No 5.

<sup>21</sup> ICTY, Prosecutor v. Kunarac, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, para. 57 and para. 58. See further: ECLI:NL:RBSGR:2009:BI2444, para. 46.

<sup>22</sup> ICTY, Prosecutor v. Kunarac, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1, 12 June 2002, para. 59.

<sup>23</sup> ICTR, Prosecutor v. Akayesu, Appeals Chamber Judgement, ICTR 96-4-A, 1 June 2001, para. 444.

<sup>24</sup> Elements of Crimes, section 8(2)(c)(ii), No 6.

<sup>25</sup> J. Jolen, *Van opstand naar jihad, (Jihadi-)Salafistische groepen en de strijd in Syria en Irak* (From revolt to jihad, (Jihadi-)Salafist groups and the struggle in Syria and Iraq), dated 18.1.2018.

<sup>26</sup> These are barrels often filled with a combination of gasoline, nails or other metal waste and explosives that are fitted with a detonator, simply thrown from a helicopter.

<sup>27</sup> Folder 4, case file 2, annex 1 to the official report, LERCA 15069-111, pages 43–44.

<sup>28</sup> Folder 4, case file 2, annex 10 to official report, LERCA 15069-177, p. 32–33.

<sup>29</sup> Folder 4, case file 2, Exhibit 10 to Trial Record, LERCA 15069-177, p. 32–33.

<sup>30</sup> Folder 4, case file 2, Exhibit 8 to Official Report 15069-177, official report of findings regarding the discovery of mortal remains in open wells, p. 38 et seq.

<sup>31</sup> Folder 2, case file 1, annex to official report of findings, chat 1 Timmy E86, LERCA 15069-109, p. 297 and official report of chat 200, LERCA 15069-96, p. 342 and p. 360.

<sup>32</sup> Folder 4, case file 2, annex 10 to official report, LERCA 15069-177, p. 32–33.

<sup>33</sup> Folder 2, case file 1, annex to official report of findings, chat 1 Timmy E86, LERCA 15069-109, p. 294.

<sup>34</sup> Folder 2, case file 1, official report of findings, LERCA 15069-27, p. 159–160.

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