

FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGEMENT

of

27 July 2017

StR 57/17

Reference: yes

BGHSt: yes

Publication: yes

§ 8(1)(9) Code of Crimes against International Law (Völkerstrafgesetzbuch)

On the criminal liability for desecration of a corpse/ corpses pursuant to § 8(1)(9) Code of Crimes against International Law.

Federal Court of Justice, Judgement of 27 July 2017 - 3 StR 57/17 - Higher Regional Court of Frankfurt am Main

in the criminal proceedings

against

for war crimes against persons

ECLI: DE: BGH: 2017: 270717U3STR57.17.0



The 3rd Criminal Panel of the Federal Court of Justice, in the hearing of 27 July 2017, in which participated:

Presiding Federal Court Judge [...],

Federal Court Judges

[...],

[...],

[...],

[...],

as associate judge

Federal Public Prosecutor at the Federal Court of Justice as representative of the Federal Prosecutor's Office

Lawyer

as defence lawyer

Judicial Inspector (Justizamtsinspektor)

As Registrar of the Court Registry

has ruled:



The defendant's appeal against the judgement of the Higher Regional Court of Frankfurt am Main dated 12 July 2016 is rejected.

The appellant must bear the costs of his appeal.

Ipsa jure

Grounds:

1 The Higher Regional Court sentenced the defendant to two years imprisonment for a war crime against persons. The accused appealed against his conviction based on an appeal on point of law. The appeal was unsuccessful.

2 I. The Higher Regional Court essentially reached the following findings:

3 At the end of 2013, the defendant decided to join the "armed Jihad" in Syria to help "the Muslim brothers" fight against the Assad regime and contribute to the building of an Islamic theocracy. He arrived in Syria by 8 March 2014 and subsequently lived in the home of his friend V in the City of Binnish in the Province of Idlib. A native of Offenbach, V, who had already been living in Syria as a Jihadist for a year and a half by then, had weapons training and was consequently battle-tested. He gave the accused an AK 47 assault rifle and instructed him on how to handle firearms and in fighting techniques.

4 In the Province of Idlib and in many other parts of Syria, there is an ongoing civil war even to this day, one in which Syrian government troops face a large number of fighting groups, most of which are motivated by Islam. Some of the opposition groups, in particular the "Free Syrian Army", the "Jabhat al-Nusra" and the then so-called Islamic State in Iraq and Syria, which had a hierarchical military structure and a large number of fighters, had significant portions of the country under their control, especially in the north of the country.

5 In the period between 8 March 2014 and 16 April 2014, a group of armed Jihadist fighters, including V, attacked a so-called checkpoint near Binnish, held by Syrian government forces. In the course of the subsequent confrontation, the group that included V captured at least two enemy soldiers and killed them. During or after the killing, group fighters beheaded the two soldiers, spiked the severed heads onto metal poles with weights attached to their lower ends, and set them side by side in front of a school in Binnish.

6 The defendant saw himself as part of V's group; he considered the slain, who he knew were members of the Syrian government forces, to be "infidel" Alawis. He decided to mock the two victims, to deride them when speaking of their death and to be photographed with the trophy-like displayed heads.

7 For this, dressed in a green camouflage-patterned top and green trousers, he posed with the heads by squatting on the ground right next to one of the spiked heads between the two metal bars, assuming a casual pose. He was photographed in this pose from the front close up, so that the severed head of one of the victims, with his face severely disfigured by serious injuries, could also be clearly seen in the close-up. In addition, the defendant is grouped together between the impaled heads with V, who is carrying an AK 47, and an unknown person, who is also wearing military camouflaged clothing. He is again squatting on the ground, while V and the other person are standing directly behind the defendant. The unknown person is placing his right arm on V's shoulder, and he is touching the accused with his left arm to demonstrate togetherness. Holding this pose of superiority and mercilessness, the defendant and his colleagues were photographed twice. The severed head of the other victim can be seen in one of the two photos, which is taken in a way that easily enables



identification of the victim. Both impaled heads are clearly visible in the other photo.

8 On 16 April 2014, V posted the picture of the defendant on the internet, photographed together with him and the unknown person with one of the victims on display, along with another picture, in which V is standing alone next to one of the skewered heads holding an AK 47 in his arms. At the time when the photos were produced, the accused already assumed that they could be posted on the internet by one of those involved and agreed to this.

9 II. The comprehensive review of the judgement, submitted in the assignment of error concerning substantive law, did not reveal any legal error to the detriment of the defendant.

10 The findings reached without legal error include the defendant's conviction for a war crime against persons. The Higher Regional Court has correctly assumed that the defendant, acting within the context of a non-international armed conflict, severely demeaned and degraded a person protected under international humanitarian law (§ 8(1)(9) of the Code of Crimes against International Law (Völkerstrafgesetzbuch, hereinafter VStGB).

11 1. At the time of the offence, the fighting between the Syrian army and opposition groups in Syria, especially in the Province of Idlib, was a non-international armed conflict within the meaning of § 8(1) VStGB. Decisive in determining the existence of an armed conflict is the use of armed force, attributable to one of the parties in the conflict (FCJ, Judgement of 17 June 2010 - AK 3/10, BGHSt 55, 157, 166, of 17 November 2016 - AK 54) / 16, Juris mn. 23). While an international armed conflict presupposes the use of armed force between states, a non-international armed conflict is one in which armed forces within a state fight against organized armed groups or such groups against each other, providing the hostilities are of a certain duration and intensity. The requirements that the groups concerned have a certain organizational structure and that the armed conflicts have a certain intensity and duration ensure that mere internal disturbances, tensions, riots, occasional acts of violence and other similar acts are not classified as armed conflicts (FCJ, Judgement of 17 November 2016 - AK 54/16, Juris mn. 23 with further references).

12 The fighting in Syria between the Syrian armed forces and oppositional armed groups, especially in the Province of Idlib, went far beyond mere domestic turmoil and tensions such as rioting or occasional acts of violence. It has been going on since spring 2014 and grown to encompass almost the entire country. The conflicting parties, such as the "Free Syrian Army", the "Jabhat al-Nusra", and the "Islamic State in Iraq and Syria", were also highly organized, to say the least: they were hierarchically structured, had a great deal of military equipment, controlled large areas of the country and were able to train their militants militarily and conduct coordinated attacks. Accordingly, it was an armed conflict that was certainly still considered to be non-international at the time of the crime. Irrespective of whether the civil war has now become so "internationalized" by the intervention of foreign forces that an international armed conflict now has to be assumed (on the internationalization of non-international armed conflicts, see Zimmermann / Geiß, Münchener Kommentar zum Strafgesetzbuch (MüKoStGB), 2nd ed., § 8 VStGB mn. 96, 101), this was not considered the case in Spring 2014.

13 2. The victims were also persons to be protected under international humanitarian law. This follows from § 8(6)(2) VStGB, which states that, in a non-international armed conflict, persons not directly involved in the hostilities and subject to the power of the opposing party are to be protected under international humanitarian law. These include enemy fighters who are "hors de combat", i.e. incapacitated, (see Bundestag Drucksache, 14/8524, p. 30; Zimmermann / Geiß, op. cit. mn. 90; also see the provisions in Article 8(2)(c) of the Rome Statute of the International Criminal Court (ICC Statute) corresponding to § 8(6)(2) VStGB - Werle / Jeßberger, Völkerstrafrecht, 4th ed., mn. 1189).



- 14 Such was the status of the two slain soldiers. They were members of the Syrian government forces who had been captured by the group of armed Jihadist fighters to which V also belonged. They were thus incapacitated and in the power of an opposing party.
- 15 3. The two soldiers were subject to the scope of protection provided by § 8(1)(9) VStGB, even after their killing.
- 16 a) The accordingly criminal, grievous demeaning or degrading treatment of a person to be protected under international humanitarian law shall also pertain to the deceased. In this respect, the provision serves to protect the dignity of the dead or human dignity extending beyond death (FCJ, Judgement of 8 September 2016 - StB 27/16, NJW 2016, 3604, 3606; Zimmermann / Geiß, op. cit. mn. 204; see also Werle / Jeßberger, op. cit., mn. 1238).
- 17 In contrast, it is occasionally argued in legal literature that § 8(1)(9) VStGB does not cover the desecration of corpses (Berster, ZIS 2017, 264). This view is based essentially on the fact that lawmakers only wanted to codify the secure existence of customary international law, which, however, could not be interpreted as "criminalizing" the desecration of corpses in armed conflicts. The consolidation of customary international law does not arise either from the Geneva Conventions and Protocols or from later international law practice, in particular not from the so-called elements of the crime or international case law. Furthermore, the subsumption of deceased persons under the concept of "person" violates the prohibition of analogy under Article 103(2) of the German Constitution (Grundgesetz). Finally, the imprisonment for violations of § 8(1)(9) VStGB in conjunction with § 38 (2) of the German Criminal Code (Strafgesetzbuch, hereinafter StGB) from one to 15 years with regard to the desecration of the corpses is considered to be high.
- 18 This argument cannot be accepted.
- 19 aa) It does not correspond to the intention of the legislator. The VStGB is intended to implement the criminal provisions of the ICC Statute and ensure that Germany is always in a position to prosecute the crimes within the jurisdiction of the International Criminal Court. In its orientation to the criminal provisions of the ICC Statute and the so-called elements of the crime formulated in it, the legislator saw a significant step towards the transposition of assured customary international law into national law, because it essentially regarded the customary international law as enshrined in the ICC Statute (see Bundestag Drucksache, 14/8524, p. 12 f; also see Berster, op. cit., p. 265).
- 20 § 8(1)(9) VStGB is based on Article 8(2)(b)(xxi) and (c)(ii) ICC Statute (Bundestag Drucksache, 28/8524, p. 28), which classifies the demeaning and degrading treatment of protected persons in international and non-international armed conflicts as war crimes. For the interpretation of the provisions contained in Art. 8 ICC Statute, use is made of the "elements of crime" under Art. 9 ICC Statute. A footnote on the elements concerning Article 8(2)(b)(xxi) and (c)(ii) ICC Statute states that the provisions also cover deaths (elements of the crime according to Article 8(2)(b)(xxi)(1), footnote 49, and Article 8(2)(c)(ii)(1), footnote 57). Similarly, § 8(1)(9) StGB is to be understood in the same manner (see Werle / Jeßberger, op. cit., mn. 1236, 1238; Zimmermann / Geiß, op. cit. mn. 204).
- 21 bb) By virtue of the fact that Article 8(2)(b)(xxi) and (c)(ii) ICC Statute also includes the demeaning and degrading treatment of the deceased as a war crime, it correspondingly follows that the objection against the criminality of the desecration of corpses during armed conflicts cannot be attributed to the recognised existing customary international law. For the ICC Statute is itself a central source of international criminal law and it largely confirms and clarifies the criminal law applicable under customary international law (Werle / Jeßberger, op. cit., mn. 189 f; also see Berster, op. cit., p. 265). The regulations of the statute partly involve



international law originally based on conventions and partly a mere declaratory determination of pre-existing customary international law. The latter applies in particular to the elements of the crime standardized in, inter alia, Art. 8 ICC Statute (see also: Werle / Jeßberger, op. cit., mn. 192).

- 22 (1) It cannot be argued that the elements of the crime are merely "non-binding interpretive aids" and that the extension of Article 8(2)(b)(xxi) and (c)(ii) ICC Statute to dead persons only based on footnotes to the respective elements of the crime (see however Berster op. cit., p. 266).
- 23 Regardless of the question concerning the legal validity of the elements of the crime, it should be noted that these were formulated by a working group (so-called PrepCom), which, in addition to proposals from various Member States, based its preparation on a study by the International Committee of the Red Cross (ICRC). This study represented all relevant sources of international law and was itself based on extensive research and analysis, not in the least including the relevant decisions of international and national war-crime trials (Dörmann, in: Fischer / Kreß / Lüder [ed.], *International and National Prosecution of Crimes, Under International Law 2001*, p. 95, 96). The study mentions, for example, Art. 8(2)(b)(xxi) ICC Statute, which deals with the mutilation of prisoners of war (see UN Doc. PCNICC / 1999 / WGEC / INF.2, p. 49; see also Dörmann, *Elements of War Crimes, 2003*, p. 314). This clarifies the fact that, from the point of view of the ICRC and PrepCom, the prohibition of the desecration of corpses was part of the customary international law and, correspondingly, should be included in the ICC Statute. The view that this could not have "been taken seriously" by PrepCom (Berster, p. 267), however, remains as speculative as the view that the mention of "dead persons" only in footnotes of the elements of the crime "suggests" that, in this respect, no full consensus had been achieved (Berster, op. cit., p. 266).
- 24 Finally, there is no reason to treat war crimes involving the grievous demeaning or degrading treatment differently in international armed conflict than in non-international armed conflict (Berster, p. 265 f.). Rather, both the ICRC and the PrepCom spoke in favour of equal treatment (UN Doc. PCNICC / 1999 / WGEC / INF.2, p. 48; Dörmann, *Elements of War Crimes, 2003*, p. 404).
- 25 (2) The prohibition under customary international humanitarian law against the desecration of corpses in armed conflicts results from the rules of international humanitarian law in international and non-international armed conflicts published by the ICRC (*Customary International Humanitarian Law*). The customary international legal anchoring of the rules summarized by the ICRC is based on an appropriate global practice by nation states. According to Rule no. 113, it is recognized that each party to a conflict must take all possible measures to prevent dead bodies from being plundered, while mutilation of corpses is prohibited.
- 26 Rule no. 113 of the customary international humanitarian law published by the ICRC is in accordance with Article 8 of Protocol II of 8 June 1977 to the Geneva Convention of 12 August 1949 relating to the protection of victims of non-international armed conflicts. According to this, "whenever circumstances permit, and particularly after an engagement", all feasible measures must be taken without delay in order, inter alia, "to search for the dead, prevent their being despoiled, and decently dispose of them".
- 27 (3) The criminality of the desecration of corpses in armed conflicts under customary international law has also been reflected in decisions of international courts. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered degrading treatment, mutilation, burial in mass graves and the "re-internment" of dead bodies to be degrading (see ICTY, *Judgement of 1 September 2004 - Brđanin, IT-99-36-T, no. 1014 ff.*,



1019). The International Criminal Tribunal for Rwanda (ICTR) has assessed the introduction of a bottle into the vagina of a female corpse in a similar manner (see ICTR, Judgement of 18 December 2008 - Bagosora et al., ICTR-98-41-T, no. 2219, 2222; Judgement of 14 December 2011 - Bagosora et al., ICTR-98-41-A, no. 729).

- 28 cc) Regarding the deceased as persons to be protected under international humanitarian law within the meaning of § 8(1)(9) VStGB also does not contravene the analogy prohibition. The term "person" is generally synonymous with "human" (see www.duden.de/rechtsschreibung/Person: www.woerterbuchnetz.de/dwb, "person"). It refers to both living and dead people; whether the person concerned is alive or dead is made clear by adding the appropriate adjective. This is also the language used in the German Criminal Code. This is demonstrated by the example of § 168(1) StGB, in which mention is made of a "verstorbenen Menschen" (deceased person). Finally, the same is true in international criminal law, as an examination of the elements of the crime already referred to in Article 8(2)(b)(xxi) and (c)(ii) ICC Statute makes clear. In the original English version, it says: "For this crime, 'persons' can include dead persons." It is therefore made equally clear by adding the appropriate adjective that a deceased person is meant.
- 29 dd) In view of the fact that the ICC Statute, protecting the dignity of the dead or human dignity extending beyond death, qualifies the demeaning and degrading treatment of deceased persons protected in armed conflicts under international humanitarian law as war crimes, there can ultimately not be any doubt that the German legislature is free to standardize a corresponding crime in the transposition of the ICC Statute.
- 30 In principle, it is up to the legislator to determine the type of punishment and minimum penalty imposed on the commission of a criminal offence. The establishment of a penal framework is exclusively based on legislative evaluation within the limits of a rationally justifiable act. The penalties that are appropriate for an offence - abstract or concrete - and where the limits of constitutional punishment are to be set depends on a plenitude of value judgements. The German constitution allows the legislator wide scope for the standardization of criminal penalties. When reviewing legal penalties, a violation of the principle of culpability and the prohibition against excess is therefore only considered if the statutory provision - measured in terms of the idea of justice - leads to absolutely insupportable results (see Federal Constitution Court, Judgement of 13 February 1973 - 2 BvL 8/71, BVerfGE 34, 261, 267, and Judgement of 16 January 1979 - 2 BvL 4/77, BVerfGE 50, 125, 133 f., 138, 140).
- 31 It is not clear that the statutory provision in § 8(1)(9) VStGB as such might exceed the limits of the scope to which the legislature is entitled, even if it is applied to the demeaning or degrading treatment of the deceased. The unlawful and culpable nature of corpse desecration, which is generally lower than that of other war crimes against persons, can be sufficiently taken into account in individual cases within the existing penal framework.
- 32 b) Applicability of § 8(1)(9) VStGB is not precluded by the fact that the action of the defendant only pertained to the severed heads of the soldiers. For the demeaning or degrading treatment of a deceased person is also considered criminal if the offence is only directed against body parts. This is certainly true, in any event, when it involves the head of the deceased.
- 33 It is irrelevant in this respect that § 8(1)(9) VStGB does not explicitly designate body parts as potential objects of offence, in contrast to § 168(1) StGB. The fact that they are also included depends on the intention and purpose of the provision. Along with Article 8(2)(b)(xxi) and (c)(ii) ICC Statute, it serves to protect personal dignity. The provisions of the ICC Statute express this to a certain degree by emphasizing "the impairment of personal



dignity" and merely citing demeaning and degrading treatment as an example.

34 The personal dignity of a deceased may also be affected by behaviours that only affect his or her severed head. For the head is the outstanding identifying feature of a person and determines the external perception of a person the most.

35 4. The behaviour of the accused also constitutes grievous demeaning and degrading "Behandlung" (i.e. treatment) of the two slain soldiers.

36 a) The accused (mis)treated (hat behandelt) the victims by photographing them with their heads severed and staked on poles.

37 aa) "Behandeln" in the meaning of § 8(1)(9) VStGB includes all conduct directly related to the victim in question. In this respect, the following applies:

38 (1) It is not necessary for the offender to physically act on the person concerned; rather, even verbal abuse may be sufficient (Zimmermann / Geiß, op. cit., mn. 201).

39 This follows from common usage. According to this usage, "behandeln" means that someone or something is handled in a certain way. This need not involve physical contact (see www.duden.de/rechtschreibung/Behandlung, see also www.woerterbuchnetz.de/dwb, "Behandeln").

40 This also corresponds to legal usage (see Hardtung, MüKoStGB 2nd ed., § 224, mn. 36). Thus, an aggravated battery by means of a life-endangering "Behandlung" within the meaning of § 224(1)(5) StGB does not necessarily require physical contact. It can also be committed by omission (see Fischer, StGB, 64th ed., § 224, mn. 12a) or, under certain circumstances, by mere threat (FCJ, Judgement of 26 November 1985 - 1 StR 393/85, NSStZ 1986, 166).

41 The same applies to the degrading treatment of a subordinate under § 31(1) of the German Military Criminal Code (Wehrstrafgesetz, abbreviated WStG). It is understood that any behaviour of a superior by means of which he or she demeans subordinates into interchangeable objects, exposing him or her to ridicule and contempt, and thus disregarding the social value and esteem that the subordinate generally enjoys in the social community as a human being and, in particular, possesses as a soldier in the military community (MüKoStGB / Dau, 2nd ed., § 31 WStG, mn. 3; Erbs / Kohlhaas / Dau, Supplementary Criminal Laws, 208. EL, WStG § 31 mn. 3 with further references). Accordingly, degrading treatment within the meaning of § 31(1) WStG, for example, consists of mere utterances containing sexual allusions to subordinate female medical officers or insults of an embarrassing, degrading or sexual nature (Erbs / Kohlhaas / Dau, op. cit. 4).

42 Finally, international understanding of the term also implies that demeaning and degrading treatment need not involve physical contact with the victim. Hence, the International Criminal Tribunal for the former Yugoslavia has already considered mere statements to be sufficient (ICTY, Judgement of 2 November 2001 - Kvočka et al., IT-98-30 / 1-T, no. 172). Degrading non-physical treatment can also be regarded as the constant libel of captured Bosnian Muslims who were forced to sing Serbian songs, perform the "Serbian salute" and submit to Serbian nationalist symbols (ICTY, Judgement of 1 September 2004 - Brđanin, IT-99-36-T, no. 1015), as well as forcing prisoners to relieve themselves in their own clothing (ICTY, Judgement of 2 November 2001 - Kvočka et al., IT-98-30 / 1-T, no. 173) or to dance naked on the table (ICTY, Judgement of 22 February 2001 - Kunarac et al., IT-96-23-T & IT-96-23 / 1-T, no. 772 f., 781 f.). The International Criminal Tribunal for Rwanda also deems degrading treatment to include a female victim who had previously been



forcibly stripped without performing any physical exercise in front of a group of perpetrators (ICTR, Judgement of 2 September 1998 - Akayesu, ICTR-96-4-T, no. 688, 694, 697).

- 43 According to the intention of the legislator, "any kind" of demeaning or degrading treatment should suffice for determining commitment of the offence, including in particular and in addition to corporal punishment, "displaying prisoners or insulting them" (Bundestag Drucksache, 14/8524, p. 28).
- 44 (2) "Behandeln" within the meaning of § 8(1)(9) VStGB does not presuppose any psychic effect on the person concerned; in fact, he or she need not even be aware of the treatment. In effect, this also follows from common usage, according to which it is only important that someone or something is handled in a certain way. For example, a person may be "treated like air" without even noticing.
- 45 (3) The only thing consequently required is that the behaviour directly relates to the person, because then there can be no question that the victim is involved. This corresponds to the fact that, according to the findings above, the deceased, who cannot be mentally affected, are included in the scope of protection of the standard.
- 46 bb) The behaviour of the accused directly relates to the slain soldiers, as far as he posed with their severed heads and allowed himself to be photographed with them. In contrast, the later publication of photos on the Internet was not directly related to the slain soldiers. There is no "Behandlung" of the soldier, but of the photos.
- 47 b) The demeaning and degrading treatment of the slain soldiers by the defendant was also "schwerwiegend" (grievous) in the meaning of § 8(1)(9) VStGB.
- 48 aa) In including the expression "in schwerwiegender Weise" (in a grievous manner), the intention of the legislature is to exclude, in particular, "insults of only minor gravity" from the scope of the offence (Bundestag Drucksache, 14/8524, p. 28). In view of the criminal nature of § 8(1)(9) VStGB and the associated minimum punishment of one-year imprisonment and in light of the constitutional requirement of punishment appropriate to the crime, this qualification requires a restrictive interpretation.
- 49 The starting point for this arises from the English-language original version of Article 8(2)(b)(xxi) and (c)(ii) ICC Statute, on which the legislator wished to base § 8(1)(9) VStGB. There, the term "outrage" is used in connection with the demeaning and degrading treatment qualified as a war crime. This term can be interpreted as "Frevel(tat)" (sacrilegious (act)), "Gräuel(tat)" (atrocious (act)) or "Ungeheuerlichkeit" (monstrosity) (see <https://de.langenscheidt.com/englisch-deutsch/outrage>). As a war crime, the ICC Statute only therefore includes the demeaning or degrading treatment that violates the dignity of the person concerned to such an extent that the offence in question can be regarded as an atrocious act (see also Werle / Jeßberger, op. cit. 1238). Decisive in this regard is an objective scale (Werle / Jeßberger, op. cit.), in which - as can be deduced from the elements of the crime (see elements of the crime in Article 8(2)(b)(xxi)(1) n. 49; Article 8(2)(c)(ii)(1) n. 57) - the cultural background of each victim must be considered (MüKoStGB / Zimmermann / Geiß, op. cit., mn. 202).
- 50 Accordingly, the scope of § 8(1)(9) VStGB should be limited to acts that violate the dignity of the person concerned to such an extent that the offence, from the point of view of an objective observer and taking into account the cultural background of the victim, appears as a "Gräueltat" (atrocious act). According to the sense of the word (see also <https://de.wikipedia.org/wiki/Gräuel>), this is the case if the behaviour of the offender appears gruesome or terrifying.



51 With reference to the demeaning or degrading treatment of the deceased, this can especially be deemed as such in the case of mutilation or other bodily disfigurement (see ICTR, Judgement of 18 December 2008 - Bagosora et al., ICTR-98-41-T, no. 2219, 2222; see also Judgement of 14 December 2011 - Bagosora and Others, ICTR-98-41-A, No 729). By contrast, mere verbal insults, verbal abuse or other non-physical demeaning or degrading treatments of the deceased are in principle not susceptible of being regarded as an atrocious act. A contrasting view can only be valid if such behaviour appears, on exceptional occasions, to be as horrible or terrifying as an atrocity involving the commission of physical acts.

52 bb) This is how things are in this case, however.

53 The behaviour of the accused, who repeatedly posed in a manner that conveys superiority and mercilessness, standing in close proximity to the severed heads of the soldiers speared on metal poles and, in effect, displayed as trophies, is associated with the previous demeaning and degrading treatment of them, which consisted in mounting their heads on poles and displaying them in front of the school. Not burying the corpses or handing them over to the enemy, but instead spearing their heads on metal poles and presenting them publicly as trophies, undoubtedly constituted grievous demeaning and degrading treatment of the dead.

54 The same applies to the behaviour of the accused, which is connected to the display of the skewered heads and is not itself connected with any bodily harm. He used the situation created by the previous treatment of the victims, this extremely degrading situation, to further deepen their degradation. Photographing superiority and mercilessness in the immediate vicinity of the impaled and exposed heads seems, from the point of view of an objective observer, no less horrifying, considering the cultural background of the victims, than the impalement and display of the heads. The accused thus demonstrated that the degrading condition of the victims did not cause him any sympathy or shame. By staging a scene alone and together with V. and the unknown person with the severed and impaled heads, he and his accomplices expressed that the heads served as mere trophies with which to adorn themselves. Viewed objectively, the fact that the defendant did not at the same time have a physical effect on the victims is irrelevant.

55 5. Ultimately, the defendant committed the crime in connection with the armed conflict. The functional relationship required in this respect is present if the existence of the armed conflict was of material importance for the ability of the perpetrator to commit the crime, for his decision to commit a crime, for the manner in which it was committed or for the purpose of the crime. The act must not be committed only "on the occasion" of the armed conflict. On the other hand, it is not necessary to carry out a crime during ongoing combat operations or in particularly close proximity to them (see, in this regard, FCJ, Judgement of 17 November 2016 - AK 54/16, juris, mn. 29; Werle / Jeßberger, op. cit., mn. 1163 ff.; Bundestag Drucksache, 14/8524, p. 25).

56 The act of the defendant would have been practically unthinkable without the armed conflict. He had gone to Syria to join a group of Jihadist fighters and to contribute to the formation of an Islamic theocracy through armed struggle against Syrian government forces. The deceased were government soldiers who had been captured and killed in the storming of their checkpoints, and the subsequent display of their severed heads, as well as the defendant's posing with their heads, served to demonstrate their own superiority and mercilessness.

[...]

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[...]

[...]

[...]

