

Court:	Higher Regional Court of Berlin 2a Criminal Division		
Decision date:	1 March 2017		
File reference:	(2A) 172 OJs 26/16 (3/16), 2A 172 OJs 26/16 (3/16)	Statutory provisions:	Section 8(1), subparagraph 9 of the Code of Crimes against International Law (<i>Völkerstrafgesetzbuch</i> – VStGB), Section 8(6), subparagraph 3 VStGB
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Sentence for war crimes against a person in Iraq: photo print of the heads severed from the bodies of two enemy fighters from the terrorist militia Islamic State, who had been killed in combat

Headnote

The treatment of a person who is to be protected under international humanitarian law – which notably includes, pursuant to Section 8(6), subparagraph 3 VStGB, members of the armed forces and fighters for the opposing side, who have laid down their arms or are defenceless in some other way – in a gravely humiliating or degrading manner, which is punishable under Section 8(1), subparagraph 9 VStGB, also includes deceased persons (following the Federal Court of Justice NJW 2016, 3604 and the Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, 5-3 StE 2/16 - 4- 1/16 -).

This decision cites

Case-law

Following Higher Regional Court of Frankfurt, 5th Criminal Division, 12 July 2016, file ref.: 5 - 3 StE 2/16 - 4 - 1/16

Order

For war crimes against a person, on two identical counts, the accused is sentenced to **one (1) year and eight (8) months imprisonment**, the enforcement of which is suspended.

The accused shall bear the costs of the proceedings.

Criminal provisions applied:

Section 8(1), subparagraph 9 VStGB and Section 8(6), subparagraph 3 VStGB;

Section 52(1), second option and Section 56(1) and (2) of the Criminal Code (*Strafgesetzbuch* – StGB)

Reasons

- 1 The subject of the proceedings is the commission of a war crime following the ‘Second Battle of Tikrit’ in Iraq. As a member of the Iraqi armed forces, in March 2015 the accused held two heads up by the hair, which had been severed from the bodies of enemy fighters

from the terrorist militia Islamic State who had been killed in combat, and was photographed in that pose.

2 I. Personal circumstances of the accused

3 1. The 28-year-old accused was born on ... in ... (Iraq) and is an Iraqi citizen. As the third of
4 seven children, he grew up in an ordered family environment in fairly wealthy
5 circumstances in a large house in B. His father is a manager at a bank in B.; his mother is a
6 housewife.

7 Until 2003, the accused attended middle school in B. Due to the problematic situation in
8 Iraq after Saddam Hussein was removed from power, it was not possible for the accused
9 to continue with his schooling after he successfully graduated from middle school, or to
10 begin any regular training. Instead, he had to take on different temporary jobs and help to
11 support his family. In 2011, he was kidnapped in B. by criminals who demanded a ransom
12 from his family for his release. He was released after one day. As a result of this, and
13 because of the unstable situation in Iraq, the accused no longer wished to live in B., and
14 thus travelled to Lebanon. He spent around a year there, and applied for permission to
15 emigrate to the United States of America. However, his father asked him to return to B.,
16 and the accused did so. He then began training as a bank clerk in B., in the branch of the
17 bank managed by his father. The accused successfully completed this training.

18 In August 2013, the accused married R., born in 1991, who is also an Iraqi citizen. He lived
19 with her in his parents' house in B. The accused and his wife followed a lifestyle influenced
20 by Western ideals. This marriage has not yet produced any children, although the wife of
21 the accused suffered a miscarriage in Iraq.

22 By summer 2014 at the latest, the accused, who is rather slight in stature, had voluntarily
23 joined the Iraqi army. He felt obliged to do so because he wanted to defend his country
24 against the terrorist militia known as Islamic State. He had not had any military experience
25 prior to this. After a short period of military orientation, he was primarily based in the S.
26 Governorate north of B. Most recently, he served as an officer in the rank of lieutenant in
27 the anti-terrorism unit of the Iraqi army, and commanded a company of around 100 men.
28 Following the successful Second Battle of Tikrit in March 2015, during which he committed
29 the war crime for which he is sentenced here, the accused was granted a month's leave
30 and returned to B. In a subsequent combat mission in the H. mountains on the north-east
31 border of the S. Governorate, in which he again took part, his company was dissolved due
32 to the high number of losses – only six soldiers survived. The accused fled from the H.
33 mountains back to B. and did not rejoin the army.

34 Instead, in summer 2015, the accused decided to flee Iraq following his experiences in the
35 Iraqi army and because of the desperate situation in the country. Together with his wife,
36 he flew from B. to E., and then travelled by bus into Turkey. The accused and his wife
37 initially lived there for three months, but then decided, due to the difficult conditions in
38 Turkey, to flee further into Europe. They set off for Greece by boat, and ultimately arrived
39 in the Federal Republic of Germany on 6 December 2015.

40 From 7 February to 16 August 2016, the accused and his wife lived in a school gymnasium
41 functioning as a temporary refugee shelter on P.-Straße in Be. Both took part in various
42 events there and in the local district (the accused's wife does not wear a headscarf in
43 Germany), in order to get to know their neighbours better, and they studied German. The
44 accused was very open-minded and has a positive attitude towards the Western
45 community of values. He was a rather inconspicuous presence in the refugee shelter, and
46 never came across as aggressive. He understands spoken German and can express himself
47 in simple sentences in German. Most recently, the couple moved to a refugee shelter on
48 Q.-weg in B.

- 9 On 31 July 2016, a police operation took place at the refugee shelter in B., which was the starting point for the investigations in the present proceedings. The accused felt that the way he was treated during the course of this operation – initially, it was speculated that the accused had an Islamist background – was not appropriate. As a result of this, and because his wife has to support her mother who lives in B., the accused and his wife decided to return to Iraq. However, due to the accused being arrested in relation to the present proceedings on 25 August 2016, the couple’s return trip to Iraq by direct flight, scheduled for the following day, did not take place. The travel costs had been paid by the immigration authorities; the couple had also received financial support for their voluntary departure. The accused still intends to return to his homeland. He and his wife could move back into his family home in B., where they lived before fleeing from Iraq. The accused’s entire family lives in Iraq, as do his wife’s relatives. The accused wishes to live a quiet life with his wife, surrounded by his family, and would like to return to work in the profession for which he was trained. He does not believe that his failure to return to the army in the summer of 2015 will cause problems for him in Iraq. After his incarceration in relation to this case, contact with his wife initially broke off; she did not return to Iraq alone without him, but the accused is nevertheless very concerned about her.
- 10 The asylum proceedings for the accused and his wife were halted by final decision of the Federal Office for Migration and Refugees of 13 September 2016. As justification, it was stated that they had withdrawn their asylum applications on 25 August 2016. It was established at the same time that the principle of non-refoulement did not apply. The accused and his wife were asked to leave the Federal Republic of Germany within one week of receiving notice of this decision; at the same time, they were threatened with deportation, and the legal ban on entering and residing in Germany after deportation was set at five years.
- 11 During his deployment in the Iraqi army, the accused suffered several bullet wounds in both arms and in his hip. These injuries received rudimentary treatment in Iraq; follow-up treatment took place in Germany. In the course of treatment, a metal plate was inserted into the accused’s right arm, where a bullet had passed through and damaged nerves and tissue. He therefore still has slightly limited mobility today.
- 12 2. The accused has no convictions.
- 13 3. On 25 August 2016, the accused was provisionally arrested and, on the basis of the arrest warrant issued by the investigating judge of the Federal Court of Justice on 26 August 2016 (4 BGs 94/16), was placed in custody in relation to the present proceedings from that day, specifically in prison K until 31 August 2016 and subsequently in prison B.-M. under booking number 2311/16-8. In delivering the judgment, the Division has annulled the aforementioned arrest warrant issued by the investigating judge of the Federal Court of Justice.
- 14 **II. Facts of the case**
- 15 **1. Situation in Iraq**
- 16 a) Events between 2003 and 2013
- 17 After the coalition forces led by the United States of America invaded Iraq in 2003, toppled the regime of the then President Saddam Hussein and installed a new, Shiite-dominated government, a resistance movement arose, initially still Ba’athist and later increasingly Sunni-Islamist, which in the following years took increasingly violent action, originally from underground, against the occupying troops and the new government. Over the next few years, the government marginalised the Iraqi army and the Sunni ruling elite, who had been highly influential under Saddam Hussein.

- 18 The opposition groups included, in particular, the IS predecessor organisation 'Monotheism and Jihad' led by the Jordanian Abu Musab al-Zarqawi, which in October 2004 was renamed 'Monotheism and Jihad in Mesopotamia', better known as 'Al-Qaeda in Iraq', and joined the 'Al-Qaeda core' group from Afghanistan and Pakistan. Later Shiite militias formed, which also acted against the occupying troops. These were joined by other Sunni-Islamist splinter groups, which were in competition with Al-Qaeda in Iraq. In February 2006, Al-Qaeda in Iraq carried out a bomb attack on the Shiite Al-Askari mosque in Samarra in the Salah ad-Din Governorate, which led to an escalation in religiously motivated acts of violence across the entire country, leaving tens of thousands of people dead. Al-Zarqawi was killed in a targeted air strike by the US air force in June 2006, but this had no impact on the course of the conflict. Rather, Al-Qaeda in Iraq reformed as the self-styled 'Islamic State of Iraq' (ISI) from October 2006 under the leadership of Abu Omar al-Baghdadi. From 2008, however, the situation stabilised considerably, which was probably due to the massive increase in US troops from 2007 onwards. The Sunni insurgents were noticeably weakened and contained. In the subsequent years up to 2010, the number of victims fell sharply, although the situation overall remained tense. Abu Omar al-Baghdadi was killed in April 2010 by a joint military operation conducted by Iraqi and US forces.
- 19 However, with the withdrawal of the last US troops stationed in Iraq on 18 December 2011, the security situation again took a turn for the worse. Just a few days later, there were several devastating bomb attacks in Baghdad and other cities. The Sunni-Islamist insurgent groups gained strength once again. Large parts of Iraq were destabilised by the conflict in the following years. Tens of thousands of people were killed, and hundreds of thousands were forced to flee their homes. This was also linked to events in Iraq's western neighbouring country Syria, in which protests against the regime of Bashar al-Assad had been increasingly escalating into violence since March 2011. As early as August 2011, the then leader of ISI, Abu Bakr al-Baghdadi, sent fighters of Syrian origin from his organisation to Syria to form a sub-organisation there targeting the Syrian regime. This was established in January 2012 under the name 'Jabhat al-Nusra' (JaN) and subsequently achieved notable military victories against the Syrian army. At the same time, ISI was able to increase its power in Iraq and carry out countless coordinated attacks against civil and military targets. In April 2013, al-Baghdadi proclaimed from Iraq that the two groups were merging under the name 'Islamic State in Iraq and the Levant' (ISIL), although this was rejected by the JaN leadership. In response, the Iraqi army attempted to attack ISIL support bases along the border. Nevertheless, bomb and suicide attacks continued across the whole country.
- 20 b) Present conflict phase
- 21 The present conflict phase began on 30 December 2013, after a police operation against Sunni opponents of the government in the city of Ramadi in the Al Anbar Governorate to the west of Baghdad. Within a few days, Ramadi and the neighbouring city of Fallujah fell under ISIL control. There were also severe clashes in the districts of Haditha and Hit, also in the Al Anbar Governorate, in which, however, the Iraqi army initially maintained the upper hand. From Al Anbar, the conflict rapidly spread to the neighbouring Governorates of Babil, to the south, and Salah ad-Din to the north. The conflict escalated further as a result of the ISIL offensive in June 2014, which targeted the cities of Samarra, Mosul and Kirkuk. On 10 June 2014, ISIL took control of Mosul, a city with over a million inhabitants, which has served as their central seat of power in Iraq ever since.
- 22 At the end of June 2014, Tikrit also fell into ISIL's hands, while the government regained control of Samarra. At around the same time, fighting was also taking place in the Diyala Governorate to the north-east of Baghdad, in which the Iraqi military was also using air strikes. On 29 June 2014, in light of the unexpected military successes, the leader of ISIL,

Abu Bakr al-Baghdadi, announced the creation of a caliphate named 'Islamic State' (IS), and declared himself the 'legitimate leader' of all (Sunni) Muslims. From August 2014, the IS offensive began for the capture of the town of Sinjar in the Nineveh Governorate, which led to the flight and expulsion of tens of thousands of Yazidis living there, as a result of which thousands of people were murdered, raped and enslaved. However, Kurdish combat units, with aerial support from Western armed forces, had recaptured a large part of this territory by the end of 2014. In January 2015, Iraqi troops drove IS out of Diyala Province.

23 The violent conflict in Iraq involving IS cost well over 12 000 lives in 2014 alone. In January 2015, the number of displaced persons stood at well over 2 million. The armed conflict in Iraq still continues today. Even now, IS continues to employ a mixture of symmetric and asymmetric warfare. Accordingly, it has used and continues to use both conventional heavy weapons, some of which were looted from the Iraqi army, as well as small arms like firearms and blades, and (often improvised) bombs. IS's strategy in Iraq aimed and continues to aim particularly at seizing control of economically important facilities such as oil refineries or dams.

24 c) In particular: Second Battle of Tikrit

25 On 2 March 2015, the Iraqi army and associated combat units, with aerial support from the anti-IS coalition led by the United States of America, began a major offensive to recapture Tikrit in what is known as the Second Battle of Tikrit. The Shiite units described the offensive as revenge for the Camp Speicher massacre, in which several hundred Iraqi soldiers were executed by IS at Camp Speicher outside Tikrit in summer 2014.

26 Tikrit is a Sunni-dominated city with probably significantly more than 100 000 inhabitants, situated around 160 kilometres north-west of Baghdad. It was the main seat of Saddam Hussein's clan. A road runs through the city connecting the capital city Baghdad to the city of Mosul, the western part of which at least is still occupied by IS today. The progress and outcome of the Second Battle of Tikrit was the starting point, and was decisive, in announcing the intention to recapture the city of Mosul, which has over a million inhabitants.

27 The number of troops fighting for the Iraqi army and its allies during the Second Battle of Tikrit is given as 20 000 to 30 000, and the number of IS fighters is given as 13 000. After heavy fighting with IS fighters, the Iraqi army advanced to Tikrit city centre, where they were able to take Saddam Hussein's presidential palace on 2 April 2015. At this point, only individual IS cells were still putting up resistance in the city, and these were gradually weeded out. On 12 April 2015, the Iraqi government finally confirmed that there were no more IS fighters in Tikrit, although individual clashes continued to break out until 17 April 2015. Around 1 000 soldiers fighting for the Iraqi army and their allies fell in the Second Battle of Tikrit, and around 800 IS soldiers were killed.

28 **2. Position of the accused in the Iraqi army**

29 In March 2015, the accused served as an officer in the rank of lieutenant in the anti-terrorism unit of the Iraqi army. Due to their comparatively high value in battle, these Iraqi special forces are the mainstay of the fight against IS in Iraq. They were established in 2003 as the anti-terrorism unit of the Iraqi army, with support from the US. The accused commanded a company of around 100 men.

30 As a result, the accused was the target of a piece of IS war propaganda circulated on the internet, particularly on Facebook. IS distributed numerous photos of the accused on the internet, in the form of an official wanted poster. These revealed the accused's Facebook identity and where he lived, and denounced him as a non-believer. It was also stated that he – the accused – had one hundred mercenaries/soldiers from all over the world. IS

pretended that he – the accused – now lay dead at their feet, or that he was killing and massacring women and children in Tikrit; in addition, they used the slogan that they would, ‘God willing (...) soon dispatch him to hell’. The accused was aware of all this, and downloaded these appeals from the internet.

31 **3. Offence**

32 Firstly, at some point in March 2015 (the date cannot be specified more exactly), the accused arrived as a member of the Iraqi special forces with his unit in the administrative district of Salah ad-Din, before the gates of the city of Tikrit. As part of the offensive to recapture Tikrit (the Second Battle of Tikrit), which lasted for around a month, there then followed three days of fighting against units from the terrorist militia known as Islamic State (IS), in which the accused took part.

33 After the IS front line had retreated due to a continuous combination of air strikes and ground attacks, the accused and his company moved into the liberated areas. Other companies of the Iraqi army, also involved in the recapture of Tikrit, then collected the IS fighters killed during the clashes so that their bodies could be removed from the battlefield, and searched the corpses. As this took place, two officers, identified only as J and Ja, went up to the corpses and each severed the head from a dead enemy fighter’s body with a machete. The accused was around 600 m away at this point and could not see the decapitations.

34 J and Ja then walked across the battlefield, each holding a severed head, and came across the accused. Ja asked the accused to hold the severed heads up in his hands so that they could photograph him in that pose. The accused acceded to this request because, as an officer, he felt obliged to and he feared losing his authority among his subordinates if he refused. He was aware of the fact that displaying the severed heads served to mock the enemy in a military conflict, damaged the honour of the dead, who were identifiable in the photo at least to their immediate family, and degraded them.

35 In the resulting photo – it could not be determined who had taken it – the accused is standing in the centre; he is completely visible except for his feet. He is wearing a black combat uniform and a light-coloured cartridge pouch on his upper body. An assault rifle hangs from his right shoulder, the barrel pointed downwards. His facial expression is tense; he is squinting at the camera and is blinded by the sun. No people can be seen in the background. Several small huts stand in a bare field with just a few sparse patches of grass; one white and one red flag are hoisted in front of the foremost hut. The accused is lifting his slightly outstretched arms to the side, to a height just beneath his breastbone. In each hand, he is holding up by the hair, using only his fingers, a human head that has been severed from its body. Their faces are turned to the camera in side profile – the left head in left-side profile, the right head in right-side profile. The facial features of the victims are clearly recognisable, specifically long hair, deep hairline, forehead, the front-facing eye, nose, the front-facing ear for the left head (the front-facing ear on the right head is covered by hair), mouth, long beard and whiskers, moustache. Parts of the severed throat still hang below the left head. As regards details, reference is made to the photograph on Sheet 38 Volume 1 of the case file (third sentence of Section 267(1) of the Code of Criminal Procedure (*Strafprozessordnung – StPO*)).

36 **4. Subsequent events**

37 This photo, which depicts the accused holding up by the hair two human heads which have been severed from their bodies, which are identifiable at least by their immediate family due to their clearly recognisable facial features, was then uploaded by members of his company to Facebook, although it cannot be ruled out that this was only available in a non-public area of the site. The accused obtained the photo from here and saved it to his tablet computer. He assumed that this photo and other photos, in particular the wanted

posters issued by IS featuring him, as described above, would be helpful in illustrating the situation in Iraq, and substantiate his application to be granted asylum. In the end, however, the photos were not shown at an official asylum hearing. The photo that is the subject of these proceedings was on the accused's Facebook page, but it cannot be ruled out that it was only available in a private area of the site, nor can it be ruled out that it was only available for a short period of time.

38 On 31 July 2016, a police operation took place in the refugee shelter in which the accused was living at that time. The background to this was an alleged threat made by the accused. A site security guard had forbidden a child from skateboarding through the gymnasium which was being used as a dormitory. The accused had got involved in the matter and allegedly threatened the private security employee. This allegation was not substantiated. During their operation, however, witnesses police inspector Ph and police inspector Da were informed that the accused had 'interesting' pictures stored on one of his technical devices. The accused was extremely cooperative and handed his tablet computer and his smartphone over to the officers. At first, it was assumed that the accused had an Islamist background, because the content of the IS wanted posters also found on his tablet computer when it was seized could not initially be categorised.

39 The accused then made himself available for questioning at the State Criminal Police Office of Be., which took place around one month later.

40 **III. Assessment of evidence**

41 **1. Findings concerning the personal circumstances of the accused**

42 The findings concerning the personal circumstances of the accused are based on his credible information. In addition, the accused has documented his life in recent years through a large number of photos stored on his technical devices, and has also published and commented on some of these on his Facebook profile, but also on other platforms and in different chat forums on the internet. The profile of the accused, considered as whole, depicts a self-aware self-portrait of a young man who grew up in circumstances akin to a civil war and who emulates Western ideals. The Division has been able to create a comprehensive picture of the accused's personality and career, which is in accordance with his information and the impression obtained of him in the main hearing.

43 **2. Findings concerning the situation in Iraq**

44 No particular proof needs to be collected concerning the situation in Iraq, because all of the relevant facts in this regard are generally known. Generally known facts are facts which are, as a rule, known to reasonable and experienced persons, or facts which they could reliably learn at any point without any particular specialist knowledge with the help of generally accessible sources of information (see Federal Court of Justice Criminal Division 6, 292, 292 and 293/294 and 295; 40, 97, 99; Higher Regional Court NJW 1972, 1909; Higher Regional Court of Frankfurt StV 1983, 192). This is the case here. The Second Battle of Tikrit in March 2015, as part of the ongoing armed conflict in Iraq and the general trend of confrontations between IS and its predecessor organisations and other Sunni Islamists on the one side and the central Iraqi government on the other, was continuously the subject of international news reports. This applies particularly in light of the fact that IS has an organisational structure which allows it to plan and carry out sustained and focused military operations of considerable intensity.

45 **3. Findings concerning the position of the accused in the Iraqi army**

46 Findings concerning the position of the accused in the Iraqi army are also based on his credible information. The accused's information has been corroborated by the outcome of the supplementary hearing of evidence. Namely:

- 47 In a letter of 19 August 2016, the German Military Counter-Intelligence Service confirmed, on the basis of photographs it had been sent, that the accused holds the rank of lieutenant. It also stated that the insignia on the right arm showed that the accused belonged to the Iraqi special forces. Furthermore, the Military Counter-Intelligence Service provided further information about these Iraqi special forces, which also influenced the Division's findings.
- 48 In its expert assessment of 10 August 2016, the State Criminal Police Office of Be. also came to the conclusion that, on the basis of the photographs showing the accused in uniform and with the Iraqi national flag, it was to be assumed that the accused was a member of the Iraqi armed forces and had fought against IS. This assessment was substantiated by further findings: anti-IS statements were found on the accused's device, for example: 'Fallujah has been liberated. There is no place for them in Iraq!' together with a crossed-out portrait of the 'caliph', Abu Bakr al-Baghdadi; the accused was defamed in an IS post; spatial and temporal references to the recapture of the city of Tikrit could be established.
- 49 The Division is able to assess the conclusions of the Military Counter-Intelligence Service and the State Criminal Police Office of B. for itself by evaluating the corresponding photographic material. There is no doubt that the conclusions submitted by the authorities mentioned are correct.
- 50 **4. Findings concerning the offence**
- 51 The accused has given a full confession, not only before the Division, but also in his police interview. He has not only fully admitted the accusation, but has also provided credible information about the circumstances surrounding the incident and about his motivation. In the main hearing, the accused for the most part spoke freely and for himself, and answered the Division's questions, including the critical ones, in detail.
- 52 Before the Division, the accused, clearly ashamed of the offence he had committed, tried initially to plead for understanding, maintaining that he was acting under superior orders at that time and that had he refused to display the severed heads, he would surely have been sentenced to death. However, after it was pointed out to the accused that this statement was a contradiction of his police interview, he corrected his previous assessment and clarified – plausibly, convincingly and in accordance with his statement in his police interview – that, as an officer, he felt obliged to hold up the heads. If he had said to his colleagues that he did not want to, they could have understood from this that he did not approve of the fighting. He did not want that; a refusal on his part would have been detrimental to his colleagues' motivation. He was however not threatened with any consequences had he refused to display the severed heads. He was aware of the fact that displaying the severed heads served to mock the enemy in a military conflict, damaged the honour of the two fallen men, and degraded them. He felt bad about it and until today had blocked the incident from his mind. As he had already done in his police interview, in the main hearing the accused named both the Iraqi soldiers who had allegedly severed the enemy fighters' heads from their bodies. J and Ja had been officers and had led their own companies. J was the captain and leader of a company which he – the accused – had supported; J had recently been killed in the war. Ja had been of the same rank, i.e. a lieutenant, and had led a company that was part of the intelligence service. Ja asked him to hold the severed heads up in his hands so that he could be photographed in that pose. He – the accused – understood that this offence would be prosecuted in Germany and was ultimately grateful for this. He wanted to stress, however, that he fought against terrorists in Iraq and in doing so almost lost his life. Many of his colleagues were in fact killed.

- 53 As a whole, the accused's confession was believable. It has been corroborated by the outcome of the supplementary hearing of evidence. Namely:
- 54 The Division assessed not only the photograph depicting the actual offence, but also a video, clearly taken on a smartphone, of the decapitation prior to the offence. It could not be established who took this video. The events recorded in the video fully confirm the accused's statement. The Division has no doubt that these events immediately preceded the display of the severed heads by the accused. The accused even indicated to the police, after he had already given an extensive confession, that this video was on J's – non-public – Facebook page, and downloaded the relevant file from this page for the police using his own Facebook access. The accused cannot be seen in the video. Instead, a number of soldiers appear, one of whom severs the head from a corpse lying on the floor with several blows from a machete, picks it up, walks off and calls to his colleagues, who are driving around in off-road vehicles: 'We've got this from IS!' Another soldier, also holding a severed head in one hand, then appears. The men line up and display the heads. The heads are those which the accused held up a short time later, in order to be photographed in that pose. The video then cuts out.
- 55 In addition, the Division questioned the detective chief superintendent Si who led the investigations. The witness outlined in particular the process of the investigative proceedings. Initially, another department at the State Criminal Police Office had led the investigation, because it was assumed at first that the accused had an Islamist background due to the IS wanted posters he possessed. After this had been definitively ruled out, however, she took over the investigation and questioned the accused extensively. The accused was cooperative throughout, and also made it clear to them that the incident weighed upon him. He also pleaded with them for understanding in relation to his offence, as he initially said that the actual war crime was the severing of the two heads, in which he was not involved. He did however then clarify that he took full responsibility for his actions. This outline corresponds to the Division's assessment of the accused, because the accused initially attempted to show his own behaviour in a more favourable light in the main proceedings as well, but then clearly acknowledged his own responsibility. The witness also stated that the accused helped the police to view and evaluate the pictures stored on his technical devices and on his profiles on the internet. He also provided important information for this purpose – such as the passwords for accessing his electronic devices and his own Facebook page, and through this J's Facebook profile – without which it would have been more difficult to clarify the circumstances surrounding the incident. However, her authorities had not been able to more closely identify the Iraqi soldiers named by the accused as those who severed the heads of the fallen enemy soldiers from their bodies.
- 56 **5. Findings concerning subsequent events**
- 57 The credible statements made by the accused, which were also confirmed in this regard by the outcome of the supplementary hearing of evidence, also form the basis for the findings concerning subsequent events that took place following the offence.
- 58 With regard to the issue of the further distribution of the photograph, showing the accused holding up two human heads that have been severed from their bodies, the Division was unable to rule out that the photograph had only been located in a non-public area of a Facebook page and, in the case of the Facebook page of the accused, only for a short period of time. No further clarification was possible in this respect. In this regard, the accused had already indicated to the police that the photograph was only visible on 'Facebook' and that he had 'downloaded' the photo 'from there' to his 'account' and 'published' it. He was not asked any follow-up questions during his police interrogation. In the main hearing, the accused was – understandably – no longer able to recall how long

the photograph had actually been available on his own Facebook page and whether said photograph had even been located in a public area or had only been visible to connected profiles. He had instead been concerned with being able to save the photograph to his own device, so that he could show it, if necessary. In this connection, the witness, detective chief superintendent Si, credibly stated that she had analysed the accused's Facebook page and had not (no longer) been able to find the photograph in question there. She was also unable to find any other images or content directly connected to the offence. No evidence besides the photograph could be found to suggest that the accused had an extremist background of any kind. In addition, a technical examination of the accused's tablet computer did not indicate that the photo that is the subject of these proceedings had been distributed, although the storage location on the tablet computer did suggest that the image had been transferred via Facebook. It was not possible to establish on the basis of the examination, namely the manual inspection of the content of the Facebook page, whether the image had been sent or received and with which contact it had been exchanged. The witness had no other investigative methods available to her in this respect.

59 The Division has questioned police inspectors Ph and Da further in relation to the circumstances in which the photo that is the subject of these proceedings was found. The witnesses were in charge of police deployment in the refugee shelter located in the school gymnasium on P.-Straße on 31 July 2016. In the main hearing, they agreed that the suspected threat made by the accused towards a private security employee, which had been the reason for their deployment, had not been definitively confirmed at the time. The accused had initially been arrested in the shelter and then removed by members of the police unit; he then stated that he was the source of the identified threat and proceeded to cooperate fully. During subsequent interviews with a number of residents of the shelter, they – the witnesses – were informed that the accused had a number of 'interesting' images stored on one of his devices. They – the witnesses – did not suspect that the accused had been specifically named to them by IS sympathisers, even though they could not deny the feeling that two different groups had formed amongst the residents of the shelter, those who had been supportive of the accused and those who had not. In any event, the accused had consistently been described to them as a somewhat inconspicuous type who had never been noted as being particularly aggressive, including by supervisors at the refugee shelter.

60 **IV. Legal analysis**

61 According to the findings made, the accused is guilty of a war crime against a person pursuant to Section 8(1), subparagraph 9 VStGB on two identical counts pursuant to Section 52(1) StGB. Pursuant to Section 8(1), subparagraph 9 VStGB, anyone who, in connection with an international or non-international armed conflict, treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner is liable to prosecution.

62 **1. Applicability of German criminal law**

63 German criminal law applies pursuant to the first sentence of Section 1 VStGB. In accordance with that provision, the Code of Crimes against International Law is to be applied to the offences listed therein even when the offence was committed abroad and bears no relation to Germany.

64 **2. Non-international armed conflict**

65 It is to be assumed that a non-international armed conflict within the meaning of Section 8(1) VStGB has been occurring in Iraq at the latest since the beginning of 2014,

which conflict was thus ongoing at the time of the offence and continues to the present date. The armed conflict includes, in particular, the Second Battle of Tikrit in March 2015.

- 66 An armed conflict is understood as the use of armed force between countries (international armed conflict) or widespread armed confrontations between the government of a country and organised, armed groups or between the aforementioned groups within a country (non-international armed conflict) (see *Zimmermann/Geiß*, in: MK, StGB, 2nd edition., Section 8 VStGB, paragraph 96, with further references). In order to be classed as a non-international armed conflict, in contrast to mere civil unrest, tension, riots and occasional acts of violence and similar events, it is necessary for the armed confrontations to exceed a certain duration and intensity and for the organisational structures of the groups involved to meet a minimum standard (see *Zimmermann/Geiß*, loc. cit., paragraphs 110 and 111, with further references). The parties to the conflict have the required standard of organisation if they are capable, on the basis of their military discipline and de facto authority, of planning and conducting sustained and focused military operations (see Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016 – 5-3 StE 2/16-4-1/16 – case-law citation, paragraph 142).
- 67 Based on this standard, the military confrontation in question here exceeds the required threshold of relevance under international law. The military operation to recapture Tikrit, lasting around a month and resulting in several hundred deaths on both sides, does not represent mere tension or an occasional act of violence; rather, the overall duration and extent of the armed confrontations between IS and its predecessor organisation and other Sunni Islamists, on one side, and the armed forces of the Iraqi government and their combat units or militia, on the other side, exceeded the required degree of intensity at the beginning of 2014 at the latest. The parties to the conflict also have the required organisational structure. In particular, IS had and still has a hierarchical structure, held (and still holds) military control over considerable regions of Iraq and was (and continues to be) capable of recruiting fighters and providing them with military training, of conducting sustained and focused attacks, and of putting up a military defence against Iraqi armed forces.
- 68 **3. Persons who are to be protected under international humanitarian law**
- 69 Both of the victims whose severed heads were held up and photographed are persons to be protected under international humanitarian law pursuant to Section 8(1), subparagraph 9 VStGB, in conjunction with Section 8(6), subparagraph 3 VStGB.
- 70 The treatment of a person who is to be protected under international humanitarian law – which notably includes, pursuant to Section 8(6), subparagraph 3 VStGB, members of the armed forces and fighters for the opposing side, who have laid down their arms or are defenceless in some other way – in a gravely humiliating or degrading manner, which is punishable under Section 8(1), subparagraph 9 VStGB, also includes deceased persons (see Federal Court of Justice NJW 2016, 3604, 3606, and subsequently Higher Regional Court of Frankfurt am Main, judgment of 8 November 2016 – 5-3 StE 4/16-4-3/16 – case-law citation, paragraph 235; in detail Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit., paragraph 145 et seq. with regard to Section 8(1), subparagraph 9 in conjunction with Section 8(6), subparagraph 2 VStGB; in addition *Werle/Jeßberger*, *Völkerstrafrecht*, 4th edition, paragraph 1238 and *Zimmermann/Geiß*, loc. cit., paragraph 8, 204).
- 71 a) The provision of Section 8(6), subparagraph 3 VStGB is to be understood as a catch-all provision. Accordingly, persons who are to be protected under international humanitarian law are, in both international and non-international armed conflicts, members of the armed forces and fighters for the opposing side who have laid down their arms or are defenceless in some other way. This protection is objectively necessary due to the fact

that, even if they have already laid down their arms, these individuals are, despite their vulnerability, not eligible for the status afforded under Section 8(6), subparagraph 1 and 2 VStGB until they are under the authority of the opposing side as prisoners of war or captured fighters (see Official Record No 14/8524 of the Bundestag, pages 30 and 31). The decisive factor is their defencelessness (see *Zimmermann/Geiß*, loc. cit., paragraph 95). The protection of such fighters that are *hors de combat* is consistent with customary international law and is based in Article 41 of Protocol I of 1977 to the Geneva Convention of 1949 for international armed conflicts and in Common Article 3 of the Geneva Convention of 1949 and Article 4 of Protocol II of 1977 to the Geneva Convention of 1949 for non-international armed conflicts (see Official Record No 14/8524 of the Bundestag, page 31).

- 72 The two victims whose severed heads were held up and photographed belonged to the 'opposing side' within the meaning of the provision, which speaks to the intention of the accused. Although their exact identity is unknown, they were IS fighters killed in action shortly beforehand. If they had not yet been covered by the protection afforded under international humanitarian law during previous combat operations on the side of IS, they were, in any event, defenceless within the meaning of Section 8(6), subparagraph 3 VStGB at the latest upon their death.
- 73 b) The fact that the two victims in question died on the battlefield does not deprive them of the protection afforded by Section 8(1), subparagraph 9 VStGB in conjunction with Section 8(6), subparagraph 3 VStGB. At the time of the offence, they fell under the protection afforded by international humanitarian law, as the provision of Section 8(1), subparagraph 9 VStGB, in conjunction with Section 8(6), subparagraph 3 VStGB, also applies to persons killed. This provision also seeks to preserve the honour of the dead and human dignity, which continues even after death (see Federal Court of Justice, loc. cit.; Higher Regional Court of Frankfurt am Main, judgments of 8 November 2016, loc. cit., and 12 July 2016, loc. cit.; *Werle/Jeßberger*, loc. cit.; *Zimmermann/Geiß*, loc. cit.).
- 74 This is apparent from the meaning and purpose of that provision. With the Code of Crimes against International Law, the legislator sought to implement the criminal provisions of the Rome Statute of the International Criminal Court (ICC Statute) and ensure that the Federal Republic of Germany is always in a position to itself prosecute offences falling under the jurisdiction of the International Criminal Court. It is for this reason that the criminal liability standardised by the Code of Crimes against International Law has been partly expanded, even deliberately, compared to the ICC Statute (see Official Record No 14/8524 of the Bundestag, page 12). Section 8(1), subparagraph 9 VStGB is based on Article 8(2)(b)(xxi) and Article 8(2)(c)(ii) of the ICC Statute (see Official Record No 14/8524 of the Bundestag, page 28), according to which humiliating and degrading treatment in international and non-international armed conflicts is considered a war crime. The interpretation of that provision is assisted by what are known as 'elements of crimes' pursuant to Article 9(1) of the ICC Statute. With regard to the elements concerning Article 8(2)(b)(xxi) and Article 8(2)(c)(ii) of the ICC Statute, it is stated, in a footnote in each case, that deceased persons also fall under the protection afforded by the ICC Statute (see Elements of Crimes, Article 8(2)(b)(xxi), subparagraph 1, footnote 49 and Article 8(2)(c)(ii), subparagraph 1, footnote 57). Accordingly, Section 8(1), subparagraph 9 VStGB is also to be understood in the same way (see Federal Court of Justice, loc. cit.; Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit., paragraph 153; *Werle/Jeßberger*, loc. cit., paragraph 1236, 1238).
- 75 The conclusion drawn from the aforementioned elements of crimes in Article 8 of the ICC Statute, namely that the humiliating treatment of persons killed in armed conflict – whether international or non-international – is punishable by law, is also supported in international criminal case-law. This is to be taken into account for the interpretation of

the cases listed in the Special Section of the Code of Crimes against International Law, which are provisions independent of general German criminal law (see Official Record No 14/8524 of the Bundestag, page 13). For example, the International Criminal Tribunal for the former Yugoslavia held that the posthumous mutilation of bodies or the burial and reburial of bodies in different places for the purposes of concealment constituted humiliating and degrading treatment of persons killed (see case-law of the International Criminal Tribunal, Prosecutor v. Brdjanin – IT-99-36-T – Trial Chamber, judgment of 1 September 2004, paragraph 1019; see also in this respect Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit., paragraph 156, with further references).

76 Finally, the interpretation that the ‘person’ element in Section 8(1), subparagraph 9 VStGB also includes deceased persons or persons killed does not go beyond the limits of the wording, nor does it breach Article 103(2) of the Constitution or Section 1 StGB (see, in detail, Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit., paragraph 149 to 151).

77 **4. Gravely humiliating or degrading treatment**

78 According to the findings made, in posing with the severed heads of the victims and allowing himself to be photographed, the accused treated them in a gravely humiliating or degrading manner.

79 Any type of conduct, i.e. action, tolerance or omission, may, in principle, constitute an offence under Section 8(1), subparagraph 9 VStGB. In particular, the term ‘treatment’ does not require the perpetrator to have had any physical impact on the victims’ bodies (see Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit., paragraph 161 et seq., with further references). Rather, mere verbal abuse may even be sufficient (see *Zimmermann/Geiß*, loc. cit., paragraph 201). According to international criminal case-law, an objective standard must be applied to determine the severity of the behaviour. For this, the humiliating or degrading treatment must be so serious that a ‘reasonable person’ would be outraged (see case-law of the International Criminal Tribunal, Prosecutor v. Aleksovski – IT-95-14/1-T – Trial Chamber, judgment of 25 June 1999, paragraph 56); in other words, the degradation must be such that the behaviour is ‘generally’ regarded as outrageous (see ICC Elements of Crimes, Article 8(2)(b)(xxi), subparagraph 2 and Article 8(2)(c)(ii), subparagraph 2). At the same time, however, consideration must also be given to the cultural background of the victim in question (see *Zimmermann/Geiß*, loc. cit., paragraph 202, with further references).

80 The act of posing with the severed heads of the victims, who are directly identifiable to their immediate family from the photograph, is so degrading that the behaviour is generally regarded as outrageous across all cultures, because it expresses a blatant disregard for the victims’ personal dignity (see Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit., paragraph 166). The deceased victim is displayed as a trophy, so to speak, and thus reduced to a mere object. Accordingly, the act of posing with the severed heads of persons killed, instead of burying them or returning them to the other side, is a way of gravely humiliating and degrading a person in Islamic cultures as well. Moreover, a ‘reasonable person’ would generally feel disgust, revulsion and horror upon seeing the photo that was taken of this scene (see also Higher Regional Court of Frankfurt am Main, judgment of 12 July 2016, loc. cit.).

81 **5. Functional correlation**

82 There is also the necessary degree of functional correlation between the act committed by the accused and the armed conflict.

- 83 All of the war crimes listed in the Code of Crimes against International Law are characterised, in particular, by a correlation between the act and an (international or non-international) armed conflict. Such a correlation, which is to be understood in functional terms, exists where the presence of an armed conflict was of decisive importance to the perpetrator's ability to commit the offence, to his decision to commit the offence, to the manner in which the offence was committed or to the purpose of the offence; the offence should not have been committed merely 'on the occasion' of the armed conflict (see *Zimmermann/Geiß*, loc. cit., paragraph 119 et seq., with further references).
- 84 The required functional correlation between the offence and the armed conflict must be found to exist in the present case. The persons killed were enemy combatants, including from the point of view of the accused. They had been killed during a military skirmish that was still ongoing immediately prior to the offence. The offence committed by the accused would have been virtually inconceivable in the absence of the armed conflict. The purpose of the subsequent display of the heads was also precisely that of demonstrating the superiority and ruthlessness of the combat units on the side of the accused to the opposing military forces.
- 85 **6. Mens rea**
- 86 The accused acted with intent. He knew that the persons killed, with whose heads he posed, were opposing fighters and that he was to be photographed in that pose. He was also aware of the fact that the presentation of the severed heads served to ridicule the opponents and to belittle and offend the honour of the two people in the photo at least identifiable by relatives. Furthermore, intent to humiliate or degrade the victim through the action is not required according to the wording of Section 8(1), subparagraph 9 VStGB. This is in line with the case-law of the international criminal courts (see case-law of the International Criminal Tribunal, Prosecutor v Aleksovski – IT-95-14/1-A – Trial Chamber, judgment of 24 March 2000, paragraphs 27 and 28).
- 87 **V. Legal consequences**
- 88 1. When determining the penalty, the Division used as a basis the legal penalty framework of Section 8(1), subparagraph 9 VStGB.
- 89 The Division did not make use of the mitigation of sentence allowed under Section 46b(1), subparagraph 1 and Section 49(1) StGB. In its decision, the Division took particular account of the nature and scope of the facts disclosed and their significance for the investigation of the crimes, the date of disclosure, the extent of the support of the law enforcement agencies by the accused and the severity of the crimes to which his information related, as well as the relationship between those circumstances and the severity of the offence and guilt of the accused (see Section 46b(2) StGB). By voluntarily disclosing what he knew before the opening decision was issued, the accused made a significant contribution to the uncovering of the decapitations of the fallen fighters of the opposing party by J and Ja. These crimes also respectively constitute a listed offence within the meaning of Section 100a(2), subparagraph 10(c) StPO in conjunction with Section 8(1), subparagraph 9 VStGB. However, it was to be taken into consideration that, despite the fact that the accused had revealed the Facebook page of J to the police and provided further details of the perpetrators' involvement in the Iraqi army, identification by the German authorities of the Iraqi soldiers named by the accused is not possible in respect of J who had, according to credible information from the accused, since been killed in fighting, and highly unlikely in respect of Ja, and that therefore the significance of the investigative assistance is to be assessed as carrying rather less weight in the present case. With regard to the severity of the offence and guilt of the accused, a shift in the penalty framework was ultimately not justified here. However, the support of the law

enforcement agencies by the accused and his contribution to uncovering the crimes mentioned were appropriately reflected as a general ground for sentence mitigation.

90 2. When determining the penalty, the Division took account of the following circumstances in favour of the accused:

91 The accused has no convictions. He made a full confession, at an early stage, to the police. His confession was made with remorse and understanding. The accused also sincerely renounced his crime and was completely cooperative. In addition to naming the perpetrators of the decapitations, he provided further details thereon regarding their involvement in the Iraqi army and finally not only mentioned, including in explanation of his own involvement in the whole matter, the decapitation video, but also actively helped to secure that video. As an officer of lieutenant rank in the counter-terrorism unit of the Iraqi army, the accused was in a particularly pressurised situation at the time of the act; he felt obliged to present the severed heads and feared that he would lose authority amongst his subordinates if he were to refuse. Under the immediate pressure of a battle that was successful but also involved heavy losses within his own ranks and within those of the opponents, the accused, who had been seriously injured himself as a soldier in the past, spontaneously decided to commit the act. The accused had been wanted by IS and was therefore a particular target of the terrorist militia, which for its part had already committed numerous terrible war crimes and publicly disclosed them for propaganda purposes. The wrongdoing committed in the scope of the act is to be assessed as attenuated, because the victims were already dead at the time of the humiliation. The act took place approximately two years ago. The Division has also not been able to exclude that the photo showing the accused holding up two decapitated human heads had only appeared in a non-public area of a Facebook page and, in the case of that of the accused, only for a short period of time, even though it has been recognised that further distribution of the image was and is still possible. In the main hearing, the accused ultimately agreed to the extrajudicial confiscation of his tablet computer so that the photo in question here could be destroyed.

92 When determining the penalty, the Division took account of the following circumstances to the detriment of the accused:

93 The accused posed with the disfigured heads of two people. He let himself be photographed with the severed heads at close quarters; these can therefore be clearly seen in the photo and are at least identifiable by relatives. As the commander of around one hundred soldiers, the accused acted as a role model for them. Through the publication – which he at least approved – of the photo on the internet, even though it cannot be excluded that this only appeared in a non-public area of a Facebook page and, in the case of that of the accused, only for a short period of time, the ridiculing of the two victims is heightened.

94 After weighing up all the circumstances speaking in favour of and against the accused, the Division therefore considers a custodial sentence of

95 **one year and eight months**

96 to be in proportion to the nature and severity of the offence.

97 3. The enforcement of the custodial sentence issued has been suspended.

98 a) The social prognosis is favourable, Section 56(1) StGB. The Division expects that the accused will see the conviction as a warning and will not commit any more offences in future even without the (further) effect of the penalty enforcement. In this case, the Division took account of the character of the accused, his past, the circumstances of his

crime, his conduct after the crime, his life circumstances and the expected effects of the suspension.

- 99 With regard to the details in this respect, reference is made to the factors carrying weight in favour of and against the accused in the scope of the specific determination of the penalty. In particular, it has not been overlooked here that, as the commander of around one hundred soldiers, the accused acted as a role model for them. On the other hand, it may not be disregarded that the accused, who has no previous convictions and who made a full confession, has been sufficiently impacted by his first experience of several months of detention on remand and sees this as a permanent warning. The spontaneously committed act was a singular event in the scope of the Second Battle of Tikrit. The accused feels guilty and has permanently renounced his behaviour. This is supported by the fact that the accused named the perpetrators of the preceding decapitations at an early stage. The act that is being judged here also led him to decide to leave the Iraqi army and to flee from Iraq. He does not want to have to participate in armed conflict again. The accused has also always lived in ordered social conditions, albeit most recently under the restrictions of his flight. He has been married for several years, completed vocational training, worked in his profession until voluntarily joining the Iraqi army and is supported by his family with regard to the provision of accommodation in B. The fact that the asylum procedure regarding him and his wife in Germany has been permanently abandoned supports the Division's assessment, because this is based on the spouses' decision, which is to be respected, to return to their country of origin. In view thereof, it is reliably to be expected that the accused will resist any future criminal incentives and will not commit any further offences even without the effect of the penalty enforcement.
- 100 b) According to the overall view of the crime and the character of the accused and in consideration of the grounds for mitigating and increasing the sentence, there are also particular circumstances pursuant to Section 56(2) StGB which, despite the considerable degree of wrongdoing and guilt, which is reflected in the severity of the sentence, make a suspended sentence appear not to be inappropriate and contrary to the general interests protected by criminal law.
- 101 The grounds for sentence mitigation set out in detail and the favourable circumstances outside of the actual crime carry particular weight in the present case. In particular, it cannot be left out of consideration that the accused did not come to the attention of the criminal justice system until he was 26 years of age. The accused had previously led a respectable life. He had volunteered to serve in the Iraqi army, because he, understandably, wanted to defend his country against the terrorist militia known as Islamic State. He found himself in a war involving heavy losses and was wounded several times. He is still suffering from the effects of his war injuries today.
- 102 The crime also involved a singular situation which is highly unlikely to be repeated. The accused has permanently renounced the crime. This is shown not only in that he made a full confession at an early stage – even though the Division does not fail to recognise that, with the photograph showing the actual crime, there was particularly convincing evidence for convicting the accused – but also in that the accused was always cooperative with the German law enforcement agencies and provided investigative assistance. Even though a shift in the penalty framework did not appear justified to the Division in this respect, it must however be considered that the identification of the perpetrators named by the accused, which was ultimately impossible for German law enforcement agencies, is also conditioned by the international nature of the crime in question here.
- 103 The overall assessment also included the fact that the accused is an open-minded, intelligent young man who critically reflects on his own wrongdoing and can credibly rule out getting into a comparable situation again. In the main hearing, the accused appeared

to the Division to be so steadfast and mature that a one-off wrongdoing on the part of the accused in the particular situation of a military battle against the extremely brutal terrorist militia known as Islamic State is to be assumed.

- 104 c) The defence of the legal order does not demand the enforcement of the penalty (Section 59(3) StPO). The defence of the legal order does not demand the enforcement of the penalty if the well-informed, law-abiding population, in possession of all the facts, would show understanding for a suspended sentence and would thereby not lose their trust in the sanctity of the law and would not consider the judgment to be an unjustified concession and unsafe yielding to wrongdoing or crime (see Federal Court of Justice Criminal Division 24, 40, 45 and 46; 53, 311, 320; Higher Regional Court of Bavaria Criminal Division 1977, 196, 197 and 198).
- 105 On the basis thereof, the Division does not fail to recognise that, as correctly pointed out by the prosecuting authority, the present case involves a war crime against a person. The accused has therefore also been sentenced to a not inconsiderable penalty. However, a general exclusion of the possibility of suspension in a certain group of crimes is contrary to the legal principles stipulated in the provisions on suspended sentences (see Federal Court of Justice Criminal Division 24, 40, 46; Federal Court of Justice StraFo 2011, 324 and 325; Fischer, StGB, 64th edition, Section 56, paragraph 16). In the present case, in consideration of the crime and the character of the perpetrator, the particular peculiarities of the case, as described, instead preclude the need for an unconditional enforcement of the penalty, even in view of the guilt-increasing factors mentioned. The Division points out in this regard that the present situation precisely does not involve the 'posing' of a 'returnee' who had joined the armed jihad in the civil war regions of the Middle East in order to fight against all, in his view, 'unbelievers' there. In this respect, there is also no need to give consideration to the deterrence of other possible perpetrators from the circle of IS or comparable groups.
- 106 **VI. Costs**
- 107 The decision as to costs which is to be made pursuant to Section 464(1) StPO is based on the first sentence of Section 465(1) StPO.

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