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# **Prosecution of International Crimes Using Digitally Derived Evidence in National Courts:**

**Cases from Bosnia and Herzegovina, Finland,  
Germany, Netherlands, Sweden, United Kingdom**

as part of

## **THE DIGITALLY DERIVED EVIDENCE PROJECT**

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## Introduction

The Digitally Derived Evidence (DDE) project was launched in spring term of 2019, with the aim of outlining the evidentiary framework applicable to DDE in international criminal courts and tribunals, and international fact-finding missions.

The first phase of research analysed the treatment of digital evidence as expressly articulated in the jurisprudence of international courts and tribunals covering various evidentiary considerations such as reliability, authenticity, and provenance.

Since the field is so fast moving, the Project broadened to consider how DDE is used to prosecute atrocity crimes in national courts, and to see the extent to which courts are in conversation with each other regarding the legal standards, rules of evidence, and standards of proof to be applied when using new types of evidence.

Leiden IHL Clinic students analysed cases from the Netherlands, Germany, Sweden, Finland, the United Kingdom, and Bosnia and Herzegovina, where national systems prosecuted their own nationals and foreign nationals charged with atrocity crimes committed in Rwanda, Syria, Iraq, and Afghanistan.

The students analysed

1. The DDE that was used in the case, and what role it played in the proceedings;
2. the argumentation of the parties regarding the DDE;
3. reasoning of the court in the case, including the decision on guilt or innocence, but most particularly any statements from the court about the DDE;
4. National rules of evidence;
  - a) The way the rule/s operate(s) in the domestic system in question;
  - b) Whether the rule is reflected in other legal systems;
  - c) How the rule was applied in the case in relation to the DDE.

## Case List

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# Prosecutor v. Raed Abdulkareem (Sweden, 2017)

Blekinge District Court, Case B 569-16, Judgment 6 December 2016  
Scania and Blekinge Court of Appeal, Case B 3187-16, Judgment 11 April 2017  
[Sweden]

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## I. Executive Summary

This case involved proceedings in Sweden against a member of the Iraqi armed forces, Mr Raed Abdulkareem (the Defendant), alleging that he had engaged in humiliating and degrading treatment that seriously violated the dignity of protected persons by posing among several dead and mutilated bodies. On 6 December 2016, the Defendant was found guilty of war crimes and sentenced to six months' imprisonment.<sup>1</sup> The guilty verdict was confirmed on appeal on 11 April 2017, but the sentence was increased to nine months' imprisonment as a result of additional findings on the scope of the Defendant's liability.<sup>2</sup> In both instances, the Courts primarily relied on digitally-derived evidence (DDE). In particular, the Courts assessed photographs and a film (some of which had been uploaded to Facebook) as well as Facebook data. This case forms part of a group of other successful domestic prosecutions of international crimes within the Swedish criminal courts, stemming from the conflict in Syria and Iraq.<sup>3</sup>

## I. Background

### A. DDE legal provisions / evidentiary norms

No rules of evidence or other legal provisions specifically relating to DDE were discussed in these judgments, although the District Court judgment reveals that the DDE was tendered as 'written

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<sup>1</sup> *Prosecutor v Raed Thaer Abdulkareem*, Blekinge District Court, B 569-16, Judgment 6 December 2016 (Abdulkareem judgment). The original judgment from the Blekinge District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment (as Annex A) is available [here](#). Pinpoint references within this case study refer to the location of the material in the unofficial version.

<sup>2</sup> *Prosecutor v Raed Thaer Abdulkareem*, Scania and Blekinge Court of Appeal, B 3187-18, Judgment 11 April 2017 (Abdulkareem COA judgment). A unofficial English translation of this judgment is available [here](#). Pinpoint references within this case study refer to the location of the material in the unofficial version.

<sup>3</sup> See for example: *Prosecutor v Mobamad Abdullab*, Södertörn District Court, B 11191-17, Judgment 25 September 2017 (*Abdullab judgment*); *Prosecutor v Moubannad Droubi*, Södertörn District Court, B 2639-16, Judgment 11 May 2016 and Svea Court of Appeal, B 4770-16, Judgment 5 August 2016 (*Droubi judgment*), available [here](#); *Prosecutor v Haisam Omar Sakhanb*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (*Sakhanb judgment*). The original judgment from the Stockholm District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment is available [here](#).

evidence'. The legal framework of evidence, including DDE, in the Swedish legal system is considered further below.

## **B. Factual background of the case**

The Defendant is an Iraqi national. In 2014 and 2015, the Defendant admitted that he was a radio operator in the Iraqi regime's army, or a military force allied to the Iraqi regime.<sup>4</sup>

In October 2015, the Defendant came to Sweden seeking asylum.<sup>5</sup>

On 4 July 2016, the Defendant was convicted of robbery by the Scania and Blekinge Court of Appeal and was sentenced to imprisonment for three years and six months.<sup>6</sup> As part of the investigation into this robbery, the police discovered that the Defendant had published pictures of himself on Facebook showing him wearing combat uniform, pictures of desecrated dead bodies, and a picture of a head lying on a barrel.<sup>7</sup> A preliminary investigation into these photographs was initiated, which resulted in the discovery of additional pictures. These pictures were of Iraqi Army soldiers and Islamic State (IS) militants and showed different poses and actions next to desecrated bodies.<sup>8</sup> The photographs were all of events that took place in Salah al-Din in Iraq, in spring 2015.<sup>9</sup>

The Defendant admitted that, on the day the photographs were taken, four people were captured to be killed, or were killed during battles, and then photographed.<sup>10</sup> The Defendant argued that he was not present for the fighting; he had only accompanied the Commander to the place where the fighting occurred after it ended.<sup>11</sup> Thus, when the Defendant arrived at the scene, there were four people already dead who he understood had all belonged to IS.<sup>12</sup> He (and others) stood around the bodies which were lying on the ground and took various pictures and 'selfies'. The Defendant admitted that he was in the photos but stated that he had been forced to participate by the

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<sup>4</sup> Abdulkareem judgment (n 1) 4.

<sup>5</sup> TT/AFP/The Local, 'Swedish court jails Iraqi for war crimes after Facebook post' (*The Local*, 8 December 2016) <<https://www.thelocal.se/20161206/swedish-court-jails-iraqi-for-war-crimes-after-facebook-post>> accessed 12 January 2020.

<sup>6</sup> Abdulkareem judgment (n 1) 18.

<sup>7</sup> *ibid* 4.

<sup>8</sup> *ibid*.

<sup>9</sup> *ibid*.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid* 14.

<sup>12</sup> *ibid*.

‘general’.<sup>13</sup> In July 2015, a number of these pictures, as well as a film of the scene that was shot just before the corpses were photographed, were published to the Defendant’s Facebook account.<sup>14</sup>

### C. Legal system background

Sweden is a civil law country. Typically, proceedings in a civil law country are more inquisitorial than adversarial, meaning the court is actively involved in all stages of the proceedings. Importantly, unlike the common law system, criminal cases in Sweden are heard by four judges – one professional judge (who is legally trained) and three lay judges – with no jury.<sup>15</sup> Therefore, the judges play a very active and direct role in all facets of a case, including in relation to adducing evidence and determining its probative value.<sup>16</sup> For example, ‘a judge will often actively question witnesses and may even request parties to submit additional evidence’.<sup>17</sup>

The fundamental principles governing the laws of evidence in Sweden are ‘free admission’ and ‘free evaluation’ of evidence.<sup>18</sup> This generally means there are no restrictions on what is admissible as evidence, so long as the court finds it relevant to the proceedings. Therefore, and in the absence of a rule explicitly prohibiting its introduction, even illegally obtained evidence can be admitted to the court if it has probative value.<sup>19</sup>

The Swedish rules of procedure for both civil and criminal cases are set out in the Swedish Code of Judicial Procedure (CJP).<sup>20</sup> The CJP sets out general rules relating to presenting evidence in criminal trials. The presentation of evidence in the Swedish legal system is the responsibility of the parties. However, the court may also present evidence on its own motion.<sup>21</sup> Chapter 46 Section 6 of the CJP provides that the presentation of the evidence may be made through references to audio and video recordings and other documents in the case, if the court deems it appropriate.

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<sup>13</sup> *ibid.* The District Court did not specify whether the ‘General’ was the same person as the ‘Commander’ that the Defendant had previously referred to. However, it is possible that they are the same people because the Defendant’s testimony states: ‘The general told them to take pictures. His comrades said that he was afraid, and the commander told him and several others to be in the pictures.’ (Emphasis added): see Abdulkareem judgment (n 1) 14.

<sup>14</sup> *ibid.* 4, 10 and 15.

<sup>15</sup> Bernard Michael Ortwein II, ‘The Swedish Legal System: An Introduction’ (2003) 13 *Indiana International & Comparative Law Review* 405, 421.

<sup>16</sup> *ibid.* 429.

<sup>17</sup> *ibid.*

<sup>18</sup> Christoffer Wong, ‘Overview of Swedish Criminal Procedure’ (Lund University Faculty of Law, 2012) 27 <[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019.

<sup>19</sup> *ibid.* 28.

<sup>20</sup> *ibid.* 1.

<sup>21</sup> [Swedish Code of Judicial Procedure](#) (1942: 740) (CJP) Ch 35 s. 6.

Therefore, in the Swedish system, ‘digital material is treated as [a] written document if it can be rendered into a readable form’.<sup>22</sup> An example of this in the present case is the use of ‘photographs, films, [...] and screenshots’ which are listed in the ‘written evidence’ cited in the judgment.<sup>23</sup> Moreover, “written documents” can also include media such as ‘CD or DVD discs, and many other forms ...[including] a mobile telephone which contains SMS messages’;<sup>24</sup> for the purposes of things such as seizure orders.

Swedish evidentiary law contains no specific rules assigning value to particular types of evidence; instead, this is left entirely to the court’s discretion. This discretion is rather broad, as can be appreciated from the wording of the relevant Swedish statutes (outlined below). The overall determination of the probative value rests with the court which engages in the ‘conscientious examination’ of the evidence, a trait common to civil law systems.<sup>25</sup> Thus, the court’s discretion is the largest determinative factor in the admissibility of evidence, provided the court is satisfied of the authenticity of the evidence before it.

The court must, after ‘evaluating everything that has occurred in accordance with the dictates of its conscience [...] determine what has been proved in the case’.<sup>26</sup> The CJP further requires that evidence must be of sufficient probative value to be admissible.<sup>27</sup>

Chapter 38 of the CJP contains provisions regarding documentary evidence, specifying that ‘[W]ritten documents invoked as evidence should be produced in the original. A certified copy may be produced if this is found sufficient or if the original is not obtainable’.<sup>28</sup> However, in criminal cases, there is no burden on the accused to produce relevant written documents.<sup>29</sup> A similar provision is found in Chapter 39 relating to physical evidence, which states that ‘[A]nybody holding an object that can be brought conveniently to the court and that can be assumed to be of importance as evidence, is obliged to make the object available for inspection at a view’.<sup>30</sup> Again, this provision does not impose the burden to bring evidence upon the accused .

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<sup>22</sup> Wong (n 18) 18.

<sup>23</sup> Abdulkareem judgment (n 1) 3.

<sup>24</sup> Wong (n 18) 18; see also CJP (n 21) Ch 27.

<sup>25</sup> Wong (n 18) 27.

<sup>26</sup> CJP (n 21) Ch 35 s. 1.

<sup>27</sup> *ibid* Ch 35 s. 7.

<sup>28</sup> *ibid* Ch 38 s. 1.

<sup>29</sup> *ibid* Ch 38 s. 2.

<sup>30</sup> *ibid* Ch 39 s. 5

In terms of witness testimony, the CJP provides that any witness providing evidence in a case shall give their testimony orally.<sup>31</sup> There are additional provisions in relation to expert witnesses set out in Chapter 40 of the CJP which allow the court to obtain an expert opinion on determining that the relevant issue requires special professional knowledge.<sup>32</sup> Before a court can appoint such an expert and receive expert advice, it must invite the parties to state their views on the involvement of the expert.<sup>33</sup> If the parties come to an agreement on the use of a particular expert, he shall be used 'provided that he is found suitable and there is no impediment to his appointment'.<sup>34</sup> The Swedish legal system further requires that any such expert submit their report in writing, detailing the 'reasoning and circumstances upon which the conclusions in the opinion are founded'.<sup>35</sup> The witness can also be orally examined on the request of parties, should the court find it necessary.<sup>36</sup>

The Court also has the power to order that certain evidence be kept confidential in accordance with the Public Access to Information and Secrecy Act.<sup>37</sup> For example, the Court may order that information relating to an investigation in a criminal case must be kept confidential if it contains details of an individual's personal and financial circumstances and the information cannot be disclosed without the individual or person related to him suffering injury.<sup>38</sup> Confidentiality also applies to information relating to an individual's health or sexual life, including information about abuse, sexual offences or other similar information if it can be assumed that the individual or someone close to them will suffer significantly if the information is released.<sup>39</sup> In addition, if information is presented at a hearing behind closed doors, the confidentiality provisions will remain applicable and the relevant documents may continue to be confidential even during the court's continued handling of the case (unless the court decides otherwise).<sup>40</sup>

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<sup>31</sup> *ibid* Ch 36 s. 16.

<sup>32</sup> *ibid* Ch 40 s. 1.

<sup>33</sup> *ibid* Ch 40 s. 3.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid* Ch 40 s. 7.

<sup>36</sup> *ibid* Ch 40 s. 8.

<sup>37</sup> [Public Access to Information and Secrecy Act](#) (*Offentlighets-och sekretesslag*) (2009: 400).

<sup>38</sup> *ibid* Ch 35, s 1.1.

<sup>39</sup> *ibid* Ch 21, s 1.

<sup>40</sup> *ibid* Ch 43 s. 5.2.



## D. Legal background of the case

### 1. Summary

The Defendant was charged with war crimes pursuant to Section 4 of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (the Act).<sup>41</sup> The District Court found that the Defendant was guilty of the war crime of subjecting protected persons to humiliating or degrading treatment which is intended to seriously violate their personal dignity, but only in relation to some of the photographs.<sup>42</sup> The Court therefore imposed a sanction of six months' imprisonment, pursuant to Chapter 34, Section 1.1 of the Swedish Penal Code (Penal Code).<sup>43</sup>

On appeal, the Court of Appeal confirmed the District Court's finding that the Defendant was guilty of war crimes.<sup>44</sup> However, the Court of Appeal disagreed with the District Court's assessment of the Defendant's actions, finding that more of his conduct met the required threshold to amount to war crimes. In particular, they considered his actions in the majority of the photographs amounted to subjecting protected persons to humiliating or degrading treatment which seriously violated their personal dignity.<sup>45</sup> In addition, the Court of Appeal considered that the Defendant's conduct in publishing some of the photographs on Facebook also met this threshold.<sup>46</sup> The Court of Appeal therefore considered the total penal value of the Defendant's criminality was higher, and increased the Defendant's sentence to nine months' imprisonment, pursuant to Chapter 34, Sections 1.1.2 and 3.2 of the Penal Code.<sup>47</sup>

In reaching these verdicts, the Courts considered a number of legal issues, which are addressed below.

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<sup>41</sup> [The Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes](#) (*Lag om straff för folkmord, brott mot mänskligheten och krigsförbrytelser*) (2014:406) (The Act).

<sup>42</sup> Abdulkareem judgment (n 1) 17.

<sup>43</sup> The Court and thus this report, follows the version of the Swedish Penal Code (*Brottsbalken*) (1962:700) which was in force prior to 1 July 2016: see Abdulkareem COA judgment (n 2) 1. The exact version of the Penal Code which was relied on by the Courts was not able to be located online. However, a translation of the Penal Code from December 2019 is available [here](#).

<sup>44</sup> Abdulkareem COA judgment (n 2) 1 and 4-5.

<sup>45</sup> *ibid* 4-5.

<sup>46</sup> *ibid* 4.

<sup>47</sup> *ibid* 5.

## **2. What legal rules were applicable?**

The Defendant was charged with war crimes both for being photographed next to dead bodies, and for publishing photographs on Facebook.<sup>48</sup> The acts charged allegedly constituted a breach of Section 4.7 of the Act, which requires the prosecution to prove three separate elements:

1. The act must be part of, or otherwise be in connection with, an armed conflict or occupation (Issue One);
2. The act must concern a protected person who is subjected to humiliating or degrading treatment (Issue Two); and
3. The act must also, by its nature, be a serious violation of personal dignity (Issue Three).<sup>49</sup>

## **3. Was there an armed conflict at the relevant time?**

In order to assess whether there was an armed conflict in Iraq at the relevant time, the District Court primarily relied on reports prepared by international actors, including the United Nations Mission for Iraq (UNAMI), as well as the legal position of the Swedish Migration Agency from 2014.<sup>50</sup> The District Court considered that these reports had ‘good credibility’.<sup>51</sup> Ultimately, the District Court found that the prosecutor had conducted a convincing investigation, showing that there was ‘at least’ a non-international armed conflict (NIAC) occurring between Iraq and IS in the Salah al-Din region during the spring and summer of 2015.<sup>52</sup>

## **4. Nexus**

The District Court did not consider in detail whether there was a nexus between the armed conflict and the act committed (as required by Section 4.7 of the Act), nor does it appear to have made an explicit finding on this ground. However, given the Defendant was found to have breached the relevant section, it can be presumed that this element was considered to be satisfied by the District Court. In any event, there was a range of evidence that supported this finding, including testimony and photographs demonstrating that the victims were IS militants, while the perpetrators were Iraqi soldiers (that is, the opposing sides of the armed conflict).<sup>53</sup>

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<sup>48</sup> Abdulkareem judgment (n 1) 3.

<sup>49</sup> *ibid* 5

<sup>50</sup> *ibid* 5-7.

<sup>51</sup> *ibid* 7.

<sup>52</sup> *ibid* 7 and 16.

<sup>53</sup> This evidence is considered in greater detail in below.

The required nexus was confirmed on appeal, as the Court of Appeal noted that they accepted the District Court's assessment that the offence was part of or otherwise associated with an armed conflict in the Salah al-Din region in Iraq.<sup>54</sup>

### 5. Were the persons in the photographs 'protected persons'?

The primary issue in this case was whether the dead persons in the relevant photographs could be considered 'protected persons', as required by Section 4.7 of the Act.<sup>55</sup> Section 3 of the Act defines a 'protected person' as being

a person who, being wounded, sick, shipwrecked, a prisoner of war or a civilian or in some other capacity, enjoys special protection under the Geneva Conventions of 12 August 1949, Additional Protocol I to these Conventions from 1977, or otherwise under customary international law applicable in armed conflicts or during occupation.<sup>56</sup>

In interpreting Section 4.7 of the Act, the District Court considered various sources of international law, including the interpretation of similar provisions in Common Article 3 of the Geneva Conventions<sup>57</sup> and Article 8(2)(c)(ii) of the Rome Statute.<sup>58</sup> It was noted that all three articles contain a prohibition against humiliating and degrading treatment of any person who is put out of action or is otherwise not involved in the fighting, regardless of whether they are suspected of belonging to a terrorist organisation.<sup>59</sup> In particular, the Court noted that Footnote 57 to Article 8(2)(c)(ii) Element 1 of the Elements of Crimes explicitly states that, for war crimes involving humiliation, degradation or other violation of personal dignity, persons can include dead persons.<sup>60</sup> The District Court also noted that the three articles do not require the victim to be aware of the violation, so the person may be unconscious or dead at the relevant time.<sup>61</sup> The District Court therefore found that it would be in accordance with general international law,

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<sup>54</sup> Abdulkareem COA judgment (n 2) 2.

<sup>55</sup> Abdulkareem judgment (n 1) 16. This is discussed in further detail in below.

<sup>56</sup> The Act (n 41) s 3; Abdulkareem judgment (n 1) 7.

<sup>57</sup> [Geneva Conventions \(I-IV\)](#) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions).

<sup>58</sup> [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

<sup>59</sup> Abdulkareem judgment (n 1) 7-9.

<sup>60</sup> Ibid 9; [Elements of Crimes of the International Criminal Court](#).

<sup>61</sup> *ibid*.

Swedish legislation and decisions in national courts of other countries<sup>62</sup> to interpret the term ‘protected person’ as covering dead persons, especially with regards to the prohibition against violating their personal dignity.<sup>63</sup>

Consequently, the District Court concluded the dead persons in the photographs were ‘protected persons’.<sup>64</sup> On appeal, the Court of Appeal agreed with this conclusion.<sup>65</sup>

#### **6. Did the actions involve humiliating and degrading treatment amounting to a serious violation of the personal dignity of the protected persons?**

In considering this issue, the District Court had regard to a variety of evidence on the desecration of bodies, including the International Committee of the Red Cross’ study on customary law,<sup>66</sup> foreign judgments from Finland and Germany applying to people who have posed with severed heads,<sup>67</sup> the statement of an expert witness regarding Islamic practices on the desecration of bodies, and the various films and photographs recovered from the Defendant’s Facebook account and other devices.<sup>68</sup> The Court’s consideration of these films and photographs will be addressed in greater detail below.

On the basis of the written evidence, and the Defendant’s own information, the District Court found that the Defendant had both posed in and published the pictures outlined in the indictment.<sup>69</sup> However, the District Court considered that not all of the Defendant’s actions met the requisite level of humiliating and degrading treatment which ‘seriously’ violated the personal dignity of the deceased persons. In particular, the District Court considered that manifestations of joy, victory gestures, and posing in front of partially dressed dead persons could not be punished in connection with dead persons.<sup>70</sup> Thus, the District Court found that only the photographs

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<sup>62</sup> Unfortunately, the District Court did not elaborate on which other decisions it was referring to and no decisions from other countries were mentioned in this section of the judgment.

<sup>63</sup> *ibid* 7, 9 and 17.

<sup>64</sup> *ibid* 16-17.

<sup>65</sup> Abdulkareem COA judgment (n 2) 2.

<sup>66</sup> In particular, the focus was on Rule 113 which states that every actor in a conflict must take all possible precautions to prevent the dead from being despoiled and the mutilation of dead bodies is prohibited: Abdulkareem judgment (n 1) 10; ICRC, ‘Rule 113. Treatment of the Dead’ (ICRC IHL Database) < [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule113](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule113) > accessed 13 January 2020.

<sup>67</sup> Unfortunately, the District Court did not elaborate on which other decisions it was referring to and no decisions from other countries were mentioned in this section of the judgment.

<sup>68</sup> Abdulkareem judgment (n 1) 9 – 16.

<sup>69</sup> *ibid*.

<sup>70</sup> *ibid* 17.

showing the Defendant posing next to one of the severed heads exposed the person in question to such degrading treatment that it was intended to seriously violate the personal dignity.<sup>71</sup>

The Court of Appeal overturned this finding, noting that it was not possible to simply exclude all pictures where the Defendant exhibited victory gestures or manifestations of joy. Instead, the assessment of whether humiliating or degrading treatment of a protected person is meant to seriously violate their personal dignity should be based on the context in which the act occurs.<sup>72</sup> The Court of Appeal therefore considered the circumstances surrounding the photographs, as well as the photographs themselves, to conclude that the Defendant's actions in relation to the dead persons in each of the photographs was intended to seriously violate their personal dignity.<sup>73</sup> In addition, the Court of Appeal noted that, in publishing the pictures to his Facebook account (and thereby allowing their potentially unlimited distribution on the internet),<sup>74</sup> the Defendant treated the photographed persons in such a humiliating and degrading way that is likely to seriously violate the personal dignity of the persons.<sup>75</sup> Consequently, the verdict that the Defendant was guilty of war crimes was confirmed.<sup>76</sup>

## **7. Intent of the Defendant**

The Defendant did not deny that he was present in the pictures but argued that he was forced to participate in them.<sup>77</sup> In particular, the Defendant stated that he believed that if he had not been completely obedient and loyal to the army, he would have been killed.<sup>78</sup> In considering this argument, the District Court had regard to the photographs and particularly the Defendant's actions and poses therein.<sup>79</sup> The District Court found that there was nothing in the photographs to indicate that the Defendant was forced to participate and, in fact, some of the photographs suggested the opposite.<sup>80</sup> Therefore, the District Court concluded the Defendant's objection of lack of intent and distress had not been proven.

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<sup>71</sup> *ibid.*

<sup>72</sup> Abdulkareem COA judgment (n 2) 3.

<sup>73</sup> *ibid* 3-4.

<sup>74</sup> It is presumed that the Defendant had a private Facebook profile as the District Court noted that the pictures published to the Defendant's Facebook page were only accessible to his friends. However, the District Court also confirmed that it was not possible to see how many people actually an opportunity had to see what was published in July 2015 since Facebook does not have data about the number of friends the Defendant had at the relevant time: see Abdulkareem judgment (n 1) 13. This may explain why the Court of Appeal stated that publication of the images on Facebook allowed their unlimited distribution: see Abdulkareem COA judgment (n 2) 4.

<sup>75</sup> *ibid* 4.

<sup>76</sup> *ibid* 5.

<sup>77</sup> Abdulkareem judgment (n 1) 14 – 15.

<sup>78</sup> *ibid* 15.

<sup>79</sup> *ibid* 18. This issue will be considered in greater detail below.

<sup>80</sup> *ibid* 17.

Again, this finding was confirmed by the Court of Appeal, which stated ‘it is also clear that [the Defendant] has not acted in distress or had a lack of intent in his conduct.’<sup>81</sup>

## II. DDE

The prosecutor in this case relied on extensive DDE in the form of photographs, a film and Facebook data. In total, 24 censored photographs were tendered as ‘written evidence’<sup>82</sup> and split into two distinct categories of ‘red marked’ and ‘orange marked’.<sup>83</sup> Orange marked photographs depicted the Defendant in military combat uniform and armed with various weapons, including an anti-tank grenade launcher, an automatic rifle and a machine gun.<sup>84</sup> Red marked images depicted the Defendant posing near dead bodies, or with severed heads.<sup>85</sup> The District Court and Court of Appeal referred to 17 photographs as being ‘red marked’ (photographs 1-2, 7, 9-12, 14-22 and 24).<sup>86</sup> The District Court describes the general contents of approximately 11 different photographs, but the contents of individual photographs are not discussed in detail with reference to their numerical label.<sup>87</sup>

The manner in which the photographs were taken varied, as some were taken by someone outside the frame, and others were taken in the form of so-called ‘selfies’, which the Court of Appeal described as photographs ‘where [the defendant] and others appear in the foreground of the picture, but where one or two dead people are in the focus of the images’.<sup>88</sup> In total, eight of the photographs were ‘selfies’ (photographs 2, 7, 9-10, 15-16, 18 and 24).<sup>89</sup> There is inconsistency between the two Courts about how many of the relevant photographs were uploaded to the Defendant’s Facebook account. The Court of Appeal stated that four photographs were published on the Defendant’s Facebook account and all these photographs belonged to the red marked category (photographs 1, 9, 12 and 24). However, the District Court only refers to two photographs being posted on the Defendant’s Facebook (photographs 1 and 9).<sup>90</sup>

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<sup>81</sup> Abdulkareem COA judgment (n 2) 4.

<sup>82</sup> Abdulkareem judgment (n 1) 3, 16.

<sup>83</sup> *ibid* 11; Abdulkareem COA judgment (n 2) 4. Note: no information is provided by either Court as to how the images were censored, other than that they were labelled as ‘censored’.

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid*.

<sup>86</sup> *ibid*; Abdulkareem COA judgment (n 2) 4. Note: No orange marked photographs are individually discussed in the judgment, however as 17 photographs are referred to as ‘red marked’, it is assumed that between 2 to 7 photographs may fit into the orange marked category.

<sup>87</sup> Abdulkareem judgment (n 1) 11-12.

<sup>88</sup> Abdulkareem COA judgment (n 2) 4.

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid*; Abdulkareem judgment (n 1) 3-4, 11-13, 16.

The film was published on the Defendant's Facebook account in July 2015 and was also tendered as 'written evidence' by the prosecutor.<sup>91</sup> The Facebook data that was used as DDE included screenshots, general information about publication, and logins.<sup>92</sup>

### **A. What did the DDE Prove?**

The DDE used in this case was relevant to varying extents to the second and third issues set out above at 2.4.2. Predominantly, the DDE was used to determine whether the Defendant had committed a serious violation of the dignity of protected persons. The film, as well as the Facebook data, contributed to establishing numerous counts of serious violation of dignity. This is set out in detail below.

### **B. DDE relied upon to provide context to the offending**

The Courts used DDE to provide context to the offending, which assisted with the determination of two issues: whether there was a nexus between the acts and the NIAC, and whether the dead persons in the photographs were 'protected persons'. In particular, it assisted to demonstrate the link between the victims and the NIAC, as required by both Swedish law and IHL for them to constitute protected persons.<sup>93</sup>

The DDE that was used to provide context to the offending was photographs. supporting oral testimony provided by the Defendant. A preliminary investigation into the Defendant found that the photographs of the Iraqi Army soldiers and IS were taken during spring 2015,<sup>94</sup> and the Defendant's testimony confirmed that they were taken in Salah al-Din region in Iraq.<sup>95</sup> An expert witness confirmed that during the spring of 2015, an internal armed conflict was occurring in this region between the State of Iraq on the one hand, and the IS on the other, this finding was supported by both Courts.<sup>96</sup> A number of the censored orange marked images show the Defendant in his army uniform and holding various weaponry.

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<sup>91</sup> Abdulkareem judgment (n 1) 3, 15.

<sup>92</sup> *ibid* 12. Note: the login data includes information on the date and time of login, as well as the location of the login.

<sup>93</sup> See discussion of the legal requirements at Section 2.4.5 above.

<sup>94</sup> Abdulkareem COA judgment (n 2) 4.

<sup>95</sup> *ibid*; Abdulkareem judgment (n 1) 14-15. This information formed part of the preliminary investigation.

<sup>96</sup> Abdulkareem judgment (n 1) 4, 6-7, 11, 16; Abdulkareem COA judgment (n 2) 2.

Overall, the District Court concluded that the dead persons appearing in the photographs were protected persons<sup>97</sup> and, on appeal, the Court of Appeal confirmed this conclusion.<sup>98</sup> The Court of Appeal further expressed that it accepted that ‘the offence was part of or otherwise associated with an armed conflict in the Salal al-Din region in Iraq’.<sup>99</sup>

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<sup>97</sup> Abdulkareem judgment (n 1) 16-17.

<sup>98</sup> Abdulkareem COA judgment (n 2) 2.

<sup>99</sup> *ibid.*



Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court	Probative Value – Court of Appeal
<b>Photographs</b> <ul style="list-style-type: none"> <li>• <b>Orange marked</b></li> <li>• <b>Censored</b></li> <li>• <b>Unspecified number</b></li> </ul>	<p>The photographs were obtained by the police while they were investigating other crimes of the Defendant and were then submitted to the Swedish Armed Forces.<sup>100</sup></p> <p>Numerous photographs were published to the Defendant's Facebook and others were taken from his mobile phone.<sup>101</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court found that:</p> <ul style="list-style-type: none"> <li>• The photographs confirmed the Defendant's statement that he was in the military.<sup>102</sup></li> <li>• The photographs showed him in combat uniform and holding weapons including 'an anti-tank grenade launcher, an automatic rifle and a machine gun'.<sup>103</sup></li> <li>• The photographs were taken in the Salah al-Din region in Iraq, where it was found that a NIAC was occurring at the relevant time.<sup>104</sup></li> </ul>	<p>The Court of Appeal made no separate finding to the District Court in relation to this DDE.<sup>105</sup></p>

<sup>100</sup> Abdulkareem judgment (n 1) 4.

<sup>101</sup> Abdulkareem judgment (n 1) 14; Abdulkareem COA judgment (n 2) 2.

<sup>102</sup> ibid 11.

<sup>103</sup> ibid.

<sup>104</sup> ibid 4.

<sup>105</sup> Abdulkareem COA judgment (n 2) 1.

	However, it is not specified whether these particular photographs were obtained from Facebook or his mobile phone.			
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### **C. DDE relied upon to determine whether the act was a serious violation of the personal dignity of the protected persons**

Having established the victims were protected persons, the District Court then turned to the issue of whether the Defendant's actions amounted to humiliating and degrading treatment which was a serious violation of the personal dignity of the protected persons. The DDE relied on for this purpose included the previously mentioned film, the photographs and the Facebook data. The content of the photographs and the film showed the Defendant engaging in a range of different actions with dead bodies and severed heads.

In analysing the DDE, the District Court discussed the range of photographs (without specific reference to their numerical label) and determined that they depicted the following acts:

- (a) The Defendant smiling while pointing at a severed head with a weapon;<sup>106</sup>
- (b) The Defendant wearing military uniform and ammunition belt, pointing with a screwdriver at a severed head lying on a barrel;<sup>107</sup>
- (c) A selfie of the Defendant making a 'V-sign' as three dead bodies partly undressed lay on the ground;<sup>108</sup>
- (d) Four bodies lying on the ground. Three of the bodies are lying with their head shown in the picture and the fourth is positioned so that only the lower part of the body can be seen;<sup>109</sup>
- (e) The Defendant posing with his foot and weapon on a dead body;<sup>110</sup>
- (f) The Defendant standing next to another man and pointing a weapon towards a dead body on the ground;<sup>111</sup>
- (g) '...between the two bodies lying on the ground, a black strap can be seen between the two bodies lying on the ground, as well as a chain from the body on the right, which is partly beneath the right body. A man in military uniform stands with his foot on a piece of the chain. The chain and the strap may have been used to drag the bodies behind, for example, a car';<sup>112</sup>
- (h) Defendant squatting in front of a barrel with a severed head on it;<sup>113</sup>

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<sup>106</sup> Abdulkareem judgment (n 1) 11.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.* Note: the "V-sign" is not explained, but presumably is the commonly used "peace sign" made with index and middle finger.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.* According to the NFC analysis, the body in this picture belongs to the severed head photographed on the barrel.

<sup>111</sup> *ibid.*

<sup>112</sup> Abdulkareem judgment (n 1) 11.

<sup>113</sup> *ibid.*

- (i) A picture which appears to be of the Defendant taking another picture of himself and a dead body on the ground;<sup>114</sup>
- (j) Additional pictures with severed heads and partially undressed bodies;<sup>115</sup> and
- (k) The Defendant looking straight into the camera while pointing at a body whose head has been severed and placed on a barrel.<sup>116</sup>

As noted in above, the District Court considered that only some of the actions depicted in the photographs met the threshold of being humiliating and degrading treatment that is intended to seriously violate the personal dignity of the protected persons. This included all pictures where the Defendant posed next to one of the severed heads (such as the photographs described at (a), (b), (h) and (k) above) but did not include pictures showing manifestations of joy or victory gestures or the Defendant posing with partially dressed dead people.<sup>117</sup> The Court of Appeal disagreed with these findings and determined that the Defendant's actions in the photographs should be assessed based on the context in which they occurred.<sup>118</sup> The Court of Appeal therefore ultimately concluded that the majority of actions shown in the pictures met the threshold of being humiliating or degrading treatment that was intended to seriously violate their personal dignity, including the photographs described at (c) to (g) and (i) above.<sup>119</sup>

The film shows a severely injured or dead man on the bonnet of a car. The Defendant is seen reversing the car. Numerous other people can be seen discussing whether the man on the bonnet is alive or not.<sup>120</sup> The District Court found that this film depicted the Defendant acting in mutual agreement with others and that his actions in the film showed his intent.<sup>121</sup> Facebook data, obtained through an investigation conducted by the prosecution, was further used to indicate the date of creation of the Defendant's profile, the potential audience that had access to the photographs and film, track his logins, and the geographic location data associated with his logins and posting.

In particular, the Court refers to photographs 1 and 9 and their specific Facebook data, as set out in the table below. The District Court looked at how many Facebook friends the Defendant had, in order to assess how many people could have accessed the photographs. The District Court

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<sup>114</sup> *ibid* 12.

<sup>115</sup> *ibid*.

<sup>116</sup> *ibid*.

<sup>117</sup> *ibid* 17.

<sup>118</sup> Abdulkareem COA judgment (n 2) 3.

<sup>119</sup> *ibid* 3-4.

<sup>120</sup> Abdulkareem judgment (n 1) 10.

<sup>121</sup> *ibid*.

noted that, at the time of posting, there were around one billion registered Facebook users.<sup>122</sup> However, the District Court noted that the photographs published on the Defendant's Facebook were only accessible to his friends and that the number of Facebook friends he had was only confirmed on 20 May 2016, almost a year after the photographs were posted.<sup>123</sup> Therefore, the District Court found that it was 'not possible to say how many people actually had an opportunity to see what was published in July 2015'.<sup>124</sup> In the case of photographs 1 and 9, which were 'liked' 44 and 42 times respectively, the District Court found that '[I]t may be assumed that at least those who have liked the image have viewed it'.<sup>125</sup>

The following table identifies the DDE that was relied on by the District Court and Court of Appeal to assess this issue.

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<sup>122</sup> *ibid* 12.

<sup>123</sup> *ibid* 13.

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid* 12.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – District Court	Probative Value – Court of Appeal
<b>Photographs (general)</b>	The photographs were obtained by the police while they were investigating other crimes of the Defendant and were then submitted to the Swedish Armed Forces. <sup>126</sup> Numerous photographs were published to the Defendant’s Facebook and others were taken from his mobile phone. <sup>127</sup>	There was nothing in the judgment to suggest that the DDE was challenged.	In analysing this evidence, the District Court found <ul style="list-style-type: none"> <li>• Where the Defendant posed next to a severed head, those photographs ‘exposes the person in question to degrading treatment that is intended to seriously violate their personal dignity’.<sup>129</sup></li> <li>• Where the Defendant posed in the photographs ‘in front of the partially dressed dead people does not reach the level at which they are likely to seriously violated their personal dignity’.<sup>130</sup></li> <li>• The District Court found that two of the photographs and the film</li> </ul>	The Court of Appeal, in relation to photographs published on Facebook made the following findings: <ul style="list-style-type: none"> <li>• ‘By publishing the images, he has treated the photographed persons in such humiliating and degrading way that is likely to seriously violating the personal dignity of the persons’.<sup>132</sup></li> <li>• ‘On the grounds mentioned by the District Court, it is also clear that [the Defendant] has not acted in distress or had a lack of intent in his conduct’.<sup>133</sup></li> <li>• Where the Defendant posed in the photographs of dead persons, it</li> </ul>

<sup>126</sup> Abdulkareem judgment (n 1) 4.

<sup>127</sup> ibid 14; Abdulkareem COA judgment (n 2) 2.

<sup>129</sup> ibid 17.

<sup>130</sup> ibid.

<sup>132</sup> Abdulkareem COA judgment (n 2) 4.

<sup>133</sup> ibid.

	<p>The prosecutor gained access to the pictures on Facebook through a relative of the Defendant.<sup>128</sup></p>		<p>were published on Facebook in July 2015.<sup>131</sup></p>	<p>violated their personal dignity as ‘it is not generally possible to exclude victory gestures or manifestations of joy from what could constitute a punishable war crime, because it depends on the context in which they are committed and how they manifest themselves’.<sup>134</sup></p> <ul style="list-style-type: none"> <li>• The Defendant’s “selfies” with dead persons subjected the persons to ‘humiliating or degrading treatment that was intended to seriously violate their personal dignity’.<sup>135</sup></li> <li>• The Court of Appeal ‘has difficulty seeing any other reasonable motive for the subsequent photographing of the bodies, other than for an intentionally degrading purpose’.<sup>136</sup></li> </ul>
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<sup>128</sup> Abdulkareem judgment (n 1) 12.

<sup>131</sup> *ibid* 4, 10.

<sup>134</sup> Abdulkareem COA judgment (n 2) 3.

<sup>135</sup> *ibid* 4.

<sup>136</sup> *ibid*.

<p><b>Photograph 1</b></p> <ul style="list-style-type: none"> <li>• <b>Red marked</b></li> <li>• <b>Censored</b></li> <li>• <b>Published on Facebook on 4 July 2015</b></li> <li>• <b>44 likes</b></li> <li>• <b>42 comments</b></li> </ul>	<p>The Prosecutor obtained access to this photograph on Facebook through a relative of the Defendant.<sup>137</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court made no distinct findings as to this particular piece of DDE.</p>	<p>The Court of Appeal made the following findings:</p> <ul style="list-style-type: none"> <li>• ‘By publishing the images, he has treated the photographed persons in such humiliating and degrading way that is likely to seriously violating the personal dignity of the persons’.<sup>138</sup></li> </ul>
<p><b>Photograph 9</b></p> <ul style="list-style-type: none"> <li>• <b>Red marked</b></li> <li>• <b>Censored</b></li> <li>• <b>Published on Facebook on 3 July 2015</b></li> <li>• <b>42 likes</b></li> <li>• <b>14 comments</b></li> </ul>	<p>The Prosecutor obtained access to this photograph on Facebook through a relative of the Defendant.<sup>139</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court made no distinct findings as to this particular DDE.</p>	<p>The Court of Appeal made the following findings:</p> <ul style="list-style-type: none"> <li>• ‘By publishing the images, he has treated the photographed persons in such humiliating and degrading way that is likely to seriously violating the personal dignity of the persons’.<sup>140</sup></li> </ul>
<p><b>Film</b></p>	<p>Uploaded to the Defendant’s</p>	<p>There was nothing in the judgment to suggest that the</p>	<p>In analysing this evidence, the District Court found that:</p> <ul style="list-style-type: none"> <li>• In the context of the film, the Defendant and others must ‘be</li> </ul>	<p>The Court of Appeal made the following findings:</p> <ul style="list-style-type: none"> <li>• ‘The Court of Appeal assesses that the dead people were transported</li> </ul>

<sup>137</sup> Abdulkareem judgment (n 1) 12.

<sup>138</sup> Abdulkareem COA judgment (n 2) 4.

<sup>139</sup> Abdulkareem judgment (n 1) 12.

<sup>140</sup> Abdulkareem COA judgment (n 2) 4.



	<p>Facebook in July 2015.<sup>141</sup></p> <p>On 5 July 2015, two albums were created on the Defendant's Facebook containing film clips. This film is one of them.</p>	<p>DDE was challenged.</p>	<p>presumed to have performed the act together and by mutual agreement'.<sup>142</sup></p> <ul style="list-style-type: none"> <li>• Further to the above, that the Defendant 'must therefore be presumed to have intent'.<sup>143</sup></li> <li>• The District Court found that the film was 'presumably filmed just before the corpses were photographed'.<sup>144</sup></li> </ul>	<p>to the site and placed there in a manner that was demeaning for the dead persons'.<sup>145</sup></p>
<p><b>Facebook data</b></p> <ul style="list-style-type: none"> <li>• <b>Recorded logins between 1 March 2015 and 1 September 2015</b></li> <li>• <b>IP address numbers and ISPs recorded</b></li> <li>• <b>Able to geographically locate place of logins</b></li> </ul>	<p>Details of how this was obtained vary. Presumably it was obtained by the police. Some parts were obtained as part of a preliminary investigation and supported by the</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court made no distinct findings as to this particular piece of DDE, other than that it contextualised and verified other DDE.</p>	<p>The Court of Appeal made no further findings in relation to this DDE.</p>

<sup>141</sup> Abdulkareem judgment (n 1) 10.

<sup>142</sup> ibid.

<sup>143</sup> ibid.

<sup>144</sup> ibid. No information is provided as to how the Court determined this timeline of events.

<sup>145</sup> Abdulkareem COA judgment (n 2) 3.

	Swedish National Forensic Centre. <sup>146</sup>			
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<sup>146</sup> ibid 3.

## **D. What DDE discussion was there?**

### **1. The way the rule operates in the domestic system**

Rules of evidence relating to DDE were not directly discussed in this case, nor are they expressly provided for in Swedish domestic laws. However, the relatively open and free nature of the Swedish rules of evidence creates an opportunity for DDE to be tendered and relied upon in criminal cases. This open system of evidentiary rules means that certain assumptions can be made about the DDE that was discussed by the court in this case.

First, the use of the evidence at first instance stems from the court's discretion to include it. The rules of evidence under the CJP stipulate that any such written evidence can be introduced by either party, or the court itself, and must be admitted in a 'readable form'.<sup>147</sup> The court would have to rule on its relevance and exclude any evidence it deemed manifestly irrelevant or immaterial to the case. As the court holds the discretion to dismiss or allow the admission of evidence, reliance on DDE throughout this case illustrates that the DDE used was relevant, probative, and authenticated. This general assumption is supported by the 'conscientious examination' principle included in the Swedish legal system.<sup>148</sup>

Rules regarding expert opinions are set out under Chapter 40 of the CJP, specifying that any report made by the expert must be submitted to the court in writing and oral testimony will only be given if the court deems it suitable on the request of one or more of the parties.<sup>149</sup> Expert evidence was used in this case in the form of expert statements from the Swedish National Forensic Centre (NFC), expert statements from unnamed expert witnesses, reports from UNAMI and a report from the Swedish Migration Agency.<sup>150</sup>

Verification and analysis of the DDE was conducted by expert witnesses. Experts, such as the Swedish National Forensic Centre (NFC), used "image analysis" to determine the content and context of the DDE. For example, the NFC was able to determine that the head shown in photograph 1, belonged to the deceased body that appeared in photographs 11, 13, 14 and 21.<sup>151</sup>

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<sup>147</sup> CJP (n 21) Ch 35 s. 6; Christoffer Wong (n 18) 18.

<sup>148</sup> CJP (n 21) Ch 35 s. 7; Christoffer Wong (n 18) 27.

<sup>149</sup> CJP (n 21) Ch 40 s. 7-8.

<sup>150</sup> Abdulkareem judgment (n 1) 3.

<sup>151</sup> *ibid* 12.

Both the Court of Appeal and the District Court enforced a confidentiality order in relation to the uncensored DDE, in accordance with the Public Access to Information and Secrecy Act.<sup>152</sup> These uncensored photographs show persons who ‘can be identified by relatives’ and show the Defendant ‘when he squats in front of a barrel with a severed head’.<sup>153</sup>

## 2. Whether the rule is reflected in other legal systems

The District Court made a number of references to war crimes prosecutions in similar circumstances that had occurred in Finland and Germany.<sup>154</sup> In particular, it referenced proceedings applying to people who had posed with severed heads.<sup>155</sup> Unfortunately, the Court did not elaborate on which precedents it was referring to. However, in the indictment contained in Annex 1 to the District Court judgment<sup>156</sup> the prosecutor identifies that they had submitted into evidence:

Finnish judgments showing that Birkalands District court and the Central District Court of Justice have determined that posing with separated heads should be considered a war crime, to the effect that war crimes according to international custom can be committed against dead persons ....

Press release from the Supreme Court in Frankfurt am Main stating that the Court ruled that posing and photography with severed heads is humiliating treatment of protected persons under humanitarian law, to prove that war crimes under international custom can be committed against dead persons...<sup>157</sup>

This demonstrates that, although these countries may each have slightly different rules of evidence relating to the prosecution of war crimes and the use of DDE, they can still be used as persuasive precedents.

This case was also referred to in subsequent Swedish jurisprudence relating to similar circumstances, namely the case of *Mohammed Abdullah*.<sup>158</sup> In that case, the Defendant was a member

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<sup>152</sup> [Public Access to Information and Secrecy Act](#) (2009:400); Abdulkareem COA judgment (n 2) 1.

<sup>153</sup> Abdulkareem judgment (n 1) 12.

<sup>154</sup> *ibid* 10.

<sup>155</sup> *ibid*.

<sup>156</sup> Note: this is only available in the untranslated version of the District Court judgment, at page 21.

<sup>157</sup> Note: this translation is not official – see Abdulkareem judgment (n 1) Annex 1 to the untranslated version, page 24.

<sup>158</sup> Abdullah judgment (n 3).

of the Syrian army who was convicted of war crimes for violating the human dignity of five dead or seriously injured people by posing in military uniform among their bodies, with his foot resting on one man's body.<sup>159</sup> Again, the primary evidence in this case was DDE in the form of photographs which had been uploaded to the Defendant's Facebook account.<sup>160</sup> However, the current case was used by the District Court in *Mohammed Abdullah* as an example of the outcome that had been achieved in similar circumstances. Relevantly, the District Court in that case noted that

Documents that seriously violate personal dignity and, in particular, humiliating and derogatory treatment can be of various kinds and there are a number of cases in tribunal practice where they are referred to.<sup>161</sup>

Other notable Swedish cases using DDE as evidence to prosecute international crimes domestically include the case of *Haisam Omar Sakanh*<sup>162</sup> and *Mouhannad Droubi*.<sup>163</sup>

### **3. How the rule was applied in the case in relation to DDE**

The DDE in this case was tendered and accepted as written evidence by the Prosecutor. The three types of DDE used in this case included 24 photographs, 1 film and an unspecified amount of Facebook data. Verification and contextualisation of the DDE was undertaken by various expert witnesses, including the NFC. It was further supplemented by the oral testimony of the Defendant.<sup>164</sup> The most interesting component of the way the DDE was used in this case was the use of Facebook data. In particular, the Court of Appeal found that the publication of particular photographs to Facebook, even if they were only accessible to his Facebook friends, met the threshold of violation of personal dignity.

The Court of Appeal discussed the distribution of photographs on Facebook, in particular noting that by publishing them, the Defendant 'has treated the photographed persons in such humiliation and degrading way that is likely to seriously [violate] the personal dignity of the persons'.<sup>165</sup> The focus of the Court of Appeal on the privacy settings of the Defendant's Facebook is important

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<sup>159</sup> *ibid* 21.

<sup>160</sup> *ibid* 14, 25, and 26.

<sup>161</sup> *ibid* 14.

<sup>162</sup> *Sakanh* judgment (n 3).

<sup>163</sup> *Droubi* judgment (n 3).

<sup>164</sup> *Abdulkareem* judgment (n 1) 13-16.

<sup>165</sup> *ibid*.

for numerous reasons. The fact that the Defendant's Facebook profile was on a 'private' friends setting limited how many people could have direct access to the photographs and the film.<sup>166</sup> This fact was ascertained in the District Court through testimony of the Defendant. Such privacy settings restrict the scope of the distribution of the published photographs and film. However, the Court of Appeal noted that the publication of the photographs and film allowed for their 'unlimited distribution'.<sup>167</sup> Had the settings been on 'public', the Court of Appeal could likely have viewed this as an even more serious violation of personal dignity of the victims. Resultantly, the Defendant may have faced a higher sentence. It is unclear how the Court of Appeal determines that restricted privacy settings would nonetheless allow for 'unlimited distribution', other than to assume the DDE could have the *potential* to be widely distributed by being posted on the internet.

The Facebook data was crucial to this case in attributing the published photographs and films to the Defendant. This DDE was used to establish that the Facebook account was registered on 31 August 2014 in Iraq.<sup>168</sup> The Court further used a log of the Defendant's logins to determine that, between 1 March 2015 and 1 September 2015, the Defendant logged into his account at least once a day and quite often, several times a day.<sup>169</sup> All of the IP numbers associated with the respective logins go to Internet Service Providers (ISPs) in Iraq.<sup>170</sup> The logins recorded between 1 March 2015 and 6 September 2015 occur only in Iraq, with the first login outside of the country occurring in Turkey at 01:22 on 7 September 2015.<sup>171</sup> The District Court found that the Defendant himself had admitted that the logins had taken place in Iraq, which is consistent with the investigation conducted of the logins.<sup>172</sup>

This DDE was further supported by the Defendant's testimony which provided that someone at the "base" helped create his Facebook account and that he uploaded the photographs and film between 3 and 5 July 2015, however he 'does not know why he uploaded the pictures'.<sup>173</sup> The Defendant further claimed that he was unaware of the photographs on his mobile phone and did

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<sup>166</sup> Abdulkareem judgment (n 1) 13.

<sup>167</sup> Abdulkareem COA judgment (n 2) 4. Note: this seems to be in contradiction to what "friends only" privacy settings allow.

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.* An IP (Internet Protocol address) number is a label which can identify a device or computer on a network. More information available [here](#) and [here](#).

<sup>171</sup> Abdulkareem judgment (n 1) 13.

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid* 15. The base is presumably the army base in Iraq.

not distribute those photographs.<sup>174</sup> DDE hereby played a crucial role as it was used in conjunction with the Defendant's testimony to establish the charge.

This is also indicative of a broader finding, namely that where DDE was relied on by the Courts, it was the primary evidence used. Expert evidence was used by the Courts to interpret and support the DDE. For example, an expert who was a professor of Islamic theology and philosophy was consulted about the implications of desecrating corpses according to Muslim tradition.<sup>175</sup> Similarly, the Courts often relied on multiple forms of DDE as corroborating evidence leading to one conclusion. This is further evidence that the Courts attributed significant value to the DDE in making their findings.

The weight attributed to the DDE by the Courts may have been influenced by the Defendant admitting a number of key facts – in particular, that he was present in the photographs in question, and that the events took place in Iraq in spring 2015.<sup>176</sup> Such admissions meant that the Court was not required to take additional steps to interrogate the authenticity and reliability of the DDE, including for example, whether it was actually the Defendant in the photographs. In light of these admissions, it is notable that some of the photographs still underwent an additional verification procedure in the form of analysis by the NFC. However, according to the prosecutor's indictment, the purpose of this analysis was only to confirm 'that Raed Abdulkareem posed and allowed himself to be photographed next to the dead person both before and after his head was separated'.<sup>177</sup> The District Court relied on the NFC's analysis significantly throughout its review of the relevant photographs.<sup>178</sup> The assistance of the NFC has been sought in a number of other Swedish cases to confirm, review, or authenticate various elements of the DDE relied upon in these proceedings.<sup>179</sup> It is therefore arguable that this additional verification procedure is used because it elevates the probative value of the evidence, as it assists to confirm the content, authenticity, and reliability of the DDE.

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<sup>174</sup> *ibid.*

<sup>175</sup> *ibid* 10 and 16.

<sup>176</sup> *ibid* 4.

<sup>177</sup> Note: this translation is not official – see Abdulkareem judgment (n 1) Annex 1 to the untranslated version, page 23.

<sup>178</sup> See for example Abdulkareem judgment (n 1) 11 and 12.

<sup>179</sup> See for example the cases of *Haisam Omar Sakanb* (n 3) and *Mohammed Abdullah* (n 3).

# Prosecutor v. Raed Abdulkareem – REFERENCE LIST

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- *Prosecutor v Raed Thaer Abdulkareem*, Blekinge District Court, B 569-16, Judgment 6 December 2016 (Abdulkareem judgment). The original judgment from the Blekinge District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment (as Annex A) is available [here](#).
- *Prosecutor v Raed Thaer Abdulkareem*, Scania and Blekinge Court of Appeal, B 3187-18, Judgment 11 April 2017 (Abdulkareem COA judgment). A unofficial English translation of this judgment is available [here](#).
- [\*Prosecutor v Mohamad Abdullah\*](#), Södertörn District Court, B 11191-17, Judgment 25 September 2017
- *Prosecutor v Monbannad Droubi* Södertörn District Court, B 2639-16, Judgment 11 May 2016 and Svea Court of Appeal, B 4770-16, Judgment 5 August 2016, available [here](#)
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  - Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85;
  - Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135;
  - Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
- [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90



- [Elements of Crimes of the International Criminal Court.](#)
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# **Prosecutor v. Mohamad Abdullah (Sweden, 2017)**

**Södertörn District Court, B 11191-17, Judgment 25 September 2017**

*Prepared by Agata Daszko and Bonnie Johnston*

*Edited by Dr Emma Irving and Neil Cockerill*

## **I. Executive Summary**

This case involved proceedings in Sweden against a member of the Syrian army, Mr Mohamad Abdullah (the Defendant) for violating the human dignity of five dead or seriously injured persons by posing in military uniform among their bodies, with his foot resting on one man's body.<sup>1</sup> This case is important as it is the first case involving a conviction of a member of the Syrian army for war crimes committed during the Syrian conflict, and was a test case for the use of social media material as evidence of international crimes.<sup>2</sup> The primary evidence in this case was digitally derived evidence (DDE), in the form of photographs and posts that had been uploaded to the Defendant's Facebook account, which were relied on by the District Court to convict him. A report by the Swedish National Forensic Centre (NFC) was also included by the Prosecutor in their prosecutorial bundle, which is not referenced by the District Court but is said to prove the photograph in question is authentic and has not been tampered with.<sup>3</sup>

## **I. Background**

### **A. DDE legal provisions / evidentiary norms**

No rules of evidence or other legal provisions relating to the DDE were discussed in the judgment of the District Court. The legal framework of evidence, including DDE, in the Swedish legal system is considered further below.

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<sup>1</sup> *Prosecutor v Mohamad Abdullah*, Södertörn District Court, B 11191-17, Judgment 25 September 2017 (Abdullah Judgment).

<sup>2</sup> Anne Barnard, 'Syrian Soldier Is Guilty of War Crime, a First in the 6-Year Conflict' (*The New York Times*, 3 October 2017) <<https://www.nytimes.com/2017/10/03/world/middleeast/syria-war-crime.html>> accessed 5 December 2019.

<sup>3</sup> Abdullah Judgment (n 1) 25. Unfortunately, this report was not able to be accessed by the authors.

## B. Factual background of the case

The Defendant was a Syrian national who belonged to the Alawite group.<sup>4</sup> He joined the Syrian army at the start of 2014, although his role within the army was contested in the proceedings.<sup>5</sup> According to the Defendant, he was part of the medical team and did not carry weapons. However, the Prosecutor alleged the Defendant had a more prominent role, as a result of pictures showing him wearing an ammunition belt and the content of posts made on Facebook.<sup>6</sup> Ultimately, however, the District Court considered it did not need to determine this issue because it had no decisive significance to the case.<sup>7</sup>

In July 2015, the Defendant came to Sweden seeking asylum.<sup>8</sup> In 2016, the police and prosecutors received tips that the Defendant fought in Syria, as well as a photograph of the Defendant.<sup>9</sup> In the photograph, the Defendant is wearing a military uniform while standing with his foot on the stomach of a person who was either dead or seriously injured, with four other dead or seriously injured persons around him (a copy of this photograph is available in Appendix 1).<sup>10</sup>

The Defendant argued<sup>11</sup> that the dead or seriously injured persons depicted in the photograph were members of the Islamic State.<sup>12</sup> They were brought to the Syrian army's base in Otejba by villagers, and were not subjected to any violence at the scene (that is, all wounds were sustained prior to or during their transfer to the army base).<sup>13</sup> The Defendant stated that, upon receiving these persons from the villagers, his officer indicated it would raise morale if the soldiers posed for photographs with the bodies to create war propaganda. The Defendant stated that he was ordered to take a photograph with the bodies for this purpose and believed he would be executed for treason if he did not comply.<sup>14</sup> The Defendant was arrested in August 2017 and charged with exposing at least five persons to humiliating and derogatory treatment. This charge was in relation

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<sup>4</sup> Abdullah Judgment (n 1) 3 and 11.

<sup>5</sup> *ibid* 3.

<sup>6</sup> *ibid*.

<sup>7</sup> *ibid*.

<sup>8</sup> *ibid*.

<sup>9</sup> *ibid*. Media reports indicate that this information was provided by other Syrian refugees: see Trial International, 'Abdullah Mohamed' (*Trial International*, 10 January 2018) <<https://trialinternational.org/latest-post/mohamed-abdullah/>> accessed 5 December 2019; see also Barnard (n 2).

<sup>10</sup> *ibid*.

<sup>11</sup> Unfortunately, the District Court did not provide any other version of events in its judgment.

<sup>12</sup> *ibid* 12.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid*.

to the Defendant posing and allowing himself to be photographed standing next to dead or seriously injured persons with the knowledge that the picture was to be disseminated as part of the Syrian state's war propaganda.<sup>15</sup>

### C. Legal system background

Sweden is a civil law country. Typically, proceedings in a civil law country are more inquisitorial than adversarial, meaning the court is actively involved in all stages of the proceedings. Importantly, unlike the common law system, criminal cases in Sweden are heard by four judges – one professional judge (who is legally trained) and three lay judges – with no jury.<sup>16</sup> Therefore, the judges play a very active and direct role in all facets of a case, including in relation to adducing evidence and determining its probative value.<sup>17</sup> For example, 'a judge will often actively question witnesses and may even request parties to submit additional evidence'.<sup>18</sup>

The fundamental principles governing the laws of evidence in Sweden are 'free admission' and 'free evaluation' of evidence.<sup>19</sup> This generally means there are no restrictions on what is admissible as evidence, so long as the court finds it relevant to the proceedings. Therefore, and in the absence of a rule explicitly prohibiting its introduction, even illegally obtained evidence can be admitted to the court if it has probative value.<sup>20</sup>

The Swedish rules of procedure for both civil and criminal cases are set out in the Swedish Code of Judicial Procedure (CJP).<sup>21</sup> The CJP sets out general rules relating to presenting evidence in criminal trials. The presentation of evidence in the Swedish legal system is the responsibility of the parties. However, the court may also present evidence on its own motion.<sup>22</sup> Chapter 46 Section 6 of the CJP provides that the presentation of evidence may be made through references to audio and video recordings and other documents in the case, if the court deems it appropriate. Therefore,

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<sup>15</sup> *ibid.*

<sup>16</sup> Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2003) 13 *Indiana International & Comparative Law Review* 405, 421.

<sup>17</sup> *ibid* 429.

<sup>18</sup> *ibid.*

<sup>19</sup> Christoffer Wong, 'Overview of Swedish Criminal Procedure' (Lund University Faculty of Law, 2012) 27 <[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019.

<sup>20</sup> *ibid* 28.

<sup>21</sup> Wong (n 19) 1.

<sup>22</sup> [Swedish Code of Judicial Procedure](#) (1942: 740) (CJP) Ch 35 s. 6.

in the Swedish system, ‘digital material is treated as [a] written document if it can be rendered into a readable form’.<sup>23</sup> Furthermore, ‘written documents’ can also include media such as ‘CD or DVD discs, and many other forms ... [including] a mobile telephone which contains SMS messages’; for the purposes of things such as seizure orders.<sup>24</sup>

Swedish evidentiary law contains no specific rules assigning value to particular types of evidence; instead, this is left entirely to the court’s discretion. The overall determination of probative value rests with the court and the court engages in ‘conscientious examination’ of the evidence, a trait common to civil law systems.<sup>25</sup> The wording used in Swedish statutes, as outlined below, gives the courts a wide scope in how evidence is admitted and evaluated. Thus, the court’s discretion is the determinative factor in the admissibility of evidence.

When evaluating the admissibility and relevance of evidence, the court will conduct a ‘conscientious examination’. The court must, after ‘evaluating everything that has occurred in accordance with the dictates of its conscience [...] determine what has been proved in the case’.<sup>26</sup> The CJP further requires that evidence must be of sufficient probative value to be admissible, stating:

[I]f the court finds that a circumstance that a party offers to prove is without importance in the case, or that an item of evidence offered is unnecessary or evidently should be of no effect, the court shall reject that proof. The court may also reject an item of evidence offered if the evidence can be presented in another way with considerably less trouble or costs.<sup>27</sup>

Generally, the presentation of evidence in the Swedish legal system is the responsibility of the parties, however, the court may also present evidence on its own motion.<sup>28</sup> Chapter 38 of the CJP contains provisions regarding documentary evidence, specifying that: ‘[W]ritten documents invoked as evidence should be produced in the original. A certified copy may be produced if this

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<sup>23</sup> Wong (n 19) 18.

<sup>24</sup> *ibid*; see also CJP (n 22) Ch 27.

<sup>25</sup> CJP (n 22) Ch 35 s 7; Wong (n 19) 27.

<sup>26</sup> CJP (n 22) Ch 35 s. 1.

<sup>27</sup> *ibid* Ch 35 s. 7.

<sup>28</sup> *ibid* Ch 35 s. 6.

is found sufficient or if the original is not obtainable'.<sup>29</sup> However, in criminal cases, there is no burden on the accused to produce relevant written documents.<sup>30</sup> A similar provision is found in Chapter 39 relating to physical evidence, which states that '[A]nybody holding an object that can be brought conveniently to the court and that can be assumed to be of importance as evidence, is obliged to make the object available for inspection at a view'.<sup>31</sup> Again, this provision does not impose the burden to bring evidence upon the accused.

In terms of witness testimony, the CJP provides that any witness providing evidence in a case shall give their testimony orally.<sup>32</sup> There are additional provisions in relation to expert witnesses set out in Chapter 40 of the CJP which allow the court to obtain an expert opinion on determining that an issue requires special professional knowledge.<sup>33</sup> Before a court can appoint such an expert and receive expert advice, the court must invite the parties to state their views on the involvement of the expert.<sup>34</sup> If the parties come to agreement on the use of a particular expert, they shall be used 'provided that he is found suitable and there is no impediment to his appointment'.<sup>35</sup> The Swedish legal system further requires that any such expert submit their report in writing, detailing the 'reasoning and circumstances upon which the conclusions in the opinion are founded'.<sup>36</sup> The witness can also be orally examined on the request of parties, should the court find it necessary.<sup>37</sup>

The District Court also made a number of comments regarding the burden of proof in criminal proceedings. In particular, it was noted that the prosecutor bears the burden of proving everything that has a bearing on the question of guilt, including that the Defendant committed the act alleged and that it was a wrongful act.<sup>38</sup> The District Court also noted that the evidentiary standard in criminal proceedings is beyond reasonable doubt, meaning other explanations for the commission of the crime ought to have been excluded.<sup>39</sup> If the prosecutor cannot prove this, the indictment should be dismissed.<sup>40</sup>

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<sup>29</sup> *ibid* Ch 38 s. 1.

<sup>30</sup> *ibid* Ch 38 s. 2.

<sup>31</sup> *ibid* Ch 39 s. 5

<sup>32</sup> *ibid* Ch 36 s. 16.

<sup>33</sup> *ibid* Ch 40 s. 1.

<sup>34</sup> *ibid* Ch 40 s. 3.

<sup>35</sup> *ibid* Ch 40 s. 3.

<sup>36</sup> *ibid* Ch 40 s. 7.

<sup>37</sup> *ibid* Ch 40 s. 8.

<sup>38</sup> Abdullah Judgment (n 1) 5.

<sup>39</sup> *ibid* 6.

<sup>40</sup> *ibid*.

## D. Legal background of the case

The District Court found the Defendant guilty of a war crime under Chapter 22 Section 6 of the Swedish Penal Code (Penal Code)<sup>41</sup> for humiliating and degrading treatment of persons protected by international humanitarian law.<sup>42</sup> He was therefore sentenced to 8 months' imprisonment.<sup>43</sup> In reaching this verdict, the District Court considered a number of legal issues.

### 1. Existence of an armed conflict

The District Court consulted a number of sources to conclude that, in January 2014, there existed a non-international armed conflict in Syria. The main documents the Court relied on were the reports by the Independent International Commission of Inquiry on the Syrian Arab Republic,<sup>44</sup> as well as domestic<sup>45</sup> and international<sup>46</sup> jurisprudence. Consequently, the District Court concluded that it could apply the rules of international humanitarian law applicable in situations of a non-international armed conflict.

### 2. War crime

The District Court considered that the rules applicable in a non-international armed conflict included Common Article 3 to the four Geneva Conventions<sup>47</sup> and Article 8 (2)(c)(ii) of the Rome Statute,<sup>48</sup> both of which prohibit degrading or humiliating treatment of civilians or of persons no

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<sup>41</sup> The Court, and thus this report, follows the [version of the Swedish Penal Code](#) (*Brottsbalk*) (1962:700) which was in force prior to 1 July 2014: see Abdullah Judgment (n 1) 1. The exact version of the Penal Code which was relied on by the District Court, namely the version in force prior to 1 July 2014, was not able to be located online. A translated version of the Penal Code, which was last updated in 1999, is available [here](#): it is not the same version that was used by the Court, but the authors believe that Chapter 22 Section 6 follows the same wording. The current version of the Penal Code (in Swedish) is available [here](#), but note that significant changes were made to the relevant sections through the [1 July 2014 amendment](#).

<sup>42</sup> Abdullah Judgment (n 1) 21.

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.* 7.

<sup>45</sup> *ibid.* 6, referring to [Prosecutor v. Mouhannad Droubi](#), Svea Court of Appeal B 4770-16, Judgment 5 August 2016.

<sup>46</sup> Abdullah Judgment (n 1) 7, referring to: *Prosecutor v. Tadić* (Appeals Chamber Decision) IT-94-1-AR72 (2 October 1995), *Prosecutor v. Haradinaj* (Trial Chamber Judgment) IT-04-84-T (3 April 2008).

<sup>47</sup> [Geneva Conventions \(I-IV\)](#) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions).

<sup>48</sup> [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

longer taking active part in the hostilities. These offences are punishable in Sweden under Chapter 22 Section 6 of the Penal Code, which recognises the legal applicability of '[...] generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts'.<sup>49</sup> The District Court also noted that the customary international humanitarian law study conducted by the International Committee of the Red Cross had expressed that 'documents that violate personal dignity are not allowed in either international or non-international armed conflict[s]'.<sup>50</sup> Therefore, the District Court concluded that acts which seriously violate personal dignity should also be recognised within the application of Chapter 22 Section 6 of the Penal Code as invoking responsibility for international law violations.<sup>51</sup>

The Court did not find it necessary to determine who the victims of the Defendant were – that is, whether they were fighters or civilians<sup>52</sup> - or whether they were dead or seriously injured.<sup>53</sup> They were, after all, protected persons and, as such, were afforded protection and dignity under international humanitarian law.<sup>54</sup> Therefore, in exposing five of the victims to humiliating or degrading treatment, the Defendant was guilty of a violation of international law and, in turn, of Chapter 22 Section 6 of the Penal Code.<sup>55</sup>

### 3. Nexus

The District Court did not consider in detail the existence of a nexus between the act committed and the armed conflict. However, it found that the Defendant had been fully aware that the photographs would be used as war propaganda.<sup>56</sup> The Court thus concluded that there existed the 'necessary connection between the act and the armed conflict'.<sup>57</sup>

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<sup>49</sup> [Penal Code \(n 41\)](#).

<sup>50</sup> Abdullah Judgment (n 1) 11, referring to [Rule 113 ICRC](#) which reads: 'Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited': ICRC, 'Rule 113. Treatment of the Dead' (ICRC IHL Database) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule113](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule113)> accessed 31 January 2020.

<sup>51</sup> *ibid.*

<sup>52</sup> Abdullah Judgment (n 1) 14.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid* 14-15.

<sup>55</sup> *ibid* 15.

<sup>56</sup> *ibid* 15.

<sup>57</sup> *ibid.*



#### 4. Mitigating Circumstances

The District Court observed that, under Chapter 24 Section 4 of the Penal Code, ‘a deed committed by someone in distress constitutes [...] a crime only if it takes into account the nature of the danger, the damage caused to another and the circumstances in general.’<sup>58</sup> The provision further reads that ‘[n]ecessity exists when a danger threatens life, health, property or some other important interest protected by the law.’<sup>59</sup> In these circumstances, the District Court noted that refuting an objection to distress could be difficult because it is about proving that a certain situation *did not* exist. Thus, the prosecutor’s task was to produce sufficient evidence to prove that defence of distress was not justified (reputing this defence has a slightly lower evidentiary standard than beyond a reasonable doubt).<sup>60</sup> Therefore, the District Court examined whether, as claimed by the Defendant, the crimes he was accused of committing happened because he acted in distress (what is commonly known as duress).<sup>61</sup> The Defendant claimed that his actions were motivated by the fact that he was afraid of being killed for treason if he refused to be photographed.<sup>62</sup> The Court concluded that the assertion lacked basis and was inconsistent with his previous claims. As such, the Defendant should be held responsible for the crime committed.<sup>63</sup>

#### 5. Other

The District Court was also asked to determine whether the Defendant should be allowed to remain in Sweden.<sup>64</sup> Although this discussion falls outside the ambit of the present report as it addresses matters of domestic migration law alone, it is pertinent to note that the District Court ultimately concluded that the Defendant should not be expelled.

## II. DDE

The District Court had regard to a variety of both DDE and non-DDE in reaching its determination on the criminal responsibility of the Defendant. The primary form of DDE was a photograph of the Defendant posing next to five dead or seriously injured persons,<sup>65</sup> but other

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<sup>58</sup> *ibid* 5.

<sup>59</sup> Penal Code (n 41) Ch 24 s. 4 SPC.

<sup>60</sup> Abdullah Judgment (n 1) 6.

<sup>61</sup> *ibid* 15.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid* 16.

<sup>64</sup> *ibid* 17-20.

<sup>65</sup> It is not clear from the judgment that the picture was taken from Facebook, as the judgment simply says that the picture was provided to the Swedish police. However, media reports indicate the photograph was on Facebook: see for example Barnard (n 2); Heba Habib and Louisa Loveluck, ‘A Syrian soldier has been sentenced for battlefield

DDE included photographs and posts uploaded to Facebook.<sup>66</sup> By contrast, the non-DDE used by the District Court included expert evidence (including evidence regarding the interpretation of the DDE) and reports prepared by the Independent International Commission of Inquiry of the Syrian Arab Republic.<sup>67</sup>

## **A. What did the DDE Prove?**

### **1. DDE relied upon to determine the Defendant's treatment of people in the photograph**

DDE was firstly relied on by the District Court to assist with determining whether the Defendant had exposed the five people in the photograph to such humiliating or degrading treatment that their personal dignity had been seriously violated (in contravention of Chapter 22, Section 6 of the Penal Code).<sup>68</sup>

To assist with its review of the photograph, the District Court also considered other (non-DDE) evidence including the previous outcome in a similar case from Sweden<sup>69</sup> and expert evidence regarding the pose adopted by the Defendant in the photograph.<sup>70</sup> The District Court found that, when the photograph was combined with this other evidence, it was clear the Defendant had subjected the five people to such humiliating or degrading treatment their personal dignity had been seriously violated.<sup>71</sup>

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crimes. Why did it take so long?' (*The Washington Post*, 1 October 2017) available at <[https://www.washingtonpost.com/world/middle\\_east/a-syrian-soldier-has-been-sentenced-for-battlefield-crimes-why-did-it-take-so-long/2017/09/30/d4ab28d6-a362-11e7-8c37-e1d99ad6aa22\\_story.html](https://www.washingtonpost.com/world/middle_east/a-syrian-soldier-has-been-sentenced-for-battlefield-crimes-why-did-it-take-so-long/2017/09/30/d4ab28d6-a362-11e7-8c37-e1d99ad6aa22_story.html)> accessed 2 January 2020; Tom Rollins, 'Where are they hiding?' (*The New Humanitarian*, 20 April 2016) available at <<http://www.thenewhumanitarian.org/feature/2016/04/20/where-are-they-hiding>> accessed 2 January 2020; Nuhanovic Foundation, 'Al Kawakibi report on the Case of Mohammed Abdullah in Sweden' (*Nuhanovic Foundation*, 2017) <<http://www.nuhanovicfoundation.org/en/reports-onaaccountability-andareparations/al-kawakibi-report-on-the-case-of-mohammed-abdullah-in-sweden/>> accessed 5 December 2019.

<sup>66</sup> *ibid* 14, 25 and 26.

<sup>67</sup> *ibid* 7, 8 and 26.

<sup>68</sup> *ibid* 14.

<sup>69</sup> *Prosecutor v Raed Abdulkareem*, Scania and Blekinge Court of Appeal, B 3187-16, Judgment 11 April 2017. An unofficial translation of this judgment is available [here](#) (Abdulkareem Judgment).

<sup>70</sup> Abdullah Judgment (n 1) 14-15.

<sup>71</sup> *ibid* 15.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court
<p><b>Photograph</b></p> <p>This photograph shows the Defendant posing next to five dead or seriously injured persons.<sup>72</sup></p>	<p>The photograph was provided to police. Media reports indicate that other Syrian refugees had accessed it on the Defendant's Facebook account and were responsible for providing it to the police, although this is not mentioned in the judgment.<sup>73</sup></p>	<p>There is nothing in the judgment to indicate that the DDE was challenged.</p>	<p>The District Court did not review the content of the photograph in detail, other than to say that:</p> <ul style="list-style-type: none"> <li>• it was impossible to determine whether the people in the photograph were civilians or fighters, or whether they were dead or seriously injured.<sup>74</sup> Ultimately however, it did not matter because they were protected persons who should be treated with dignity and not subjected to abusive treatment;<sup>75</sup></li> <li>• the people were placed in unnatural positions and had been lying on each other in a degrading way;<sup>76</sup> and</li> <li>• the Defendant had posed and allowed himself to be photographed next to five dead or seriously injured persons. He had his foot on one of the people and was looking into the camera.<sup>77</sup></li> </ul>

<sup>72</sup> ibid 13-14 and 25.

<sup>73</sup> ibid 3; Barnard (n 2); Trial International (n 9); Habib & Loveluck (n 65); Rollins (n 65); Nuhanovic Foundation (n 65).

<sup>74</sup> ibid 14.

<sup>75</sup> ibid.

<sup>76</sup> ibid.

<sup>77</sup> ibid.

			<p>The District Court also considered previous jurisprudence relating to similar circumstances, which is explained in greater detail below.<sup>78</sup></p> <p>In reviewing the photograph, the District Court also received evidence from an expert (a Professor of Islamic Theology and Philosophy) regarding the act of the Defendant putting his foot on someone else.<sup>79</sup></p> <p>The expert gave evidence that this pose was particularly sensitive in Arab culture as a way of showing disrespect to others, with the disrespect heightened in this case by there being several other people on the scene.<sup>80</sup></p> <p>Although it is not referred to in the judgment itself, the ‘Custody Objectives’ document prepared by the Prosecutor (included as an Appendix to the judgment) indicates that the Swedish National Forensic Centre provided an expert opinion on the photograph, to prove that it was not tampered with.<sup>81</sup></p>
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## 2. DDE relied upon to determine whether the Defendant should be released from criminal responsibility

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<sup>78</sup> Abdulkareem Judgment (n 69).

<sup>79</sup> Abdullah Judgment (n 1) 4, 14 and 25.

<sup>80</sup> *ibid* 15.

<sup>81</sup> *ibid* 25.

The District Court also had regard to DDE when considering the Defendant’s arguments as to why he should be released from criminal responsibility for the offence. In particular, the Defendant alleged that he acted in distress because he believed he would be executed for treason if he did not follow his superior’s orders.<sup>82</sup>

Ultimately, the District Court considered that the circumstances revealed by the additional photographs taken from his Facebook page and the Defendant’s own testimony meant that there was not an emergency situation and the Defendant should not be released from liability for distress.<sup>83</sup>

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court
<p><b>Photographs</b></p> <p>On the Defendant’s Facebook account (Abo Al Haidaren)<sup>84</sup></p>	<p>The photographs were obtained by the Prosecutor from a Facebook account belonging to the Defendant.<sup>85</sup></p> <p>Again, the judgment does not specify how (or in what form) the Prosecutor obtained the photographs</p>	<p>There is nothing in the judgment to indicate that the DDE was challenged.</p>	<p>The Prosecutor submitted that the pictures prove that:</p> <ul style="list-style-type: none"> <li>• the Defendant was part of the Syrian army’s armed forces;<sup>87</sup> and</li> <li>• the Defendant had a more prominent role in the Syrian army than he alleged, including by appearing in pictures dressed in uniform and wearing an ammunition belt.<sup>88</sup></li> </ul> <p>The District Court identified that the Defendant had commented on one of these pictures – the picture at ‘page 358’ of the preliminary investigation record – where the Defendant is shown to be carrying an</p>

<sup>82</sup> ibid 15.

<sup>83</sup> ibid.

<sup>84</sup> ibid 26. There is no further information provided in the judgment about the content of these photographs.

<sup>85</sup> ibid.

<sup>87</sup> ibid.

<sup>88</sup> ibid 3.

	<p>from the Defendant's Facebook account. However, media reports indicate that third parties (including other Syrian refugees and a human rights organisation) had accessed the pictures on the Defendant's Facebook account and were responsible for providing them to the police and the Prosecutor.<sup>86</sup></p>		<p>ammunition belt.<sup>89</sup> The Defendant commented that it was taken later the same day (as the original photograph referred to above) and he had borrowed the belt from a friend.</p> <p>The District Court therefore relied on at least one of these photographs to demonstrate that the Defendant allowed himself to be photographed again later the same day and was wearing an ammunition belt again (ostensibly borrowed from a friend).<sup>90</sup> This was said to be incompatible with his argument that he was frightened or uncomfortable in the situation.<sup>91</sup></p>
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### 3. Other DDE presented to the District Court

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<sup>86</sup> *ibid* 3; Barnard (n 2); Trial International (n 9); Habib & Loveluck (n 65); Rollins (n 65); Nuhanovic Foundation (n 65).

<sup>89</sup> *ibid* 13.

<sup>90</sup> *ibid* 16.

<sup>91</sup> *ibid*.

The ‘Custody Objectives’ document prepared by the Prosecutor and attached as Appendix 1 to the District Court’s judgment refers to additional DDE which was relied on by the Prosecutor and presented to the District Court as written evidence.<sup>92</sup> Although the District Court’s judgment does not explicitly identify that it has relied on this evidence, there are references throughout the judgment to indicate that it was considered. It is therefore considered in the following table.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court
<p><b>Photographs</b></p> <p>On the Defendant’s Facebook account (Abo Al Haidaren).<sup>93</sup></p>	<p>The photographs were obtained by the Prosecutor from a Facebook account belonging to the Defendant.<sup>94</sup></p> <p>Again, the judgment does not specify how (or in what form) the Prosecutor</p>	<p>There is nothing in the judgment to indicate that the DDE was challenged.</p>	<p>The Prosecutor submitted that the pictures proved that:</p> <ul style="list-style-type: none"> <li>• the Defendant was part of the Syrian army’s armed forces;<sup>96</sup> and</li> <li>• the Defendant had a more prominent role in the Syrian army than he alleged, including by appearing in pictures dressed in uniform and wearing an ammunition belt.<sup>97</sup></li> </ul> <p>As noted above, the District Court relied on at least one of these photographs to assist with the determination of whether the Defendant</p>

<sup>92</sup> ibid 4 and 25-26.

<sup>93</sup> ibid 26. There is no further information provided in the judgment about the content, number or author of these photographs.

<sup>94</sup> ibid.

<sup>96</sup> ibid.

<sup>97</sup> ibid 3.

	obtained the photographs from the Defendant's Facebook account. However, media reports indicate that third parties (including other Syrian refugees and a human rights organisation) had accessed the pictures on the Defendant's Facebook account and were responsible for providing them to the police and the Prosecutor. <sup>95</sup>		could be released from criminal responsibility on the grounds of distress. <sup>98</sup>  It is not known whether the District Court also considered the other photographs.
<b>Excerpts from Facebook pages</b> <sup>99</sup>  The judgment does not provide any further information about these	The Prosecutor obtained the excerpts from Facebook pages. <sup>101</sup>  Again, the judgment does not specify how the Prosecutor	There is nothing in the judgment to indicate that the DDE was challenged.	The Prosecutor submitted that the purpose of the Facebook excerpts was to: <ul style="list-style-type: none"> <li>confirm that the photograph showing the Defendant posing with the five dead or injured people had been disseminated;<sup>103</sup> and</li> </ul>

<sup>95</sup> ibid 3; Barnard (n 2); Trial International (n 9); Habib & Loveluck (n 65); Rollins (n 65); Nuhanovic Foundation (n 65).

<sup>98</sup> ibid 16.

<sup>99</sup> ibid 26.

<sup>101</sup> ibid.

<sup>103</sup> ibid.



<p>excerpts, but a report prepared by a human right organisation indicates that the excerpts included screenshots showing comments made by the Defendant on Facebook as well as Facebook posts made by the Defendant.<sup>100</sup> Copies of these materials are available at Appendix B.</p>	<p>obtained the excerpts from the Defendant’s Facebook account. However, media reports indicate that third parties (including other Syrian refugees and a human rights organisation) had accessed the information on the Defendant’s Facebook account and were responsible for providing it to the police and the Prosecutor.<sup>102</sup></p>		<ul style="list-style-type: none"> <li>• show that the Defendant had a more prominent role in the Syrian army than he had alleged.<sup>104</sup></li> </ul> <p>In its judgment, the District Court referred to ‘the comments [the Defendant] posted on Facebook that he was in the military for four years and been injured twice’.<sup>105</sup> The Defendant responded that this was an exaggeration in response to a person who had written things about him.<sup>106</sup></p> <p>Beyond this, it is not known how (or whether) these posts were used by the District Court.</p>
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<sup>100</sup> AlKawakibi Human Rights Organisations, ‘Report’ (*Al Kawakibi Human Rights Organisation*, 2017) available at [http://www.nuhanovicfoundation.org/user/file/2017\\_al\\_kawakibi\\_organization\\_for\\_human\\_rights\\_swedish\\_case\\_against\\_mohammed\\_abdullah\\_eng.pdf](http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights_swedish_case_against_mohammed_abdullah_eng.pdf) accessed 30 January 2020, 4-7.

<sup>102</sup> *ibid* 3; Barnard (n 2); Trial International (n 9); Habib & Loveluck (n 65); Rollins (n 65); Nuhanovic Foundation (n 65).

<sup>104</sup> *ibid* 3.

<sup>105</sup> *ibid* 13.

<sup>106</sup> *ibid*.

## B. What DDE discussion was there?

This trial involved a landmark conviction – the first conviction of a member of the Syrian army for war crimes during the conflict.<sup>107</sup> In relying predominately on photographs and posts obtained from Facebook, this case has also been hailed as a test case, demonstrating how materials gathered from social media can be used as evidence in criminal proceedings for international crimes.<sup>108</sup> There are three main findings that can be drawn from the use of the DDE in these proceedings.

First, the District Court did not consider it necessary to explicitly examine the authenticity or reliability of the DDE that was used. For example, in the ‘Custody Objectives’ document submitted by the prosecutor (listed in Appendix 1 of the judgment), the Prosecutor identifies that the prosecutorial bundle includes a report by the NFC.<sup>109</sup> This document was not available to the authors of this report but was said to prove that the photograph in question was authentic and had not been tampered with.<sup>110</sup> Notably however, in its judgment the District Court did not refer to this report or address the question of authenticity of the photograph. This is in stark contrast to a previous decision by the Stockholm District Court where reports by the NFC and the National Board of Forensic Medicine regarding films obtained from YouTube and Facebook were heavily relied on in the judgment and assisted to confirm the authenticity and reliability of the DDE.<sup>111</sup> The absence of any discussion of the authenticity of the DDE used in this case is particularly notable given it was ‘open source’ DDE, meaning it is material that is publicly available. The reliability and authenticity of open source DDE must generally be carefully examined as the possibility for editing and manipulating it is usually higher than for closed source DDE (evidence coming from sources that are not accessible to the public).<sup>112</sup> For example, some social media platforms scrub the metadata from the DDE (including, for example, information about the time and place where the image was created) which may affect the probative value and reliability of evidence obtained from this source.<sup>113</sup>

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<sup>107</sup> Barnard (n 2).

<sup>108</sup> *ibid.*

<sup>109</sup> Abdullah Judgment (n 1) 25.

<sup>110</sup> *ibid.*

<sup>111</sup> See *Prosecutor v Haisam Omar Sakbanh*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (*Sakbanh judgment*). The original judgment from the Stockholm District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment is available [here](#).

<sup>112</sup> *ibid.*; Eurojust, ‘Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union’ (The Hague, 2018), 7.

<sup>113</sup> International Bar Association, ‘Evidence Matters in ICC Trials: An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice’ (IBA ICL Perspectives, August 2016), 26-27.

Second, the Court considered previous similar jurisprudence, which had also relied on DDE, in determining the appropriate outcome in this case. The District Court in the present case noted '[d]ocuments that seriously violate personal dignity and, in particular, humiliating and derogatory treatment can be of various kinds and there are a number of cases in tribunal practice where they are referred to.'<sup>114</sup> In particular, the District Court referred to another Swedish case involving Mr Raed Abdulkareem, an Iraqi national.<sup>115</sup> In that case, Mr Abdulkareem posed next to desecrated dead bodies and a severed head and was consequently found guilty of a war crimes and sentenced to 9 months' imprisonment.<sup>116</sup> Again, the primary evidence in this case included photographs and a film (some of which had been uploaded to Facebook) as well as Facebook data.<sup>117</sup> Demonstrating that the law does not operate in a vacuum, the Court in Mr Abdulkareem's case also made a number of references to the fact that prosecution of similar war crimes had taken place in other European jurisdictions, namely Finland and Germany.<sup>118</sup> Thus, Mr Abdulkareem's case was used as an example by the District Court of how DDE could be used to achieve a conviction in similar circumstances.

Finally, expert evidence and other non-DDE was used by the District Court in this case to interpret and support the DDE. For example, in examining the main photograph used in this case, an expert was consulted about the meaning of the pose adopted by the Defendant in the photograph.<sup>119</sup> Similarly, the Defendant's testimony in court was later used to support the District Court's conclusions about the events depicted in the photograph.<sup>120</sup> In addition, the District Court used various forms of DDE to support and corroborate each other. For example, the Defendant's Facebook posts and comments, a form of open-source DDE, were also relied on by the Court to reach their conclusion about the correct characterisation of the conduct shown in the photographs.<sup>121</sup> This indicates that the DDE was the primary evidence relied on in the proceedings, with other evidence adduced to contextualise and corroborate the DDE. It also indicates that the District Court attributed significant value to the DDE (where it was used) in making their findings on the various issues.

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<sup>114</sup> Abdullah Judgment (n 1) 14, the District Court makes an explicit reference to Abdulkareem judgment (n 69).

<sup>115</sup> Abdulkareem Judgment (n 69).

<sup>116</sup> *ibid* 1.

<sup>117</sup> *ibid* 3, 16.

<sup>118</sup> *ibid* 10.

<sup>119</sup> *ibid* 14-15; see Section 3.1.1 above for more information.

<sup>120</sup> *ibid* 15.

<sup>121</sup> *ibid* 13, 15, 26.

## **APPENDIX 1**

### **WARNING**

The following page contains a graphic picture depicting several dead or seriously injured persons in compromising positions.

If you think you will be uncomfortable or sensitive to contents of this nature, please do not continue.



Source: The New Humanitarian, 'Where are they hiding?' (*The New Humanitarian*, 20 April 2016) <<http://www.thenewhumanitarian.org/feature/2016/04/20/where-are-they-hiding>> accessed 2 January 2020.

## **APPENDIX 2**

### **WARNING**

The following 3 pages contain strong language and information regarding killings.

If you think you will be uncomfortable or sensitive to contents of this nature, please do not continue.

1. Screenshot of comments from the Defendant's Facebook page, with translation of comments prepared by the Al Kawakibi Human Rights Organisation



**Diaa Tarabeih: Yahya, leave it to me....game over for this varmint.....**

**Bandah Ali: I hope they are my pictures, it is an honor to me, you varmint.**

**Yahya Fawakherji: Bandah Ali, put a shoes in your mouth, we will meet in the court soon, fuck you and your Assad.**

**Bandah Ali: do whatever you want, you rabbit.**

**If we feared rabbits, we would not grow carrots.( its a popular saying in our home)**

**Yahya Fawakherji: they are not your pictures, are they !!!!! You mouse..... Is not this a post on your Facebook where you said that it is a medal you????**

**Bandah Ali: of course it is a medal, you rabbit , and an honor medal also.**

**Yahya Fawakherji: so, use this medal in Sweden over there, why are you angry....you mouse**

**Bandah Ali: you are wrong, rabbit, I can use this medal all over the world, history will curse you because you do not have honor. The family of Samir Nahili, the bastard, in Homs is famous for having whores, you can review his history.**

Source: AlKawakibi Human Rights Organisations, 'Report' (*Al Kawakibi Human Rights Organisation*, 2017) available at

<[http://www.nuhanovicfoundation.org/user/file/2017\\_al\\_kawakibi\\_organization\\_for\\_human\\_rights\\_swedis\\_h\\_case\\_against\\_mohammed\\_abdullah\\_\(eng\).pdf](http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights_swedis_h_case_against_mohammed_abdullah_(eng).pdf)> accessed 30 January 2020, 4.

2. Screenshot of Facebook post by the Defendant, with translation prepared by the AlKawakibi Human Rights Organisation



بنده علي  
لتوضيح اخواتي ورفقاتي وكل انسان شريف بيحيني وبحبو .  
هيذا يلي لمنشورات هيبني وسام شرف الي ولاهلي لان كنت ومازلت  
جندي بجيش العربي السوري لمدة اربع سنوات تصاوبت مرتين  
والحمد لله كانو سليمين وتحاربت من قبل كل كلب حرب هالبلد وقتل  
قيننا وديج اطفالنا ونقلع برا لبلد ليعمل زلة من ورا شاشة التليفون  
وعم يشتغلو علي هون حتا يندوني انا باي طريقة بس انا سيدنا  
علي حاميني واتكالي عالمولى عز وجل بيعطيني القوة وما بيثاثر  
علي باذن الله .  
بس اكثر شي بيقهرني وبيخليني موت لما ابن بلدي وابن جماعتي  
ويلى كان في يوم من الايام صديقي ودخل بيتي اكلنا وشربنا  
وسكرنا وغنينا وعشنا اجمل ايام وذكريات .  
بيحكي علي وبيقول عني او عن غيري هربت او بيقتد بيحاول  
يعمل مهرج عالقيس كرمال كام لايك بموضوع ايا حدا من طرطوس  
سافر وحب يعمل مستقبل بحب قلو يا صاحبي او يا اخي او يا  
ابن بلدي .  
هيذا انا ابو الحيدر وهيذا ماضي وتاريخي اذا جاز التعبير  
وشو ما نحكا وشو مانقال بحكي عن نفسي انا رح تضلو اخواتي  
واهلي لو الدني فرقنا بتمنى لحة والصدق يجمعونا .مساكن خير  
يا اغلا عالم بلدي كلا .

Mobile Uploads · Nov 28 · 🌐

View Full Size · More Options

Share

394 people like this.

View previous comments...

Facebook INSTALLED Open

Bandah Ali: my friends, my brothers and every honest man who loved me, I want to explain that these posts are a medal honoring me and my family because I was and still a soldier in the Arab Syrian Army for 4 years. I was injured twice, but I am alright. I have been fought by those who destroyed the country, killed us and our children and at last they left the country to show their courage through the screen of their mobile phone. They are planning to cause harm to me in many ways, but my dependence on my God Ali and the help of Ali Protected me and give me the strength that protects me. What bothers me and makes me angry is when the son of my country and my friend with whom I eat, drink wine, sing songs and live happily speaks ill of me and says that I and many others flee from the country or he pretend to be a clown in order to gain some likes on Facebook. I consider everyone, who left Tartus in order to make a good life, my brother, my friend and the son of my country.

This is me, Abo Haydarain, and this is my past and my history. Whatever you say, you are still my brothers. Even if life disperses us, I hope that love and honesty could gather us.

Good night

You are the best people in my life.

Source: AlKawakibi Human Rights Organisations, 'Report' (*Al Kawakibi Human Rights Organisation*, 2017) available at

[http://www.nuhanovicfoundation.org/user/file/2017\\_al\\_kawakibi\\_organization\\_for\\_human\\_rights\\_swedish\\_case\\_against\\_mohammed\\_abdullah\\_eng.pdf](http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights_swedish_case_against_mohammed_abdullah_eng.pdf) accessed 30 January 2020, 5.



3. Screenshot of Facebook comments, with translation prepared by the AlKawakibi Human Rights Organisation



Source: AlKawakibi Human Rights Organisations, 'Report' (*Al Kawakibi Human Rights Organisation*, 2017) available at [http://www.nuhanovicfoundation.org/user/file/2017\\_al\\_kawakibi\\_organization\\_for\\_human\\_rights\\_swedis\\_h\\_case\\_against\\_mohammed\\_abdullah\\_eng.pdf](http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights_swedis_h_case_against_mohammed_abdullah_eng.pdf) accessed 30 January 2020, 6.

# Prosecutor v. Mohamad Abdullah – REFERENCE LIST

## DOMESTIC CASES - SWEDEN

- [Prosecutor v Mohamad Abdullah](#), Södertörn District Court, B 11191-17, Judgment 25 September 2017
- [Prosecutor v Moubannad Droubi](#), Svea Court of Appeal, B 4770-16, Judgment 5 August 2016
- [Prosecutor v Raed Abdulkareem](#), Scania and Blekinge Court of Appeal, B 3187-16, Judgment 11 April 2017
- *Prosecutor v Haisam Omar Sakbanh*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (The original judgment from the Stockholm District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment is available [here](#))

## DOMESTIC LEGISLATION - SWEDEN

- Penal Code (*Brottsbalk*) (1962: 700) (The version of the Penal Code which was relied on by the District Court, namely the version in force prior to 1 July 2014, was not able to be located online. The current version of the Penal Code is available [here](#))
- [Code of Judicial Procedure](#) (*Rättegångsbalk*) (1942: 740)

## INTERNATIONAL SOURCES

- [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90
- *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
- *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 8
- *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
- *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
- *Prosecutor v. Tadić* (Appeals Chamber Decision) IT-94-1-AR72 (2 October 1995)
- *Prosecutor v. Haradinaj* (Trial Chamber Judgment) IT-04-84-T (3 April 2008)

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1. Anne Barnard, 'Syrian Soldier Is Guilty of War Crime, a First in the 6-Year Conflict' (*The New York Times*, 3 October 2017) <<https://www.nytimes.com/2017/10/03/world/middleeast/syria-war-crime.html>> accessed 5 December 2019
2. Christoffer Wong, 'Overview of Swedish Criminal Procedure' (Lund University Faculty of Law, 2012) 27  
<[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019
3. Eurojust, 'Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union' (The Hague, 2018)
4. Heba Habib and Louisa Loveluck, 'A Syrian soldier has been sentenced for battlefield crimes. Why did it take so long?' (*The Washington Post*, 1 October 2017) available at <[https://www.washingtonpost.com/world/middle\\_east/a-syrian-soldier-has-been-sentenced-for-battlefield-crimes-why-did-it-take-so-long/2017/09/30/d4ab28d6-a362-11e7-8c37-e1d99ad6aa22\\_story.html](https://www.washingtonpost.com/world/middle_east/a-syrian-soldier-has-been-sentenced-for-battlefield-crimes-why-did-it-take-so-long/2017/09/30/d4ab28d6-a362-11e7-8c37-e1d99ad6aa22_story.html)> accessed 2 January 2020
5. ICRC, 'Rule 113. Treatment of the Dead' (ICRC IHL Database) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule113](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule113)> accessed 31 January 2020
6. AlKawakibi Human Rights Organisations, 'Report' (*Al Kawakibi Human Rights Organisation*, 2017) available at <[http://www.nuhanovicfoundation.org/user/file/2017\\_al\\_kawakibi\\_organization\\_for\\_human\\_rights\\_swedish\\_case\\_against\\_mohammed\\_abdullah\\_\(eng\).pdf](http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights_swedish_case_against_mohammed_abdullah_(eng).pdf)> accessed 30 January 2020
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# Prosecutor v. Oussama Achraf Akhlafa (Netherlands, 2019)

Case No. 09 / 748003-18 & 09 / 748003-19

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## I. Executive Summary

The case involved Mr Oussama Achraf Akhlafa (the Defendant), a Dutch citizen, who was an IS militant and fought alongside IS in Iraq and Syria from 2014 until 2016. During his time there, he posed in a photograph next to a man executed by IS and subsequently uploaded it to Facebook. The Defendant was found guilty of one count of a war crime by the District Court of The Hague,<sup>1</sup> under Section 6 (1) (c) of the International Crimes Act (ICA) for an outrage upon personal dignity, in particular humiliating and degrading treatment of protected persons and sentenced to seven years and six months. The Akhlafa judgment analyses photographic evidence and additional audio-visual information from other online platforms. The main types of DDE used in this case were three photographs posted on Facebook, online chat conversations from Facebook and seized mobile phones.

## II. Background

### A. Factual background of the case

The Defendant travelled to Syria on 24 October 2014 and stayed there until 3 September 2016. During the period from 1 August 2014 until 1 November 2016, the Defendant participated in a terrorist organization IS and took preparatory acts to commit a terrorist offence.<sup>2</sup> During that period, a photograph was taken of him where he is seen posing alongside a deceased person in orange clothing, who was bloodied, stabbed and hanging on a cross on the side of the road. The Defendant subsequently uploaded this photograph on his Facebook account in order to disseminate it among the

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<sup>1</sup> *Prosecutor v Oussama Achraf Akhlafa*, (Case 09/748003-18 & 09/748003-19), [2019], Dutch District Court, the Netherlands (*Akhlafa* judgment). It must be stressed that the report is based entirely on an unofficial translation transcript of the judgment.

<sup>2</sup> *Akhlafa* judgment (n 1) s 3.3.2.

community.<sup>3</sup> The Defendant was also accused of uploading and disseminating two additional photographs where the deceased enemy combatants are being humiliated by other IS members.<sup>4</sup> It should be emphasized that since the arrest warrant of the Defendant is not available, the factual circumstances and the basis of his arrest are not explained in detail.

## B. Legal System Background

The Dutch legal system is a civil law system with an “inquisitorial” criminal process in which judges take an active role in investigating the facts of the case and the quality of evidence.<sup>5</sup> Dutch criminal law is codified in the Dutch Criminal Code (*Wetboek van Strafrecht*)<sup>6</sup> (DCC), the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) (DCCP)<sup>7</sup> as well as the International Crimes Act (*Wet Internationale Misdriften*).<sup>8</sup> The rules of evidence can be found in the DCCP.

As per Section 338 DCCP, conviction can only be pronounced on the basis of evidence presented during the trial proceedings.<sup>9</sup> The evidence may not rest upon the testimony of a single witness (*unus testis nullus testis*) and the conviction may never be based solely on the statement of the accused - a guilty plea as such does not exist in the Dutch criminal procedure, but rather forms part of the evidence (Section 341 (4) DCCP). However, the scope of admissible evidence is very wide and can include hearsay and, to an extent, also illegally obtained evidence.<sup>10</sup>

The DCCP is silent on DDE. Section 339 allows for five kinds of evidence to be admitted: the court’s own observation during a court trial; the statement of the accused in or out of court; the statement of a witness in court; the statement of an expert in court; and written materials. The “written materials” encompasses a wide range of means as explained in Section 344 DCCP and include: reports by members of competent agencies (i.e. police reports on facts) or circumstances personally perceived or

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3 *ibid.* For additional information regarding the privacy settings see: Section 3.2 of this report.

4 *Akhlafa* judgment (n 1) s 5.1.

5 Brants-Langeraar CH, ‘Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure’ (2007) 11, *Electronic Journal of Comparative Law* 1, 2-3.

6 [Criminal Code of the Kingdom of Netherlands \(Adopted on 3 March 1881, amended version as of 1 March 2019\)](#), (Dutch Criminal Code) - unofficial translation available [here](#).

7 [Criminal Procedure Code of the Kingdom of Netherlands \(Adopted on 15 January 1921, amended version as of 1 March 2019\)](#), (Dutch Code of Criminal Procedure DCCP) - unofficial translation available [here](#).

8 [International Crimes Act \(Adopted on 19 June 2003\)](#) (ICA) unofficial translation available [here](#).

9 DCCP (n 7) s 338 reads: The court may find that there is evidence the Defendant committed the offence as charged in the indictment only when the court through the hearing has become convinced thereof from legal means of evidence.

10 DCCP, (n 7) s 359 (a); see also Matthias Borgers and Lonneke Stevens ‘The Use of Illegally Gathered Evidence in the Dutch Criminal Trial’ in Sjef van Erp, & Lars van Vliet (eds), *Netherlands Reports to the Eighteenth International Congress of Comparative Law* (Hart 2010), 570.

experienced by these agencies (Section 344 (1) (2) DCCP); expert reports (Section 344 (1) (4) DCCP) and all other written materials, although the latter is only to be used in relation to the content of other means of evidence (Section 344 (1) (5) DCCP).

An official report by an investigating officer has special evidential value, since it can constitute proof that the Defendant committed the offences with which he or she is charged - meaning that as per Section 344 (2) DCCP evidence can be based solely on the report of the police officer.

Although DDE as such is not expressly mentioned in the Dutch rules of evidence, these are broad enough so encompass such evidence.<sup>11</sup>

## **1. Jurisdiction**

The jurisdiction of the Court was based upon Section 2 of the ICA. The ICA establishes that the Netherlands has jurisdiction over anyone who commits any of the crimes defined in the ICA outside the Netherlands. in the following instances: If the suspect is present in the Netherlands, if the crime is committed against a Dutch national, or if a Dutch national who commits any of the crimes is outside the Netherlands. The Defendant was a Dutch national and was also located in the Netherlands. Therefore, the Court found that it had jurisdiction and declared the case admissible.<sup>12</sup>

## **2. Existence of a non-international armed conflict**

Court established that during the time when the Defendant was in Syria and Iraq (24 October 2014 - 3 September 2016), there existed a Non-International Armed Conflict (NIAC).<sup>13</sup> The information provided in the investigation file helped the Court in analyzing the intensity of protracted armed violence as well as the degree of the organisation of the armed group. The information, upon which the Court relied was:

[M]ainly the (successive) knowledge documents that form[ed] part of the criminal file and [were] entirely based on public sources, such as reports from the IICIS, reports from Human

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11 Bert-Jaap Koops, 'Cybercrime Legislation in the Netherlands' (18th International Congress on Comparative Law, Washington DC, 25-31 July 2010).

12 *Akhlafa* judgment (n 1) s 3.3.2.

13 *Akhlafa* judgment (n 1) s 5.3.3.1.

Rights Watch and Amnesty International, journalistic sources as well as websites, social media, documents and images from jihadist organizations active in Syria.<sup>14</sup>

### 3. Nexus

The Court also confirmed that the requirement of the nexus between the armed conflict and the conduct of the Defendant was met in this regard, in order to distinguish the committed crimes from common crimes, the Court made a number of references to the 1949 Geneva Conventions<sup>15</sup> and the international jurisprudence.<sup>16</sup> Therefore, the Court found that the rules of international humanitarian law related to NIAC, in particular the Common Article 3 of the Geneva Conventions, were applicable to the offences committed by the Defendant.<sup>17</sup>

### 4. Crimes Charged

Mr. Akhlafa was charged with the following offences:

- 1) Participation in a terrorist organisation under Art. 140a DCC, between 24 October 2014 and 3 September 2016 in Syria, Iraq and Turkey;<sup>18</sup>
- 2) Preparatory acts to commit a terrorist offence under Article 96 (2) CC, as he, during the same period, was preparing and promoting terrorist offences in Syria and Iraq and Turkey and the Netherlands;<sup>19</sup>
- 3) Three counts of a war crime under Section 6(1)(c) International Crimes Act. The crime in question was the outrage upon personal dignity, in particular humiliating and degrading

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14 *ibid.*

15 [Geneva Conventions](#) (I-IV) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, “Geneva Conventions”).

16 *Akhlafa* judgment (n 1) s 5.3.5.1; These cases included *Prosecutor v. Tadić* (Appeals Chamber Decision) IT-94-1-AR72 (2 October 1995); *Prosecutor v. Akayesu* (Judgment) ICTR 96-4-A (1 June 2001); *Prosecutor v. Kunarac* (Appeals Chamber Judgment) IT-96-23 and IT-96-23 /1 (12 June 2002); *Prosecutor v. Rutaganda* (Appeals Chamber Judgment) ICTR-96-3-1 (26 May 2003); *Prosecutor v. Haradinaj* (Trial Chamber Judgment) IT-04-84-T (3 April 2008).

17 *Akhlafa* judgment (n 1) s 5.3.4.1.

18 *ibid* ss 4.3.3.1 and 4.3.3.2.

19 *ibid.*

treatment, against persons taking no active part in the hostilities. Section 6(1)(c) also highlight that this is a violation of [Common Article 3 of the Geneva Conventions](#).

In relation to the war crime charges, the Prosecutor accused Mr. Akhlafa that during his stay in Syria as a member of ISIS in the period from 1 August 2014 up to 1 November 2016:

- a) He has posed in Photograph No. 1 with a smile on his face alongside a man executed by “IS”, who was bloodied and stabbed in orange clothes and hanging on a cross on the side of the road. The defendant has then subsequently uploaded this photograph on his Facebook account in order to distribute it among the community;<sup>20</sup>
- b) He has distributed Photograph No. 2 of a deceased woman in a puddle of blood, where a foot is placed on the head of the victim;<sup>21</sup> and
- c) He has distributed Photograph No. 3 of a man holding a decapitated head of a female.<sup>22</sup>

Mr. Akhlafa was found guilty of three out of five charges overall and was sentenced to seven years and six months imprisonment. He was acquitted of two out of three counts of war crimes. In relation to count two – distributing of Photograph No. 2, the Court stated that because the defendant is not in the photograph, he has was not the one who took it and he has not sent it to more than one person, the offence was not of such a nature and seriousness that it could amount to an outrage on the personal dignity of the deceased person.<sup>23</sup> In relation to count three – distributing Photograph No. 3, the Court noted that there was insufficient evidence that it was Mr. Akhlafa (and not another person) who distributed the photograph in a Facebook chat.<sup>24</sup>

### **III. DDE**

#### **A. Summary**

Throughout the proceedings, the Court relied on a number of DDE to issue its judgment. These include:

- 1) Photographs No. 1, No. 2 and No. 3, obtained by the police through seized mobile phones;<sup>25</sup>

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20 *ibid* s 5.3.2.

21 *ibid*.

22 *Akhlafa* judgment (n 1) s 5.3.2.

23 *ibid* s 5.3.4.2.

24 *ibid*.

25 *ibid* s 5.1.



- 2) Analysis of the geo-location metadata of the given photographs;<sup>26</sup>
- 3) Chat conversations on Facebook between the Defendant and other suspects or witnesses, obtained by the police through seized mobile phones;<sup>27</sup>
- 4) Photographs of the Defendant found online, particularly on Facebook and via chat conversations through seized mobile phones<sup>28</sup> and,
- 5) Photographs of the victims found online, on Twitter<sup>29</sup>

The Court, to corroborate the DDE, also relied on testimonies given to the police by a number of suspects, as well as witness testimonies during the court proceedings.<sup>30</sup>

The defense never challenged the authenticity of the DDE or the chain of custody related to it, therefore the Court did not elaborate on the question of admissibility. It should also be emphasized that other procedural documents, which might contain additional details regarding the Courts consideration of evidentiary matters are unavailable<sup>31</sup>

## **B. What did the DDE prove?**

### **1. Participation in a terrorist organization and preparatory acts for terrorist offence**

The Defendant was charged with the following offences:

- 1) Participation in a terrorist organisation under Art. 140a of the DCC, between 24 October 2014 and 3 September 2016 in Syria, Iraq and Turkey;<sup>32</sup>
- 2) Preparatory acts to commit a terrorist offence under Art. 96 (2) CC, as he, during the same period, was preparing and promoting terrorist offences in Syria and Iraq and Turkey and the Netherlands;<sup>33</sup>

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26 *ibid* s 5.3.2.

27 *ibid*.

28 *ibid*.

29 *ibid*.

30 *ibid*.

31 The judgment in its Annexes makes many references to different procedural documents either at the phase of the investigation or previous hearings before the Court. These include: official reports of findings, official hearings of witnesses, reports of hearings and others. It is presumed that the mentioned documents could contain information on evidentiary matters, but they are not accessible to the public.

32 *Akhlaja* judgment (n 1) ss 4.3.3.1 and 4.3.3.2.

33 *ibid*.

With regards to these offences, the DDE was used, together with other evidence (namely the inclusion of the Defendant's name on the IS payroll), by the Court to establish that the Defendant was guilty of the participation in a terrorist organization and preparatory acts for terrorist offences.<sup>34</sup> The Court noted that:

The many chat conversations, the photographs on which the defendant (with or without others) can be seen in combat clothing and / or with weapons and / or the gesture, the fact that he has been in places that were controlled and controlled by IS and the mention of his position on the payroll does not allow any other conclusion than that the defendant has joined IS, has actually made a factual contribution to the armed struggle and thus participated in IS.<sup>35</sup>

## **2. Count one: posed next to a deceased person, took the photograph and posted it on Facebook**

The Defendant was charged with one count a war crime under Section 6 (1) (c) of the ICA. The Prosecutor argued that from 1 August 2014 up to 1 November 2016, he posed in Photograph No. 1 alongside a man executed by IS. The Defendant has then subsequently uploaded this photograph on his Facebook account in order to disseminate it among the community.<sup>36</sup>

With regards to this offence, the DDE was used to prove that, by posing and smiling next to the victim, the Defendant further contributed to the humiliating and degrading treatment. Such conduct, according to the Court, showed that the victim's body was treated as a trophy and that the Defendant is superior to the deceased.<sup>37</sup> Lastly, the Court noted that by posting the photograph on his personal Facebook account, the Defendant ensured that a wide audience was given an opportunity to get acquainted with the photograph and that he intended that such humiliating and degrading treatment of the victim would continue.<sup>38</sup>

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34 He was further acquitted under the *non bis in idem* principle as he was already convicted in Turkey of participating in an armed terrorist organisation.

35 *Akhlajā* judgment (n 1) s 4.3.3.2.

36 *Akhlajā* judgment (n 1) s 5.3.2.

37 *ibid* s 5.3.4.2.

38 *ibid*.

### **3. Count two: disseminating a photograph of a deceased woman**

The Defendant was charged with one count of a war crime under Section 6 (1) (c) ICA. The Prosecutor accused the Defendant of disseminating Photograph No. 2, that portrayed a deceased woman in a puddle of blood and a foot placed on her head.<sup>39</sup>

With regards to this offence, the DDE was used to acquit the Defendant. In fact, the Court was unable to establish that he was portrayed in the photograph, that he sent it to more than one person and that he took the picture himself. The Court thus concluded that his conduct was not of such nature or seriousness to meet the criteria for criminal liability.<sup>40</sup>

The defence also argued that because the police were able to find the photograph online, they were able to establish that it was posted on 12 July 2014, which does not coincide with the time during which the Defendant was in Syria or Iraq.<sup>41</sup>

### **4. Count three: disseminated a photograph of a man holding a decapitated head of a woman**

The Defendant was charged with one count of a war crime under Section 6 (1) (c) ICA. The Prosecutor accused the Defendant of disseminating Photograph No. 3 of a man holding a decapitated head of a woman.<sup>42</sup>

With regards to this offence, the DDE was also used to acquit the Defendant, as the Court noted that, although, the evidence showed that there was a chat conversation between “Niya 2” and Person 2, it is not clear whether the Defendant sent the photograph during this conversation or whether this was done by someone else. Lastly, the Court emphasized that the photograph did not fit into the context of the conversation and that it could not be excluded that the phone had also been used by someone else.<sup>43</sup>

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39 *ibid* s 5.3.2.

40 *ibid* s 5.3.4.2.

41 *Akhlajā* judgment (n 1) ss 5.1 and 5.3.2.

42 *ibid* s 5.3.2.

43 *ibid*.

**Table of charged offences, guilty verdicts and acquittals by the Court**

	<b>Offence</b>	<b>Charge</b>	<b>Guilty verdict</b>	<b>Acquittal</b>
1)	Preparatory acts to commit a terrorist offence under Art. 96 (2) CC.	One count	One count	-
2)	Participation in a terrorist organization under Art. 140a CC.	One count	One count	-
3)	War crime under Section 6 (1) (a) of the ICA. <sup>44</sup>	Three counts	One count	Two counts
		Sentenced to seven years and six months.		

See tables below for further explanation of the DDE that was considered by the Court.

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<sup>44</sup> Further applicable articles of law are Arts. 57, 83, 96, 134a, 140a, 157, 176a, 176b, 288a, 289, and 289a of the Dutch Criminal Code (n 6), *Akblafa* judgment (n 1) s 9.

### Determination of the participation in a terrorist organization and preparatory acts for terrorist offence

Evidence	Where/how it was obtained	Challenged	Probative Value
<b>Online Chat Conversations</b> between the Defendant and Person 2. <sup>45</sup>	Seized from the phone of a third party to the proceedings, referred to as Person 2, who was suspected of planning to travel to Syria and Iraq to meet the Defendant. <sup>46</sup>	No, the Defendant did not deny talking to her or saying the things transcribed in the judgement (i.e. “that he always shoots at windows, because he is afraid of [the] snipers”). <sup>47</sup>	The chat conversations seem to be taken at face value referring only to its content (rather than admissibility or authenticity). They were used to show that the suspect was aware of what he was doing and that the information they contained negated his assertion that he was merely a parking guard or humanitarian aid worker. <sup>48</sup>
<b>Online Chat Conversations</b> (Facebook Messenger) between a Person 4 and his son, a co-suspect. <sup>49</sup>	Submitted to the police by Person 4. <sup>50</sup>	No.	See above.
<b>Additional photographs.</b> <sup>51</sup>	As part of the Online Chat Conversations between the Defendant and Person 2 and between Person 4 and a co-suspect. <sup>52</sup>	No.	The Court afforded due consideration to the visual evidence and observed that the suspect was photographed wearing a bandana with the IS logo and raising the Muslim greeting with (right) index finger, the so-called Tawhid gesture. <sup>53</sup>

45 *Akblafa* judgment s 4.3.3.2.

46 *ibid.*

47 *ibid* s 4.3.2.

48 *ibid* s 4.3.3.2.

49 *ibid* s 4.3.2.

50 *ibid.*

51 *ibid.*

52 *ibid.*

53 *ibid.*

**Determination of count one of a war crime: posed next to a deceased person, took the photograph and posted it on Facebook**

Evidence	Where/how it was obtained	Challenged	Probative Value
<p><b>Photograph No. 1</b> of the Defendant standing next to a bloody and presumably dead man, who was dressed in an orange clothes and hanging on a cross.<sup>54</sup></p>	<p>The photograph was found<sup>55</sup> on the Defendant’s personal Facebook page by a third person who presented it to the local police in Utrecht. The same photograph was also found on a confiscated mobile phone of Person 3. Person 3 recognized the Defendant in the Photograph 1, which was also corroborated by the Defendant’s father. The police, by using the geo-location data included in the photograph, concluded that it was taken in Abu Kamal in Syria.<sup>56</sup> The police also established that the deceased could be identified in a number of other photographs found on the internet and Twitter messages, which also helped to establish the date of the execution.<sup>57</sup></p>	<p>No</p>	<p>Using the photograph, the Court: 1) Confirmed that it was Mr. Akhlafa who was the person in the Photograph No. 1, taken between 15 June 2015 and 2 July 2015 in Abu Kamal, Syria; 2) Rejected the Defendant’s claim that it was taken against his will as it shows him actively posing and smiling broadly besides the victim; 3) Confirmed that the Defendant was proud of the photograph, as proved by the chat conversations with Person 2.<sup>58</sup></p>
<p><b>Chat conversations via Facebook.</b><sup>59</sup></p>	<p>Chat conversations from a mobile phone belonging to Person 2, that was seized by the Police.<sup>60</sup></p>	<p>No</p>	<p>Confirmed that it was the Defendant who posted this photograph on his Facebook account.<sup>61</sup> Chat conversations via Facebook also revealed that the Defendant inquired whether Person 2 still had the photograph, as he wanted a new profile picture.<sup>62</sup></p>

54 *Akhlafa* judgment (n 1) s 5.1.

55 The witness stated that the photo originated (in Dutch - “afkomstig”) from Facebook. Therefore, it could be presumed that the photograph was saved by using ordinary download or a screenshot function. In either way, such methods erase all of the relevant metadata from any photograph.

56 *Akhlafa* judgment (n 1) s 5.3.2.

57 In Dutch – “twitterberichten”. But the wording could have been confused with “Tweets”, as posts on Twitter, rather than actual messages from a personal account.

58 *Akhlafa* judgment (n 1) s 5.3.2.

59 *ibid.*

60 *ibid* s 4.3.2.

61 *ibid* s 5.3.2.

62 *ibid.*

**Determination of count two of a war crime: disseminated a photograph of a deceased woman**

<b>Evidence</b>	<b>Where/how it was obtained</b>	<b>Challenged</b>	<b>Probative Value</b>
<b>Photograph No. 2</b> of a deceased woman lying on the ground, with a foot on top of her body. <sup>63</sup>	The photograph was obtained from the mobile phone seized from Person 3 with whom the Defendant shared the photograph via Facebook. The same photograph was also found online by the police as part of a series of Twitter posts. <sup>64</sup>	No	While the Court agreed that the photograph showed an attack on the personal dignity of the victim, <sup>65</sup> it reiterated that the question before it was whether the suspect, by the forwarding of the photograph, has affected the dignity of the deceased woman. <sup>66</sup> Accordingly, this was not proven by the Prosecution, since the defendant was not in the photograph, he has was not the one who took it and he has not sent it to more than one person. <sup>67</sup>

**1) Determination of count three of a war crime: disseminated a photograph of a man holding a decapitated head of a woman**

<b>Evidence</b>	<b>Where/how it was obtained</b>	<b>Challenged</b>	<b>Probative Value</b>
<b>Photograph No. 3</b> of a man holding a woman's head that is separate from the body. <sup>68</sup>	The photograph was obtained by the police during an inspection of a mobile phone, which was owned by Person 2, who received it in a chat conversation from a person, which had a nickname of "Niya 2". As highlighted in the judgment, the same photograph can be found elsewhere on the internet, as well as on a Twitter post, where it is noted that the woman's head belongs to an IDS Kurdish soldier. <sup>69</sup>	No	The Court found that there was insufficient evidence that the Defendant was the person who sent the photograph during a chat conversation with Person 2. <sup>70</sup>

<sup>63</sup> *Akhlafa* judgment (n 1) s 5.3.2.

<sup>64</sup> *ibid.*

<sup>65</sup> The Court did consider the photograph in detail, even noting that given the significance of Islamic culture, placing a foot on a dead body is particularly disrespectful (*Akhlafa* judgment (n 1) s 5.3.4.2).

<sup>66</sup> *Akhlafa* judgment (n 1) s 5.3.2.

<sup>67</sup> *ibid* s 5.3.4.2.

<sup>68</sup> *Ibid* s 5.3.2.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

## II. DDE Discussion

While the judgment makes several references to the DCCP and the DCC as well as the International Crimes Act and a large number of international regulations and jurisdictions, it does not elaborate on the evidentiary rules in any detail. The Court only applies the DCCP norms in relation to the *ne bis in idem* question and the required elements of crime, contained in the International Crimes Act, insofar as to establish whether a war crime has been committed. What the Court does do, however, is to refer to the ‘official reports, drawn up in the legal form by (a) competent investigating officer(s)’.<sup>71</sup> These reports are explicitly mentioned throughout the judgment in the footnotes: Official report findings of 26 February 2019, official report number LERCA15069-98, and official report of trial *verbal* of 27 March 2019 report number LERCA15069-177. In line with Art. 344(2) DCCP, these reports form evidentiary basis in the proceedings.

Indeed, the only reference to means of evidence is made in the footnotes.<sup>72</sup> While one may normally afford much less attention to footnotes than the main body of text, the Court in the present case makes a number of interesting references in the footnotes, especially when explaining that prosecution for war crimes is taking place at national level in various European countries.<sup>73</sup> The Court refers explicitly to the Eurojust, report on ‘Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources - Legal framework and recent developments in the Member States of the European Union’.<sup>74</sup> The ‘open source’ evidence referred to in the title is said to encompass such DDE as publicly available ‘social media, blogs and discussion fora [...] and photos and videos’.<sup>75</sup> It needs to be noted, however, that the report does not discuss evidentiary or procedural rules in any detail. It does propose good practices, but this does not even amount to guidelines:

[C]arefully analysing the material and determining whether the material is authentic are important steps. [...] For example, with respect to photographs or videos found on the Internet, identifying the IP address that is linked to the specific social network post that contained the photograph/video is important. In the same way, determining the date on which a particular image was taken is potentially an interesting element in the context of a criminal investigation.<sup>76</sup>

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71 *Akhlafa* judgment (n 1) s 4.3.2.

72 *ibid* s 1.

73 *ibid* s 5.3.4.1.

74 [Eurojust: Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union, The Hague, February 2018.](#)

75 *ibid* 6.

76 *Akhlafa* judgment (n 1) 7.



In the same footnote the Court also refers to case law of other legal systems namely Finland and Germany.<sup>77</sup> This case law refers to instances where a person has posed with a severed head and has subsequently shared these images and videos online. When reading of the judgments alone, none of them address the questions of rules of evidence.

Interestingly, the Court mentions that by ‘using geo-locating, the police concluded that the photo was taken in Abu Kamal in Syria’.<sup>78</sup> Unfortunately, it is not clear from the Court proceedings which of the two mentioned photographs (found on Facebook or obtained from the mobile phone) contained the geo-location data, nor how such metadata was extracted or analysed. A photograph that is taken with a smartphone or any kind of other digital camera is typically rendered in an “Exchangeable image file format (EFIX)” format, which contains additional information – metadata, including the location where the photograph was taken. It could also be presumed that it was taken from a mobile phone application, although the Court does not make it clear from which one as, for instance, the “WhatsApp” application does not erase the mentioned metadata, while others do. If the metadata was taken from a photograph, which was downloaded from Facebook, it should be mentioned that such photographs contain no metadata, as the mentioned EXIF format is automatically removed once a photograph is posted in the Facebook platform. Nevertheless, it could be that the location was determined by way of analyzing the geographical features – objects, terrain, particular signs from the location or any other information that seen in the photograph. But since the photographs are not accessible and the judgment makes no further references to such features, additional clarity is lacking.

Finally, the Court mentions that a ‘wide audience was given an opportunity to get acquainted with the photograph and that he intended that such humiliating and degrading treatment of the victim would continue’.<sup>79</sup> It is clear that the Court places emphasis to such dissemination as a necessary element of the war crime, but does not go into detail under what kind of privacy settings (“public” or “private”) the photographs were shared.<sup>80</sup> Such further argumentation is important as it could provide more clarity on the impact on the severity of the crime or support the subjective element of the continuation

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<sup>77</sup> *Prosecutor v Jebbar Salman Ammar* (Case R 16/1304) [2016], District Court of Pirkanmaa, Finland; *Prosecutor v Hadi Hameed Hilal* (Case R 16/214) [2016], District Court of Kanta-Häme, Finland; *Prosecutor v. Aria Ladjedvardi*, (Case R 5-3 StE 2/16 - 4 - 1/16) [2016], Higher Regional Court of Frankfurt am Main, Germany.

<sup>78</sup> *Akhlafa* judgment (n 1) s 5.3.2.

<sup>79</sup> *ibid* s 5.3.4.2.

<sup>80</sup> ‘What is public information on Facebook?’, *Facebook Help Center* ‘On Facebook, when a person posts something, he or she can control who sees the content by using the audience selector tool. When a person chooses to share something by selecting the “public” option from the audience selector, it is considered public information. Facebook considers that [s]omething that’s public can be seen by anyone. That includes people who aren’t your [the user’s] friends, people off of Facebook and people who use different media such as print, broadcast (ex: television) and other sites on the Internet.’ <<https://www.facebook.com/help/203805466323736>> accessed 10 December 2019.

of the crime. While there is no information that other Courts would take such an elaborate approach, the emphasis on the privacy settings in Facebook was taken by the High Regional Court of Frankfurt am Main in the case of *Prosecutor v Aria Ladjedvardi* (2016)<sup>81</sup> and the District Court of Kanta-Häme in the case of *Prosecutor v Hadi Habeed Hilal* (2016).<sup>82</sup>

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81 *Prosecutor v. Aria Ladjedvardi*, (Case R 5-3 StE 2/16 - 4 - 1/16) [2016], Higher Regional Court of Frankfurt am Main, Germany.

82 *Prosecutor v Hadi Habeed Hilal* (Case R 16/214) [2016], District Court of Kanta-Häme, Finland.

# Prosecutor v. Oussama Achraf Akhlafa – REFERENCE LIST

## CASES

- [Prosecutor v. Oussama Achraf Akhlafa](#), (Case 09/748003-18 & 09/748003-19), [2019], Dutch District Court, the Netherlands (unofficial translation transcript of the judgment)
- *Prosecutor v. Tadić* (Appeals Chamber Decision) IT-94-1-AR72 (2 October 1995)
- *Prosecutor v. Akayesu* (Judgment) ICTR 96-4-A (1 June 2001)
- *Prosecutor v. Kunarac* (Appeals Chamber Judgment) IT-96-23 and IT-96-23 /1 (12 June 2002)
- *Prosecutor v. Rutaganda* (Appeals Chamber Judgment) ICTR-96-3-1 (26 May 2003)
- *Prosecutor v. Haradinaj* (Trial Chamber Judgment) IT-04-84-T (3 April 2008)
- [Prosecutor v. Aria Ladjedvardi](#), (Case R 5-3 StE 2/16 - 4 - 1/16) [2016], Higher Regional Court of Frankfurt am Main, Germany
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## DOMESTIC LEGISLATION – THE NETHERLANDS

- [Criminal Code of the Kingdom of Netherlands \(Adopted on 3 March 1881, amended version as of 1 March 2019\)](#), (Dutch Criminal Code) - unofficial translation available [here](#).
- [Criminal Procedure Code of the Kingdom of Netherlands \(Adopted on 15 January 1921, amended version as of 1 March 2019\)](#), (Dutch Code of Criminal Procedure) - unofficial translation available [here](#).

## INTERNATIONAL SOURCES

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
- Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
- Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
- [International Crimes Act \(Adopted on 19 June 2003\)](#), unofficial translation can be found [here](#)

## ARTICLES

- Brants-Langeraar CH, 'Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure' (2007) 11 *Electronic Journal of Comparative Law*
- Bert-Jaap Koops, '[Cybercrime Legislation in the Netherlands](#)' (18th International Congress on Comparative Law, Washington DC, 25-31 July 2010)
- Matthias Borgers and Lonneke Stevens 'The Use of Illegally Gathered Evidence in the Dutch Criminal Trial' in Sjef van Erp, & Lars van Vliet (eds), *Netherlands Reports to the Eighteenth International Congress of Comparative Law* (Hart 2010)

# Prosecutor v. Šefik Alić (Bosnia and Herzegovina, 2014)

Case X-KRŽŽ-06/294,

Court of Bosnia and Herzegovina, 2007 - 2014

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*Editors: Dr Emma Irving and Neil Cockerill*

## 1. Executive Summary

This case involved proceedings in Bosnia and Herzegovina (BiH) against a former member of the Army of BiH, Šefik Alić (the Defendant).<sup>1</sup> He was found guilty of inhuman treatment of prisoners of war (POWs) and of failing to prevent, in his capacity as the Assistant Battalion Commander of Security, the killing of said POWs. Consequently, on 21 January 2011, the Defendant was sentenced to ten years imprisonment,<sup>2</sup> a sentence that was later reduced to eight years.<sup>3</sup> The offences took place during the Bosnian War in 1995, and the events were recorded on video by one of the Battalion's members. This video footage, an example of closed source Digitally Derived Evidence (DDE),<sup>4</sup> played a crucial role in the proceedings. The DDE was used to not only corroborate other evidence such as witness statements but also as primary evidence.

### I. Background

#### A. DDE Legal provisions/evidentiary norms

No rules of evidence or other legal provisions specifically relating to the DDE were discussed in the judgement. The legal framework of evidence, including DDE, in the Bosnian legal system is considered below.

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<sup>1</sup> *Indictment against Šefik Alić*, (Prosecutor's Office of Bosnia and Herzegovina) KT-RX 141/06 (26 January 2007) [unofficial English translation](#) (*Alić Indictment*); *Prosecutor v Šefik Alić* (The Court of Bosnia and Herzegovina, Section I for War Crimes) X-KRŽŽ-06/294 (11 April 2008) [official English translation](#) (*Alić First Instance Verdict*); *Prosecutor v Šefik Alić, Second Instance Verdict* (The Court of Bosnia and Herzegovina, the Panel of the Appellate Division) X-KR-06/294 (20 January 2011), [official English translation](#) (*Alić Second Instance Verdict*); *Prosecutor v Šefik Alić, Third Instance Verdict* (The Court of Bosnia and Herzegovina, Third-Instance Panel) X-KRŽŽ-06/294 (14 October 2011) [official English translation](#) (*Alić Third Instance Verdict*).

<sup>2</sup> *Alić Second Instance Verdict* (n 1) [161].

<sup>3</sup> *Prosecutor v Šefik Alić, Third Instance Judgment* (The Court of Bosnia and Herzegovina, Third-Instance Panel) X-KRŽŽ-06/294 (22 September 2014), [official English translation](#) (*Alić Third Instance Judgment*); for more information on procedural history see 2.4.

<sup>4</sup> Closed source DDE is that which is not available to the public, as opposed to open source DDE. For more information about open source DDE, see Nikita Mehandru and Alexa Koenig, '[Open Source Evidence and the International Criminal Court](#)' *Harvard Human Rights Journal* (15 April 2019) <[https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#\\_ftn6Z](https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#_ftn6Z)> accessed 17 January 2020 [6].

## B. Factual background of the case

The Defendant, a Bosnian national, was a member of the Army of BiH, and served as an Assistant to the Commander of the *Hamza* Battalion for Security.<sup>5</sup> On 5 August 1995, he participated in Operation Oluja.<sup>6</sup> This operation was an offensive launched during the Bosnian War (1992-1995) by the Croatian Army, with the support of the Army of BiH, to regain control over the Krajina region from the separatist ethnic Serbs.<sup>7</sup>

During the operation, members of the *Hamza* Battalion captured four soldiers of the Army of Srpska Krajina. These members, including the Defendant, subsequently mistreated, intimidated and physically abused the captured soldiers.<sup>8</sup> For example, one POW was forced to march at the head of the column, with no ammunition, acting as a lure to capture other Srpska Krajina soldiers.<sup>9</sup> One of the main perpetrators of the abuse was an ‘irregular soldier’, Tewfik Al Harbi,<sup>10</sup> who despite not being officially a member of the Battalion, participated as one in the field. It was Tewfik who ultimately executed the four POWs.<sup>11</sup> The events leading up to the execution as well as the bodies of the executed were filmed by Meho Veladžić, the Brigade cameraman.<sup>12</sup>

The Defendant was arrested on 2 November 2006.<sup>13</sup> Two days later, the Court of Bosnia and Herzegovina (BiH Court) ordered his custody based on the risk that if he were to be released, he would interfere with the course of the proceedings.<sup>14</sup> On 26 January 2007, he was charged by the Prosecutor’s Office of BiH for committing war crimes against POWs.<sup>15</sup>

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<sup>5</sup> The *Hamza* Battalion was the IV Battalion of the 505th Brigade of the 5th Corps of the Army of BiH: see *Alić First Instance Verdict* (n 1) 1.

<sup>6</sup> For more information on this operation, also known as ‘Operation Storm’, see Human Rights Watch, ‘[Croatia, a Decade of Disappointment: Continuing Obstacles to the Reintegration of Serb Returnees](https://www.hrw.org/reports/pdfs/c/croatia/croatia968.pdf)’ (2006) <<https://www.hrw.org/reports/pdfs/c/croatia/croatia968.pdf>> accessed 22 January 2020 .

<sup>7</sup> *ibid* 2.

<sup>8</sup> *Alić Second Instance Verdict* (n 1) 4.

<sup>9</sup> *ibid*.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid* 5.

<sup>12</sup> *ibid* [40] and [79]; *Alić Third Instance Verdict* (n 1) [66].

<sup>13</sup> Trial International, ‘[Sefik Alic](https://trialinternational.org/latest-post/sefik-alic/)’ (25 April 2016) <<https://trialinternational.org/latest-post/sefik-alic/>> accessed 23 January 2020.

<sup>14</sup> The Court of Bosnia and Herzegovina, ‘[Custody ordered for Šefik Alić](http://www.sudbih.gov.ba/vijest/odreen-pritvor-efiku-aliu-16338)’ (6 November 2006) <<http://www.sudbih.gov.ba/vijest/odreen-pritvor-efiku-aliu-16338>> accessed 23 January 2020.

<sup>15</sup> *Alić Indictment* 5; for more information see 2.4.1.

### C. Legal system background

The case was pursued in BiH, which is a civil law jurisdiction. Typically, proceedings in a civil law country are more inquisitorial than adversarial, meaning the judge is actively involved in all stages of the proceedings.

The case at hand was first decided by the BiH Court, before an appeal was allowed by the Constitutional Court of Bosnia and Herzegovina. Therefore, this report only addresses the law applicable at those Courts and does not detail the complexities of the legal system of BiH. These complexities stem from the fact that the state is separated into two entities – the Federation of Bosnia and Herzegovina (FBiH) (which is further divided into 10 canons) and Republika Srpska (RS). BiH has, furthermore, four court systems – that of BiH, FBiH, RS and the Brcko District. Each court system has its own laws and, therefore, four Criminal Codes, four Criminal Procedure Codes, four Civil Procedure Codes and four Laws on Enforcement Procedure are in force at the same time.<sup>16</sup>

The BiH Court comprises three divisions: Criminal, Administrative and Appellate. Each of these divisions is separated into different sections.<sup>17</sup> Criminal proceedings are decided, in first instance, by the Criminal Division, which includes a section dedicated to war crimes (Section I).<sup>18</sup> Second and third instance appeals are decided by the corresponding section of the Appellate Division.<sup>19</sup>

The law applicable at the BiH Court, as well as at the Constitutional Court, includes the Criminal Procedure Code of BiH (BiH CPC)<sup>20</sup> and the Criminal Code of BiH (BiH CC).<sup>21</sup> The rules on criminal procedure and evidence can be found in the former.

With regard to evidentiary norms, the BiH CPC provides for the principle of free evaluation of evidence. Article 15 of the BiH CPC states that:

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<sup>16</sup> Council of Europe and Venice Commission, [‘The Judicial Power in Bosnia and Herzegovina \(BiH\) Background Paper’](#) Opinion no. 648/2011 (9 December 2011) 7.

<sup>17</sup> The Court of Bosnia and Herzegovina, [‘Organizational structure of the Court of BiH’](http://www.sudbih.gov.ba/stranica/40/pregled) <<http://www.sudbih.gov.ba/stranica/40/pregled>> accessed 31 January 2020.

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> Criminal Procedure Code of Bosnia and Herzegovina, BiH Official Gazette No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18; unofficial consolidated text available [here](#).

<sup>21</sup> Criminal Code of Bosnia and Herzegovina, BiH Official Gazette No. 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18; unofficial consolidated text available [here](#) (“BiH CC”).

The right of the Court, Prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules.

Moreover, in accordance with Article 281(2) of the BiH CPC:

The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.

When taken together, these provisions create an obligation for the court to conscientiously evaluate every item individually and cumulatively with all other evidence during deliberations in order to decide whether a certain fact is proven or not.<sup>22</sup> The principle of free evaluation of evidence is also limited by Article 10(2) of the BiH CPC, which provides that:

The Court shall not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, or on evidence obtained through essential violation of this Code.

With regards to DDE, the BiH CPC makes a number of references to photographs being used as evidence in criminal proceedings.<sup>23</sup> However, under Article 20 of the BiH CPC, outlining Basic Terms, '[t]he term "photographs" refers to still and digital photographs, X-ray films, videotapes, and motion pictures.'

Finally, the BiH CPC is strongly influenced by international jurisprudence – the 2010 joint report by the ICTY, UNICRI, ODIHR and OSCE entitled 'Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions' reads:

The Commentary to the BiH Criminal Procedure Code stresses that "the procedural and legal aspect of the international criminal law and on human rights law is well developed and has an extraordinary influence on domestic procedural criminal legislation".

Moreover, the Commentary includes in its list of international regulations the ICTY

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<sup>22</sup> International Criminal Law Services, '[Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions](https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-12-procedure-and-evidence.pdf)' (2010) <<https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-12-procedure-and-evidence.pdf>> accessed 22 January 2020, 65.

<sup>23</sup> BiH CPC Article 85 (Method of Examination, Confrontation and Identification), Article 219 (Collection of Information), Article 274 (Records on Evidence).

Statute, the ICTY Rules of Procedure and Evidence, as well as the ICC Rome Statute. The ICTY Rules of Procedure and Evidence were the primary influences on the new Criminal Procedure Code.<sup>24</sup>

#### D. Legal background of the case

On 11 January 2011, the Panel of the Appellate Division of the BiH Court (Second Instance of the BiH Court) found the Defendant guilty of a war crime contrary to Common Article 3(1)(a) and (c) of the Geneva Conventions.<sup>25</sup> This verdict was the result of the Defendant's participation in the physical and mental abuse of POWs and in their killings, while having a duty to protect them.<sup>26</sup> Under BiH Law, this is a criminal offense of War Crimes against Prisoners of War in violation of Article 175(a),<sup>27</sup> in conjunction with Articles 21 (Manner of Perpetrating Criminal Offence), 29 (Co-perpetration) and 180(1) (Individual and Command Responsibility) of the BiH CC.

The Defendant was consequently sentenced to 10 years imprisonment.<sup>28</sup> Despite the Defence's appeal, this decision was upheld on 14 October 2011 by the Third-Instance Panel of the Appellate Division of the BiH Court (Third Instance of the BiH Court). Notwithstanding, an appeal to the Constitutional Court of BiH was allowed and the decision of 14 October 2011 was revoked in the part concerning the application of the more lenient criminal code. Consequently, on 22 September 2014, the Third Instance of the BiH Court issued a new decision. While reducing the sentence to 8 years, the Court did not dispute that the Defendant was guilty of the criminal offence of War Crimes against Prisoners of War. Instead, the Court applied the provisions contained in the Criminal Code of Socialist Federative Republic of Yugoslavia (CC

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<sup>24</sup> *ibid* 31; It needs to be noted that the authors of this report did not have access to the 2005 Commentary on the Criminal Procedure Code in Bosnia and Herzegovina Council of Europe and European Commission, *Komentari Zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini, Zajednički projekat Vijeda Evrope i Evropske komisije (Commentary on the Criminal Procedure Code in Bosnia and Herzegovina)* (2005) available in BCS only.

<sup>25</sup> [Geneva Conventions \(I-IV\)](#) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions).

<sup>26</sup> *Alić Second Instance Verdict* (n 1) 4.

<sup>27</sup> The full wording of Article 175(a) of the BiH CC reads: 'Whoever, in violation of the rules of international law, orders or perpetrates in regard to prisoners of war any of the following acts: Depriving another persons of their life (murders), intentional infliction of severe physical or mental pain or suffering upon persons (tortures), inhuman treatment, including therein biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation [...] shall be punished by imprisonment for a term not less than ten years or long-term imprisonment'.

<sup>28</sup> *Alić Second Instance Verdict* (n 1) [161].



SFRY),<sup>29</sup> which was the law applicable at the time of the offence was committed and carried with it a lesser sentence. The Court nevertheless stressed that the definitions of the criminal offence of War Crimes against POWs were ‘identical’ between the BiH CC and the CC SFRY.<sup>30</sup>

As the Third Instance of the BiH Court’s decision of 22 September 2014 did not address the elements of the crime, in contrast to the previous decisions of the BiH Court, it is not analysed in detail in this report.

## 1. Indictment

The prosecution brought forward six counts in its indictment:<sup>31</sup>

1. That on 5 August 1995, the Defendant participated in the military operation ‘Oluja’ during which four members of the (enemy) Army of Srsпка Krajina were captured by the Defendant’s battalion. By the function the Defendant was performing (Assistant Battalion Commander of Security), he was responsible for the protection of the lives and wellbeing of the prisoners, who were captured, mistreated and killed.
2. That the Defendant, together with another (Tewfik Al Harbi) over whom he had effective control, mistreated a prisoner of war and exposed him to danger by forcing him to march at the head of the column without ammunition as a scout and as a lure to capture other soldiers of the enemy forces.
3. That the four prisoners were, furthermore, in the custody and under the control of the Defendant.
4. That the Defendant himself mistreated and subjected at least three of the prisoners in his custody to threatening and intimidating behaviour and physical abuse. In addition, the Defendant did not prevent Tewfik from further inhuman behaviour such as kicking and slapping the victims.
5. That the Defendant did not prevent Tewfik from further harming the prisoners – the four prisoners were subsequently executed by Tewfik.
6. That the Defendant failed to report the killings to his superiors and he otherwise took no (adequate) action to have the killings and the perpetrators investigated and punished.

On the basis of the above, the Prosecution requested the BiH Court to find the Defendant guilty of the criminal offence of War Crimes against POWs contrary to Article 175(a) of the BiH CC

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<sup>29</sup> *Alić Third Instance Judgment* (n 3) [22]; Yugoslavia: Criminal Code of the Socialist Federal Republic of Yugoslavia, 1 July 1977.

<sup>30</sup> *Alić Third Instance Judgment* (n 3) [26].

<sup>31</sup> *Alić Indictment* (n 1) 2-4.

and in violation of Common Article 3 (1) (a) of the Geneva Conventions, namely: inhuman treatment (physical and mental mistreatment of the four prisoners) and depriving another person of his life (murder of the four prisoners).<sup>32</sup>

In reaching its verdicts, the three Instances of the BiH Court addressed the legal issues summarized in the following sub-sections.

## **2. Violation of International Law**

Article 175(a) of the BiH CC establishes that for one to commit a war crime against POWs, one must act in violation of international law. The three Instances of the BiH Court referred solely to Common Article 3 of the Geneva Conventions in this matter and applied the same methodology to establish that the offence took place as conveyed in the provision.

## **3. Existence of an armed conflict**

The existence of an armed conflict was established by the three Instances of the BiH Court. Notably, after considering the jurisprudence referring to the existence of an armed conflict, namely ICTY's *Kunarac* case,<sup>33</sup> the Second Instance of the BiH Court did not find it necessary to examine the issue in detail. It simply held that:

[T]he issue of existence of the armed conflict as described in the Indictment was not challenged during the proceedings. The forces of the Army of B-H were indeed in conflict with the Army of Serb Krajina during the period relevant to the Indictment, which is the period that marks the beginning of the *Oluja* operation that all witnesses testified about.<sup>34</sup>

## **4. Nexus**

Similarly, the Second Instance of the BiH Court relied on the *Kunarac* case to discuss the need for the nexus between the alleged offences and the armed conflict, stating that: "The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it."<sup>35</sup> It held that nexus existed because the Defendant, 'as an assistant to the commander of a

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<sup>32</sup> *ibid* 5.

<sup>33</sup> *Prosecutor v. Dragoljub Kunarac et al.*, (Appeals Chamber Judgment) IT-96-23 (12 June 2002) [56].

<sup>34</sup> *Alić Second Instance Verdict* (n 1) [93].

<sup>35</sup> *Kunarac* [58].

military formation that took part in the armed conflict on the side of the Army of B-H, was beyond doubt part of [the] conflict'.<sup>36</sup>

## 5. Victims as protected persons

According to the Second Instance of BiH Court (a determination which was shared by all Instances) there was:

[N]o dilemma that the victims were four members of the Army of Serb Krajina who had laid down their arms [...]. [And that] these persons were prisoners of war, captured in the zone of war operations during the Oluja military operation, and that, as such, they fell in the category of protected persons defined in Common Article 3 of the Geneva Conventions.<sup>37</sup>

## 6. Liability of the Defendant

In order for the Defendant to be convicted of the offences with which he was charged, the BiH Court had to be satisfied that he committed the crime himself or ordered it to be committed by someone else.<sup>38</sup>

While at first instance, the Section I for War Crimes of the BiH Court (First Instance of the BiH Court) did not find that the Defendant perpetrated the offences and therefore, acquitted him of all charges, this decision was overturned by the Second Instance.<sup>39</sup> Specifically, the Second Instance found that, with regards to inhuman treatment, the Defendant himself participated in the physical and mental abuse of the POWs. With regards to their killing, the Court was satisfied that the Defendant was liable because he failed to protect them when he had a duty to do so (as the Assistant Battalion Commander of Security).<sup>40</sup> It also held that he failed to take necessary and reasonable measures to prevent the killing of the POWs, although he was legally obliged to protect them.<sup>41</sup> Furthermore, the Second Instance of the BiH Court observed that the Defendant had exercised effective control over Tewfik, who abused and later killed the POWs.<sup>42</sup>

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<sup>36</sup> *Alić Second Instance Verdict* (n 1) [96].

<sup>37</sup> *Alić Second Instance Verdict* (n 1) [98].

<sup>38</sup> *ibid* [100].

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid* [36], [43], [50].

<sup>41</sup> *ibid* [5], [142].

<sup>42</sup> *ibid* [86], [102].

These findings were confirmed by the Third Instance of the BiH Court, in both its 14 October 2011 and 22 September 2014 judgments. In the latter, the Court said:

The degree of criminal responsibility [...] is apparent from the [Defendant's] active participation in several instances of prisoners' mistreatment, full passivity with regard to the abuse of prisoners by Tewfik Al-Harbi, and ultimately the passivity and indifference towards their murder since, obviously, he [the Defendant] did not accordingly file any official report he was obliged to file within his duties, whereby he showed that he did not condemn the act and did not believe it was an important and relevant fact, which undoubtedly took place and which should have been recorded.<sup>43</sup>

## 7. Inhuman Treatment

The First Instance of the BiH Court found that the Defendant's treatment of the prisoners, although unpleasant or harsh, did not amount to inhuman treatment.<sup>44</sup>

This was rejected by the Second Instance of the BiH Court. The Second Instance of the BiH Court established that, based on ICTY's jurisprudence, 'inhuman treatment is conduct which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offense of torture.'<sup>45</sup> The Second Instance looked not only at the actions of the Defendant, which initially might have been 'classified as infliction of light bodily injuries, mere mild blows',<sup>46</sup> but also at the circumstances surrounding these actions. The Court noted that these actions 'occurred very soon after the capture of these persons, who were soldiers of the enemy army fresh from the frontline, in a state of shock. They were alone and disarmed among a dozen of soldiers of the enemy army.'<sup>47</sup> The Defendant, furthermore, threatened one of the prisoners by making references to the manner in which 'Tewfik kills'.<sup>48</sup> The Second Instance of the BiH Court held that all of these actions, taken together with the Defendant's knowing and willing participation,<sup>49</sup> amounted to inhuman treatment and as such

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<sup>43</sup> *Alić Third Instance Judgment* (n 3) [43].

<sup>44</sup> *Alić First Instance Verdict* (n 1) 34.

<sup>45</sup> *Alić Second Instance Verdict* (n 1) [105]; the BiH Court referring to: *Prosecutor v. Dario Kordić and Mario Cerkez* (Appeals Chamber Judgment) IT-95-14/2A, (17 December 2004) [39].

<sup>46</sup> *Alić Second Instance Verdict* (n 1) [115].

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid* [17].

<sup>49</sup> *ibid* [121].

violation of Common Article 3(c) of the Geneva Conventions and, consequently, Article 175 of the BiH CC.<sup>50</sup>

## 8. Killing of the POWs

The Defendant was ‘charged with the perpetrating, that is, aiding and abetting murder, and with omission to take all necessary and reasonable measures to prevent or punish the perpetrators.’<sup>51</sup>

Although the Defendant was acquitted of these charges by the First Instance of the BiH Court, he was found guilty by the Second Instance BiH Court. In fact, the latter established that, while it was Tewfik who committed the murders, the Defendant should be held responsible for the former’s actions based on five facts:

1. The Defendant ‘could conclude [...] that Tewfik was an impetuous and aggressive person with clear intention and readiness to kill the enemy’.<sup>52</sup>
2. That while Tewfik was not a member of the Battalion, he was nevertheless present as a soldier, armed and in uniform. The Defendant should have been cautious of Tewfik’s behaviour and should have demonstrated his authority as he was aware that Tewfik was free of responsibility required by regular membership in the Battalion. It was the Defendant’s ‘moral obligation’ to protect the prisoners from such an aggressive person.<sup>53</sup>
3. The Defendant’s presence ‘during the intimidation of the first captive and his subsequent inhuman treatment must have been encouraging for Tewfik.’<sup>54</sup> The Defendant also ‘tacitly approved of Tewfik’s actions and thus encouraged Tewfik to implement his plan to ultimately kill the prisoners’.<sup>55</sup>
4. As the Assistant Commander for Security, the Defendant was responsible for the captives.<sup>56</sup>
5. The Defendant was present throughout the interactions with the victims, ‘that is, both at the time of the capture and of the interrogation, which the footage also shows. [He] even personally led one of them on a stretch of a forest path.’<sup>57</sup>

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<sup>50</sup> *ibid* [122].

<sup>51</sup> *ibid* [123].

<sup>52</sup> *ibid* [131].

<sup>53</sup> *ibid* [132].

<sup>54</sup> *ibid* [133].

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid* [134].

<sup>57</sup> *ibid* [135].

The Second Instance of the BiH Court held that these facts, in the context of time and events, pointed to the Defendant's omission to protect the persons he knew were prisoners. The Court also held that, based on Tewfik's overall behaviour, the Defendant knew the prisoners' lives were threatened and that they would be killed. The analysis of the Defendant's conduct led the Court 'to an indisputable conclusion on his involvement in [the] killing'.<sup>58</sup> Accordingly, it found the Defendant guilty for perpetrating the murder by omission jointly with Tewfik Al Harbi.<sup>59</sup>

In the Indictment, the Defendant was also charged with superior responsibility for the killing of the prisoners by Tewfik Al Harbi. Although following different reasoning, both the First and the Second Instances of the BiH Court dismissed this charge. Specifically, while the First Instance found that the elements of superior responsibility were not met, the Second Instance decided it was not necessary to assess the Defendant's command responsibility because he was personally responsible for co-perpetrating the murder.<sup>60</sup>

## II. DDE

### A. What did the DDE Prove?

When deciding this case, the three Instances of the BiH Court relied mainly on one type of DDE: the video footage of Operation Oluja captured by the 505<sup>th</sup> Brigade cameraman<sup>61</sup> on 5 August 1995.<sup>62</sup>

Four different video recordings were submitted as evidence by the Prosecution. To support the indictment, the Prosecution presented a CD with video footage of '[t]he killing of four prisoners'<sup>63</sup> and a CD with video footage of the '[q]uestioning and killing of [redacted]'.<sup>64</sup> Two additional DVDs were listed as part of the Prosecution's evidence in the first and second instance decisions: 'DVD recording of the guard of hono[u]r of the *Hamza* Battalion'<sup>65</sup> and 'DVD recording [of the] funeral of the *Hamza* Battalion Commander, Izet Nanić'.<sup>66</sup> The Defence, on the other hand,

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<sup>58</sup> *ibid* [137].

<sup>59</sup> *ibid* [148].

<sup>60</sup> *ibid*; a decision that was confirmed by the Third Instance of the BiH: see *Alić Third Instance Verdict* (n 1) [115].

<sup>61</sup> Specifically, by Meho Veladžić, a member of the 505th Brigade, who was also a Prosecution and Defence witness in the proceedings: see *Alić First Instance Verdict* (n 1) 4; as stated previously, the *Hamza* Battalion was the IV Battalion of the 505th Brigade of the 5th Corps of the Army of BiH: see above at n 5.

<sup>62</sup> *Alić Second Instance Verdict* (n 1) [40].

<sup>63</sup> Identified as 'CD1 No. BiH 00001056': see *Alić Indictment* (n 1) 6 and 23.

<sup>64</sup> Identified as 'CD2 Video material: CD2 s.Korpus-ARBIH-sos.Brigada.>'; the description of the video is redacted in the indictment: see *ibid* 7 and 23.

<sup>65</sup> *Alić First Instance Verdict* (n 1) 7; *Alić Second Instance Verdict* (n 1) 10.

<sup>66</sup> *ibid*.

submitted a ‘DVD recording made during the critical operation’.<sup>67</sup> Nonetheless, both the First and Second Instances of the BiH Court expressly relied solely on the video footage presented by the Defence, noting that it showed the same events depicted in the Prosecution’s video footage, ‘while having a superior quality and a longer coverage of the events at issue’.<sup>68</sup>

The video footage was of substantial importance in the determination of this case, as recognized by the First Instance of the BiH Court.<sup>69</sup> The three Instances of the BiH Court relied extensively on the video material for establishing the relevant facts and, thus, for deciding the abovementioned issues. In fact, they made recurring references to it in their reasoning. In some instances, the footage was the only evidence used by the BiH Court.<sup>70</sup> The footage was also referred to in the first instance decision as the ‘principal evidence for the Prosecution’.<sup>71</sup>

Other DDE, namely a set of photographs of the victims and snapshots of the video footage,<sup>72</sup> was also listed as evidence in the BiH Court’s first and second instance decisions.<sup>73</sup> However, these photographs were not mentioned in the reasoning of any of the decisions.<sup>74</sup>

Despite the significance of the DDE, the three Instances of the BiH Court also relied on a wide range of non-DDE, including witness testimonies, maps, sketches, medical records and military documents.<sup>75</sup>

The following section identifies how the video footage was considered and used by the three Instances of the BiH Court to determine the issues identified in 2.4.

## 1. Violation of International Law

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<sup>67</sup> *Alić First Instance Verdict* (n 1) 7; *Alić Second Instance Verdict* (n 1) 11.

<sup>68</sup> *Alić First Instance Verdict* (n 1) 16; see also *ibid* 31 and *Alić Second Instance Verdict* (n 1) [10].

<sup>69</sup> *Alić First Instance Verdict* (n 1) 16.

<sup>70</sup> As the First Instance of the BiH Court stated in its decision, ‘[t]he Trial Panel however notes that there is no witness testimony related to the physical mistreatment of the POWs by the Accused; accordingly, in the absence of sufficient witness testimony, the Trial Panel relied heavily on the video footage related to the alleged mistreatment of the prisoners’: see *Alić First Instance Verdict* (n 1) 31.

<sup>71</sup> *ibid* 4.

<sup>72</sup> Specifically, the decisions of the BiH Court refer to ‘Photographs (from the CD which is Exhibit T1)’ and to ‘Photo-documentation (clips) from the DVD recording’: see *ibid* 6-7; *Alić Second Instance Verdict* (n 1) 10-11.

<sup>73</sup> Although no further information is given in the judgement about the photograph as to whether it was a digital or analogue in form, it was probably at some point stored digitally, being at least considerable as digitalised evidence and, as such, DDE for the purposes of this report.

<sup>74</sup> They were, however, presented during the second instance trial, as the Appellate Body refers that the public was excluded ‘from the trial during every reproduction of the [...] photo documentation (clips) from the DVD footage’: see *Alić Second Instance Verdict* (n 1) [11].

<sup>75</sup> For a comprehensive list, see *Alić First Instance Verdict* (n 1) 5-7; *Alić Second Instance Verdict* (n 1) 5-9.

When determining this issue, the three Instances of the BiH Court relied primarily on non-DDE evidence and on the analysis of the law. However, the video footage was used by the Second Instance of the BiH Court to establish the circumstances surrounding the events described in the indictment.<sup>76</sup> It was also used to reaffirm its finding on the status of the victims as POWs.<sup>77</sup>

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<sup>76</sup> *Alić Second Instance Verdict* (n 1) [55].

<sup>77</sup> *ibid* [98].



Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value	Other information
<b>Video footage</b> of Operation Oluja <sup>78</sup>	The video footage was captured by the Brigade cameraman, Meho Veladžić. <sup>79</sup>  It was presented as evidence by the Defendant. <sup>80</sup> No information was provided on how the Defence (and the Prosecution) obtained a copy of the video footage.	No.  The video footage was adduced by the Defence and its authenticity was not contested by the Prosecution, that contrarily relied on it to build the case. <sup>81</sup>	The Second Instance of the BiH Court relied on the DDE to establish the context of the offences attributed to the Defendant. Specifically, it concluded from the footage that the events took place in the summertime and ‘were filmed while the Battalion was moving through a forest’. <sup>83</sup> It further affirmed that the footage showed at what time the four prisoners were captured. <sup>84</sup>	The Defence challenged the video footage presented by the Prosecution, on the basis of it not including scenes that were very important for the Defendant. <sup>87</sup> It thus presented its own, longer video recording of the operation. As noted in 3.1, this was the video footage

<sup>78</sup> *Alić First Instance Verdict* (n 1) 16; *Alić Second Instance Verdict* (n 1) [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>79</sup> He was considered the ‘indisputable author of the video recordings’: see *ibid*.

<sup>80</sup> Although, as explained in 3.1, the Prosecution adduced video footage covered by the one presented by the Defence.

<sup>81</sup> *ibid* 16.

<sup>83</sup> *Alić Second Instance Verdict* (n 1) [55].

<sup>84</sup> *Alić Second Instance Verdict* (n 1) [55]; The Court of BiH does not expand on how the time of capture was determined, stating only that ‘[t]he footage also depicts the time of the capture of four Serb soldiers’. As no reference is made to the Court’s reliance on metadata, it is apparent that the time was determined through watching the video.

<sup>87</sup> *Alić First Instance Verdict* (n 1) 4; The verdict states that the Defence ‘contested the authenticity of the video-recording’. However, the Defence’s contention does not seem to amount to the video’s authenticity, but rather to fact that relevant segments of the video were not included: see 3.2 for further discussion on this matter.

		<p>The authenticity of the video was also verified by the statement of the Brigade cameraman that recorded it.<sup>82</sup></p>	<p>The DDE was also used to determine that the victims were protected persons under IHL. In this instance, although noting that the Defence did not dispute the victims' status,<sup>85</sup> the Second Instance of the BiH Court affirmed that 'it is clear from the footage and the evidence given by all Prosecution witnesses that these persons were prisoners of war, captured in the zone of war operations during the <i>Oluja</i> military operation'.<sup>86</sup></p>	<p>relied on by the three Instances of the BiH Court.</p> <p>Both the First and the Second Instances of the BiH Court decided to exclude the public from the trial during the reproduction of the video footage.<sup>88</sup></p>
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<sup>82</sup> *ibid* [10] and [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>85</sup> *ibid* [98].

<sup>86</sup> *Alić Second Instance Verdict* (n 1) [98].

<sup>88</sup> *Alić First Instance Verdict* (n 1) 8; *Alić Second Instance Verdict* (n 1) [11].

## 2. Liability of the Defendant

The DDE was used in the reasoning of the Second and Third Instances of the BiH Court concerning the Defendant's status and the duties that emerged thereof, two elements that were essential to establish the Defendant's liability.<sup>89</sup> Specifically, the video footage was one of the pieces of evidence used by the Second Instance of the BiH Court to determine 'that it was proven beyond a reasonable doubt that, on 5 August 1995, the Accused Šefik Alić, had the status as an Assistant Commander for Security of the "Hamza" Battalion and that he was in the field together with the Battalion on the referenced day'.<sup>90</sup> Moreover, the footage was used, in conjunction with testimonial evidence, to establish that the prisoners were placed under the Defendant's control<sup>91</sup> and that he was responsible, as Assistant Commander, for the life and wellbeing of the prisoners<sup>92</sup> as well as 'for safely escorting them to the Brigade'.<sup>93</sup>

The Third Instance of the BiH Court also referred to the DDE when dismissing the Defendant's appeal of the Second Instance's verdict decision on this issue.<sup>94</sup>

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<sup>89</sup> As explained in 2.4.1.

<sup>90</sup> *Alić Second Instance Verdict* (n 1) [24].

<sup>91</sup> *ibid* [50].

<sup>92</sup> *ibid* [36] and [40].

<sup>93</sup> *ibid* (n 1) [50].

<sup>94</sup> *Alić Third Instance Verdict* (n 1) [69].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value	Other information
Video footage of Operation Oluja <sup>95</sup>	The video footage was captured by the Brigade cameraman, Meho Veladžić. <sup>96</sup>  It was presented as evidence by the Defendant. <sup>97</sup> No information was provided on how the Defence (and the Prosecution) obtained a copy of the video footage.	No.  The video footage was adduced by the Defence and its authenticity was not contested by the Prosecution, that contrarily relied on it to build the case. <sup>98</sup>	<b>Second instance:</b>  In the analysis of the Defendant's status, the DDE was used to invalidate the witnesses' statements that denied his presence in the field on 5 August 1995, together with the Battalion. <sup>100</sup> Specifically, the Second Instance of the BiH Court stated that 'the presence of the Accused was undoubtedly proven by the DVD footage', and thus the witnesses were 'absolutely unconvincing'. <sup>101</sup>	The Defence challenged the video footage presented by the Prosecution, on the basis of it not including scenes that were very important for the Defendant. <sup>105</sup> It thus presented its own, longer video recording of the operation. As noted in 3.1, this was the video footage

<sup>95</sup> *Alić First Instance Verdict* (n 1) 16; *Alić Second Instance Verdict* (n 1) [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>96</sup> He was considered the 'indisputable author of the video recordings': see *ibid*.

<sup>97</sup> Although, as explain in 3.1, the Prosecution adduced video footage covered by the one presented by the Defence.

<sup>98</sup> *Alić First Instance Verdict* (n 1) 16.

<sup>100</sup> *Alić Second Instance Verdict* (n 1) [28].

<sup>101</sup> *Alić Second Instance Verdict* (n 1) [28].

<sup>105</sup> *Alić First Instance Verdict* (n 1) 4; The verdict states that the Defence 'contested the authenticity of the video-recording'. However, the Defence's contention does not seem to amount to the video's authenticity, but rather to fact that relevant segments of the video were not included: see 3.2 for further discussion on this matter.

		<p>The authenticity of the video was also verified by the statement of the Brigade cameraman that recorded it.<sup>99</sup></p>	<p>When assessing the Defendant's duties as Assistant Commander, the Second Instance of the BiH Court referred to the DDE, stating that:</p> <p style="padding-left: 40px;">[i]t can be clearly seen in the footage that the Accused Alić was present among the members of the Battalion, that he was armed and wearing a dark green beret, military vest and yellow T-shirt.<sup>102</sup></p> <p>Subsequently, it observed, based both on witness statements and on the video footage, that the Defendant 'treated others as though he possessed certain authority'.<sup>103</sup> The inferences of the Second Instance of the BiH Court based on the DDE were further used for reaching the</p>	<p>relied on by the three Instances of the BiH Court.</p> <p>Both the First and the Second Instances of the BiH Court decided to exclude the public from the trial during the reproduction of the video footage.<sup>106</sup></p>
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<sup>99</sup> *Alić Second Instance Verdict* (n 1) [10] and [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>102</sup> *Alić Second Instance Verdict* (n 1) [40].

<sup>103</sup> *ibid* [41].

<sup>106</sup> *Alić First Instance Verdict* (n 1) 8; *Alić Second Instance Verdict* (n 1) [11].

			<p>conclusion that some of the witnesses' testimonies were not reliable.<sup>104</sup></p>	
			<p style="text-align: center;"><b>Third instance:</b></p> <p>Similarly, the Third Instance of the BiH Court considered that the DDE confirmed that 'on the critical day' the Defendant was present in the field.<sup>107</sup></p> <p>It was also stated in the third instance verdict that the video footage proved 'clearly, without a shred of doubt' the Defendant's presence in the company of other members on the Battalion on 5 August 1995, as well as 'that he was armed, and that he donned a dark-green beret, a military jacket and a yellow shirt.'<sup>108</sup></p> <p>Finally, the Third Instance of the BiH Court referred to the video footage as correctly</p>	

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<sup>104</sup> *ibid* [48].

<sup>107</sup> *Alić Third Instance Verdict* (n 1) [50].

<sup>108</sup> *ibid* [66].

		supporting the Second Instance's decision establishing the prisoners' identity, <sup>109</sup> and that they were captured during Operation Oluja. <sup>110</sup>	
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<sup>109</sup> *ibid* [69].

<sup>110</sup> *ibid* [74]; for this finding, testimonial evidence was also used.

### 3. Inhuman Treatment

The DDE was paramount in the findings at first instance regarding the perpetration of inhuman treatment of the prisoners by the Defendant. In fact, the First Instance of the BiH Court expressly stated in its decision that, as the testimonial evidence was insufficient, it ‘relied heavily on the video footage related to the alleged mistreatment of the prisoners’.<sup>111</sup> It further concluded that ‘the treatment imposed upon the prisoners, and as depicted on the video footage from time frames referenced above, do[es] not rise to the level of severity to constitute inhuman treatment’.<sup>112</sup>

As described in 2.4.5, the Second Instance of the BiH Court reached a different conclusion when assessing this issue.<sup>113</sup> In fact, it considered that the facts attributed to the Defendant and Tewfik Al Harbi amounted to inhuman treatment.<sup>114</sup> In order to do that, it also relied on the DDE, in conjunction with other sources of evidence. Specifically, the video footage was used to determine that the facts described on counts 2 and 4 of the indictment were proved.<sup>115</sup>

Although more scantily, when upholding the Second Instance’s decision on this issue, the Third Instance of the BiH Court also referred to the DDE.<sup>116</sup>

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<sup>111</sup> *Alić First Instance Verdict* (n 1) 31.

<sup>112</sup> *ibid* 33.

<sup>113</sup> *Alić Second Instance Verdict* (n 1) [111].

<sup>114</sup> *ibid* [110]-[122].

<sup>115</sup> *ibid* [55], [57], [61]-[63] and [71]-[76]; however, only part of the facts described in count 4 was considered proved.

<sup>116</sup> *Alić Third Instance Verdict* (n 1) [85]-[88].



Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value	Other information
Video footage of Operation Oluja <sup>117</sup>	The video footage was captured by the Brigade cameraman, Meho Veladžić. <sup>118</sup>  It was presented as evidence by the Defendant. <sup>119</sup> No information was provided on how the Defence (and the Prosecution) obtained a	No.  The video footage was adduced by the Defence and its authenticity was not contested by the Prosecution, that contrarily relied on it to build the case. <sup>120</sup>  The authenticity of the video was also verified by	<b>First instance:</b>  The First Instance of the BiH Court placed significant reliance on the DDE to determine that the treatment of the prisoners did not amount to inhuman treatment. <sup>122</sup>  The video footage was first used to determine how the prisoners were treated after their capture, namely through what was described as their intimidation and slapping <sup>123</sup> (count 4 of the indictment). <sup>124</sup>	The Defence challenged the video footage presented by the Prosecution, on the basis of it not including scenes that were very important for the Defendant. <sup>132</sup> It thus presented its own, longer video recording of the operation. As noted in 3.1, this was the video footage relied on by the three Instances of the BiH Court.

<sup>117</sup> *Alić First Instance Verdict* (n 1) 16; *Alić Second Instance Verdict* (n 1) [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>118</sup> He was considered the ‘indisputable author of the video recordings’: see *ibid*.

<sup>119</sup> Although, as explain in 3.1, the Prosecution adduced video footage covered by the one presented by the Defence.

<sup>120</sup> *Alić First Instance Verdict* (n 1) 16.

<sup>122</sup> This reliance is clearly expressed both in the First Instance Verdict and in the Second Instance Verdict: see *Alić First Instance Verdict* (n 1) 33; *Alić Second Instance Verdict* (n 1) [108].

<sup>123</sup> *Alić First Instance Verdict* (n 1) 31; *Alić Indictment* (n 1) 3.

<sup>124</sup> *Alić Indictment* (n 1) 3.

<sup>132</sup> *Alić First Instance Verdict* (n 1) 4; The verdict states that the Defence ‘contested the authenticity of the video-recording’. However, the Defence’s contention does not seem to amount to the video’s authenticity, but rather to fact that relevant segments of the video were not included: see 3.2 for further discussion on this matter.

	<p>copy of the video footage.</p>	<p>the statement of the Brigade cameraman that recorded it.<sup>121</sup></p>	<p>In this context, the First Instance of the BiH Court stated that the video footage ‘clearly depicts’ the moment ‘when the POW1 was captured [and] Tewfik looked for a knife to attack the captive’.<sup>125</sup></p> <p>It further specified that ‘[t]he evidence [being the video footage and the corresponding transcript] clearly indicates that somebody indeed intervened during the rifle scene telling Tewfik to stop the threats’, although it could not establish who that person was, and that the Defendant was present during this scene.<sup>126</sup></p> <p>Second, the video footage was used to establish the facts surrounding the forcing of the first prisoner, Mirko Devetak, to march at the head of the column of the soldiers of the</p>	<p>Both the First and the Second Instances of the BiH Court decided to exclude the public from the trial during the reproduction of the video footage.<sup>133</sup></p>
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<sup>121</sup> *Alić Second Instance Verdict* (n 1) [10] and [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>125</sup> *Alić First Instance Verdict* (n 1) 31.

<sup>126</sup> *Alić First Instance Verdict* (n 1) 31.

<sup>133</sup> *Alić First Instance Verdict* (n 1) 8; *Alić Second Instance Verdict* (n 1) [11].

			<p><i>Hamza</i> Battalion<sup>127</sup> (count 2 of the indictment).<sup>128</sup></p> <p>In this context, it noted that the footage ‘depicts POW1 walking in the column of soldiers, being surrounded by the soldiers of the Hamza Battalion’<sup>129</sup> and that ‘the prisoners were clearly holding or casually carrying the rifles, which is in contradiction with the witness testimonies’.<sup>130</sup></p> <p>The DDE was also used to dismiss the Prosecution’s contention that the prisoner was ‘mentally tormented’ and ‘led into the danger zone’, with the First Instance of the BiH Court stating that ‘the video footage does not depict any indicia of force: the prisoner walked freely with the soldiers, his hands were</p>	
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<sup>127</sup> *ibid* 33.

<sup>128</sup> *Alić Indictment* (n 1) 2.

<sup>129</sup> *Alić First Instance Verdict* (n 1) 33.

<sup>130</sup> *ibid*.

			untied and there were no guns pointing at the prisoner. <sup>131</sup>	
			<p style="text-align: center;"><b>Second instance:</b></p> <p>Like the First Instance, the Second Instance of the BiH Court relied heavily on the DDE when determining this issue, although it reached the opposite conclusion.<sup>134</sup></p> <p>When analysing the facts described in count 2 of the indictment, the Second Instance of the BiH Court relied on the DDE multiple times.<sup>135</sup></p> <p>In this regard, it noted that the video footage depicted the soldiers' interrogation and Tewfik Al Harbi's behaviour towards</p>	

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<sup>131</sup> *ibid.*

<sup>134</sup> In fact, contrary to the First Instance, the DDE supported the finding that the prisoners were treated inhumanly both by Tewfik Al Harbi and by the Defendant: see *Alić Second Instance Verdict* (n 1) [118].

<sup>135</sup> It expressly stated that the analysis of 'the DVD footage starting at 5:27 and stopping at 7:25 minutes, as well as the witness testimonies' lead to the conclusion that that the facts as set forth in the Indictment are accurate': see *ibid* [62].

them.<sup>136</sup> Specifically, the footage was used to corroborate witness evidence giving account of when Tewfik Al Harbi threatened to kill the first prisoner and was stopped by other members of the Battalion.<sup>137</sup>

The DDE was also used to dismiss the Defence's objections to the BiH Court's finding that the first prisoner 'was placed under the supervision and control of the Accused, who interrogated and intimidated the prisoner together with Tewfik, that the Accused said that Tewfik "only slits throats", and that the prisoner was forced to march at the head of the column as a lure',<sup>138</sup>

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<sup>136</sup> *ibid* [55].

<sup>137</sup> In this regard, the Second Instance of the BiH Court stated that '[t]his testimony is consistent in its entirety with the events depicted on the DVD footage, starting at 6:35 and stopping at 6:40 minutes. It shows a Serb soldier surrounded by the "Hamza" Battalion soldiers and the person identified by witnesses as Tewfik Al Harbi going from soldier to soldier asking for a knife to kill the prisoner': see *ibid* [57].

<sup>138</sup> *ibid* [61].

stating that these facts were corroborated by the DDE and by the testimonial evidence.<sup>139</sup>

Moreover, it noted that '[t]he footage starting at 5:27 and stopping at 7:25 minutes depicted Tewfik Al Harbi rushing at the prisoner Devetak and moving from one soldier to another asking for a knife to kill him', while members of the Battalion were stopping him.<sup>140</sup> It added that '[i]n the footage, Tewfik introduced himself to Devetak as a *mujahedin* and told the prisoner "I come, I kill one, two"', following which the Defendant told the prisoner that Tewfik 'only slits throats'.<sup>141</sup>

This account of the video footage was restated in a different segment of the second

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<sup>139</sup> *ibid.*

<sup>140</sup> *ibid* [63].

<sup>141</sup> *Ibid*; in the same paragraph, the Second Instance of the BiH Court also stated that '[t]he footage also depicted this witness crossing over the terrain in the direction which witness Hasan Ćatić states was supposed to have taken them to the Command of the Army of Serb Krajina'.

instance verdict relating to the same issue.<sup>142</sup>

In this segment, it was added that the video showed the Defendant ‘addressing and interrogating the prisoner about the troop deployments’, in the company of Tawfik Al Harbi (this being the context where the described events occurred).<sup>143</sup>

Consequently, the Second Instance of the BiH concluded that the Defendant ‘could certainly notice the prisoner's fear, as the other soldiers did, and one of the soldiers even told the prisoner: "Don't be afraid, why are you afraid?"’<sup>144</sup>

When analysing the events detailed under count 4 of the indictment, the Second Instance of the BiH Court affirmed that they ‘were partially described by witness W5 and partly recorded on the DVD footage’.<sup>145</sup>

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<sup>142</sup> *ibid* [114].

<sup>143</sup> *ibid*.

<sup>144</sup> *ibid*.

<sup>145</sup> *ibid* [71].

In fact, the testimony of this witness was accepted 'to the extent to which it is corroborated by the DVD footage and with regard to the actions that have not been contested'.<sup>146</sup> The Second Instance of the BiH Court subsequently specified which parts of the testimony were covered by the video footage.<sup>147</sup> Most relevantly, it stated that

beginning at 13:45 and ending at 14:00, the DVD depicts Tewfik Al Harbi and the Accused Alić hitting (the fourth) captive Branko Bašić in the back of his head as he walked in front of them.<sup>148</sup>

Finally, the Second Instance of the BiH Court observed that 'at least according to

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<sup>146</sup> *ibid* [72].

<sup>147</sup> *ibid* [73] - [75].

<sup>148</sup> *ibid* [75]; this was repeated further in another segment of the Second Instance Verdict, namely that '[t]he Accused is also seen on the DVD footage slapping Branko Bašić on the back of his head with Tewfik, as the prisoner walked in front of them': see *ibid* [115].



		<p>the DVD footage’, no other member of the <i>Hamza</i> Battalion participated in any unlawful act against the prisoners,<sup>149</sup> and that, on the contrary, it ‘witnessed on the DVD the laudable willingness of other soldiers to protect the first captive from Tewfik’.<sup>150</sup> This behaviour was contrasted with Tewfik Al Harbi’s and the Defendant’s behaviour in the same circumstances, which led to the conclusion that the Defendant, being ‘obviously passive’<sup>151</sup> participated in the inhuman treatment with Tewfik Al Harbi.<sup>152</sup></p>	
		<p style="text-align: center;"><b>Third instance:</b></p> <p>Apart from a general reference to the video footage as supporting the Second Instance’s</p>	

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<sup>149</sup> *ibid* [118].

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid*.

<sup>152</sup> *ibid*.

			<p>decision on this issue,<sup>153</sup> the Third Instance of the BiH Court expressly relied on the DDE to determine that:</p> <p>Tewfik Al Harbi has shown an unnecessary use of force also against captive Petar Stambolija when he pulled his hair during interrogation, in the presence of the accused, while the accused hit captive Branko Bašić in the back of his head together with Tewfik, while walking in front of them (...).<sup>154</sup></p>	
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<sup>153</sup> *Alić Third Instance Verdict* (n 1) [85].

<sup>154</sup> *ibid* [88].

#### 4. Killing of the POWs

In the first instance, both the DDE and other evidence were used to evaluate the fulfilment of the legal requirements of the Defendant's responsibility for the killing of the four prisoners. The depiction of the events in the footage was clearly essential for the First Instance of the BiH Court's determination that the Defendant was not responsible under command responsibility, namely because he 'complied with his duties as the assistant commander for security when he safely delivered and placed the prisoners with his superior officer, Battalion Commander, at the elevation Hleb'.<sup>155</sup>

The DDE was also one of the sources of evidence used in the three Instances of the proceedings to establish the facts surrounding the death of the four prisoners. Particularly, the video footage supported not only the BiH Court's finding that the prisoners were killed, but also that Tewfik Al Harbi claimed to have killed them.<sup>156</sup> The video material was also used by the Second Instance to find that the Defendant perpetrated the murder by omission, as described in 2.4.5.<sup>157</sup>

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<sup>155</sup> *Alić First Instance Verdict* (n 1) 47.

<sup>156</sup> *Alić First Instance Verdict* (n 1) 34; *Alić Second Instance Verdict* (n 1) [123]; *Alić Third Instance Verdict* (n 1) [100] and [107].

<sup>157</sup> *Alić Second Instance Verdict* (n 1) [131], [135]-[136]; the Second and the Third Instances of the BiH Court did not assess the Defendant's command responsibility, because they considered that he was instead guilty of perpetrating the murder of the POWs by omission, jointly with Tewfik Al Arbi: see 2.4.5 for a more detailed explanation.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value	Other information
Video footage of Operation Oluja <sup>158</sup>	<p>The video footage was captured by the Brigade cameraman, Meho Veladžić.<sup>159</sup></p> <p>It was presented as evidence by the Defendant.<sup>160</sup> No information was provided on how the Defence (and the Prosecution) obtained a copy of the video footage.</p>	<p>No.</p> <p>The video footage was adduced by the Defence and its authenticity was not contested by the Prosecution, that contrarily relied on it to build the case.<sup>161</sup></p> <p>The authenticity of the video was also</p>	<p><b>First instance:</b></p> <p>When analysing this issue, the First Instance of the BiH Court stated that the video footage showed four dead soldiers.<sup>163</sup></p> <p>The footage was also used to support the witnesses' testimonies according to which the prisoners were killed by Tewfik Al Harbi.<sup>164</sup></p> <p>More notable was the use of the DDE in the assessment of the Defendant's superior responsibility for the killing of the four prisoners.</p>	<p>The Defence challenged the video footage presented by the Prosecution, on the basis of it not including scenes that were very important for the Defendant.<sup>176</sup> It thus presented its own, longer video recording of the operation. As noted in 3.1, this was the video footage relied on by the</p>

<sup>158</sup> *Alić First Instance Verdict* (n 1) 16; *Alić Second Instance Verdict* (n 1) [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>159</sup> He was considered the 'indisputable author of the video recordings': see *ibid.*

<sup>160</sup> Although, as explain in 3.1, the Prosecution adduced video footage covered by the one presented by the Defence.

<sup>161</sup> *Alić First Instance Verdict* (n 1) 16.

<sup>163</sup> *Alić First Instance Verdict* (n 1) 34.

<sup>164</sup> *ibid.*

<sup>176</sup> *Alić First Instance Verdict* (n 1) 4; The verdict states that the Defence 'contested the authenticity of the video-recording'. However, the Defence's contention does not seem to amount to the video's authenticity, but rather to fact that relevant segments of the video were not included: see 3.2 for further discussion on this matter.

		<p>verified by the statement of the Brigade cameraman that recorded it.<sup>162</sup></p>	<p>When determining the first element – existence of a superior-subordinate relationship<sup>165</sup> –, the First Instance of the BiH Court mentioned generically that it was used to determine ‘the Accused’s command position held during the <i>Oluja</i> operation and the period covered by the Indictment’.<sup>166</sup></p> <p>When analysing the second element – the corresponding <i>mens rea</i><sup>167</sup> –, the First Instance of the BiH Court concluded, upon carefully reviewing the video footage, that there was no proof of the Defendant’s presence at the elevation Hleb after the POWs were handed over to the Battalion Commander,<sup>168</sup> nor during or after their execution.<sup>169</sup> Thus, it found that the Defendant</p>	<p>three Instances of the BiH Court.</p> <p>Both the First and the Second Instances of the BiH Court decided to exclude the public from the trial during the reproduction of the video footage.<sup>177</sup></p>
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<sup>162</sup> *Alić Second Instance Verdict* (n 1) [10] and [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>165</sup> *Alić First Instance Verdict* (n 1) 27.

<sup>166</sup> *ibid* 38.

<sup>167</sup> *ibid* 28.

<sup>168</sup> *Alić First Instance Verdict* (n 1) 43-44.

<sup>169</sup> *ibid* 44.

<sup>177</sup> *Alić First Instance Verdict* (n 1) 8; *Alić Second Instance Verdict* (n 1) [11].

		<p>could not have been aware of Tewfik Al Harbi's plan to execute the POWs.<sup>170</sup></p> <p>Finally, when analysing the third requirement – failure to prevent or punish the subordinate<sup>171</sup> – the First Instance of the BiH Court noted that ‘the video footage confirms the Accused’s departure from the elevation after he surrendered the prisoners to the Battalion Commander’.<sup>172</sup> It also affirmed that ‘the video footage corroborates witness testimony and clearly depicts that the POWs were under the control of the Battalion Commander at the elevation Hleb.’<sup>173</sup> These two findings were clearly essential for the First Instance of the BiH Court to determine that the Defendant fulfilled his duties when he took the prisoners to</p>	
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<sup>170</sup> ibid 45.

<sup>171</sup> ibid 45. In this regard, it also considered ‘the part of the video footage where Tewfik told one of the POWs that he was a *mujahdeen* who came to kill, and where the Accused was present at the time the statement was made’, although it ultimately concluded that the second requirement was not fulfilled.

<sup>172</sup> ibid 46.

<sup>173</sup> ibid 47.

		<p>the Battalion Commander,<sup>174</sup> therefore acquitting him of the charges.<sup>175</sup></p>	
		<p style="text-align: center;"><b>Second instance:</b></p> <p>The Second Instance of the BiH Court also relied on the video footage to determine that the four prisoners were killed<sup>178</sup> – more precisely by firearms<sup>179</sup> – and that Tewfik Al Harbi was the person that killed them.<sup>180</sup></p> <p>The Second Instance of the BiH Court relied on a corroboratory witness’ statement that identified the bodies showed in the footage to find that ‘the bodies visible in the footage were those of the</p>	

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<sup>174</sup> *ibid.*

<sup>175</sup> *ibid* 48.

<sup>178</sup> In this regard, the Second Instance of the BiH Court affirmed that based on one witness’ statement ‘and the DVD footage on which Tewfik admits to cameraman Meho Veladžić the murder of these persons, the fact that all four captives were eventually killed was established in the proceedings’: see *Alić Second Instance Verdict* (n 1) [123].

<sup>179</sup> *ibid* [135].

<sup>180</sup> The footage – specifically the segment ‘starting at 15:44 and ending at 16:20’ – is described as showing ‘Tewfik calling over the cameraman to film the bodies and boasting that he had killed them’ and ‘four dead bodies with visible bullet wounds laid out on the side of the road’: see *Ibid* [81]. This was repeated, with different wording, in a different segment of the Second Instance Verdict: see *ibid* [134].

executed prisoners of war identified in the Indictment'.<sup>181</sup>

The DDE was also referred to several times in the Second Instance of the BiH Court's reasoning relating to the Defendant's omission 'to protect the persons he knew were prisoners'.<sup>182</sup> In particular, it stated that at least 'in those segments of the event depicted on the DVD footage', the Defendant, 'as any reasonable person and as an experienced soldier' could have deduced Tewfik Al Harbi's aggressiveness and readiness to kill the prisoners.<sup>183</sup> It further observed that the footage showed the Defendant's presence in the formation 'all the time, that is, both at the time of the capture and of the interrogation', and that he 'even personally led one of them [i.e., one of the POWs] on a stretch of a forest path'.<sup>184</sup>

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<sup>181</sup> *ibid* [82].

<sup>182</sup> *ibid* [136].

<sup>183</sup> *ibid* [131].

<sup>184</sup> *ibid* [135].



**Third instance:**

The Third Instance of the BiH Court referred to the DDE when upholding the Second Instance's finding that the four POWs were killed and that Tewfik Al Harbi was recorded by the Battalion's cameraman admitting to the killing.<sup>185</sup> It also mentioned that the video footage clearly showed the POWs bodies 'lying by the dirt road in full view'.<sup>186</sup>

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<sup>185</sup> *Alić Third Instance Verdict* (n 1) [100] and [107].

<sup>186</sup> *ibid* [107].

## B. What DDE discussion was there?

Although the BiH Courts' verdicts invoked the applicable rules of evidence,<sup>187</sup> there was no discussion of these rules specifically relating to the DDE. Nonetheless, reference was made both to the Defence's challenge of the DDE's authenticity and to its authentication.

In the first instance verdict, the BiH Court mentioned that the Defence disputed the authenticity of the video footage presented by the Prosecution.<sup>188</sup> It is however clear that the Defence's objections were not grounded in the DDE's lack of authenticity, but rather in its lack of reliability. Specifically, the Defence argued that certain scenes that were very important for the Defendant were deleted from the Prosecution's footage.<sup>189</sup> This was confirmed by the First Instance of the BiH Court.<sup>190</sup> The Defence was permitted to submit its own video recording of the operation which was, subsequently, the one relied on by the three Instances of the BiH Court.<sup>191</sup>

The DDE was authenticated through testimonial evidence. Specifically, the Brigade cameraman who captured the video footage testified to its authenticity.<sup>192</sup> Interestingly, although his statement was apparently made with reference to the video footage presented by the Prosecution, the BiH Court decided to extend this authentication to the video footage adduced by the Defence. The fact that the Prosecution did not challenge the evidence presented by the Defence and instead relied on it to build its case, undoubtedly contributed to this decision.<sup>193</sup>

The First Instance of the BiH Court's considerations on these matters are particularly pertinent. Highlighting 'the sensibility of such type of evidence',<sup>194</sup> it mentioned that it 'did not consider this documentary evidence to be void of authenticity yet it did not automatically accept it to be an accurate portrayal of the facts at issue'.<sup>195</sup> It further described how it analysed this evidence, noting that it was

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<sup>187</sup> Particularly in the first instance: see *Alić First Instance Verdict* (n 1)16-17.

<sup>188</sup> *ibid* 4.

<sup>189</sup> *Ibid*; in fact, it does not seem that the Defence contended that the fact that the Prosecution's video was not complete indicated that it had been tampered with or altered, as no reference to this appears in any of the decisions.

<sup>190</sup> *ibid* 16; specifically, the First Instance of the BiH Court considered that the Prosecution's video footage 'does not constitute an integral recording of one period of time, considering that one part which actually happened, as undoubtedly arises from the testimonies of all the witnesses, is obviously "cut out" from the video footage presented by the Prosecution'.

<sup>191</sup> As explained in 3.1.

<sup>192</sup> *Alić Second Instance Verdict* (n 1) [10] and [40]; *Alić Third Instance Verdict* (n 1) [66].

<sup>193</sup> *Alić First Instance Verdict* (n 1) 16.

<sup>194</sup> *Ibid*; it is not clear what was intended with this assertion.

<sup>195</sup> *ibid*.

evaluated ‘within the context of the trial record as a whole, including the testimony of Witness Veladžić Meho, the Brigade cameraman who was an indisputable author of the video recordings.’<sup>196</sup>

The prominence of the DDE in the BiH Court’s reasoning is noteworthy. As stated in 3.1 and the analysis therein, the three Instances of the BiH Court relied largely on the DDE for determining this case. Despite being used, in most cases, in conjunction with non-DDE, the recurring references to the video footage in the BiH Court’s verdicts reveal its considerable importance in the proceedings. This importance was expressly recognized by the BiH Court<sup>197</sup> and is even more remarkable when considering that the events at stake in the proceedings took place in 1995 – when the use of video recording devices was not as widespread as it is now. Moreover, given the significant lapse of time between the occurrence of the events and the proceedings, the availability of video footage depicting the events was a great advantage to the BiH Court, as it allowed for it to obtain a better appreciation of the events at stake in the proceedings and assisted its evaluation of other types of evidence.

In fact, it is worth considering the relationship of the DDE to other types of evidence in this case. Particularly, the BiH Court’s often used the DDE in conjunction with testimonial evidence.<sup>198</sup> In some cases, the witnesses’ statements were used to corroborate the video footage, the most notable example being the testimony of the Brigade cameraman responsible for its recording. His statement allowed the BiH Court to establish, for instance, the date that the events depicted in the video material took place.<sup>199</sup> Testimonial evidence was further used to confirm the identity of the persons depicted in the video, including that of Tewfik Al Harbi<sup>200</sup> and the prisoners, both alive<sup>201</sup> and dead.<sup>202</sup> The video footage was also used to both confirm or reject the witnesses’ statements.<sup>203</sup> In one case, the BiH Court goes as far as affirming that the testimony of one witness was accepted to the extent to which it was corroborated by the video footage.<sup>204</sup>

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<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.*

<sup>198</sup> For instance, *Alić Second Instance Verdict* (n 1) [24], [57] and [62] and *Alić Third Instance Verdict* (n 1) [74]; see 3.1 for a comprehensive account.

<sup>199</sup> *Alić Second Instance Verdict* (n 1) [40].

<sup>200</sup> *ibid* [55].

<sup>201</sup> *ibid* [75].

<sup>202</sup> *ibid* [82].

<sup>203</sup> For instance, in the first instance verdict the Court states that ‘the Trial Panel examined the video footage, which depicts POW1 walking in the column of soldiers, being surrounded by the soldiers of the Hamza Battalion. [...] the Court noted, in a number of instances, that the prisoners were clearly holding or casually carrying the rifles, which is in contradiction with the witness testimonies’: see *Alić First Instance Verdict* (n 1) 33.

<sup>204</sup> *Alić Second Instance Verdict* (n 1) [72]; In particular, the Second Instance of the BiH Court stated that ‘[t]he Defen[c]e argued that the testimony of witness W5 conflicted with his statements given during the investigation phase. However, the

The analysis of the BiH Court's engagement with the DDE in its reasoning allows for two final considerations to be made. First, the verdicts the BiH Court include several detailed descriptions of the video footage, offering a good understanding of its content.<sup>205</sup> Second, the First Instance and the Second Instance of the BiH Court reached opposite conclusions based on the analysis of the same video footage, a fact that demonstrates the subjectivity of the analysis of the evidence by the court. Indeed, the two Instances evaluated the same evidence on the basis of a different understanding of the legal framework applicable to the events. This eventually resulted in them deciding the same issue in a different manner,<sup>206</sup> however both expressly referred to the DDE to support their findings.<sup>207</sup>

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Appellate Panel accepts the testimony of witness W5 to the extent to which it is corroborated by the DVD footage and with regard to the actions that have not been contested.' Thus, in this instance, the BiH Court found the DDE more reliable than the testimonial evidence, a decision that might have stemmed from the inconsistency of the witness's statements.

<sup>205</sup> As is clear from the analysis made under 3.1.1 to 3.1.4.

<sup>206</sup> This happened, for example, concerning the perpetration of inhuman treatment by the Defendant: see *Alic Second Instance Verdict* (n 1) [108]-[111].

<sup>207</sup> Although focusing on different segments of the video footage: see 3.1.3 for a more detailed account.

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# Prosecutor v. Yvonne Basebya (Netherlands, 2013)

Case No. 09/748004-09, 2013

*Authors: Inês Ferreira and Ludovica Vecchio*

*Editors: Dr Emma Irving and Neil Cockerill*

## 1. Executive Summary

In the present case, Yvonne Basebya (the Defendant), a Dutch citizen, was prosecuted in the Netherlands for a series of international crimes, including genocide and war crimes.<sup>1</sup> The District Court of the Hague convicted the Defendant of incitement to commit genocide on 1 March 2013.<sup>2</sup> The Digitally Derived Evidence (DDE) relied on in the case included videos and photographs, as a means to rebuild historical events and to assess testimonial evidence. However, reliance on DDE by the Court was mostly peripheral, in order to corroborate witness statements. The case is noteworthy as it is the first case where a Dutch citizen has been convicted of genocide before a Dutch court.<sup>3</sup>

### I. Background

#### A. DDE Legal provisions/evidentiary norms

No rules of evidence or other legal provisions specifically relating to the DDE were discussed in the judgement. The legal framework of evidence, including DDE, in the Bosnian legal system is considered below.

#### B. Factual background of the case

In 1994, hundreds of thousands of Tutsis and moderate Hutus were massacred in an abhorrent manner in Rwanda. It is estimated that approximately 75% of all Tutsis in Rwanda were killed.<sup>4</sup> The Rwanda genocide provoked a significant shock to humanity, especially 'because of its scale, and the short period and the manner in which these massacres took place'.<sup>5</sup>

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<sup>1</sup> *The Prosecutor v Yvonne Basebya* (Case 09/748004-09) [2013] Dutch District Court.

<sup>2</sup> *ibid.*

<sup>3</sup> BBC, '[Yvonne Basebya Jailed for Rwanda Crimes](https://www.bbc.com/news/world-africa-21632819)' BBC (1 March 2013) <<https://www.bbc.com/news/world-africa-21632819>> accessed 18 October 2019.

<sup>4</sup> *Basebya* (n 1) [22.4].

<sup>5</sup> *Basebya* (n 1) [22.4].

The Defendant, a Dutch citizen born in Rwanda, was wanted because of her involvement with the Coalition for the Defence of the Republic (CDR), an extremist anti-Tutsi group.

At the time of the alleged offences, the Defendant was living in Gikondo, Kigali, Rwanda.<sup>6</sup> Her husband, Augustin Basebya, was a high-ranking politician for the National Republican Movement for Democracy and Development, an ally of the CDR.<sup>7</sup> Due to her husband's connection to the extremist anti-Tutsi movement, the Defendant embraced and promoted its radical racist ideology within her sphere of influence.<sup>8</sup> In particular, she partook in the organisation of CDR party-meetings and she was actively promoting and inciting low-class Hutu youngsters to engage in violent acts of persecution against the Tutsi population group.<sup>9</sup>

In 2007, the Rwandese Public Prosecution Service and the human rights organisation African Rights informed the Dutch National Office of the Public Prosecutor that the Defendant was living in the Netherlands, which led to the initiation of the investigation.<sup>10</sup> Following the publication of an article in the Rwandan newspaper "The New Times" causing the case to gain momentum,<sup>11</sup> the Dutch authorities searched the Defendant's dwelling in Reuver (Limburg, the Netherlands) seeking further evidence.<sup>12</sup> The Defendant was subsequently arrested in the Netherlands in 2010 and prosecuted for her suspected involvement in the Rwandan genocide (including committing several serious offences from October 1990 to July 1994).<sup>13</sup>

### **C. Legal system background**

The case was brought before the District Court of the Hague and pursued under the Dutch legal system, which is a civil law system.

In civil law systems, the judge typically takes on a more active role in the establishment of the facts. The standard of proof is often the subjective conviction of the judge, while preserving the presumption of innocence. There are also usually no strict rules on the admissibility of evidence. As a result, criminal proceedings in civil law systems tend to have a less adversarial character than in

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<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid* [4.1].

<sup>11</sup> Edwin Musoni, '[Several Teams Arrive to Investigate Genocide Suspects](https://www.newtimes.co.rw/section/read/19689)' *The New Times* (12 May 2010) <<https://www.newtimes.co.rw/section/read/19689>> accessed 18 October 2019.

<sup>12</sup> *Besabya* (n 1) [4.7].

<sup>13</sup> *ibid.*



common law. However, in light of the need to safeguard the rights of the accused, they cannot be considered as having a purely inquisitorial character.

Criminal proceedings in the Netherlands have a mixed character.<sup>14</sup> While the pre-trial phase has ‘a moderate inquisitorial character’,<sup>15</sup> the trial phase acquires a more adversarial character.<sup>16</sup> The rights of the accused are safeguarded already at an early stage (during the investigative phase) as well as throughout the proceedings.<sup>17</sup> These rights temper the inquisitorial elements present at the pre-trial phase, for instance through the ordering of searches and other coercive measures. During the trial phase, they constitute the basis for the enforcement of the principle of immediacy, according to which ‘all evidence has to be produced and discussed at trial in the presence of the defendant’.<sup>18</sup>

The Dutch Code of Criminal Procedure (DCCP)<sup>19</sup> contains the legal provisions on evidence applicable to criminal proceedings in the Netherlands.<sup>20</sup>

The standard of proof for conviction is set out in Article 338 of the DCCP, which provides that ‘[t]he court may find that there is evidence the defendant committed the offence as charged in the indictment only when the court through the hearing has become convinced thereof from legal means of evidence’. In other words, the standard is met when ‘the trial judge has obtained the inner conviction that the defendant is guilty of the offence, based on the statutory means of evidence’.<sup>21</sup>

The statutory means of evidence are listed in Article 339(1) of the DCCP that reads as follows:

The following shall be exclusively admissible as legal means of evidence

- 1.° the court’s own observations;
- 2.° the statements of the defendant;
- 3.° the statements of a witness;
- 4.° the statements of an expert witness;

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<sup>14</sup> Peter J.P. Tak characterises them as being ‘moderately accusatorial’. See Peter JP Tak *The Dutch criminal justice system* (3rd edn, Wolf Legal Publishers 2008) 29. Peter van J. Koppen, however, considers that ‘[t]he Dutch system is the most inquisitorial among inquisitorial systems’. See Peter van J, Koppen ‘[Miscarriages of Justice in Inquisitorial and Accusatorial Legal Systems](#)’ (2007) 7 *Journal of the Institute of Justice and International Studies* 50, 51.

<sup>15</sup> *ibid* 90.

<sup>16</sup> *ibid* 30.

<sup>17</sup> Tak (n 14) 29.

<sup>18</sup> *ibid*.

<sup>19</sup> [Wetboek van Strafvordering 1921 \(non-official translation of the text valid on 8 October 2012\). The wording of the provisions relevant to this report has not been changed since that date.](#)

<sup>20</sup> Although there are other Acts that have procedural criminal law provisions; Tak (n 14) 36-7.

<sup>21</sup> Bert-Jaap Koops, ‘[Cybercrime Legislation in the Netherlands](#)’ (18th International Congress on Comparative Law, Washington DC, 25-31 July 2010)

<[https://pure.uvt.nl/ws/portalfiles/portal/1260757/Koops\\_Cybercrime\\_Legislation\\_Netherlands\\_100826.pdf](https://pure.uvt.nl/ws/portalfiles/portal/1260757/Koops_Cybercrime_Legislation_Netherlands_100826.pdf)> accessed 21 October 2019.

5.° written materials.

The statements of the defendant are ‘about facts or circumstances, he [or she] knows from his own knowledge, given at the court session’.<sup>22</sup> The defendant is not obliged to make any statements during the proceedings, and no adverse inferences can be drawn from his or her silence.<sup>23</sup> Statements of witnesses are in turn defined as ‘information he [or she] gives in court on facts or circumstances he [or she] personally observed or experienced’.<sup>24</sup> This means that the witness’s ‘[p]ersonal opinions, guesses and conclusions are excluded as evidence’.<sup>25</sup> Under Articles 341(4) and 342(2) of the DCCP, the statements of the defendant or the statements of one witness alone are not sufficient for the court to conclusively establish that the defendant has *de facto* and *de jure* committed the offence.<sup>26</sup>

The documents that are considered written materials for the purposes of the DCCP are listed in Article 344(1), referring mainly to judiciary and police reports. The residual category comprising ‘all other written materials’ is limited in scope, as ‘said materials may only be used in conjunction with the content of other means of evidence’.<sup>27</sup> However, documentary evidence that does not fall in any of the listed categories can be presented during the trial, ultimately entering the proceedings under the category of ‘the court’s own observations’.<sup>28</sup>

Although DDE is not expressly mentioned in the Dutch rules of evidence, these are broad enough that such evidence can be considered as implicitly encompassed. In this regard, Professor Bert-Jaap Koops notes that:

The ‘other writings’ of Article 344, para. 1 of the DCCP are independent of a medium and can include electronic documents, as long as they can be read aloud. Forensic digital evidence can thus be used in court in various ways: as official documents written by experts, as expert statements made in court, as official reports by investigating officers describing their observations or as observations by the judge when the evidence is demonstrated on a computer in court.<sup>29</sup>

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<sup>22</sup> DCCP, Art 341(1).

<sup>23</sup> Tak (n 14) 106.

<sup>24</sup> DCCP, Art 342(1).

<sup>25</sup> Tak (n 14) 36-7.

<sup>26</sup> DCCP.

<sup>27</sup> DCCP, Art 344(1)(v).

<sup>28</sup> Tak (n 14) 105.

<sup>29</sup> Koops (n 21).

In fact, the lack of express provisions regulating DDE has not prevented the Dutch courts from often relying on that type of evidence.<sup>30</sup>

#### D. Legal background of the case

The Defendant was charged by the Dutch National Office of the Public Prosecutor with the following offences:<sup>31</sup>

1. genocide in her immediate living environment, pursuant to Article 1 of the 1964 Genocide Convention Implementation Act<sup>32</sup> (charge 1);
2. attempted genocide in her immediate living environment, pursuant to Article 1 of the 1964 Genocide Convention Implementation Act<sup>33</sup> (charge 2);
3. murder, pursuant to Article 289 of the Dutch Criminal Code<sup>34</sup> (charge 3);
4. conspiracy to commit genocide, pursuant to Article 1 of the 1964 Genocide Convention Implementation Act<sup>35</sup> (charge 4);
5. incitement to commit genocide, pursuant to Article 1 of the 1964 Genocide Convention Implementation Act<sup>36</sup> and Article 131 of the Dutch Criminal Code<sup>37</sup> (charge 5); and
6. war crimes – unlawful assault on human dignity and threat (*bedreiging*), pursuant to Article 8(1) of the 1952 Act on Criminal Law in Wartime (charge 6).<sup>38</sup>

The legal issues considered by the Court can be summarized as follows:

- charge 1: whether the Defendant co-committed as an intellectual instigator, incited or was an accessory in the commitment of the murder and rape of Tutsis on or around 22 February

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<sup>30</sup> See *The Prosecutor v Oussama Achraf Akhlaifa* (Case 09/748003-18 & 09/748003-19) [2019] Dutch District Court.

<sup>31</sup> *Basebya* (n 1) [1.2].

<sup>32</sup> [Uitvoeringswet genocideverdrag 1964](#); The Genocide Convention Implementation Act 1964 is now expired (replaced by the [International Crimes Act, 2003](#), the Netherlands).

<sup>33</sup> *ibid.*

<sup>34</sup> DCCP.

<sup>35</sup> Genocide Convention Implementation Act 1964.

<sup>36</sup> *ibid.*

<sup>37</sup> [Wetboek van Strafrecht 1881](#) (non-official translation of the text valid on 1 October 2010).

<sup>38</sup> [Wet Oorlogsstrafrecht 1952](#) (replaced by the [International Crimes Act, 2003](#), the Netherlands); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 3(1)(a) [Common Art 3](#).

1994, the massacre of Tutsis in the Palloti Church in Gikondo on or around 9 April 1994 and the murder of a Tutsi on or around 11 April 1994;<sup>39</sup>

- charge 2: whether the Defendant co-committed as an intellectual instigator, incited or was an accessory in the commitment of attacks on Tutsis on or around 22 February 1994 and searched for Tutsis with the intent to kill them or hurt them from 6 April to 18 July 1994;<sup>40</sup>
- charge 3: whether the Defendant co-committed as an intellectual instigator, incited or was an accessory in the commitment of the murder of a woman, incorrectly identified as Tutsi on 22 February 1994;<sup>41</sup>
- charge 4: whether, from 1 October 1990 up to 14 April 1994, the Defendant made any agreement with others to destroy the Tutsi population, including through keeping a list of Tutsis that should be murdered;<sup>42</sup>
- charge 5: whether, within the same period as in charge 4, the Defendant publicly and verbally incited to commit genocide against the Tutsis, including through leading the chanting of extremist anti-Tutsi songs and to publicly expressing anti-Tutsi sentiments and defending the extermination of all Tutsis;<sup>43</sup> and
- charge 6: whether, within the same period as in charge 4, the Defendant co-participated in actions that put Tutsi individuals in ‘situations in which they were seriously publicly humiliated and had to fear for their lives, mental and physical wellbeing and that of their close family members’.<sup>44</sup>

The judgement was delivered on 1 March 2013 and the Defendant was found guilty of public incitement to commit genocide (charge 5).<sup>45</sup> It was considered that all the other charges were not ‘legally and convincingly’ proven.<sup>46</sup> Indeed, the Court considered that the evidence submitted sufficed to show how she partook in anti-Tutsi chants and expressed hatred against the Tutsi population group, ultimately satisfying the evidentiary threshold for criminal liability.<sup>47</sup> Conversely, the Court was not convinced by the evidence produced (mainly testimonial) that the Defendant was guilty of the other charges, thus acquitting her thereof.<sup>48</sup>

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<sup>39</sup> *Basebya* (n 1) [1.2].

<sup>40</sup> *ibid* [1.2].

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid* [1.2,18.6].

<sup>43</sup> *Basebya* (n 1).

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid* [23].

<sup>47</sup> *ibid*; DCCP Art 338.

<sup>48</sup> *Basebya* (n 1) [14-19].

The Defendant was sentenced to 6-years imprisonment, which was the maximum sentence for the crime of incitement to genocide at the time.<sup>49</sup> Both the Defendant and the Dutch National Office of the Public Prosecutor refrained from pursuing an appeal,<sup>50</sup> making the District Court's decision final.

## II. DDE

In its reasoning, the Court considered the following DDE: videos,<sup>51</sup> photographs,<sup>52</sup> wiretapped conversations<sup>53</sup> and audio recordings of confidential communications.<sup>54</sup>

### A. What did the DDE Prove?

The Court relied on DDE in two main ways. Firstly, the DDE was used to corroborate the witness statements, which constituted the primary evidence used. Secondly, it was used to establish certain facts that were relevant when determining two of the issues outlined in above, namely:

- whether the Defendant had committed (as intellectual perpetrator) together and in association with others the murder of a Tutsi individual on or around 11 April 1994 (charge 1); and
- whether, between 1 October 1990 and 14 April 1994, the Defendant publicly and verbally incited to commit genocide against the Tutsis (charge 5).

#### *Corroboration of testimonial evidence*

When assessing the relevant testimonial evidence, the Court noted how, because of the 'special and extreme circumstances' of the case, significant 'reticence' had to be used in evaluating the plausibility of the witness statements.<sup>55</sup> This was because of the lapse of time since the occurrence of the events as well as because of the multiple and diverse range of activities involved.<sup>56</sup> As a result, the witnesses could not be expected to remember exactly the days or the nature of a specific activity.<sup>57</sup> In fact, the Court stated that the witness statements could be tested 'in view of the results of the special investigative actions', which included wiretapped telecommunications and the recording of confidential information.<sup>58</sup> In this context, the Court relied on 'a DVD with images of a CDR-meeting

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<sup>49</sup> Wetboek van Strafrecht (n 40) Art 57.

<sup>50</sup> National Public Prosecutor's Office, '[Rwandan Genocide Case Appeal Withdrawn](https://www.om.nl/vaste-onderdelen/zoeken/@31907/hoger-beroep/)' *Openbaar Ministerie* (28 June 2013) < <https://www.om.nl/vaste-onderdelen/zoeken/@31907/hoger-beroep/> > accessed 18 October 2019.

<sup>51</sup> *Basebya* (n **Error! Bookmark not defined.**) [8.26].

<sup>52</sup> *ibid* [7.2, 17.11].

<sup>53</sup> *ibid* [11.12].

<sup>54</sup> *ibid* [8.6].

<sup>55</sup> *Basebya* (n 1) [8.4,8.27].

<sup>56</sup> *ibid* [11.32].

<sup>57</sup> *ibid* [11.32].

<sup>58</sup> *ibid* [8.26].

in Butare on 5 December 1992' and 'video material about the living environment of the defendant'.<sup>59</sup> The former played a role in the corroboration of witness statements, allowing the Court to distinguish those events which the witnesses had directly assisted to or were involved in from those they just heard for instance at the Gacaca Courts hearings.<sup>60</sup> Hence, the Court adopted an overall holistic approach to witness statements, assessing them through different viewpoints and procedural devices. Nonetheless, it did not elaborate on how the DDE was specifically used for this purpose.

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<sup>59</sup> *ibid.*

<sup>60</sup> *Ibid* [8.15].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value	Other information
DVD with images of a CDR-meeting in Butare on 5 December 1992 <sup>61</sup>	Special investigation powers implemented by the Dutch National Criminal Investigation Service (DNCIS) <sup>62</sup>	Not specified	The DVD was used to corroborate witness statements. The Court listed the DVD when referring to the objective information available in the file against which it is possible to test the witness statements. <sup>63</sup>	
Video material about the living environment of the Defendant <sup>64</sup>	Recorded and collected in the course of the proceedings <sup>65</sup>	Not specified	The video material was used to corroborate witness statements. The Court listed the video material when referring to the objective information available in the file against which it is possible to test the witness statements. <sup>66</sup>	It is not clear from the judgment whether the video material is contemporaneous to the offences or to the investigations. Moreover, no information is provided about the content of the video material.

<sup>61</sup> *Basehya* (n 1) [8.26].

<sup>62</sup> *ibid* [4.7].

<sup>63</sup> *ibid* [8.26].

<sup>64</sup> *ibid* [8.26].

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid*.





## 1. Charge 1: Defendant's alleged involvement in the murder

Around 11 April 1994, a Tutsi man was murdered by a group of *abakarani*.<sup>67</sup> The allegation was that the Defendant had been involved in the co-perpetration of such murder.<sup>68</sup> This was founded on the fact that a Hutu man, 'AAB', betrayed the victim by naming him as a Tutsi to the Defendant, after which she allegedly sent the group of *abakarani*.<sup>69</sup> A witness, 'EER', testified to having allegedly seen 'AAB' coming out of the Defendant's house on the evening before the attack.<sup>70</sup>

In order to assess this accusation, the photograph was instrumental to the Court's finding.<sup>71</sup> Accordingly, the Court confronted EER with a photograph of the gate of another witness's house – witness 'R' – which EER identified as the one he saw 'AAB' come out from.<sup>72</sup> The Court thus concluded that it was not possible to establish that 'AAB' had been in the Defendant's house on the evening before the attack.<sup>73</sup> In conjunction with other considerations, this led to the acquittal of the Defendant for the murder.<sup>74</sup>

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<sup>67</sup> *Basebya* (n 1) [17.7]; 'Abakarani is the Kinyarwanda word for porters and carriers. These were the disadvantaged youngsters who made a few francs with their porter's jobs'. See *Basebya* (n 1) [7.7].

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid* [17.7].

<sup>70</sup> *ibid.*

<sup>71</sup> Although no further information is given in the judgement about the photograph as to whether it was a digital or analogue in form, it was probably at some point stored digitally, being at least considerable as digitalised evidence and, as such, DDE for the purposes of this report.

<sup>72</sup> *ibid* [17.11].

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value	Other information
Photograph of a gate in the Gikondo Sector <sup>75</sup>	Examining Judge Inquiry <sup>76</sup>	Not specified	The photograph was used in the cross-examination of a witness statement, leading to its discredit. <sup>77</sup>	The judgement does not provide information on whether the photograph was contemporaneous to the offences or taken at a later moment. As a result, it is also unclear whether the photograph is analogue or digital. <sup>78</sup>

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<sup>75</sup> *Basebya* (n 1) [17.11].

<sup>76</sup> *ibid* [17].

<sup>77</sup> *ibid*.

<sup>78</sup> Nonetheless, as explained in n 71 it can still be considered DDE for the purposes of this report.

## 2. Charge 5: incitement to commit genocide against the Tutsis

When determining charge 5, the Court relied on DDE in order to establish the following:

- a) whether the Defendant's anti-Tutsi political activity and sentiments linked her actions to the Rwanda genocide; and
- b) the nature of the immediate living environment of the Defendant and what significance it had in the overall context of the Rwandan genocide.

### 1. Membership to the CDR and Anti-Tutsi Sentiment

One of the defences presented by the Defendant was that she did not have anti-Tutsi sentiments. Indeed, she argued that 'she and her children had many Tutsi-friends, many Tutsis had come to her daughter's [daughter 1] wedding and in April 1994 the Defendant had even offered shelter to Tutsis and saved their lives'.<sup>79</sup> To support this, the Defence relied on the video-recording of the reception of the daughter's wedding.<sup>80</sup> The contention was rejected by the Court, mainly because it was often the case that Hutu and Tutsi had 'friendly ties' with each other.<sup>81</sup> The video was thus dismissed as lacking probative value for the purposes of the Defence's argument. However, it was still taken into consideration in the evaluation of the immediate living environment of the Defendant (Subsection b).

In order to further affirm the Defendant's anti-Tutsi sentiments, the Court relied on the wiretapped conversations of the Defendant where she manifested a 'condescending and hostile' attitude towards the Tutsis.<sup>82</sup> Accordingly, the Court mentions a number of statements the Defendant made, including referring to the Tutsi as 'cockroaches' and to the 'Ten Commandments for the Hutu'.<sup>83</sup> Moreover, from the wiretapped conversations it appeared that until her arrest, the Defendant had kept in touch with well-known representatives of the anti-Tutsi movement.<sup>84</sup>

Wiretapped telephone conversations overall were the main evidence to establish the Defendant's membership to the CDR.<sup>85</sup> In particular, the Court relied on a conversation that took place in 2009 between the Defendant and the girlfriend of one of her daughters, during which the Defendant said she was a member of the CDR.<sup>86</sup> This was further corroborated by expert evidence

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<sup>79</sup> *Basebya* (n 1) [9.16].

<sup>80</sup> *ibid* [7.3].

<sup>81</sup> *ibid* [5.4].

<sup>82</sup> *ibid* [9.19].

<sup>83</sup> *ibid* [9.19]; the "Ten Commandments" essentially call for Hutus 'not to have mercy for Tutsis anymore'.

<sup>84</sup> *ibid* [6.11].

<sup>85</sup> *Basebya* (n 1) [11.11].

<sup>86</sup> *ibid* [11.12].

from Professor Guichaoua, who explained that the girlfriend had become a member of the CDR following the guidance from the Defendant.<sup>87</sup>

## 2. Immediate Living Environment

In light of the cultural, social, geographical and historical differences between Rwanda during the genocide and the Netherlands, the Court considered it necessary to rely on documentary evidence, including DDE, to ‘paint a picture of the developments in Rwanda and in some cases, more specifically in Gikondo during the charged period’.<sup>88</sup> Accordingly, the Court used ‘visual material’ of the living environment of the Defendant.<sup>89</sup> The visual material featured a video-recording showing the Defendant’s house, which had been taken on her daughter’s wedding reception, to describe the house’s configuration,<sup>90</sup> and a ‘digital presentation’ of the Gikondo sector.<sup>91</sup> The latter included aerial photographs of the neighbourhood as well as measurements and records of locations and houses.<sup>92</sup> It ultimately allowed the Court to establish that the Defendant lived in a densely populated and highly industrialised and commercialised zone.<sup>93</sup> In this regard, the appointed experts focused mainly on the DDE when determining the nature of the living environment of the Defendant.<sup>94</sup> For instance, they relied on expert evidence from Professor Guichaoua to provide a report about the political and historical context of the events in Rwanda during the relevant time-frame.<sup>95</sup>

It allowed the Court to appreciate the ‘heterogeneous’ nature of the local population featuring ‘disadvantaged youngsters’.<sup>96</sup> The Gikondo sector was hence ‘strategically favourable’ for the political radicalisation led by the CDR.<sup>97</sup> Accordingly, their ‘political activism’ strongly relied on the prevalence of the local youth movements.<sup>98</sup> As a result, the Court ultimately found that the CDR retained a monopoly over the Gikondo sector.<sup>99</sup> These considerations allowed the Court to identify a nexus between the Defendant’s acts and the ongoing genocide in Rwanda: by living in

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<sup>87</sup> *ibid* [11.13].

<sup>88</sup> *ibid* [8.26].

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* [7.3].

<sup>91</sup> *ibid* [7.2].

<sup>92</sup> *ibid*.

<sup>93</sup> *ibid*.

<sup>94</sup> *ibid* [7].

<sup>95</sup> *ibid* [4.18].

<sup>96</sup> *Basehya* (n 1) [7.7].

<sup>97</sup> *ibid* [7.9].

<sup>98</sup> *ibid* [7.9].

<sup>99</sup> *ibid* [7.9].

the Gikondo sector, she was exposed to CDR activities and this facilitated her anti-Tutsi sentiments which ultimately led her to incite the commitment of genocide.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – Court Martial	Other information
Wiretapped telecommunications and the recording of confidential information <sup>100</sup>	Special investigation powers implemented by the DNCIS <sup>101</sup>	Not specified	<p>The Court uses the Defendant’s conversations recorded on wiretapped communications to establish her membership to the CDR and, more broadly, her hatred towards the Tutsi population group.<sup>102</sup></p> <p>The Defendant’s recorded statements were referred in the Court’s reasoning regarding the rejection of the defence’s argument that she did not have anti-Tutsi sentiments.<sup>103</sup></p>	
Digital presentation of the Gikondo sector, including measurements and recordings of different	Special investigation powers implemented by the DNCIS <sup>105</sup>	Not specified	The Court relied on the digital presentation when determining the Defendant’s living environment. <sup>106</sup>	It is not specified in the judgment exactly to what is meant by the referred digital presentation.

<sup>100</sup> *Basebya* (n 1) [9.19, 11.12].

<sup>101</sup> *ibid* [4.7, 8.26].

<sup>102</sup> *ibid* [11.11, 11.12].

<sup>103</sup> *Basebya* (n 1) [9.19].

<sup>105</sup> *ibid* [7].

<sup>106</sup> *ibid* [7].

locations and houses and photographs and air photographs of the sector <sup>104</sup>				
Video-recording of the daughter's wedding <sup>107</sup>	Not specified	Not specified	<ul style="list-style-type: none"> <li>• The defence relied on the video to show the heterogeneity of the attendees to prove that the Defendant did not have anti-Tutsi sentiments.<sup>108</sup> The allegation did not succeed, as the Court relied on other evidence (namely court findings in other proceedings)<sup>109</sup> to reject this allegation.<sup>110</sup></li> <li>• The Court relied on the video's depiction of the Defendant's house when determining her living environment.<sup>111</sup></li> </ul>	

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<sup>104</sup> *ibid* [7.2].

<sup>107</sup> *Basebya* (n 1) [7.3].

<sup>108</sup> *ibid* [9.16].

<sup>109</sup> *ibid* [5.2].

<sup>110</sup> *ibid* [5.4].

<sup>111</sup> *ibid* [7.3].

## B. What DDE discussion was there?

The Court's engagement with the DDE in its reasoning was rather scarce. Although it referred to some DDE in the context of 'objective evidence' to corroborate the witness statements, only in one instance did it explain how such evidence was used to that effect. In both cases, however, the judgement does not contain any consideration of the authenticity of the DDE used. This is arguably because most of the evidence had been obtained through the special investigation by the DNCIS and the examining judge inquiry,<sup>112</sup> which may function as a guarantee of authenticity. Moreover, the fact that the Court mainly relied on closed-source DDE<sup>113</sup> also provided a security in terms of the reliability and authenticity of the material submitted as opposed to open-source DDE. Indeed, the latter, being available to the public, is easier to be tampered with.

The DDE was used as main evidence in the contextualisation of the case at hand. The Court was able to establish both the geographical (through the aerial photos) and the social (through the wedding video) living environment of the Defendant. It is worth noting that in cases like the present one contextualisation is paramount, considering the aforementioned inherent cultural difference between the adjudicating body (Dutch) and the Defendant's living environment (Rwandese). Hence, relying on DDE allowed the District Court to obtain a more accurate account of the facts and a better appreciation of the circumstances, ultimately ensuring the conduct of a fair trial and the provision of transnational justice.

Although the Court refrains from providing an in-depth account of their use of DDE in the corroboration of witness statements, the centrality of this type of evidence can be deduced by analysing the judgment. In terms of witness cross-examination, the DDE allowed a more accurate formulation of the questions and assessment of the reaction of the witnesses to them.<sup>114</sup> Accordingly, the location of the witnesses' houses, determined by the measurements and records in the digital presentation of the Gikondo sector was relevant to determine the access they had to seeing the alleged acts. Moreover, the 'DVD with images of a CDR-meeting in Butare'<sup>115</sup> was arguably important in distinguishing those events which the witnesses had directly assisted in or were involved in from those

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<sup>112</sup> Section 3.1.

<sup>113</sup> Closed source DDE is that which is not available to the public, as opposed to open source DDE. For more information about open source DDE, see Nikita Mehandru and Alexa Koenig, '[Open Source Evidence and the International Criminal Court](https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#_ftn6Z)', *Harvard Human Rights Journal* (15 April 2019) <[https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#\\_ftn6Z](https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#_ftn6Z)> accessed 30 January 2020 [6].

<sup>114</sup> *Basebya* (n 1) [10.48].

<sup>115</sup> *Basebya* (n 1) [8.26].



they just heard about for instance at the Gacaca Courts hearings. This ultimately allowed the Court to determine what weight shall be given to the statements, whether they amounted to real or hearsay evidence.

Indeed, it was noted in the proceedings that the interviews were ‘hard’, ‘long’ and ‘intensive’ for the witnesses.<sup>116</sup> Nevertheless, it can be concluded that the Court adopted a rather conservative approach to the evidentiary material available, giving priority to witness statements over DDE, which was just used to corroborate the former. In other words, whilst both witness statements and DDE did not amount to sufficiently reliable evidence individually, combining them for corroboration purposes ensured a greater objectiveness in the evidentiary material before the court.

On the other hand, the difficulty in assessing the authenticity of DDE arguably underlies the Court’s reluctance to directly refer to it. Indeed, there is rather limited legal guidance on how to approach and evaluate DDE, as can be appreciated by the lack of provisions in the DCCP expressly covering the matter. Hence, it is defensible that the Court circumvented the legal uncertainty surrounding the evidentiary value of DDE by refraining from extensively relying on it.

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<sup>116</sup> *ibid* [4.34].

# Prosecutor v. Yvonne Basebya – REFERENCE LIST

## LEGISLATION

- [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field](#) (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
- [Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea](#) (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
- [Geneva Convention Relative to the Protection of Civilian Persons in Times of War](#) (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
- [Geneva Convention Relative to the Treatment of Prisoners of War](#) (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
- International Crimes Act 2003
- [International Criminal Offences Act, 2003](#)
- [Uitvoeringswet genocideverdrag 1964](#) (Genocide Convention Implementation Act 1964)
- [Wetboek van Strafrecht 1881](#) ([non-official translation of the text valid on 1 October 2010](#))
- [Wetboek van Strafvordering 1921](#) (Dutch Code of Criminal Procedure, [non-official translation of the text valid on 8 October 2012](#))

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- *The Prosecutor v Oussama Achraf Akhblafa*, (Case 09/748003-18 & 09/748003-19), [2019], Dutch District Court
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# R v. Alexander Wayne Blackman (United Kingdom, 2017)

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## I. Executive Summary

This case involved proceedings in the United Kingdom (UK) against a Royal Marine, Mr Alexander Wayne Blackman (Mr Blackman), for the killing of an Afghan insurgent while he was on a tour of duty in Afghanistan in 2011. Both the killing itself and the surrounding circumstances were captured on a camera mounted to the helmet of one of the other marines in Mr Blackman's company. This case is particularly notable because the video footage, an example of 'closed source' digitally derived evidence (DDE), was the principal evidence used against Mr Blackman. At all stages of the proceedings, the Courts considered and relied on the video footage (albeit for different purposes) in reaching their decisions.

## II. Background

### A. DDE legal provisions / evidentiary norms

No rules of evidence or other legal provisions relating to the DDE were discussed in the written decisions issued by each of the Courts in the proceedings against Mr Blackman. The legal framework of evidence, including DDE, in the UK's legal system is considered further in Section 2.3.

### B. Factual background of the case

In March 2011, Mr Blackman, an Acting Colour Sergeant in the UK's Royal Marines, was deployed to Afghanistan,<sup>1</sup> as part of an operation of the British Armed Forces which involved combating the insurgency in Helmand Province in southern Afghanistan.<sup>2</sup> He was in command of a group of Royal Marines stationed at one of the British outposts in this province: Command Post (CP) Omar.<sup>3</sup>

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<sup>1</sup> *R v Alexander Wayne Blackman* [2017] EWCA Crim 190 [13] (*Blackman Second Appeal*).

<sup>2</sup> *R v Sergeant Alexander Wayne Blackman and Secretary of State for Defence* [2014] EWCA Crim 1029 [1] (*Blackman First Appeal*). This operation was known as 'Operation Herrick'. It was part of the International Security Assistance Force, an operation mandated by the United Nations and led by the North Atlantic Treaty Organisation with the objective of enabling the Afghan government to provide effective security across the country and develop new Afghan security forces to ensure Afghanistan would not become a safe haven for terrorists: North Atlantic Treaty Organisation, '[ISAF's mission in Afghanistan \(2001-2014\) \(Archived\)](https://www.nato.int/cps/en/natohq/topics_69366.htm)' (NATO, 1 September 2015) <[https://www.nato.int/cps/en/natohq/topics\\_69366.htm](https://www.nato.int/cps/en/natohq/topics_69366.htm)> accessed 27 October 2019.

<sup>3</sup> *ibid* [3].

On 15 September 2011, a different British outpost was attacked by insurgents using small arms fire. The attack was recorded on a surveillance system that relayed a live feed of images to Camp Bastion, where the main British base was located.<sup>4</sup> An Apache helicopter was sent to the scene from Camp Bastion and, on locating one of the insurgents in an open field, fired 139 rounds of ammunition at him.<sup>5</sup> Although it was believed by those watching that the insurgent could not have survived, a foot patrol of approximately eight marines from CP Omar (led by Mr Blackman) was ordered to undertake a battle damage assessment.<sup>6</sup> The purpose of this assessment was to determine and report on the effect of the helicopter's attack.<sup>7</sup>

At the time of the incident, it was assumed by those back at the British bases that the insurgent had died of injuries inflicted by the gunfire from the helicopter.<sup>8</sup> However, in actual fact, when Mr Blackman's patrol located the insurgent, he was badly wounded but still alive.<sup>9</sup> After disarming the insurgent, he was roughly moved by the marines to another location (causing him additional pain) so that he would be out of sight of the Apache helicopter and the surveillance system. First aid was denied to the insurgent, at Mr Blackman's order.<sup>10</sup> Mr Blackman and various other marines made cruel, crude and derogatory comments to the insurgent.<sup>11</sup> Finally, Mr Blackman fired a shot into the insurgent's chest from close range, killing him.<sup>12</sup> Mr Blackman then said to the other marines '...Obviously this doesn't go anywhere, fellas. I've just broke the Geneva Convention.'<sup>13</sup>

The events were not discovered until September 2012, when military police uncovered a video recording of the incident while investigating an unrelated matter.<sup>14</sup> A formal investigation was

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<sup>4</sup> *Blackman Second Appeal* (n 1) [16].

<sup>5</sup> *Blackman First Appeal* (n 2) [2].

<sup>6</sup> *Blackman Second Appeal* (n 1) [18].

<sup>7</sup> *ibid*; *Blackman First Appeal* (n 2) [3].

<sup>8</sup> *ibid* [4].

<sup>9</sup> *R v Sergeant Alexander Wayne Blackman* (Sentencing Remarks by HHJ Jeff Blackett, Judge Advocate General, Court Martial, 6 December 2013) 1 (*Blackman Sentencing Remarks*).

<sup>10</sup> *ibid*.

<sup>11</sup> *Blackman Second Appeal* (n 1) [21]-[22].

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid* [22]; [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(b)(vi); Geneva Conventions (I-IV) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, [art 3\(1\)\(a\)](#); Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, [art 4\(1\)](#).

<sup>14</sup> *Blackman Second Appeal* (n 1) [1].

launched, during which six further video clips were discovered.<sup>15</sup> These clips were recovered from the memory card of a camera which had been mounted on the helmet of one of the other marines in Mr Blackman's company.<sup>16</sup> Mr Blackman did not know the video had been taken.<sup>17</sup>

On 11 October 2012, Mr Blackman and six other marines were arrested by the Royal Military Police on suspicion of murder.<sup>18</sup>

### C. Legal system background

Mr Blackman was prosecuted in the UK. The UK's legal system is a common law system, or a system of 'law declared by judges'.<sup>19</sup>

As a common law jurisdiction, the UK's court system is predominantly adversarial. This means the parties have the primary responsibility for investigating their own cases, finding and presenting facts and calling their own evidence.<sup>20</sup> In criminal trials, juries are used to decide on the guilt or innocence of an accused. However, the judge still plays an active role, controlling the way the case is conducted, deciding whether evidence is admissible and instructing the jury about the law on each of the charges made and what the prosecution must prove.<sup>21</sup> In the UK, defendants in a criminal trial are considered innocent until proven guilty. Therefore, the prosecution must adduce sufficient evidence to prove that a defendant is guilty 'beyond a reasonable doubt'.<sup>22</sup> Conversely, a defendant is only required to produce evidence at trial if they wish to assert an affirmative defence.<sup>23</sup>

Although ordinary courts of justice (that is, civilian courts or Crown Courts) would have had jurisdiction to try Mr Blackman for the charges alleged in these proceedings, a decision was made<sup>24</sup> that he should be prosecuted in the Court Martial at Bulford, which belongs to the UK's Service

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<sup>15</sup> Max Channon, '[What Royal Marine Sgt Alexander Blackman is doing now is brilliant](https://www.plymouthherald.co.uk/news/plymouth-news/what-royal-marine-sgt-alexander-1406301)' (*Plymouth Herald*, 31 March 2018) <<https://www.plymouthherald.co.uk/news/plymouth-news/what-royal-marine-sgt-alexander-1406301>> accessed 29 October 2019.

<sup>16</sup> *ibid*; *Blackman First Appeal* (n 2) [6].

<sup>17</sup> *Blackman Second Appeal* (n 1) [20].

<sup>18</sup> Channon (n 15).

<sup>19</sup> The Incorporated Council of Law Reporting for England & Wales, '[The English legal system](https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/)' (*ICLR*) <<https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/>> accessed 30 October 2019.

<sup>20</sup> Suzanne Rab, '[Legal Systems in UK \(England and Wales\): overview](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)' (*Thomson Reuters*, 1 March 2018) <[https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 30 October 2019.

<sup>21</sup> *ibid*.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid*.

<sup>24</sup> Unfortunately, none of the Courts in these proceedings elaborated on who made the decision that Mr Blackman should be arraigned before Courts Martial instead of ordinary courts of justice: see for example *Blackman Second Appeal* (n 1) [2].

Justice System.<sup>25</sup> This is the system of justice for service personnel and civilians subject to service discipline, who are tried in the permanent standing Court Martial for offences against service law.<sup>26</sup>

Proceedings before the Court Martial are similar to those conducted before Crown Courts.<sup>27</sup> They are presided over by a judge, named ‘The Judge Advocate’.<sup>28</sup> The Judge Advocate has the sole responsibility for making binding rulings on the law, including on matters of practice and procedure.<sup>29</sup> The Court Martial is also composed of a jury of three to seven officers,<sup>30</sup> known as ‘The Board’, who decide on the guilt or innocence of the accused.<sup>31</sup> Unlike the Crown Courts, the Board decides by a simple majority.<sup>32</sup> However, ‘the standard directions given by a Judge Advocate to the members of the Court Martial who will decide on guilt or innocence is that they must strive to be unanimous’.<sup>33</sup> If the defendant is found guilty of the charged offences, the Board joins the Judge Advocate in the sentencing proceedings.<sup>34</sup> The Judge Advocate holds the casting vote.<sup>35</sup>

Rules of evidence applicable in a trial before the Court Martial are set out in Part 12 of The Armed Forces (Court Martial) Rules 2009.<sup>36</sup> The rules of evidence applicable in trials before the ordinary courts of justice shall be applied in trials before the Court Martial.<sup>37</sup> No person appearing before the Court Martial can be required to answer any question or produce any document which they could not be required to answer or produce in similar proceedings in a trial on indictment in England and Wales.<sup>38</sup> The rules of evidence applicable in ordinary criminal proceedings are contained in Part 11 of the Criminal Justice Act 2003<sup>39</sup> and Parts VII and VIII of the Police and Criminal Evidence Act 1984.<sup>40</sup>

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<sup>25</sup> *Blackman Second Appeal* (n 1) [2].

<sup>26</sup> Courts and Tribunals Judiciary, ‘[Military](https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/)’ (Courts and Tribunals Judiciary, 2019) <<https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/>> accessed 30 October 2019.

<sup>27</sup> This is given added force by the operation of rule 26 of the AFR 2009 (n 36): *Blackman First Appeal* (n 2) [12].

<sup>28</sup> [Armed Forces Act 2006 \(AFA 2006\)](#) s 155(1)(a).

<sup>29</sup> *ibid* s 159.

<sup>30</sup> *ibid* ss 155(1)-(2).

<sup>31</sup> *ibid* s 160.

<sup>32</sup> *ibid* s 160(1).

<sup>33</sup> *Blackman First Appeal* (n 2) [15].

<sup>34</sup> Judge Advocate General and the Director of the Military Court Service, ‘[The Court Martial And The Summary Appeal Court Guidance, Volume 1: Guide to Procedure](https://www.judiciary.uk/wp-content/uploads/2015/05/20150616-cm_sac_guide_voll_procedure_ver7_hqmcs-o.pdf)’ (Version 7, June 2015) <[https://www.judiciary.uk/wp-content/uploads/2015/05/20150616-cm\\_sac\\_guide\\_voll\\_procedure\\_ver7\\_hqmcs-o.pdf](https://www.judiciary.uk/wp-content/uploads/2015/05/20150616-cm_sac_guide_voll_procedure_ver7_hqmcs-o.pdf)> accessed 31 October 2019, 6 (Guide to Procedure).

<sup>35</sup> AFA 2006 s 160(4).

<sup>36</sup> [The Armed Forces \(Court Martial\) Rules 2009 \(AFR 2009\)](#) Part 12.

<sup>37</sup> *ibid* r 73(1).

<sup>38</sup> *ibid* r 73(3).

<sup>39</sup> [Criminal Justice Act 2003 \(CJA 2003\)](#) Part 11.

<sup>40</sup> [Police and Criminal Evidence Act 1984 \(PCA 1984\)](#) Parts VII and VIII.

The rules of evidence contained in these documents are silent on DDE, but deal generally with areas such as evidence of a defendant's bad character,<sup>41</sup> hearsay evidence,<sup>42</sup> evidence of service matters,<sup>43</sup> expert evidence,<sup>44</sup> and special measures directions (those directions providing for special measures that may be applied to evidence given by a witness).<sup>45</sup> However, the absence of express provisions in the UK's statutory law regarding DDE does not mean this evidence is inadmissible. Instead, this silence has the effect of subjecting DDE to the same rules as other types of evidence.

Evidence may be presented by calling witnesses, producing documents or producing 'real evidence'.<sup>46</sup> DDE may be real evidence or hearsay,<sup>47</sup> although the characterisation of DDE as one or the other can be difficult.<sup>48</sup> Real DDE is that which 'has been electronic in source, process and result, with no human intervention in the process'.<sup>49</sup> Real DDE may therefore include tapes, films or photographs which actually record a relevant incident taking place.<sup>50</sup> By contrast, hearsay DDE may be 'information recorded and processed by a computer, but which has been inputted either directly, or indirectly, by a person'.<sup>51</sup> For example, an employee may compile records and someone else may transfer the information to the computer.<sup>52</sup> In accordance with the statutory provisions, hearsay DDE is generally inadmissible unless it falls within one of the exceptions outlined in the legislation.<sup>53</sup>

All evidence, including DDE, must be both relevant and admissible in order to be adduced in criminal proceedings.<sup>54</sup> Evidence is 'relevant' if it assists to prove or disprove a fact at issue in the proceedings.<sup>55</sup> All relevant evidence is potentially admissible, so long as it relates to the facts in issue or the circumstances that makes those facts probable or improbable, and has been properly obtained.<sup>56</sup>

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<sup>41</sup> AFR 2009 (n 36) Part 12 ch 2; CJA 2003 (n 39) Part 11 ch 1.

<sup>42</sup> AFR 2009 (n 36) Part 12 ch 3; CJA 2003 (n 39) Part 11 ch 2.

<sup>43</sup> AFR 2009 (n 36) Part 12 ch 4.

<sup>44</sup> AFR 2009 (n 36) Part 12 ch 5; CJA 2003 (n 39) s 127.

<sup>45</sup> AFR 2009 (n 36) Part 12 ch 6; CJA 2003 (n 39) Part 11 ch 3.

<sup>46</sup> Health and Safety Executive, '[Key rules of evidence](http://www.hse.gov.uk/enforce/enforcementguide/court/rules-key.htm)' (HSE) <<http://www.hse.gov.uk/enforce/enforcementguide/court/rules-key.htm>> accessed 31 October 2019.

<sup>47</sup> A hearsay statement is a statement which is not made in oral evidence by a witness during a trial but which is relied upon in the trial as evidence of the matter: see AFR 2009 (n 36) r 81(6).

<sup>48</sup> Stephen Mason and Daniel Seng, 'The Foundations of Evidence in Electronic Form' in Stephen Mason and Daniel Seng (eds) *Electronic Evidence* (Fourth Edition, Institute of Advanced Legal Studies, 2017) 39-40.

<sup>49</sup> Health and Safety Executive, '[Collecting physical evidence – Preparing evidence for court](http://www.hse.gov.uk/enforce/enforcementguide/investigation/physical-preparing.htm#P25_3785)' (HSE) <[http://www.hse.gov.uk/enforce/enforcementguide/investigation/physical-preparing.htm#P25\\_3785](http://www.hse.gov.uk/enforce/enforcementguide/investigation/physical-preparing.htm#P25_3785)> accessed 31 October 2019.

<sup>50</sup> The Law Commission, 'Criminal Law, Evidence in Criminal proceedings: Hearsay and Related Topics' (Law Com CP No 138, 1995) 16.

<sup>51</sup> HSE (n 49).

<sup>52</sup> The Law Commission (n 50) 16.

<sup>53</sup> CJA 2003 (n 39) s 114.

<sup>54</sup> HSE (n 46).

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*



As in ordinary criminal proceedings, in Court Martial proceedings, the Board makes findings of fact based on the evidence presented by both the prosecution and the defence that was deemed admissible by the judge.<sup>57</sup> In other words, it is the judge who decides what evidence is appropriate for the members of the Board to hear and see, but it is the Board that analyses such evidence and draws conclusions therefrom.<sup>58</sup> Thus, admissibility of evidence is always determined by the judge and is subject to rules on exclusion (such as the rules regarding hearsay or evidence of the defendant's or bad character).

Most relevantly, the UK's Crown Prosecution Service has issued guidance indicating that video recorded evidence is admissible as evidence in criminal proceedings and may be used in a variety of ways in the proceedings (including as direct evidence of events captured on the video recording to show what was done by a particular offender).<sup>59</sup> However, the prosecution must be able to prove the authenticity of the video recording, including by showing that the video footage produced in evidence is the original recording or an authentic copy and that it has not been tampered with.<sup>60</sup> Thus, the party who adduces a recording (audio or video) as evidence must provide evidence of its provenance and history which is sufficient to satisfy a judge that the evidence is authentic.<sup>61</sup> This guidance is in line with the basic principles for handling digital evidence outlined in the guidelines prepared by the Association of Chief Police Officers.<sup>62</sup> The purpose of these guidelines is to ensure that digital evidence recovered as part of investigations can be introduced as authentic and reliable evidence in court proceedings. To that end, it includes the following principles:

- No action should be taken to change data which may subsequently be relied on in court;
- Any person accessing original data must be competent to do so and give evidence explaining the relevance and implications of their actions;
- A record of all processes applied to the digital evidence should be kept, which must be repeatable to an independent third party; and
- The person in charge of the investigation has responsibility for ensuring the law and these principles are adhered to.<sup>63</sup>

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<sup>57</sup> Guide to Procedure (n 34) 4-5.

<sup>58</sup> *ibid.*

<sup>59</sup> The Crown Prosecution Service, '[Exhibits](https://www.cps.gov.uk/legal-guidance/exhibits)' (CPS, 9 April 2018) <<https://www.cps.gov.uk/legal-guidance/exhibits>> accessed 31 October 2019.

<sup>60</sup> *ibid.*

<sup>61</sup> *R v Robson & Harris* [1972] 1 WLR 651.

<sup>62</sup> Association of Chief Police Officers, '[ACPO Good Practice Guide for Digital Evidence](http://library.college.police.uk/docs/acpo/digital-evidence-2012.pdf)' (Version 5, 2012, APCO) <<http://library.college.police.uk/docs/acpo/digital-evidence-2012.pdf>> accessed 8 November 2019.

<sup>63</sup> *ibid.* 6.

## D. Legal background of the case

The legal issue in the case was whether Mr Blackman's shooting of the insurgent amounted to murder, or should instead be qualified as manslaughter. The Court Martial and the Court Martial Appeal Court (CMAC) in the first appeal, found that Mr Blackman had committed murder.<sup>64</sup> In the second appeal, however, the CMAC quashed the conviction for murder,<sup>65</sup> and substituted a verdict of manslaughter by reason of diminished responsibility.<sup>66</sup>

### 1. Initial Proceedings

The UK's Service Prosecution Authority charged Mr Blackman with murder, pursuant to Section 42 of the Armed Forces Act 2006 (AFA 2006).<sup>67</sup> Section 42 provides that a person subject to service law<sup>68</sup> commits an offence if he or she carries out any act that is punishable with a criminal penalty by the law of England and Wales.<sup>69</sup> Murder or manslaughter, if committed by a British citizen, regardless of where it was committed, is punishable by the law of England and Wales with imprisonment.<sup>70</sup> As a result, when a person in the armed forces commits murder or manslaughter, he or she may be liable to any punishment mentioned in section 164 of the AFA 2006,<sup>71</sup> including imprisonment<sup>72</sup> and dismissal with disgrace from Her Majesty's service.<sup>73</sup>

In his defence in the initial proceedings, Mr Blackman argued that he had believed the Afghan insurgent was already dead when he fired at him.<sup>74</sup> The findings of the Court Martial, which were primarily based on the video footage,<sup>75</sup> were that this argument lacked credibility and his actions in killing the insurgent were clearly deliberate.<sup>76</sup> Mr Blackman was thus found guilty of murder by the

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<sup>64</sup> CJA 2003 (n 39) sch 21; *Blackman Sentencing Remarks* (n 9) 2; *Blackman First Appeal* (n 2).

<sup>65</sup> *Blackman Second Appeal* (n 1) [80].

<sup>66</sup> *ibid* [114].

<sup>67</sup> *Blackman First Appeal* (n 2) [7]; [Armed Forces Act 2006](#) (AFA 2006), s 42.

<sup>68</sup> Or a civilian subject to service discipline.

<sup>69</sup> AFA 2006 (n 67) s 42(1)(a). Section 42(1)(b) of the AFA 2006 further provides that if the person who it applies to does an act that, if done in England or Wales, would be so punishable, commits an offence: see *Blackman First Appeal* (n 2) [7].

<sup>70</sup> [Offences Against the Person Act 1861](#), s 9.; See also *R v Page* [1954] 1 QB 170; and *Blackman First Appeal* (n 2) [7].

<sup>71</sup> AFA 2006 (n 67), s 42(3)(a).

<sup>72</sup> *ibid* s 164(1)1.

<sup>73</sup> *ibid* s 164(1)2.

<sup>74</sup> *Blackman First Appeal* (n 2) [36].

<sup>75</sup> The evidence that was considered by the Court Martial in relation to the conviction and sentencing is considered further in Section 3.1.1.

<sup>76</sup> *Blackman Sentencing Remarks* (n 9) 2. *Blackman First Appeal* (n 2) [31], [32] and [42].

Board on 8 November 2013.<sup>77</sup> On 6 December 2013, he was sentenced to life imprisonment<sup>78</sup> with a minimum term of 10 years.<sup>79</sup> Additionally, as a result of his conviction, Mr Blackman was also ‘reduced to the ranks and dismissed with disgrace from Her Majesty’s Service’.<sup>80</sup>

## 2. First Appeal

In 2014, Mr Blackman appealed against both his conviction and sentence before the CMAC.<sup>81</sup> The appeal against conviction was based on the argument that some attributes of the UK’s Service Justice System were incompatible with basic features of democracy and the European Convention on Human Rights.<sup>82</sup> The appeal against the sentence was based on the contention that the Court Martial’s findings on some aggravating factors were wrong and that it had not correctly weighed relevant mitigating factors.<sup>83</sup> Consequently, the minimum term ought to be reduced.<sup>84</sup>

The CMAC’s judgment in the first appeal was issued on 22 May 2014.<sup>85</sup> The appeal against conviction was rejected by the CMAC, on the basis that the Court Martial’s particularities (as compared to ordinary courts) were justified by the difference between the conditions of military and civil life and were not a discrimination against members of the armed forces.<sup>86</sup> Conversely, the appeal against sentence was upheld.<sup>87</sup> In this regard, the CMAC found that ‘combat stress arising from the nature of the insurgency in Afghanistan’ and Mr Blackman’s personal circumstances at the time<sup>88</sup> should have been accorded greater weight as mitigating factors.<sup>89</sup> It further stated that the publicity surrounding the proceedings and other particular circumstances would be sufficient deterrence, making it unnecessary to add an additional term by way of deterrence to the sentence.<sup>90</sup> As a result, the CMAC reduced the minimum term of the life imprisonment to eight years.<sup>91</sup>

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<sup>77</sup> *Blackman First Appeal* (n 2) [9].

<sup>78</sup> AFA 2006 (n 67) s 217(1)(a).

<sup>79</sup> CJA 2003 (n 39) sch 21; *Blackman Sentencing Remarks* (n 9) 2 and 5.

<sup>80</sup> *Blackman Sentencing Remarks* (n 9) [21].

<sup>81</sup> *Blackman Second Appeal* (n 1) [5].

<sup>82</sup> *ibid*; [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (European Convention on Human Rights, as amended by Protocol Nos 11 and 14) (adopted on 4 November 1950, entered into force 3 September 1953) ETS 5.

<sup>83</sup> *Blackman Second Appeal* (n 1) [5].

<sup>84</sup> *Blackman First Appeal* (n 2) [50]-[55].

<sup>85</sup> *Blackman First Appeal* (n 2).

<sup>86</sup> *ibid* [11]-[30].

<sup>87</sup> *Blackman Second Appeal* (n 1) [5].

<sup>88</sup> These circumstances were both the fact that his mental welfare had not been ordinarily assessed and the existence of evidence of his paranoia ‘about the Taliban’s “gunning” for him’: *Blackman First Appeal* (n 2) [75].

<sup>89</sup> *ibid* [75].

<sup>90</sup> *ibid* [76].

<sup>91</sup> *ibid* [77].

### 3. Second Appeal

On 15 December 2016, the Criminal Cases Review Commission (CCRC) referred Mr Blackman's case to the CMAC for a new appeal.<sup>92</sup> This appeal was principally on the grounds of fresh psychiatric evidence, which indicated that Mr Blackman suffered from a recognised medical condition called 'adjustment disorder', both during the offence and at the time of the trial before the Court Martial.<sup>93</sup> In its judgement of 15 March 2017, based on the psychiatric evidence, the CMAC found that Mr Blackman suffered from an adjustment disorder.<sup>94</sup> It further considered that, had this evidence been available to the Board, it could have raised a doubt as to Mr Blackman's guilt.<sup>95</sup> Consequently, the CMAC deemed the Court Martial's verdict was unsafe, quashed the conviction for murder,<sup>96</sup> and substituted a verdict of manslaughter by reason of diminished responsibility.<sup>97</sup>

On 28 March 2017, Mr Blackman's sentence was reduced to a determinate sentence of 7 years,<sup>98</sup> and dismissal from the service (without disgrace).<sup>99</sup>

## III. DDE

### A. What did the DDE Prove?

When determining this case, both the Court Martial at first instance and the two CMACs relied on one main source of DDE, being the video footage of the incident. During the second appeal, the CMAC indicated this was the 'principal' evidence against Mr Blackman in the case.<sup>100</sup> Notwithstanding this finding, non-DDE was also relied on at each stage of the proceedings (particularly in the appeal proceedings), including witness testimonies from the other marines in Mr Blackman's company, government reports, and psychiatric reports and testimony from psychiatric experts.<sup>101</sup>

The following section identifies how the video footage was considered and used at each stage of the proceedings.

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<sup>92</sup> [Alexander Blackman](#) (CMAC, 21 December 2016) [6].

<sup>93</sup> *Blackman Second Appeal* (n 1) [7].

<sup>94</sup> *ibid* [80] and [85].

<sup>95</sup> *ibid* [80].

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid* [114].

<sup>98</sup> In other words, the term of 7 years in prison was the whole sentence and not the minimum term of a life imprisonment sentence. See AFA 2006 (n 67) s 246.

<sup>99</sup> [R v Alexander Wayne Blackman](#) [2017] EWCA Crim 325 [21].

<sup>100</sup> *Blackman Second Appeal* (n 1) [20].

<sup>101</sup> See for example: *Blackman First Appeal* (n 2) [36]-[40]; *Blackman Second Appeal* (n 1) [25]-[27], [29]-[35], [38]-[40], [48]-[54].

## 1. Use of DDE in the Initial Proceedings

As was noted in above, the Court Martial found Mr Blackman guilty of murder. At the time of writing, the judgment for the conviction was not available. However, Sentencing Remarks were issued by Justice Jeff Blackett (Judge Advocate General), which provide a limited insight into the Court Martial's perspective on the impact of the DDE on both the conviction and sentencing of Mr Blackman. These remarks show that DDE was used by Judge Blackett in assisting with the determination of the appropriate sentence for Mr Blackman. In particular, the video footage identified the circumstances prior and subsequent to the shooting, thus contributing to His Honour's mitigating and aggravating factors.<sup>102</sup>

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<sup>102</sup> *Blackman Sentencing Remarks* (n 9) 3-4.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – Court Martial	Other information
<p><b>Video footage</b><sup>103</sup></p> <p>Six video clips taken from the head camera of a marine in Mr Blackman’s company on 15 September 2011 which recorded the killing of an Afghan insurgent by Mr Blackman</p>	<p>The video footage was recorded by a camera mounted on the helmet of one of the marines in Mr Blackman’s group.<sup>104</sup></p> <p>Unofficial video footage of the incident taken by one of the marines in the company was found by military police during an investigation for an unrelated matter. This discovery led to a formal investigation, during</p>	<p>There was nothing in the sentencing remarks to suggest that the DDE was challenged.</p>	<p>Only the first five clips were played in open court at trial and were observed by Judge Blackett to constitute a ‘significant part of the prosecution evidence in this case’.<sup>106</sup> Judge Blackett also determined that the sixth clip was ‘of no evidential value’.<sup>107</sup></p> <p>The sentencing remarks given by Judge Blackett contain a number of findings about the deliberate nature of the killing of the Afghan insurgent, based on the video footage. His Honour observed that the video footage had been used to establish:</p> <ul style="list-style-type: none"> <li>• The insurgent was alive when Mr Blackman first arrived on the scene but</li> </ul>	<p>In separate but related proceedings appealing the Court Martial’s decision not to release the videos to the media, it was observed that ‘no steps were taken to pixelate the faces of any of the marines or the deceased Afghan, as the video was an essential part of the evidence at the trial’.<sup>108</sup></p> <p>Similarly, in the Second Appeal proceedings, the CMAC noted that the six clips formed the ‘principal</p>

<sup>103</sup> For a detailed description of the content of this footage, see *Blackman Sentencing Remarks* (n 9) 1-2; *Blackman Second Appeal* (n 1) [19]-[22].

<sup>104</sup> *Blackman First Appeal* (n 2) [6].

<sup>106</sup> *R v Marines A, B and C & Ors*, *Ruling on application for access to DVD footage* (Court Martial, 28 October 2013) [1].

<sup>107</sup> *ibid* [2]. Unfortunately, no further information was offered by the Court Martial in their ruling to indicate why this clip had been deemed to lack the evidential value of the others.

<sup>108</sup> *Marines A & Ors v Guardian News and Media & Other Media* [2013] EWCA Crim 2367 [16].

	<p>which the six video clips used in these proceedings were recovered from the memory card of the helmet camera.<sup>105</sup></p>		<p>was seriously wounded and no longer a threat;</p> <ul style="list-style-type: none"> <li>● The series of subsequent events that lead to the insurgent's death;</li> <li>● The insurgent was handled in a 'robust manner' which caused him additional pain and was not given medical treatment, and Mr Blackman did nothing to stop him being treated in this way;</li> <li>● The implausibility of Mr Blackman's suggestion that he thought the insurgent was dead when he discharged his gun;</li> <li>● Mr Blackman was in complete control at the time of the incident; he was calm and matter of fact in his words and conduct (particularly after the shooting) and murdered the insurgent in cold blood;</li> <li>● This was not action taken in the heat of battle, or immediately afterward, and Mr</li> </ul>	<p>evidence' against Mr Blackman.<sup>109</sup></p>
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<sup>105</sup> *Blackman Second Appeal* (n 1) [2].

<sup>109</sup> *ibid* [20].

			<p>Blackman and his company were not under any immediate threat; and</p> <ul style="list-style-type: none"><li>● Mr Blackman appreciated the wrongfulness of his actions by advising the patrol they were not to say anything and acknowledging he had broken the Geneva Convention.</li></ul>	
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## 2. Use of DDE in the First Appeal proceedings

As noted above, Mr Blackman appealed both his conviction and sentence to the CMAC. As Mr Blackman appealed his conviction on the basis of a purely legal argument, the DDE was not relied upon or discussed by the CMAC in its decision on this point.

By contrast, the CMAC did consider and rely on the DDE in determining Mr Blackman's appeal against sentence, which was based on claims that the Court Martial was wrong in certain findings that informed the aggravating factors and had not accorded sufficient weight to various mitigating factors.<sup>110</sup>

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<sup>110</sup> *Blackman First Appeal* (n 2) [51]-[55].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – CMAC
<p><b>Video footage</b><sup>111</sup></p> <p>Six video clips taken from the head camera of a marine in Mr Blackman’s company on 15 September 2011 which recorded the killing of an Afghan insurgent by Mr Blackman</p>	<p>The video footage was recorded by a camera mounted on the helmet of one of the marines in Mr Blackman’s group.<sup>112</sup></p> <p>Unofficial video footage of the incident taken by one of the marines in the company was found by military police during an investigation for an unrelated matter. This discovery led to a formal investigation, during which the six video clips used in these proceedings were</p>	<p>There was nothing in the First Appeal judgment to suggest that the DDE was challenged.</p>	<p>The video footage was used by the CMAC in considering Mr Blackman’s appeal against sentence in two main ways.</p> <p>First, the CMAC considered that it was necessary to set out the circumstances of the insurgent’s killing. These circumstances were said to be clear both from the findings made the Court Martial when sentencing Mr Blackman and from the video recording made by the marine.<sup>114</sup> After examining the circumstances described by the Court Martial, the CMAC concluded that:</p> <p style="padding-left: 40px;">Those grave findings were made by the Court Martial having heard the evidence. There is sufficient support from the video (which we have seen) and the transcript of the video that preclude us in any way from going behind those findings.<sup>115</sup></p>

<sup>111</sup> For a detailed description of the content of this footage, see *Blackman Sentencing Remarks* (n 9) 1-2; *Blackman Second Appeal* (1) [19]-[22].

<sup>112</sup> *Blackman First Appeal* (n 2) [6].

<sup>114</sup> *Blackman First Appeal* (n 2) [31].

<sup>115</sup> *ibid* [33].

	<p>recovered from the memory card of the helmet camera.<sup>113</sup></p>		<p>Second, the CMAC relied predominately on the video to confirm the aggravating features (as identified by the Court Martial at first instance) in Mr Blackman's sentence. In particular, the CMAC considered the following aggravating factors were influenced by the video footage:</p> <ul style="list-style-type: none"> <li>● The circumstances of the shooting (as found proved by the Court Martial) included four deliberate acts: Mr Blackman's decision to stop first aid, Mr Blackman's order to move the insurgent to a location where he would not be seen; the discharge of the round into the insurgent's chest and the instruction not to say anything about what had happened;</li> <li>● The patrol was not under threat from the wounded insurgent, and any threat from other insurgents in the vicinity played no causative effect in Mr Blackman's decision to kill the wounded insurgent;</li> <li>● Mr Blackman's deliberate involvement, dishonest cover-up and acknowledgement that he had broken the Geneva Convention, in circumstances where the other soldiers looked to Mr Blackman for leadership; and</li> </ul>
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<sup>113</sup> *Blackman Second Appeal* (n 1) [2].

			<ul style="list-style-type: none"><li>• Mr Blackman's failure to follow the standards of conduct which represented the values for which the British Armed Forces had been sent to Afghanistan.<sup>116</sup></li></ul>
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<sup>116</sup> *ibid* [64]-[67].

### 3. Use of DDE in Second Appeal proceedings

At the hearing of Mr Blackman's second appeal to the CMAC, the 'principal evidence' was DDE, being the video footage of the insurgent's death.<sup>117</sup> Again however, other non-DDE was also relied on by the CMAC, including psychiatric evidence and evidence relating to the conditions under which Mr Blackman served and his service and medical history.<sup>118</sup>

As with the first appeal before the CMAC, the DDE was not the focus of the proceedings because it was not the basis for Mr Blackman's appeal against his conviction. Instead, the focus was on new evidence regarding Mr Blackman's mental health at the time of the incident.<sup>119</sup> However, the CMAC still considered and relied on the DDE (albeit to a limited extent) in reaching its decision.

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<sup>117</sup> *Blackman Second Appeal* (n 1) [11].

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid* [7].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – CMAC
<p><b>Video footage</b><sup>120</sup></p> <p>Six video clips taken from the head camera of a marine in Mr Blackman’s company on 15 September 2011 which recorded the killing of an Afghan insurgent by Mr Blackman</p>	<p>The video footage was recorded by a camera mounted on the helmet of one of the marines in Mr Blackman’s group.<sup>121</sup></p> <p>Unofficial video footage of the incident taken by one of the marines in the company was found by military police during an investigation for an unrelated matter. This discovery led to a formal investigation, during which the six video clips used in these proceedings were recovered from the memory card of the helmet camera.<sup>122</sup></p>	<p>There was nothing in the Second Appeal judgment to suggest that the DDE was challenged.</p>	<p>In its judgment, the CMAC considered the content of the video footage in detail, including setting out detailed observations about the content of Clips 4 and 5 (which were deemed to be ‘the most important’).<sup>123</sup> The CMAC noted the findings of the Court Martial and confirmed these findings were made on the basis of the video clips and other evidence before it. The CMAC then concluded:</p> <p style="padding-left: 40px;">That is not surprising for whatever might now be said about [Mr Blackman’s] mental health and his responsibility for what he did, his conduct and that of the marines reveals that the insurgent was believed to be alive, after which [Mr Blackman] shot him at close quarters.<sup>124</sup></p> <p>The CMAC primarily considered the DDE to confirm whether the findings of the Court Martial and the first CMAC in relation to the video footage were supported by</p>

<sup>120</sup> For a detailed description of the content of this footage, see *Blackman Sentencing Remarks* (n 9) 1-2; *Blackman Second Appeal* (n 1) [19]-[22].

<sup>121</sup> *Blackman First Appeal* (n 2) [6].

<sup>122</sup> *ibid* [2].

<sup>123</sup> *Blackman Second Appeal* (1) [20]-[22].

<sup>124</sup> *ibid* [24].

		<p>the psychiatric evidence. After considering the testimony of one of the psychiatrists that it would be ‘dangerous’ to assume the video accurately reflected Mr Blackman’s mental state at the time of the incident, the CMAC noted this does not undermine the conclusion about the appropriate inferences that may be drawn from the videos.<sup>125</sup> Instead, the CMAC considered the appropriate course was to determine whether the conclusion reached by the Court Martial (as principally derived from the video clips) was an accurate representation of Mr Blackman’s mental state at the relevant time.<sup>126</sup></p> <p>The CMAC also noted that ‘findings of the Board, particularly in relation to the credibility of [Mr Blackman], cannot now be of substantial weight, as the Board had not heard the psychiatric evidence which could have impacted on its judgment.’<sup>127</sup> In circumstances where the CMAC did not specify all of the findings of the Court Martial which were no longer to be considered of substantial weight, it must be</p>
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<sup>125</sup> *ibid* [25]-[28].

<sup>126</sup> *ibid* [28].

<sup>127</sup> *ibid* [75].

			inferred that the CMAC is also referring to evidence of, or findings stemming from, the video footage.
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## **B. What DDE discussion was there?**

As stated in Section 2.1, no rules of evidence relating to DDE were discussed in the written decisions issued in the proceedings concerning Mr Blackman. This may be because the UK's rules of procedure and evidence also do not include express provisions regulating DDE.

There is also no reference to the admissibility or weight of the DDE in any of the decisions. This may stem from the way criminal proceedings are structured in the UK legal system (both for ordinary criminal proceedings and within the Court Martial system). When the DDE used in Mr Blackman's case was presented to the members of the Board at trial, its admissibility had already been decided. This is because, under UK law (including in the Court Martial system), the admissibility of evidence is a matter of decision by the judge.<sup>128</sup> As a result, the members of the Board had only to look at its content: they did not need to focus on how it was obtained or whether it violated common law or the defendant's rights. Similarly, when the CMAC evaluated the DDE in both appeals, it did not look into the admissibility of the video footage, only into what it depicted. In particular, the CMAC was not required to consider the admissibility of the videos because they were not new evidence offered in the appeal but evidence that had already been admitted and considered in the first instance.

As a result, any insight on how rules of evidence were applied in relation to DDE in this case is limited. It is also difficult to obtain a detailed understanding the perceived value of the DDE in these proceedings. Even so, the fact that the DDE was the principal evidence used to sustain Mr Blackman's conviction and sentence allows for the following inferences to be made.

First, it can be inferred the DDE was deemed both admissible and relevant by the Judge Advocate. This is because the Court Martial's rules of evidence provide that only admissible evidence is presented for consideration by the Board at trial. If there were any challenges to the admissibility of the video footage (which is not evident on the face of the judgments), these would have been determined by the Judge Advocate alone. Given the potential for video footage to be manipulated and the guidance for authenticating video evidence that was issued by the Crown Prosecution Service, it is interesting that there was no indication in the judgments that additional authentication measures were undertaken to confirm the evidence had not been tampered with (for example, review by a digital forensic expert). One possible explanation for the lack of any challenge or identified need for authentication is that the video footage was considered 'real evidence', tendered as direct evidence of the events the subject of

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<sup>128</sup> Guide to Procedure (n 34) 4.

the prosecution, which is presumed to be reliable as there is no human intervention in the process of creating the evidence.<sup>129</sup>

It may also be inferred from the continued references to the DDE being the key evidence against Mr Blackman that it was accorded significant weight by each of the Courts. The value which DDE is given by the courts may be at least partially dependent on its source.<sup>130</sup> Unlike most of the other current domestic cases relying on DDE, the DDE in these proceedings was closed source. While open sources are those which contain material that is publicly available, closed sources are those that are not available to the public, such as private communications data and financial information. A judge may consider aspects of the form, content and origin of closed source evidence to increase its probative value.<sup>131</sup> For example, some social media platforms scrub the metadata from the DDE (including, for example, information about the time and place where the image was created) which may affect the utility and reliability of evidence obtained from this source.<sup>132</sup> However, as the DDE in these proceedings was accessed directly from the memory card of the helmet camera, the following factors may mean it has greater reliability than an item of open source DDE. First, the author of the evidence is clearly identifiable and can provide evidence as to its source. Second, as there was no evidence to the contrary, it is assumed the video's metadata was intact and assisted with assessing the origin and integrity of the footage. Finally, and again given there is no evidence to the contrary, the fact that the video footage was recovered directly from a private source indicates it was less likely to have been forged, edited or manipulated. As closed source evidence, the DDE used in this case may therefore be considered to have greater reliability (as compared with a situation where the same video footage had been accessed from an open source, such as a social media platform).

Finally, the present case can serve as an example of the limits of DDE. Particularly, in the second appeal, the weight attributed to the expert evidence surpassed the weight attributed to the video footage as proof of Mr Blackman's mental state at the time of the offences. In the second appeal judgement, the CMCA expressly refers to the following statement of one of the psychiatrists: 'I have looked at that video a number of times, and I don't accept that that video accurately and truly reflects his mental state at the time – or I think it would be dangerous to assume that'.<sup>133</sup> The CMCA followed

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<sup>129</sup> HSE (n 49).

<sup>130</sup> International Bar Association, 'Evidence Matters in ICC Trials: An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice' (IBA ICL Perspectives, August 2016), 24.

<sup>131</sup> International Bar Association (n 130) 24.

<sup>132</sup> *ibid* 26-27.

<sup>133</sup> *Blackman Second Appeal* (n 1) [27].

by noting that ‘this view does not undermine the conclusion we have expressed as to the appropriate inferences to be drawn from the video but, rather, goes to the impact of the appellant’s mental health on his rationality and self-control’.<sup>134</sup> But it is apparent both from the sentencing remarks and from the appeal judgements that the video footage depicted a cold-blooded execution of the insurgent. This did not stop the defence from successfully relying on other types of evidence to paint a different picture. The prioritisation of the expert evidence over the DDE is more notable considering that the former was produced several years after the events recorded in the latter had taken place. Hence, the outcome of Mr Blackman’s case shows that even an authenticated recording of an offence that clearly shows the perpetrator’s actions can relinquish when confronted with other pieces of evidence that offer an explanation for such actions.

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<sup>134</sup> *ibid* [28].

# R v. Alexander Wayne Blackman – REFERENCE LIST

## CASES

- [R v Marines A, B and C & Ors](#), Ruling on application for access to DVD footage (Court Martial, 28 October 2013)
- [Marines A & Ors v Guardian News and Media & Other Media](#) [2013] EWCA Crim 2367
- [R v Sergeant Alexander Wayne Blackman](#) (Sentencing Remarks by HHJ Jeff Blackett, Judge Advocate General, Court Martial, 6 December 2013)
- [R v Sergeant Alexander Wayne Blackman and Secretary of State for Defence](#) [2014] EWCA Crim 1029
- [Alexander Blackman](#) (CMAC, 21 December 2016)
- [R v Alexander Wayne Blackman](#) [2017] EWCA Crim 190
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- *R v Page* [1954] 1 QB 170
- *R v Robson & Harris* [1972] 1 WLR 651

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- [Criminal Justice Act 2003](#)
- [Offences Against the Person Act 1861](#)
- [Police and Criminal Evidence Act 1984](#)

## INTERNATIONAL SOURCES

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- [Geneva Convention Relative to the Protection of Civilian Persons in Times of War](#) (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
- [Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts](#) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
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# Prosecutor v. Mouhannad Droubi (Sweden, 2016)

Södertörn District Court, B 2639-16, Judgment 11 May 2016.

Svea Court of Appeal, B 4770-16, Judgment 5 August 2016.

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*Editors: Emma Irving and Neil Cockerill*

## I. Executive Summary

The case involved the prosecution of Syrian national Mouhannad Droubi (the Defendant), in the Swedish Södertörn District Court and Swedish Svea Court of Appeal. The Defendant was a member of the opposition group, the Free Syrian Army (FSA). The Defendant was accused and convicted of participating in the torture of another member of the FSA. The evidence relied upon included oral and written testimony, written documentary evidence in the form of expert opinions, as well as numerous types of digitally derived evidence (DDE). The DDE used included a film, numerous photographs, and copies of Facebook chatlogs. This case forms part of a group of other successful domestic prosecutions of international crimes within the Swedish criminal courts, stemming from the conflict in Syria.<sup>1</sup>

## II. Background

### A. DDE legal provisions / evidentiary norms

No rules of evidence or other legal provisions specifically relating to the DDE were discussed in these judgments. The legal framework of evidence, including DDE, in the Swedish legal system is considered further below.

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<sup>1</sup> See for example: *Prosecutor v Raed Thaer Abdulkareem*, Blekinge District Court, B 569-16, Judgment 6 December 2016 (Abdulkareem judgment). The original judgment from the Blekinge District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment (as Annex A) is available [here](#); *Prosecutor v Mobamad Abdullah*, Södertörn District Court, B 11191-17, Judgment 25 September 2017 (*Abdullah judgment*); *Prosecutor v Haisam Omar Sakbanh*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (*Sakbanh judgment*). The original judgment from the Stockholm District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment is available [here](#).

## B. Factual background of the case

The Defendant is a Syrian citizen born in Latakia, Syria.<sup>2</sup> After being in prison for participating in demonstrations against President Bashar al-Assad, the Defendant contacted the FSA group around May 2012.<sup>3</sup> The victim in this case was also a member of the FSA and was abducted after having a dispute with the group's leader about weapons.<sup>4</sup> After his capture, the victim was tied to a chair and subjected to torture-like treatment, involving numerous types of physical and mental abuse, parts of which were filmed.<sup>5</sup> The abuse occurred between the end of May and beginning of June 2012.<sup>6</sup> In June 2012, once the regime forces took over al-Haffah,<sup>7</sup> the Defendant fled to Sweden and claimed asylum.<sup>8</sup> The Defendant was arrested in October 2014, after the Swedish police came into possession of the film which depicted the torture.<sup>9</sup>

## C. Legal system background

Sweden is a civil law country. Civil legal proceedings are generally inquisitorial as opposed to adversarial so that the court is actively involved in all stages of the proceedings. Importantly, unlike in common law systems, criminal cases in Sweden are heard by four judges – one professional judge (who is legally trained) and three lay judges – with no jury.<sup>10</sup> Therefore, the judges play a very active and direct role in all the facets of a case, including in relation to adducing evidence and determining its probative value.<sup>11</sup> For example, 'a judge will often actively question witnesses and may even request parties to submit additional evidence'.<sup>12</sup>

The fundamental principles governing the laws of evidence in Sweden are 'free admission' and 'free evaluation' of evidence.<sup>13</sup> Generally, this means that there are no restrictions on evidence admissibility, so long as the court finds it relevant to the proceedings. Therefore, in the absence of

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<sup>2</sup> Södertörn District Court, B 2639-16, Sweden Judgment 11 May 2016. '*Droubi* Judgment B 2639-16' available [here](#) 16.

<sup>3</sup> *ibid* 16.

<sup>4</sup> *Droubi* Judgment B 2639-16 (n 2) p. 21. Note: the victim wanted to create a 'sub-group' and requested two AK-47s from the group leader to achieve this goal. He was resultantly suspected of being a spy for the regime aiming to divide the FSA movement.

<sup>5</sup> *ibid* 17. Note: it was filmed in sequences.

<sup>6</sup> *ibid* 32.

<sup>7</sup> Note: the 'regime' refers to the Syrian Regime led by current Syrian President Bashar al-Assad.

<sup>8</sup> *Droubi* Judgment B 2639-16 (n 2) 16.

<sup>9</sup> *ibid* 16.

<sup>10</sup> Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2003) 13 *Indiana International & Comparative Law Review* 405, 421.

<sup>11</sup> *ibid* 429.

<sup>12</sup> *ibid*.

<sup>13</sup> Christoffer Wong, 'Overview of Swedish Criminal Procedure' (Lund University Faculty of Law, 2012) 27 <[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019.

a rule explicitly prohibiting its introduction, even illegally obtained evidence can be admitted to the court if it is considered as having probative value.<sup>14</sup>

The Swedish rules of procedure for both civil and criminal cases are set out in Chapters 35 to 41 of the Swedish Code of Judicial Procedure (CJP).<sup>15</sup> This statute sets out general rules relating to presenting evidence in criminal trials. The CJP does not make any specific reference to DDE, but contains provisions on ‘documentary evidence’ more broadly.<sup>16</sup> However, in the Swedish system, ‘digital material is treated as [a] written document if it can be rendered into a readable form’.<sup>17</sup> An example of this in the present case is the use of ‘photographs and chatlogs’, which are listed in the ‘written evidence’ cited in the judgment.<sup>18</sup> Written documents can also include media such as ‘CD or DVD discs, and many other forms [including] a mobile telephone which contains SMS messages’.<sup>19</sup>

Swedish evidentiary law contains no specific rules that assign value to particular types of evidence; instead, this is left entirely to the court’s discretion. This discretion is rather broad as can be appreciated from the wording of the relevant Swedish statutes (outlined below). The overall determination of probative value rests with the court which engages in the ‘conscientious examination’ of the evidence, a trait common to civil law systems.<sup>20</sup> This generally means that the court’s discretion is the determinative factor in the admissibility of evidence, provided the court is satisfied of the authenticity of the evidence before it.<sup>21</sup>

The court must, after ‘evaluating everything that has occurred in accordance with the dictates of its conscience...determine what has been proved in the case’.<sup>22</sup> The CJP further states:

[I]f the court finds that a circumstance that a party offers to prove is without importance in the case, or that an item of evidence offered is unnecessary or evidently should be of no effect, the court shall reject that proof. The court may also reject an item of evidence

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<sup>14</sup> *ibid* 28.

<sup>15</sup> *ibid* 1; [the Swedish Code of Judicial Procedure](#).

<sup>16</sup> CJP Ch 38.

<sup>17</sup> Christoffer Wong (n 13) 18.

<sup>18</sup> Droubi Judgement B 2639-16 (n 2) 20.

<sup>19</sup> *ibid*; see also CJP Ch 27.

<sup>20</sup> CJP Ch 35 s 7; Christoffer Wong (n 13) 27.

<sup>21</sup> CJP Ch 35 s 3.

<sup>22</sup> CJP Ch 35 s 1.



offered if the evidence can be presented in another way with considerably less trouble or costs.<sup>23</sup>

Chapter 38 of the CJP outlines documentary evidence and specifies that '[W]ritten documents invoked as evidence should be produced in the original'. A certified copy may be produced if this is found sufficient or if the original is not obtainable.<sup>24</sup> The burden to produce relevant written documents falls on both parties for civil proceedings, whilst in criminal cases the accused does not bear such burden.<sup>25</sup> A similar provision is found in Chapter 39 relating to physical evidence, which states that '[A]nybody holding an object that can be brought conveniently to the court and that can be assumed to be of importance as evidence, is obliged to make the object available for inspection at a view'.<sup>26</sup> Again, this provision does not impose a burden upon the accused themselves to bring evidence. Generally, the presentation of evidence in the Swedish legal system is the responsibility of the parties, however, the court may also present evidence on its own motion.<sup>27</sup>

In terms of witness testimony, the CJP provides that any witness providing evidence in a case shall give their testimony orally.<sup>28</sup> Witnesses can also be subsequently orally examined at the request of parties, should the court deem it necessary.<sup>29</sup> In any oral questioning of witnesses, the court shall reject any questions that are 'manifestly irrelevant to the matter at issue, confusing, or otherwise inappropriate'.<sup>30</sup> There are additional provisions in relation to expert witnesses under Chapter 40 which allow the court to obtain an expert opinion on the determination of an issue which requires special professional knowledge.<sup>31</sup> Before appointing experts, the court must invite the parties to state their views.<sup>32</sup> If the parties agree on the use of a particular expert, they shall be appointed 'provided that he is found suitable and there is no impediment to his appointment'.<sup>33</sup> The Swedish legal system further requires that any such expert submits their report in writing, detailing the 'reasoning and circumstances upon which the conclusions in the opinion are founded'.<sup>34</sup>

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<sup>23</sup> *ibid* s 7.

<sup>24</sup> *ibid* Ch 38 s 1.

<sup>25</sup> *ibid* Ch 38 s 2.

<sup>26</sup> *ibid* Ch 39 s 5.

<sup>27</sup> *ibid* Ch 35 s 6.

<sup>28</sup> *ibid* Ch 36 s 16.

<sup>29</sup> *ibid* Ch 40 s 8.

<sup>30</sup> *ibid* Ch 40 s 10, Ch 36 s 17.

<sup>31</sup> CJP Ch 40 s 1.

<sup>32</sup> CJP Ch 40 s 3.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid* Ch 40 s 7.

## **D. Legal background of the case**

### **1. Summary**

Prosecution in this case was first brought before the Södertörn District Court in early February 2015,<sup>35</sup> and the judgment delivered on 11 May 2016.<sup>36</sup> The Defendant was sentenced to 7-years imprisonment for gross abuse under Chapter 3 Section 6 of the Penal Code,<sup>37</sup> and was acquitted for international crimes under Chapter 22 Section 6. The District Court also ruled in favour of the Defendant's expulsion from the country according to Chapter 8a Section 1 of the Aliens Act (2005: 716).<sup>38</sup>

An appeal was brought by both parties to the Svea Court of Appeal on 11 May 2016.<sup>39</sup> The Prosecutor sought a longer sentence and the Defendant requested his acquittal and dismissal of his deportation order.<sup>40</sup> The Svea Court of Appeal delivered its judgment on 5 August 2016.<sup>41</sup> The Court found the Defendant to be responsible for violations of international law as per Chapter 22 Section 6 of the Penal Code, in addition to gross abuse under Chapter 3 Section 6 of the Penal Code.<sup>42</sup> The sentence imposed by the Court of Appeal was therefore increased to 8-years imprisonment.<sup>43</sup>

### **2. Specific offences**

The prosecution presented two main grounds under which to hold the Defendant responsible, namely gross abuse and the international crime of torture of a helpless person.<sup>44</sup> The offences are set out below.

#### **1. Gross Abuse**

Gross Abuse is defined under Chapter 3 Section 6 of the Penal Code as 'an aggravation of abuse', as defined under Section 5. Accordingly, the crime is gross if 'the act constituted a mortal danger or whether the offender inflicted grievous bodily harm or severe illness or otherwise displayed

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<sup>35</sup> *Droubi* Judgment B 2639-16 (n 1) 15.

<sup>36</sup> There was another District Court judgment delivered on 26 February 2015.

<sup>37</sup> [Swedish Penal Code](#).

<sup>38</sup> [Swedish Aliens Act](#).

<sup>39</sup> Svea Court of Appeal, B 4770-16, Judgment 5 August 2016 *Droubi* Judgment B 4770-16'.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *Droubi* Judgment B 2639-16 (n 2) 17.

particular ruthlessness or brutality'.<sup>45</sup> This crime carries a sentence of one- to ten-years imprisonment.<sup>46</sup> In the present case, the District Court found that the seriousness of the abuse could be determined by assessing whether 'the bodily injury is permanent, the offence caused extreme suffering or the perpetrator showed extreme recklessness'.<sup>47</sup> Consideration shall also be given to whether 'the circumstances of the crime are strongly aggravating'.<sup>48</sup>

## 2. International Crime

Liability for breach of international law is provided for under Chapter 22 Section 6 of the Penal Code:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years.<sup>49</sup>

The provision further states that serious violations include 'occasioning severe suffering to persons enjoying special protection under international law'.<sup>50</sup> If the crime is gross, the sentence can extend 'for at most ten years, or for life'.<sup>51</sup> To determine whether this is the case, 'special consideration shall be given to whether it comprised a large number of individual acts'.<sup>52</sup>

Upon establishing the existence of an ongoing internal armed conflict (NIAC)<sup>53</sup> in Syria and the victim qualifying as a protected individual, the Courts could hold the Defendant liable for the torture of 'a combatant out of combatable condition'.<sup>54</sup> The international law which is relevant to NIACs is rather limited, featuring only Additional Protocol II to the Geneva Conventions I-IV and Common Article 3 of the Geneva Conventions I-IV.<sup>55</sup> Accordingly, the torture-like conduct

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<sup>45</sup> [Swedish Penal Code](#) Ch 3 s 6.

<sup>46</sup> *ibid.*

<sup>47</sup> *Droubi* Judgment B 2639-16 (n 2) 43.

<sup>48</sup> *ibid* 43.

<sup>49</sup> Swedish Penal Code Ch 22 s 6.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> Note: the judgment uses the term 'internal armed conflict', however this can be used interchangeably with the more commonly used 'non-international armed conflict'.

<sup>54</sup> *Droubi* Judgment B 2639-16 (n 2) 18,53.

<sup>55</sup> *ibid* 35; [Geneva Conventions \(I-IV\)](#) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva

of the Defendant amounts to a ‘serious infringement’ of Common Article 3 as well as of ‘generally accepted principles’ of IHL.<sup>56</sup>

## E. Legal Issues

There are five legal issues that the District Court and Court of Appeal considered in this case.

The issues are as follows:

- Issue One – Was there a non-international armed conflict (‘NIAC’)?
- Issue Two – What is the level of responsibility of the Defendant?
- Issue Three – How should the abuse be assessed?
- Issue Four – Was the victim a protected person (nexus)?
- Issue Five – Can the Defendant be deported?

### 1. Issue One – Was there a NIAC?

A NIAC is defined as a conflict ‘between a state and an armed group or between armed groups’.<sup>57</sup> Whether there is an ongoing NIAC will be determined assessing ‘the facts on the ground’.<sup>58</sup> Due to the limited availability of relevant international legislation (see above), the authority for establishing whether a NIAC exists comes from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>59</sup> Accordingly, there are two main criteria to be satisfied – whether the opposition is an organised group and whether there is a sufficient level of intensity of conflict.<sup>60</sup> As to the former, the District Court addressed factors such as ‘the command structure, the opportunity to implement different military operations, logistics to supply weapons and personnel, the opportunity to implement disciplinary measures, speak with a voice’.<sup>61</sup> To determine intensity, it considered the weapons and the ammunition used, the death-toll, the number of individuals who escaped, and the intensity of individual contentions.<sup>62</sup>

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Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions).

<sup>56</sup> *ibid* 18.

<sup>57</sup> *Droubi* Judgment B 2639-16 (n 2) 35.

<sup>58</sup> *ibid* 40.

<sup>59</sup> *ibid* 35 (in particular *Tadic Case* (Judgment) ICTY-94-1 (26 January 2000)).

<sup>60</sup> *ibid* 35.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid*.

The District Court concluded that there was an ongoing NIAC in Syria relying on factors such as the fact that a cease-fire agreement had been concluded,<sup>63</sup> and that the FSA was the ‘foremost opposition armed group’.<sup>64</sup> Moreover, it considered expert witnesses (Ola Engdahl<sup>65</sup> and Said Mahmoudi<sup>66</sup>) as well as reports from the International Committee of the Red Cross, Human Rights Watch and the Independent Commission of Inquiry on Syrian Arab Republic (COI).<sup>67</sup> As a result, both the District Court and the Court of Appeal concluded that, at the time of the abuse (between the end of May and the beginning of June 2012), there was an ongoing NIAC in Syria.<sup>68</sup>

## 2. Issue Two – What is the level of responsibility of the Defendant?

The Defendant denied responsibility on the basis that he was ‘forced to join the armed group and carry out the abuse’,<sup>69</sup> as he would have been beaten upon refusing.<sup>70</sup> In support of this submission, the Defendant ‘relied on inter alia testimony from his friends’.<sup>71</sup> Hence, he claimed that his conduct should be ‘justified’ as he was acting ‘in distress’ (also known as “under duress”).<sup>72</sup> However, the District Court found that the testimonies he relied upon had limited probative value.<sup>73</sup> Indeed, the witnesses were not actually present at the events and provided information on the basis of what the Defendant told them i.e. it was mere hearsay evidence.<sup>74</sup> Moreover, there was evidence that other people who had refused to participate had not been ‘subjected to reprisals’.<sup>75</sup> Hence, the Defendant’s claim that he was in a ‘state of emergency’ was unjustified.<sup>76</sup> Moreover, the District Court found that Defendant had an ‘active and leading role in the abuse’.<sup>77</sup>

The Defendant claimed that, after being abducted, he was brought to where the victim was and he assisted in administering the abuse to the victim.<sup>78</sup> He admitted to beating the victim with a

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<sup>63</sup> *ibid* 38

<sup>64</sup> *ibid* 48.

<sup>65</sup> *ibid* 35; Ola Engdahl researches and teaches international law at the Defense College.

<sup>66</sup> *ibid* 38; Said Mahmoudi has been Professor of International law at Stockholm University, he has written and published articles on the use of force in international law.

<sup>67</sup> *ibid* 37, 49.

<sup>68</sup> *Droubi* Judgment B 4770-16 (n 39) 6.

<sup>69</sup> *Droubi* Judgment B 2639-16 (n 2) 19.

<sup>70</sup> *ibid* 45.

<sup>71</sup> *ibid*.

<sup>72</sup> *ibid* 19; “distress” is the term used in the [Swedish Penal Code](#), see for example: Ch 3 s 3, Ch 4 ss 3,10 Ch 9 s 5.

<sup>73</sup> *ibid* 45.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*.

<sup>76</sup> *ibid* 45. Note: the judgment refers to the Defendant’s claimed state of distress interchangeably as a ‘state of emergency’. The use of this phrasing should therefore be understood in the context of that meaning and not its general use.

<sup>77</sup> *ibid* 41, 45.

<sup>78</sup> *ibid* 28.

‘whip-like object’, although he claimed that the beating did not go any further than what was shown in the film.<sup>79</sup> He also described the nature of the beating as ‘not that hard’ and causing only rapidly passing pain as where he claimed to have struck the victim (on the cheek) did not show any injuries.<sup>80</sup> He also denied the allegation of pouring liquid (water with lemon and salt) on the victim’s wounds.<sup>81</sup> Moreover, the Defendant denied acting ‘together or in consensus with other persons involved in the practice of violence’.<sup>82</sup> The District Court rejected the Defendant’s claim.<sup>83</sup> The District Court found the Defendant’s claim had limited credibility as a result of its inconsistency with his earlier statements.<sup>84</sup> Indeed, the Defendant originally denied participating in the abuse ‘at all’, and later changed his submission ‘without being able to provide a convincing explanation for it’.<sup>85</sup>

Furthermore, the District Court recognised the authority of the victim’s account of the facts as he provided a ‘detailed and coherent story’ and never exaggerated the facts.<sup>86</sup> Both the District Court and the Court of Appeal concluded that the Defendant participated in the abuse over the course of five days and was doing so in conjunction with others.<sup>87</sup> This was established through the testimony heard in court, and corroborated by the film.<sup>88</sup> The fact that the Defendant acted with others furthered the ruthlessness of his conduct in the opinion of the District Court.<sup>89</sup>

### **3. Issue Three – How should the abuse be assessed?**

The District Court emphasised that the extent of the abuse is to be determined on a case-by-case basis through an overall assessment of all the circumstances of the individual instance.<sup>90</sup> Chapter 3 Section 6 of the Penal Code outlines a number of factors to be taken into account when making such an assessment: whether ‘the act constituted a mortal danger or whether the offender inflicted grievous bodily harm or severe illness or otherwise displayed particular ruthlessness or brutality’. The District Court also identified additional factors such as whether the abuse was unprovoked, prolonged and whether the victim was without protection.<sup>91</sup> All these were considered to be

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<sup>79</sup> *ibid* 19, 28; further detail on the probative value of the film at Section 3.1.1 of this Report.

<sup>80</sup> *ibid* 19, 28.

<sup>81</sup> *ibid* 28.

<sup>82</sup> *ibid* 41.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid* 42.

<sup>85</sup> *ibid*.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid* 43.

<sup>88</sup> *ibid*.

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* 44.

<sup>91</sup> *ibid* 44.

satisfied on the facts and the District Court found that the Defendant acted with ‘extreme recklessness’.<sup>92</sup>

The threshold for gross abuse is easily satisfied in cases of ‘torture-like’ treatment, like the one at hand, because of the ‘extensive use of force’ deployed as well as the significant stress caused to the victim, especially in terms of death anxiety.<sup>93</sup> As the abuse was carried out by many perpetrators over several days, and the victim had been bound and defenceless, the Court concluded that the crime ought to be ‘considered extremely serious’.<sup>94</sup>

#### **4. Issue Four – Was the victim a protected person (nexus)?**

The applicability of international humanitarian law (IHL) to the case at hand requires that there be a nexus (connection) in place between the NIAC and the Defendant’s misconduct.<sup>95</sup> In this regard, the Södertörn District Court and the Svea Court of Appeal reached opposite conclusions, the former negating the existence of such a nexus and the latter instead finding it.<sup>96</sup>

The prosecutor argued that the victim had ‘left the group’ to form his own opposition group.<sup>97</sup> Different groups have different interests and may ‘end up in conflicts with each other’.<sup>98</sup> On these grounds, the prosecution submitted that the abuse was related to the NIAC.<sup>99</sup>

### **3. Södertörn District Court**

The District Court found that the victim was also a combatant, and that the abuse followed from a ‘brawl’ about weapons with the group leader whilst the ultimate purpose was still to stand against the regime.<sup>100</sup> Hence, the Court found that the “new” group shared the same purpose as the Defendant’s group.<sup>101</sup> As a result, the abuse could not be considered as ‘part of any military strategic plan or link in the fighting between the parties’.<sup>102</sup> Instead, it was identified as more of an act of ‘revenge’.<sup>103</sup> The Court concluded that the Defendant and the victim stood ‘on the same

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<sup>92</sup> *ibid* 55.

<sup>93</sup> *Droubi* Judgment B 2639-16 (n 2) 44.

<sup>94</sup> *ibid* 44.

<sup>95</sup> *Droubi* Judgment B 4770-16 (n 39) 7.

<sup>96</sup> *Droubi* Judgment B 2639-16 (n 2).

<sup>97</sup> *ibid* 16, 52.

<sup>98</sup> *ibid* 52.

<sup>99</sup> *ibid*.

<sup>100</sup> *ibid*.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid* 53.

<sup>103</sup> *ibid*.

side' of the conflict so that there was no nexus to the NIAC.<sup>104</sup> Therefore, although the victim was 'a combatant out of combatable condition', he did not qualify as a 'specially protected person'.<sup>105</sup> The absence of a link between the NIAC and the abuse prevented the pursuance of a claim under international law.

#### 4. Svea Court of Appeal

The Court of Appeal reversed the decision of the District Court.<sup>106</sup> It explicitly excluded the contention that the conflict was one of 'private nature'.<sup>107</sup> The victim's decision to create his own group was perceived as an attempt to divide the original group.<sup>108</sup> Hence, the purpose of the abuse was to establish whether the victim 'belonged or worked for the regime'.<sup>109</sup> Indeed, in the film, the victim is asked whether 'he is a spy for the regime'.<sup>110</sup> The Court identified this argument as 'a more reasonable explanation' for the Defendant's conduct.<sup>111</sup>

The Court of Appeal found that there was a nexus between the abuse and the NIAC and also concluded that the victim fell in the 'circle of protected persons'.<sup>112</sup> As a result, the 'objective conditions' for the applicability for international law were fulfilled and the Defendant was found liable under international law for torturing a 'helpless person'.<sup>113</sup>

#### 5. Issue Five – Can the Defendant be deported?

An order for deportation can be issued under Chapter 8a Section 1 of the Aliens Act (2005: 716). The Defendant objected to his expulsion on the grounds that he would be killed or seriously injured upon return to Syria.<sup>114</sup> The Migration Board recognised the validity of such a claim but also noted that the obstacle posed by the non-refoulement obligation is only temporary.<sup>115</sup>

As a result, both the District Court and the Court of Appeal agreed that, since the Defendant posed a 'serious danger to public order', he should be expelled and banned from the country.<sup>116</sup>

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<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> *Droubi* Judgment B 4770-16 (n 39).

<sup>107</sup> *ibid.* 7.

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.* 7.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.* 8.

<sup>114</sup> *Droubi* Judgment B 2639-16 (n 2) 54.

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*



### III. DDE

This case used DDE in the form of a film,<sup>117</sup> numerous photographs,<sup>118</sup> and Facebook chatlogs from the Defendant's computer and phone.<sup>119</sup> The DDE that was the most important in this case was the film, as it depicted the torture of the victim (the alleged abuse). The film was valuable as it enabled the Courts to corroborate the victim's testimony and give insight into the extent of the torture inflicted. Whilst there is no detailed mention of how the Defendant was identified in the film, both the District Court and the Court of Appeal appear to accept that the Defendant was present in it and engaged in some of the torture that the victim suffered. There was some discussion in relation to a belt that the Defendant could be seen wearing in both the film and the photographs. This contributed to the identification of the Defendant. The District Court refers to the preliminary investigation, where it is stated that the Defendant initially denied being in the film for fear of being deported to Syria.<sup>120</sup> However, once he was assured by his lawyer that he would not be deported, the Defendant later admitted to being in the film.<sup>121</sup> The District Court further mentions that 'during the course of the case in court, the plaintiff was identified', however the 'plaintiff' in this regard is the victim and not the Defendant.<sup>122</sup> This 'identification' may relate either to the victim being found while proceedings were ongoing, or within the video itself.

#### A. What did the DDE Prove?

The DDE played an important role in the District Court and Court of Appeal's consideration of *Issue Two*, *Issue Three* and *Issue Four* of the case, which are considered in further detail below. The DDE was used to establish numerous elements necessary for the District Court and Court of Appeal to convict the Defendant. Notably, the District Court convicted the Defendant of 'gross abuse' under Chapter 3 Section 6 of the Penal Code,<sup>123</sup> but acquitted him of an international crime under Chapter 22 Section 6(1) of the Penal Code.<sup>124</sup> However, the Court of Appeal convicted the

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<sup>117</sup> *Droubi* Judgment B 4770-16 (n 39) 3, 12; *Droubi* Judgment B 2639-16 (n 2) 16, 19, 20, 24, 29-30, 41, 43.

<sup>118</sup> *Droubi* Judgment B 4770-16 (n 39) 3; *Droubi* Judgment B 2639-16 (n 2) 20,

<sup>119</sup> *Droubi* Judgment B 2639-16 (n 2) 20, 29. The Defendant's mobile phone and computer were seized by a District Court order and held by the National Operations Department, see *Droubi* Judgment B 2639-16 (n 2) 12.

<sup>120</sup> *ibid* 30.

<sup>121</sup> *ibid*.

<sup>122</sup> *ibid* 16. The use of the term 'plaintiff' may be a translation error, however at page 17 of the District Court judgment, the term 'plaintiff' appears to relate to the victim, and not the Defendant, as the torture is discussed as being inflicted upon the 'plaintiff'.

<sup>123</sup> [Swedish Penal Code](#); *Droubi* judgment B2639-16 (n 2) 12.

<sup>124</sup> [Swedish Penal Code](#) in its wording prior to 1 July 2014; *Droubi judgment* B2639-16 (n 2) 12.

Defendant under both the aforementioned Chapters, thereby overturning the District Court's determination that there was no nexus between the armed conflict and the offending.<sup>125</sup>

The film relied on in this case was viewed in an 'unpixellated' form in private by the District Court and the Court of Appeal.<sup>126</sup> This was in accordance with confidentiality as outlined in Chapter 5 Section 1 of the CJP and Chapter 21 Section 1 the Secrecy Act.<sup>127</sup>

### **1. DDE relied upon to determine Issue Two – What is the level of responsibility of the Defendant?**

In the determination of the Defendant's responsibility in committing the crimes alleged by prosecutors, the District Court took into consideration the film, photographs and Facebook chatlogs. In the film, the Defendant was seen participating in the torture of the victim who was tied up and appeared to have already been 'previously injured'.<sup>128</sup> The District Court specifically stated that the 'violence [of the abuse] was recorded on film'.<sup>129</sup> The District Court found that the contents of the film showed that the Defendant 'participated in the abuse together and in agreement with other[s]'.<sup>130</sup>

The District Court also considered photographs of the Defendant where he could be seen posing with guns, although the Defendant claimed that the magazines of the guns were empty and that they were never used.<sup>131</sup> These photographs were taken while he was a member of the opposition group.<sup>132</sup> They indicate the participation of the Defendant in the armed opposition group.<sup>133</sup> The film used by the District Court as DDE in this case was obtained from the Defendant's Facebook page,<sup>134</sup> however, there is no clear indication as to where the photographs were obtained from.

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<sup>125</sup> *Droubi* Judgment B 4770-16 (n 39).

<sup>126</sup> *Droubi* Judgment B2639-16 (n 2) 12. Note: The judgment notes that the film was played 'at the negotiation within closed doors'. Presumably, this viewing included the Judge(s) and counsel. The 'unpixellated' form is not explained in the Judgment. However, it is likely that it refers to the film being viewed in a clear format, without any blurring or pixelating of potentially sensitive or confronting material.

<sup>127</sup> [CJP; Secrecy Act \(2009:400\)](#).

<sup>128</sup> *Droubi* Judgment B2639-16 (n 2) 16.

<sup>129</sup> *ibid*.

<sup>130</sup> *ibid* 43

<sup>131</sup> *ibid* 29.

<sup>132</sup> *ibid*.

<sup>133</sup> *ibid*.

<sup>134</sup> *ibid* 30.

Other DDE used by the District Court to determine this issue were chatlogs taken from the Defendant's Facebook.<sup>135</sup> The Defendant claimed he created his Facebook profile when he arrived near the border in Turkey and that he began posting on it at the end of July 2012.<sup>136</sup> In one of the messages in the chatlogs, the Defendant claimed to be the 'commander' of the opposition group.<sup>137</sup> This DDE was, therefore, used to refute the Defendant's claims that he did not hold a leading role in the group.<sup>138</sup>

The Court of Appeal relied on the 'extensive written evidence, as well as films and photographs' in the same manner as the District Court.<sup>139</sup> The Court of Appeal further stated that it 'rejects' that the Defendant should be relieved of responsibility because of his claim that he was 'forced to join the armed group'.<sup>140</sup> The Court of Appeal did not make any direct findings in relation to the DDE, other than the statement set out above.

The following table identifies the DDE that was relied on by the District Court and Court of Appeal to assess this issue.

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<sup>135</sup> *ibid* 29-30.

<sup>136</sup> *ibid* 30.

<sup>137</sup> *ibid*.

<sup>138</sup> *ibid*.

<sup>139</sup> *Droubi* Judgment B 4770-16 (n 39) 3. Note: the translated judgment states that the Court of Appeal relied on the evidence 'substantially the same as in the District Court'. No further clarity is given. It is assumed that this means the Court of Appeal adopts the District Court's assessment of this evidence.

<sup>140</sup> *ibid* 4.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court	Probative Value – Court of Appeal
<b>Film</b>	The film came to the attention of the police at some stage in 2014 and led to the Defendant’s arrest. <sup>141</sup> The Defendant uploaded it to his Facebook page around the end of July 2012 and also reposted it again	There was nothing in the judgment to suggest that the DDE was challenged.	The District Court found that: <ul style="list-style-type: none"> <li>• It was ‘unquestionable’ that the Defendant participated in the torture as shown in the film.<sup>143</sup></li> <li>• That the Defendant ‘had an active and leading role in the abuse throughout the day, except for the first day’.<sup>144</sup></li> <li>• The Defendant ‘participated in the abuse together and in agreement with others’.<sup>145</sup></li> </ul>	The Court of Appeal made no separate finding to the District Court in relation to this DDE. <sup>146</sup>

<sup>141</sup> *Droubi* Judgment B2639-16 (n 2) 16.

<sup>143</sup> *ibid* 41.

<sup>144</sup> *ibid*.

<sup>145</sup> *ibid* 43.

<sup>146</sup> *Droubi* Judgment B 4770-16 (n 39) 3. Note: the translated judgment states that the Court of Appeal relied on the evidence ‘substantially the same as in the District Court’. No further clarity is given. It is assumed that this means the Court of Appeal adopts the District Court’s assessment of this evidence.

	on 16 April 2013. <sup>142</sup>			
<b>Photographs</b>	No information provided as to where the photographs were obtained from. <sup>147</sup>	There was nothing in the judgment to suggest that the DDE was challenged.	The Defendant can be seen posing with firearms with other members of the opposition group. The District Court found that this indicated the membership of the Defendant to the opposition group and his willingness to participate in their actions. <sup>148</sup>	The Court of Appeal made no separate finding to the District Court in relation to this DDE. <sup>149</sup>
<b>Chatlogs – from Facebook</b>	The Defendant testified that this Facebook account was opened when he was at the border in Turkey. <sup>150</sup> The	There was nothing in the judgment to suggest that the DDE was challenged.	The District Court found that the Defendant had written in a chat that ‘he was the commander’ of the opposition group. <sup>152</sup> This indicated that he had a ‘leading role’ in the	The Court of Appeal made no separate finding to the District Court in relation to this DDE. <sup>154</sup>

<sup>142</sup> *ibid* 30.

<sup>147</sup> Note: it is likely these came from the Facebook page of the Defendant.

<sup>148</sup> *Droubi* Judgment B2639-16 (n 2) 29.

<sup>149</sup> *Droubi* Judgment B 4770-16 (n 39) 3. Note: the translated judgment states that the Court of Appeal relied on the evidence ‘substantially the same as in the District Court’. No further clarity is given. It is assumed that this means the Court of Appeal adopts the District Court’s assessment of this evidence.

<sup>150</sup> *Droubi* judgment B2639-16 (n 2) 29.

<sup>152</sup> *ibid* 29.

<sup>154</sup> *Droubi* Judgment B 4770-16 (n 39) 3. Note: the translated judgment states that the Court of Appeal relied on the evidence ‘substantially the same as in the District Court’. No further clarity is given. It is assumed that this means the Court of Appeal adopts the District Court’s assessment of this evidence.

	Defendant admitted that the Facebook profile in question was his own. <sup>151</sup> No information is provided as to how these chatlogs were obtained.		group and was not forced to participate. <sup>153</sup>	
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<sup>151</sup> *Droubi* Judgment B 4770-16 (n 39) 29.

<sup>153</sup> *ibid* 29.

## 2. DDE relied upon to determine Issue Three – How should the abuse be assessed?

The District Court noted that the alleged abuse of the victim could be established by the ‘violence [that] was recorded on film’.<sup>155</sup> The District Court used the DDE to corroborate the victim’s testimony of the abuse he suffered. The District Court described the torture in extensive detail, referring both to the film and the testimony of the victim. The victim’s testimony described the physical torture as including being whipped, the smashing of fluorescent lamps and drinking glasses on his head and body, being suspended on a ‘flying mat’, the pouring of lemon juice and salt water liquid into his open wounds, the removal of six of his teeth with pliers and being forced to extinguish cigarettes with the soles of his feet.<sup>156</sup> In addition, he was subjected to mental torture, which resulted in extreme ‘death anxiety’ and was exacerbated by the torturers reading him verses from the *Qur’an* used to prepare people for death.<sup>157</sup> The District Court went on to note that the victim’s story was detailed and coherent and further ‘received support from [the] injuries and scars on his body’.<sup>158</sup> The District Court did not discuss whether all of these claims of torture were established by the DDE, or if only some of them were.

In assessing and determining the level of abuse in this case, the Court of Appeal stated that it ‘shares the judgment of the District Court to the extent that it found the defendant participated in the abuse of [the victim]’.<sup>159</sup> The Court of Appeal ruled that the crime should be considered as ‘extremely serious’ in accordance with Chapter 3, Section 6 (2) of the CJP.<sup>160</sup> The Court of Appeal found that the conduct the Defendant engaged in was ‘considered to be extremely gross’ and therefore should be sentenced to a longer term of imprisonment, 8 years.<sup>161</sup>

The prosecutor in the District Court case claimed that:

The abuse is to be considered extremely serious because [the Defendant] showed extraordinary ruthlessness by being together with several other persons for several days and nights expose [the Victim] who was bound to hands and feet and completely defenseless, for torture-like beatings on repeated occasions.<sup>162</sup>

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<sup>155</sup> *Droubi* Judgment B2639-16 (n 2) 16.

<sup>156</sup> *ibid* 24.

<sup>157</sup> *ibid*.

<sup>158</sup> *ibid* 42.

<sup>159</sup> *Droubi* Judgment B 4770-16 (n 39) 4.

<sup>160</sup> *ibid* 4.

<sup>161</sup> *ibid*.

<sup>162</sup> Request of the Prosecutor: *Droubi* Judgment B2639-16 (n 2) 17.

The following table identifies the DDE that was relied on by the District Court and Court of Appeal to assess this issue.



Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – District Court	Probative Value – Court of Appeal
<b>Film</b>	<p>The film came to police awareness at some stage in 2014 and led to the Defendant’s arrest.<sup>163</sup></p> <p>The Defendant uploaded it to his Facebook around the end of July 2012 and also reposted it again on 16 April 2013.<sup>164</sup> The Defendant</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>In analysing this evidence, the District Court considered the film showed an extremely serious and gross level of abuse which included:</p> <ul style="list-style-type: none"> <li>• The infliction of extensive injuries;</li> <li>• Continuation of abuse even after extensive injuries had been inflicted;</li> <li>• Causing of prolonged pain; and</li> <li>• Intent to cause ‘death anxiety’ or similar stress.<sup>166</sup></li> </ul>	<p>The Court of Appeal made no separate finding to the District Court in relation to this DDE.<sup>167</sup></p>

<sup>163</sup> *Droubi* Judgment B2639-16 (n 2) 16.

<sup>164</sup> *ibid* 30.

<sup>166</sup> *ibid* 44.

<sup>167</sup> *Droubi* Judgment B 4770-16 (n 39) 3. Note: the translated judgment states that the Court of Appeal relied on the evidence ‘substantially the same as in the District Court’. No further clarity is given. It is assumed that this means the Court of Appeal adopts the District Court’s assessment of this evidence.

	admitted that the Facebook profile in question was his own. <sup>165</sup>			
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<sup>165</sup> *Droubi* Judgment B 4770-16 (n 39) 29.

### 3. DDE relied upon to determine Issue Four – Was the victim a protected person? (Nexus)

The District Court considered photographs of the Defendant where he could be seen posing with guns, as outlined above.<sup>168</sup> However, the District Court came to the conclusion that there was no nexus between the offending and an armed conflict, as outlined above in 2.4.2(d).<sup>169</sup>

When determining the nexus between the abuse and the armed conflict, the Court of Appeal turned to the DDE of the film.<sup>170</sup> The Court of Appeal determined that the film depicts the torture of the victim, during which the victim is ‘asked if he is a spy for the regime and if he killed many of the [sic] people’.<sup>171</sup> The Court of Appeal found that the film gave ‘a clear impression that the purpose of the treatment of [the victim]’ was to see if he worked for the regime.<sup>172</sup> Overall, the Court of Appeal found that this conclusion was more compelling than the claim that the torture was ‘only a vengeance for an injustice’.<sup>173</sup> As a result, the Court of Appeal determined that against this background, ‘there is one such nexus, between the internal armed conflict and the treatment of [the victim]’ and therefore the abuse fell under IHL.<sup>174</sup> Furthermore, in adopting the District Court’s view, the Court of Appeal determined that the victim was covered by a ‘protected circle of persons’ under international law, as a captured enemy who could not defend himself.<sup>175</sup>

The Court of Appeal further found that the Defendant must have been aware that there was an ongoing NIAC between different opposition groups and the regime, and that he subsequently would have known of the risks of holding and torturing the victim who was a protected person.<sup>176</sup> The Court of Appeal held that ‘the extent and intensity of the fighting’ as well as the organisation of the opposition groups at the time of the torture, established the link between the armed conflict and the offending.<sup>177</sup> Consequently, the Court of Appeal determined that the Defendant should be convicted of a serious violation of international law.<sup>178</sup>

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<sup>168</sup> *Droubi* Judgment B2639-16 (n 2) 29.

<sup>169</sup> *ibid* 12.

<sup>170</sup> *Droubi* Judgment B 4770-16 (n 39) 7.

<sup>171</sup> *ibid* 7.

<sup>172</sup> *ibid*.

<sup>173</sup> *ibid*.

<sup>174</sup> *ibid*.

<sup>175</sup> *ibid*.

<sup>176</sup> *ibid* 8.

<sup>177</sup> *Droubi* Judgment B 4770-16 (n 39) 8.

<sup>178</sup> *ibid* 8.

The following table identifies the DDE that was relied on by the District Court and Court of Appeal to assess this issue.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – District Court	Probative Value – Court of Appeal
<b>Film</b>	<p>The film came to police awareness at some stage in 2014 and led to the Defendant’s arrest.<sup>179</sup></p> <p>The Defendant uploaded it to his Facebook around the end of July 2012 and also reposted it again on 16 April 2013.<sup>180</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court made no reference to the film in consideration of this issue.</p>	<p>The Court of Appeal found that the film:</p> <ul style="list-style-type: none"> <li>• Depicts the torture of the victim, during which the victim is ‘asked if he is a spy for the regime and if he killed many of the [<i>sic</i>] people’.<sup>181</sup></li> </ul> <p>The Court of Appeal found that the film gave:</p> <ul style="list-style-type: none"> <li>• ‘a clear impression that the purpose of the treatment of [the victim]’ was to see if he worked for the regime.<sup>182</sup></li> </ul>

<sup>179</sup> *Droubi* Judgment B2639-16 (n 2) 16.

<sup>180</sup> *ibid* 30.

<sup>181</sup> *Droubi* Judgment B 4770-16 (n 39) 7.

<sup>182</sup> *ibid* p 7.

<b>Photographs</b>	No information provided as to where the photographs were obtained from. <sup>183</sup>	There was nothing in the judgment to suggest the DDE was challenged.	The District Court found that these photographs were taken with other members of an opposition group. The District Court did not make any determination that this opposition group had a nexus to an ongoing armed conflict within Syria. <sup>184</sup>	The Court of Appeal made no separate finding to the District Court in relation to this DDE. <sup>185</sup>
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<sup>183</sup> Note: it is likely these came from the Facebook page of the Defendant.

<sup>184</sup> *Droubi* Judgment B2639-16 (n 2) 29.

<sup>185</sup> *Droubi* Judgment B 4770-16 (n 39) 3. Note: the translated judgment states that the Court of Appeal relied on the evidence ‘substantially the same as in the District Court’. No further clarity is given. It is assumed that this means the Court of Appeal adopts the District Court’s assessment of this evidence.

## **B. What DDE discussion was there?**

An interesting point to note is that whilst the film helped to convict the Defendant, the victim claimed that the film only depicts a fraction of the torture and abuse he actually suffered.<sup>186</sup> The victim claimed that he 'has no idea what day the movie was filmed but he remembers that they were filming more sequences than the one shown in this case'.<sup>187</sup> The Defendant denied this accusation. The Court did not consider any torture outside of that contained in the film, as it did not have any evidence beyond the testimony of the victim to support this fact. This shows the significance the Court placed on the DDE, as it considered mere testimony insufficient to establish the offending behaviour.

### **1. The way the rule operates in the domestic system**

Rules of evidence relating to DDE were not discussed in this case, nor do they explicitly exist in Swedish domestic laws. However, the relatively open and free nature of the Swedish rules of evidence create an opportunity for digital evidence to be tendered and relied upon in criminal cases. This open system of evidentiary rules means that certain assumptions can be made about the DDE that was discussed by the Courts in this case. There is brief mention by the Court of Appeal on how the DDE will be viewed in the case in accordance with the CJP and Secrecy Act, although this is not expanded upon.<sup>188</sup>

The use of the evidence at first instance stems from the court's discretion to include it. The rules of evidence under the CJP stipulate that any such documentary evidence can be introduced by either party, or the court itself, and must be admitted in a 'readable form'.<sup>189</sup> The court would have to rule on its relevance and exclude any evidence it deemed manifestly irrelevant or immaterial to the case. As the court holds the discretion to dismiss or allow the admission of evidence, reliance on DDE throughout this case illustrates that the DDE used was relevant, probative and authenticated. This general assumption is supported by the 'conscientious examination' principle included in the Swedish legal system.<sup>190</sup>

Rules regarding expert opinions are set out under Chapter 40 of CJP, specifying that any report made by the expert must be submitted to the court in writing and oral testimony will only occur if the court

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<sup>186</sup> *ibid* 24.

<sup>187</sup> *Droubi* Judgment B2639-16 (n 2) 24.

<sup>188</sup> Trial Code Ch 5 s 1 of the and Secrecy Act (2009:400) Ch21 s 1.

<sup>189</sup> CJP Ch 35 s 6; Christoffer Wong (n 13) 18.

<sup>190</sup> CJP Ch 35 s 7; Christoffer Wong (n 13) 27.

deems it suitable on the request of one or more of the parties.<sup>191</sup> Expert witnesses used in this case included Ola Engdahl,<sup>192</sup> and Said Mahmoudi, who provided evidence in relation to the NIAC in Syria.<sup>193</sup>

## 2. Whether the rule is reflected in other legal systems

Precedents or rules from other jurisdictions were not referred to in the judgments of either the District Court or the Court of Appeal.

There is no reported use of this case as precedent, either binding or persuasive, in other legal systems. As no Swedish statutes set out clear evidentiary rules relating to DDE, it subsequently cannot be reflected in the rules of other legal systems. However, other notable Swedish cases using DDE as evidence to prosecute international crimes domestically include the case of *Mohammed Abdullah*,<sup>194</sup> and *Haisam Omar Sakanb*.<sup>195</sup>

## 3. How the rule was applied in the case in relation to DDE

The three types of DDE that were adduced in these proceedings include one film, numerous photographs and an unspecified amount of Facebook chatlogs.

There was no discussion in either the District Court or the Court of Appeal in relation to the verification procedures being undertaken in the gathering of this DDE. The use of experts in this case was limited only to the assessment of whether there was a NIAC occurring at the time of the alleged offending in Syria. There was no expert assessment mentioned in relation to the content of the DDE, nor on the procedures by which it was obtained. Whilst there is reference to the chatlogs and film posted on Facebook, there is no discussion of how these were then extracted from this source. For example, there is no mention of whether the video was accessible due to ‘public privacy’<sup>196</sup> settings on the Defendant’s Facebook page or whether it was obtained by some other means. Furthermore, as Facebook chatlogs are private between the individuals conducting the chat,<sup>197</sup> the logs obtained in this

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<sup>191</sup> CJP Ch 40 s 7-8.

<sup>192</sup> *Droubi* Judgement B 2639-16 (n 2) 35.

<sup>193</sup> *ibid* 38.

<sup>194</sup> Mohammed Abdullah, *Södertörn District Court* 25 September 2017, judgment available [here](#).

<sup>195</sup> *Sakanb* Judgment (n 10).

<sup>196</sup> More information on this can be found [here](#).

<sup>197</sup> More information on this can be found [here](#).



case must have been sourced by another means. This was likely done as a result of the seizure of the Defendant's phone and computer, however, no elaboration of this is discussed by either court.<sup>198</sup>

Notably, the DDE played a crucial role in these proceedings, especially in relation to the film which documented alleged abuse claimed. This DDE was specifically corroborated by the victim, whose words and body bore the evidence of the abuse. Whilst it may be argued that the use of an expert to contextualise and analyse the DDE is useful,<sup>199</sup> it may be surmised that the content of the film in this case did not need any further interpretation. If this had been the case, the court would have been able to obtain an expert opinion on the determination of an issue which requires special professional knowledge.<sup>200</sup>

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<sup>198</sup> Note: Realising the source of information is different to verifying its authenticity, which is an important distinction in relation to DDE.

<sup>199</sup> Note: expert evidence was used in assessing DDE in the *Sakbanb* case (n 10) as well as in the German case of [Prosecutor v. Aria Ladjedvardi](#), Higher Regional Court, Frankfurt am Main, Germany (Case reference: 5-3 StE 2/16 - 4 - 1/16), 12 July 2016.

<sup>200</sup> CJP Ch 40 s. 1.

# Prosecutor v. Mouhannad Droubi – REFERENCE LIST

## LEGISLATION

- Geneva Conventions, Common Article 3 - <https://ihl-databases.icrc.org/ihl/WebART/375-590006>
- Swedish – Public Access to Information and Secrecy Act (2009:400) - <https://www.government.se/49b75b/contentassets/2ca7601373824c8395fc1f38516e6e03/public-access-to-information-and-secrecy-act>
- Swedish Aliens Act (2005:716) - [https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005\\_716.pdf](https://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf)
- Swedish Code of Judicial Procedure (1942:740) - [https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998\\_65.pdf](https://www.government.se/49e41c/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf)
- Swedish Criminal Code (1962:700) - <https://www.government.se/48d6e0/contentassets/5315d27076c942019828d6c36521696e/the-swedish-criminal-code.pdf>

## CASES

- *Prosecutor v Haisam Omar Sakbanh*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (*Sakbanh judgment*). The original judgment from the Stockholm District Court (in Swedish) is available [here](#). An unofficial English translation of this judgment is available [here](#).
- *Prosecutor v Mohamad Abdullah*, Södertörn District Court, B 11191-17, Judgment 25 September 2017 (*Abdullah judgment*);
- *Prosecutor v Raed Thaer Abdulkareem*, Blekinge District Court, B 569-16, Judgment 6 December 2016 (*Abdulkareem judgment*). The original judgment from the Blekinge District Court (in Swedish) is available [here](#). An unofficial English translation of this judgment (as Annex A) is available [here](#).

## ARTICLES

- Ortwein BM II, 'The Swedish Legal System: An Introduction' (2003) 13 *Indiana International & Comparative Law Review* 405
- Wong C, 'Overview of Swedish Criminal Procedure' (Lund University Faculty of Law, 2012) 27 <[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019

# Prosecutor v. Hadi Habeeb Hilal (Finland, 2016)

(2016) Case R 16/214

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*Editors: Dr Emma Irving and Neil Cockerill*

## 1. Executive Summary

In this case, Mr Hadi Habeeb Hilal (Mr Hilal), an Iraqi national, was prosecuted in Finland for publishing a photo on Facebook that portrayed him posing with a severed head of an Islamic State (IS) fighter.<sup>1</sup> Mr Hilal was convicted on 22 March 2016 by the District Court of Kanta-Häme (the Court) for committing a war crime of ‘outrage upon personal dignity’ and was sentenced to a suspended imprisonment of 13 months.<sup>2</sup> This case is particularly noteworthy because the principal evidence used against Mr Hilal was a photograph posted publicly on Facebook.<sup>3</sup> Additionally, the Court relied not only on DDE from open sources but also from closed sources,<sup>4</sup> namely photographs stored on Mr Hilal’s mobile phone.<sup>5</sup>

### I. Background

#### A. DDE legal provisions/evidentiary norms

No rules of evidence or other legal provisions specifically relating to DDE were discussed in the judgement. The legal framework of evidence, including DDE, in the Finnish legal system is considered below.

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<sup>1</sup> *Prosecutor v Hadi Habeeb Hilal* (Case R 16/214) [2016] District Court of Kanta-Häme (*Hilal*). This report is based on an unofficial English translation of the judgement, available at <<https://www.legal-tools.org/doc/546cd9/pdf/>> accessed 9 December 2019. Pinpoint references refer to this translation.

<sup>2</sup> *Hilal* (n 1) 9.

<sup>3</sup> *ibid* 6. This is an example of open sourced Digitally Derived Evidence (DDE). See [DDE Clinic Working Definition of DDE]; Human Rights Center, UC Berkeley School of Law, ‘[The New Forensics: Using Open Source Information to Investigate Grave Crimes](https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio_report_2018_9.pdf)’ (2018), <[https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio\\_report\\_2018\\_9.pdf](https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio_report_2018_9.pdf)> accessed 10 December 2019, 7–8, 6; Nikita Mehandru and Alexa Koenig, ‘[Open Source Evidence and the International Criminal Court](https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#_ftn6Z)’ *Harvard Human Rights Journal* (15 April 2019) <[https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#\\_ftn6Z](https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/#_ftn6Z)> accessed 10 December 2019.

<sup>4</sup> Mehandru and Koenig (n 3).

<sup>5</sup> *Hilal* (n 1) 3.

## B. Factual background of the case

Mr Hilal served as a sergeant in the Iraqi Ground Forces from November 2014 to September 2015.<sup>6</sup> He was a member of the Iraqi Special Operations Forces,<sup>7</sup> a special unit directed by Iraq's Counter-Terrorism Service<sup>8</sup> which was involved in combat operations against the extremist group IS.<sup>9</sup> Specifically, he was part of the Iraqi Counter-Terrorism Battalion, a sub-unit that was directly involved in these operations.<sup>10</sup>

On 19 March 2015, Mr Hilal was in Tikrit, Iraq, where there was an ongoing non-international armed conflict between the Iraqi armed forces and the IS.<sup>11</sup> During his time there, he was photographed with a severed head of a deceased male.<sup>12</sup> Although the victim's identity was not clear from the photograph,<sup>13</sup> the severed head depicted therein allegedly belonged to an IS fighter that was beheaded as a result of a suicide bomb attack.<sup>14</sup>

On 2 April 2015, while presumably still in Iraq, Mr Hilal posted the photograph on his Facebook profile with the privacy settings set to "public",<sup>15</sup> thus making the photograph accessible to anyone.<sup>16</sup> At the end of 2015, Mr Hilal migrated to Finland.<sup>17</sup> On 7 January 2016, he was arrested

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<sup>6</sup> *ibid* 1.

<sup>7</sup> *ibid*.

<sup>8</sup> The Counter-Terrorism Service is an independent security agency instituted by the United States (US) in Iraq following the 2003 US-led invasion of Iraq, responsible for leading most of the combat operations against the extremist group IS. See David M. Witty '[Iraq's Post-2014 Counter-Terrorism Service](https://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus157-Witty-2.pdf)' <<https://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus157-Witty-2.pdf>> accessed 9 December 2019, 1.

<sup>9</sup> *ibid*. The Islamic State is also known as the Islamic State of Iraq and Syria (ISIS) or the Islamic State of Iraq and the Levant (ISIL). For more information, see '[ISIS](https://www.counterextremism.com/threat/isis)' (*Counter Extremism Project*) <<https://www.counterextremism.com/threat/isis>> accessed 10 December 2019.

<sup>10</sup> *Hilal* (n 1) 1 and 3.

<sup>11</sup> *ibid* 6; '[Iraq launches offensive to take back Tikrit from ISIL](https://www.aljazeera.com/news/2015/03/iraq-launches-offensive-tikrit-isil-150301181442703.html)' (*Al Jazeera*, 2 March 2015) <<https://www.aljazeera.com/news/2015/03/iraq-launches-offensive-tikrit-isil-150301181442703.html>> accessed 10 December 2019; '[Iraqi forces seek to encircle IS fighters in Tikrit](https://www.bbc.com/news/world-middle-east-31727470)' (*BBC*, 4 March 2015) <<https://www.bbc.com/news/world-middle-east-31727470>> accessed 10 December 2019.

<sup>12</sup> *Hilal* (n 1) 6.

<sup>13</sup> *ibid* 4.

<sup>14</sup> *ibid* 2. This was Mr Hilal's contention. The Court did not determine the cause of death of the IS fighter, stating, like the Prosecutor, that the photo depicts Mr Hilal 'with the severed head of an enemy soldier apparently killed in combat or in a bomb attack'. See *ibid* 1 and 4.

<sup>15</sup> *Hilal* (n 1) 1. It is important to note that the Court recognized that the photograph was published on a public Facebook profile, meaning that it was under the "public" privacy settings. Therefore, the Court immediately established an element of wide dissemination to the public. Interestingly, the Court did not provide more reasoning to support the establishment of this element of wide dissemination of the photograph or whether it had any impact on the severity of the crime. A different approach was taken by the High Regional Court of Frankfurt am Main. See *Prosecutor v Aria Ladjedvardi* (Case R 5-3 StE 2/16 - 4 - 1/16) [2016] High Regional Court of Frankfurt am Main (*Prosecutor v Aria Ladjedvardi*).

<sup>16</sup> *Hilal* (n 1) 1; '[Basic Privacy Settings & Tools: Selecting an Audience for Stuff You Share](https://www.facebook.com/help/325807937506242)' (*Facebook Help Center*) <<https://www.facebook.com/help/325807937506242>> accessed 29 December 2019.

AFP, '[Second Iraqi Fighter Found Guilty Of War Crimes In Finland](https://www.justiceinfo.net/en/live-feed/26473-.html)' (*Justiceinfo.net*, 22 March 2016) <<https://www.justiceinfo.net/en/live-feed/26473-.html>> accessed 10 December 2019.

and remanded on suspicion of war crimes.<sup>18</sup> As the arrest warrant was not available for consulting at the time of the writing and the judgement does not elaborate on the details surrounding his arrest, those details are not discussed in this report.

### C. Legal system background

The case was brought before the District Court of Kanta-Häme and pursued under the Finnish legal system, which is a civil law system.

In civil law systems, courts are actively involved in all stages of the proceedings. The judge typically takes on a more active role in the establishment of the facts. The standard of proof is often the subjective conviction of the judge, while preserving the presumption of innocence. There are usually no strict rules on the admissibility of evidence. As a result, criminal proceedings in civil law systems tend to have a less adversarial character than in common law. However, they cannot be considered as having a purely inquisitorial character in order to safeguard the rights of the accused.

In the Finnish legal system,<sup>19</sup> the substantive criminal law is set out in the Criminal Code of Finland (CC),<sup>20</sup> while the procedural matters are codified in the Criminal Procedure Act of Finland (CPA).

<sup>21</sup> The Code of Judicial Procedure of Finland (CJP)<sup>22</sup> also contains general provisions applicable in criminal cases.

The rules of evidence applicable in criminal proceedings in Finland are set out in the CPA and the CJP.

Pursuant to Chapter 1, section 7(1) of the CC, Finnish law applies to any offence committed outside of Finland where the punishment of the act is based on an international agreement or on another statute or regulation internationally binding on Finland, regardless of the law of the place of commission.<sup>23</sup>

Chapter 1, section 7 of the CC determines that the CC applies to crimes considered international crimes, including war crimes as defined in the Rome Statute of the International Criminal Court (Rome Statute).<sup>24</sup>

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<sup>18</sup> *Hilal* (n 1) 7.

<sup>19</sup> It bears many similarities with the Swedish legal system.

<sup>20</sup> [1889 Criminal Code of the Republic of Finland](#) (*Rikoslaki*) (amendments up to 766/2015) (CC).

<sup>21</sup> [1997 Criminal Procedure Act of the Republic of Finland](#) (*Laki oikeudenkäynnistä rikosasioissa*) (amendments up to 733/2015) (CPA).

<sup>22</sup> [1734 Code of Judicial Procedure of the Republic of Finland](#) (*Oikeudenkäymiskaari*) (amendments up to 732/2015) (CJP).

<sup>23</sup> [CC](#).

<sup>24</sup> [CC](#); [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 38544 (Rome Statute).

Chapter 11, section 5(1) of the CC specifies in greater detail the acts which are punishable as war crimes. When defining war crimes that are not covered in the first paragraph, Chapter 11, section 5(2) of the CC states that:

A person who commits another act defined under article 8(2) of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002) or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognized and established laws and customs of war in accordance with international law shall be sentenced for a war crime.<sup>25</sup>

Chapter 11, section 7(1) of the CC also defines petty war crimes, stating that ‘[i]f the war crime, considering the consequence caused or the other relevant circumstances, is petty when assessed as a whole, the offender shall be sentenced for a petty war crime [...]’.<sup>24</sup>

In the Rome Statute, war crimes of outrages upon personal dignity are defined in Article 8(2)(b)(xxi) and (2)(c)(ii) that refer to humiliating and degrading treatment in international armed conflicts (IAC) and non-international armed conflicts (NIAC) respectively.<sup>26</sup>

Additionally, when interpreting Article 8 of the Rome Statute, the Elements of Crimes<sup>27</sup> are also to be taken into account when applying the relevant provisions of the CC.<sup>28</sup> In those cases where the CC does not provide for a certain war crime, Article 8 of the Rome Statute is applied directly, and the Elements of Crimes are also taken into account.

The general provisions that deal with evidentiary matters are set out in Chapter 17 of the CJP, whilst provisions related exclusively to the criminal proceedings are outlined in various chapters of the CPA. There are no specific rules dealing with DDE. Therefore, DDE is considered as general evidence.<sup>29</sup>

There are no special rules on the way evidence must be collected, nor on what may qualify as admissible evidence in criminal proceedings, as a rule restraining “hearsay evidence” does not

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<sup>25</sup> CC.

<sup>26</sup> Rome Statute.

<sup>27</sup> International Criminal Court, [Elements of Crimes](#), Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010 (International Criminal Court publication, RC/11).

<sup>28</sup> *Hilal* (n 1) 5.

<sup>29</sup> Ari-Matti Nuutila, ‘*The Finnish Criminal Procedure*’ *Criminal Procedure Systems in the European Community* (2012) <<https://sites.google.com/site/arimattinuutila/2012-the-finnish-criminal-procedure>> accessed 29 December 2019.

exists in Finland. Therefore, in criminal proceedings, the facts may be proven by all possible means.<sup>30</sup>

The law does not provide an exhaustive list of the available means of evidence. Instead, the court is simply required to weigh everything that has been revealed in the case in order to ‘decide what is to be deemed the truth in the matter’ beyond reasonable doubt.<sup>31</sup> There is no exclusionary rule or doctrine that would require the court to disregard certain types of evidence.<sup>32</sup> There are also no rules that dictate how the court must assess the evidence, as it must look for the material truth and is only bound by its own evaluation of the evidence.

Expert witnesses may give explanations of the evidence on the basis of their special competence. Although the court is not bound by the expert evidence, it follows it as a settled practice.<sup>33</sup>

The most relevant provision on expert witnesses that is relevant to this case is Chapter 17 (44) (1) of the CJP, which provides that:

If, in the consideration of a question which must be ascertained on the basis of special professional knowledge, it is deemed necessary to use an expert witness, the court shall obtain a statement on this question from an agency, a public official or another person in the field or entrust the giving of such a statement to one or more experts in the field who are known to be honest and competent.<sup>34</sup>

#### **D. Legal background of the case**

The relevant legislation applied in this case is the Rome Statute, given that Article 8 of the Rome Statute is directly applicable in the Finnish criminal proceedings.

As mentioned above, the Court can refer to the interpretation guidelines, the Elements of Crimes,<sup>35</sup> to determine how to apply the elements of the war crimes contained in the CC and in the Rome Statute. In this case, the Court referred to the Elements of Crimes of the Rome Statute related to the Article 8 (2)(b (xxi) and 8 (2)(c)(ii), that define the objective and subjective elements of the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>36</sup>

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<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> [CJP](#).

<sup>35</sup> [Elements of Crimes](#).

<sup>36</sup> *Hilal* (n 1) 5.

Mr Hilal was accused of an act defined as a war crime under Article 8 of the Rome Statute.<sup>37</sup> In particular, he was accused of treating the person photographed in an inhumane and degrading way, causing an outrage to his dignity. This charge was based on Chapter 11, section 5 (2) of the CC and on Article 8 (2)(b)(xxi) and Article 8 (2) (c) (ii) of the Rome Statute.<sup>38</sup>

Given that the Court determined that the war crime was committed in the context of a NIAC, Mr Hilal was convicted under Chapter 11, section 5 (2) of the CC and under Article 8 (2)(c)(ii) of the Rome Statute. The Court rejected Mr Hilal's contention that his conduct constituted a petty war crime in accordance with Chapter 11, section 7 of the CC.<sup>39</sup>

Considering that Mr Hilal had been held on remand since 7 January 2016, he was sentenced to a suspended custodial sentence.<sup>40</sup> Mr Hilal did not appeal the decision.

In reaching its verdict, the Court dealt with the following legal issues:

**1. Issue one: was there a NIAC occurring in Iraq at the time of the offences?**

The first issue that the Court had to consider was whether there was a NIAC occurring in Iraq between 2014 and 2015. To determine this issue, the Court relied on the statement of an expert witness, who confirmed that 'in March 2015 the Tikrit area in Iraq was in a state of domestic, civil war-like conflict as maintained by IS, although there were also some characteristics of international conflict'.<sup>41</sup> Therefore, the Court, determined that the situation at the time of the events could be classified as a NIAC.<sup>42</sup>

**2. Issue two: was Mr Hilal photographed with a severed head of an enemy soldier and did he share that photograph with the public?**

Secondly, the Court had to establish whether Mr Hilal was photographed 'with the severed head of an enemy soldier' and then posted this photograph on Facebook.

In this instance, the Court found that Mr Hilal posed with the deceased person,<sup>43</sup> and that he shared the photograph on his Facebook profile.<sup>44</sup>

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<sup>37</sup> *ibid* 1.

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid* 7.

<sup>40</sup> *ibid* 7 and 9.

<sup>41</sup> *ibid* 5.

<sup>42</sup> *ibid* 3, 5 and 7.

<sup>43</sup> Although the Court stated that '[i]t is not easy to determine whose head this is from the photographs. '; *ibid* 4.

<sup>44</sup> *ibid* 6.



Mr Hilal himself admitted to this version of the facts, although he contended that he had not beheaded the men shown in the picture and that only the mutilation of a dead person's body parts was an offence under Article 8 (2)(b)(xxi) of the Rome Statute.<sup>45</sup> However, such interpretation of the law was rejected by the Court.<sup>46</sup>

### **3. Issue three: did Mr Hilal have the intention to humiliate and degrade the victim's dignity?**

The third issue was whether Mr Hilal's conduct affected the personal dignity of the deceased man depicted in the photographs and whether such conduct was humiliating and degrading.<sup>47</sup>

Although Mr Hilal admitted to publishing the photograph on his Facebook profile, he rejected that he had the intention to humiliate the person depicted therein. He contended that the image did not depict any violent acts and that, by posting it online, his intention was not to humiliate or degrade the dead person, but rather to console the victims of the IS and to show that the enemy could be defeated.<sup>48</sup>

To determine this issue, the Court applied the 'interpretation instructions for the definitions of crimes under the Rome Statute',<sup>49</sup> which detail the elements of war crimes based on outrages upon personal dignity under Article 8 (2)(b)(xxi) and (c)(ii). In this regard, the Court noted that:

[...] the elements of the crime under section c (ii) include such person or persons being either *hors de combat*, or being civilians, medical personnel or religious personnel taking no active part in the hostilities. Regarding both of the aforementioned points, the interpretation instructions state that for the crimes in question, 'persons' can include dead persons, and it is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other outrage upon personal dignity [...].<sup>50</sup>

Therefore, the Court found that '[The Defendant's] conduct [was] directed at the personal dignity of the person depicted, and it [was] humiliating and degrading. His conduct [was] of such degree as to be generally recognised as a crime against personal dignity'.<sup>51</sup>

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<sup>45</sup> *ibid* 2.

<sup>46</sup> *ibid* 7.

<sup>47</sup> *ibid* 6.

<sup>48</sup> *ibid* 2.

<sup>49</sup> i.e. the [Elements of Crimes](#).

<sup>50</sup> *Hilal* (n 1) 5.

<sup>51</sup> *ibid* 6.

#### **4. Issue four: was the victim a protected person?**

Subsequently, the Court had to establish whether the enemy soldier depicted in the photograph was a protected person, as this is required under Article 8 (2)(c)(ii) of the Rome Statute. In this instance, the Court considered that:

According to the interpretation instructions [...] the term ‘person’, [...] also refer[s] to dead persons. Taking this into account, [the Court] is of the view that the acts referred to in article 8 (2)(c)(ii) of the Rome Statute of the International Criminal Court may also be the acts referred to therein when directed at persons who have become hors de combat following their death in combat.<sup>52</sup>

In addition to Mr Hilal’s confession, the Court relied on the statement of an expert that implicitly confirmed that the depicted soldier was an enemy combatant. Additionally, the expert stated that ‘the photographs of heads removed from their bodies could be regarded as signs of victory intended for a person’s own social circle, and as indicators of a person’s own ability and renowned ruthlessness against the enemy’.<sup>53</sup>

Therefore, the Court determined that the depicted enemy combatant was a protected person under the Rome Statute.

#### **5. Issue five: was the crime committed by Mr Hilal a petty war crime under the CC?**

Lastly, the Court had to assess whether the relevant circumstances regarding the conduct, when considered as a whole, allowed it to determine the severity of the crime, or if the consequences of Mr Hilal’s conduct amounted to a petty crime, as described in Chapter 11, section 7 of the CC.<sup>54</sup> In this regard, Mr Hilal contended that his conduct should be considered a petty crime.<sup>55</sup> His argument was ultimately rejected by the Court.<sup>56</sup>

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<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.* 7.

<sup>55</sup> *ibid.* 3 and 7.

<sup>56</sup> *ibid.*

## II. DDE

### A. What did the DDE prove?

Two categories of DDE were listed as evidence in the judgement: images taken from Mr Hilal's Facebook profile (evidence presented by the Prosecution) and photographs saved on his mobile telephone (evidence presented both by the Prosecution and Mr Hilal).<sup>57</sup>

Both categories were of significant importance in reaching the final decision in this case. The Court expressly stated that the finding that Mr Hilal 'acted as described in the charge' was based on 'both the collection of images from [Mr Hilal's] Facebook profile and the photographs stored on his mobile phone, which were submitted as documentary evidence'.<sup>58</sup>

Although not listing them as a separate type of evidence, the Court additionally considered the comments to a photograph posted on Mr Hilal's Facebook profile.<sup>59</sup>

Non-DDE such as Mr Hilal's statements<sup>60</sup> and expert evidence<sup>61</sup> was also relied on by the Court.

The photographs and images were used by the Court when determining three of the issues outlined in the sections on issues two, three, and four. A detailed analysis of how the DDE was considered in deciding each of these issues will be provided in the following sub-sections.

#### 1. Issue two: was Mr Hilal photographed with a severed head of an enemy soldier and did he share that photograph with the public?

When determining issue two, the Court relied on the photographs published on Mr Hilal's Facebook profile and stored in his mobile telephone.

The judgement focused on one photograph posted on Facebook on 2 April 2015.<sup>62</sup> Hence, less detailed information was provided as to the other photographs. Nonetheless, both collections of images were used to establish that Mr Hilal was photographed bending down near the victim.<sup>63</sup>

Moreover, the Court relied on Mr Hilal's confession where he admitted that he was the person portrayed in the photograph and that he posted it on Facebook.<sup>64</sup>

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<sup>57</sup> *ibid* 3.

<sup>58</sup> *ibid* 6.

<sup>59</sup> *ibid* 4.

<sup>60</sup> *ibid* 2 and 6.

<sup>61</sup> *ibid* 3.

<sup>62</sup> *ibid* 1 and 3.

<sup>63</sup> *ibid* 4.

<sup>64</sup> *ibid* 2.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value / How did the court use the DDE?
<p><b>Photograph</b> taken on 19 March 2015 and published on Mr Hali's Facebook profile on 2 April 2015.<sup>65</sup></p>	<p>The photograph was presented as evidence both by the Prosecutor and Mr Hilal's defence.<sup>66</sup></p> <p>No information is provided on how it was obtained. However, given that it was shared publicly by Mr Hilal on his Facebook profile, it was accessible to anyone that did a search on Facebook or any other search engine.<sup>67</sup></p>	<p>No. On the contrary, Mr Hilal acknowledged that he was depicted in the photograph and that he posted it on his Facebook profile.<sup>68</sup></p>	<p>The photograph was key for the Court to determine Mr Hilal's conduct, namely posing in a photograph with a severed head of a male and posting it on Facebook.</p> <p>The Court stated in this regard that '[o]n 2 April 2015 [the Defendant] published on his Facebook profile, which was under the name [...], a photo taken on 19 March 2015, in which he is depicted with the severed head of an enemy soldier apparently killed in combat or in a bomb attack'.<sup>69</sup></p> <p>It further said that '[t]he image was published on a public Facebook profile, meaning that it would have</p>

<sup>65</sup> *ibid* 1, 3 and 4.

<sup>66</sup> *ibid* 3. The purposes for which the defence relied on such evidence are not clearly expressed in the judgement. However, it can be deduced that it was used to support Mr Hilal's argument that his reasons for taking the photographs and what they depicted were not such that he could be held criminally liable. See section 3.2 for further discussion on this matter.

<sup>67</sup> *ibid* 1 and 4; ['What is public information on Facebook?' \(Facebook Help Center\)](https://www.facebook.com/help/203805466323736) <<https://www.facebook.com/help/203805466323736>> accessed 10 December 2019.

<sup>68</sup> *Hilal* (n 1) 2.

<sup>69</sup> *ibid* 2-3.

			<p>been freely accessible to any of Facebook's more than a billion users'.<sup>70</sup></p> <p>Moreover, although a collection of images from Mr Hilal's Facebook profile was mentioned in the judgement, this photograph was referred to separately by the Court in many other instances. Hence, it appears to have been the main documentary evidence used by the Court.</p> <p>Nonetheless, considering that Mr Hilal confessed to this finding,<sup>71</sup> the relative weight of the photograph and Mr Hilal's statement in the determination of the issue is not clear.</p>
<p><b>(Other) Photographs</b> in the collection of images from Mr Hilal's Facebook profile.<sup>72</sup></p>	<p>The photographs were presented as evidence both by the Prosecutor and Mr Hilal's defence.<sup>73</sup></p>	<p>No. The photographs were offered as evidence not only by the Prosecutor but also by Mr Hilal's defence.</p>	<p>These photographs were described in the judgement as showing Mr Hilal 'crouching down on the ground, with an assault rifle pointed at the ground in his hand, looking at the camera, and on the ground</p>

<sup>70</sup> ibid 3.

<sup>71</sup> ibid 2.

<sup>72</sup> ibid 3-4.

<sup>73</sup> ibid 3. The purposes for which the defence relied on such evidence are not clearly expressed in the judgement. However, it can be deduced that it was used to support Mr Hilal's argument that his reasons for taking the photographs and what they depicted were not such that he could be held criminally liable. See section 3.2 for further discussion on this matter.

	<p>No information is provided on how they were obtained.<sup>74</sup></p> <p>It is not expressly stated in the judgement that these photographs were also shared with the general public on Mr Hilal's Facebook profile.</p>		<p>close by in front of him is the head referred to in the charge'.<sup>75</sup></p> <p>As such, it is apparent that all the images taken from Mr Hilal's Facebook profile were similar and were taken on 19 March 2015.</p> <p>The Court expressly mentioned these photographs when describing the events on the section of the judgement dedicated to 'Grounds for the attribution'.<sup>76</sup> They were also mentioned as part of the evidence on the basis of which it found 'that [the Defendant] has acted as described in the charge'.<sup>77</sup></p> <p>In conclusion, the whole collection of Facebook photographs was used to determine that Mr Hilal posed with a severed male head on photographs later posted on his Facebook profile page.</p>
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<sup>74</sup> This information is probably contained in the 'preliminary investigation record 2400/R1/16 appendix 1, pp. 26–32' referred to in the judgement. However, such record is not available for consulting at the time of writing. See *ibid* 3.

<sup>75</sup> *ibid* 4. Although the judgement is not particularly clear in this regard, this description appears to also apply to the photograph of 19 April 2015.

<sup>76</sup> *ibid* 3.

<sup>77</sup> *ibid* 6.

<p><b>Photographs</b> stored on Mr Hilal’s mobile phone.<sup>78</sup></p>	<p>The photographs were presented as evidence by the Prosecutor.<sup>79</sup></p> <p>No information is provided on how they were obtained.<sup>80</sup></p>	<p>Nothing in the judgement suggests that this evidence was challenged.</p>	<p>These photographs were described in the judgement as showing Mr Hilal ‘crouching down on the ground, with an assault rifle pointed at the ground in his hand, looking at the camera, and on the ground close by in front of him is the head referred to in the charge’.<sup>81</sup> As such, the images stored in Mr Hilal’s mobile phone were presumably similar to the ones that were taken on 19 March 2015 and were posted on his Facebook profile.</p> <p>The Court expressly mentioned these photographs when describing the events on the section of the judgement dedicated to ‘Grounds for the attribution’.<sup>82</sup> They were also mentioned as part of the evidence on the basis of which it found ‘that [the Defendant] has acted as described in the charge’.<sup>83</sup></p>
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<sup>78</sup> *ibid* 3-4.

<sup>79</sup> *ibid* 3.

<sup>80</sup> This information is probably contained in the ‘preliminary investigation record appendix 2, pp. 33–37’ referred to in the judgement. However, such record is not available for consulting at the time of writing. See *ibid* 3.

<sup>81</sup> *ibid* 4. Although the judgement is not particularly clear in this regard, this description appears to also apply to the photograph of 19 April 2015.

<sup>82</sup> *ibid* 3.

<sup>83</sup> *ibid* 6.

			As such, the photographs saved on Mr Hilal's phone were also used for determining that he posed with a severed male head.
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**2. Issue three: did Mr Hilal had the intention to humiliate and degrade the victim's dignity?**

When establishing the intent behind Mr Hilal's conduct, the Court relied mostly on the expert evidence<sup>84</sup> and on the fact that Mr Hilal 'ha[d] not presented grounds considered acceptable for taking and publishing the photograph in question'.<sup>85</sup> However, to conclude that Mr Hilal intended to humiliate and degrade the deceased man's dignity, the Court also looked at the comments of other Facebook users to the photograph published on Mr Hilal's profile on 2 April 2015.<sup>86</sup> Additionally, both the expert evidence and Mr Hilal's statements used the photograph as a reference. As such, the photograph itself can be considered as evidence used in determining issue three.

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<sup>84</sup> *ibid* 6.

<sup>85</sup> *ibid* 7.

<sup>86</sup> *ibid* 4.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value / How did the court use the DDE?
<p><b>Facebook Comments</b> on the photograph taken on 19 March 2015 and published on Mr Hilal's Facebook profile on 2 April 2015.<sup>87</sup></p>	<p>No information is provided on how this evidence was obtained.</p> <p>However, given that the comments were published in relation to the photograph on Mr Hilal's public Facebook profile, they were accessible to anyone that did a search on Facebook or any other search engine.<sup>88</sup></p>	<p>Nothing in the judgement suggests that this evidence was challenged.</p>	<p>The Court pointed out that the photograph taken on 19 March 2015 and published on Mr Hilal's Facebook profile on 2 April 2015 'attracted comments featuring statements praising him, such as "beloved hero" and "you are the most shining of heroes"'.<sup>89</sup> The Court then followed by asserting that '[The Defendant] is not even alleged to have taken part in the severing of the head from the body of the person referred to in the charge, or to have otherwise played any role in its removal from the body'.<sup>90</sup></p> <p>Therefore, the comments appear to have contributed to form the conviction that the purpose of posting the photograph was to project Mr Hilal's strength and to threaten the enemy.<sup>91</sup></p>

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid* 1 and 4. See ['What is public information on Facebook?'](#) (n 67).

<sup>89</sup> *Hilal* (n 1) 4.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid* 6.

<p><b>Photographs</b> in the collection of images from Mr Hilal’s Facebook profile.<sup>92</sup></p>	<p>The photographs were presented as evidence both by the Prosecutor and Mr Hilal.<sup>93</sup></p> <p>No information is provided on how they were obtained.<sup>94</sup></p> <p>It is not expressly stated in the judgement that these photographs were also shared with the general public on Mr Hilal’s Facebook profile.</p>	<p>No. The photographs were offered as evidence not only by the Prosecutor but also by Mr Hilal.</p>	<p>The Court relied on the statements of two expert witnesses (referred to as “Expert A” and “Expert M”) to infer Mr Hilal’s motivation to pose and post photographs in which he was portrayed with a severed head of an enemy combatant.</p> <p>According to one of these statements:</p> <p style="padding-left: 40px;">in the area in which the events took place, photographs of heads removed from their bodies could be regarded as signs of victory intended for a person’s own social circle, and as indicators of a person’s own ability and renowned ruthlessness against the enemy. Thus, the aim of these photographs is to strengthen an individual’s position within an armed group, or to increase internal cohesion within an armed group by demonstrating that its members, if necessary, form a brutal team. The aim of posting these photographs is, thus, to send an enemy, such as ISIS, a clear message</p>
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<sup>92</sup> *ibid* 3-4.

<sup>93</sup> *ibid* 3. The purposes for which the defence relied on such evidence are not clearly expressed in the judgement. However, it can be deduced that it was used to support Mr Hilal’s argument that his reasons for taking the photographs and what they depicted were not such that he could be held criminally liable. See section 3.2 for further discussion on this matter.

<sup>94</sup> This information is probably contained in the ‘preliminary investigation record 2400/R1/16 appendix 1, pp. 26–32’ referred to in the judgement. However, such record is not available for consulting at the time of writing. See *Hilal* (n 1) 3.

			<p>that where necessary, the party depicted in the photographs is able to carry out such acts.<sup>95</sup></p> <p>This opinion was corroborated by Expert M's statement, asserting that 'the purpose of photographs featuring severed heads of opponents is to threaten the enemy with revenge'.<sup>96</sup></p> <p>Hence, in this instance, the DDE was used with the support of expert evidence that offered an explanation of its content and context.</p>
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<sup>95</sup> ibid 6.

<sup>96</sup> ibid.

### **3. Issue four: was the victim a protected person?**

Although issue four was mainly a legal issue, the DDE was relevant because it contributed to the Court's finding that the victim was an 'enemy soldier'.<sup>97</sup> It should be noted that the principal evidence that the Court relied on to decide this issue was Mr Hilal's statements<sup>98</sup> and the expert witnesses' statements.<sup>99</sup>

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<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.* 2.

<sup>99</sup> *ibid.* 6.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value / How did the court use the DDE?
<p><b>Photograph</b> taken on 19 March 2015 and published on Mr Hilal's Facebook profile on 2 April 2015.<sup>100</sup></p>	<p>The photograph was presented as evidence both by the Prosecutor and Mr Hilal.<sup>101</sup></p> <p>No information is provided on how it was obtained. However, given that it was shared publicly by Mr Hilal on his Facebook profile, it was accessible to anyone that did a search on Facebook or any other search engine.<sup>102</sup></p>	<p>No. On the contrary, Mr Hilal acknowledged that he was depicted in the photograph and that he posted it on his Facebook profile.<sup>103</sup></p>	<p>The identity of the victim was not established by the Court. When referring to the collection of photographs published on Mr Hilal's Facebook profile, the Court stated that: '[i]t is not easy to determine whose head this is from the photographs'.<sup>104</sup> Nonetheless, when describing the photograph, the Court asserted more than once that Mr Hilal was 'depicted with the severed head of an enemy soldier', i.e. an IS fighter.<sup>105</sup></p> <p>From the judgement, it is not clear how the Court concluded that the beheaded person was an IS combatant. Mr Hilal's statements seem to have contributed to this finding.<sup>106</sup></p>

<sup>100</sup> *ibid* 1, 3 and 4.

<sup>101</sup> *ibid* 3. The purposes for which the defence relied on such evidence are not clearly expressed in the judgement. However, it can be deduced that it was used to support Mr Hilal's argument that his reasons for taking the photographs and what they depicted were not such that he could be held criminally liable. See section 3.2 for further discussion on this matter.

<sup>102</sup> *Hilal* (n 1) 1 and 4; ['What is public information on Facebook?'](#) (n 67).

<sup>103</sup> *Hilal* (n 1) 2.

<sup>104</sup> *ibid* 4.

<sup>105</sup> *ibid* 1, 3, 4 and 6.

<sup>106</sup> Including the statement that 'the head was severed in a suicide bomb attack perpetrated by the ISIS fighter'. See *ibid* 2.

## **B. What DDE discussion was there?**

As stated above, no rules of evidence relating to the DDE were discussed in the judgement. There is also no reference to the admissibility or authenticity of the DDE or how it was obtained. Additionally, the weight of the DDE in relation to the non-DDE is not clearly stated by the Court. Any insight on how the rules of evidence were applied to DDE in this case is therefore limited.

The principal evidence for the conviction was clearly the photograph published on Facebook on 2 April 2015. Furthermore, the acts of capturing (taking) the photograph and posting it on Facebook were additional subjective elements of the criminal conduct that the Court relied upon.

The Court also referred to other photographs posted on Mr Hilal's Facebook profile and saved on his mobile phone, although the information provided on the judgement in this regard is scarce. For instance, no information is given on the number of photographs used or the day they were taken. Additionally, the Court refers interchangeably to one photograph or to a collection of photographs in some instances of its reasoning,<sup>107</sup> making it difficult to assess how each photograph was used to prove the charges. This is particularly interesting when considering that DDE from open sources and closed sources is contemplated indistinctively by the Court.

However, given that the evidence was not contested, this distinction was of little importance to Mr Hilal's conviction. As mentioned before, Mr Hilal admitted to being the person depicted in the photograph and to sharing it on Facebook.<sup>108</sup> It is also worth mentioning that the Facebook photographs were presented as evidence by both the Prosecutor and Mr Hilal. This might have contributed to the attribution of greater probative value of the DDE by the Court. It might also explain the lack of references to its authenticity. In fact, given Mr Hilal's confession and the fact that both parties relied on the same evidence, the Court was spared the need to assess its authenticity and weight too strictly, as it was allowed to find that they were authentic and reliable.

The purposes for which the defence relied on such evidence are not clear. In fact, the judgement offers no explanation on why Mr Hilal's defence submitted the collection of images taken from his Facebook account as evidence. Nonetheless, Mr Hilal contended that simply posing in the photograph and posting it on Facebook did not amount to a war crime. To sustain his contention, he argued that '[t]he photograph did not depict any act of violence'<sup>109</sup>, that he 'did not attempt to use the photograph

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<sup>107</sup> *ibid* 4.

<sup>108</sup> *ibid* 2.

<sup>109</sup> *ibid*.

to demonstrate that he was in any way involved in the severing of the head',<sup>110</sup> or to show his 'superiority or ruthlessness to the enemy',<sup>111</sup> but rather 'to communicate to his own social circle that ISIS troops could be defeated and the war ended',<sup>112</sup> therefore encouraging other fighters and consoling the victims of IS and their families.<sup>113</sup> Thus, a conclusion could be drawn that Mr Hilal relied on the DDE to demonstrate that his reasons for taking the photographs and what they depicted did not amount to a crime.

The present case also serves as an example of how expert witnesses can be used to support the Court's analysis of the DDE by offering an explanation of the context in which the evidence was produced. As was explained above, two expert witnesses' statements were relied upon by the Court to conclude Mr Hilal's intention to humiliate and degrade the deceased men's dignity when posing in the photograph and sharing it with the public.

Mr Hilal was the second person in the same month to have been found guilty of war crimes in criminal proceedings in Finland relying highly on DDE.<sup>114</sup> This case also holds several similarities with other cases decided in Germany,<sup>115</sup> Sweden<sup>116</sup> and the Netherlands<sup>117</sup> where photographs found online were used as the principal evidence to convict persons for posing with desecrated bodies of enemy combatants in Syria or Iraq. The evidentiary basis and the rules that were applied in relation to those cases are fairly similar. The main differences can be found on the courts' reasoning: while some courts did not focus further on certain objective and subjective elements of crimes, others turned their attention to and emphasized particular elements of the defendant's conduct, such as the method of posting the photographs online, the specific manner in which the accused was posing in the photographs, different ways to establish the identity of the accused or even deliberate whether the victims were in fact protected persons. To support their analysis, the courts either used additional documentary evidence or witness statements.

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<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> The first case was also related to an Iraqi national, Mr Jebbar Salman Ammar, who was convicted on 18 March 2016, by the District Court of Pirkanmaa, for a war crime of outrage upon personal dignity based on a photograph found on Facebook. See *Prosecutor v Jebbar Salman Ammar* (Case R 16/1304) [2016] District Court of Pirkanmaa.

<sup>115</sup> *Prosecutor v Rami K*, (Case 172 OJs 26/16 (3/16)) [2017] Criminal Division of the Berlin Higher Regional Court (Unofficial [English translation](#)).

<sup>116</sup> *Prosecutor v Haisam Omar Sakhanb* (Case B 3787-16) [2017], Stockholm District Court (Unofficial [English translation](#)).

<sup>117</sup> See *Prosecutor v Oussama Achraf Akhlafa* (Case 09/748003-18 & 09/748003-19) [2019] Dutch District Court.



In the case of Mr Hilal, the Court took a reserved approach and did not elaborate on how the required elements of crimes were determined. This arguably stemmed from the weight of the DDE used in the proceedings. In other words, the fact that Mr Hilal was clearly identifiable in the photograph, as well as the fact that he admitted to being the person portrayed in the photograph, and the person that posted it on Facebook, might have contributed to the Court's reserved approach.

However, the Court's reasoning on the fact that the photograph was published on a public Facebook profile is noteworthy. While the Court did not mention the specific method of posting, it noted that it was public and established an element of wide dissemination.<sup>118</sup> Unfortunately, the Court did not provide further reasoning on this means of establishing wide dissemination nor whether it had any impact on the severity of the crime.<sup>119</sup> In fact, the Court emphasized that 'the image was published on a public Facebook profile, meaning that it would have been freely accessible to any of Facebook's more than a billion users'.<sup>120</sup> It is not clear whether the Court meant that the fact that photographs were published under the "public" privacy settings sufficed or whether it turned its attention to the fact that they were widely accessible to the public through the search engine, as a subjective element to prove Mr Hilal's intent or the severity of the crime. The latter could be regarded as a troubling and unpersuasive argument, since it would mean that the public would be required to use the search engine to specifically look for such photograph and find it. Only then would this become a subjective element to prove that the crime was committed. In such cases, the public would have to know what to search specifically, which is not the case. Therefore, the emphasis should be placed on the "public" privacy settings to prove the intent and the severity of the crime, as it does not require the result of the search, only the intention to disseminate by making it public.

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<sup>118</sup> On Facebook, when a person posts something, he or she can control who sees the content by using the audience selector tool. When a person chooses to share something by selecting the "public" option from the audience selector, it is considered public information. Facebook considers that '[s]omething that's public can be seen by anyone. That includes people who aren't your [the user's] friends, people off of Facebook and people who use different media such as print, broadcast (ex: television) and other sites on the Internet.' See 'What is public information on Facebook?' (n 67).

<sup>119</sup> A similar approach was taken in the case of *Prosecutor v Aria Ladjedvardi*, although in this case, the Court specifically emphasized that it was done under the public privacy settings. See *Prosecutor v Aria Ladjedvardi* (n 15).

<sup>120</sup> *Hilal* (n 1) 1.

# Prosecutor v. Hadi Habeeb Hilal – REFERENCE LIST

## CASES

- [Prosecutor v Hadi Habeeb Hilal](#) (Case R 16/214) [2016], District Court of Kanta-Häme, Finland
- [Prosecutor v. Aria Ladjedvardi](#), (Case R 5-3 StE 2/16 - 4 - 1/16) [2016], Higher Regional Court of Frankfurt am Main, Germany
- [Prosecutor v Jebbar Salman Ammar](#) (Case R 16/1304) [2016], District Court of Pirkanmaa, Finland
- [Prosecutor v Rami K.](#), (Case R 172 OJs 26/16 (3/16) [2017], The Criminal Division of the Berlin Higher Regional Court, Germany
- [Prosecutor v Haisam Omar Sakhanh](#), (Case R B 3787-16) [2017], Stockholm District Court, Sweden
- [Prosecutor v Oussama Achraf Akhlafu](#), (Case 09/748003-18 & 09/748003-19), [2019], Dutch District Court, the Netherlands

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- [1889 Criminal Code of the Republic of Finland](#) (*Rikoslaki*) (amendments up to 766/2015)
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# Prosecutor v Aria Ladjedvardi (Germany, 2016)

(2016) Case R 5-3 StE 2/16 - 4 - 1/16

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*Editors: Dr Emma Irving and Neil Cockerill*

## I. Executive Summary

This case involved Mr. Aria Ladjedvardi (the ‘defendant’), a 21-year-old German national. He became a radicalized individual while living in Germany and eventually travelled to Syria in 2014 to take part in the armed conflict. In Syria, three photographs taken of the defendant posing with severed heads of enemy combatants, which were subsequently uploaded to Facebook. The accused was arrested and charged with war crimes under Section 8 (1)(9) and Section 8 (6)(2) of the Code of Crimes against International Law (CCAIL), for gravely humiliating and degrading treatment of protected persons,<sup>1</sup> in this instance, the bodies of deceased soldiers. The evidence relied upon in this case included audio and visual evidence, such as photographs and voice messages, as well as witness and expert testimonies. The main types of DDE used in the case were three photographs posted on Facebook, that were found on computers and mobile telephones, as well as audio (voice) messages conducted through “WhatsApp” and other platforms.<sup>2</sup>

## II. Background

### A. Summary of DDE Provisions/ evidentiary norms

No rules of evidence or other legal provisions relating to the DDE were discussed in the judgments issued by the Courts in these proceedings. The legal framework of evidence, including DDE, in the German legal system is considered further below.

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<sup>1</sup> [Code of Crimes against International Law \(Völkerstrafgesetzbuch\) of 26 June 2002 \(Federal Law Gazette I p. 2254\), which was amended by Article 1 of the Law of 22 December 2016 \(Federal Law Gazette I p. 3150\)](#) (CCAIL); The CCAIL transposes the Rome Statute into domestic German law. See also [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute); [Geneva Conventions \(I-IV\)](#) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions).

<sup>2</sup> [Prosecutor v. Aria Ladjedvardi](#), (Case R 5-3 StE 2/16 - 4 - 1/16) [2016], Higher Regional Court, Frankfurt am Main, Germany (*Ladjedvardi case*).

## **B. Factual background of the case**

The defendant, travelled to Syria in the spring of 2014, where he intended to join Islamist militias and die as a martyr. Arriving in Syria no later than 8 March 2014, he met a friend from Germany and was instructed by him in the operation of firearms and other fighting techniques.

Between 8 March 2014 and 16 April 2014, a group of armed jihadist fighters (including the defendant) attacked a checkpoint that was held by the armed forces of the Syrian government. After securing the objective, the group captured at least two enemy soldiers, who they subsequently beheaded either during or after executing them. The heads that were separated from the bodies were then impaled on metal rods and placed side by side in front of a school. The defendant and other members of the group took three photographs with the heads of the two victims.

On 16 April 2014, the photographs of the defendant were posted on Facebook under public privacy settings, meaning that the images were accessible by a wide range of the social media community. The photographs were also re-posted by other members of the group. After the defendant returned to Germany around the end of April or the beginning of May 2014, he saved the photographs on his mother's mobile telephone and on a computer belonging to the sister of his friend, who was previously killed in Syria.

Based on an arrest warrant issued by an Investigative Judge of the Federal Court of Justice, the defendant was arrested on 14 October 2015 on suspicions of committing a war crime of having treated persons subject to protection under international humanitarian law in a degrading and humiliating manner in connection with a non-international armed conflict ('NIAC').<sup>3</sup> It should be emphasized that the arrest warrant is not available, therefore the factual circumstances and the basis of his arrest are not explained in detail.

## **C. Legal system background**

Germany has a civil law system. The main aspects of this system relevant to criminal proceedings are set out below.

In 2002, Germany transposed the Rome Statute of the International Criminal Court (Rome Statute) into German law.<sup>4</sup> Sections 8 to 12 of the CCAIL outline War Crimes. The majority of offences outlined in the CCAIL are also mirrored in the GCCP and constitute war crimes when

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<sup>3</sup> [Press release of the Office of The Public Prosecutor General of the Federal Court of Justice of Germany](#), "Indictment on suspicion of committing a war crime", (19 February, 2016).

<sup>4</sup> Open Society Justice Initiative, [Universal Jurisdiction Law and Practice in Germany](#) (April 2019) 4.

committed in the context of an armed conflict.<sup>5</sup> The aim of incorporating the Rome Statute into domestic law was to ensure Germany's 'ability to pursue crimes falling within the jurisdiction of the ICC'.<sup>6</sup>

The CCAIL sets out two categories of liability:

- (i) Individual criminal responsibility of the perpetrator for his or her own actions; and
- (ii) Responsibility of military commanders and civilian superiors for crimes committed by their subordinates.<sup>7</sup>

In this case, individual criminal responsibility as referred to in sections 6 to 15 of the CCAIL is applicable.

The jurisdiction for crimes committed under the CCAIL is restricted to the Higher Regional Courts, which generally sit with a panel of five judges.<sup>8</sup> The requirements for an arrest warrant are set out in the GCCP and requires 'significant suspicion that the alleged offence was committed by the suspect and, in addition, the existence of one of the following grounds for an arrest':

- (i) it is established that the accused has fled or is in hiding;
- (ii) there is a risk that the accused will evade the criminal proceedings; or
- (iii) the accused's conduct gives rise to the strong suspicion that he or she will destroy, alter, remove, suppress, or falsify evidence; improperly influence the co-accused, witnesses, or experts; or cause others to do so, and if, therefore, the danger exists that establishment of truth will be made more difficult.<sup>9</sup>

The rules of evidence under German law are set out in the *Strafprozeßordnung*, the GCCP.<sup>10</sup> The GCCP sets out extensive provisions in relation to evidentiary rules and norms within Germany. The most relevant section related to this case is Section 244(2) of the GCCP. Section 244(2) of the GCCP states the following:

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<sup>5</sup> *ibid* 9.

<sup>6</sup> *ibid* 15.

<sup>7</sup> *ibid* 12; [CCAIL](#) (n 1) s 4, 6-15.

<sup>8</sup> [Universal Jurisdiction Law and Practice in Germany](#) (n 5) 23.

<sup>9</sup> [Universal Jurisdiction Law and Practice in Germany](#) (n 5) 21; German Code of Criminal Procedure (GCCP), s 112, *Strafprozeßordnung (StPO)*, available in English [here](#).

<sup>10</sup> [GCCP](#) (n 10).

In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision.

As a result, the Court is free to take any admissible evidence into account and assign whatever weight it deems appropriate to such evidence at its discretion. There are certain legal requirements and limitations on the means of obtaining evidence. Further outlined in section 261 of the GCCP is that Judges are free to assess the probative value of evidence.<sup>11</sup> Unlawfully obtained evidence is not automatically inadmissible, as it can still be used at trial if the Court considers the state interest in criminal prosecution outweighs the fundamental rights of the defendant.<sup>12</sup>

Overall, the court will consider the circumstances and determine admissibility on a case-by-case basis.<sup>13</sup> The defendant can raise objections to the admissibility of unlawfully obtained evidence.<sup>14</sup> Both parties can introduce evidence at trial and such evidence can be disclosed at any time before the close of oral proceedings.<sup>15</sup> Subsequently, DDE can be admissible evidence if the Court, in its discretion, deems it appropriate.

There are no specific provisions dealing with DDE in the GCCP, however open-source materials, such as social media platforms can be used to provide evidence.<sup>16</sup> Any evidence that is available to the public on social media platforms can be searched by investigators, however it is unlawful to bypass privacy settings.<sup>17</sup>

Essentially, the admissibility of evidence will depend on ‘the balance between the interests of an effective prosecution of crimes, and the violation of the rights, especially the general right to privacy and informational self-determination of the defendant’.<sup>18</sup>

The use of an expert witness was crucial in contextualising and assessing the content of the DDE in this case. Rules of evidence regarding expert witnesses are set out under section 85 of the GCCP, stating that provisions ‘concerning evidence by witnesses shall apply if experienced persons have to be examined to prove past facts or conditions the observation of which required special professional knowledge’.<sup>19</sup> Applications to include expert witnesses can be made by either party at

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<sup>11</sup> [GCCP](#) (n 10) s 261; [Universal Jurisdiction Law and Practice in Germany](#) (n 5) 27.

<sup>12</sup> [Universal Jurisdiction Law and Practice in Germany](#) (n 5) 27.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> [GCCP](#) (n 10) 246 (1).

<sup>16</sup> [Universal Jurisdiction Law and Practice in Germany](#) (n 5) 28.

<sup>17</sup> [Universal Jurisdiction Law and Practice in Germany](#) (n 5) 28-29.

<sup>18</sup> *ibid.* 29.

<sup>19</sup> [GCCP](#) (n 10) s 85.

trial, however applications can be rejected if the court itself possesses the ‘necessary specialist knowledge’.<sup>20</sup>

## D. Legal background of the case

### 1. Summary

The defendant in this case was charged under Sections 8(1)(9) and 8(6)(2) of the CCAIL for treating a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner.

The CCAIL came into force on 26 June 2002, with the purpose of applying to all criminal offences committed against international law abroad, with no relation to Germany.<sup>21</sup> The CCAIL contains an exception to offences committed under sections 8 to 14, where the commission of an act done so in execution of a military order, if the perpetrator is unaware that the order is unlawful and insofar as the order is ‘manifestly unlawful’.<sup>22</sup> The CCAIL is further not limited by the statute of limitation, as the prosecution of serious criminal offences under the CCAIL shall not be subject to any statute of limitations.<sup>23</sup>

The defendant largely admitted external facts and provided information relating to his background and process of religious development.<sup>24</sup> Overall, the findings on the personal circumstances of the defendant were therefore determined upon the defendant’s own admission and supported by ‘comprehensive information’ that he provided to the Court.<sup>25</sup> Whilst the defendant put forward this information as a means to relativise, or tone down, his radicalisation,<sup>26</sup> the Court held it to be indicative of his intent and willingness to participate in the alleged offending.<sup>27</sup>

The defendant’s testimony, as well as the DDE were largely contextualised by way of Expert Witness R, as provided for by Section 85 of the GCCP. The evidence of the expert was arguably crucial to the Court’s determination of evidence as it required special knowledge beyond the scope of that held by the Court itself.

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<sup>20</sup> *ibid* s 244.

<sup>21</sup> [CCAIL](#) (n 1), Art 1, s 1.

<sup>22</sup> *ibid* Art 1, s 3.

<sup>23</sup> *ibid* Art 1, s 5.

<sup>24</sup> *Ladjedvardi case* (n 2) 8 [B].

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid*.

<sup>27</sup> *ibid* 8 [B(I)].



In reaching its verdict, the Court was required to consider the following four legal issues:

- (i) Was there a non-international armed conflict (NIAC) occurring in Syria at the relevant time? And if so, was there a nexus between the NIAC and the offending?
- (ii) Was the accused part of a jihadist group, and if so, did he possess the requisite intent to carry out the offending?
- (iii) Were the victims of the offence protected persons?
- (iv) Did the acts constitute gravely degrading and humiliating treatment?

These four issues will be dealt with in turn below.

The High Regional Court of Frankfurt am Main found the accused guilty for the charged offences under Section 8(1)(9) and Section 8(6)(2) of the CCAIL. The Court sentenced the defendant to two years imprisonment. In sentencing, the Court referred to both mitigating and aggravating factors that it took into consideration upon deciding a final sentence. The first consideration of the Court was the young age of the defendant.<sup>28</sup> The Court also considered it mitigating that the protected persons were already dead at the time the degrading treatment occurred, and that the heads had already been impaled on metal rods before the defendant posed with them.<sup>29</sup> Another mitigating factor was that the defendant was not the one to post the images of Facebook; an act which the Court considered as further deepening the mockery of the victims.<sup>30</sup> In terms of aggravating factors, the Court considered the disfigurement of the heads of the victims, showing numerous injuries.<sup>31</sup>

The defendant appealed the judgment of the Higher Regional Court of Frankfurt am Main dated 12 July 2016 on the basis of error in applying Section 8 (1) (9) of the CCAIL.

The Federal Court of Justice dealt with three core legal questions based on which the Higher Regional Court issued its judgment. Firstly, it stated that the Higher Regional Court has correctly assumed that 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 NIAC within the meaning of section 8 (1) CCAIL.<sup>32</sup> Secondly, it was reaffirmed that the victims were also persons to be protected under

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<sup>28</sup> *ibid* 28 [D (II)].

<sup>29</sup> *Ladjedardi case* (n 2) 28 [D (II)].

<sup>30</sup> *ibid* 29 [D (II)].

<sup>31</sup> *Ibid*.

<sup>32</sup> [Appeals decision against the judgement of the Higher Regional Court of Frankfurt am Main dated 12 July 2016](#), (Case R 3 StR 57/17) [2017] Federal Court of Justice, Germany, 11.

international humanitarian law in the meaning of section 8 (6) (2) CCAIL, which states that, in a NIAC, persons not directly involved in the hostilities and subject to the power of the opposing party are to be protected under international humanitarian law.<sup>33</sup> Lastly, it was confirmed that the two soldiers were subject to the scope of protection provided by section 8 (1) (9) CCAIL, even after their killing.<sup>34</sup>

Therefore, the Federal Court of Justice rejected the appeal in 27 July 2017 stating that: '[T]he Higher Regional Court has correctly assumed that the defendant, acting within the context of a NIAC, severely demeaned and degraded a person protected under international humanitarian law Section 8 (1) (9) of the CCAIL'.<sup>35</sup>

## 2. Determination of Issue One – Nexus between NIAC and Offence.

In determining this issue, the Court had to consider whether there was a functional relationship, or nexus, between the armed conflict and the offending. Firstly, the Court had to establish whether a NIAC existed, and if so, whether the alleged offending had a nexus to this NIAC.

The Court held that the conflict occurring at the time in Syria was a NIAC, between organised armed groups particularly the Jabat al Nusra (JaN), ISIS and the Free Syrian Army. In its reasoning, the Court stated that 'these are not mere tensions or isolated violence; rather, these armed conflicts exceed duration and scope of [the] required level of intensity'.<sup>36</sup>

As a result of determining a NIAC existed, the Court found that the CCAIL was the applicable law in this case, particularly as it reflected IHL norms. The CCAIL establishes universal jurisdiction under section 1. The Court held that 'due to the actions and level of organisation of the various groups involved, the conflict had met the thresholds of duration and intensity of violence, thus giving rise to the application of IHL'.<sup>37</sup> The Court found that the defendant was a member of JaN which was a party to the NIAC and that the offending directly related to the NIAC that was occurring.<sup>38</sup>

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<sup>33</sup> *ibid* 13.

<sup>34</sup> *ibid* 15.

<sup>35</sup> *ibid* 10.

<sup>36</sup> *Ladjevardi case* (n 2) 22 [C (II)].

<sup>37</sup> International Crimes Database, 'Prosecutor v Aria Ladjevardi' (12 July 2016) <<http://www.internationalcrimesdatabase.org/Case/3276/Aria-Ladjevardi/>> accessed: 28 October 2019.

<sup>38</sup> *Ladjevardi case* (n 2) 22 [C (II)].

### 3. Determination of Issue Two – Intent

The intent of the defendant was established in two ways by the Court. Firstly, the Court considered whether the defendant was part of a jihadist armed group. Secondly, it considered whether his actions amounted to intent to participate in offending.

The defence's claim was that the defendant was forced to pose for the photos and was only in Syria to provide humanitarian aid.<sup>39</sup> The defendant claimed that he only travelled to Syria to help Sunni victims of the Assad regime and thereby had no intent to participate in either an armed group, or the alleged offending.<sup>40</sup> The religious background and development of the defendant was considered relevant by the Court in determining this issue. The defendant was raised as a Shi'a Muslim by his parents, but later converted to Sunni Islam in 2012.<sup>41</sup> The Court heard evidence of the defendant's radicalisation, in particular that he had been involved in the 'Islamist-Salafist' scene since at least 2013.<sup>42</sup> The defendant had further participated in *Da'wa* mission work, and appeared in an Islamist missionary video, published on the internet on 7 February 2014.<sup>43</sup>

The defendant admitted to having received combat training, including the use of an AK 47 weapon.<sup>44</sup> Expert Witness R was heavily relied upon by the court in order to determine this issue. The expert concluded that 'anyone who presents himself with a weapon becomes part of a group or association, as a person cannot fight there alone'.<sup>45</sup> Additionally, when the defendant returned from Syria, he maintained close contact with the Islamist-Salafist scene.<sup>46</sup> The Court held that due to the strong evidence of the defendant's Islamic radicalisation, as well as the significant amount of evidence indicating he was a member of JaN, the defendant was, and continued to be, a member of an armed jihadist group.<sup>47</sup> As a result, the defendant could not claim he was a mere bystander, or humanitarian aid worker forced to be in the NIAC.

In further establishing the intent of the defendant, the Court considered the photographic evidence closely. The Court determined that the fact the photographs were saved by the defendant on both

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<sup>39</sup> Trial International, 'Aria Ladjedvardi' (21 June 2017) <<https://trialinternational.org/latest-post/aria-ladjedvardi/>> accessed: 28 October 2019.

<sup>40</sup> *Ladjedvardi case* (n 2) 4 [A (II)(1)(b)].

<sup>41</sup> *ibid* 3 [A (II)(1)(a)].

<sup>42</sup> *ibid* 3-4 [A (II)(1)(a)].

<sup>43</sup> *Ladjedvardi case* (n 2) 4 [A (II)(1)(a)].

<sup>44</sup> *ibid* 8 [B(I)].

<sup>45</sup> *ibid* 19 [B (III)(2)(a)(2)].

<sup>46</sup> *ibid* 7 [A (II)(2)(b)].

<sup>47</sup> *ibid* 19 [B (III)(2)(a)(2)].

his mother's telephone and a third party's computer were a strong indication that he had intended to participate in armed jihad.<sup>48</sup> The Court further described the manner in which the defendant posed in the photographs was 'trophy-like', thereby inconsistent with his claims that he was forced to be in the photos.<sup>49</sup> The Court held that the requisite intent had been established.<sup>50</sup>

#### **4. Determination of Issue Three – Were the victims 'protected persons'**

In determination of issue three, the Court found that, in accordance with Section 8(6)(2) of the CCAIL, the persons whose heads were impaled on metal rods in the images were protected persons under international law.<sup>51</sup> The Court determined that in a NIAC, the wounded, sick and castaways that are no longer able to participate in hostilities and are in the power or control of the enemy are classified as 'protected persons'.<sup>52</sup> The executed individuals in the photos in this case were found to be government soldiers (enemy combatants), and therefore 'part of a party that was captured and put out of action (*hors de combat*)'.<sup>53</sup> The Court determined that the definition of protected persons under international law also applied to persons killed or deceased. The Court considered it fundamental that the doctrine of the dead, as well as the dignity of man continuing beyond death, was upheld.<sup>54</sup> It thereby found that crimes can be committed against deceased persons. Specifically, the court stated:

The inclusion of the dead within the scope of protection under s 8(6)(2) in conjunction with s 8(1)(9) of the CCAIL not only complies with the provisions of the ICC Statute, but also international criminal justice law.<sup>55</sup>

The court further stated that this interpretation was reflected under customary international law, as well as in the Rome Statute and the International Committee of the Red Cross customary rules on IHL.<sup>56</sup>

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<sup>48</sup> *ibid* 17 [C (III)(2)(b)].

<sup>49</sup> *ibid* 6 [A (II)(2)(b)].

<sup>50</sup> *ibid* 19 [B (III)(2)(a)(2)].

<sup>51</sup> *ibid* 22 [C (III)]; [Rome Statute of the International Criminal Court](#) (n 1) Art. 8 (2)(c)(ii).

<sup>52</sup> *Ladjevardi case* (n 2) 22 [C (III)].

<sup>53</sup> *Ladjevardi case* (n 2) 22 [C (III)].

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid* 23 [C (III)].

<sup>56</sup> *ibid* 24 [C (III)]; [International Committee of the Red Cross Customary IHL Rule 113](#); see also [Rome Statute](#) (n 1) Art 8 (2)(d) and (f).

## 5. Determination of Issue Four – Was there grave degrading and humiliating treatment?

In determination of this issue, the Court turned to Rule 113 of the ICRC rules on IHL, which states that '[E]ach party to the conflict must take all possible measures to prevent the dead from being despoiled' under this rule, mutilation of dead bodies is therefore prohibited.<sup>57</sup> The Court found that for the purposes of interpreting the provision, 'treatment' did not require the offender to physically perform acts on the body of the victim and thereby that merely posing with the bodies in such a manner, was sufficient to satisfy the degrading treatment requirement.<sup>58</sup> The Court further relied on international jurisprudence, which has confirmed that degrading treatment can exist affirmatively, even without physical contact with the victim.<sup>59</sup>

The Court held that the defendant and other members of the group had degraded, or acted degradingly towards, the dead bodies, by impaling the severed heads and subsequently by posing next to them and photographing it.<sup>60</sup> The Court found that the trophy like treatment of the severed heads and knowledge of the fact that viewing such photos would horrify and shock a reasonable person, demonstrated the intent of the accused to mock the dead.<sup>61</sup> The Court thereby found that the defendant had engaged in gravely degrading and humiliating treatment of the deceased persons.

### III. DDE

#### A. What did the DDE Prove?

The Court, relied on a vast number of different forms of DDE in order to determine on the legal questions whether: (ii) the accused was part of a jihadist group, and if so, did he possess the requisite intent to carry out the offending; (iii) were the victims of the offence protected persons; and (iv) did the acts constitute gravely degrading and humiliating treatment.

It should be noted that no DDE was used in order to establish the first (i) legal question, regarding the establishment of NIAC and the nexus between the NIAC and the offence.

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<sup>57</sup> *Ladjedvardi case* (n 2) 24 [C (III)].

<sup>58</sup> *ibid* 24 [C (IV)].

<sup>59</sup> *ibid*.

<sup>60</sup> *Ladjedvardi case* (n 2) 24 [C (IV)].

<sup>61</sup> International Crimes Database, '[Prosecutor v Aria Ladjedvardi](#)' (n 38).

**1. DDE relied upon to determine whether the defendant was part of a jihadist group and whether he possessed the intent to carry out the offences**

In determining the second (ii) legal question – whether the defendant was part of a jihadist group and whether he possessed the intent to carry out the offences, the Court turned to five different packages of evidence:

- 1) First package of evidence – three photographs of the defendant alongside the degraded and humiliated enemy combatants were considered as a whole, since they were taken at the same time and displayed the same conduct.<sup>62</sup>
- 2) Second package of evidence – series of further photographs of the defendant in different combat roles, equipment, apparel, religious gestures and attributes, some of which were posted on Facebook and others found on the seized computer and mobile telephone were considered as a whole also.<sup>63</sup>
- 3) Third package of evidence – voice and audio messages between the accomplice of the defendant and other witnesses, containing details about the assault operation on the enemy checkpoint in Syria, the identities of the victims, motives and other details related to the offence.
- 4) Fourth package of evidence – telephone calls between the defendant and different persons, containing conversations regarding the defendant’s membership in Jabat al Nusra, plans to travel to Syria and views regarding non-believers.

In this regard, the Court established the intent of the defendant to commit the offence through the conduct of posing and distributing the photographs online and the knowledge of its impact, based on the three main photographs. What is interesting here is that the Court noted that the photographs were posted on Facebook under public privacy settings,<sup>64</sup> but did not elaborate or explain the particular meaning of such function. On Facebook, when a person posts something, they can control who sees the content by using the audience selector tool. When a person chooses to share something by selecting the ‘public’ option from the audience selector, it’s considered public information by Facebook.<sup>65</sup>

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<sup>62</sup> The judgment does not detail if these photographs were supported by metadata, nor if any metadata existed in relation to these photographs.

<sup>63</sup> See: Footnote 36.

<sup>64</sup> International Crimes Database, ‘[Prosecutor v Aria Ladjedvardi](#)’ (n 38).

<sup>65</sup> ‘[What is public information on Facebook?](#)’, *Facebook Help Center*, accessed: 26 October 2019; Facebook considers that public information can be viewed by anyone, including by individuals who are not “Facebook friends”. This further includes ‘people who use different media such as print, broadcast (e.g. television) and other sites on the Internet’.

Based on the five mentioned packages, the Court rejected the defendant's claim that his role in Syria was related to providing humanitarian aid and established his membership of a jihadist group, his intentions and motives in Syria.<sup>66</sup>

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<sup>66</sup> *Ladjevardi case* (n 2) 17 [B (II)(2)(a)(2)].

*Determination of Issue Two - Intent (Was the defendant part of a jihadist group)*

**First package of Evidence – Three photographs.**

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p><b>Photo 1:</b> Defendant posed within the immediate vicinity of one of the impaled heads on the floor, kneeling next to it.<sup>67</sup></p> <p><b>Photo 2:</b> A close-up image of defendant from the front, where the impaled head of one of the victims was visible. The face of the victim was “disfigured by serious injuries”.<sup>68</sup></p> <p><b>Photo 3:</b> Grouped together with ‘Y’ who carried an AK47 and an unknown person between the spiked head.<sup>69</sup></p>	<p>The photographs were uploaded by an individual identified as ‘Vedat V.’ onto a Facebook page, with limited privacy settings.<sup>70</sup></p> <p>The defendant also stored the photos on a computer belonging to the sister of a deceased foreign fighter and on his mother’s phone.<sup>71</sup></p> <p>Since the details containing the defendants arrest are unavailable, it could be presumed that the Police became aware of the photographs posted on Facebook prior to the arrest and also found on the seized computer and mobile phone.</p>	<p>There were indications that the defendant made procedural objections to the use of the images, the grounds for those objections were not specified in the judgment.<sup>72</sup></p>	<p>In analysing this evidence, the Court noted that the trophy like treatment of the severed heads and knowledge of the fact that viewing such photos would horrify and shock a reasonable person demonstrated the intent of the accused to mock the dead.<sup>73</sup></p> <p>The Court found that the accused was aware and wanted to be photographed, that he knew the heads belonged to members of the opposition, and that he intended to mock the dead and their honour.<sup>74</sup></p> <p>Additionally, he was aware of the fact that the photos were likely to be posted online, where they could potentially be viewed by an unlimited group of people.<sup>75</sup></p>

<sup>67</sup> *Ladjedvardi case* (n 2) 6-7 [A (II)(2)(b)].

<sup>68</sup> *ibid* 7 [A (II)(2)(b)].

<sup>69</sup> *ibid*.

<sup>70</sup> International Crimes Database, ‘[Prosecutor v Aria Ladjedvardi](#)’ (n 38).

<sup>71</sup> *ibid*.

<sup>72</sup> *Ladjedvardi case* (n 2) 15 [B (III)(2)(a)].

<sup>73</sup> International Crimes Database, ‘[Prosecutor v Aria Ladjedvardi](#)’ (n 38).

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*.



Second package of Evidence – Series of further photographs

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p><b>Photograph No. 1:</b> Defendant is seen with an AK 47 assault rifle in front of a fire.<sup>76</sup></p> <p><b>Photograph No. 2:</b> Defendant poses with an AK 47 assault rifle, held with right hand at chest level, with right index finger parallel to the barrel above the trigger.<sup>77</sup></p> <p><b>Photograph No. 3:</b> Defendant and “Y” are seen standing together in front of a roller shutter both equipped with AK 47 assault rifles.<sup>78</sup></p> <p><b>Range of additional photographs of the defendant<sup>79</sup>:</b></p> <ul style="list-style-type: none"> <li>• holding an AK 47 assault rifle;</li> <li>• standing in a room in camo pants, military attire (black kepi) on which the Islamic creed is written in Arabic script;</li> </ul>	<p>The details containing the defendant’s arrest are unavailable. Nevertheless, it can be presumed that the Police became aware of the photographs posted on Facebook and found them on the seized computer and mobile phone.</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The Court held that there are no clues in the photographs that the defendant intended to provide humanitarian aid. Also, it was stated that even if the photos do not show actions related to the actual combat, the context of the photos are determinative, as they are taken in Syria, where the defendant is seen engaging in specific gestures and both he and “Y” are equipped with weapons and combat clothing.<sup>80</sup></p> <p>The Court rejected that there are no further clues that he intended to provide humanitarian aid based on his relaxed position in the photos, the fact that he had been a radicalized Muslim prior to traveling to Syria.<sup>81</sup></p> <p>Whilst the photographs such did not show his face entirely<sup>82</sup>, the Court considered that the images still remained probative, as the defendant’s positive identification could be adduced from a distinctive ring that he wore, as seen in at least two of the photos.<sup>83</sup></p>

<sup>76</sup> *Ladjedvardi case* (n 2) 7 [A (II)(2)(b)].

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid* 17 [C (II)(2)(a)(2)(b)].

<sup>80</sup> *ibid.*

<sup>81</sup> International Crimes Database, ‘[Prosecutor v Aria Ladjedvardi](#)’ (n 38).

<sup>82</sup> *Ladjedvardi case* (n 2) 11 [B (III)(1)(b)].

<sup>83</sup> *ibid.*

<ul style="list-style-type: none"> <li>• crouching in front of black flag with the Islamic creed;</li> <li>• standing by a bush, wearing camouflage and tactical vest;</li> <li>• standing by a rock formation and holding an AK 47 assault rifle;</li> <li>• standing in front of a roll up door together with Y who is also armed and with another person, who according to the defendant, is the owner of the internet café where they often stayed;</li> <li>• seen in camouflage clothing with protective vest, raised right index finger pictured in front of a destroyed bus;</li> <li>• seen in same clothes as above, but inside the bus at an airport, also with his raised right index finger;</li> <li>• seen with his right index finger raised, in front of mosque with Y and XY, where all three of them are wearing camouflage</li> <li>• seen with Y and XY, where all of them are wearing camo. The defendant and Y both are equipped with AK 47 assault rifles.</li> </ul>			<p>The Court further relied the testimony of an expert witness “R” in order to assess that the images described are based on or reflect a Salafist-Jihadist direction. He concluded that:<sup>84</sup></p> <ul style="list-style-type: none"> <li>• anyone who presents himself with a weapon becomes part of a group or association, as a person cannot fight there alone (or on an individual basis);</li> <li>• people wearing the ‘black kepi’ are usually a follower of a jihadist group;</li> <li>• the defendant wore this with Arabic Islamic inscription in 2 photographs;</li> <li>• identified Jihadist flag in the images;</li> <li>• the picture where the defendant is equipped with an AK47 assault rifle, his left hand is visibly raised with Y and XY, as they were militant jihadists. Expert noted in particular, that “This clearly visible armament and the fact that one of the persons [has] raised [their] index finger”, which is the ‘one god’ sign;</li> <li>• the photographic self-staging with weapons in a warzone as evident in these images and it is common practice and widespread in the jihadist scene – as the images are used to convince others to come join the jihad;</li> <li>• the decapitation was done by a “Jihadist group”;</li> <li>• ruled out that it could not be the Free Syrian Army FSA;</li> </ul>
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<sup>84</sup> *Ladjevardi case* (n 2) 18-19 [C (II)(2)(a)(2)(b)].

**Third package of evidence – Voice and audio messages**

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p><b>Voice message<sup>85</sup> “PTT-1”.</b><sup>86</sup> “Y” answers witness P question where and when the photographs that were posted on Facebook were taken and details other particularities of the events surrounding the capture of enemy soldiers.</p> <p><b>Voice message “PTT-2”.</b><sup>87</sup> “Y” gives more details regarding the attack on the enemy checkpoint.</p> <p><b>Voice message “PTT-3”.</b><sup>88</sup> “Y” gives more details about the events surround the killing and mutilating enemy combatants, considers the possibility that one person held the rank of a general, further discusses their appearance and his positive feelings towards their death.</p> <p><b>Audio file “AUD-1”.</b><sup>89</sup> This was a group chat between “Y” and witness P. Here, “Y” shares his negatives views towards the combatants and the Syrian government, notes that one of the killed held the rank of a general and was convinced that he was an Alawite. Also, mentioned that the killed enemy combatants belong to the government forces, explained that he did not killed them or cut their heads off, but was in the photograph, since he was very happy about it.</p>	<p>There is no indication from where these messages were obtained.</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The Court noted that these messages prove that the defendant travelled to Syria and stayed there during the period in question.<sup>90</sup></p> <p>The plausibility of the facts was confirmed by expert witness “R”. He acknowledged the existence of the checkpoint in question and explained that the government forces most likely are Alawites since they are loyal to the Bashar al-Assad, who are Alawites.<sup>91</sup></p>

<sup>85</sup> The case does not specify the online platform through which the conversations were made. In these messages, witness “P” asks a question in a form of voice message and “Y” replies in a form voice message as well.

<sup>86</sup> *Ladjevvardi case* (n 2) 12 [B (III)(1)(b)(3)].

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid* 12-13 [B (III)(1)(b)(3)].

<sup>90</sup> *ibid* 12 [B (III)(1)(b)(3)].

<sup>91</sup> *ibid* 13 [B (III)(1)(b)(3)].

#### Fourth package of evidence – Telephone calls

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p><b>Product No. 1</b> – 26 February 2015.<sup>92</sup> Defendant called an unknown person and discussed travel to Syria.</p> <p><b>Product No. 2</b> – 5 March 2015.<sup>93</sup> Defendant discusses his Islamic faith and said: “kill[ing] is nothing nice. But you have to kill some people. You just have to...there are situations where you have to do it”;</p> <p><b>Product No. 3</b> – 10 April 2015.<sup>94</sup> Defendant called an unknown female person and told her she should wear a headscarf and practice Islam;</p> <p><b>Product No. 4</b> – 9 April 2015.<sup>95</sup> Defendant called Ms. D and admitted that he has “never done anything” except to the “kuffar” which he still hates today”;<sup>96</sup></p> <p><b>Product No. 6</b> – 4 August 2015.<sup>97</sup> Defendant called Ms. D during which he discussed the city he lived in Syria and that he had used an AK on his first shooting practice, where he suffered effects of its surprising recoil. He also</p>	<p>Since the details containing the defendants arrest are unavailable, it could be presumed that the Police was monitoring his or other identified persons telephone conversations.</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>Based on these telephone conversations, the Court rejected the defendant’s claim that he intended to provide humanitarian aid. The Court noted that these conversations indicate his views towards non-believers, his intention to travel to Syria to join the armed forces to draw a "holy fight" and, if necessary, die as a martyr. According to the Court, these conversations show that he, at the time of the events, was a member of Jabat al Nusra.<sup>101</sup></p>

<sup>92</sup> *Ladjvardi case* (n 2) 16 [C (II)(2)(a)(2)(a)].

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid* 15 [B (III)(3)(1)(c)].

<sup>95</sup> *ibid.*

<sup>96</sup> There is no reference to Product No. 5 in the judgment.

<sup>97</sup> *ibid* 16-17 [C (II)(2)(a)(2)(a)].

<sup>101</sup> *ibid.*

<p>described that the recoil of weapon had caused him to flinch by the pressure and the noise, he got a shock from this, but later that it became “normal”. Described an incident involving the shooting of a fighter jet, filming corpses and sending the videos to German friends and capturing and killing the pilot.<sup>98</sup></p> <p><b>2 January 2016 audio chat on “WhatsApp”.</b><sup>99</sup> A conversation was between witness Q and “Y”, where they discuss the defendant’s motives to come to Syria to fight for “Jihad” and his activities there.</p> <p><b>February 2015 intercepted and monitored chat traffic</b><sup>100</sup>. A particular conversation where Witness “Y” discuss his participation and activities in Jabat al Nusra to witness P.</p>			
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<sup>98</sup> *Ladjevardi case* (n 2) 17 [C (II)(2)(a)(2)(a)].

<sup>99</sup> *ibid* 18 [C (II)(2)(a)(2)(b)].

<sup>100</sup> No further indication on which online platform, which specific date or which specific message.

## **2. DDE relied upon to determine whether the victims of the offence were ‘protected persons’**

In determining the third (iii) legal question – whether the victims of the offence were protected persons, the Court again turned to the first package of evidence three photographs of the defendant alongside the degraded and humiliated enemy combatants. In this regard, the Court established that the victims were protected persons.<sup>102</sup> Based on the photographs, the Court observed that they were no longer able to participate in hostilities and were in the power or control of the enemy and were found to be government soldiers, and therefore ‘part of a party that was captured and put out of action’.<sup>103</sup>

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<sup>102</sup>*Ladjevardi case* (n 2) 22 [C (III)].

<sup>103</sup> *ibid.*

Determination of Issue Three - Were the victims ‘protected persons’

**Evidence – Three previously mentioned photographs**

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p><b>Photo 1:</b> Defendant posed within the immediate vicinity of one of the impaled heads on the floor, kneeling next to it.<sup>104</sup></p> <p><b>Photo 2:</b> A close-up image of defendant from the front, where the impaled head of one of the victims was visible. The face of the victim was “disfigured by serious injuries”.<sup>105</sup></p> <p><b>Photo 3:</b> Grouped together with ‘Y’ who carried an AK47 and an unknown person between the spiked head.<sup>106</sup></p>	<p>Since the details containing the defendants arrest are unavailable, it could be presumed that the Police became aware of the photographs posted on Facebook prior to the arrest and also found on the seized computer and mobile phone.</p>	<p>There were indications that the defendant made procedural objections to the use of the images, the grounds for those objections were not specified in the judgment.<sup>107</sup></p>	<p>The Court determined that in a NIAC, the wounded, sick and castaways that are no longer able to participate in hostilities and are in the power or control of the enemy, are classified as ‘protected persons’.<sup>108</sup> The executed individuals in the photos in this case were found to be government soldiers, and therefore ‘part of a party that was captured and put out of action’.<sup>109</sup> The Court determined that the definition of protected persons under international law also applied to persons killed or deceased. The Court considered it fundamental that the doctrine of the dead, as well as the dignity of man continuing beyond death, was upheld.<sup>110</sup></p>

<sup>104</sup> *Ladjvardi case* (n 2) 6-7 [A (II)(2)(b)].

<sup>105</sup> *ibid* 7 [A (II)(2)(b)].

<sup>106</sup> *ibid*.

<sup>107</sup> *ibid* 15 [B (III)(2)(a)].

<sup>108</sup> *ibid* 22 [C (III)].

<sup>109</sup> *ibid*.

<sup>110</sup> *ibid*.

### **3. DDE relied upon to determine whether the victims of the offence were ‘protected persons’**

In determining the fourth (iv) legal question – whether the acts constituted grave degrading and humiliating treatment, the Court once again turned to the first package of evidence – three photographs of the defendant alongside the degraded and humiliated enemy combatants. In this regard, the Court established that by impaling the severed heads and subsequently by posing next to them in a treatment of a trophy like manner and knowledge of the impact of such photograph to the public, constituted an offence of grave degrading and humiliating treatment.<sup>111</sup>

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<sup>111</sup> International Crimes Database, [‘Prosecutor v Aria Ladjedvardi’](#) (n 38).



Determination of Issue Four - Was there gravely degrading and humiliating treatment?

**Evidence – Three previously mentioned photographs**

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p><b>Photo 1:</b> Defendant posed within the immediate vicinity of one of the impaled heads on the floor, kneeling next to it.<sup>112</sup></p> <p><b>Photo 2:</b> A close-up image of defendant from the front, where the impaled head of one of the victims was visible. The face of the victim was “disfigured by serious injuries”.<sup>113</sup></p> <p><b>Photo 3:</b> Grouped together with ‘Y’ who carried an AK47 and an unknown person between the spiked head.<sup>114</sup></p>	<p>Since the details containing the defendants arrest are unavailable, it could be presumed that the Police became aware of the photographs posted on Facebook prior to the arrest and also found on the seized computer and mobile phone.</p>	<p>There were indications that the defendant made procedural objections to the use of the images, the grounds for those objections were not specified in the judgment.<sup>115</sup></p>	<p>The Court held that the defendant and other members of the group had degraded, or acted degradingly towards, the dead bodies, by impaling the severed heads and subsequently by posing next to them and photographing it.<sup>116</sup> The Court found that the trophy-like treatment of the severed heads and knowledge of the fact that viewing such photos would horrify and shock a reasonable person, demonstrated the intent of the accused to mock the dead.<sup>117</sup></p>

<sup>112</sup> *Ladjedvardi case* (n 2) 6-7 [A (II)(2)(b)].

<sup>113</sup> *ibid* 7 [A (II)(2)(b)].

<sup>114</sup> *ibid*.

<sup>115</sup> *ibid* 15 [B (III)(2)(a)].

<sup>116</sup> *ibid* 24 [C (IV)].

<sup>117</sup> International Crimes Database, ‘[Prosecutor v Aria Ladjedvardi](#)’ (n 38).

## **B. What DDE discussion was there?**

### **1. The way the rule operates in the domestic system**

Specific rules of evidence relating to DDE were not discussed in this case, nor do they explicitly exist in German domestic laws. As discussed in Part 2.3 of this report, provisions relating to DDE and evidentiary rules are set out in the GCCP. The GCCP gives the Court a wide scope and discretion, allowing it to consider any evidence it deems appropriate and probative. The weight of such evidence is thereby also determined by the Court. This open system of evidentiary rules means that any evidence can essentially be admitted at the discretion of the Court.

Evidence can be adduced by either party or the Court in German criminal proceedings. The DDE presented in this case was presented by the prosecution, however the defendant himself also provided evidence.

### **2. Whether the rule is reflected in other legal systems**

The legislation under which the defendant was prosecuted derives almost entirely from the Rome Statute.<sup>118</sup> The legal analysis of the crimes and how these standards were applied in this case, can therefore be seen to be reflected in cases before the ICC.

The way in which evidentiary rules operate in Germany's civil system is similar to the way in which they operate in the Swedish legal system.<sup>119</sup> The level of discretion given to the Court to admit even inadmissible evidence was also illustrated in the Swedish prosecution of Haisam Omar Sakanh.<sup>120</sup> Together, these cases represent how civil legal systems are applying similar evidentiary standards for the admission of DDE.

This case was the first case prosecuted under the CCAIL in Germany and thereby represents a landmark case in Germany.

### **3. How the rule was applied in the case in relation to DDE**

DDE was undoubtedly the predominant evidence used in this case. The main types of DDE that were relied on in these proceedings included three photos posted to Facebook, a range of other

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<sup>118</sup> *Universal Jurisdiction Law and Practice in Germany* (n 5) 4.

<sup>119</sup> See: *Swedish Code of Judicial Procedure* (1942:740) also available in English [here](#).

<sup>120</sup> *Prosecutor v Haisam Omar Sakanh*, (Case R B 3787-16) [2017], Stockholm District Court, Sweden. An unofficial English translation of this judgment is [here](#).

photographs, six phone conversations labelled as ‘Product 1-6’,<sup>121</sup> three voice recordings labelled ‘PTT 1-3’<sup>122</sup> and one audio recording labelled ‘AUD-1’.<sup>123</sup> The use of non-DDE evidence, such as the defendant’s testimony and information and the expert witness, was used only insofar as it contextualised and supported the DDE evidence. It was the collaborative use of this non-DDE and DDE evidence that gave it its overall probative value.

For example, Expert Witness R was able to provide information that explained the defendant’s actions and role in the Salafist-Jihadist movement. The defendant’s role in this armed jihadist group was crucial to establishing the legal issues in this case and the intent of the defendant to participate willingly in the alleged offending. The clarification provided by the expert, allowed the Court to contextualise and conclude that the defendant’s actions were part of his participation in a radical regime. This was further supported by the evidence adduced from the defendant himself, which showed a pattern towards radical Islamic beliefs. In assessing the severity of the criminal conduct, the Court also considered DDE. Notably, the Court considered that it was a mitigating factor that the defendant was not the one to post the images of Facebook; an act which the Court considered as further deepening the mockery of the victims.<sup>124</sup>

The Court attributed a strong value to the DDE and the corroboration of the expert to contextualise the DDE. An important thing not discussed in the judgment, however, is the manner in which the DDE was verified. The assumption therefore is that the Court was satisfied as to its authenticity. Whilst the DDE images of the defendant did not show his face entirely, the Court found that the images remained highly probative as the defendant’s positive identification could be adduced from a distinctive ring that he wore, as seen in at least two of the photos.<sup>125</sup> This illustrates the wide powers of the Court to admit such evidence. Whilst the defendant made numerous procedural objections to the use of the images, the grounds for those objections were not specified in the judgment.<sup>126</sup> The grounds for objections are likely to have been admissibility related, as the wording ‘procedural challenge’ indicates, however this is not clarified by the Court. It is therefore the assumption that the Court held that the probative value of the images outweighed the grounds for objection.

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<sup>121</sup> Excluding Product No. 5. *Ladjedvardi case* (n 2) 15-17.

<sup>122</sup> *Ladjedvardi case* (n 2) 12-13 [B (III)(1)(b)(3)].

<sup>123</sup> *ibid* 11 [B (III)(1)(b)].

<sup>124</sup> *ibid* 29 [D (II)].

<sup>125</sup> *ibid*.

<sup>126</sup> *ibid* 15 [B (III)(2)(a)].

The Court placed a particular emphasis on the way the some of the DDE was handled by the defendant, particularly in relation to his storage of the photos. The emphasis the Court placed on the photos being saved by the defendant is not explained in detail. However, it can be presumed that this emphasis perhaps indicated that the Court felt the defendant had wanted to preserve the memory of his time in Syria.

A difficulty faced by German courts, and other domestic and international courts alike, is determining the evidentiary value and authenticity of images, messages and videos as they are prone to manipulation.<sup>127</sup> However, these questions are not explicitly addressed in this judgment. In another German case, concerned the prosecution of ‘Rami K’ on the suspicion of the commission of a war crime, the Court allowed DDE in the form of photos posted on Facebook.<sup>128</sup> The photos in this case showed the accused holding two severed heads of Islamic State fighters.<sup>129</sup> In this case, like the present, the court determined that the images had enough probative value. This was ultimately supported by the evidence provided by ‘Expert Witness R’.<sup>130</sup> The case of Rami K also did not discuss authentication or verification procedures of the DDE used.

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<sup>127</sup> *Ladjedvardi case* (n 2) 29 [D (II)].

<sup>128</sup> [Prosecutor v Rami K](#), (Case R 172 OJs 26/16 (3/16) [2017] Criminal Division of the Berlin Higher Regional Court, Germany.

<sup>129</sup> *ibid.*

<sup>130</sup> *Ladjedvardi case* (n 2) 17-20.

# Prosecutor v. Aria Ladjedvardi – REFERENCE LIST

## CASES

- [Prosecutor v. Aria Ladjedvardi](#), (Case R 5-3 StE 2/16 - 4 - 1/16) [2016], Higher Regional Court, Frankfurt am Main, Germany.
- [Appeals decision against the judgement of the Higher Regional Court of Frankfurt am Main dated 12 July 2016](#), (Case R 3 StR 57/17) [2017] Federal Court of Justice, Germany.
- [Prosecutor v Haisam Omar Sakhanb](#), (Case R B 3787-16) [2017], Stockholm District Court, Sweden. An unofficial English translation of this judgment is [here](#).
- [Prosecutor v Rami K](#), (Case R 172 OJs 26/16 (3/16) [2017], The Criminal Division of the Berlin Higher Regional Court, Germany.

## ARTICLES

- Open Society Justice Initiative, [Universal Jurisdiction Law and Practice in Germany](#), (April 2019).

## LEGISLATION

- [Code of Crimes against International Law \(Völkerstrafgesetzbuch\) of 26 June 2002 \(Federal Law Gazette I p. 2254\), which was amended by Article 1 of the Law of 22 December 2016 \(Federal Law Gazette I p. 3150\)](#).
- [German Code of Criminal Procedure, Strafprozeßordnung \(StPO\)](#).
- [Swedish Code of Judicial Procedure](#) (1942:740) also available in English [here](#).

## INTERNATIONAL SOURCES

- [Rome Statute of the International Criminal Court](#) (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 38544.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31.
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85.
- Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.
- Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

## OTHER

- [Press release of the Office of The Public Prosecutor General of the Federal Court of Justice of Germany](#), “Indictment on suspicion of committing a war crime”, (19 February, 2016).
- Trial International, ‘[Aria Ladjedvardi](#)’ (21 June 2017).
- International Crimes Database, ‘[Prosecutor v Aria Ladjedvardi](#)’ (12 July 2016)
- [International Committee of the Red Cross Customary IHL Rule 113](#).
- ‘[What is public information on Facebook?](#)’, *Facebook Help Center*.

# Prosecutor v. Rami K (Germany, 2017)

Kammergericht Berlin Strafsenat 172 OJs 26/16 (3/16)

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## I. Executive Summary

In the case of Rami K (the Defendant), the Higher Regional Court in Berlin (*Kammergericht*) relied upon a number of DDE to prove his criminal liability.<sup>1</sup> In 2015, the Defendant was a lieutenant in the Iraqi Armed Forces where he fought against the Islamic State of Iraq and Levant (IS). Following the Battle for Tikrit (2<sup>nd</sup> March 2015), he was photographed holding the severed heads of two IS fighters.<sup>2</sup> This photo was later posted on social media (Facebook).<sup>3</sup>

The Court analysed the photographic and social media (Facebook) evidence provided by the Defendant and concluded that the Defendant treated persons who were protected under international humanitarian law in a gravely humiliating or degrading manner.<sup>4</sup> The Defendant was subsequently sentenced to 20-months imprisonment.<sup>5</sup>

## II. Background

### A. DDE Legal Provisions or Evidentiary Norms

No rules of evidence or other legal provisions specifically relating to the DDE were discussed in the judgement. The legal framework of evidence in the German legal system is considered below.

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<sup>1</sup> Kammergericht Berlin Strafsenat (The Criminal Division of the Berlin Higher Regional Court) 172 OJs 26/16 (3/16), ECLI:DE:KG:2017:0301.2A172OJS26.16.3.1.0A (1 March 2017) [[“Rami K”](#)].

<sup>2</sup> *ibid* [35].

<sup>3</sup> *ibid* [37].

<sup>4</sup> *ibid* [80]; [Völkerstrafgesetzbuch](#) (official translation available at [Code of Crimes against International Law](#)) (CCAIL) in the version published on 26 June 2002 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 2254), as most recently amended by Article 1 of the Law of 22 December 2016 (Federal Law Gazette I p. 3150) s 8(1)(9),8(6)(3) ; [Geneva Conventions](#) (I-IV) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions) Common Art 3.

<sup>5</sup> *Rami K* (n 1) [95].

## B. Factual Background of the Case

In 2003, a US-led coalition invaded Iraq overthrowing Saddam Hussein's regime and establishing a Shi'ite-dominated government, resulting in the rise of a Sunni-Islamist opposition. At the time, the Defendant was a member of the Iraqi army serving as a lieutenant in the anti-terrorist unit'.<sup>6</sup>

The Battle for Tikrit (2<sup>nd</sup> March 2015) is especially relevant to the present case. There, the Iraqi army 'led by the US-led anti-IS coalition launched a large-scale offensive to recapture Tikrit'.<sup>7</sup> Two members of Defendant's unit (identified as "J" and "Ja"), upon recapturing Tikrit, advanced into the liberated area and, using a machete, severed the heads of the two dead IS fighters.<sup>8</sup> The Defendant did not directly observe the beheadings as he was 'about 600 meters away' when these happened.<sup>9</sup> J and Ja then asked the Defendant to pose for a photograph with the heads in his hands.<sup>10</sup> Although the Defendant confessed to being aware that this action would have mocked his opponents and the families of the two victims, he nevertheless complied with the request.<sup>11</sup> The Defendant argued that his complicity was because he felt obliged to take part in the act since as a lieutenant he feared a loss of authority otherwise.<sup>12</sup>

The picture was subsequently uploaded on Facebook by the 'comrades of his company'.<sup>13</sup> The Defendant downloaded the picture on his personal computer (PC), with the aim of relying on it as evidence for his future asylum case.<sup>14</sup> He subsequently fled Iraq with his family and ultimately found refuge in a shelter in Germany.<sup>15</sup> On 31 July 2014, the police conducted a search of the refugee shelter, following allegations of threats made by the Defendant to private security guards.<sup>16</sup> The Defendant cooperated and handed the officer his PC, and smartphone.<sup>17</sup> The Higher Regional Court in Berlin

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<sup>6</sup> *Rami K* (n 1) [6].

<sup>7</sup> *ibid* [25].

<sup>8</sup> *ibid* [33].

<sup>9</sup> *ibid* [33].

<sup>10</sup> *ibid* [34].

<sup>11</sup> *ibid* [34].

<sup>12</sup> *ibid* [34].

<sup>13</sup> *ibid* [37].

<sup>14</sup> *Rami K* (n 1) [37].

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid*.

<sup>17</sup> *ibid* [38].

found the Defendant guilty of war crimes (gravely humiliating or degrading treatment of the victims), and he fully admitted to the charges.<sup>18</sup>

### C. Legal System Background

The German legal system is a civil law system, operating on an inquisitorial basis whereby the judges are actively involved in investigating the facts of the case. German criminal law is codified in a number of provisions including the *Strafgesetzbuch* (German Criminal Code: GCC),<sup>19</sup> the *Völkerstrafgesetzbuch* (German Code of Crimes against International Law: CCAIL), and the *Strafprozessordnung* (German Code of Criminal Procedure: GCCP).<sup>20</sup> While the first two include substantive criminal law, the rules of procedure and evidentiary norms can be found in the GCCP.

Under German criminal law, in order to open an investigation, all that is necessary is a sufficient factual indication of a crime as opposed to specific evidence.<sup>21</sup> If a person is suspected of having committed a crime, the allegation must be based on concrete facts and can be demonstrated, for example, by testimonies, documentary evidence, or open-source material.<sup>22</sup>

At the trial stage, the court can only determine the defendant's criminal liability by relying on four types of evidence: witnesses,<sup>23</sup> experts,<sup>24</sup> visual inspections (including of DDE),<sup>25</sup> and written materials.<sup>26</sup> The guilty plea as such does not exist under German law and has to be corroborated by other evidence.<sup>27</sup> While both the Prosecution and the Defence may propose evidence to be presented at trial, it is the trial court, and in particular the presiding judge, who is responsible for deciding what

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<sup>18</sup> *ibid.*

<sup>19</sup> The [Strafgesetzbuch](#) (official translation available at [The German Criminal Code](#)) in the version published on 13 November 1998 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 945, 3322).

<sup>20</sup> The [Strafprozessordnung](#) (official translation available at German [Code of Criminal Procedure](#)) (GCCP) in the version published on 7 April 1987 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410).

<sup>21</sup> GCCP, s 152(2), s 160(1).

<sup>22</sup> Open Society Justice Initiative, 'Universal Jurisdiction Law and Practice in Germany' *Trial International* (April 2019), 26 <<https://www.justiceinitiative.org/uploads/cc4f8190-8afa-4513-9603-25ab7bc5bb46/universal-jurisdiction-law-and-practice-germany-20190417.pdf>> accessed 31 October 2019.

<sup>23</sup> GCCP, s 48-71.

<sup>24</sup> *ibid* s 72-85.

<sup>25</sup> *ibid* s 86.

<sup>26</sup> *ibid* s 249.

<sup>27</sup> Jenia I. Turner, 'Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons' (2016) 57 *Wm & Mary L Rev* 1549, 1571.



evidence is both relevant and admissible.<sup>28</sup> Accordingly, the decision of the court needs to be based on the evidence presented during the trial.<sup>29</sup>

Exclusion of evidence is uncommon in German courts.<sup>30</sup> Indeed, owing to their investigatory nature, the courts are effectively tasked with finding the whole truth - only in a very limited number of circumstances (i.e. torture as per Section 136a (3) GCCP, protection of core privacy as per Sections 100a(4) and 100c(5) GCCP) do courts exclude relevant evidence. The Federal Constitutional Court itself has argued that exclusion of relevant evidence must remain an exception.<sup>31</sup>

German criminal law also allows for the use of open-source materials.<sup>32</sup> However, no formal rules with respect to the assessment of evidentiary value exist. When gathering open-source evidence, the prosecutors have to inspect the origin of the information to ensure it possesses probative value.<sup>33</sup> Nevertheless, under Section 261 GCCP, judges can themselves assess the probative value of the evidence.<sup>34</sup>

#### **D. Legal Background of the Case**

On 1 March 2017, the Criminal Division of the Berlin Higher Regional Court (*Kammergericht*) found the Defendant guilty of war crimes, namely of gravely humiliating or degrading a person entitled to protection under international humanitarian law as per Section 8(1)(9) CCAIL, and sentenced him to 20-months imprisonment.<sup>35</sup>

### **1. Jurisdiction**

The Court determined that its universal jurisdiction derived from Section 1(1) CCAIL, which grants it jurisdiction to crimes which have been committed outside of German territory.<sup>36</sup>

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<sup>28</sup> GCCP, s 244(2).

<sup>29</sup> *ibid* s 261.

<sup>30</sup> Thomas Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial?* (Springer 2019), 61.

<sup>31</sup> BVerfG, Judgment of the Second Senate of 12 September 2012 - 2 BvR 1390/12, [1-215].

<sup>32</sup> Universal Jurisdiction (n 21) 26.

<sup>33</sup> *ibid* 27.

<sup>34</sup> GCCP, s 261 reads: The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.

<sup>35</sup> *Rami K* (n 1) [95]; Arts. 8(2)(b)(xxi), 8(2)(c)(ii) Rome Statute of the International Criminal Court (ICC Statute) (adopted on 17 July 1998, entered into force 1 July 2002).

<sup>36</sup> *ibid* [63].

## 2. Non-International Armed Conflict

In relation to the ongoing conflict in Iraq, the Court did not require additional evidence as the relevant facts were well-known and available to the public without the need for special expertise (judicial notice).<sup>37</sup> On the basis of the facts available about the Battle for Tikrit of March 2015 (regarding the organisational structure of the parties, the duration, and the intensity), the Court determined that the hostilities reached the threshold of a non-international armed conflict.<sup>38</sup>

## 3. War Crimes

With regards to the war crimes committed, the Court examined relevant domestic and international legislation,<sup>39</sup> as well as previous domestic decisions.<sup>40</sup> The Court concluded that following their death, the victims were persons under the protection of international humanitarian law as per Section 8(3) CCAIL.<sup>41</sup> Hence, they found the Defendant guilty on the basis of Section 8(1)(9) CCAIL of gravely degrading or humiliating a person who was entitled to protection under international humanitarian law.<sup>42</sup>

Following this, the Court assessed the threshold required for the Defendant's actions to amount to serious humiliating or degrading treatment. The Court held that the relevant standard was objective and provided that the treatment must be so severe that a reasonable person would be outraged.<sup>43</sup> The Court then determined that:

Posing with the severed heads of the victims, who are easily identifiable by their relatives on the photograph produced, reaches such a degree of degradation that the action is viewed as general and cross-cultural as outrageous, because through this action a blatant disregard for personality value the victim is expressed.<sup>44</sup>

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<sup>37</sup> *ibid* [44].

<sup>38</sup> *ibid* [65-67].

<sup>39</sup> CCAIL; Common Art. 3 to the Geneva Conventions; Art. 4 Second Additional Protocol (adopted on 8 June 1977); Arts. 8(2)(b)(xxi), 8(2)(c)(ii), 9(1) ICC Statue.

<sup>40</sup> BGH StB 27/16 (Higher Regional Court Frankfurt am Main) 5-3 StE 4/16-4-3/16 (8 September 2016); OLG Frankfurt am Main, judgment of 8 November 2016 - 5-3 StE 4 /16-4-3 / 16 - quoted in *Juris*, No. 235.

<sup>41</sup> *Rami K* (n 1) [70-74].

<sup>42</sup> *ibid* [61].

<sup>43</sup> *Rami K* (n 1) [79].

<sup>44</sup> *ibid* [80].

#### 4. Nexus

The Court examined the necessary functional connection (the “nexus”) between the crime committed and the armed conflict. In order to establish this, the Court assessed whether the offence had been a ‘thought-out act’ committed to further the military conflict or if it just happened to be committed ‘on occasion’ of the armed conflict.<sup>45</sup> The Court held that the offence constituted a thought-out act in the context of the armed conflict.<sup>46</sup> The Court found that the purpose of the subsequent display and handling of the heads was to demonstrate to the enemy the superiority and mercilessness of the Iraqi combatants, further supporting the existence of a “nexus”.<sup>47</sup>

#### 5. Mitigating Circumstances

Finally, the Court established that, despite the Defendant’s contribution to the disclosure of the evidence, no mitigating circumstances could be found in line with sections 46b(1)(1) and 49(1) GCCP.<sup>48</sup>

### III. DDE

#### A. What did the DDE prove?

On 31 July 2014, police searched the refugee shelter where the Defendant was residing.<sup>49</sup> Since the beginning of that investigation, the Defendant was cooperative - he handed over his PC, smartphone and provided the police with the necessary information to access his social media (accounts, passwords, and usernames).<sup>50</sup> He also assisted the police in ‘screening and evaluating the images stored on his technical devices and his profiles on the internet’.<sup>51</sup> This allowed the Court to seize the incriminating Photograph as well as supplementary evidence which supported information provided by the Defendant and witnesses.

#### 1. War Crimes

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<sup>45</sup> *ibid* [83].

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid* [84].

<sup>48</sup> *ibid* [89].

<sup>49</sup> *Rami K* (n 1) [38].

<sup>50</sup> *ibid* [38-39].

<sup>51</sup> *ibid* [55].

Upon recapturing Tikrit, on 2 March 2015, two officers (J and Ja) decapitated the dead bodies of two enemy soldiers and handed the severed heads over to the Defendant asking him to pose with them for a photo.<sup>52</sup> The Defendant complied with this request, he argued that he felt compelled to do so in order to maintain his command presence over his troops.<sup>53</sup> In the photograph, the Defendant was pictured wearing ‘a black combat suit and a bright cartridge pouch around his torso’.<sup>54</sup> He was also carrying an assault rifle on his right shoulder.<sup>55</sup> His arms were ‘slightly stretched sideways’ and he was holding the hair of the severed heads with his fingers, ‘their faces are aligned in the side-profile’ to the camera.<sup>56</sup> In complying with J and Ja’s request, the Defendant was fully aware of the effects of such photograph, namely the mockery of the opponents and ‘hurting the genealogy’ of the two victims, who could be identified by their families considering their clearly recognisable facial features.<sup>57</sup> In view of this photograph, the Court concluded that the Defendant was liable for war crimes, in particular the treatment persons who were protected under international humanitarian law in a gravely humiliating or degrading manner.<sup>58</sup>

The photograph was subsequently uploaded by the ‘comrades of his company’ on Facebook and the Defendant downloaded it from Facebook onto his PC.<sup>59</sup> However, the police could not conclusively establish that the photo had been disseminated on the internet.<sup>60</sup> According to witnesses and to an analysis of the social media activity of the Defendant, it appeared that the photo was only available on the non-public Facebook of the Defendant and for a relatively short time.<sup>61</sup> This was for him to see and download from his account; there was no evidence of dissemination from his PC.<sup>62</sup> Moreover, according to a witness, the picture was no longer available on Facebook at the time of the proceedings.<sup>63</sup> It was thus assumed that the photograph had only been transferred via Facebook Messenger, further showing that there had been no evidence of dissemination.<sup>64</sup>

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<sup>52</sup> *ibid* [33-34].

<sup>53</sup> *ibid* [34].

<sup>54</sup> *ibid* [35].

<sup>55</sup> *ibid* [35].

<sup>56</sup> *ibid* [35].

<sup>57</sup> *ibid* [34-35].

<sup>58</sup> CCAIL, s 8(1)(9).

<sup>59</sup> *Rami K* (n 1) [37].

<sup>60</sup> *ibid* [58].

<sup>61</sup> *ibid* [58].

<sup>62</sup> *ibid* [58].

<sup>63</sup> *ibid* [58].

<sup>64</sup> *ibid* [58].

The Court was also presented with a video of the decapitation scene.<sup>65</sup> There, the two officers (J and Ja) are pictured, one in the process of severing the head of one of the victims and the other running with the other severed head in his hands.<sup>66</sup> The fact that the Defendant is not present in the video further confirms his submission that he did not directly assist in the beheading.<sup>67</sup> Again, it was the Defendant himself who directed the police to the non-public Facebook of the officer J where the video was available.<sup>68</sup> Overall, the video ‘impressively confirms’ the Defendant’s confession, hence his liability for the war crime.<sup>69</sup>

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court
Photograph <sup>70</sup>	Police Search	Not specified	<p>The photograph was instrumental to identifying the Defendant and the victims.<sup>71</sup> In particular, the clear identifiability of the victims provided further support to the accusation of an intention of mockery behind the Defendant’s conduct.</p> <p>The uniform that the Defendant was wearing in the photograph also allowed the Court to determine the position that the Defendant retained in the Iraqi Army.<sup>72</sup></p>

<sup>65</sup> *ibid* [54].

<sup>66</sup> *ibid* [54].

<sup>67</sup> *ibid* [54].

<sup>68</sup> *ibid* [54].

<sup>69</sup> *ibid* [54].

<sup>70</sup> *Rami K* (n 1) [34-37].

<sup>71</sup> *ibid* [34].

<sup>72</sup> *ibid* [37].

Video <sup>73</sup>	Police Search	Not specified	The video depicted the crime scene, and provided more accurate knowledge of the events leading up to the photograph being taken of the Defendant. It confirms that the Defendant was neither responsible for the beheadings nor did he directly assist the act, indeed he does not appear in the video. However, the severed heads which can be seen in the video are the same that the Defendant subsequently holds in the photograph. <sup>74</sup>
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## 2. Nexus

Section 8(1) CCAIL requires the act to be ‘in connection’ with the armed conflict (international or non-international), as opposed to merely ‘on occasion of the armed conflict’.<sup>75</sup> In the present case, the nexus was established by the fact that the victims were ‘enemy fighters’ and they ‘had been killed in a military struggle that had immediately preceded and not yet ended the act’.<sup>76</sup> Accordingly, the video of the decapitation records the time ‘immediately preceding’ the handing of the heads over to the Defendant.<sup>77</sup> Moreover, the video shows that J and Ja decapitated the IS fighters and subsequently they shouted ‘We have IS!’.<sup>78</sup>

The nexus is further confirmed by the photographs provided by the Office of the Military Shielding Service (*Das Amt für den Militärischen Abschirmdienst*).<sup>79</sup> Noting the uniform he was wearing and the presence of the Iraqi national flag, the State Office of Criminal Investigation (*Das Landeskriminalamt*)

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<sup>73</sup> *ibid* [54].

<sup>74</sup> *ibid* [54].

<sup>75</sup> *Rami K* (n 1) [83].

<sup>76</sup> *ibid* [84].

<sup>77</sup> *ibid* [54].

<sup>78</sup> *ibid* [54].

<sup>79</sup> *ibid* [47].

assumed that he was a member of the Iraqi army fighting against the IS.<sup>80</sup> This was also deducible from the presence of anti-IS slogans on the Defendant’s PC, such as ‘Fallujah has been liberated, there is no place in Iraq for you!’ or the crossed-out image of Abu Bakr Al-Bagdadi.<sup>81</sup> Moreover, the badge he can be seen wearing on his right arm in the photographs suggested that he was a member of the special forces.<sup>82</sup> This allowed the Court to conclude that ‘the Defendant was in the rank of First Lieutenant’.<sup>83</sup>

The connection of the Defendant’s act to the armed conflict was also determined on the basis of the IS Facebook posts that are defaming him.<sup>84</sup> Moreover, the metadata (spatial and temporal relation) of the post associate it with the recapture of Tikrit.<sup>85</sup> There, the IS claimed the Defendant was either laying ‘as a corpse or he was killing and slaughtering women and children in Tikrit’; in addition, the slogan was issued that they would send him ‘with God's permission (...) soon in hell’.<sup>86</sup> This was part of a broader IS propaganda against the Defendant: he was consistently ‘insulted as an infidel’.<sup>87</sup> The fact that IS mentioned the Defendant in their Facebook propaganda shows that he retained a high ranking position within the Iraqi Army.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court
Photograph <sup>88</sup>	Police Search	Not specified	The uniform that the Defendant was wearing in the photograph also allowed the Court to determine the position that the

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<sup>80</sup> *ibid* [48].  
<sup>81</sup> *ibid* [48].  
<sup>82</sup> *ibid* [47].  
<sup>83</sup> *ibid* [47].  
<sup>84</sup> *ibid* [48].  
<sup>85</sup> *ibid* [48].  
<sup>86</sup> *ibid* [30].  
<sup>87</sup> *Rami K* (n 1) [30].  
<sup>88</sup> *Rami K* (n 1) [34-37].

			Defendant retained in the Iraqi Army. <sup>89</sup>
<b>Video</b> <sup>90</sup>	Police Search	Not specified	The video depicted the crime scene, and provided more accurate knowledge of the events leading up to the photograph being taken of the Defendant. It allows to identify J and Ja as members of the Iraqi army. Moreover, the nexus is further established by the fact that right after the beheading, J and Ja run to the Defendant shouting ‘We have IS!’. <sup>91</sup>
<b>Other Photographs</b> <sup>92</sup>	Office of the Military Shielding Service	Not specified	The uniform that the Defendant is wearing in the photos – including the badge on his right arm - led to the conclusion that he was a high-ranking officer in the Iraqi Army. Moreover, in some of the photographs, he can be seen holding the Iraqi national flag which is further evidence of his membership to the Iraqi army. <sup>93</sup>
<b>Anti-IS slogans on Defendant’s computer-tablet</b> <sup>94</sup>	Police Search	Not specified	The slogans allowed the Court to establish that the Defendant was committed to the opposing the IS. <sup>95</sup>

<sup>89</sup> ibid [37].

<sup>90</sup> ibid [54].

<sup>91</sup> ibid [54].

<sup>92</sup> ibid [47].

<sup>93</sup> ibid [48].

<sup>94</sup> ibid [48].

<sup>95</sup> ibid [48].



<b>Facebook Activity - Posts</b> <sup>96</sup>	Investigation, with Defendant's assistance	Not specified	The metadata of the posts correspond to the time and place of the recapture of Tikrit, proving that the IS published defamatory posts about the Defendant right after the recapture. <sup>97</sup> Moreover, the fact that the IS posted about the Defendant also supports the fact that he retained a high position within the Iraqi Army.
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### 3. Mitigating Circumstances

The Facebook presentation of the Defendant as well as the images that he had been storing on his technical devices allowed the Court to deduce the personality and career of the Defendant.<sup>98</sup> This was determinative in shaping his sentence as it allowed the Court to consider the 'special circumstances' as required under Section 56 GCC.

<b>Type of DDE</b>	<b>Where and how was the DDE obtained?</b>	<b>Was the DDE challenged?</b>	<b>Probative Value - District Court</b>
<b>Defendant's Facebook Activity - Photos and Videos</b>	Investigation, with Defendant's assistance, witness statements	Not specified	The personal life and circumstances of the Defendant, deduced from his Facebook profile and activity, assisted the Court in evaluating whether his case had any mitigating circumstances. <sup>99</sup> The Court ultimately refrained from

<sup>96</sup> *Rami K* (n 1) [48].

<sup>97</sup> *ibid* [48].

<sup>98</sup> *Rami K* (n 1) [42].

<sup>99</sup> *ibid* [42].

			recognising any such circumstances.
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#### IV. DDE Discussion

The Court relied on two main types of DDE which are visual DDE (photographs and video) and social media (Facebook).

The Court did not expressly discuss the rules of evidence, however, in line with Section 261 GCCP, the Court assessed the probative value of the DDE provided. The issue of admissibility and/or authenticity of the DDE presented was not raised by the defence nor challenged by the Defendant, who himself admitted to being the person pictured.<sup>100</sup> Moreover, part of the DDE was submitted by the Office of the Military Shielding Service, which can be said to function as a guarantee of authenticity.

Although the Defendant confessed to all the accusations, DDE was still of crucial importance to the conclusion of the judgement as German criminal law does not recognise guilty pleas as sufficient for reaching a decision. As discussed above,<sup>101</sup> supplementary evidence is necessary. The Court thus relied on the DDE in order to corroborate the Defendant's confession. For example, the uniform that the Defendant was wearing in the photographs allowed the Court to conclude that he was a member of a Special Unit in the Iraqi Army.<sup>102</sup> By noting how the facial features of the victims, hence their identities, were discernible, the Court concluded that the Defendant was aware or ought to have been aware of the effects of his acts, namely disdain to the family of the victims and to the opponent coalition as a whole. Although intent or recklessness with regards to the offence of degrading and humiliating treatment are not required under either German law,<sup>103</sup> or international jurisprudence,<sup>104</sup> the Court still considered the deliberate nature of his state of mind as relevant in assessing culpability.<sup>105</sup> Indeed, the identifiability of the victims results in an even higher degree of degradation as the act is viewed as

<sup>100</sup> *Rami K* (n 1) [38].

<sup>101</sup> See above at 2.3.

<sup>102</sup> *Rami K* (n 1).

<sup>103</sup> CCAIL, s 8(1)(9).

<sup>104</sup> *Prosecutor v Aleksovski* (Appeals Chamber) IT-95-14/1-A (24 March 2000); *Lubanga*, ICC PTC I, 29 January 2007 (ICC-01/04-01/06-803); *Prosecutor v Kunarac, Kovac & Vukovic* IT-96-23-T & IT-96-23/1-T (22 February 2001); *Prosecutor v Tadic* (Appeals Chamber) IT-94/1-A (15 July 1999).

<sup>105</sup> *Rami K* (n 1) [86].

outrageous in general and cross-cultural sense. On this, the Court concluded that the dead victims were used as trophies and thus reduced to mere objects.<sup>106</sup>

The Court also considered the social media activity of the Defendant as further evidence to corroborate his statements. In particular, it referred to a Facebook post by IS defaming the Defendant as an ‘infidel’, the Court subsequently assessed the ‘spatial and temporal relation’ of such post with the Battle for Tikrit.<sup>107</sup>

While the Court does not mention other jurisdictions specifically it does make a number of references to previous domestic cases.<sup>108</sup>

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<sup>106</sup> *ibid* [80].

<sup>107</sup> *Rami K* (n 1) [48].

<sup>108</sup> BGH NJW 2016, 3604, 3606; OLG Frankfurt am Main, judgment of 8 November 2016 - 5-3 StE 4 / 16-4-3 / 16 - quoted in Juris, No. 235, in detail Higher Regional Court Frankfurt am Main, judgment of 12 July 2016.K

# Prosecutor v. Rami K – REFERENCE LIST

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- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
- Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions)
- Geneva Convention Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
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- The [Strafgesetzbuch](#) (official translation available at [The German Criminal Code](#)) in the version published on 13 November 1998 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 945, 3322)
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# **Prosecutor v. Haisam Omar Sakhanh (Sweden, 2017)**

**Stockholm District Court, B 3787-16, Judgment 16 February 2017**  
**Svea Court of Appeal, B 2259-17, Judgment 31 May 2017**

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*Editors: Dr Emma Irving and Neil Cockerill*

## **I. Executive Summary**

This case involved proceedings in Sweden against a Syrian national, Mr Haisam Omar Sakhanh (the accused) for his participation in the killing of seven Syrian soldiers while he was in Syria in May 2012.<sup>1</sup> The evidence relied upon in this case included written documentary evidence in the form of expert opinion reports, as well as an array of digitally derived evidence (DDE). The main types of DDE used in the case were films that had been uploaded to YouTube and posts, photos and comments uploaded to Facebook. This case is notable for the quantity of DDE that was adduced and relied upon by each of the Swedish Courts in reaching their decisions. In particular, expert and written documentary evidence was used to authenticate and verify the DDE, offering context and deep analysis of its content.

## **II. Background**

### **A. DDE legal provisions / evidentiary norms**

No rules of evidence or other legal provisions relating to the DDE were discussed in the judgments issued by the Courts in these proceedings. The legal framework of evidence, including DDE, in the Swedish legal system is considered further below.

### **B. Factual background of the case**

The context of the Syrian conflict can be traced back to major popular uprisings that occurred in numerous countries in the Middle East and North Africa during Spring 2011, coined the “Arab Spring”. Most relevantly, the Syrian uprising sought the resignation of President Bashar al-Assad.

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<sup>1</sup> *Prosecutor v Haisam Omar Sakhanh*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (*Sakhanh judgment*). The original judgment from the Stockholm District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment is available [here](#). Pinpoint references within this case study refer to the location of the material in the official (untranslated) version; *Prosecutor v Haisam Omar Sakhanh*, Svea Court of Appeal, B 2259-17, Judgment 31 May 2017 (*Sakhanh COA judgment*). The original judgment from the Court of Appeal (in Swedish) is available [here](#). However, again, an unofficial English translation of this judgment is available [here](#). Pinpoint references within this case study refer to the location of the material in the official (untranslated) version.

During the uprising, the secular Free Syrian Army (FSA) and several Islamist resistance movements emerged.<sup>2</sup>

When the Arab Spring first began, the accused resided in Italy on a residence permit, which he had been on since 13 March 1999.<sup>3</sup> However, on 30 April 2012, the accused flew to Southern Turkey, where he met a friend and travelled to Kafr Kila in north-western Syria. Kafr Kila is the headquarters of the Suleiman combat group (SCG), an armed opposition group which had recruited the accused.<sup>4</sup>

On either 4 or 5 May 2012, the SCG and the Ahrar Alshamal Sermin battalion (AAS) orchestrated an attack on a Turkish military post immediately outside the town of Delbiya.<sup>5</sup> During the attack, nine Syrian soldiers were captured and brought to the base at Kafr Kila. One soldier from the SCG was killed during the attack, and his funeral on approximately 5 May 2012 was later filmed by the accused and uploaded to YouTube.<sup>6</sup>

On either 6 or 7 May 2012, the captured Syrian soldiers were taken to a location outside Kafr Kila. Members of the SCG and the AAS posed with the soldiers and the weapons seized in the attack, which the accused documented on film. Members of the SCG then executed seven of the nine captured soldiers by firing shots at close range to their heads and bodies.<sup>7</sup> The accused was one of the executioners, firing several shots with an automatic rifle which hit one victim's head and body. Following the execution, the bodies of the executed soldiers were thrown into cavities on the ground.<sup>8</sup> The execution and handling of the dead bodies were also captured on films which were uploaded to YouTube.<sup>9</sup> It was not clear from the judgment who filmed these events, although it was concluded that it was likely the same individual.<sup>10</sup>

On 18 June 2013, the accused travelled to Sweden and applied for asylum. He was subsequently granted a permanent residence permit and refugee status on 17 October 2013 by the Swedish Migration Board.<sup>11</sup>

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<sup>2</sup> *Sakbanh judgment* (n 1) 4.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid* 5-6.

<sup>6</sup> *ibid* 5, 36-37.

<sup>7</sup> *ibid* 6.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* 20, [17].

<sup>10</sup> *ibid* 20-21, [18].

<sup>11</sup> *ibid* 6.

On 5 September 2013, the online edition of the New York Times published a partially censored video of the execution of captive soldiers recorded by the SCG (which had been provided to them by a former opposition fighter).<sup>12</sup> The Italian police identified the accused in the video and alerted the Swedish police. The Swedish police then launched a preliminary investigation into suspected serious international crimes.<sup>13</sup> As part of this investigation, it was reported that Sweden conducted extensive research to establish the context of the crimes and cooperated with various countries to identify and gather the relevant material, including locating additional evidence on YouTube and Facebook.<sup>14</sup> It was also reported that the Prosecutors later subpoenaed Facebook and YouTube to access the metadata for the entries (including the times the YouTube videos were posted and access to a deleted Facebook account), although this was not mentioned in the judgments.<sup>15</sup> On the basis of the evidence gathered by the Prosecutors, an arrest warrant was issued for the accused on 11 March 2016, and he was arrested on 13 March 2016.

### C. Legal system background

Sweden is a civil law country. Typically, proceedings in a civil law country are more inquisitorial than adversarial, meaning the court is actively involved in all stages of the proceedings. Importantly, unlike the common law system, criminal cases in Sweden are heard by four judges – one professional judge (who is legally trained) and three lay judges – with no jury.<sup>16</sup> Therefore, the judges play a very active and direct role in all facets of a case, including in relation to adducing evidence and determining its probative value.<sup>17</sup> For example, ‘a judge will often actively question witnesses and may even request parties to submit additional evidence’.<sup>18</sup>

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<sup>12</sup> eyeWitness to atrocities, ‘3rd EU Day Against Impunity: Harnessing the Power of Technology for Justice’ (*Medium*, 22 May 2018) <<https://medium.com/@eyewitnessdevelopment/3rd-eu-day-against-impunity-harnessing-the-power-of-technology-for-justice-132e7c0c377f>> accessed 22 October 2019.

<sup>13</sup> *Sakbanh judgment* (n 1) 6-7.

<sup>14</sup> eyeWitness to atrocities (n 13).

<sup>15</sup> Avi Asher-Schapiro, ‘Youtube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals’ (*The Intercept*, 2 November 2017) <<https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>> accessed 22 October 2019.

<sup>16</sup> Bernard Michael Ortwein II, ‘The Swedish Legal System: An Introduction’ (2003) 13 *Indiana International & Comparative Law Review* 405, 421.

<sup>17</sup> *ibid* 429.

<sup>18</sup> *ibid*.



The fundamental principles governing the laws of evidence in Sweden are ‘free admission’ and ‘free evaluation’ of evidence.<sup>19</sup> This generally means there are no restrictions on what is admissible as evidence, so long as the court finds it relevant to the proceedings. Therefore, and in the absence of a rule explicitly prohibiting its introduction, even illegally obtained evidence can be admitted to the court if it has probative value.<sup>20</sup>

The Swedish rules of procedure for both civil and criminal cases are set out in the Swedish Code of Judicial Procedure (CJP).<sup>21</sup> The CJP sets out general rules relating to presenting evidence in criminal trials. The presentation of evidence in the Swedish legal system is the responsibility of the parties. However, the court may also present evidence on its own motion.<sup>22</sup> Chapter 46 Section 6 of the CJP provides that the presentation of the evidence may be made through references to audio and video recordings and other documents in the case, if the court deems it appropriate. Therefore, in the Swedish system, ‘digital material is treated as [a] written document if it can be rendered into a readable form’.<sup>23</sup> An example of this in the present case is the use of ‘screenshots’, which convert digital media from Facebook pages into a documentary form. Moreover, “written documents” can also include media such as ‘CD or DVD discs, and many other forms ... [including] a mobile telephone which contains SMS messages’;<sup>24</sup> for the purposes of things such as seizure orders.

Swedish evidentiary law contains no specific rules assigning value to particular types of evidence; instead, this is left entirely to the court’s discretion. This discretion is rather broad, as can be appreciated from the wording of the relevant Swedish statutes (outlined below). The overall determination of the probative value rests with the court which engages in the ‘conscientious examination’ of the evidence, a trait common to civil law systems.<sup>25</sup> Thus, the court’s discretion is the largest determinative factor in the admissibility of evidence, provided the court is satisfied of the authenticity of the evidence before it.

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<sup>19</sup> Christoffer Wong, ‘Overview of Swedish Criminal Procedure’ (Lund University Faculty of Law, 2012) 27 <[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019.

<sup>20</sup> *ibid* 28.

<sup>21</sup> *ibid* 1.

<sup>22</sup> [Swedish Code of Judicial Procedure](#) (1942: 740) (CJP) Ch 35 s. 6.

<sup>23</sup> Wong (n 19) 18.

<sup>24</sup> Wong (n 19) 18; see also CJP (n 21) Ch 27.

<sup>25</sup> Wong (n 19) 27.

The court must, after ‘evaluating everything that has occurred in accordance with the dictates of its conscience [...] determine what has been proved in the case’.<sup>26</sup> The CJP further requires that evidence must be of sufficient probative value to be admissible.<sup>27</sup>

Chapter 38 of the CJP contains provisions regarding documentary evidence, specifying that ‘[W]ritten documents invoked as evidence should be produced in the original. A certified copy may be produced if this is found sufficient or if the original is not obtainable’.<sup>28</sup> In criminal cases, there is no burden on the accused to produce relevant written documents.<sup>29</sup> A similar provision is found in Chapter 39 relating to physical evidence, which states that ‘[A]nybody holding an object that can be brought conveniently to the court and that can be assumed to be of importance as evidence, is obliged to make the object available for inspection at a view’.<sup>30</sup> Again, this provision does not impose the burden to bring evidence upon the accused .

In terms of witness testimony, the CJP provides that any witness providing evidence in a case shall give their testimony orally.<sup>31</sup> There are additional provisions in relation to expert witnesses set out in Chapter 40 of the CJP which allow the court to obtain an expert opinion on determining that the relevant issue requires special professional knowledge.<sup>32</sup> Before a court can appoint such an expert and receive expert advice, it must invite the parties to state their views on the involvement of the expert.<sup>33</sup> If the parties come to an agreement on the use of a particular expert, he shall be used ‘provided that he is found suitable and there is no impediment to his appointment’.<sup>34</sup> The Swedish legal system further requires that any such expert submit their report in writing, detailing the ‘reasoning and circumstances upon which the conclusions in the opinion are founded’.<sup>35</sup> The witness can also be orally examined on the request of parties, should the court find it necessary.<sup>36</sup>

The Court also has the power to order that certain evidence be kept confidential in accordance with the Public Access to Information and Secrecy Act.<sup>37</sup> For example, the Court may order that

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<sup>26</sup> CJP (n 22) Ch 35 s. 1.

<sup>27</sup> *ibid* Ch 35 s. 7.

<sup>28</sup> *ibid* Ch 38 s. 1.

<sup>29</sup> *ibid* Ch 38 s. 2.

<sup>30</sup> *ibid* Ch 39 s. 5

<sup>31</sup> *ibid* Ch 36 s. 16.

<sup>32</sup> *ibid* Ch 40 s. 1.

<sup>33</sup> *ibid* Ch 40 s. 3.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid* Ch 40 s. 7.

<sup>36</sup> *ibid* Ch 40 s. 8.

<sup>37</sup> [Public Access to Information and Secrecy Act](#) (*Offentlighets-och sekretesslag*) (2009: 400).

information relating to an investigation in a criminal case must be kept confidential if it contains details of an individual's personal and financial circumstances and the information cannot be disclosed without the individual or person related to him suffering injury.<sup>38</sup> Confidentiality also applies to information relating to an individual's health or sexual life, including information about abuse, sexual offences or other similar information if it can be assumed that the individual or someone close to them will suffer significantly if the information is released.<sup>39</sup> In addition, if information is presented at a hearing behind closed doors, the confidentiality provisions will remain applicable and the relevant documents may continue to be confidential even during the court's continued handling of the case (unless the court decides otherwise).<sup>40</sup>

## D. Legal background of the case

### 1. Summary

The proceedings were initially heard in the Stockholm City District Court in January 2017, with the judgment given on 16 February 2017.<sup>41</sup> The accused was convicted of crimes against international law under Chapter 22, Sections 6.1 and 6.2 of the Swedish Penal Code (Penal Code).<sup>42</sup> He was also found to have committed a serious violation of Common Article 3 of the Geneva Conventions I-IV (Geneva Conventions).<sup>43</sup> The accused was therefore sentenced to life imprisonment. The accused subsequently appealed to the Court of Appeal, who gave its judgment confirming the conviction and sentence on 31 May 2017.<sup>44</sup> On 20 July 2017, the Swedish Supreme Court denied the accused leave to appeal.

### 2. Specific offences

In this case, the prosecutor requested the accused be sentenced for:

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<sup>38</sup> *ibid* Ch 35, s 1.1.

<sup>39</sup> *ibid* Ch 21, s 1.

<sup>40</sup> *ibid* Ch 43 s. 5.2.

<sup>41</sup> *Sakhanb judgment* (n 1).

<sup>42</sup> The Swedish Penal Code (1962: 700), as worded prior to 1 July 2014 (Penal Code); see also *Sakhanb judgment* (n 1) 2. The version of the Penal Code which was relied on by the District Court, namely the version in force prior to 1 July 2014, was not able to be located online. The current version of the Penal Code is available [here](#), but note that significant changes were made to the relevant sections after 1 July 2014.

<sup>43</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (collectively, Geneva Conventions), [art 3](#).

<sup>44</sup> *Sakhanb COA judgment* (n 1) 1.

- (1) Crimes against international law (gross crimes) pursuant to:
  - (a) Chapter 22, Sections 6.1 and 6.2 of the Penal Code, as it existed prior to 1 July 2014; and
  - (b) Common Article 3 of the Geneva Conventions;<sup>45</sup> and
- (2) Murder under Chapter 3, Section 1 of the Penal Code.<sup>46</sup>

Chapter 22, Section 6 of the Penal Code provides that a person may be convicted if they have committed ‘[...] a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts’.<sup>47</sup> Serious violations include, for example the use of a weapon prohibited by international law and attacks on civilians or persons who are injured or disabled. Although the sentence prescribed for this offence is four years’ imprisonment, the provision also provides that, if the crime is ‘serious’, the person can be imprisoned for a maximum of eighteen years or life.<sup>48</sup> In considering whether a crime is serious, regard may be had to factors such as the number of people killed, whether it was committed through a large number of separate acts or the extent of any damage or property loss as a result of the crime.<sup>49</sup>

The Prosecutor contended that the accused’s actions occurred in the context of an ongoing non-international armed conflict (NIAC) involving the state of Syria on one side and a number of armed groups on the other.<sup>50</sup> Common Article 3 of the Geneva Conventions and Article 4 of the 1977 Additional Protocol II (AP II)<sup>51</sup> contain provisions which relate to the protection of victims in NIACs. Both of these conventions extend protection to persons who take no active part in hostilities, whether because they are civilians or combatants who have ceased to participate in hostilities because they were captured or detained. Both Common Article 3 and Article 4 of AP II require protected persons to be treated humanely, and explicitly prohibit a range of actions, including:

- (a) violence to life and person, in particular murder, mutilation, cruel treatment and torture;

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<sup>45</sup> Geneva Conventions (n 43) [art 3](#).

<sup>46</sup> *Sakbanh judgment* (n 1) 7.

<sup>47</sup> Penal Code (n 42) Ch 22 s 6; *Sakbanh judgment* (n 1) 15.

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> *Sakbanh judgment* (n 1) 7.

<sup>51</sup> Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II), [art 4](#).

- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment; and
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>52</sup>

### 3. Legal Issues

It was the Prosecutor's case that the accused acted together and in agreement/consultation with the other perpetrators to carry out a summary execution of the victims. This execution did not constitute a procedure issued by a legitimate court, or a procedure that met fair trial requirements under international humanitarian law (IHL).<sup>53</sup>

Conversely, the accused denied his criminal responsibility in regard to this act. Instead, he claimed that a fair trial was conducted the day prior to the execution, where the soldiers had been sentenced to death.<sup>54</sup>

In reaching its verdict, the District Court was therefore required to consider four issues:

- (1) Was there a NIAC occurring in Syria at the relevant time?
- (2) Did the accused execute captured soldiers in the manner alleged by the Prosecutor?
- (3) Was the execution preceded by a fair trial conducted by a legitimate court? As part of this, the District Court was necessarily required to make a legal assessment of the conditions under which a non-State actor may establish courts.
- (4) What was the correct classification of the crime?

These four issues are dealt with in turn below.

#### a) Determination of Issue One – Was there a NIAC?

In determining this issue, the District Court had regard to a variety of written and oral evidence about the state of affairs in Syria in May 2012.<sup>55</sup> This included reports on the extensive armed

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<sup>52</sup> Geneva Conventions (n 43) [art 3](#); AP II (n 51) [art 4](#).

<sup>53</sup> *Sakbanh judgment* (n 1) 7-8.

<sup>54</sup> *ibid* 8-9.

<sup>55</sup> *ibid* 9-10 and 18, [12]-[13].

violence and the intensity of the conflict prepared by international organisations,<sup>56</sup> and oral evidence from expert witness ‘M’.<sup>57</sup>

However, this issue was not disputed by the accused. On the basis of the evidence presented, the District Court therefore concluded that, at the time of the relevant events in May 2012, there was a NIAC in Syria. This finding had the effect that all forces who participated in the conflict were subject to IHL.<sup>58</sup>

**b) Determination of Issue Two – Did the accused execute the captured soldiers?**

In light of its finding that there was a NIAC at the time in Syria, the District Court was then required to consider whether, during this NIAC, the accused executed the seven soldiers in the manner alleged by the prosecution.<sup>59</sup>

This issue was determined on the basis of DDE (being four films obtained from YouTube showing various parts of the aftermath of the attack on Delbiya, including the execution and disposal of bodies), admissions made by the accused and other statements.<sup>60</sup> A detailed consideration of the evidence is contained below.

Ultimately, having regard to the evidence presented, the District Court found that in the:

Idlib Province in Syria, together and in agreement/consultation with other perpetrators, at the time and location alleged by the prosecutor, [the accused] took the life of seven unidentified persons from the Syrian state’s armed forces, who had been captured and were thus put out of action.<sup>61</sup>

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<sup>56</sup> *ibid* 18, [12].

<sup>57</sup> *ibid* 9-10.

<sup>58</sup> *ibid* 18-19, [13].

<sup>59</sup> *ibid* 19, [14].

<sup>60</sup> *Sakhanh judgment* (n 1) 22-23, [24]. Note that the District Court does not elaborate further on who made the ‘other statements’ or what their content is.

<sup>61</sup> *ibid*.

**c) Determination of Issue Three – Was the execution preceded by a fair trial conducted by a legitimate court?**

As a result of reaching the conclusion that the accused had conducted the execution of the Syrian soldiers in the manner alleged by the prosecution, the District Court was required to consider the accused's counterargument that his actions were not a criminal offence. This claim was premised on the basis that, under orders, the accused had carried out a death sentence issued by a legitimate court, following a procedure that complied with the essential requirements for a fair trial in accordance with IHL.<sup>62</sup>

*i. Establishment of courts and fair trial*

The District Court first examined whether it was possible for non-State actors to establish courts and, if so, what were the requirements for a fair legal process. It is beyond the scope of this case study to consider this point in detail, as no DDE was relied upon in reaching the findings that were made.

In summary however, the District Court held that, in the context of a NIAC, a non-State actor could establish its own courts for the purposes of maintaining discipline in its armed units and maintaining law and order in a given territory that the actor controls.<sup>63</sup> The District Court considered three elements were required for a non-State actor to legitimately establish such a court. First, the court must be staffed by personnel appointed in a regulated manner as judges or civil servants in the justice system before the outbreak of the conflict. Second, the court must apply the law in effect before the start of the NIAC, or law which does not deviate significantly (in a more stringent direction) from the legislation that applied before the conflict. Third, the court must be independent, impartial and able to meet the essential requirements for a fair trial.<sup>64</sup>

*ii. Validity of the accused's claim he executed a death sentence issued by a legitimate court following a fair trial*

The District Court then considered the accused's claim that he was ordered to carry out a death penalty imposed by a legitimate court, following a procedure that met the requirements for a fair trial in accordance with IHL.

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<sup>62</sup> *ibid* 23, [25].

<sup>63</sup> *ibid* 26-27, [31].

<sup>64</sup> *ibid*.

There were a number of evidentiary facts that were relevant to the District Court's determination of this issue, including:

- (a) whether the SCG was an Islamist unit with a close association with the FSA;
- (b) whether the SCG had control over the territory and populations (a prerequisite for establishing courts);
- (c) whether the proceedings otherwise met the legal requirements for a court established by a non-State actor;
- (d) whether the timeframe between the attack and the execution allowed for a fair trial to be conducted; and
- (e) whether the motivation for the execution of the soldiers was actually revenge.<sup>65</sup>

Again, the District Court had regard to a wide variety of sources when investigating these issues, including a number of films,<sup>66</sup> reports from international organisations,<sup>67</sup> the accused's statements to the police,<sup>68</sup> posts and photos on SCG Facebook accounts,<sup>69</sup> and the testimony of expert witnesses.<sup>70</sup> The DDE evidence that was presented is considered further below.

The District Court's investigation of the evidence led it to conclude that no trial whatsoever had taken place. The preconditions did not exist for the SCG to have established a court that met the requirements of being independent and impartial and conducting a fair trial in accordance with IHL.<sup>71</sup> The Prosecutor's charge was found to be proven. The act performed by the accused was therefore found to be manifestly unlawful and he could not escape criminal responsibility.<sup>72</sup>

#### **d) Determination of Issue Four – How should the crimes be classified?**

The final issue for the District Court to determine was how to classify the crime which had been committed by the accused.<sup>73</sup> The District Court considered it was clear there was a nexus between the prosecuted acts and the armed conflict for three reasons. First, the accused's acts were carried

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<sup>65</sup> *ibid* 30-39, [38]-[63].

<sup>66</sup> *ibid* 16-18, [17]-[24].

<sup>67</sup> *ibid* 14-15 [10]-[12].

<sup>68</sup> *ibid* 4, 14.

<sup>69</sup> *ibid* 22 [41]-[45].

<sup>70</sup> *ibid* 10.

<sup>71</sup> *ibid* 39-40, [64].

<sup>72</sup> *ibid* 40, [66].

<sup>73</sup> *ibid* 40, [67].



out in the context of a NIAC in Syria, which the District Court considered to have played a decisive role in the accused's ability and decision to perform the act. Second, the victims were captured by Syrian soldiers who belonged to the opposing group involved in the NIAC. Finally, the accused performed the acts as a member of the SCG, and the actions served a specific purpose.<sup>74</sup>

The acts of the accused in executing seven people who were 'hors de combat' was considered to be a serious violation of the rules of IHL, particularly Common Article 3 of the Geneva Conventions. Therefore, the accused's actions were a crime in contravention of international law under Chapter 22, Section 6(1) of the Penal Code.<sup>75</sup> The offence was elevated to a 'gross' offence because 'many people were executed in particularly cruel circumstances, where the victims, who at the time had extensive injuries, several of them after being mistreated, completely lacked the opportunity to defend themselves and obviously understood that they were to be killed.'<sup>76</sup>

#### **4. Outcome of the District Court proceedings**

The District Court ultimately found that the accused had committed very serious crimes with such a high penal value that the only appropriate punishment was life imprisonment.<sup>77</sup> In addition and having regard to the serious nature of the crime, the District Court found the accused should be expelled from Sweden with a ban on returning.<sup>78</sup>

#### **5. Appeal to the Court of Appeal**

The accused appealed to the Court of Appeal, seeking to dismiss the action and set aside the decision on expulsion.<sup>79</sup> During the conduct of the appeal, additional hearings were held at the accused's request, but the Court of Appeal did not explicitly rely on any of the additional information provided by the accused in reaching its decision.<sup>80</sup>

The Court of Appeal accepted the assessment of the District Court that in May 2012, there was a NIAC in Syria and, therefore, that IHL was applicable.<sup>81</sup>

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<sup>74</sup> *ibid.*

<sup>75</sup> *ibid* 40-41, [68].

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid* 42, [73]-[74].

<sup>78</sup> *ibid* 42, [72].

<sup>79</sup> *Sakhanb COA judgment* (n 1) 2.

<sup>80</sup> *ibid* 2.

<sup>81</sup> *ibid* 2-3.

The Court of Appeal also considered it was clear that the accused had intentionally taken the lives of seven unidentified person from the Syrian state forces, who had been captured and were put out of action.<sup>82</sup>

The Court of Appeal therefore considered whether the accused should be convicted of a crime, based on the contention that the accused believed he participated in the carrying out of a legitimate death sentence; and thus did not possess the requisite *mens rea* to participate in extrajudicial killings.<sup>83</sup> In establishing the accused's criminal intent, the Court of Appeal considered the evidence presented to the District Court, including the DDE evidence such as the films of the executions.<sup>84</sup> The Court of Appeal's views on the evidence will be considered further below.

In conclusion, the Court of Appeal found that the accused's criminal intent could be established. The Court thereby determined that the accused was responsible for the crimes as classified by the District Court.<sup>85</sup> In light of these findings, the Court of Appeal confirmed the District Court's judgment in respect of sanctions and the expulsion of the accused. There were no mitigating circumstances.<sup>86</sup>

### III. DDE

As has been illustrated above, the District Court had regard to a range of different types of evidence in reaching its decision in relation to 'the criminal act' of the accused,<sup>87</sup> including oral evidence of expert witnesses, written evidence and DDE.<sup>88</sup> Some of the DDE were presented as 'screenshots', which is the copying or capture of a displayed screen. For example, this was done in regard to films secured from YouTube and a film from the accused's intrusion into the Syrian Embassy in Milan in October 2012.<sup>89</sup> However, most of the DDE in this case was obtained from the numerous Facebook profiles and YouTube accounts held by the SCG, such as comments, posts, photographs and videos.<sup>90</sup>

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<sup>82</sup> *ibid* 2.

<sup>83</sup> *ibid* 3.

<sup>84</sup> *ibid* 3-6.

<sup>85</sup> *ibid* 7.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid* 10.

<sup>88</sup> For the full list of evidence considered by the District Court, see *Sakhanb judgment* (n 1) 10.

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* 20, [17].

### **A. What did the DDE Prove?**

DDE played an important role in the District Court's consideration of Issues Two and Three, which are considered further below.

#### **1. DDE relied upon to determine Issue Two - Did the accused execute the captured soldiers?**

The accused acceded to the prosecutor's allegation that he participated in the execution of the soldiers, on the date and time alleged by the prosecutor, by shooting one the soldiers. However, this acknowledgment was given by the accused with the caveat that he carried out these actions as a member of SCG, which was party to the armed conflict in Syria at the time of the events in question.<sup>91</sup>

However, the accused denied that the unidentified victims had extensive injuries from mistreatment at the time they were executed. The accused also denied that he was in the location where the corpses were handled after the execution.

The following table identifies the DDE that was relied on by the District Court to assess the validity of the accused's denials.

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<sup>91</sup> *ibid* 19, [15].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court	Probative Value – Court of Appeal
<p><b>Propaganda film</b></p> <p>Film showing the line-up of captured soldiers, along with the armed groups who performed the attack in Delbiya<sup>92</sup></p>	<p>The judgment identifies that the films were obtained from YouTube.<sup>93</sup></p> <p>The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The content of the propaganda film was analysed by the National Board of Forensic Medicine (NBFM).<sup>95</sup></p> <p>The investigations by the NBFM were considered by the District Court to determine whether the accused had conducted the crime alleged by the Prosecutor although the District Court did not explicitly identify what the propaganda film was used for. However, given the content of the film, it may be inferred it was used to confirm the number and identity of the executioners and the victims, as well</p>	<p>The Court of Appeal considered each of the films to determine whether the accused should have been convicted of a crime (in particular, whether he was carrying out a death sentence issued by a legitimate court following a process that met the requirements of IHL).</p> <p>The Court of Appeal observed that the propaganda film ‘gives the clear impression that the soldiers are being displayed for propaganda purposes’, because:</p> <ul style="list-style-type: none"> <li>• Both the captured soldiers and members of the armed groups</li> </ul>

<sup>92</sup> For a detailed description of the content of this film, see *ibid* 21, [18].

<sup>93</sup> *ibid* 20, [17].

<sup>95</sup> *ibid* 21, [18]. Note that this film may also have been reviewed by the Swedish National Forensic Centre (as the other films were), however this is not made clear in the judgment.

	speeches in the films. <sup>94</sup>		as the extent of the victims' injuries prior to execution (to corroborate the evidence on these points in Films 0, 1 and 2). <sup>96</sup>  The District Court also noted that 'the evidential value of the films is very high' and 'the crime for which [the accused] is charged has been filmed and presented to the District Court in the form of evidence'. <sup>97</sup>	who carried out the attack were visible;  <ul style="list-style-type: none"> <li>• The members of the armed groups posed with their weapons; and</li> <li>• a speech is given pertaining to the armed conflict.<sup>98</sup></li> </ul>
<b>Film 1</b>  Film showing the execution of the captured soldiers <sup>99</sup>	The judgment identifies that the films were obtained from YouTube. <sup>100</sup>	There was nothing in the judgment to suggest that the DDE was challenged.	The content of Film 1 was analysed by both the Swedish National Forensic Centre (NFC) and the NBFM.	The Court of Appeal considered that the films of the executions showed that: <ul style="list-style-type: none"> <li>• Several soldiers had visible injuries from mistreatment on their backs;</li> </ul>

<sup>94</sup> *Sakbanh judgment* (n 1) 10. Note that 'PM' is not further defined in the judgment but is most likely to be a shorthand reference to a 'pro memoria' (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the relevant word also appears as 'screenshots'.

<sup>96</sup> *ibid* 21-22, [18]-[22].

<sup>97</sup> *ibid* 21-22, [20].

<sup>98</sup> *Sakbanh COA judgment* (n 1) 4.

<sup>99</sup> For a detailed description of the content of this film, see *ibid* 20, [18].

<sup>100</sup> *ibid* 20, [17].

	<p>The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films.<sup>101</sup></p>		<p>These investigations were considered by the District Court to determine whether the accused had conducted the crime alleged by the Prosecutor and, explicitly, to establish:</p> <ul style="list-style-type: none"> <li>• The ‘relevant person’ in Film 1 was the accused;</li> <li>• The film had not been manipulated by sound or objects in the film being changed around the person in question;</li> <li>• There was audio and visual evidence of the accused firing at least six shots (also corroborated by the ‘Italian film’ (see below));</li> <li>• The extent of the injuries suffered by the victims prior to execution; and</li> </ul>	<ul style="list-style-type: none"> <li>• The executions were preceded by a speech about revenge;</li> <li>• After the executions, men who had participated raised their weapons in a victory gesture; and</li> <li>• 70-80 shots were fired by 9 different shooters at the executions.<sup>104</sup></li> </ul>
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<sup>101</sup> *ibid* 10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the relevant word also appears as ‘screenshots’.

<sup>104</sup> *Sakhanb COA judgment* (n 1) 4.

			<ul style="list-style-type: none"> <li>The number of bodies that were thrown into the pit were estimated to be seven (also corroborated by Films 0 and 2, and the ‘Italian film’).<sup>102</sup></li> </ul> <p>The District Court also noted that ‘the evidential value of the films is very high’ and ‘the crime for which [the accused] is charged has been filmed and presented to the District Court in the form of evidence’.<sup>103</sup></p>	
<p><b>Films 0 and 2</b></p> <p>Films showing the handling of the bodies after the execution<sup>105</sup></p>	<p>The judgment identifies that the films were obtained from YouTube.<sup>106</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The contents of Films 0 and 2 were analysed by both the NFC and NBFM.</p> <p>These investigations were considered by the District Court to determine whether the accused had conducted</p>	<p>The Court of Appeal considered that the films showed:</p> <ul style="list-style-type: none"> <li>the subsequent handling of the bodies was very offensive;</li> <li>a person who resembled the accused was present during the handling of the bodies; and</li> </ul>

<sup>102</sup> *Sakbanb judgment* (n 1) 21, [19].

<sup>103</sup> *ibid* 22, [20].

<sup>105</sup> For a detailed description of the content of this film, see *ibid* 20-21, [18].

<sup>106</sup> *ibid* 20, [17].

	<p>The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films.<sup>107</sup></p>		<p>the crime alleged by the Prosecutor and, explicitly, to establish:</p> <ul style="list-style-type: none"> <li>• The number of bodies that were thrown into the pit were estimated to be seven (also corroborated by Film 1 and the ‘Italian film);</li> <li>• The accused was present when the dead bodies were handled after the execution, because a person filmed from behind in Film 0 had the same appearance, jacket and weapon as the accused in Film 1.<sup>108</sup></li> </ul> <p>The District Court also noted that ‘the evidential value of the films is very high’ and ‘the crime for which [the accused] is charged has been</p>	<ul style="list-style-type: none"> <li>• statements were made in connection with the armed conflict and revenge.<sup>110</sup></li> </ul>
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<sup>107</sup> *ibid*10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the relevant word also appears as ‘screenshots’.

<sup>108</sup> *ibid* 21-22, [19]-[21].

<sup>110</sup> *Sakhanb COA judgment* (n 1) 4.



			filmed and presented to the District Court in the form of evidence'. <sup>109</sup>	
<b>'Italian Film'</b> <sup>111</sup>  Film of the execution from another angle	There is no information in the judgment as to when and how this DDE was obtained.	There was nothing in the judgment to suggest that the DDE was challenged.	This film was considered by the District Court to determine whether the accused had conducted the crime alleged by the Prosecutor and, explicitly, to establish: <ul style="list-style-type: none"> <li>• whether there was audio and visual evidence of the accused firing at least six shots (also corroborated by Film 1); and</li> <li>• the number of bodies that were thrown into the pit were estimated to be seven (also corroborated by Films 1, 0 and 2).</li> </ul> The District Court also noted that 'the evidential value of the films is	The Court of Appeal considered that the films of the executions showed that: <ul style="list-style-type: none"> <li>• Several soldiers had visible injuries from mistreatment on their backs;</li> <li>• The executions were preceded by a speech about revenge;</li> <li>• After the executions, men who had participated raised their weapons in a victory gesture; and</li> <li>• 70-80 shots were fired by nine different shooters at the executions.<sup>113</sup></li> </ul>

<sup>109</sup> *ibid* 21-22, [20].

<sup>111</sup> *ibid* 21, [19]. Note that this is the description of the film given by the District Court in its judgment – it did not elaborate on the source, content or videographer of the film.

<sup>113</sup> *Sakhanb COA judgment* (n 1) 4.

			very high' and 'the crime for which [the accused] is charged has been filmed and presented to the District Court in the form of evidence'. <sup>112</sup>	
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Ultimately, the District Court found that the reports of the NFC and NBFM acted in support of the film evidence in proving that the accused engaged in the conduct alleged by the prosecutor.<sup>114</sup> In analysing the content of the films, the District Court was able to reject the accused's statement by determining that the accused was present when the dead bodies were handled after the execution and victims had extensive injuries after being exposed to mistreatment since they were captured.<sup>115</sup>

In analysing the film evidence, the Court of Appeal adopted the views of the District Court, finding it to be indicative of a single context, in line with the NBFM's conclusion.<sup>116</sup> In particular, the Court of Appeal adopted the District Court's assessment that several of the executed soldiers had been mistreated prior to their executions and the accused had participated in the subsequent handling of the bodies.<sup>117</sup>

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<sup>112</sup> *ibid* 21-22, [20].

<sup>114</sup> *Sakbanb judgment* (n 1) 21-22 [20].

<sup>115</sup> *ibid* 22-23, [24].

<sup>116</sup> *Sakbanb COA judgment* (n 1) 3.

<sup>117</sup> *ibid*.

## 2. DDE relied upon to determine Issue Three

Having regard to the principles of criminal law (both international and domestic), the District Court determined that they were required to consider all evidence in order to assess what was proven in the case.<sup>118</sup> In particular, it was required to consider evidence that helped to reveal what occurred in respect of each relevant circumstance. The District Court stated ‘[W]hen it comes to assessing what is proven in the case, it is up to the court to consider all investigations. This means specifically, in respect of each relevant circumstance, to consider evidence that helps to reveal what has occurred’.<sup>119</sup>

In relation to Issue Three, this meant the District Court needed to investigate the events that preceded the execution and how this affected the accused’s actions. Most relevantly, DDE was used by the District Court to assist with the determination of three evidentiary aspects that would help them to decide whether a death sentence was issued by a legitimate court following a fair trial.

### a) Was the SCG an Islamist unit without any close association with the FSA?

DDE was firstly used by the District Court to establish whether the SCG was an Islamist unit without any close association with the FSA. Although the District Court did not explicitly identify how this issue impacted whether a fair trial had been conducted, it can be inferred that the determination of this issue was important because the FSA was more likely to have established the preconditions for a legitimate court. By contrast, if the SCG was not associated with the FSA, it would be more likely that the proceedings were extra judicial proceedings by an ad hoc militant rebel group.

The following table identifies the DDE that was relied on by the District Court to assess this issue.

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<sup>118</sup> *Sakbanh judgment* (n 1) 28-29, [35]-[37].

<sup>119</sup> *ibid* 29, [37].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – District Court	Probative Value – Court of Appeal
<p><b>Facebook posts from 7 May 2012</b><sup>120</sup></p>	<p>The judgment does not explicitly state where or how the DDE was obtained. However, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook accounts, posts and comments in</p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>In analysing this evidence, the District Court considered it:</p> <ul style="list-style-type: none"> <li>supported information that the SCG did not use the FSA’s banner, as no FSA flag was observable in any of the relevant films;</li> <li>showed contradictions between the FSA and the SCG’s beliefs regarding the content of the revolution; and</li> <li>illustrated the SCG did not act under or as part of the secularised FSA, but was instead an independent Islamist / Nationalist Armed Group.<sup>122</sup></li> </ul>	<p>The Court of Appeal did not address the DDE used to determine this issue.</p>

<sup>120</sup> ibid 30, [41]. Unfortunately, the District Court did not describe the author, nature or content of these Facebook posts in further detail.

<sup>122</sup> ibid 30-31, [41]-[45].

	relation to the SCG. <sup>121</sup>			
<b>Various films</b> <sup>123</sup>	The judgment identifies that the films were obtained from YouTube. <sup>124</sup> The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films. <sup>125</sup>	There was nothing in the judgment to suggest the DDE was challenged.	The District Court noted that the FSA flag could not be observed in any of these films. It therefore relied on this evidence to support its broader conclusion that the SCG was not closely associated to the FSA.	The Court of Appeal did not address the DDE used to determine this issue.

<sup>121</sup> ibid 10.

<sup>123</sup> ibid 31, [42]. The District Court only identifies these films as ‘the films in question’ – it may be inferred that they are referring to the films identified above, namely the propaganda film, Film 1, Film 0 and Film 2.

<sup>124</sup> ibid 20, [17].

<sup>125</sup> ibid 10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the word ‘screendumps’ also appears as ‘screenshots’.

<p><b>Photos of the SCG posted on Facebook by the accused.</b></p> <p>On 15 August 2012, the accused also commented on the photo stating ‘Together with my brothers on the journey and in the faith’.<sup>126</sup></p>	<p>The judgment does not explicitly state where or how the DDE was obtained. However, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook accounts, posts and comments in relation to the SCG.<sup>127</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court did not specifically comment on the value of this particular piece of evidence. However, the District Court did rely on it to support its broader conclusion that the SCG did not act under, or as part of, the secularised FSA, but was instead an independent Islamist / Nationalist Armed Group.<sup>128</sup></p>	<p>The Court of Appeal did not address the DDE used to determine this issue.</p>
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<sup>126</sup> ibid 31, [42].

<sup>127</sup> ibid 10.

<sup>128</sup> ibid 31, [45].

<p><b>Photo published on the SCG Facebook profile on 18 August 2012</b></p> <p>The photo is of various members of the SCG (including the accused) with the words ‘May Allah Protect You! You are the war lion.’<sup>129</sup></p>	<p>The judgment does not explicitly state where or how the DDE was obtained. However, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook accounts, posts and comments in relation to the SCG.<sup>130</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court did not specifically comment on the value of this particular piece of evidence. However, the District Court did rely on it to support its broader conclusion that the SCG did not act under, or as part of, the secularised FSA, but was instead an independent Islamist / Nationalist Armed Group.<sup>131</sup></p>	<p>The Court of Appeal did not address the DDE used to determine this issue.</p>
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<sup>129</sup> ibid 31, [43].

<sup>130</sup> ibid 10.

<sup>131</sup> ibid 31, [45].

<p><b>Images of the SCG posted on Facebook with posts containing Islamist propaganda from June to September 2012.</b></p> <p>The post included a statement ‘that a soldier in the Islamic State is worth ten soldiers in the other brigades [...] and that the Islamic State defends Greater Syria and its people’.<sup>132</sup></p> <p>Other members of the SCG also posted similar Facebook posts on their</p>	<p>The judgment does not explicitly state where or how the DDE was obtained.</p> <p>However, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook accounts, posts and comments in relation to the SCG.<sup>134</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court did not specifically comment on the value of this particular piece of evidence.</p> <p>However, the District Court did rely on it to support its broader conclusion that the SCG did not act under, or as part of, the secularised FSA, but was instead an independent Islamist / Nationalist Armed Group.<sup>135</sup></p>	<p>The Court of Appeal did not address the DDE used to determine this issue.</p>
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<sup>132</sup> ibid 31, [44].

<sup>134</sup> ibid 10.

<sup>135</sup> ibid 31, [45].



profiles and liked each other's posts. <sup>133</sup>				
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The District Court ultimately considered the evidence supported the Prosecutor's view that the SCG had no connection to the FSA.<sup>136</sup> The District Court's interpretation of the DDE evidence was supported by the testimony of 'expert witness L'. This expert testified that what was said in the films (see row 2 above) 'comprised of an islamist terminology with fairly general Sunni-islamist content, mixed with nationalist and revolutionary thinking, which later developed into a more islamist direction'.<sup>137</sup>

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<sup>133</sup> *ibid.*

<sup>136</sup> *ibid* 31, [45].

<sup>137</sup> *ibid* 31, [45].

**b) Timing of the attack and executions**

DDE was also relied on by the District Court to establish the timing of the attack on Delbiya and the subsequent executions of the Syrian soldiers who had been captured. If, as the Prosecutor alleged, there had been a brief timespan between the attack and the execution, this may preclude the possibility that the prisoners had been accorded due process as required by IHL, criminal law, and the principle of legality.

The following table identifies the DDE that was relied on by the District Court to assess this issue.

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value – District Court	Probative Value – Court of Appeal
<p><b>Comments made on the SCG Facebook account</b><sup>138</sup></p> <p>These comments were:</p> <p><i>06 May 2012 at 20:35 UTC</i>:<sup>139</sup></p> <p>‘In the name of God, the Merciful Statement by the Suleiman combat group, My brothers, please pray for the heroes of our division. They are currently</p>	<p>The judgment does not explicitly state where or how the DDE was obtained.</p> <p>However, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook</p>	<p>Although the accused did not directly challenge the authenticity of the DDE, he suggested its reliability for this purpose may be lower because there was a ‘natural delay in the posts made on Facebook or other digital media when</p>	<p>The District Court considered the timestamps and the content of these posts to determine when the attack that led to the capture of the Syrian soldiers took place.</p>	<p>In relation to this evidence, the Court of Appeal observed that the timing for the attack on Delbiya is ‘shown on the [SCG’s] Facebook page. The information in the entries about the attack are detailed and it is indisputable<sup>142</sup> that other parts of the content are correct. There is no reason to question the information in the entries about the time of the attack.’<sup>143</sup></p>

<sup>138</sup> *ibid* 36-37, [54]. Again, unfortunately, there is no further information in the District Court’s judgment about where the comments were posted or who were the authors of the comments.

<sup>139</sup> The District Court noted that all time markings on Facebook and YouTube were in UTC (Coordinated Universal Time), where the time zone in Syria was UTC +02:00 – see *ibid* 36, fn 24.

<sup>142</sup> Note that the word ‘indisputable’ appears in the unofficial English translation of this judgment prepared by Eurojust. However, a different translation instead uses the word ‘uncontested’.

<sup>143</sup> *Sakbanh COA judgment* (n 1) 3.

<p>carrying out an operation in their area in collaboration with the Ahrar Alshamal Sermin battalion. After the operation is complete, we will publish the operational details, and may God give us success’.</p> <p><i>05 May 2012 at 03:44 UTC:</i>  ‘In the name of God, the Merciful  Detailed statement on the operation of the Suleiman combat group in collaboration with the Ahrar Alshamal Sermin battalion, dated 5 May 2012, from 24:00-03:00 at</p>	<p>accounts, posts and comments in relation to the SCG.<sup>140</sup></p>	<p>the [SCG] provided information and images, which relied on a connection in the area to administrators who resided in Saudi Arabia, the UK or Turkey’.<sup>141</sup></p>		
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<sup>140</sup> ibid 10.

<sup>141</sup> ibid 14.

dawn (Quran). We would like to delight you with the news of the martyrdom of the hero and the jihadist [K.] from Hama, [H.] who is known as [A.], we ask God to receive our martyrs. Five injured members of the division's jihadists, [M.] from the town of Besh, [A.] from Hama, first assistant [Y.] from Kafer Nebode, [J.] from Harem, [A.] from Kafre Keyla, we hope God helps them to a speedy recovery. Nine live captured by Bashars Nusairi's leagues, we have also been able to take over the following weapons:

<p>We will publish full films from the entire operation later’.</p> <p><i>06 May 2012 at 22:34 UTC:</i></p> <p>‘Now we are publishing films about the martyr [K.] from the Suleiman combat group, who was killed during the offensive operation against the security forces and Nusiri Shabihas centres concentrated in Dilibia town, from 24:00-03:00 at dawn. The city is 700m from the Turkish-Syrian borders and this martyr is from Hama, [H.], Mercy to our martyrs and patience to their relatives, Long live Syrian, free and proud’.</p>				
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<p><b>The answer to a question on the SCG’s Facebook account on 7 May 2012 at 22:27 UTC</b></p> <p>The question asked about the date of the operation and the answer stated it ‘occurred 5/5/2012 and it lasted from 24:00 until 03:00 at dawn.’<sup>144</sup></p>	<p>The judgment does not explicitly state where or how the DDE was obtained.</p> <p>However, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook accounts, posts and comments in relation to the SCG.<sup>145</sup></p>	<p>Although the accused did not directly challenge the authenticity of the DDE, he suggested its reliability for this purpose may be lower because there was a ‘natural delay in the posts made on Facebook or other digital media when the [SCG] provided information and images, which relied on a</p>	<p>The District Court considered the content of this answer to determine when the attack that led to the capture of the Syrian soldiers took place.</p>	<p>In relation to this evidence, the Court of Appeal observed that the timing for the attack on Delbiya is ‘shown on the [SCG’s] Facebook page. The information in the entries about the attack are detailed and it is indisputable that other parts of the content are correct. There is no reason to question the information in the entries about the time of the attack.’<sup>147</sup></p>
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<sup>144</sup> *ibid* 37, [55].

<sup>145</sup> *ibid* 10.

<sup>147</sup> *Sakhanh COA judgment* (n 1) 3.

		connection in the area to administrators who resided in Saudi Arabia, the UK or Turkey'. <sup>146</sup>		
<p><b>Propaganda film</b></p> <p>The film was published on:</p> <ul style="list-style-type: none"> <li>• YouTube on 7 May 2012 at 11:04 UTC; and</li> <li>• Facebook page <i>Manifestazioni Siriande a Milano</i> at approximately 17:00 on 8 May 2012.<sup>148</sup></li> </ul>	<p>The judgment identifies that the films were obtained from YouTube.<sup>149</sup></p> <p>The judgment also identifies that the Prosecutor secured 'PMs and screendumps about films' from YouTube and</p>	<p>Although the accused did not directly challenge the authenticity of the DDE, he suggested its reliability for this purpose may be lower because there was a 'natural delay in the posts made on</p>	<p>The content of the film and the timing for its publication were used by the District Court to determine when the attack and execution took place.</p> <p>In analysing this evidence, the District Court considered:</p> <ul style="list-style-type: none"> <li>• The time of sunrise and sunset on 6 May 2012 (as obtained from Google),<sup>153</sup> being 05:36 and 19:23 respectively;</li> </ul>	<p>The Court of Appeal observed that the date of the execution was clear from this evidence.<sup>154</sup></p>

<sup>146</sup> *ibid* 14.

<sup>148</sup> *Sakhanb judgment* (n 1) 37, [58]-[59].

<sup>149</sup> *Ibid* 20, [17].

<sup>153</sup> *ibid*.

<sup>154</sup> *Sakhanb COA judgment* (n 1) 5, where the Court of Appeal notes that it shares the District Court's conclusion, 'primarily based on what the District Court points out in paragraphs 58-60'.



	<p>translations of the speeches in the films.<sup>150</sup></p> <p>As noted above, it may be inferred that the Prosecutor received assistance from authorities in the US in relation to accessing and translating the Facebook accounts, posts and comments in relation to the SCG.<sup>151</sup></p>	<p>Facebook or other digital media when the [SCG] provided information and images, which relied on a connection in the area to administrators who resided in Saudi Arabia, the UK or Turkey'.<sup>152</sup></p>	<ul style="list-style-type: none"> <li>• The length of shadows observable on the propaganda and execution films showed that the event occurred at sundown;</li> <li>• The time of publication of the film on YouTube, in view of the accused's statement that the execution took place in close proximity to the propaganda film;</li> <li>• That the circumstances supported the accused's statements during questioning regarding his movements immediately preceding and after the attack; and</li> <li>• Other evidentiary facts on the length of the time between the</li> </ul>	
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<sup>150</sup> ibid 10. Note that 'PM' is not further defined in the judgment but is most likely to be a shorthand reference to a 'pro memoria' (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the word 'screendumps' also appears as 'screenshots'.

<sup>151</sup> ibid.

<sup>152</sup> ibid 14.

			capture and the execution of the soldiers.	
<p><b>Film published on YouTube on 7 May 2012 at 19:10 UTC</b></p> <p>The film shows gunfire from the same source as the sound of the execution film.<sup>155</sup></p>	<p>The judgment identifies that the films were obtained from YouTube.<sup>156</sup></p> <p>The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films.<sup>157</sup></p>	<p>Although the accused did not directly challenge the authenticity of the DDE, he suggested its reliability for this purpose may be lower because there was a ‘natural delay in the posts made on Facebook or other digital media when the [SCG] provided</p>	<p>The film was used by the District Court to verify their findings regarding when the attack that led to the capture of the Syrian soldiers took place.</p>	<p>The Court of Appeal observed that the date of the execution was clear from this evidence.<sup>159</sup></p>

<sup>155</sup> *ibid* 37, [58].

<sup>156</sup> *ibid* 20, [17].

<sup>157</sup> *ibid* 10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the word ‘screendumps’ also appears as ‘screenshots’.

<sup>159</sup> *Sakbanh COA judgment* (n 1) 5, where the Court of Appeal notes that it shares the District Court’s conclusion, ‘primarily based on what the District Court points out in paragraphs 58-60’.

		information and images, which relied on a connection in the area to administrators who resided in Saudi Arabia, the UK or Turkey'. <sup>158</sup>		
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<sup>158</sup> Ibid 14.

### **c) Motivation for the execution**

Finally, DDE was used by the District Court to determine the motivation for the execution, for the purposes of establishing whether the execution was motivated by revenge rather the enforcement of a sentence issued by a legitimate court following a fair trial.<sup>160</sup>

The following table identifies the DDE that was relied on by the District Court to assess this issue.

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<sup>160</sup> *Sakbanh judgment* (n 1) 39, [63].

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value - District Court	Probative Value – Court of Appeal
<p><b>Propaganda film posted on YouTube</b></p>	<p>The judgment identifies that the films were obtained from YouTube.<sup>161</sup> The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films.<sup>162</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court considered this evidence supported the contention that the motivation for the execution of the captured soldiers was to demand revenge.<sup>163</sup></p>	<p>The Court of Appeal observed that the content of the films generally:</p> <ul style="list-style-type: none"> <li>• Did not indicate that the executions could be explained by being part of a legal process; and</li> <li>• Gave a clear impression the motive was to take revenge.<sup>164</sup></li> </ul> <p>In particular, the Court of Appeal observed the propaganda film gave the clear impression the soldiers were being displayed for propaganda purposes.<sup>165</sup></p>

<sup>161</sup> *ibid* 20, [17].

<sup>162</sup> *ibid* 10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the word ‘screendumps’ also appears as ‘screenshots’.

<sup>163</sup> *ibid* 39, [63].

<sup>164</sup> *Sakhanb COA judgment* (n 1) 4-5.

<sup>165</sup> *ibid* 4.

<p><b>Execution video on YouTube</b></p> <p>The video:</p> <ul style="list-style-type: none"> <li>• Contained a statement declaring: ‘We will be revenged, and it is a binding promise. And you will pay for our blood twice by your blood. Day by day, and blood vengeance is our requirement’; and</li> <li>• Showed members of the SCG raising their weapons as a victory gesture.<sup>166</sup></li> </ul>	<p>The judgment identifies that the films were obtained from YouTube.<sup>167</sup></p> <p>The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films.<sup>168</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court considered the evidence illustrated that the execution was not the result of a fair trial, since there were no statements about the names of the convicted persons or what they were charged with and convicted of, or even that it concerned the implementation of a death sentence issued by a court.<sup>169</sup></p> <p>This evidence therefore supported the contention that the motivation for the execution of the captured soldiers was to demand revenge.</p>	<p>The Court of Appeal observed that the content of the films generally:</p> <ul style="list-style-type: none"> <li>• Did not indicate that the executions could be explained by being part of a legal process; and</li> <li>• Gave a clear impression the motive was to take revenge.<sup>170</sup></li> </ul>
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<sup>166</sup> *Sakbanh judgment* (n 1) 39, [63].

<sup>167</sup> *ibid* 20, [17].

<sup>168</sup> *ibid* 10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, the word ‘screendumps’ also appears as ‘screenshots’.

<sup>169</sup> *ibid* 39, [63].

<sup>170</sup> *Sakbanh COA judgment* (n 1) 5.

<p><b>Video which was posted on YouTube</b><sup>171</sup></p> <p>The video showed the handling of the dead bodies</p>	<p>The judgment identifies that the films were obtained from YouTube.<sup>172</sup></p> <p>The judgment also identifies that the Prosecutor secured ‘PMs and screendumps about films’ from YouTube and translations of the speeches in the films.<sup>173</sup></p>	<p>There was nothing in the judgment to suggest that the DDE was challenged.</p>	<p>The District Court observed that, in the film:</p> <ul style="list-style-type: none"> <li>• The dead bodies were desecrated by being handled in an extremely offensive manner; and</li> <li>• Offensive statements were made.</li> </ul> <p>The District Court therefore considered this evidence supported the contention that the motivation for the execution of the captured soldiers was to demand revenge.<sup>174</sup></p>	<p>The Court of Appeal observed that the content of the films generally:</p> <ul style="list-style-type: none"> <li>• Did not indicate that the executions could be explained by being part of a legal process; and</li> <li>• Gave a clear impression the motive was to take revenge.<sup>175</sup></li> </ul> <p>In particular, the Court of Appeal observed this film showed the handling of the bodies was offensive and statements were made in connection with armed conflict and revenge.<sup>176</sup></p>
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<sup>171</sup> *Sakbanh judgment* (n 1) 39, [63].

<sup>172</sup> *ibid* 20, [17].

<sup>173</sup> *ibid* 10. Note that ‘PM’ is not further defined in the judgment but is most likely to be a shorthand reference to a ‘pro memoria’ (or a memorandum). This quote is extracted from the unofficial translation prepared by Eurojust. Depending on the translation service that is used, word ‘screendumps’ also appears as ‘screenshots’.

<sup>174</sup> *ibid*.

<sup>175</sup> *Sakbanh COA judgment* (n 1) 5.

<sup>176</sup> *ibid* 4-5.

Ultimately, the District Court found that this evidence contradicted the accused's statement that the execution was preceded by a fair trial by a legitimate court, resulting in a death sentence.<sup>177</sup> Instead, the evidence demonstrated the motivation for the execution was revenge.<sup>178</sup>

Again, the Court of Appeal agreed with the District Court's conclusion that the evidence provided a basis for the conclusion that this was a 'deliberate, extrajudicial killing'.<sup>179</sup>

## **B. What DDE discussion was there?**

### **1. The way the rule operates in the domestic system**

Rules of evidence relating to DDE were not discussed in this case, nor do they explicitly exist in Swedish domestic laws. However, the relatively open and free nature of the Swedish rules of evidence create an opportunity for digital evidence to be tendered and relied upon in criminal cases. This open system of evidentiary rules means certain assumptions can be made about the DDE that was discussed by the court in this case.

First, the use of the evidence at first instance stems from the court's discretion to include it. The rules of evidence under the CJP stipulate that any such documentary evidence can be introduced by either party, or the court itself, and must be admitted in a 'readable form'.<sup>180</sup> The court would have to rule on its relevance and exclude any evidence it deemed manifestly irrelevant or immaterial to the case. As the court holds the discretion to dismiss or allow the admission of evidence, reliance on DDE throughout this case illustrates that the DDE used was relevant, probative and authenticated. This general assumption is supported by the 'conscientious examination' principle included in the Swedish legal system.<sup>181</sup>

Second, expert evidence was used in this case as a means of interpreting, authenticating and contextualising the DDE. Rules regarding expert opinions are set out under Chapter 40 of CJP, specifying that any report made by the expert must be submitted to the court in writing and oral testimony will only occur if the court deems it suitable on the request of one or more of the parties.<sup>182</sup>

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<sup>177</sup> *Sakhanb judgment* (n 1) 39, [63].

<sup>178</sup> *ibid.*

<sup>179</sup> *Sakhanb COA judgment* (n 1) 4.

<sup>180</sup> CJP (n 22) Ch 35 s. 6; Christoffer Wong (n 19) 18.

<sup>181</sup> CJP (n 22) Ch 35 s. 7; Christoffer Wong (n 19) 27.

<sup>182</sup> CJP (n 22) Ch 40 s. 7-8.



Expert witnesses used in this case to provide information relating to the DDE included ‘expert witness L’, the expert opinion from the NFC and a forensic medicine opinion from the NBFM. It is clear from the District Court’s judgment that both the NFC and NBFM submitted a report with their expert opinion on the DDE, in compliance with the CJP, as many references are made to these reports.<sup>183</sup>

The NFC expert opinion was derived from a report dated 7 March 2016 and contained information regarding fingerprint examination and identification.<sup>184</sup> The date of the NBFM report is unknown, however it is discussed that the report contained an expert analysis of the content of the films.<sup>185</sup> Expert witness ‘L’ was consulted about what was contained in the films in regard to the Islamist terminology used. This expert ‘testified’ to the interpretation of Islamist content both in the films and Facebook posts.<sup>186</sup> However, the nature, whether oral, written or both, of this expert witness’ testimony is unknown as it is not further clarified in the judgment.

## 2. Whether the rule is reflected in other legal systems

Precedents or rules from other jurisdictions were not referred to in the judgments of either the District Court or the Court of Appeal.

There is no reported use of this case as precedent, either binding or persuasive, in other legal systems. As no Swedish statutes set out clear evidentiary rules relating to DDE, it subsequently cannot be reflected in the rules of other legal systems.

However, this case forms part of a group of other successful domestic prosecutions of international crimes within the Swedish criminal courts, stemming from the conflict in Syria and Iraq.<sup>187</sup>

## 3. How the rule was applied in the case in relation to DDE

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<sup>183</sup> *Sakbanh judgment* (n 1) 20-22, [18], [20], [22].

<sup>184</sup> *ibid* 10.

<sup>185</sup> *Sakbanh judgment* (n 1) 20-22, [18], [20], [22].

<sup>186</sup> *ibid* 31-32, [45].

<sup>187</sup> *Prosecutor v Mobamad Abdullah*, Södertörn District Court, B 11191-17, Judgment 25 September 2017; *Prosecutor v Mouhannad Droubi*, Södertörn District Court, B 2639-16, Judgment 11 May 2016 and Svea Court of Appeal, B 4770-16, Judgment 5 August 2016; *Prosecutor v Raed Thaer Abdulkareem*, Blekinge District Court, B 569-16, Judgment 6 December 2016. The original judgment from the Blekinge District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment (as Annex A) is available [here](#).

The main types of DDE that were adduced in these proceedings were videos taken by the SCG that were uploaded to YouTube and comments, posts and photos from various Facebook accounts linked to the SCG. The Chief Prosecutor, Mr Henrik Attorps, advised that ‘social media evidence proved crucial’ in this case.<sup>188</sup>

Notably, the films underwent an additional verification procedure where an expert opinion was sought from the NFC and a forensic medicine opinion was sought from the NBFM. These bodies analysed the content of the films and produced reports of their findings, which were also tendered to the Courts as evidence in the proceedings. In addition, an expert witness was consulted about the content of the films, particularly the Islamist terminology used. As was noted above, the District Court explicitly concluded the evidential value of the films was ‘very high’ and the content of the films, combined with the reports of the experts, provided ‘such support to [the accused’s] admission that it is proven that he has acted in the manner alleged by the prosecutor’.<sup>189</sup> Similar comments were not made by the District Court about the other items of DDE, which were also not clearly identified as having been put through similar verification procedures. It is therefore arguable that these additional verification measures elevated the probative value of the evidence to the court because they assisted to confirm the authenticity and reliability of the films.

Conversely, the Court of Appeal considered there was ‘no reason to question’ information in the SCG’s Facebook entries about the attack, because the entries were detailed and it was ‘indisputable’ other parts of the content were correct.<sup>190</sup> Unfortunately, the Court of Appeal did not elaborate on this finding and, as noted above, there is nothing in the judgments of either court to indicate the evidence retrieved from Facebook underwent any additional verification procedures by experts. However, when this evidence was discussed in the District Court judgment, other evidence was used to corroborate it, such as the propaganda film and statements of the accused. Similarly, the validity of the content of the Facebook entries was able to be confirmed by reference to the other evidence that had been presented in the proceedings (such as the number of soldiers captured, the place of the attack and the death of one of the SCG members). It is possible the Court of Appeal considered the corroborating evidence demonstrated the authenticity and reliability of the Facebook entries, rather than requiring additional verification procedures.

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<sup>188</sup> Asher-Schapiro (n 15).

<sup>189</sup> Emphasis added – see *Sakbanb judgment* (n 1) 21-22, [20].

<sup>190</sup> *Sakbanb COA judgment* (n 1) 5.

It is also notable that, where DDE was relied on by the Courts in determining an issue in these proceedings, it was the predominant evidence used. Any non-DDE (such as expert evidence and written documentary evidence) was used by the Courts to support the conclusions drawn from the DDE. For example, the District Court relied almost exclusively on DDE in the form of Facebook posts and films in reaching its conclusion on the timing of the attack on Delbiya and executions of the captured Syrian soldiers. However, the DDE was supported by non-DDE in the form of evidence about the time of sunrise and sunset on the relevant dates and statements from the accused.<sup>191</sup> Similarly, the Court often relied on multiple items of DDE as corroborating evidence leading to one conclusion. It is, therefore, evident that the Courts attributed significant value to the DDE (where it was available) in making their findings on the various issues in this case.

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<sup>191</sup> *Sakhanb judgment* (n 1) 36 - 38, [54]-[62].

# Prosecutor v. Haisam Omar Sakhanh – REFERENCE LIST

## CASES

- *Prosecutor v Haisam Omar Sakhanh*, Stockholm District Court, B 3787-16, Judgment 16 February 2017 (The original judgment from the Stockholm District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment is available [here](#))
- *Prosecutor v Haisam Omar Sakhanh*, Svea Court of Appeal, B 2259-17, Judgment 31 May 2017 (The original judgment from the Court of Appeal (in Swedish) is available [here](#). However, again, an unofficial English translation of this judgment is available [here](#))
- [\*Prosecutor v Mobamad Abdullah\*](#), Södertörn District Court, B 11191-17, Judgment 25 September 2017
- [\*Prosecutor v Moubannad Droubi\*](#), Södertörn District Court, B 2639-16, Judgment 11 May 2016 and Svea Court of Appeal, B 4770-16, Judgment 5 August 2016
- *Prosecutor v Raed Thaer Abdulkareem*, Blekinge District Court, B 569-16, Judgment 6 December 2016 (The original judgment from the Blekinge District Court (in Swedish) is available [here](#). However, an unofficial English translation of this judgment (as Annex A) is available [here](#))

## ARTICLES

- Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2003) 13 *Indiana International & Comparative Law Review* 405

## SWEDISH LEGISLATION

- Penal Code (*Brottsbalk*) (1962: 700) (The version of the Penal Code which was relied on by the District Court, namely the version in force prior to 1 July 2014, was not able to be located online. The current version of the Penal Code is available [here](#))
- [Public Access to Information and Secrecy Act](#) (*Offentlighets-och sekretesslag*) (2009: 400).
- [Code of Judicial Procedure](#) (*Rättegångsbalk*) (1942: 740)

## INTERNATIONAL SOURCES

- *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
- *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
- *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
- *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
- *Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609

## OTHER

- Avi Asher-Schapiro, 'Youtube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals' (*The Intercept*, 2 November 2017) <<https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>> accessed 22 October 2019
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- Christoffer Wong, 'Overview of Swedish Criminal Procedure' (Lund University Faculty of Law, 2012) 27 <[http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura\\_10/spl\\_85/pdfs/24.pdf](http://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_10/spl_85/pdfs/24.pdf)> accessed 20 October 2019

# R v. Zardad (United Kingdom, 2007)

Case No T2203 7676

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## I. Executive Summary

The case involved an Afghan national, Faryadi Sarwar Zardad (the Defendant), in the UK Central Criminal Court (Old Bailey)<sup>1</sup> and the UK Court of Appeal.<sup>2</sup> He was the Chief Commander of Hezb-I-Islami.<sup>3</sup> This was one of the two factions at war in Afghanistan, the other being Jamiat-Islami. The charges were hostage-taking, torture, and murder at the Sarobi checkpoint, in the Hezb-I-Islami's territory.<sup>4</sup> The Courts mostly relied on witness statements, corroborated by digitally derived evidence (DDE)<sup>5</sup> in the form of two videos (one from 2003 and one from 1996). The identification procedure thereby adopted consisted of witnesses being interrogated as to whether they recognised the Defendant in the videos. The case is noteworthy as it was the first time that the crime of torture was prosecuted in a different jurisdiction than where it had been committed,<sup>6</sup> as well as 'the first case of its kind under English law'.<sup>7</sup>

## II. Background

### A. DDE Legal Provisions/Evidentiary Norms

No rules of evidence or other legal provisions specifically relating to the DDE were discussed in the judgments. The legal framework of evidence in the UK legal system, including DDE, is considered further below.

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<sup>1</sup> R v Zardad [2004] WL 07343840.

<sup>2</sup> R v Zardad [2007] EWCA Crim 279.

<sup>3</sup> Zardad (n 1).

<sup>4</sup> ibid.

<sup>5</sup> ibid.

<sup>6</sup> James Sturcke, 'Afghan warlord could face retrial' *The Guardian* (London, 18 November 2004) <<https://www.theguardian.com/uk/2004/nov/18/afghanistan.world>> accessed 15 January 2020.

<sup>7</sup> Zardad (n 1) [4].

## B. Factual Background of the Case

The Defendant was the Chief Commander of the political and paramilitary organisation Hezb-I-Islami, which was one of the two factions in the Afghan civil war, the other being Jamiat-Islami.<sup>8</sup> In this capacity, he exercised military authority over the Sarobi checkpoint on the route to Kabul, which was in the territory controlled by Hezb-I-Islami.<sup>9</sup> He was in charge of about 1000 men, who terrorised, tortured, imprisoned, blackmailed, and killed civilians passing by that route.<sup>10</sup> He subsequently fled to the UK and applied for asylum to avoid persecution by the Taliban regime.<sup>11</sup> The Defendant was arrested in 2003 in the UK and found guilty for his criminal conduct in Afghanistan between 1992 and 1996 involving torture and hostage-taking.<sup>12</sup> He was sentenced to 20 years of imprisonment and deportation upon his release was recommended.<sup>13</sup>

## C. Legal System Background

The Defendant was prosecuted in the UK. The UK's legal system is a common law system, so that the court system is predominantly adversarial. This means that parties have the primary responsibility for investigating their own cases, finding and presenting facts and calling their own evidence.<sup>14</sup> In criminal trials, juries decide on the guilt or innocence of the accused. However, because the jury is constituted of laypeople, they can only be referred questions of fact, whilst questions of law are left for the judge to determine. Hence, the judge still plays an active role, controlling the way the case is conducted, deciding whether evidence is admissible and instructing the jury about the law on each of the charges made and what the prosecution must prove.<sup>15</sup>

The UK legal system is based on the fundamental principle of presumption of innocence – the defendant is innocent until proven otherwise/guilty. Therefore, the prosecution must adduce sufficient evidence to prove that the defendant is guilty 'beyond a reasonable doubt'.<sup>16</sup> Conversely, the defendant is only required to produce evidence at trial if they wish to assert an affirmative defence.<sup>17</sup>

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<sup>8</sup> *ibid.*

<sup>9</sup> *Zardad* (n 1).

<sup>10</sup> *ibid.*

<sup>11</sup> Andy Tighe, "No impunity" for warlords in UK' *BBC* (London, 18 July 2015) <[http://news.bbc.co.uk/2/hi/uk\\_news/4007065.stm](http://news.bbc.co.uk/2/hi/uk_news/4007065.stm)> accessed 15 January 2020.

<sup>12</sup> *Zardad* (n 2).

<sup>13</sup> *ibid.*

<sup>14</sup> Suzanne Rab, 'Legal Systems in UK (England and Wales): overview' *Thomson Reuters* (1 March 2018) <[https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 15 January 2020.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> Rab (n 14).

The right to appeal can be exercised upon the claimant obtaining leave from the Court of Appeal.<sup>18</sup> The appeal shall be allowed if the conviction is ‘unsafe’.<sup>19</sup>

The rules of evidence applicable in ordinary criminal proceedings are contained in Part 11 of the Criminal Justice Act 2003<sup>20</sup> and Parts VII and VIII of the Police and Criminal Evidence Act 1984.<sup>21</sup> These are silent on DDE, rather dealing generally with areas such as evidence of a defendant’s bad character,<sup>22</sup> hearsay evidence,<sup>23</sup> expert evidence,<sup>24</sup> and special measures directions (those directions providing for special measures that may be applied to evidence given by a witness).<sup>25</sup> However, the lack of express provisions in UK statutory law regarding DDE does not render the relevant evidence inadmissible. Instead, as a result of these ‘malleable rules of evidence’,<sup>26</sup> DDE can be considered as subject to the same rules as other types of evidence. Generally, the electronic form of the DDE does not amount to a bar to its admissibility: photographs,<sup>27</sup> tape recordings,<sup>28</sup> automated film recordings,<sup>29</sup> microfilm,<sup>30</sup> video recordings<sup>31</sup> have all been admitted by British courts. Moreover, two additional “prospective”<sup>32</sup> provisions have been recently included in the CJA 2003, referring to ‘evidence by video recording’.<sup>33</sup> Section 137 states that if the witness has already given an account of the facts and there is a video recording of it, the statements in the video have the same probative value of a direct witness statement. This will apply if the court is satisfied that the recollection of the facts in the video is better,<sup>34</sup> and that this evidence will not be prejudicial to the defendant.<sup>35</sup>

Evidence may be proved by calling witnesses, producing documents or producing ‘real evidence’.<sup>36</sup> DDE may be real evidence or hearsay, although the characterisation of DDE as one or the other can be difficult.<sup>37</sup> On the one hand, real DDE is that which ‘has been electronic in source, process and

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<sup>18</sup> [Criminal Appeals Act 1968 \(CAA 1968\)](#) s 1(2),18(1).

<sup>19</sup> *ibid* s 2.

<sup>20</sup> [Criminal Justice Act 2003 \(CJA 2003\)](#) Part 11.

<sup>21</sup> [Police and Criminal Evidence Act 1984 \(PCA 1984\)](#) Parts VII and VIII.

<sup>22</sup> CJA 2003, Part 11 ch 1.

<sup>23</sup> *ibid* Part 11 ch 2.

<sup>24</sup> *ibid* s 127.

<sup>25</sup> *ibid* Part 11 ch 3.

<sup>26</sup> Stephen Mason and Daniel Seng, ‘The Foundations of Evidence in Electronic Form’ in Stephen Mason and Daniel Seng (eds) *Electronic Evidence* (4th edn, Institute of Advanced Legal Studies, 2017) 36.

<sup>27</sup> *R v The United Kingdom Electronic Telegraph Company (Ltd)* [1862] 176 ER 33.

<sup>28</sup> *Garry Parker v Mason* [1940] 2 KB 590.

<sup>29</sup> *The Statute of Liberty Owners of Motorship Sapporo Maru v Owners of Steam Tanker Statute of Liberty* [1968] 1 WLR 739.

<sup>30</sup> *Barker v Wilson* [1980] 1 WLR 884.

<sup>31</sup> *R v Nikolovski* [1996] 111 CCC (3d) 403.

<sup>32</sup> Prospective provisions being those provisions which are not yet in force.

<sup>33</sup> CJA 2003, s 137-138.

<sup>34</sup> CJA 2003, s 137.

<sup>35</sup> CJA 2003, s 138.

<sup>36</sup> Health and Safety Executive, ‘Key rules of evidence’ (HSE)

<<http://www.hse.gov.uk/enforce/enforcementguide/court/rules-key.htm>> accessed 15 January 2020.

<sup>37</sup> Mason (n 25) 39-40.



result, with no human intervention in the process'.<sup>38</sup> Thus, real DDE may include tapes, films or photographs which actually record a relevant incident taking place.<sup>39</sup> On the other hand, hearsay DDE may be 'information recorded and processed by a computer, but which has been inputted either directly, or indirectly, by a person'.<sup>40</sup> In accordance with the statutory provisions, hearsay DDE is generally inadmissible unless it falls within one of the exceptions outlined in the legislation.<sup>41</sup> The general 'hearsay rule'<sup>42</sup> is that the person who submits the evidence must have 'personal knowledge of the matters'.<sup>43</sup>

All evidence, including DDE, must be relevant and admissible in order to be adduced in criminal proceedings.<sup>44</sup> Evidence is 'relevant' if it assists in proving or disproving a fact at issue in the proceedings.<sup>45</sup> All relevant evidence is potentially admissible if it relates to the facts at issue or the circumstances that make those facts probable or improbable and has been properly obtained.<sup>46</sup>

DDE has to be subjected to a process of authentication, as any other form of evidence.<sup>47</sup> Nevertheless, when it comes to DDE, this process is rather 'critical', 'challenging' and often expensive.<sup>48</sup> It is yet fundamental because of the 'latent assumptions' and 'hidden errors' which are inherent in DDE.<sup>49</sup> Authentication generally occurs according to the 'best evidence rule' which requires the possession of the original document.<sup>50</sup> For reasons of practicality, the physical copy might not be needed in the case of DDE as the digital file in itself will constitute the primary evidence.<sup>51</sup>

Most relevantly, the UK's Crown Prosecution Service has issued guidance indicating that video evidence can be admissible in criminal proceedings and may be used in a variety of ways (including as direct evidence of events captured on the video recording to show what was done by a particular offender).<sup>52</sup> However, the prosecution must be able to prove the authenticity of the video recording, including showing that the video footage is the original recording or an authentic copy and that it has

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<sup>38</sup> Health and Safety Executive, 'Collecting physical evidence – Preparing evidence for court' (*HSE*) <[http://www.hse.gov.uk/enforce/enforcementguide/investigation/physical-preparing.htm#P25\\_3785](http://www.hse.gov.uk/enforce/enforcementguide/investigation/physical-preparing.htm#P25_3785)> accessed 15 January 2020.

<sup>39</sup> The Law Commission, 'Criminal Law, Evidence in Criminal Proceedings: Hearsay and Related Topics' (Law Com CP No 138, 1995) 16.

<sup>40</sup> *HSE* (n 31).

<sup>41</sup> CJA 2003, s 114.

<sup>42</sup> *Mason* (n 25) 41.

<sup>43</sup> Criminal Evidence Act 1965 (CEA 1965) s 1(1)(a).

<sup>44</sup> *ibid* s 109.

<sup>45</sup> *HSE* (n 31) [3].

<sup>46</sup> *ibid*.

<sup>47</sup> *Mason* (n 25) 48,

<sup>48</sup> *ibid*.

<sup>49</sup> *ibid*.

<sup>50</sup> CJA 2003, s 133.

<sup>51</sup> *Mason* (n 25) 54.

<sup>52</sup> The Crown Prosecution Service, 'Exhibits' (*CPS*, 9 April 2018) <<https://www.cps.gov.uk/legal-guidance/exhibits>> accessed 15 January 2020.

not been tampered with.<sup>53</sup> Thus, the party who submits a recording (audio or video) bears the burden of proving its authenticity on the basis of its provenance and history.<sup>54</sup> This guidance is in line with the basic principles for submitting digital evidence outlined in the guidelines prepared by the Association of Chief Police Officers.<sup>55</sup> The purpose of these guidelines is to ensure that digital evidence recovered as part of investigations can be introduced as authentic and reliable in the court proceedings. To that end, it includes the following principles:

- No action should be taken to change data which may subsequently be relied on in court;
- Any person accessing original data must be competent to do so and give evidence explaining the relevance and implications of their actions;
- A record of all processes applied to the digital evidence should be kept, which must be repeatable to an independent third party; and
- The person in charge of the investigation has responsibility for ensuring the law and these principles are adhered to.<sup>56</sup>

## D. Legal Background of the case

### 1. Summary

The case was first brought before the Central Criminal Court (Old Bailey) on 24 March 2004.<sup>57</sup> The judgement was delivered by Mr Justice Treacy on 7 April 2004.<sup>58</sup> The Defendant was found guilty for the crime of torture under Section 134 of the Criminal Justice Act 1988,<sup>59</sup> and sentenced to twenty years of imprisonment and recommended deportation.<sup>60</sup> An application for leave to appeal was issued on 20 June 2006 against two aspects of the First Instance judgement: breaches in the identification procedure of the Defendant applied by the Prosecution and inconsistencies in a witness statement.<sup>61</sup> The leave to appeal was granted only for the latter ground.<sup>62</sup> Accordingly, this was heard by the Court of Appeal and subsequently rejected on 7 February 2007, as the inconsistencies in the witness statement did not have a significant effect on the jury's decision, given the wide range of admissible

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<sup>53</sup> CPS (n 47).

<sup>54</sup> *R v Robson & Harris* [1972] 1 WLR 651.

<sup>55</sup> Association of Chief Police Officers, *ACPO Good Practice Guide for Digital Evidence* (Version 5, 2012, APCO) <<http://library.college.police.uk/docs/acpo/digital-evidence-2012.pdf>> accessed 15 January 2020.

<sup>56</sup> *ibid* 6.

<sup>57</sup> *Zardad* (n 1).

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid*.

<sup>60</sup> *Zardad* (n 2) [1].

<sup>61</sup> *R v Zardad* [2006] EWCA Crim 1640.

<sup>62</sup> *ibid*.

evidence presented by the Prosecution and many other witnesses who testified against the Defendant during the trial.<sup>63</sup>

## 2. Specific Offences

The 1984 UN Convention Against Torture (CAT)<sup>64</sup> was transposed into the UK legal system through the Criminal Justice Act 1988 (CJA 1988). Section 134 of the CJA, essentially verbatim Article 1 of the CAT, provides that:

A public official or a person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

Accordingly, the Court noted that the conduct amounts to an international crime only if it is carried out by a public official since, if the perpetrator is a “layperson”, the case shall be dealt with at the internal level instead.<sup>65</sup> The conviction on indictment carries a punishment of imprisonment for life.<sup>66</sup>

The Court asserted jurisdiction on the basis of the applicability of universal jurisdiction to the prohibition of torture in light of its status as *jus cogens*.<sup>67</sup>

## 3. Legal Issues

Four legal issues were considered by the Central Criminal Court and the Court of Appeal in this case:

- Issue One – Was there a non-international armed conflict (‘NIAC’)?
- Issue Two – Was the Defendant a public official for the purposes of S 134 of CJA 1988?
- Issue Three – Was the evidence submitted under video identification procedure admissible?
- Issue Four – Was the Defendant eligible to obtain leave to appeal?

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<sup>63</sup> *Zardad* (n 2).

<sup>64</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984 entered into force on 26 June 1987) 1465 UNTS 85 (CAT).

<sup>65</sup> *Zardad* (n 1).

<sup>66</sup> CJA 1988 s 134(6).

<sup>67</sup> *The Prosecutor v Anto Furundzija* (Judgement) JL/PIU/372-E (10 December 1998).

### a) Issue One - Was there a NIAC?

At the time of the offence being committed, Afghanistan was plagued by civil war.<sup>68</sup> To reach this conclusion, the Judge relied on ‘various materials garnered from the Internet’.<sup>69</sup> These provided ‘histories of the recent past in Afghanistan’ and information on ‘the various developments which took place in the internal politics of the country’.<sup>70</sup> The nexus between the Defendant’s conduct and the armed conflict can be established from the fact that the Sarobi checkpoint was strategically placed as it was on the way to Kabul, which was in the Jamiat-Islami territory, whilst still being in the Hezb-I-Islamic territory.<sup>71</sup> However, since Article 1 of the CAT, and thus also Section 134 of the CJA, is applicable to any instance of torture whether in time of peace or of armed conflict, the Central Criminal Court noted how the requirement for such nexus was not determinative of his culpability.<sup>72</sup>

### b) Issue Two - Was the Defendant a public official for the purposes of Section 134 of CJA 1988?

Under Section 134 of the CJA 1988, for the conduct to amount to an international crime, the perpetrator shall be a public official or a person acting in an official capacity, as otherwise the case shall be dealt with at the internal level.<sup>73</sup> The Court interpreted Section 134 as referring to both *de jure* officials (‘public official’) and *de facto* ones (‘person acting in an official capacity’).<sup>74</sup> The former was excluded as there was ‘no clear evidence of an official appointment of the Defendant’ by the Prime Minister.<sup>75</sup> Instead, the Defendant was ‘leading military campaigns opposed to the government’.<sup>76</sup> On the contrary, *de facto* public officials were identified as ‘those people who are acting for an entity which has acquired *de facto* effective control over an area of a country and is exercising governmental or quasi-governmental functions in that area’.<sup>77</sup> Accordingly, the Court noted how Hezb-I-Islami had a ‘sufficient degree of organisation’, exercised ‘total control of the area in question’ and exercised a function that resembled that of a state authority.<sup>78</sup> The Judge left it for the jury to determine whether the Defendant was a *de facto* public official as it essentially amounted to a question of fact.<sup>79</sup>

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<sup>68</sup> *Zardad* (n 1) [11]

<sup>69</sup> *ibid* [10]

<sup>70</sup> *ibid* [10]

<sup>71</sup> *ibid* [11].

<sup>72</sup> *ibid* [26].

<sup>73</sup> *ibid*.

<sup>74</sup> *Zardad* (n 1) [38].

<sup>75</sup> *ibid* [30].

<sup>76</sup> *ibid* [30].

<sup>77</sup> *ibid* [38].

<sup>78</sup> *ibid* [33],[35].

<sup>79</sup> *ibid* [35],[37].

**c) Issue 3 - Was the evidence submitted under the video identification procedure admissible?**

The witnesses who identified the Defendant as the perpetrator also participated in the ‘identification procedure’.<sup>80</sup> This consisted of presenting some witnesses with images from the 2003 video featuring the Defendant, referred by the Court as Phase 1 and upon the witnesses identifying him, they would be shown stills from a 1996 video to corroborate their identification, referred to by the Court as Phase 2.<sup>81</sup> The two-phase procedure was adopted by the Prosecution ‘to enable their witnesses to identify whom they meant when they referred to the Defendant’.<sup>82</sup> The Prosecution also felt ‘that by proceeding straight to phase 2 there might be problems if those viewing the images recognised individuals other than the Defendant in the stills, thus reducing the pool of images for consideration’.<sup>83</sup>

The Defence challenged the admissibility of the videos on the basis of Section 78 of the Police and Criminal Evidence Act 1984, which provides that evidence whose ‘admission would have an adverse effect on the fairness of the proceedings’ may be refused by the court. The admissibility was challenged on five objections, based on these grounds:

- ‘Dissimilarity in appearance’;
- the Defendant ‘alone has a cup in his hand’;
- ‘two of the identifying witnesses recognised others known to them in the 1996 video stills’;
- the Defendant ‘alone appears in both’ the 2003 video and the 1996 one ‘so that he is thereby drawn to the viewer’s attention’;
- one of the witnesses ‘had previously seen a photograph’ of the Defendant ‘on the Internet and did not mention this to the Officer conducting the procedure’.<sup>84</sup>

These objections were made on the basis of “Practice of Identification of Persons by Public Officers”.<sup>85</sup> The document provides for guidance on the appropriate identification procedure under UK law. Namely, it requires that the suspect is presented with at least other eight people (objection 3), who ‘resemble the suspect in age, general appearance and position in life’ (objection 1).<sup>86</sup> It also states that the video shall ‘as far as possible, show the suspect and other people in the same positions

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<sup>80</sup> *ibid* [43].

<sup>81</sup> *ibid* [44].

<sup>82</sup> *ibid* [43].

<sup>83</sup> *ibid* [45].

<sup>84</sup> *Zardad* (n 1) [48].

<sup>85</sup> Home Office, [Annex A of Code D](#) of the Police and Criminal Evidence Act 1984 (Code D).

<sup>86</sup> *ibid* [2].

or carrying out the same sequence of movements' (objection 2).<sup>87</sup> Moreover, 'care must be taken not to direct' the witnesses' 'attention to any one individual image' (objection 4).<sup>88</sup> Objection 5 is concerned with the fact that witnesses should 'not see, or be reminded of, any photograph or description of the suspect'.<sup>89</sup> Nevertheless, the Court rejected each and all objections, as the selection of images was deemed 'fair' and facilitated identification 'as far as possible'.<sup>90</sup> Moreover, the fact that the witnesses had seen the Defendant before did not in itself preclude the applicability of the identification procedure, as the witness had informed the Court of this fact.<sup>91</sup> It was also noted how the assessment of the video by both the jury and the judge would further ensure objectivity and fairness in the process of identification of the Defendant.<sup>92</sup> Moreover, the circumstances of the case were not wholly dubious as the Defendant did admit to being the 'Commander Zardad who controlled the Sarobi checkpoint'.<sup>93</sup> The Court went as far as to argue that the two-step procedure actually amounted to a 'safeguard' for the Defendant as it allowed for checks and balances.<sup>94</sup> Hence, the Court refrained from excluding the evidence on the basis of Section 78 of the Police and Criminal Evidence Act 1984.<sup>95</sup>

#### **d) Issue 4 - Was the Defendant eligible to obtain leave to appeal?**

The Defendant submitted an 'application for leave against conviction' on two grounds: identification and witness statements.<sup>96</sup> As to the former, it was claimed that the two-steps procedure 'might have unfairly triggered recognition in the eyes of those witnesses'.<sup>97</sup> The Court of Appeal, although acknowledging the 'unique' nature of the procedure adopted in the case, rejected the claim as it did not meet the threshold of 'whether the risk of an unfair identification was such that the jury should not hear about it'.<sup>98</sup> Hence, the request for appeal was refused as the Court of Appeal 'should not interfere unless the judge acted out with the range of reasonable judgement'.<sup>99</sup>

The second ground concerned one of the witnesses (Stefan Smith) giving two different accounts on two different occasions: one where the Defendant was present and one where he was not.<sup>100</sup> As this

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<sup>87</sup> *ibid* [3].

<sup>88</sup> *ibid* [13].

<sup>89</sup> *ibid* [10].

<sup>90</sup> *Zardad* (n 1) [54].

<sup>91</sup> *ibid* [54].

<sup>92</sup> *ibid* [54].

<sup>93</sup> *ibid* [64].

<sup>94</sup> *Zardad* (n 1) [54].

<sup>95</sup> *ibid* [54].

<sup>96</sup> *Zardad* (n 51) [1].

<sup>97</sup> *ibid* [2].

<sup>98</sup> *ibid* [3].

<sup>99</sup> *ibid* [3].

<sup>100</sup> *ibid* [5].

amounted to an ‘important factual issue’, the Court of Appeal found that the Court at first instance wrongly placed the burden of establishing the inconsistency on the defence, allowing the submission of the second ground of appeal.<sup>101</sup>

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<sup>101</sup> *ibid* [7].

### III. DDE

#### A. What did the DDE Prove?

##### 1. Determination of Issue Two - Was the Defendant a public official for the purposes of S 134 of CJA 1988?

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
<p>1) <b>Witness statements and the exhibits thereto;</b><sup>102</sup></p> <p>2) <b>Various materials (historical documents) garnered from the Internet.</b><sup>103</sup></p>	<p>Submitted by both parties.</p>	<p>The evidence was not challenged but since there was a wide range of circumstantial evidential material from different authors, the Defence's position was that the existence of the Rabbani government in Kabul at the relevant time operated in effect as a trump card from their point of view. They argued that once there was a government in place, the Defendant's group was a rebel faction. Thus, the Defence argued that the Defendant could not come within the definition of public official.<sup>104</sup></p>	<p>The Court only considered whether the gathered documents were sufficient to show that the Defendant was, at the material time, a public official or a person acting in an official capacity for the purposes of Section 134 of the CJA 1988.<sup>105</sup></p> <p>The materials submitted (documents and witness statements) proved that Hezb-I-Islami had total control of the area in question. Moreover, the DDE proved that the Hezb-I-Islami faction exercised functions which would normally be carried out by a state authority.<sup>106</sup></p>

<sup>102</sup> *Zardad* (n 1) [10].

<sup>103</sup> *ibid* [10].

<sup>104</sup> *ibid* [15].

<sup>105</sup> *ibid* [30].

<sup>106</sup> *ibid* [35].



2. Determination of Issue Three – Was the evidence submitted under video identification procedure admissible?

Type of DDE	Where and how was the DDE obtained?	Was the DDE challenged?	Probative Value
1) Images from a video of Zardad and others taken in 2003, during Phase 1 of the procedure. <sup>107</sup>	The judgment does not specifically mention where it was obtained. <sup>108</sup>	The Defence did not challenge images presented in the phase 1 of the procedure.	The Court noted that the images represented a good and fair selection for identification purposes. In addition, those witnesses who could not make an identification were eliminated from the procedure, while those who managed to identify the Defendant or manifested their ability to recognize him moved onto phase 2. <sup>109</sup>
2) Compilation of stills derived from a video made in 1996, <sup>110</sup> which consists of 11 head and shoulders images of Afghan men, during Phase 2 of the procedure. <sup>111</sup>	Found in the Defendant's house on arrest in 2003. <sup>112</sup>	The Defence argued four procedural breaches regarding the still images in the phase 2 of the procedure, which are detailed below.	In general, the Court admitted the evidence for identification purposes and rejected the Defence arguments. It further reasoned that in the compilation of still images, the Defendant looked younger than in the 2003 video. In addition, his hair and beard were much longer than in the 2003 video. His appearance in the 1996 video much more closely resembled the man who was the commander at Sarobi in the period covered by the indictment. <sup>113</sup>

<sup>107</sup> Zardad (n 1) [44].

<sup>108</sup> ibid [44].

<sup>109</sup> ibid [46].

<sup>110</sup> ibid [44].

<sup>111</sup> ibid [46].

<sup>112</sup> ibid [44].

<sup>113</sup> ibid [46].

### 3. Determination of Issue Three - Procedural breaches argued by the Defence

Procedural breach	Reasoning by the Court
1) <b>Dissimilarity in appearance.</b> <sup>114</sup>	The Court reasoned that the 11 Afghan men shown in the Phase 2 video represented a fair selection. The Court did not find any breach and noted that in any event, the selection of images aimed at resembling the suspect ‘as far as possible’, which had been achieved in accordance with the provisions in Code D Annex A <sup>115</sup> . The Court left it to the jury to assess whether the selection was fair or not. <sup>116</sup>
2) <b>Zardad alone has a cup in his hand.</b> <sup>117</sup>	The Court emphasised that whilst it was true that the Defendant was the one holding a cup and the two other men held a microphone, nothing about the Defendant or those men in any way attracted particular attention to them. Once again, since the provisions of the Code D Annex A <sup>118</sup> require that the video shall ‘as far as possible, show the suspect and other people in the same positions or carrying out the same sequence of movements’, the Court noted that there was no basis for such a complaint in terms of “unfairness”. The matter was again left to the jury to consider, if needed be. <sup>119</sup>
3) <b>Two of the identifying witnesses recognized others known to them in the 1996 video stills.</b> <sup>120</sup>	Court reasoned that if these others had been excluded from the 11 images on Phase 2 of the procedure, there would still have been a sufficient number of individuals as required by procedure - i.e. the suspect and at least eight other persons in accordance with the provisions set in Code D Annex A. <sup>121</sup> As such, the Court noted that there had been no breach. It held that even if the number had fallen to eight including the suspect, the difference would not have been so significant to amount to unfairness in the circumstances. <sup>122</sup>

<sup>114</sup> *Zardad* (n 1) [54].

<sup>115</sup> Code D (n 85) [3].

<sup>116</sup> *Zardad* (n 1) [54].

<sup>117</sup> *ibid.*

<sup>118</sup> Code D (n 85) [3].

<sup>119</sup> *Zardad* (n 1) [54].

<sup>120</sup> *ibid.*

<sup>121</sup> Code D (n 85) [9].

<sup>122</sup> *Zardad* (n 1) [54].

<p>4) (a) <b>Zardad alone appears in both Phase 1 and Phase 2 material so that he is thereby drawn to the viewer's attention.</b><sup>123</sup></p>	<p>The Defence contended that by reason of the Defendant's appearance on both sets of images, attention had been drawn to him, since the provisions of the Code D Annex A<sup>125</sup> require that 'care must be taken not to direct' the witnesses' 'attention to any one individual image'. In this regard, the Court made the following remarks:</p>
<p>4) (b) <b>The witness Ghaffoor had previously seen a photograph of Zardad on the Internet and did not mention this to the Officer conducting the procedure.</b><sup>124</sup></p>	<p><b>Firstly</b>, the Court noted that given the seven-year gap between the two sets of images, and the changes in the Defendant's appearance over that period of time, the Court did not consider that it could fairly be said that nothing occurred to direct the witnesses' attention to the Defendant.<sup>126</sup></p>
	<p><b>Secondly</b>, the Court emphasised that the mere fact that a witness had previously seen an image of the suspect did not undermine the probative value of his statement.<sup>127</sup> The Court stressed that the provisions contained in Code D Annex A<sup>128</sup> provide guidance in such an event and does not prohibit the witness to participate in subsequent identification procedures. However, the Court maintained that it was ultimately left to the jury to assess the fairness of the identification procedure and to establish whether the witness testimony had been conditioned by prior exposure to images.<sup>129</sup></p>

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<sup>123</sup> *Zardad* (n 1) [54].

<sup>124</sup> *ibid.*

<sup>125</sup> Code D (n 85) [13-14].

<sup>126</sup> *Zardad* (n 1) [54].

<sup>127</sup> *ibid.*

<sup>128</sup> Code D (n 85) [13].

<sup>129</sup> *Zardad* (n 1) [54].

#### IV. DDE Discussion

The assessment of the admissibility of certain evidence under video identification procedures can be said to be the most relevant part of the judgement with regards to DDE. The judgment does not deal with any of the DDE authentication issues and focuses only on the procedural challenges. The primary DDE submitted by the Prosecution consisted of images from a video of the Defendant and others taken in 2003 and a compilation of stills derived from a video made in 1996. The Prosecution subsequently presented the DDE to a number of witnesses for them to identify the Defendant in the images. In some instances, the Court did refer to the probative value of the other evidence in relation to the main DDE. However, it refrained from providing clear and elaborate reasoning as the Court was mainly concerned with the identification of the Defendant by a number of witnesses. The identification procedure adopted by the Prosecution consisted of two phases, in order to provide for a fair opportunity for the witnesses to recognise the Defendant. This two-phase procedure was adopted with the aim to facilitate the witnesses to identify the perpetrator by reducing the pool of images as the appearance of the Defendant had changed since his unlawful actions (1992-1996) and the time of his arrest (2003). Phase 1 of the identification procedure was not challenged by the Defence. Therefore, the main discussion developed in relation to the procedure adopted in Phase 2. While the Court relied on a number of legal provisions related to such a procedure, its interpretative work only relates to the 'fairness' element. Thus, the 'fairness' of the identification procedure in appropriately directing the jury was the main point of debate between both the parties and the Court, while the subject-matter of the DDE was rather subsidiary.

The Defence made various complaints, arguing that it would have been unfair to admit this piece of evidence for the purposes of Section 78 of the Police and Criminal Evidence Act 1984. It further argued that the admission of this evidence would have been unfair both individually and cumulatively and that Code D did not provide for the procedure which had been adopted by the Court.

In response to the Defence, the Prosecution asserted that the procedure adopted was fair on the circumstances. The Prosecution acknowledged that Phase 2 procedure did not expressly feature in Code D, but subsequently argued that that could not have been conclusive on the issue of fairness and added that 'the unreported decision of the Court of Appeal in *R v Smith (Hugh Allen)*, 89/2685/W2, 26 March 1991, demonstrated that a second identification parade is neither necessarily inadmissible nor unfair'.<sup>130</sup> It further submitted that 'there was no concession that any element of Code D had been

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<sup>130</sup> *Zardad* (n 1) [53].

breached, but if it had, the Court still has to look at the issue of fairness in the context of all the circumstances as required by s 78 of the Police and Criminal Evidence Act 1984.<sup>131</sup>

The Court found that the selection of images presented was ‘fair’ and facilitated identification ‘as far as possible’ and therefore rejected the challenges on procedural admissibility brought by the Defence on all counts. Nonetheless, while having expressed such opinion on admissibility, the Court emphasised in all instances that it was to be left to the jury to assess whether the selection was fair or not by way of the facts presented at hand.

It would naturally seem that the most problematic aspect of the ‘fairness’ element within the identification procedure during Phase 2 was that the relevant provisions of Code D does not give any definitions or guidance on how to conduct any of the identification procedures in such circumstances. Nonetheless, the Court rightfully noted that the procedure adopted by the Prosecution was to ‘employ the best methods available in the circumstances’<sup>132</sup> and that ‘it was not unfair to do what they did given the time lapse between the events they describe and the date of the identification procedures’.<sup>133</sup> It further noted that the Defence was aware of such a procedure when it was being carried out but made no objections in real-time. Therefore, the approach adopted by the Prosecution had arguably been accepted by the Defence and it ultimately benefited the Defendant more than the Prosecution itself. It should also be emphasised that the Court of Appeal recognized that there are provisions in Code D which allowed for ‘occasions where a witness has more than one opportunity to identify a suspect’<sup>134</sup> and that the Prosecution ‘did not follow to the letter the provisions of the Code’.<sup>135</sup> Nevertheless, the Court ultimately ruled that ‘the risk of such a false identification was not such as to require the judge to rule that the evidence by identification should not be laid before the jury’<sup>136</sup> thus affirming the decision by the court of the first instance on the ‘fairness’ argument.

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<sup>131</sup> *Zardad* (n 1) [53].

<sup>132</sup> *ibid* [54].

<sup>133</sup> *ibid* [54].

<sup>134</sup> *Zardad* (n 51) [3].

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid*.

# R v. Zardad – REFERENCE LIST

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- *Garry Parker v Mason* [1940] 2 KB 590
- *R v Nikolovski* [1996] 111 CCC (3d) 403
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- *The Statute of Liberty Owners of Motorship Sapporo Maru v Owners of Steam Tanker Statute of Liberty* [1968] 1 WLR 739

## LEGISLATION

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- [Criminal Appeals Act 1968 \(CAA 1968\)](#)
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