SUPREME COURT OF NORWAY

J U D G M E N T

given on 26 June by the Supreme Court composed of

Justice Magnus Matningsdal
Justice Wilhelm Matheson
Justice Henrik Bull
Justice Arne Ringnes
Justice Borgar Høgetveit Berg

HR-2020-1340-A, case no. 20-024314STR-HRET
Appeal against Borgarting Court of Appeal's judgment 30 December 2019

I.

A	(Counsel Mads Andenæs)
v.	
The Public Prosecution Authority	(Counsel Frederik G. Ranke)

II.

The Public Prosecution Authority	(Counsel Frederik G. Ranke)
v.	
A	(Counsel Mads Andenæs)

(1) Justice **Bull:**

Issues and background

(2) The case concerns criminal liability for terrorist conspiracy and participation in a terrorist organisation. The main question is whether a foreign national may be prosecuted in Norway for acts committed abroad, i.e. whether Norway may exercise so-called *universal jurisdiction* in this case.

(3) A was born in Lebanon in 1983 and is a stateless Palestinian. After having lived in Lebanon, he stayed in Syria from early 2014 until early 2017. A came to Norway as an asylum seeker in March 2017. On 26 September 2017, the Norwegian Police Security Service issued an investigation order against him. He has been in custody on remand since his arrest on 28 September 2017. The processing of his asylum application has been suspended pending the outcome of the criminal case.

(4) On 11 March 2019, the National Authority for Prosecution of Organised and Other Serious Crime brought the following charge against A:

> *"[F]or the period until and including 14 October 2015*
>
> **I Section 147 d of the Penal Code (1902), cf. section 5 subsection 3 of the Penal Code (2005):**
> for having participated in a terrorist organisation, when the organisation has taken steps to realise its goal by illegal means.
>
> *and for the period from and including 15 October 2015*
>
> **Section 136 a, cf. section 5 subsection 3 of the Penal Code (2005):**
> for having participated in a terrorist organisation, when the organisation has taken steps to realise its goal by illegal means.
>
> **Grounds:**
> From early 2014 until late 2016, in Syria, he participated in the terrorist organisation Jabhat al-Nusra (from July 2016: Jabhat Fatah al-Sham), as he, with the help of the organisation's network, travelled from Lebanon and into Syria to a Jabhat al-Nusra-controlled area, where he put himself under the organisation's command. He took part in the organisation's training, including weapon training, served with weapons and joined military operations and attacks for the terrorist organisation, including as a military leader. Furthermore, he spoke on behalf of Jabhat al-Nusra to media channels in connection with military operations and appeared in propaganda videos for the organisation. In May 2013, Jabhat al-Nusra was listed by the UN as a terrorist organisation, and its members have committed a number of crimes, including the killing of civilians in Syria, with the purpose of causing serious fear, among others. The organisation remained listed as a terrorist organisation after the name change in 2016.
>
> **II Section 133 subsection 1, cf. section 5 subsection 3, of the Penal Code (2005):**
> for having planned or prepared a terrorist act by entering into a conspiracy with another person to commit a criminal act specified in section 131.
>
> **Grounds:**
> Early January 2014, he travelled from Lebanon to Syria where he agreed with one or several persons affiliated with the terrorist organisation Jabhat al-Nusra to commit or

contribute to commit one or several criminal acts specified in section 274 of the Penal Code (aggravated bodily harm), section 275 (homicide) or section 355 (cause explosion that may easily lead to loss of life), with the purpose of causing serious fear in the Syrian population and wrongfully compelling the Syrian government to surrender its power. The agreement was made expressly or implicitly through participation in a terrorist organisation as described in count I.

Prosecution for counts I and II is in the public interest.

Section 62 subsection 1 of the Penal Code (1902) and section 79 (a) of the Penal Code (2005) are applicable.

The charge is brought upon the order of the Director General of Public Prosecutions."

(5) The reason why count II concerns section 133 of the Penal Code 2005 also for the period before the new Penal Code was implemented, is that the reference to section 131 entails a requirement of terrorist intent that did not follow from the reference in section 147 a subsection 4 of the Penal Code 1902 to subsection 1 of the same section. Hence, it follows from section 3 subsection 1 of the Penal Code 2005 that the new Code is to apply to the entire offence. I note that the mentioning of 15 October 2015 as crucial for whether the Penal Code 1902 or the Penal Code 2005 is applicable must be due to an error. The Penal Code 2005 entered into force on 1 October 2015. However, this has no practical significance for the case.

(6) On 6 May 2019, Oslo District Court ruled as follows:

"A, born 00.00.1983, is convicted of violation of
- section 147 d of the Penal Code 1902, cf. the Penal Code 2005 section 5 subsection 3 until 30 September 2015
- section 136 a of the Penal Code 2005, cf. section 5 subsection 3 from 1 October 2015
- section 133 of the Penal Code 2005 subsection 1, cf. section 5 subsection 3

and sentenced to 11 – eleven – years and 6 – six – months of imprisonment, see section 62 subsection 1 of the Penal Code 1902 and section 79 (a) of the Penal Code 2005.

A deduction is granted of 587 – fivehundredandeightyseven – days for time spent in custody on remand."

(7) A appealed to Borgarting Court of Appeal, which on 30 December 2019 ruled as follows :

"1. A, born 00.00.1983, is acquitted of violation of section 136 a of the Penal Code 2005 and section 147 d of the Penal Code 1902, cf. section 5 subsection 3 (count I of the indictment).

2. A, born 00.00.1983, is convicted of violation of section 147 a subsection 4 of the Penal Code 1902, cf. section 12 subsection 4 and section 133 subsection 1, cf. section 5 subsection 3 of the Penal Code 2005 (count II of the indictment) and sentenced to 8 – eight – years and 6 – six – months of imprisonment. A deduction is granted of 822 – eighthundredandtwentytwo – days for time spent in custody on remand."

(8) The judgment was pronounced with dissenting opinions. A minority of two judges did not consider it sufficiently proven that the objective and subjective conviction requirements were met for either count I or count II of the indictment.

(9) A united Court of Appeal found that A in any case should be acquitted on count I, participation in a terrorist organisation, as it would be incompatible with international law to punish him for the participation since it had taken place abroad, see section 2 of the Penal Code on the application of Norwegian criminal legislation subject to the limitations that follow from international law. The Court of Appeal considered it incompatible with international law to punish acts committed abroad without a clear legal basis in international law. The relevant legal basis was, according to the Court of Appeal, the United Nations Security Council resolution 1373 (2001) adopted on 28 September 2001. As the Court of Appeal interpreted the resolution, it only covered the acts described in count II of the indictment, not that described in count I.

(10) A appealed to the Supreme Court, contending that conviction in Norway on count II, terrorist conspiracy, was also incompatible with international law. In addition, he claimed that the organisation Jabhat Al Nusra was not a terrorist organisation. In the alternative, the appeal challenged the sentence. The Public Prosecution Authority appealed against the application of the law that led to the acquittal on count I. On 11 March 2020, the Supreme Court agreed to hear A's appeal regarding the jurisdiction issue and the sentence. The appeal from the Public Prosecution Authority also proceeded.

(11) The Supreme Court has conducted a remote hearing of the case, see section 3 of the Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak.

Background

(12) Before I give a further account of the parties' and my own view of the case, I find it practical to give an account of the situation in Syria during the relevant period and of the acts concerned in the case, as described by the Court of Appeal. Crucial here are the activities of the organisation Jabhat Al Nusra, from July 2016 named Jabhat Fatah Al Sham. In the following, I will refer to the organisation as the Al-Nusra front.

(13) During the "Arab Spring" in 2011, major demonstrations against the Syrian regime arose. A violent uprising soon developed, and a civil war has been raging in Syria since 2012. The Al-Nusra front made its public appearance in Syria in 2012. The organisation was founded with the support of the Islamic State of Iraq (ISI) and Al Qaida veterans. In April 2013, the leader of ISI, Abu Bakr Al Baghdadi, declared that ISI together with the Al-Nusra front had established the Islamic State of Iraq and the Levant (ISIL) and the Al-Nusra front was proclaimed ISIL's Syrian wing. Before long, the various groups clashed, and the Al-Nusra front detached itself from ISIL and instead formed Al Qaida's Syrian branch. During the second half of 2016, the alliance with Al Qaida also came to an end.

(14) The Al-Nusra front's aim has been to establish an Islamic state in Syria as part of a caliphate based on traditional Islamic interpretation of the law – sharia. The organisation's armed struggle has been motivated by a puritan, militant and uncompromising interpretation of Islam that is often referred to as Salafi Jihadism. The organisation has emphasised the fight against the Syrian regime in cooperation with local alliances, and has thus had a more local focus than ISIL, but it has also threatened to launch revenge attacks against the West. The front's warfare has caused considerable civilian suffering, while it has also performed socially beneficial

work for the population.

(15) From 2013, the Al-Nusra front has been particularly strong in the Aleppo and Idlib provinces, which are the areas in Syria where A has operated.

(16) When it comes to A's role in the Al-Nusra front, the contents of 23 videos are central. A has admitted to appearing in 17 of the videos. On most of them, he is masked and uniformed, carrying weapons, ammunition and communication equipment. On some videos, he appears before or during attacks on various towns, others are recorded after the fighting has ended. A video from late May 2015 shows A inciting the soldiers before battle. Another video from September 2015 shows A firing two shots with an RPG.

(17) When it comes to count II of the indictment – violation of section 133 of the Penal Code on terrorist conspiracy – the Court of Appeal summarised the majority's view as follows, based on the videos and other evidence:

> "Early January 2014, A entered into a so-called implicit agreement with the Al-Nusra front. The agreement involved committing, or contributing to others committing, a criminal act in the form of aggravated bodily harm, homicide or explosion that may easily entail loss of lives (terrorist acts). A wilfully entered into the agreement – he knew with whom he was dealing and what the agreement entailed. The purpose of the agreement was primarily that the terrorist acts would cause serious fear in the Syrian population, particularly Shia-Muslims and minorities in the Idlib province, but also in other parts of Syria and outside of Syria's borders (section 131 subsection 2 b of the Penal Code). Secondly, the purpose was to compel Syrian authorities to perform, submit to or omit to do something of substantial importance to the country, more exactly forcing Syrian authorities to relinquish power or territories, particularly in the area in and just outside the Idlib province (section 131 subsection 2 c of the Penal Code).
>
> …
>
> The goals and means or other details on the performance of the terrorist acts, were not necessarily finally settled when the agreement was entered into. However, this is not required for the provision to apply. The more detailed plan for the execution of the terrorist acts emerged along the way. A was aware of the clear overall strategy and action plan for the goals and means in the agreement, all of which is apparent in the secured video materials. It implied that the Al-Nusra front in cooperation with other allies were to force Syrian authorities out of the entire Idlib province, conquer the province by taking more and more new areas and causing serious fear in the Shia-Muslim population and amongst minorities. According to the action plan, the conquests were generally to be carried out by suicide attacks, followed by suicide fighters and storm troops, involving loss of human lives and substantial civilian suffering. A's contribution included inciting the soldiers (holding speeches) immediately before they were to carry out such missions."

(18) With regard to count I of the indictment – violation of section 136 a of the Penal Code on participation in a terrorist organisation – a united Court of Appeal found that it would be incompatible with international law to convict him of this in Norway. However, the Court of Appeal weighed the evidence thoroughly also in this respect, and the same majority as under count II found the following:

> "A participated in the Al-Nusra front from early 2014, from the time he travelled to Aleppo and started working that the Al-Nusra front's warehouse and until he left Syria early 2017. He has been involved in the Al-Nusra front's activities and actively

> contributed to maintaining the organisation in several manners. He joined the organisation and put himself under the organisation's command. He worked at the organisation's central warehouse and was responsible for digital registration of food, clothing and ammunition. He functioned as an interpreter in connection with the organisation's kidnapping of a journalist from South Africa. He was armed, received weapon training, was present during combat operations and took active part in at least one of the operations. He also contributed to conveying the organisation's message and propaganda in a number of videos, thereby demonstrating a personal and sincere support of the Al-Nusra front's acts.
>
> Several of the above contributions must be regarded as qualified, particularly the presence and participation during combat operations and the conveying of the organisation's message and propaganda through videos. An aggregate assessment of A's contributions to the Al-Nusra front implies that he clearly must be considered a participant in the organisation.
>
> The majority finds that A had an important function in the organisation. He was presented and perceived as a leader and field commander, which made the messages he conveyed in the films more effective.
>
> A has acted with intent …"

(19) I would like to mention that the Court of Appeal has assessed the significance of the Al-Nusra front's armed struggle being directed against a regime that itself stands accused of grave crimes against the Syrian population. In this regard, the Court of Appeal has pointed out, among other things, that the Al-Nusra front's own acts do not meet the requirements under international law for lawful acts of war carried out by a rebel group during an internal armed conflict.

The parties' contentions

(20) *The Public Prosecution Authority* contends:

(21) The Court of Appeal errs in assuming that there must be positive legal basis in international law for convicting foreign nationals for acts committed abroad; in other words, for exercising universal jurisdiction. It is the *limitations* on the right to exercise universal jurisdiction that require a special basis in international customary or treaty law.

(22) Admittedly, the universality principle does not apply without limitations, but this case deals with the type of universal jurisdiction that is permitted by international law. This applies to both counts of the indictment.

(23) At any rate, the Court of Appeal interprets the Security Council resolution 1373 (2001) incorrectly when concluding that it does not provide sufficient positive legal basis to convict A also of count I of the indictment.

(24) If the Public Prosecution Authority's appeal is successful, there is sufficient basis in the Court of Appeal's judgment for the Supreme Court to convict A also on count I of the indictment. This is the most serious jihadist case heard in Norwegian courts so far. At the outset, the penalty should be 14 years of imprisonment. Because A to some extent has contributed to the solving of the case, an appropriate penalty would be 13 years of imprisonment, which is what

the Public Prosecution Authority proposed also before the District Court and the Court of Appeal.

(25) *A* contends:

(26) The starting point in international law is the territoriality principle, meaning that a state may only exercise jurisdiction within its borders. Exceptions from this basic principle, for example in the form of universal criminal jurisdiction, therefore require a clear legal basis in binding international customary law, as concluded by the Court of Appeal. However, no such legal basis covering A's situation may be demonstrated. This also applies to Security Council Resolution 1373 (2001). A must therefore be acquitted on count I as well as on count II of the indictment.

(27) If the Supreme Court nonetheless should find that *A* may be convicted on both counts, he agrees that a judgment on the merits in the Supreme Court also for count I would be appropriate. In that case, the penalty must be significantly milder than what the prosecutor proposes.

My opinion

The states' right to exercise universal jurisdiction

(28) The main question as the case stands in the Supreme Court is to which extent international law permits a state to prosecute and punish foreign nationals within its borders for acts committed outside its territory. As previously mentioned, such application of criminal law is often referred to as universal jurisdiction. The choice here is between two basic rules. One of them is that universal jurisdiction cannot be exercised without a special basis in international law. The second rule is that international law at the outset does not prevent the exercise of universal jurisdiction, and that the question is rather whether international law contains limitations in that regard. Both options stem from the basic principle in international law of state sovereignty – a state's exclusive right to exercise its power within its own territory – but express different views on what this principle entails.

(29) The Court of Appeal has applied the first option, that a positive legal basis in international law must exist. I have arrived at a different conclusion.

On which principle is Norwegian criminal legislation based?

(30) It is appropriate to start with the application of Norwegian criminal legislation to acts committed abroad and the views on rules of international law expressed in the preparatory works to the Penal Code.

(31) As a starting point, the territorial application of criminal legislation is regulated in sections 5 and 6 of the Penal Code. Section 6 has no practical interest in this case. According to section 5 subsection 1, the perpetrator must be a Norwegian national or domiciled in Norway, or the acts must have been committed on behalf of an enterprise registered in Norway. In addition, at least one of several other conditions must be met, the most important being dual criminality – the acts must also be punishable under the law of the country in which they are committed. In

many cases, however, dual criminality is not required. This includes acts that "are deemed to constitute terrorist or terrorism-related acts pursuant to chapter 18 of the Penal Code", see section 5 subsection 1 (10) of the Penal Code.

(32) In section 5 subsections 2 and 3 of the Penal Code, the application of Norwegian criminal law is extended to include persons more remotely linked to Norway than the persons mentioned in subsection 1. The relevant provision in this case is section 5 subsection 3, stating among other things that subsection 1 (10) – with the exception of section 145, which is not relevant in this case – "apply correspondingly to acts committed by persons other than those covered by the first and second paragraphs when the person is present in Norway and the act carries a maximum penalty of imprisonment for a term of more than one year". As mentioned, A was subjected to investigation after arriving in Norway to apply for asylum, and the relevant provisions, sections 133 and 136 a of the Penal Code, prescribe maximum sentences by far exceeding one year of imprisonment.

(33) Section 2 of the Penal Code contains a general reservation that criminal legislation applies subject to the limitations that follow from agreements with foreign states or otherwise from international law. This reservation also applies to section 5, but the wording of section 5 nonetheless relies on a premise of the legislature that the provisions therein, at least on a general basis, may be applied without conflicting with international law – if not, the section would clearly have been worded differently.

(34) In connection with the adoption of sections 2 and 5 of the Penal Code, and also with regard to the wording of the corresponding provisions in section 1 subsection 2 and section 12 of the Penal Code 1902, the preparatory works contain several statements regarding the interpretation of international law.

(35) A subcommittee of the Penal Code Commission issued in 1984 a report on territorial criminal jurisdiction – NOU 1984: 31. The committee was of the firm opinion that international law as a main rule did not prevent universal jurisdiction, and that it was the possible limitations on the right to exercise such jurisdiction that had to follow from mandatory rules of international law. Even though the committee acknowledged the consensus amongst legal experts that certain limitations existed, the committee stated on page 25 of its report that it was "highly unlikely that any limitation could be established in international law" – as in that case, one had to demonstrate the existence of international customary law to that effect. On the contrary, it is stated on page 26, national case law was "strongly diverging". On page 14, the committee states that as long as it "in any case is highly disputed whether mandatory rules exist in international law limiting the states' criminal jurisdiction, the specific listing in section 12 (4) [of the Penal Code 1902] must prevail". Through this listing, the legislature had "expressed a clear will to prosecute these acts". I find that this view is transferable to section 5 of the Penal Code, still containing a list of penal offences justifying universal jurisdiction. I will return to that. Incidentally, the reference in section 5 subsection 3 to subsection 1 (10) on terrorist acts replaces a previous reference in section 12 subsection 1 (4) a of the Penal Code 1902 to the terrorist provisions in the same Code, which admittedly were first included in the early 2000s.

(36) The same basic view was maintained in connection with the adoption of the Penal Code 2005 and in the preparatory works to the Penal Code's Implementation Act, namely Proposition to the Odelsting No. 90 (2003–2004) page 174 and Proposition to the Storting 64 L (2014–2015) page 24–25.

(37) When the Penal Code 2005 was adopted, the Ministry proposed a wording of section 5 entailing that offences listed in section 147 a of the former Code were only punishable in Norway if the requirement of dual criminality was met, see Proposition to the Odelsting No. 90 (2003–2004) page 187. The Proposition also covered terrorist acts committed abroad by Norwegian nationals and was not justified by a changed understanding of international law, but by what one considered to be a legislatively and politically expedient solution – as terrorist acts will normally meet the requirement of dual criminality. However, the Storting's Standing Committee on Justice stated, in Recommendation to the Storting No. 72 (2004–2005) page 42, that it was necessary to depart from the dual criminality requirement for terrorist acts – without following it up in the very enactment. Later, section 147 d of the Penal Code 1902 was adopted in 2013 – with universal jurisdiction, see Proposition to the Storting 131 L (2012–2013) page 42. It was argued that terror constitutes a universal threat, but at the same time that "such offences would normally only be prosecuted by the Public Prosecution Authority when the case [was] linked to Norway". The Ministry announced that it would return to the issue pertaining to section 136 a of the Penal Code 2005, which was adopted simultaneously.

(38) In connection with the adoption of the Penal Code's Implementation Act, the Ministry therefore returned in Proposition to the Storting 64 L (2014–2015) with a wider discussion of the exercise of universal jurisdiction, particularly on terrorist acts. The Proposition resulted in an amendment of section 5 subsection 1 (10) of the Penal Code 2005 with the effect that the dual criminality requirement no longer applied for terrorist acts committed by Norwegian nationals abroad. Moreover, a reference was proposed included in subsection 3 to the amended subsection 1 (10) which entailed that this condition also was removed for terrorist acts committed by foreign nationals abroad. The propositions were adopted. On page 21, the amendments were partially explained by the possible lack of dual criminality for certain preparatory acts that, at that point, had become criminal in Norway, and the lack of the same if the act was committed in a state with a poorly developed or collapsed legal system. International obligations to prosecute terrorist offences – which could provide a basis in internal law for universal jurisdiction in accordance with section 6 of the Penal Code – would also not cover all terrorist acts.

(39) A reference was also made to the statement in Proposition to the Odelsting No. 90 (2003–2004) about refraining from prosecuting acts committed abroad, and the examples given, both by the Ministry itself and in quoted hearing statements, of terrorist acts that ought to be prosecuted here, have a certain link to Norway. They concern threats made directly or indirectly against Norway or planning abroad of terrorist acts directed against Norway. However, as I read it, it is only a question of reserve in the exercise of the prosecutorial discretion. Such a reading is supported by the rule that criminal prosecution may only be instituted when in the public interest, see section 5 subsection 7, and that the decision to prosecute is to be made by the Director General of Public Prosecutions, see section 65 subsection 1 (6) of the Criminal Procedure Act. Although the significance of section 2 is pointed out as a possible corrective factor in the application of section 5 subsection 3, it is also stated on page 22 of the Proposition that the limitations in international law on national criminal jurisdiction are presented in Proposition to the Odelsting No. 90 (2003–2004) page 174. As previously mentioned, the starting points in Norwegian Official Report 1984: 31 were maintained in this Proposition.

(40) This leads to the conclusion that the provisions on territorial application of Norwegian

criminal legislation, also when it comes to terrorist acts, are based on a clear assumption that international law at the outset permits universal jurisdiction, and that it is the limitations on, and not the right to, universal jurisdiction in each area that must follow from more specific rules of international law.

(41) As I see it – in line with the statements in Norwegian Official Report 1984: 31 – fairly strong reasons to conclude that this is not correct have to be put forward, before one applies sections 2 and 5 in accordance with a different view on international law. It should be noted in this regard that these are not rules of international law meant to protect individuals against injustice committed by governments, but rules limiting a state's exercise of its power in order to protect the sovereignty of other states. The question to ask is not *what may be prosecuted*, but rather *who may prosecute.*

Provisions on criminal jurisdiction in international law

(42) The discussion of the right to exercise universal jurisdiction is often based on the judgment from the Permanent Court of International Justice – now the International Court of Justice – in the Hague in the so-called Lotus case from 1927. The case concerned a French ship – Lotus – that had collided with a Turkish ship in international waters, and Turkish authorities' prosecution of the officer on watch on Lotus when the ship arrived in Turkish territory. Turkey was deemed entitled to prosecute because the collision had caused damage on Turkish territory, namely the Turkish ship. However, the Court also commented on the basis for universal jurisdiction in international law.

(43) The Court stated that the mutual obligations of states implies that a state cannot exercise any form of jurisdiction within the territory of another state. However, as the Court also pointed out, this does not necessarily imply that the states, when exercising jurisdiction within their own territory, may only take into account acts committed there. It also questioned whether criminal jurisdiction was governed by different and narrower rules than the application of civil law. The Court stated that nearly all nations prosecuted acts committed outside their territory, so the question was either whether they were free to do so as long as they did not contravene any prohibition in international law, or whether the territorial limits of a state's jurisdiction prevented the state from prosecuting acts committed abroad failing the existence of a permissive rule to the contrary. Although the Court did not give an entirely clear answer, its statements are often interpreted to mean that the first principle was the correct approach, and that any limitations on universal jurisdiction had to follow from binding international customary or treaty law.

(44) Whether or not a state is free to exercise universal jurisdiction unless prohibited in international law has been – and still is – controversial amongst experts. Stigen, in the article *Universaljurisdiksjon – en kritisk analyse* [Universal jurisdiction – a critical analysis], in *Tidsskrift for Rettsvitenskap* 2009 page 1 et seq, states on page 6 that "[currently], most authors, myself included, take it that the exercise of universal jurisdiction requires a positive legal basis in an international convention or in customary law". As it appears in the quote, however, there are opinions to the contrary, and Cassese, in International Criminal Law, 2013 page 294–295, accepts, from what I can see, that it is the limitations on universal jurisdiction that must be found in binding international law. He also mentions that universal jurisdiction seems to be exercised to an increasing extent. I note that Cassese was the first president of both the International Criminal Court of the Former Republic of Yugoslavia and for the UN

Special Court for Lebanon.

(45) In my view, of particular interest are several statements in the International Court of Justice's judgment 14 February 2002 in a case often referred to as the arrest warrant case or the Yerodia case. The question was whether Belgium had a right to issue an international arrest warrant against the Congolese Minister of Foreign Affairs, Yerodia, for violations of international humanitarian law. The case was decided on the basis of diplomatic immunity, without the Court as such considering the question whether Belgium could exercise universal jurisdiction in the case. However, a number of separate opinions were given on this issue, showing the judges' differing points of view as to what international law implied. I confine myself to mentioning two of them. The President of the Court, Guillaume, held that universal jurisdiction could not be exercised unless expressly permitted by international law, and that it was recognised only in cases of piracy and under some conventions. Another separate opinion was that given jointly by the British judge, later President of the Court, Higgins, and the American and the Dutch judge. They referred to the lack of a verifiable *opinio juris* in state practice on the illegality of universal jurisdiction as a starting point, and the increased international consensus on the necessity of such jurisdiction being exercised in relation to those crimes regarded as the most heinous by the international community. This suggested that the issuance as such of the arrest warrant against Yerodia was not in itself a violation of international law. They admitted that no state practice existed based on universal jurisdiction in its purest form – national criminal legislation mostly envisaged links of some sort between the case and the state – but stated that this did not necessarily indicate that the states considered exercise of universal jurisdiction in the absence of such links unlawful.

(46) Against this background, my conclusion is that there is no basis for establishing a clear rule in international law that a state may only exercise universal jurisdiction if expressly permitted in international law. Although one may also not establish as generally accepted that the starting point is the opposite, that universal jurisdiction is permitted unless international law prohibits it, Norwegian courts should not rely on this approach given that the Penal Code's provisions on territorial application, after thorough legislative assessments, do not rely on it.

Is the application of Norwegian legislation on terrorist acts towards A incompatible with the limitations on universal jurisdiction in international law?

(47) With the approach I now take, it is natural to ask which limits are laid down in international law for the exercise of universal jurisdiction. In Norwegian Official Report 1984: 31, it was stated on page 25 that it is "highly doubtful whether any limitation may be established in international law". In international law literature, others have been somewhat more restrictive, but the limitations presented are vague and mostly based on considerations of reasonableness and expediency. For the purposes of the case at hand, it is unnecessary to take a standpoint on possible limitations on a general basis. The question now is merely whether the individual application of sections 133 and 136 a of the Penal Code 2005 – prior to 1 October 2015 also section 147 d of the Penal Code 1902 – towards A for de the acts with which he is charged is incompatible with international law. For the sake of clarification, however, there is reason to answer the question in more general terms.

(48) As mentioned, the Court of Appeal's approach differs from mine, and it attributed decisive importance to whether the United Nations Security Council resolution 1373 (2001 provided a positive legal basis to prosecute A. I, too, find that that this resolution may be significant, but

in a different perspective: The resolution – and also subsequent resolutions deriving from it, whether or not they are formally binding – expresses at any rate a firm wish to prosecute terrorist acts also outside the state in which they have been committed. In any case, such a wish is a natural consequence of an international consensus – which I believe exists irrespective of the resolution – that terrorist organisations are a problem for international interaction in general. Furthermore, all states have an interest in not being perceived as a possible safe haven for foreign nationals having committed terrorist acts outside the state's borders.

(49) In section 2 of the resolution, it is stated that the Security Council

> "*Decides also* that all States shall:
>
> …
>
> (c) Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens;
>
> …
>
> (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; …".

(50) The wording may be interpreted to mean that the Resolution imposes an obligation on states to implement universal jurisdiction for terrorist acts: "[A]ll States shall … [e]nsure that any person … is brought to justice". The defence counsel has strongly emphasised that the Resolution cannot be interpreted in such a way, primarily because it does not contain an accurate definition of "terrorist acts". It is not necessary for me to consider this contention. As the question is rather whether international law contains limitations on the states' right to exercise universal jurisdiction, the Resolution suggests that such jurisdiction for terrorist offences is at least not prohibited. In such a perspective, the lack of a further definition of "terrorist acts" is not essential.

(51) This view on the Resolution is supported by the Security Council urging, in section 8 of resolution 2170 (2014), all member states

> "to take national measures to suppress the flow of foreign terrorist fighters to, and bring to justice, in accordance with applicable international law, foreign terrorist fighters of, ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, …".

(52) Despite the reservation that the states must act within the scope of international law, this request can only be read to mean that prosecution of foreign jihadists is deemed to be compatible with international law – otherwise its reach would be highly limited. Incidentally, ANF is the same as the Al-Nusra front.

(53) The Court of Appeal found that violations of section 136 a of the Penal Code 2005 and section 147 d of the Penal Code 1902 on participation in terrorist organisation were not

covered by the Resolution 1373 (2001). However, the Court of Appeal's starting point was as mentioned that universal jurisdiction demanded a clear basis in international law, which is indeed why the Court of Appeal was careful in its interpretation of the words "financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts". Some of what is covered by section 136 a of the Penal Code, was not, in the Court of Appeal's view, within a natural linguistic understanding of these words. However, with my approach, it is sufficient to conclude that the action norm in section 136 a of the Penal Code does not clearly fall outside the resolution, which it does not do in my opinion. It makes good sense to interpret section 136 a of the Penal Code as a provision directed against a person supporting terrorist acts.

(54) Against this background, Norwegian courts must assume that it is not incompatible with international law to apply the Penal Code's provisions on terrorist conspiracy to foreign nationals' acts abroad as far as permitted under section 5 subsection 3 of the Penal Code.

(55) My conclusion is, thus, that the Court of Appeal has erred in its application of the law, and that Norway has jurisdiction to prosecute A not only for count II, but also for count I of the indictment.

New conviction in the Supreme Court for count I of the indictment

(56) According to section 345 subsection 2 second sentence of the Criminal Procedure Act, the Supreme Court may pronounce a new judgment rather than setting aside that of the Court of Appeal "if the necessary preconditions are fulfilled."

(57) The case was heard over ten days in the Court of Appeal with a substantial amount of evidence presented. The judgment contains an in-depth account of the evidence, and the Court of Appeal's majority has given a thorough description of the facts it found proven beyond any reasonable doubt also for count I. The majority found that the objective as well as the subjective conditions for penalty were met – A was acquitted on count I exclusively because the Court of Appeal found that Norway had no legal basis in international law to prosecute the acts.

(58) Both parties have been given the chance to present their views, and have expressed that the conditions for conviction in the Supreme Court are met if the Supreme Court should conclude that Norway has jurisdiction with regard to both count I and count II of the indictment. A has also attended the Supreme Court's hearing by videoconference, and was given the chance to make a statement before the Court withdrew to deliberate, which he did.

(59) Against this background, my conclusion is that the conditions for pronouncing a new judgment in the Supreme Court are met. I also find it clear that the description by the Court of Appeal's majority of acts committed by A in relation to count I of the indictment, and which I quoted initially, is covered by section 136 a of the Penal Code. Thus, A must also be convicted on count I of the indictment.

Sentence

(60) When it comes to the sentence, the defence counsel has stated that some weight should be

attributed to the penalty A would have received if the acts had been prosecuted in Lebanon, and that he, there, would probably have been given around three years in prison. I cannot see any reason for this. Section 5 subsection 6 of the Penal Code states that the penalty following prosecution in accordance with section 5 may not exceed the maximum statutory penalty for a corresponding act in the country in which it is committed. The provision is based on the notion that prosecution for acts committed in a different country may appear as exercise of sovereignty towards this country. That does not mean that sentencing practices in other countries to which the defendant might be linked should also be relevant.

(61) Count II of the indictment on terrorist conspiracy is the most aggravated in the case. Section 133 of the Penal Code prescribes a maximum penalty of ten years of imprisonment. In the corresponding provision in section 147 a subsection 4 of the Penal Code 1902, the maximum penalty was 12 years of imprisonment. However, the reduction is not due to a changed view of the seriousness of the act, but to the fact that the Penal Code 2005 operates with fewer steps regarding maximum penalties. In the Supreme Court judgment Rt-2013-789 paragraph 71, it is stated that when the agreed terrorist act involves intentional killing, a natural point of reference is the normal penalty for attempted homicide, which is nine years of imprisonment.

(62) Also with regard to the penalty for count II, the Court of Appeal was divided into a majority and a minority, where the minority consisted of two lay judges. The majority stated the following on A's role:

> "The majority notes that the secured video materials to a large extent document A's role and conduct in the Al-Nusra front. He has played an important and pronounced part in the organisation, and been presented and perceived as a leader. Through his conduct and statements in the videos, he has shown a strong will to see things done, and thus demonstrated that he repeatedly and on a number of occasions had come far in the preparations of imminent terrorist acts.
>
> The case concerns conspiracy involving preparations and planning of terrorist acts with a large potential of harm and a large loss of human lives. It also concerns a long-term conspiracy with an intent to kill, which the parties have renewed and repeated a number of times over a three-year period. The object of the terrorist conspiracy was both to cause serious fear in the Syrian population, and to unlawfully compel Syrian authorities to commit, submit to or omit to do something of material importance to the country. The conspiracy was also specified to a large extent in terms of which methods the Al-Nusra front would use, including the use of suicide bombers and suicide fighters.
>
> When it comes to the significance of which type of terrorist organisation we are dealing with, the majority confines itself to referring to the killings and terrorists acts with a large potential of harm and loss of many human lives involved in the conspiracy. The fact that the Al-Nusra front appears to be less brutal towards civilians as for instance ISIL, is thus of minor importance."

(63) After an overall assessment, the Court of Appeal's majority found that the penalty for count II as a starting point had be close to the maximum penalty of ten years of imprisonment. I agree.

(64) Section 136 a of the Penal Code 2005 and section 147 d of the Penal Code 1902 on participation in a terrorist organisation both prescribe a maximum penalty of six years of imprisonment. Relevant factors in the sentencing are the duration of the participation, the tasks performed, the role in the organisation and which terrorists act it involved, see the Supreme Court judgment HR-2016-1422-A paragraph 18.

(65) In HR-2016-1422-A paragraph 30, the penalty was initially stipulated to four years and three months of imprisonment for the role as an "ordinary soldier" in ISIL for about eleven months. It had not been proven that the convicted persons had participated in acts of war, but they had been armed and performed tasks of essentially a military nature. A's participation in the Al-Nusra front lasted much longer, and the Court of Appeal's majority found that he had an important function in the organisation. As it appears from my previous quote from the Court of Appeal's judgment, he contributed to communicating the organisation's message and propaganda, and he was perceived and presented as a leader and field commander, which made his messages more effective. At the organisation's central warehouse, he was responsible for digital registration of food, clothing and ammunition, and he was an interpreter in connection with a hostage situation. In its findings in the question of guilt for count I, the Court of Appeal's majority has also pointed out his presence during combat operations and active participation in at least one of them. The fact that this is covered by section 133, does not prevent it from also being covered by section 136 a. When A's extensive and long-term participation in the Al-Nusra front is considered against the Supreme Court judgment HR-2016-1422-A, I believe that the penalty would have been six years of imprisonment for count I considered in isolation – i.e. the maximum penalty.

(66) With the coordination that must be made based on the sentence for the most aggravated offence, see section 79 a of the Penal Code 2005 and section 62 subsection 1 of the Penal Code 1902, importance must nonetheless be attached to the fact that A's contribution in combat operations as part of his participation in the terrorist organisation has been "consumed" by this also being included as central factors in his participation in terrorist conspiracy. Nonetheless, we are left with a very serious violation of section 136 a of the Penal Code 2005 and section 147 d of the Penal Code 1902 on participation in a terrorist organisation. Overall, I find that the penalty before any reduction is granted for mitigating circumstances should be 14 years of imprisonment.

(67) A has not made an unreserved confession, and the investigation has been extensive and demanding. However, the Court of Appeal has stated that it is A's own statement to Norwegian immigration authorities that formed the basis for the police's disclosure of the case, and that without A's asylum statement, he would most likely never have been prosecuted. Admittedly, this is not entirely comparable to the cases where a person unsolicited confesses to a crime that would otherwise have remained undisclosed. Even though the asylum statement presumably has been given in his own self-interest with the aim of obtaining protection, I find that importance should be attached to its role in the solving of the case. Later, he has largely admitted and explained the factual circumstances, although he maintains that he acted under pressure and that the requirements for subjective guilt are not met. The statements have to some extent simplified the investigation as they led the police to extensive video materials. This, too, must be given weight.

(68) Furthermore, as expressed by the Court of Appeal, importance should be attached to a long time spent in custody on remand, although both the investigation and the legal proceedings have progressed satisfactorily. A has currently spent 1004 days in custody on remand.

(69) On the other hand, I also agree with the Court of Appeal that given the seriousness of the case, A's health condition – PTSD with memory loss – his difficult family situation with spouse and two minor children in Syria and his background as a stateless Palestinian in Lebanon are not to be taken into consideration.

(70) Against this background, I find that the penalty should be eleven years and six months of imprisonment, the same result as that reached in the District Court.

(71) When A is now also convicted on count I of the indictment, it is expedient to formulate a new conclusion: I vote for the following

J U D G M E N T :

A, born 00.00.1983, is convicted of violation of section 133 of the Penal Code 2005 cf. section 5 subsection 3 (count I of the indictment) and section 147 d of the Penal Code 1902 cf. section 12 subsection 1 (4) (a) and section 136 a of the Penal Code 2005 cf. section 5 subsection 3 (count II of the indictment), cf. section 79 (a) of the Penal Code 2005 and section 62 subsection 1 of the Penal Code 1902, and sentenced to 11 – eleven – years and 6 – six – months of imprisonment. A deduction is granted of 1004 – onethousandandfour – days for time in custody in remand.

(72) Justice **Høgetveit Berg:** I agree with Justice Bull in all material respects and with his conclusion.

(73) Justice **Ringnes:** Likewise.

(74) Justice **Matheson:** Likewise.

(75) Justice **Matningsdal:** Likewise

(76) Following the voting, the Supreme Court gave this

J U D G M E N T :

A, born 00.00.1983, is convicted of violation of section 133 of the Penal Code 2005 cf. section 5 subsection 3 (count I of the indictment) and section 147 d of the Penal Code 1902 cf. section 12 subsection 1 (4) (a) and section 136 a of the Penal Code 2005 cf. section 5 subsection 3 (count II of the indictment), cf. section 79 (a) of the Penal Code 2005 and section 62 subsection 1 of the Penal Code 1902, and sentenced to 11 – eleven – years and 6 – six – months of imprisonment. A deduction is granted of 1004 – onethousandandfour – days for time in custody in remand.