

Extra-Territorial Jurisdiction Update

March 25, 2020

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By: Dr Joseph Rikhof

On March 1, 2019, this Journal published a question and answer session with Terje Einarsen and Joseph Rikhof about their book “A Theory of Punishable Participation in Universal Crimes” (see https://globaljustice.queenslaw.ca/news/books-question-and-answer-session-with-terje-einarsen-and-joseph-rikhof-about-their-new-book-entitled-a-theory-of-punishable-participation-in-universal-crimes). This book (see https://www.toaep.org/ps-pdf/37-einarsen-rikhof) discusses extra-territorial jurisdiction in its chapter 8 with an overview of domestic jurisprudence in the area of international crimes (war crimes, crimes against humanity, genocide and torture) in 15 countries on two continents, Europe and North America, until July of 2018.

This article will provide a thematic overview of the developments with respect to criminal processes since that time, but only with respect to Europe as there have been no new cases in the United States and Canada. The overview is based on national newspaper reporting as well as postings by the NGO, TRIAL International (see https://trialinternational.org/latest/cases/). In a separate article, the legal parameters of the cases, which have led to a conviction, will be discussed.

Cases dealing with the conflict in Syria

In the last number of years, prosecutors and courts in Europe have been seriously preoccupied with crimes committed in Syria due to the very large influx of refugees into the continent resulting from the brutal war taking place in Syria (see also https://www.lawfareblog.com/accountability-update-crimes-committed-syria).

In the *Netherlands* almost all new investigations and prosecutions have taken place for conduct in the Syrian context.

On July 8, 2019, a Dutch-born alleged Islamic State militant went on trial in the Netherlands for war crimes committed in Iraq and Syria after posing with a crucified body and sharing images of dead victims online. Oussama Achraf Akhlafa was charged with joining IS militants in Mosul in Iraq, and Raqqa in Syria, between 2014 and 2016 and with violating the personal dignity of victims as a war crime under the 1949 Geneva Conventions as well as membership in a terrorist organization. He was convicted on July 23, 2019 but only for the war crime and received a prison term of seven years and six months. A second defendant, Dutch-born 24-year-old Reda Nidalha, also went on trial the same day, accused of membership in a terrorist organization and recruiting radical jihadists via Facebook and was convicted on the same day to four and half years imprisonments for membership in a terrorist organization.

On September 5, 2019 the Dutch federal prosecutor filed charges against Ahmad al Khedr, also known as Abu Khudar, a 47-year-old Syrian who is believed to have been the commander of a battalion aligned with Jabhat al-Nusra known as Strangers of Mohassan. He was charged with both the war crime of murder and the crime of membership in a terrorist organization for allegedly participating in the summary execution of a captured Syrian solider in 2012. The crime was recorded in a video that circulated online.

On October 22, 2019, Dutch police arrested a 29-year-old Syrian and alleged former commander of Ahrar al-Sham, a Syrian Islamist group. The individual, whose name has not been released, is accused of the war crime of violating the personal dignity of victims for posing with the body of an enemy fighter and kicking a corpse during fighting in Hama in 2015. He also appeared in YouTube videos, in which he is singing to celebrate the deaths of other fighters.

In *Germany*, on June 7, 2018, Germany's chief prosecutor issued an international arrest warrant for one of Syria's most senior military officials, Jamil Hassan, head of Syria's powerful Air Force Intelligence Directorate. The detention centres run by Air Force Intelligence, where thousands are

believed to have died because of torture or neglect, are among the most notorious in Syria. The charges claim that Hassan had command responsibility over Air Force Intelligence facilities and that he must have known of the abuse (generally, for efforts in Germany with respect to Syria see https://amp.theatlantic.com/amp/article/595054/).

On August 9, 2018, Raad A. and Abbas R. were indicted for war crimes and membership in a terrorist organization. They allegedly joined ISIS in June of 2014 in Mosul and in the same month, Abbas R. was present during the execution of two Shiite women by ISIS fighters and assisted them with the transportation of the bodies. In October of 2014 they participated in the execution of a high-ranking Iraqi civil servant captured by ISIS. Raad. A., together with other ISIS members, escorted the captive to the execution site and guarded him until he was executed. Abbas R. is also accused of having insulted and humiliated the captive.

On September 24, 2018, a German court sentenced a member of a Western-backed Syrian armed opposition group to life imprisonment for war crimes. The convict, identified as Ibrahim A., was found guilty of torture and killing persons protected under international humanitarian law as well as murder and kidnapping. The 43-year-old commanded a 150-member armed group known as Ghoraba as-Sham which operated under the Free Syrian Army (FSA) umbrella group.

On December 10, 2018, German prosecutors charged a 29-year-old Syrian man with war crimes based on allegations he tortured pro-government forces his unit had captured. Mohamad K. served in the rebel Free Syrian Army from January 2012 to January 2013 and during that time he was involved in the torture of two prisoners who were part of a pro-government militia, whipping them with a cable-like object.

On February 13, 2019, German police arrested two Syrian citizens, Anwar Raslan and Eyad al-Gharib for the commission of crimes against humanity including the torture of prisoners during their work for Syria's intelligence service. In 2011 and 2012, Raslan headed Branch 251 and later Branch 285, the most notorious branches of the General Intelligence Directorate in Syria. As head of the investigative department, Raslan assigned and directed the operations in the prison, including the use of systematic and brutal torture. Al-Gharib is suspected of helping to kill two people and torturing at least 2,000 people as an intelligence worker between July 2011 and January 2012. They were charged on October 29, 2019 and their trial is expected to start soon this year. An arrest against a third person for similar crimes was made in France on the same day.

On January 13, 2020, a German court sentenced a 31-year-old Syrian man, Abdul Jawad A. K. to life in prison for double homicide and as an accessory in 17 counts of murder committed during his time as an Islamist militant in northern Syria. The victims were members of Syrian security forces and army personnel captured during the first years of the conflict; they were then executed at a dumping ground near the city of Tabka as part of a larger massacre in the area in 2013.Three other defendants were also handed down prison sentences ranging from three to eight years, namely Abdoulfatah A, Abdulrahman A.A. and Abdalfatah H. A.

In *France*, on November 5, 2018, prosecutors issued international arrest warrants for three senior Syrian intelligence and government officials for war crimes, namely security chief Ali Mamlouk, one of Syrian President Bashar al-Assad's most senior advisers, as well as Jamil Hassan, the head of Airforce Intelligence who is already the subject of a German warrant, and senior Airforce Intelligence official, Abdel Salam Mahmoud, who heads a detention facility at Mezzeh military airport in Damascus.

On February 18, 2020, a senior Syrian rebel commander suspected in the disappearance of a number of prominent human rights activists, was arrested in Marseille for war crimes, torture, enforced disappearance and complicity in these crimes, namely Islam Alloush, a former spokesperson for Jaish al-Islam, a group largely based in the Damascus suburb of eastern Ghouta.

France has also been active in investigations involving corporations. In September 2016, the French Finance Minister filed a complaint before the Paris Prosecutor against the LafargeHolcim company for its alleged illegal purchase of oil in Syria, despite the EU embargo issued in 2012. The Paris prosecutor opened an investigation in October 2016. In parallel, on September 2017, a new complaint was filed against LafargeHolcim for complicity in crimes against humanity and other charges around allegations that Lafarge had paid the Islamic State and other terrorist groups in Syria more than US$15-million between 2011 and 2014 for supplies and assurances they wouldn't attack the company's new plant near Raqqa. This complaint was originally approved on June 28, 2018 but on November 7, 2019 the Investigation Chamber of the Paris Court of Appeals dismissed the complaints related to crimes against humanity but upheld the indictment of the charges of deliberately endangering the lives of others, financing terrorism and violating a trade embargo.

In *Austria*, on 29 May 2018, 16 women and men from Syria filed a criminal complaint with the prosecutor in Vienna against senior officials in the Assad government, The allegations of the criminal complaint include torture as a crime against humanity and as a war crime committed by military intelligence, air force intelligence and general intelligence; the torture and other crimes described in the complaint, including murder, extermination, serious bodily harm and deprivation of liberty, were committed between February 2011 and January 2017 in 13 detention centers in Damascus, Daraa, Hama and Aleppo. An official investigation has been commenced.

In *Hungary*, on Sept. 3, 2019 Hungarian prosecutors charged a Syrian man, identified as F. Hassan, of terrorism and crimes against humanity for his role in the beheading of an imam and three other murders in Syria in May 2015. Authorities believe Hassan commanded a small unit of fighters for the Islamic State in a town in Homs province that was ordered to terrorize and execute civilians and religious leaders who refused to side with the Islamic State. The charges were the result of a joint investigation with authorities in Malta, Greece and Belgium coordinated by Eurojust, the European judicial cooperation agency. His trial started on November 13, 2019 and is ongoing.

Iraqi cases

In *Germany*, On December 14, 2018, a German female member of Islamic State, Jennifer W, was charged with the war crime of murder and weapons offences for letting a five-year-old girl, whom her husband had purchased as a household slave when living in then Isis-occupied Mosul in northern Iraq in 2015, die of thirst in the scorching sun. Her trial started on April 10, 2019 and is ongoing. Her husband, Taha A.-J. was arrested in May of last year in Greece, extradited to Germany in October of the same year and an indictment was filed on February 20, 2020.

In *Finland*, on January 10, 2019, Ahmed Jabbar Hasan, a former corporal in the Iraqi army, was convicted and given an 18-month suspended sentence for a war crime as a result of him being filmed cutting of the head of a dead ISIS fighter.

In *Sweden*, on February 19, 2019, a court convicted Kurda Bahaalddin H Saeed, who had fought against the Islamic State group in Iraq, of war crimes for posting macabre pictures and videos on Facebook to 15 months imprisonment.

Liberian cases

While there had been some cases arising out of the Liberian civil war before the summer of 2018, this effort was intensified considerably in the last year and a half in four countries.

In the *United Kingdom*, on June 1, 2017, Agnes Reeves Taylor, the former wife of imprisoned former Liberian president Charles Taylor, was arrested and charged in London for her alleged role in torture committed during Liberia's first civil war between 1989 and 1997. The Supreme Court of the United Kingdom decided on November 13, 2019 as part of a preliminary motion, that the crime of torture could be committed by non-governmental groups as long as they have effective control over a territory to fall within the parameters of official capacity of the torture definition. (For an analysis, see https://globaljustice.queenslaw.ca/news/when-is-an-alleged-torturer-a-person-acting-in-an-official-capacity-according-to-the-united-kingdom-supreme-court). As a result, on December 6, 2019 the case against her was dismissed as the organization she had belonged to did not have the de facto control required by the Supreme Court.

In *France*, on 4 September 2018, Kunti K, the alleged commander in the United Liberation Movement for Democracy in Liberia (ULIMO), a rebel group fighting against Charles Taylor's National Patriotic Front of Liberia (NPFL), was arrested by the French police on charges of torture, murder, slavery, using child soldiers, and cannibalism committed between 1993 and 1997. He had been released after a Paris court ruled prosecutors committed a procedural error following his arrest but was rearrested on January 10, 2020 after he violated several of his bail conditions.

In *Switzerland*, on November 10, 2014, Alieu Kosiah, another former commander of ULIMO, was arrested for his involvement in war crimes committed between 1993 and 1995 in Lofa County, Liberia. He was indicted on March 23, 2019 and his trial was scheduled to begin on April 14, 2020 but has been postponed to June/July due to the COVID-19 virus.

In *Finland*, on March 10, 2020, Gibril Massaquoi, a Sierra Leonean national, was arrested for alleged involvement in war crimes and crimes against humanity in Liberia between 1999 and 2003, namely homicide, sexual violence, and the recruitment and use of child soldiers. Earlier he had been a member of the Revolutionary United Front (RUF) inner circle during the Sierra Leonean Civil War, as a Lieutenant-Colonel and spokesman of the rebel group, as well as an assistant to the group's founder, Foday Sankoh.

Rwandan cases

Once a mainstay of investigations and prosecutions in Europe, as well as in Canada, the number of cases arising out of the 1994 genocide in that country have dwindled but are still occurring, either as a continuation of earlier processes or even as new cases.

In *Germany*, on December 20, 2018, the Bundesgerichthof in Germany overturned on appeal the war crimes allegations, but not the terrorism charges, against Ignace Murwanashyaka, the leader of the FDLR rebel group in the Democratic Republic of the Congo, and his aide Straton Musoni, and ordered a retrial. Their original trial had started on May 5, 2011 and they were convicted on September 28, 2015 and sentenced to 13 and eight years respectively for war crimes and being ring leaders of a terrorist organization.

In *Belgium*, on December 12, 2018, pre-trial chamber of the Brussels Criminal Court ruled that five Rwandan nationals, E.G., E.N., F.N., T.K., M.B., could stand trial for crimes committed during the 1994 Rwandan genocide. As part of subsequent separate trials, one of them, Fabien Neretse, was convicted on December 20, 2019 for both genocide, a first in Belgium, as well as war crimes and sentenced to 25 years imprisonment (for more details, see https://www.justiceinfo.net/en/tribunals/national-tribunals/43372-fabien-neretse-found-guilty-genocide.html).

Other cases

There have also been criminal investigations and prosecutions arising out of serious crimes committed in five countries.

In *Germany*, on October 25, 2018, German prosecutors charged a 26 year-old former officer in the Afghanistan military, Ahmad Zaheer D., with war crimes based on allegations that he facilitated the abuse of prisoners in his care in Afghanistan.

In *Sweden*, on November 5, 2019 Hamid Nouri, who had been an assistant prosecutor in Iran's extrajudicial tribunals in July and August 1988, known as the death commissions, which sentenced approximately 5,000 political dissidents to death based solely on their political or religious beliefs, was arrested for having committed crimes against humanity and murder.

As well in Sweden, on November 14, 2018, Swedish prosecutors indicted the chief executive, Alex Schneiter, a Swiss national, and Ian Lundin, the chairman of Swedish company Lundin Oil, of being complicit in war crimes in the 2000s in what is now South Sudan, namely indiscriminate attacks and intentional targeting of civilians, burning of shelters, pillage, destruction of objects necessary for survival, unlawful killing of civilians, rape of women, abduction of children, torture, and forced displacement (for more details, see https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/).

In *Italy*, on April 17, 2018, a complaint was filed by four NGOs with the public prosecutor in Rome against the directors of RWM Italia S.p.A., an Italian arms manufacturer, and against Italian government officials for authorizing arms exports to Saudi Arabia, and for complicity in murder and bodily injury in Yemen. The prosecutor has opened an investigation, which is still ongoing.

Lastly, in the *Netherlands*, on March 6, 2020, the trial of four persons implicated in the downing of the Malaysian Airlines flight MH17 in Eastern Ukraine began; Igor Girkin, Sergey Dubinskiy, Oleg Pulatov and Leonid Kharchenko have been accused of murder, manslaughter and causing an airplane to crash when deploying a missile, which struck the airplane and are tried in absentia (for more details, see https://www.government.nl/topics/mh17-incident and https://www.prosecutionservice.nl/topics/mh17-plane-crash) .

Extradition cases

Apart from the initiation of criminal investigations and prosecutions, there have also been extradition proceedings involving international crimes.

On April 25, 2019, a former Serb paramilitary fighter Milorad Barac, who had been sentenced to 15 years in prison for the war crime of killing civilians in the Gospic area in 1991, was extradited to Croatia from the Netherlands.

On June 14, 2018, Milorad Obradovic, who had been accused of taking part in the illegal arrests and torture of 120 Bosniaks in Prijedor in 1992 as well as personally killing three people, was extradited to Bosnia from Germany to stand trial.

As well, on December 10, 2018, Wenceslas Twagirayezu was extradited to Rwanda from Denmark on suspicion of having taken part in a massacre in a church and at a university in Rwerere Commune, north west Rwanda, where more than 1,000 people were killed.

Conclusion

The pace of investigations and prosecutions of perpetrators of extraterritorial crimes has increased dramatically in the last 18 months in Europe. Twelve countries initiated criminal proceedings against 29 accused (of which all but one in the UK are ongoing) while another 10 were convicted (compared with 68 convictions between 1994 and 2018, see https://www.toaep.org/ps-pdf/37-einarsen-rikhof,

page 429); in addition, three persons were extradited to the former Yugoslavia and Rwanda. Of these twelve countries, two stand out for their efforts in this area, namely Germany with nine investigations and five convictions and the Netherlands with six persons indicted and two convicted.

While the number of countries involved in such endeavours decreased slightly from 13 to 12 and the number of countries in which crimes were investigated remained the same at 11, the number of investigations against corporate players has taken on a new life with such investigations taking place in France, Sweden and Italy. It is clear that Europe has taken its obligation to complement to the work of the International Criminal Court seriously.

Please cite this article as Dr Joseph Rikhof, “Extra-Territorial Jurisdiction Update” (2020), 4 PKI Global Justice Journal 11.

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Image: SYRIA, SHABAA, SEPTEMBER 2013. Tank Syrian national army stands between the buildings in the suburbs of Damascus, after the battles with rebels.