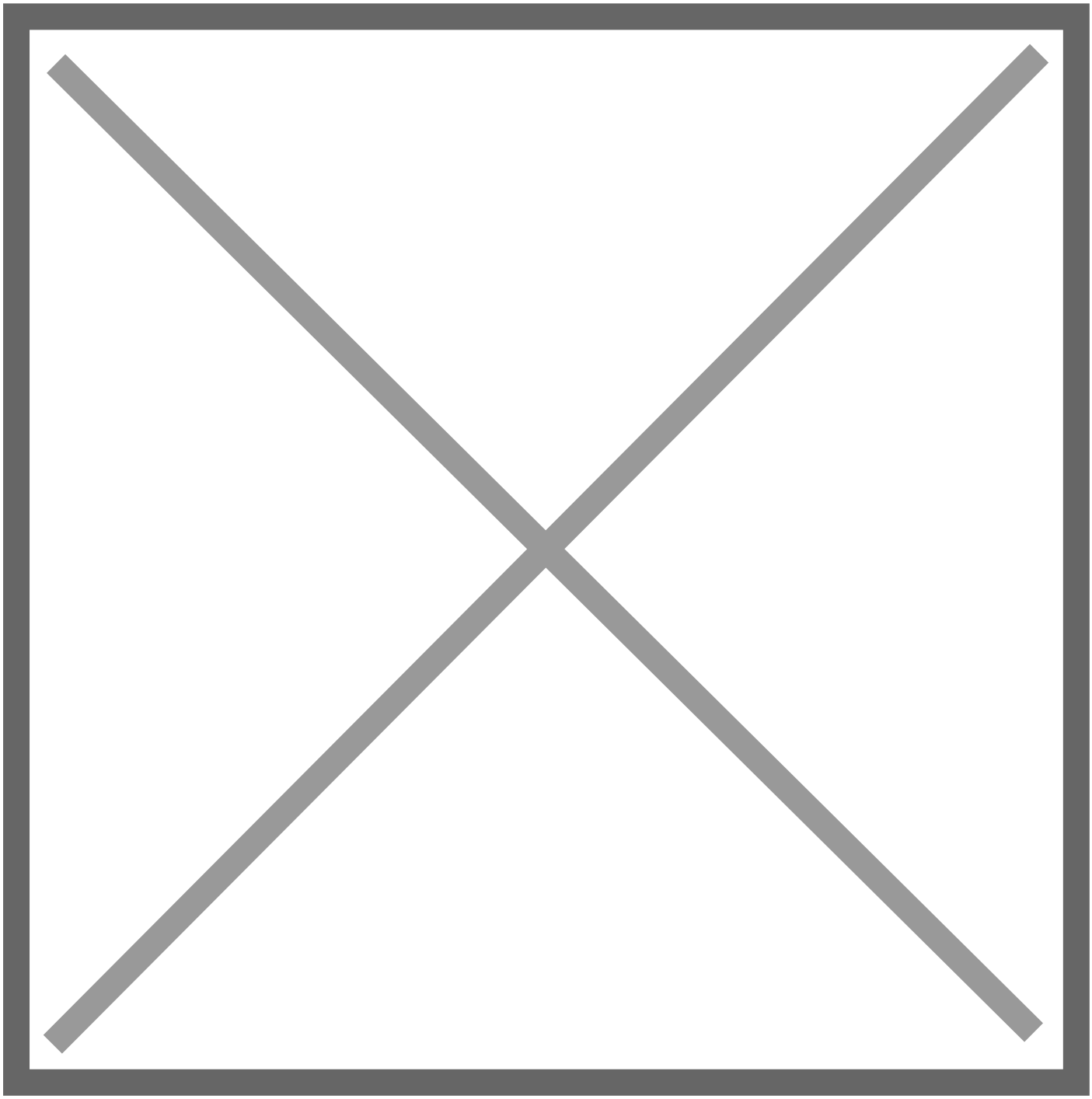

Extra-Territorial Jurisdiction Update - Jurisprudence

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By: Dr Joseph Rikhof

Extraterritorial jurisdiction was discussed recently in this journal in the following two articles: https://globaljustice.queenslaw.ca/news/extra-territorial-jurisdiction-update and https://globaljustice.queenslaw.ca/news/the-simple-way-out-why-international-crimes-must-not-be-prosecuted-as-terrorism, the latter of which incorporates this detailed report: https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf. These two articles discussed new developments in this area in a general sense, in which the first article concluded that there had been 10 convictions for both international crimes as well as terrorism since July 2018, the cut-off date of this book: https://www.toaep.org/ps-pdf/37-einarsen-rikhof (while there have been two other academic publications discussing extraterritorial jurisdiction, namely here and here). This article will look in some more detail at those ten convictions, both as part of a general overview as well as part of a discussion of the actual judgments rendered, where available, which was the case in four of these proceedings (two in Sweden, one in Germany and one in the Netherlands).

General overview of cases

In *Germany*, on April 5, 2016, the police arrested a Syrian man, Ibrahim al-F, a member of a Western-backed group known as Ghoraba as-Sham, which operated under the Free Syrian Army (FSA) umbrella group, a Syrian armed opposition group, on suspicion of war crimes in Syria, namely for torturing prisoners in Aleppo and looting and selling artworks. His trial opened on 22 May 2017 at the Higher Regional Court of Düsseldorf; he was convicted on September 24, 2018 for torture and killing persons protected under international humanitarian law as well as murder, extortionist kidnapping and the commission of war crimes; he was sentenced to life imprisonment, which was upheld on appeal on August 6, 2019. (see here, page 50)

On December 10, 2018, 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 19 February 2019, his trial began before the Higher Regional Court of Stuttgart. On 4 April 2019, he was found guilty of two counts of war crimes and sentenced to four years and six months' imprisonment. (see here, page 50)

On 29 March 2019, the federal prosecutor charged Ahmad Zaheer D. with two counts of war crimes. His trial took place from 2 to 23 July 2019 before the Higher Regional Court of Munich and on 26 July 2019 he was found guilty of one count of war crimes as well as in?icting grievous bodily harm, coercion and attempted coercion. He was sentenced to two years' probation. (for a summary of the case, see here).

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. (see here)

In *Belgium*, on December 12, 2018, the 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 here)

In *Switzerland*, on August 31, 2012, Erwin Sperisen, a dual Swiss-Guatemalan national living in Geneva, was arrested by the Geneva prosecuting authority for atrocities committed between 2004 and 2007, while Sperisen was the head of the National Civil Police of Guatemala. On June 6, 2014, the Geneva Court of Justice found Sperisen guilty of seven charges of extrajudicial killings that took place in 2006 during the takeover of the Pavón prison in Guatemala and sentenced him to life imprisonment; he was acquitted of his participation in the executions of three fugitives from the El Infiernito prison, although the court recognized that the Guatemalan police had indeed killed the escapees in cold blood. This decision was upheld on appeal on May 12, 2015. On 29 June 2017, the Swiss Supreme Court overturned this judgment and ordered a re-trial. On 20 September 2017, the same court allowed his release. On April 28, 2018, the Geneva Court of Justice ruled that he had been an accomplice in the execution of seven prisoners at the Pavón prison in 2006; he was sentenced to 15 years in prison, which was confirmed on appeal on November 28, 2019. (here, page 80)

Detailed overview of cases

In *the Netherlands*, on July 8, 2019, a Dutch-born alleged Islamic State militant went on trial 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 violating the personal dignity of victims as a war crime as well as participation in a terrorist organization for joining ISIS militants in Mosul in Iraq and Raqqa in Syria between 2014 and 2016. He was convicted on July 23, 2019 and received a prison term of seven years and six months. The judgment (here) discusses a number of legal issues, such as the application of the *ne bis idem* principle, various aspects of the commission of war crimes as well as concepts related to terrorism.

The *ne bis idem* issue arose as a result of the fact the accused had been convicted and sentenced on May 17, 2018 by a Turkish court to six years and three months for participation in an armed terrorist organization. The Dutch court was of the view that for the principle of *ne bis in idem* to apply three requirements need to be met, namely whether he was convicted for the same offence in Turkey as he

was charged with in the Netherlands, whether the conviction in Turkey was final and whether the sentence was fully completed. With respect to the first requirement, the court was of the view that in examining the legal characterization of the facts in both countries and the acts of which the accused was accused, the conviction in Turkey included the same charges as laid in the Netherlands. The second requirement was not met as the accused apparently still had an opportunity for an appeal although he had said that he had withdrawn his appeal but no evidence to that effect had been found. Lastly, given the fact that he accused had spent a year and half in pre-trial detention but was released on the day of his conviction meant that he had served less than a third of the time of incarceration imposed and such the sentence had not been completed. The conclusion of the court was that there had been a violation of the ne bis in idem principle (paragraph 3.3).

With respect to the accusation that Akhlafa had joined and participated in a terrorist organization, he argued that he had joined ISIS for humanitarian reasons and had only worked in the medical sector. Before assessing the facts, the court first provided guidance on a number of aspects related to the concept of participation in a terrorist organization. First of all, the court reiterated that the Dutch legislation had provided that regular crimes can become terrorist crimes if those crimes are committed with a terrorist objective. Based on the jurisprudence of the Dutch Supreme Court, the judgment provided clarification of several concepts in the legislation. A terrorist objective is an “objective to seriously intimidated the population or part of the population of a country, or to illegally force a government or international organization to do something, not to do it or to tolerate it, or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or of an international organization.” A terrorist organization means that “the composition of the organization is [not] always the same. Indications for the existence of such an organization may for example be common rules, holding consultations, joint decisions, task allocation, a certain hierarchy and/or echelons.” (paragraph 4.3.3.1; incidentally, for a similar approach regarding a terrorist organization in Germany, discussed during a detention review, see here, paragraph 28).

Participation in a terrorist organization is present “if the person involved belongs to the association and takes part in it or provides assistance to it, …going as far as being directly connected to the realization of the objective. Every such contribution, also referred to as participation act, to an organization may be punishable. A participation act may consist of (co-) commission of any serious offence, but also of carrying out odd jobs and (thus) performing acts that, per se, are not punishable, as long as they can be qualified an aforementioned participation or support. Examples are offering financial attribution or other material support as well as recruiting of funds or for the organization.” The *mens rea* of participation is that the person generally knows the objective of the organization but that an intention to commit specific crimes planned by the organization is not required. The court also set out the legislative parameters of preparatory acts for terrorist crimes, such as inducement of others, obtaining means and/or information, possessing items or plans and hindering efforts by the government to prevent such crimes. (paragraph 4.3.3.1)

The court found that he was guilty of a number of offences committed with a terrorist objective, namely causing explosions, murder, manslaughter, the preparation of such crimes and the possession of arms for the purpose of facilitating a terrorist crime. This was based on the following evidence: the accused had adopted the radical, extremist ideas of the armed jihads with a terrorist objective, such as ISIS; he travelled to Syria and Iraq in order to go combat zones where ISIS was active; he joined ISIS; he participated in and contributed to the armed jihad in Syria, carried out by ISIS; and he used, carried and possessed weapons in Syria. (paragraphs 4.3.3.2 and 4.4)

The court relied heavily on international humanitarian and criminal law, both international instruments as well as jurisprudence, to flesh out legal concepts related to war crimes. First of all, it provided details, based on the ICTY jurisprudence of the characterization of armed conflicts and especially non-international armed conflicts by indicating that for the latter situation two elements are essential, namely that the conflict has a high degree of intensity and that the parties in the conflict are well organized. (paragraph 5.3.3.1). It came to the conclusion that the conflicts in Syria and Iraq both meet those requirements. (paragraphs 5.3.3.2)

It engaged in a similar analysis, while this time relying on ICTY jurisprudence and the ICC Elements of Crime document (here) to determine the elements of the war crime of outrages upon personal dignity by saying that this crime occurs when “the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, dishonouring or otherwise be a serious attack on human dignity”. It also makes it clear that this crime can be committed against dead bodies. Lastly, the court made reference to the fact that this crime had already been used in several other European countries in similar circumstances. (paragraph 5.3.4.1; for an overview of such cases, see here). The court came to the conclusion that having photographs taken of himself with deceased persons would fit the definition of this war crime. (paragraph 5.4)

Lastly, in relation to the issue of war crimes, the court followed closely the jurisprudence of the ICTY and ICTR to establish a nexus between an armed conflict and the activities of a person in the sense that a person can be only be held responsible for such a crime if the existence of an armed conflict made it possible for a person to commit a crime. This resulted in the court’s finding “that there is a nexus between the conducts of the suspect in relation to photograph no. 1 and the conflict in Syria. Posing with the deceased and making a photograph (or having it made) and subsequently posting it on Facebook and sending it to someone could not have taken place without the armed conflict because the deceased person in photograph no. 1 was killed in the armed conflict in Syria by or on behalf of IS for being an alleged opponent and was then exhibited by affixing him to a crucifix.” (paragraph 5.3.5)

In *Sweden*, one case, while not strictly being one of traditional extrajudicial jurisdiction, still warrants discussion as it involved the use of social media and terrorist activities. On February 23, 2017, the Malmö District Court sentenced a Swedish national to six months’ imprisonment for having solicited funds for the terrorist organizations Jabhat al-Nusra and ISIS. The case is the first of its kind brought under the provision that criminalizes solicitation to commit terrorist crimes; in this case the solicitation

was to fund a terrorist organization, a crime punishable on conviction with up to two years in prison. (for this and other Swedish anti-terrorism laws, see here) Although the defendant denied any wrongdoing, the court established that he had solicited terrorist funds by making the following message available on his Facebook page: “help us supply our brothers at the front with weapons to avenge our siblings.” The court also found that he had provided contact information for two known funders of terrorism. (for more detail on the case, see here) The case was upheld on appeal on November 17, 2017 and then again by the Supreme Court of Sweden on November 13, 2019. (see here)

The Supreme Court upheld the ruling of the Court of Appeal by saying that factually the person who posted the Facebook page was certainly aware of Jahbat al-Nusra’s and ISIS’ acts of terror and that by posting the above appeal, he intended to persuade the general public to give money or other property to organizations to fund the purchase of weapons to be used against civilians; his intention was to appeal to the public to finance particularly serious crimes, including attacks against civilians. The importance of the Supreme Court judgment lies in the clarifying the overlap and distinctions between international humanitarian law and national anti-terrorism laws, which the court did in a manner reminiscent of the reasoning by the Supreme Court of Canada in the *Khawaja* case in 2012 (see here, paragraphs 98-102). The starting point in the decision of the Supreme Court stated that it was clear that there was a non-international armed conflict in Syria and that both Jahbat al-Nusra and ISIS were among the armed groups in that conflict (paragraph 6). In setting out the general principles of international humanitarian law, the court reiterated its basic principles, including the right of combatants to use violence to defend themselves and against their enemies, which would therefore not amount to war crimes; however, such an immunity against prosecution would not apply to persons belonging to non-government armed forces in a non-international armed conflict (paragraphs 16-21). It went on to say that terrorism, in the sense of attacking civilians in a disproportionate fashion, is prohibited in international humanitarian law (paragraph 24) while international anti-terrorism conventions contain an exemption for activities carried out during armed conflict and in according to the rules of international humanitarian law (paragraphs 25-30). When interpreting Swedish anti-terrorism legislation, the same principles should apply (paragraphs 31-35).

With respect to the principles related to instigate others to commit a crime by providing money or other property for a terrorist purpose as set out in the Swedish anti-terrorist legislation, the court indicated that the financing “must be provided with the intention that it should be used, or in the knowledge that it is to be used, for a particularly serious crime. The offender’s aim in calling on the general public must therefore be to persuade others to finance a particularly serious crime. However, the offender does not need to intend to commit a specific offence at a specific time and place; the intended type of offence (financing offence) can instead take place at an earlier or later date” (paragraph 38).

Also in *Sweden*, on February 19, 2019, a court convicted Kurda Bahaalddin H Saeed, who had fought against ISIS in Iraq, of war crimes for posting pictures and videos of dead persons on Facebook, to 15 months imprisonment. The photographs and film showed that on four occasions the civilians with

whom he had been photographed or filmed had been wounded or were dead, which he must have known when he posed the photographs taken with them. As a result, he had subjected a wounded person to humiliating or degrading treatment constituting the war crime of a serious violation of that person's dignity. (see here, pages 8-20); like the Dutch case above, the court found that the conflict in Iraq was an non-international armed conflict based on the legal requirements of intensity and organization (pages 13-14). With respect to the issue of war crimes, the court found that, based on international humanitarian law, dead persons are protected under the 1949 Geneva Conventions and their 1977 Additional Protocols (page 15). This decision and its reasoning was confirmed on appeal but the sentence was decreased to one year imprisonment on September 22, 2019. (see here, pages 1-5)

In *Germany*, on December 20, 2018, the Federal Court of Justice 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 of Musoni as Murwanashyaka had died in detention. (see here) 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 (see https://www.toaep.org/ps-pdf/37-einarsen-rikhof, pages 452 for more fact facts and pages 458-459 for the legal analysis of the case). The Federal Court of Justice agreed with the lower court (see https://www.toaep.org/ps-pdf/37-einarsen-rikhof, page 511) that the accused persons were not liable for command responsibility as they did not have effective control over the organization in the Congo (see here, paragraphs 147-152) while with respect to the conviction based on aiding and abetting, it was not proven that they had objectively and factually encouraged or facilitated the acts during the period in question (see here, paragraphs 156-168).

While the following two cases in Germany do not involve convictions but detention reviews, they do shed some light on the notion of membership in a terrorist organization. The first case referred to a number of indicia for membership: "membership requires a certain formal integration of the offender into the organization. It can only be considered if the offender supports the organization from the inside, not just from the outside. It does not necessitate a formal declaration of joining or organized involvement in the life of the organization on the part of the offender. However, the offender must occupy a position within the organization that identifies him or her as belonging to the circle of members and distinguishes him or her from non-members." (see here, paragraphs 23, which reasoning was followed five months later here, paragraph 28 in the second case, also involving a woman)

Last, in Germany, on March 4, 2016, a Düsseldorf court sentenced Nils D. to four and a half years' imprisonment as a member in a terrorist organization for his involvement in a unit of ISIS responsible for internal security at the Manbij prison in Syria. Later evidence emerged that he might have participated directly in a number of instances of torture, sometimes resulting in death. Although new charges were filed, they were rejected by the court the basis of double jeopardy on October 10, 2018.

(see here) That decision has been appealed. (see here)

Conclusion

As can be seen from the articles mentioned in the introduction, extra-judicial jurisdiction is alive and well, especially in European countries. Extra-judicial jurisdiction, from active and passive personality jurisdiction to especially universal jurisdiction (see https://www.toaep.org/ps-pdf/37-einarsen-rikhof, pages 428-429 for an explanation of these terms) has grown at a steady pace in those countries with a notable uptick in cases as a result of the influx of a large number of Syrian refugees, which have invariably included not only victims but also perpetrators of international crimes as well as terrorism.

Two overarching conclusions can be drawn from the legal overview set out in this article. The first one is that while most countries require the presence of an accused during a criminal trial, this limitation does not apply during pre-trial activities, with as result that persons suspected of international crimes and terrorism can be charged and international warrants for their arrest can be issued. (see here for detailed overview of domestic legislation regarding international crimes in a number of countries)

Secondly, the discussion of legal principles in new cases in Europe since the middle of 2018 shows that the interaction between international law and domestic law is still very similar as noted in https://www.toaep.org/ps-pdf/37-einarsen-rikhof (at pages 425-427), namely that while national courts will rely heavily on international instruments and jurisprudence when defining international crimes, such as war crimes and crimes against humanity, or transnational crimes, such as terrorism but will use previous precedents of their own courts when deciding on matters of extended liability or criminal procedure.

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