Extra-Territorial Jurisdiction: 2021 update, part I

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By: Dr Joseph Rikhof

Since the overview of the jurisprudence of extra-territorial jurisprudence in this journal in April of 2020 (see here), there have been seven new decisions by national courts in this area, namely four in the Netherlands, and one each in Germany, Spain and Switzerland. While some of those judgments involved convictions and sentences for “traditional” war crimes, at the same time the trend to have terrorism charges added to such cases has continued (for an earlier overview of this trend see here while for a cautious note regarding this development, see here). What become apparent in reading these decisions is that the basis for jurisdiction to try such crimes are expanding. Originally, jurisdiction was based on either passive nationality or universal jurisdiction but now the active nationality

jurisdiction is also becoming of importance now that a number of national have gone abroad, especially to Syria, and then have returned to their own country. (for more details of these types of jurisdiction, see see Robert J Currie and Dr. Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, Irwin Law Inc. 2020, pp 69-82).

Of these seven judgments, five will be discussed in detail as the judgments are available. The remaining two, involving Spain and Switzerland, are discussed by way of overview.

In Spain, Inocente Orlando Montano Morales was convicted on September 11, 2020 for murder with terrorist intent and sentenced to 133 years imprisonment for the murder of five Spanish Jesuit priests in November 1989 in El Salvador. These killings as well as those of a sixth Jesuit priest and two other persons, who had Salvadorean citizenship and as such were outside the jurisdiction of the Spanish court, had been ordered by the High Command of the Salvadoran Armed Forces, of which Montano was a member, during the 1980-1992 civil war in El Salvador. (For more details, including the extradition process from the United States where Montana had resided until 2017, see here, pages 64-65)

In Switzerland, Alieu Kosiah was convicted on June 18, 2021 and sentenced to 20 years imprisonment for the following war crimes between 1993 and 1995 in Lofa County, Liberia: ordering the killing of 13 civilians and 2 unarmed soldiers; murdering four civilians; personally raping a civilian; ordering the cruel treatment of 7 civilians; infringing upon the dignity of a deceased civilian; repeatedly ordering the cruel, humiliating, and degrading treatment of several civilians; repeatedly inflicting cruel, inhuman, and degrading treatment on several civilians; repeated orders to loot, and using a child soldier in armed hostilities. He was acquitted of recruiting a child soldier; attempted murder of a civilian; complicity in a civilian murder; and giving orders to loot in one instance. Kosiah had been a commander of the United Liberation Movement of Liberia for Democracy (ULIMO), a rebel group that fought against Charles Taylor's National Patriotic Front for Liberia (NPFL) in Liberia's first civil war, a non-international armed conflict, between 1989 until 1997 when about 250,000 people were killed (for more details, see here).

Cases in the Netherlands (for a general overview of recent cases, see here)

The Akhlafa case

The first case, decided on January 26, 2021 by the Court of Appeal in The Hague was an appeal of the conviction of Oussama Achraf Akhlafa (discussed here as the first case under the heading "Detailed overview of cases" while the appeal decision can be found here). The decision examines 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 case involved a Dutch-born Islamic State militant who was tried for crimes committed in Mosul, Iraq and Raqqa, Syria after posing with a crucified body and sharing images of dead victims online as well as for participation in a terrorist organization after joining ISIS militants in those countries between 2014 and 2016. He was sentenced

to seven years and six months.

The *ne bis idem* issue had arisen 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, of which he had spent a year and half in pre-trial detention. The Dutch trial judge had found that as a result he had only served less than a third of the time of the incarceration imposed, which was one of the reasons why this plea was rejected. The Dutch appeal court agreed with the trial judge for two reasons. Firstly, it rejected the defence argument that the early release by the Turkish court amounted to a remission or pardon of the sentence imposed as there was no evidence in the Turkish court record that this has been the purpose of the early release. Secondly, the argument that the entire sentence had been served in view of the Turkish regulation regarding conditional release was also rejected as again this was not clear from the Turkish record.

Next, the Court of Appeal was of the view that the prosecutor had the jurisdiction to initiate all the charges of war crimes and terrorism except one. There was no problem with the charges which were based on the implementation of international treaties, namely common article 3 of the 1949 *Geneva Conventions* (see here) with respect to war crimes in non-international armed conflicts and article 2 of the *International Convention for the Suppression of Terrorist Bombings* (see here), which was the inspiration for a large number of offences in the *Dutch Criminal Code*. However, although Dutch criminal law allows the prosecution of a Dutch national for other, regular, offences committed outside the Netherlands, this is only possible if there is an equivalent offence in the foreign country where the offence occurred. The Court of Appeal could not find an offence in the *Syrian Criminal Code*, which was similar to the charge of possessing weapons and/or ammunition or committing such a crime with terrorist intent. As result this charge was struck from the indictment.

With respect to the notion of participation in a terrorist organization, the court of appeal generally agreed with the definition given be the court of first instance by saying:

“participation is only possible if the person involved belongs to the group and participates in or supports acts that are intended to achieve or are directly related to the realisation of the purpose. An act of participation may consist of the (co-)commission of any offence, but also the provision of assistance and support, and (therefore) the performance of acts that are not punishable in themselves, as long as it is possible to talk of the aforementioned participation or support. For participation it is sufficient that the person involved has general knowledge (in the sense of unconditional intent) that the organisation has as its purpose the commission of (terrorist) offences. Any form of intent to commit the crimes specifically intended by the organisation is not required.”

For the preparation for and the promotion of terrorist acts, which is also criminal in Dutch law “it is required that the perpetrator undertakes the conduct with the intent of preparing for or facilitating the terrorist offence in question.” Additionally, “the time, place and method of implementation will have to be established in some detail. The alleged acts of preparation and promotion may be considered jointly. Even if isolated acts do not constitute punishable preparation, the combination of all acts and

the defendant's thoughts together may lead to the conclusion that the defendant had the intention of committing a serious offence." Based on this legal framework the Court of Appeal agreed with the lower court that the accused contributed to ISIS as a terrorist organization by joining and remaining a member for over two years. Similarly, his conviction for preparation and promoting terrorist offences was also upheld as he joined ISIS and thereby actually contributed to its jihad struggle. Incidentally, the court did not address the legal analysis discussed in the lower court as to the meaning of a terrorist organization as it was of the view that the fact that ISIS had been placed on both UN and EU terrorist listings was sufficient for the same conclusion in this case.

With respect to the issue of war crimes, the appeals court was in agreement with the trial court on a number of issues, including using the ICTY jurisprudence, the *Rome Statute* (see here) and its *Elements of Crime* document (see here) as sources for such crimes in Dutch law as well as the notion of a non-international armed conflict and the war crime of outrages upon personal dignity. With respect to a non-international armed conflict, the appeals court followed the ICTY jurisprudence by stating that for such a conflict to exists both parties to the conflict need to be sufficiently organized while the intensity of the conflict has to be at the level of protracted armed violence. It was of the view that ISIS had met both thresholds. Regarding intensity that "there were frequent large-scale military operations between the parties involved, using military weapons and vehicles such as tanks and artillery." The fact that ISIS had an organized structure and even had control over territory meant it was also sufficiently organized.

The appeals court also discussed in some detail the war crime of outrages upon the personal dignity and the nexus between the armed conflict and the commission of this crime, again by relying heavily on the ICTY jurisprudence, which says regarding this war crime that it:

"is conduct intentionally committed or participated in by the defendant that would generally be recognised as severely humiliating or degrading treatment or would otherwise be an outrage upon personal dignity. In assessing whether there have been outrages upon personal dignity, objective criteria relating to the severity of the conduct must be taken into account, in addition to subjective criteria relating to the vulnerability of the victim."

The Court of Appeal also said, referring to the ICC *Elements of Crime* document that "… in assessing whether there have been outrages upon personal dignity, objective criteria relating to the severity of the conduct must be taken into account, in addition to subjective criteria relating to the vulnerability of the victim."

Regarding the nexus requirement and agreeing with the trial judge, the Court of Appeal held that "the existence of an armed conflict must have played at least (i) a substantial role in the perpetrator's decision to commit the crime, (ii) his ability to do so, (iii) the manner in which the crime was committed, or (iv) the purpose for which it was committed." Applying this law to the facts, the appeals court decided that:

“by posing next to the deceased person and taking or having a photograph taken, the defendant contributed to the further deepening of the humiliation and/or degradation of the deceased person. In doing so, the defendant expressed the sentiment that the deceased's body should be viewed as a trophy and that he was superior to the deceased. That humiliating and/or degrading conduct is of such severity that it is unquestionably considered to be an outrage upon the personal dignity of the deceased person. By subsequently posting the photograph on his Facebook account, the defendant ensured that a large number of people had the opportunity to see the photograph. By doing so, in conjunction with the fact that he himself posed for the photograph and had someone take it, he further continued the outrage upon the personal dignity of the deceased person.”

Based on these considerations, the appeals court decided that the accused should be given a lengthy custodial sentence. However, his sentence was reduced by six months to seven years since the court had found that some of the charges for which the trial judge had convicted the accused were improperly taken into account.

Case of a former commander of Ahrar al-Sham

On October 22, 2019, the 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, was 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 was singing to celebrate the deaths of other fighters as well as posing armed next to an imprisoned person who was being interrogated (see here, paragraph 5.1). German authorities had initially flagged the suspect after he registered as an asylum seeker there in 2015. He was convicted on April 21, 2021 and sentenced to six years imprisonment for war crimes and participation in a terrorist organisation (see here, paragraph 9)

Like the appeals judgment just discussed, this judgment of the The Hague District court also relied heavily on ICTY caselaw to come to the conclusion that a non-international armed conflict existed in Syria and that Ahrar al-Sham was a party to this conflict based on its organization and its intense involvement in the conflict (paragraphs 5.4.1.1 and 5.4.2.1). The court also examined the general requirement of humane treatment in international humanitarian law, which can be found in common article 3 of the 1949 *Geneva Conventions*, and which can be further subdivided into other specific obligations, including two of specific interest to the case at hand, namely the prohibition of outrages upon personal dignity and the requirement of protection against public curiosity. (paragraph 5.4.1.3). With respect to outrages upon personal dignity, the court reiterated the same parameters as the appeals court, including the fact that this offence can also be used for the treatment of deceased persons as applied by the appeals court in the above case, to which it refers as well as to judgments of the ICTY and other European courts. (paragraph 5.4.1.3) With respect to the war crime of protection against public curiosity, the court was of the view that this is a war crime in international armed conflicts with the elements that prisoners must be protected from insults and public curiosity at all times. However, it held there was not sufficient evidence in customary international law to come to the

conclusion that this crime also exists in a situation of non-international armed conflicts (paragraphs 5.4.1.3 and 5.4.2.3).

With respect to the nexus to armed conflict and the knowledge of its origins requirement, the court relied on ICTY and ICTR jurisprudence to come to the same legal conclusion as the appeal court above (paragraph 5.4.1.4) and indicated that there is a nexus in this case by saying: “The deceased allegedly dies during this offensive. They are called Shabiha, a term used for militias fighting for the Assad regime. The deceased therefore belonged to the opposition of Ahrar Al-Sham, to which the defendant belonged as a fighter. The outrage upon personal dignity of the deceased opponents contributes to the display of victory. Therefore, there is a nexus between the defendant's acts and the conflict in Syria.” (paragraph 5.4.2.4)

With respect to the terrorism offences, the court first provides the legal criteria of what constitutes a terrorist organization and says that it is:

“understood to mean a partnership with a certain permanency and structure between the defendant and at least one other person. It is not required that it is established that one must have collaborated, or at least have been acquainted, with all other persons who form part of the organisation or that the composition of the partnership is always the same. Indications of the existence of such a partnership can be, for example: common rules, consultation, joint decision-making, a division of tasks, a certain hierarchy and/or echelons. The more intimate and sustainable, the sooner the requirement of a partnership with a certain structure will be met. Such a partnership can arise accidentally and over time because one gradually discovers that one has a common goal, the realisation of which is served by sustainable cooperation. Such a partnership does not depend on rules, explicit agreements or hierarchical relationships, but can very well be sustainable and derive a certain structure from working on a common goal. If there is a looser form of cooperation - no permanent participants in the partnership, the participants only know each other partially - then the requirement of the partnership in particular may mean that the mutual relationship between the participants or some of them in the partnership, gives some structure. The fact that two persons of a group have worked together in a structured context for approximately the same time is considered sufficient to also consider the other persons of that group as belonging to the organisation, without the establishment of such a structure between these persons in the cooperation.” (paragraph 6.4.1.1)

The concept of participation follows closely the precepts laid down by the appeals court above. (paragraph 6.4.1.2)

Based on these legal requirements, the court finds that Ahrar al-Sham was a terrorist organization (paragraph 6.4.2.1) and that the person in question was a participant in this organization, based on the same video evidence used to convict him of war crimes. (paragraph 6.4.2.2).

To be continued in Part II.

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About the author

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