

Extra-Territorial Jurisdiction: 2021 update, part II

August 5, 2021

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Case of distribution of ISIS propaganda

On June 29, 2021, the District Court in The Hague convicted a 32-year-old Dutch citizen and sentenced her to six years' imprisonment for involvement in war crimes committed by ISIS in Syria and Iraq (although the prosecution had requested only three years). The woman had distributed large amounts of ISIS propaganda via the Dutch Telegram messaging app in 2019. She shared two videos of prisoners of war being killed in a gruesome manner and provided her own disparaging commentary for one of the executions and by doing so, she had committed the war crime of violating the personal

dignity of the deceased people. In addition, she had incited others to commit terrorist crimes and war crimes, trained herself and others to make bomb vests and sent money to people involved in terrorist activities, all of which made her a participant in this terrorist organization. In addition to the six-year-sentence, she was ordered to undergo compulsory psychological treatment due to her psychological problems. (see here, in the overview as well as paragraph 12.3)

By way of introduction, the court indicated along the same lines as the Supreme Court of Sweden (see here, under Sweden), that the difference between international humanitarian law and anti-terrorism law lies in the fact the former has as its goal to protect persons who no longer participate actively in armed conflicts while the latter serves to protect the national public order. (see here, paragraph 2.2)

The court used the same definition for terrorist organization as in the Ahrar al-Sham case above and comes to the conclusion that ISIS was such an organization along the same lines as done in the appeal decision above re the Akhlafa case (paragraph 5.4.1) while also indicating that ISIS had been involved in terrorist crimes on a large scale. (paragraph 5.4.2) The court comes to the same conclusion as these two cases with respect to the legal parameters of participating in a terrorist organization, noting that the person concerned was more than a sympathizer of ISIS when distributing jihadist extremist material. She had become a participant in that organization due to the scale of the official and un-official ISIS propaganda posted as well as the nature of the very explicit and gruesome videos distributed by her to the general public. (paragraph 5.4.5)

The court also relied on the previously discussed cases to determine:

- what amounts to a non-international armed conflict;
- that such a conflict existed in Syria and Iraq when ISIS was active in those countries (paragraph 5.4.3);
- that ISIS had committed the war crime of outrages against personal dignity on a regular basis (paragraph 5.4.4);
- that there was a nexus to the armed conflict (paragraph 6.4.2, ad 4);
- and that by distributing videos of such ISIS practices the accused had fulfilled all the requirements of this crime, including the elements:
    - that the victims in those videos be the subject of an outrage against personal dignity (paragraph 6.4.2, ad 1);
    - that the victims were protected persons in an armed conflict (paragraph 6.4.2, ad 2);
    - that the accused had the knowledge of that status of the victims (paragraph 6.4.2, ad 3);
    - and that there was a nexus between the crimes committed by ISIS and the activities of the accused, specifically the addition of her own humiliating comments to the videos as part of their distribution. (paragraph 6.4.2, ad 4)

This person was also convicted of inciting acts of violence against the authorities (see here, articles 131 and 132 of the Dutch *Criminal Code*, which are similar to the offences of sedition in the Canadian *Criminal Code*, see here, section 59). The court provides some parameters to these offences by

saying in general:

- that they are of an inchoate nature in that they are completed by the statements of the inciter without any further evidence that they were followed by others;
- that "publicly" means there is a possibility the public will be come aware of the utterances in question,
- and that social media is a vehicle for this purpose in that the internet is a public place. (paragraph 7.3.2)

The accused's acts of inciting others to violence was further specified by indicting her for incitement to commit a war crime and a terrorist offence (for the latter pursuant to articles 131(2) and 132(3) of the Dutch *Criminal Code* (see here and paragraph 7.3.3). The court was of the view that her posting of very violent and disturbing videos combined with her messages to kill unbelievers, was intended to recruit sympathisers and obtain financial support for ISIS and as such amounted to incitement of terrorism. (paragraph 7.3.6) The videos with her commentaries were also intended to incite others to commit the war crime of violating the personal dignity of persons. (paragraph 7.3.7) By using the Telegram app, which was readily available to the public the accused fulfilled the requirement of publicly inciting the crimes of terrorism and war crimes. (paragraph 7.3.8)

Lastly, the accused was also convicted of training for terrorist offences by posting these videos contrary to article 134(a) of the Dutch *Criminal Code* (see here and paragraphs 8.3.1-8.3.3), which has its equivalent in article 83.18(3)(a) of the Canadian *Criminal Code*. (see here)

Khedr case

On September 5, 2019, charges were laid against Ahmad al Khedr, also known as Abu Khudar, a 47-year-old Syrian who had been a commander of a battalion aligned with the Jabhat al-Nusra opposition organization known as Ghuraba'a Mohassan (Strangers of Mohassan). He was charged with both the war crime of murder and the crime of participation in a terrorist organization for involvement in the summary execution of a captured soldier of the Syrian army in 2012; he was convicted and sentenced to 20 years imprisonment on July 16, 2021 by the District Court in The Hague. (see here, paragraph 11; for an overview of the trial, see here)

Based on previous jurisprudence with respect to the legal parameters of a non-international armed conflict (paragraph 5.4.1.1) and the nexus requirement (paragraph 5.4.1.4) while also examining the war crime of killing a person *hors de combat* (paragraphs 5.4.1.2 and 5.4.1.3), the court came to the conclusion that there was such a conflict in Syria in 2012 (paragraph 5.4.2.1); that the accused knew that the soldier was a protected person and *hors de combat* (paragraph 5.4.2.2); that the accused together with others killed the soldier (paragraph 5.4.2.3); and that there was a nexus between the armed conflict and the conduct of the accused (paragraph 5.4.2.4).

The accused was acquitted of the charge of participation in a terrorist organization (paragraph 6.4.2.3). As with the legal parameters of war crimes, the court relied on earlier caselaw to determine

the various aspects of this crime, such as the notion of an organization (paragraph 6.4.1.1) and participation in such an organization. (paragraph 6.4.1.3) The court also relied on the domestic legislation to identify which criminal activities amounted to terrorist offences (paragraph 6.4.1.2 referring to article 83a of the Dutch *Criminal Code*, see here, which is similar to article 83.01(1)(b)(B) of the Canadian *Criminal Code*. (see here) The court was of the view that the Jabhat al-Nusra and Ghuraba'a Mohassan groups were organizations as envisaged in the legislation (paragraph 6.4.2.1) but that it was not proven beyond reasonable doubt that they had a terrorist intent at the time of the commission of the alleged offences because the execution of the soldier was done as an act of revenge for a bloodbath against civilians by the Syrian army a couple of weeks earlier. (paragraph 6.4.2.2)

Case in Germany

On April 29, 2020, Carla-Josephine S., a German citizen, was found guilty of a number of crimes. In 2015 she left Germany with her three children without advising their father, who was entitled to joint custody, to join ISIS in Syria. In 2018, the house where she and her children were staying in Raqqa was bombe and her eight-year-old son was fatally injured. She was convicted of the following:

- membership and participating in a foreign terrorist organisation;
- abducting her children and exposing them to mortal danger, which resulted in the death of her son during an airstrike on their home; and
- war crimes for enlisting her son under the age of 15 into a training camp, which constituted an armed unit within the armed group ISIS.

She was sentenced to 5 years and 3 months of imprisonment (see here, page 51 for an overview; for a discussion of the detention review of this case, see here; for the decision itself, see here, which discussed the considerations for this penalty in paragraphs 120-141)

The legal analysis of the court centered on a number of issues. With respect to membership in a terrorist organization, the court was of the view that:

"membership requires a certain degree of consensual integration into the organisation on the part of the perpetrator. Integration can only be considered if the perpetrator supports the organisation from both within and from the outside. It is necessary for the perpetrator to occupy a position within the organisation that identifies her as a member and distinguishes her from non-members. By contrast, the assumption of membership is excluded if the support tasks were carried out for any reason other than the mutual desire for long-term participation in the life of the organisation." (paragraph 93)

With respect to exposing her children to mortal danger, this brought into play the criminal offence of violating the duty of care owed to her children (a violation of section 171 of the German *Criminal Code*, see here, which is broadly similar to section 215(2)(a)(ii) of the Canadian *Criminal Code*, see here). According to the court:

“as a parent with a duty of care and education, the Accused, insofar as she took her three children and travelled to IS territory in Syria in order to live there permanently under tyrannical rule in a war zone, while also withdrawing them from regular schooling, also committed three counts of gross violation of the duty of care or education pursuant to Section 171 StGB. She also grossly violated her duty of care by allowing her 6- to 8-year-old son to be exposed to IS paramilitary training at one of the group’s training camps. The act falls within the scope of the offence if there is a particularly clear contradiction in objective terms between the act in question and the principles of proper education and if the act in question subjectively shows a high degree of irresponsibility, measured against the capacities of the perpetrator.” (paragraph 97)

In addition, by enrolling her other two children in an ISIS training camp, she committed the war crime of child recruitment in the context of non-international armed conflict. (paragraphs 98-106; for the contents of this war crime, see article 8(2)(e)(vii) of the *Rome Statute*, here)

Conclusion

It is interesting in the above seven cases to note the various aspects, on which extra-territorial jurisdiction is based. In the past, most cases involving international crimes were based on either passive personality or universal jurisdiction. (see for more details regarding these concepts Robert J Currie and Dr. Joseph Rikhof, I*nternational and Transnational Criminal Law, Third Edition*, Irwin Law Inc. 2020, pp 71-82). This trend continued with utilizing the same bases for jurisdiction for terrorism offences, including four cases mentioned in this article, namely the Spanish case regarding passive personality for murder with a terrorist intent, universal jurisdiction for war crimes in the Swiss case and the Khedr case in the Netherlands and a combination of war crimes and terrorist offences in the Dutch Ahrar al-Sham case.

However, with the new situation of nationals from a number of countries going to Syria and Iraq to join ISIS or supporting that organization from their home country, an old form of extra-territorial jurisdiction, active personality, has become more prominent and it was used in the two other Dutch cases discussed above as well as the German case. (For a discussion of this type of jurisdiction, see Robert J Currie and Dr. Joseph Rikhof, *International and Transnational Criminal Law, Third Edition*, Irwin Law Inc. 2020, pp 69-71). One advantage of utilizing this type of jurisdiction is that it opens the possibility to use purely domestic offences in addition to the international or transnational crimes, such as war crimes and terrorism. For example, in the Netherlands, the domestic crime of inciting acts of violence was used while in Germany it was violating the duty of care owed to children.

The question is whether it will be possible to use extra-territorial jurisdiction for regular domestic crimes when the person committing such crime is not a national of the country in question. This is not an entirely hypothetical question as this was done recently in Canada when a permanent resident was accused of a hate crime regarding people outside Canada. (see here) This development would bring into play the doctrine of qualified territorial jurisdiction, which is also called the effects doctrine, where a country can take jurisdiction based on yet another basis, territorial jurisdiction in the case that the

crimes are committed or initiated on its territory but the effects are acutely felt elsewhere (see Robert J Currie and Dr. Joseph Rikhof, *International and Transnational Criminal Law*, Third Edition, Irwin Law Inc. 2020, pp 65-69 and 479-498 while for this doctrine at the ICC, see pp 226-227).

Suggested citation: Dr Joseph Rikhof, “Extra-Territorial Jurisdiction: 2021 update, part II” (2021), 5 PKI Global Justice Journal 27.

About the author

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