



# BOFAXE

## One Court at a Time: Challenges of Universal Jurisdiction and Enhancing International Justice (Part 1)

### LESSONS LEARNED THROUGH AL-KHATIB TRIAL

When the Higher Regional Court of Koblenz convicted former Syrian State intelligence officer Anwar R. of crimes against humanity on January 13, 2022, survivors, activists, and lawyers unanimously praised German courts for their commitment to international justice. The Al-Khatib trial and verdict not only marked the first instance of a Syrian official being held accountable for crimes against humanity, but also set a precedent for domestic and regional legal systems. The trial also shed light on two substantial points. First, resources for survivors and witnesses of such cases can be improved, particularly in the areas of witness protection and translations of court materials. Second, although universal jurisdiction has proven to be the only hope for prosecuting international crimes recently, such trials remain limited in number.

This piece therefore asks two questions: What lessons can be derived from the Al-Khatib trial to encourage further witness protection measures in future litigation? And why investigation and prosecution of international crimes under universal jurisdiction continue to be challenging to implement?

#### **Systematic Attacks Against Syrian Civilians and Collection of Evidence**

March 15th, 2011, almost eleven years ago, marked the start of what led to the Syrian conflict. It began with 50 peaceful protestors calling for democratic reform. In response, the government under the Syrian President Bashar al-Assad countered them with violence. Security forces resorted to armed violence aiming to intimidate uprising and to stop any anti-government movement at all costs. Consequently, thousands of civilians were arrested, several of whom were transported to a military intelligence facility known as “Branch 251” or Al-Khatib in Damascus.

The collection of information on Al-Khatib, questioning more than 80 witnesses and defected military personnel, had determined that at least 4,000 prisoners were held in the facility from April 2011 to September 2012. The so-called “Caesar files” – photographs of a former Syrian military defector – showed bodies of people who were tortured and died in Syrian detention facilities. The materials were evaluated by experts and were included in the proceedings. Anwar R., a 58-year-old Syrian national, was the head of the Investigative Unit in the General Intelligence Service Detention Center, in which Al-Khatib was a subdivision. Anwar R. was responsible for managing the processes of interrogation from April 2011 to September 2012.

#### **The Significance of this Verdict to International Justice**

Anwar R. was tried under the Code of Crimes Against International Law (CCAIL) – the 2002 implementation of the Rome Statute into German criminal law. The CCAIL provides Germany with a framework for exercising universal jurisdiction and can prosecute the limited number of crimes contained in the law. Thus, §1 of the CCAIL states that the law applies to all offenses against international law listed under §6 to §12. This means that despite neither the victim nor the perpetrator are German nationals, and that the crime did not occur in Germany, the German regional court can bring perpetrators to justice. The ratio behind the principle of universal jurisdiction is that the fight against impunity is borderless. And that all states must possess jurisdiction to prosecute those crimes that are “universally considered heinous and repugnant” (Bantekas, para. 22).

The judges convicted Anwar R. of crimes against humanity under § 7 CCAIL in concomitance with 27 cases of murder and assault in 25 cases. These included killing of persons, torture, sexual coerces and rape, and deprivation of liberty. Additionally, he was convicted under the German Criminal Code, including murder §211, in connection with use of violence and threat by endangering victims via a weapon or dangerous tools §177, and for joint offense §25. Anwar R. was sentenced to life imprisonment and has the right to appeal.

For the first time, we see a world’s trial against a former Syrian state officer for crimes against humanity. The Al-Khatib trial provided a collection of assessed and evaluated evidence of crimes by the Syrian government that can potentially be used in other future investigatory steps and trials. The verdict also marks an important judicial precedent for the German justice system. This indicates a turning point in efforts to deliver justice for the victims and for the survivors.



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## One Court at a Time: Challenges of Universal Jurisdiction and Enhancing International Justice (Part 2)

### LESSONS LEARNED THROUGH AL-KHATIB TRIAL

#### Shortcomings of Witnesses' Protection and Support

One of the major shortcomings of this trial were limited protection measures for witnesses and unclear protocols to encourage anonymity during trial procedures. Several Syrian torture survivors and witnesses of human rights violations expressed concerns for their safety and their family members to join the trial. The ones, who joined as plaintiffs, testified in an open court. The court hid their personal information from the public, gave them two initials and instructed them to wear a mask during the provision of testimony. Despite these measures, other witnesses from Germany and European countries did not feel safe to stand in an open court and claimed that the measures to ensure their protection were not enough. As a result, some withdrew and others preferred to submit their testimony remotely.

The approach to witness protection in Al-Khatib trial was described by legal scholars as clumsy. On the one hand, it was not clear if the court understood the concerns raised by witnesses or if the court just addressed them on a case by case as they arose. On the other hand, there were no specific guidelines to preserve confidentiality outside the courtroom. Some witnesses stepped outside the courtroom making phone calls and named other protected witnesses. At some point in the legal proceeding, the names of the witnesses were leaked to the press. It is still unknown how this happened, and an investigation is ongoing.

These shortcomings suggest that a clear protocol to ensure anonymity and safe conduct of witnesses inside and outside the courtroom was not strictly encouraged. And if one already existed, it requires significant refinement. Survivors would undoubtedly take comfort in seeing their perpetrators persecuted, but the fear of retaliation against them or their family members hinders the attesting process. Germany currently hosts 818.460 Syrian refugees, making Syrian witnesses fear vengeance from their community. According to a Human Rights Watch report, a witness stated that Syrian intelligence officers visited and threatened their family in Syria before they testified in Koblenz. Therefore, many witnesses withdrew fearing consequences.

Another challenge was the lack of accessibility to interpretation from German language to Arabic and vice-versa. Interpreters translated the entire trial into Arabic for the accused, which was not accessible to families and journalists in the public hall. The court also refused the suggestions of plaintiffs to share their headphones if they were absent. The German Constitutional Court in Karlsruhe issued a temporary order to include extended translation services to one accredited journalist, and a representative of the human rights organization. However, the trial remained inaccessible to non-German speakers in the public hall.

#### Limitation of Universal Jurisdiction Cases and Moving Forward

Investigation and prosecution of international crimes under universal jurisdiction remain limited in number. This is due to many reasons. First, the universal jurisdiction framework varies from one country to another. This depends on the respective implementation of universal crimes into the national legal order of the state in question. France, for example, applies universal jurisdiction only under specific circumstances. Although having adapted its criminal code to the Rome Statute in 2010, France can exercise universal jurisdiction merely if the suspect is present on French soil and when dual criminality is satisfied. Such specificity is deemed to hinder the mandate of universal jurisdiction over transnational crimes.

Second, cases of extraterritorial jurisdiction require an enormous capacity of human and monetary resources. If states do not have the man-power and allocated funds to ensure safe and transparent judicial process, it can limit the number of cases. Given that the crime scene and some witnesses are abroad, investigation and prosecution of international crimes take longer time compared to domestic procedures. Additionally, safeguarding survivors, witnesses, and their families demands considerable amounts of potentials and resources.

To mitigate such limitations, human rights organizations can assist the court with resources. One good example was the role of the European Center for Constitutional and Human Rights in supporting 17 torture survivors who gave witness testimony to the German Federal Criminal Police prior to Al-Khatib trial. Another example was the support of humanitarian organizations to identify witnesses and collect evidence in Iraq. Their efforts contributed to the world's first conviction for genocide against Yazidis.

In future and ongoing trials, it would be valuable to encourage a holistic cooperation between legal, human rights and humanitarian organizations to ensure adequate resources of man-power and funds. This can ensure sufficient means to implement universal jurisdiction and to effectively fight impunity of international crimes. Moreover, Crimes against humanity are of multidimensional nature. Trials would benefit from as many testimonies and pieces of evidence as possible to expose complex networks of perpetrators. But this can only be possible when witnesses are protected and fear no vengeance. Additionally, it would be beneficial to create simple guidelines for trial participants in their mother-tongue to propel safe conduct and anonymity inside and outside the courtroom. The German Code of Criminal Procedure grants several rights for protection (Section 55 – 59; 65 – 71). These include: to refuse to reveal identity or place of residence if a well-founded reason of fear is established; to testify remotely; to alter physical appearance; to receive assistance of a legal counsel. International tribunals offer rich guidelines on witnesses protections which domestic courts can benefit from. Therefore, more rigorous measures should be pursued in future courts.

In conclusion, almost eleven years since the start of the Syrian conflict, the Al-Khatib trial presents a landmark step towards international criminal accountability. A lesson derived from the trial is that protocols to ensure anonymity and safe conduct of witnesses can further be improved, and that transitional justice can be calibrated in a way that is more sensitive towards witnesses. The growing potentials of German courts – working in collaboration with international human rights law – not only proved to prevent impunity of perpetrators and to bring justice to survivors, but also to enhance the overall legitimacy of the transitional process, even if takes one court at a time.