COUNTER-TERRORISM OPERATIONS: STRETCHING THE LAW AT HOME AND ABROAD

XII SEMINAR FOR LEGAL ADVISORS OF THE ARMED FORCES

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THE TWO FACES OF TERRORISM

Isolated terrorist attacks

War contexts

E.g. "Foreign Fighters"
OUTLINE

I. Stretching the law abroad – *(jus ad bellum)* and *jus in bello*
   - A. Conflict (over)classification
   - B. Expansive membership into an organized armed group and targeting

II. Stretching the law at home – human rights challenges
   - A. On States’ soil – to address the threat posed by alleged terrorists
   - B. To prevent return of “foreign terrorist fighters” abroad
1. Requiring “minimal organization” of the parties?
   - Only indicative factors? See e.g. ICTY Boskoski Case; ICRC Commentaries.
   - The temptation to go for a macroscopic approach (or low level of granularity) to delineate a “Party” to a NIAC.
   - Extreme US Approach: “Global Armed Conflict” with allegedly transnational armed groups.

2. The vanishing of the theoretically demanding intensity-criterion.
   - Only indicative factors?
   - The cumulation of clearly distinct/unrelated events across the globe/region without a “continuum of attacks”.
   - “Associated forces”, “co-belligerency”, “support-based approach”.

- Particular features of the fight against terror
  - Proliferation of armed groups labelled as terrorist
  - Geographical expansion
  - Volatile character of terrorist organizations (splinter groups-alliances)
  - Opacity regarding the structure and functioning of terrorist groups

I.A. STRETCHING THE LAW ABROAD: OVER-CLASSIFICATION OF ARMED CONFLICTS
I.B. STRETCHING THE LAW ABROAD: EXPANSIVE MEMBERSHIP INTO AN OAG AND TARGETING

Mainstream approach

- MEMBERSHIP for fighters rather than "direct participation in hostilities" (see art. 13§3 APII)

Controversies on how to establish membership

- Number of States tend to have a broad understanding of membership based on STATUS (analogy with State armed forces)
  - Issues: no uniform; not based on domestic law; subjective approach.
  - ICRC approach = continuous combat function. (ICRC Guidance on Direct Participation in Hostilities 2009)
  - OAG is only made of military wing of a non-State party to a conflict

In any case, how to factually determine membership?

- Issue of "patterns of life" AND "signature strikes" – circumstantial evidence
- Ex post acknowledgment?
- Pledging of allegiance?
II. A. STRETCHING THE LAW AT HOME: ON STATES’ SOIL – TO ADDRESS THE THREAT POSED BY ALLEGED TERRORISTS

Broad criminalization of international terrorism and UN sanctions against alleged terrorists

- See e.g. UNSC Res. 1373 (2001) // UNSC Res. 1390 (2002) on sanctions
- Human rights issues:
  - Principle of legality – no definition
  - Non-discrimination
  - Criminalization of humanitarian action
  - Re sanctions: lack of effective remedy

Preventing and Countering Violent Extremism (PVE/CVE Agenda) – lights and shadows

- See 2016 Report and 2015 Plan of Action prepared by former UN Secretary-General, Ban Ki-Moon
- Human rights issues:
  - “Violent extremism” = undefined concept. E.g. “criminalization of holding extremist views”.
  - Stigmatization of communities “particularly at risk”
  - Potentially invasive approaches (e.g. UK Prevent programme)

Expansive derogations and limitations

- Derogations to face the threat of terrorism. See e.g. Turkey and France.
- See e.g. Report Fionnuala Ni Aolain (SR on counterterrorism), 2018, UN Doc. A/HRC/37/52 on issue of permanent derogations.
- Excessive limitations.
- See e.g. ECtHR, Beghal v. UK, 2019 (on the right to private and family life)
II. B. STRETCHING THE LAW AT HOME: TO PREVENT RETURN OF “FOREIGN TERRORIST FIGHTERS” ABROAD

Is there a “right to return”?
• See Art. 12§4 International Covenant on Civil and Political Rights: “No one shall be arbitrarily deprived of the right to enter his own country.”
• See also: Human Rights Committee, General Comment No. 27: Freedom of movement, 1999, §20.

Stripping of citizenship
• Art. 15§2 Universal Declaration of Human Rights: “(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”
• Art. 8 of the Convention on the Reduction of Statelessness
  • Prohibition from depriving an individual of citizenship if doing so would render him or her stateless
  • Exception: it may be legitimate where conduct is ‘seriously prejudicial to the vital interests of the State’.
• Art. 4 of the European Convention on Nationality, ratified by 20 states of the Council of Europe.
  • a everyone has the right to a nationality;
  • b statelessness shall be avoided; (See also art. 7§3)
  • c no one shall be arbitrarily deprived of his or her nationality (…)
• Other relevant human rights: prohibition of non-refoulement; right to private and family life.

Letting others prosecute “foreign terrorist fighters” abroad.
• E.g. Iraqi prosecutions
• E.g. Prosecutions by the Kurds in Syria
• Fair trial issue
CONCLUSION

- Over-classification of IHL
- Expansive notions of membership into organized armed groups labelled as terrorists
- Expansive criminal laws in relation to terrorism and violent extremism
- Invasive approaches towards preventing/countering violent extremism
- Risk of excessive limitations of HRL + derogations
- Preventing return may also give rise to human rights issues

THUS: need to continuously monitor counter-terrorism measures to ensure compliance with IHL and HRL