

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

I.A. STRETCHING THE LAW **ABROAD**: OVER-CLASSIFICATION OF ARMED CONFLICTS

- 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

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**”.

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)

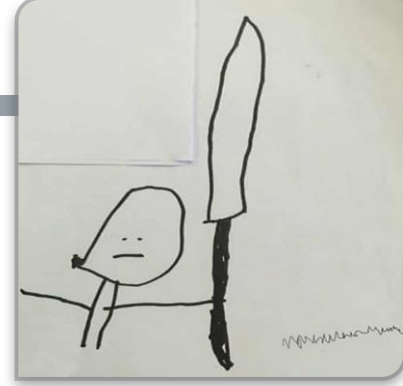
Controversies on how to establish membership

- 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
- See e.g. UNSC Res. 2170 (2014) + Res 2178 (2014) + Res 2396 (2017) on “Foreign terrorist fighters”
- 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