

The 'Exclusion Clause' and the Preservation of International Humanitarian Law
Can Activities of Non-State Actors related to (Non-International) Armed Conflict be
Terrorist Offences?

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Ratio Legis IHL & CTL



IHL



CTL



CTL and acts not prohibited by IHL:

- Principle of distinction (ea)
- Equal rights and obligations



Even if prohibited by IHL:

- Peace and reconciliation
- Implementation/dissemination IHL



Exclusion Clause

6/12 International Terrorism Conventions, Council of Europe Convention on the Prevention of Terrorism, EU Framework Decision/Directive on combating terrorism + ... Article 141bis Belgian Criminal Code:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention [...].



Armed Forces



Court of Appeal Antwerp, *Sharia4Belgium*, FD.35.98.47-12, 27 January 2016 (as well as other cases): jihadist groups (eg Jabhat al-Nusra) ≠ armed forces.

Court of Appeal Brussels, *PKK*, FD.35.98.54/09, 14 September 2017: PKK = armed forces.



Court of First Instance The Hague, *Context case*, ECLI:NL:RBDHA:2015:14365, 10 December 2015: armed forces = state armed forces.



DPH Guidance (2009): *In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).*

Commentary GC I (2016): *In the context of common Article 3, the term ‘armed forces’ refers to the armed forces of both the State and non-State Parties to the conflict.*

+ Preparatory works Terrorist Bombing Convention (1997): state + non-state armed forces.



Nature Exclusion Clause

All conventions and EU instruments: *This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.*



***R v Gul* [2013] UKSC 64:** UK can go further than required by and thus ‘gold-plate’ conventions, unless objectionable.



Procurator General at Supreme Court, *LTTE*, ECLI:NL:PHR:2016:967, 10 October 2016: exclusion clause limits scope of application of obligations, but does not oblige states to consider terrorist activities from the perspective of situations to which IHL applies.

Supreme Court, *PKK*, ECLI:NL:HR:2004:AF6988 7 May 2004; *LTTE*, ECLI:NL:HR:2017:574, 4 April 2017: IHL and common criminal law, which includes CTL, can apply concurrently.



Activities

*The **activities** of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are **governed by that law**, are not governed by this Convention,*

→ Reading ‘activities’ and ‘governed by that law’ (= IHL) in close connection could be a way to reconcile CTL and IHL.

But do states have the obligation to exclude activities from scope of their CTL?

- *R v Gul*: gold-plating allowed, unless objectionable: see ratio legis IHL;
- 5/6 international terrorist conventions containing the exclusion clause: the clause ‘*shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under **other laws***’.
- To be ctd...



Thank you for listening!

Questions?

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Comparative Table War Crime Cases		Nationality Refugee/Foreign Fighter Universal Jurisdiction (Y/N)	War Crime	Affiliation	Terrorist offence	(Provisional) Verdict
Austrian Case		Palestinian Refugee Y	Common law murder [Killing a person protected by IHL]	Kata'ib al-Farouq Brigade	Charged, not convicted of murder with terrorist intent	Life imprisonment
German Cases	Aria L.	German Foreign Fighter N	Outrages upon personal dignity	Not named group of jihadi fighters	/	Two years' imprisonment
	Rami K.	Iraqi Refugee Y	Outrages upon personal dignity	Iraqi army	/	One year and eight months' imprisonment
	Abdelkarim El B.	German Foreign Fighter N	Outrages upon personal dignity	ISIL	Membership of a terrorist group	Eight years and six months' imprisonment
Finnish Cases	Jebbar Salman Amar	Iraqi Refugee Y	Outrages upon personal dignity	Kata'ib Jund al-Imam	/	One year and four months' imprisonment (suspended)
	Hadi Habeeb Hilal	Iraqi Refugee Y	Outrages upon personal dignity	Iraqi army	/	Thirteen months' imprisonment (suspended)
	Iraqi Twin Brothers	Iraqi Refugee Y	Killing a person protected by IHL	ISIL	Murder and aggravated assault with terrorist intent	Acquitted
Swedish Cases	Mouhammad Droubi	Syrian Refugee Y	Crimes against international law [Torture]	Unnamed group linked to FSA	/	Eight years' imprisonment
	Raed Abdulkareem	Iraqi Refugee Y	Outrages upon personal dignity	Iraqi army	/	Nine months' imprisonment
	Haisam Omar Sakhanh	Syrian Refugee Y	Crimes against international law [Killing a person protected by IHL]	Firqat Suleiman el-Muqatila	/	Life imprisonment

