Warriors or Terrorists? The Transnational Criminal Law Framework on Activities of Non-State Armed Groups and their Affiliates related to Armed Conflict

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1. Theoretical Framework

I start from the traditional assumption that it is possible and valuable to distinguish between what the law is (*lex lata*) and what it should be (*lex ferenda*). Accordingly, the starting point is positivist, as positivism is the only theory of international law that cognizes the law as it is rather than as what it is not or what it should be. However, in light of the post-modernist acquis, positivism can no longer insulate itself from criticism and input from what it has typically framed as the 'outside'.[1]

The reductionist version of positivism acknowledges that law is a social practice and that legal interpretation is 'geared towards persuasion, whose validity hinges on the recipient epistemic community'.[2] Within this community, there may not always be agreement on what the law is or should be, but there *is* agreement on the law-ascertaining criteria; agreement that is presently centred around the doctrine of sources.[3]

Based on this agreement, I can describe the state of the law by following a traditional (doctrinal) approach.[4] This approach is warranted not only from a theoretical, but also from a practical perspective, namely the envisaged audience of my writings. I intend to write not only for academics, but also for an audience of diverse practitioners (law-makers, judges, prosecutors and lawyers). Practitioners have a primary interest in an analytical narrative of the law as it is, or at least one that distinguishes *lex lata* from *lex ferenda*, for else it is not persuasive from their point of view.

Nevertheless, a meaningful analysis of international law requires input from other theories. First, I rely on Koh to conceive the legal framework that I study as a reflection of a 'transnational legal process'. The framework is created, interpreted, applied and changed in a dynamic and iterative process that involves state as well as non-state actors at the international, regional and national level.[5] This theoretical perspective allows me to see and understand how the law as it stands took shape, and which actors and processes can change it.

For example, a large part of my research focuses on a particular provision contained in criminal law instruments on terrorism[6] that excludes activities committed in armed conflict from the scope of such instruments, namely the 'exclusion clause'.[7] This clause has been contested at the international level for 25 years. It originates from the negotiations of the 1997 Terrorist Bombings Convention, was later implemented in the 2002 EU Framework Decision on combating terrorism, and

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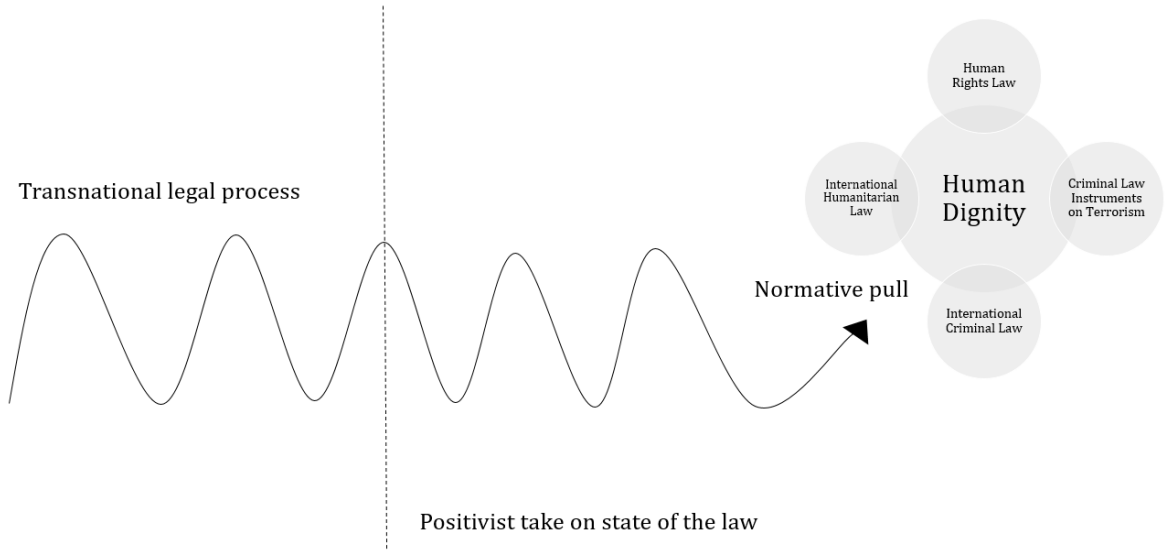
[1] See generally Jean d'Aspremont & Jörg Kammerhoffer, 'Introduction: The Future of International Legal Positivism', in Jörg Kammerhoffer & Jean d'Aspremont (eds), International Legal Positivism in a Post-Modern World (CUP 2014).
[2] Ibid, 6.
[3] As reflected in Art. 38 of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945); see generally Jean d'Aspremont, 'Herbert Hart in Today's International Legal Scholarship', in Kammer-hoffer & d'Aspremont (n 1).
[4] See Andrea Bianchi, International Law Theories: An Inquiry into Different Ways of Thinking (OUP 2016) 21-43.
[5] Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 NLR 181, 183-184.
[6] Criminal law instruments on terrorism refer to 'international and regional legal instruments that oblige States to criminalize terrorist activities, as well as to domestic criminal law sanctioning terrorist offences'.
[7] '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.'

eventually ended up in the Belgian Criminal Code. For Belgium, it was the same person from the administration who negotiated the clause in 1997, and who helped to ensure that it was incorporated into the Belgian Criminal Code. The provision was subsequently interpreted and applied by Belgian public prosecutors, defence lawyers and courts. As the provision is controversial, negotiations are ongoing in which the same person of the administration and public prosecutors are reconsidering its inclusion in the Belgian Criminal Code. Finally, that same provision is one of the main reasons inhibiting agreement on a Draft Comprehensive Convention on International Terrorism, which remains under negotiation at the international level.

Furthermore, I intend to 'incidentally' benefit from the input of other theories of international law to increase the meaningfulness and level of criticality of my analysis. For example, critical legal studies provide tools that help expose the power structures behind the exclusion clause (while the powerful West sees non-state violence as terrorism, a less powerful group of notably Islamic states is more sympathetic to non-state violence). In turn, feminist approaches to international law expose how criminal law instruments on terrorism are primarily negotiated and drafted by men, having men in mind (e.g. the focus on 'foreign terrorist fighters' at least initially obscured the role of women as perpetrators as well as victims in the Islamic State's caliphate).

Finally, I use 'human dignity' as an overarching criterion for the normative part of my analysis on two theoretical bases. First, within the epistemic community of international lawyers, there is wide agreement among law-makers, judges as well as scholars following traditional approaches to international law that human dignity is a fundamental meta-legal concept, principle or value. Therefore, using human dignity as an overarching normative criterion is persuasive. Second, the 'New Haven School' of policy-oriented jurisprudence finds that law should be used 'to achieve progress on the road to a new world order based on the fundamental value of human dignity'.[8] In line with the approach of policy-oriented jurisprudence, the normative part of my research seeks to identify a balanced relationship between criminal law instruments on terrorism on the one hand, and the law of armed conflict or international humanitarian law (IHL) on the other; a relationship that maximally ensures the human dignity and human rights of victims as well as perpetrators of activities related to armed conflict.

The figure below is a rudimentary attempt to visualize the theoretical framework just described.



[8] Ibid, 93, paraphrasing Myres McDougal.

2. Methodological Framework

The overall research question is: 'What is the criminal law framework governing the activities of non-state armed groups and their affiliates related to armed conflict, and what should it ideally be?' [descriptive + normative]. This question will be answered through four sub-questions:

- To what extent do criminal law instruments on terrorism apply to activities of non-state armed groups and their affiliates related to armed conflict? [descriptive]
- How do states criminalize and prosecute activities of non-state armed groups and their affiliates related to armed conflict? [descriptive + comparative]
- How does human rights law affect the criminalization and prosecution of activities of non-state armed groups and their affiliates related to armed conflict? [descriptive]
- How can the transnational criminal law framework on terrorism maximally ensure the human dignity and rights of victims and perpetrators of such activities? [evaluative + normative]

Following a traditional or doctrinal approach, I start answering the first research question with a historical analysis of how international criminal law instruments on terrorism have dealt with their relationship with situations of armed conflict and IHL. In doing so, I focus on how states' conflicting interests have coalesced into law that is characterized by 'constructive ambiguity'. Second, I analyse how this law was implemented into legal instruments and applied by courts at the regional and national level, which in turn improves understanding of how the law is seen across the globe. Finally, I answer this first research question by describing the current state of the law.

To answer my second research question, I conduct three case studies. I will functionally compare how Belgium, Germany and the Netherlands deal with activities of non-state actors and their affiliates related to armed conflict. I will analyse in-depth their respective legislative framework, case law and prosecutorial practice. These countries were chosen for several reasons:

- They are EU member states, and are thus bound by the EU legal instruments on terrorism;
- They have a different legislative framework: while Belgium has implemented the exclusion clause into its domestic law, Germany and the Netherlands have not;
- There is relevant case law in all three countries, notably as regards the Liberation Tigers of Tamil Eelam (LTTE), Kurdistan Workers' Party (PKK) and several jihadist groups that are or were active in the conflict in Syria/Iraq (e.g. Islamic State and Jabhat al-Nusra);
- The three countries have a different prosecutorial approach (notably, as regards the conflict in Syria/Iraq: Germany actively prosecutes international crimes; the Netherlands does so more passively; Belgium exclusively focuses on terrorism);
- I have sufficient knowledge of these three legal systems and their languages to be able to identify and analyse relevant legislation, case law and prosecutorial practice.

To fully understand the law and practice from these three legal systems, I will also conduct expert interviews. Experts are generally of research interest because they possess knowledge that is not readily accessible to researchers and 'because they are in a position to actually put their own interpretations into practice'.[9] Traditionally, expert status is associated with or attached to one's profession.[10] I intend to interview public prosecutors and defence lawyers from Belgium, Germany and the Netherlands that were involved in relevant cases (purposeful sampling), and may

[9] Alexander Bogner, Beate Littig and Wolfgang Menz, 'Introduction: Expert Interviews – An Introduction to a New Methodological Debate', in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave 2009) 7; see also Michael Meuser and Ulrike Nagel, 'The Expert Interview and Changes in Knowledge Production', in ibid, 18.
[10] Meuser and Nagel (n 9) 19.

be recommended to me by earlier interviewees (snowball or network sampling).[11] This approach allows me to more or less exhaust the very limited pool of envisaged experts in view of data saturation.[12] Following a pragmatic rather than positivist approach,[13] these interviews are conceived as semi-structured interviews that I conduct as an 'expert from a different knowledge culture' (academia).[14] This conception allows for a 'transactional' setting that permits interaction[15] and can reflect a 'discursive-argumentative professional discussion'.[16]

During the expert interviews, I aim to gather 'process knowledge' (know-how) and 'interpretive knowledge' (know-why).[17] This input serves two goals: it will strengthen the validity of my case studies, and help to identify best practices in view of the fourth (normative) research question. The interviews will be recorded, transcribed and coded in an eclectic way; entailing descriptive coding for information that merely illuminates the case studies and analytical coding for evaluations and recommendations.[18]

To answer the third research question, I will once more follow a traditional or doctrinal approach to identify how human rights law affects, or may affect, the application of criminal law instruments on terrorism to activities related to armed conflict. I will do so from the perspective of victims (e.g. right to justice, truth and reparation) and perpetrators (e.g. right to self-determination, principle of legality and principle of individual criminal responsibility).

To answer the fourth research question, I will rely on input from my comparative findings, data from the expert interviews and analysis from the perspective of human rights law. Furthermore, I will examine relevant insights from social science research (e.g. on victims' needs). All of this input will serve to substantiate the concept of human dignity, that serves as an overall benchmark to evaluate and improve the transnational criminal law framework on activities of non-state armed groups and their affiliates related to armed conflict.

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[11] Maggi Savin-Baden and Claire Howell Major, *Qualitative Research: The Essential Guide to Theory and Practice* (Routledge 2012) 177 and 313-314.
[12] ibid, 317; Angela Wroblewski and Andrea Leitner, 'Between Scientific Standards and Claims to Efficiency: Expert Interviews in Programme Evaluation', in Bogner, Littig and Menz (eds) (n 9) 242.
[13] Savin-Baden and Howell Major (n 11) 64, 143 and 171-173.
[14] Alexander Bogner and Wolfgang Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction', in Bogner, Littig and Menz (eds) (n 9) 60; cp. to the notion of 'quasi-expert' used by Michaela Pfadenhauer, 'At Eye Level: The Expert Interview – A Talk between Expert and Quasi-Expert', in Bogner, Littig and Menz (eds) (n 9).
[15] ibid; Beate Littig, 'Interviewing the Elite – Interviewing Experts: Is There a Difference?', in Bogner, Littig and Menz (eds) (n 9) 100.
[16] Pfadenhauer (n 14) 84.
[17] Bogner, Littig and Menz (n 9) 8; Bogner and Menz (n 14) 52; Littig (n 15) 101.
[18] Johnny Saldaña, The Coding Manual for Qualitative Researchers, 2nd edn (SAGE 2013) 188-193.