

Belgium, Prosecution of Terrorist Crimes in the context of Armed Conflict

INTRODUCTORY TEXT: A law that adapted the Belgian Criminal Code in 2003 grants domestic courts limited extraterritorial jurisdiction over certain crimes when they are committed with a terrorist purpose. However, it exempts from its application any actions committed in the context of an armed conflict. As exemplified by a court of first instance decision of 3 November 2016 concerning acts of the Kurdistan Workers' Party (PKK) members in Turkey, this raises interesting issues as to the qualification of potential situations of armed conflict by domestic courts and the interrelation between terrorist crimes and IHL.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Case prepared by Mr Maarten van der Heijden and Mr Thomas Van Poecke, LL.M. students at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms Yvette Issar, research assistant, both at the University of Geneva.

A. BELGIAN CRIMINAL CODE

[**Source:** Belgian Criminal Code of 8 June 1867, as modified by the Law of 19 December 2003 on Terrorist Crimes. Available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1867060801&table_name=wet, unofficial translation]

SECTION 1.3 TERRORIST OFFENCES <Added under the Act of 19 December 2003 regarding terrorist offences. Entered into force on 8 January 2004.>

Art. 137, para. 1. A terrorist offence is an offence as set out under paragraphs 2 and 3 which, by virtue of its nature or context, can cause serious damage to a country or to an international organization, and is committed deliberately with the aim of inducing serious fear in a population or of unlawfully forcing a government or international organization to undertake or refrain from undertaking a certain action or of

seriously disrupting or destroying the basic political, constitutional, economic or social structures of a country or international organization.

Paragraph 2. The following acts constitute terrorist offences within the meaning of Para. 1:

1. Deliberate killing or deliberate causing of blows or wounds [...].
2. The taking of hostages [...].
3. Kidnapping [...].
4. Causing large-scale destruction or damage [to buildings, bridges, dikes, etc.] as a result of which human life is endangered or significant economic damage is caused.
5. The hijacking of aircraft [...].

[...]

Article 141(2) These provisions do not apply to the actions of armed forces during an armed conflict as defined in and subject to international humanitarian law, nor to the actions of the armed forces of a State during the exercise of their official duties, as long as those actions are subject to other provisions of international law.

B. DECISION OF THE COURT OF FIRST INSTANCE, BRUSSELS (3 NOVEMBER 2016)

[Source: Dutch-speaking Court of First Instance, Brussels, 41st Chamber (Correctional Pre-Trial Chamber), *The Public Prosecutor v. Sezai Ucar et al.*, Investigative Cabinet File No. 2009/030 – Federal Public Prosecutor File No. FD.35.98.54/09, 3 November 2016. On file with the authors; not available online; unofficial translation.]

N.B. This decision and its reasoning reproduced hereafter have been confirmed by the Brussels Appeals Court in its decision 2017/2911 on 18 September 2017

[1] The requisition of the Public Prosecutor is as follows: [...] Transmission of the case to the Correctional Chamber is demanded. The plaintiffs the State of Turkey and Fahriye Alptekin support this demand at the hearing.

[2] The defendants demand at the hearing and in statements that criminal proceedings be discontinued [...].

[...]

III. Objections

[3] In statements and in pleas, a number of defendants argue that the facts contained in the final requisition of the Federal Prosecutor's office fall outside the jurisdiction of the Belgian courts, as they occurred in the context of an "armed conflict".

[4] The existence of such an "armed conflict" explicitly precludes the application of the offences contained in Section 1.3 [Terrorist offences], Art. 141(2) [see *Document A*].

[5] During the hearing, this question was the subject of considerable debate, during which not only the political situation and its development have been discussed, but it was also, *inter alia*, suggested that the case should not be declared ready for the pronouncement of a judgment, in view of an expert opinion as to whether or not an armed conflict exists that underpins the withhold classification of participation in the activities of a terrorist organization set out in the final requisition.

[6] In its statement, the Federal Prosecutor's office refers to the judgment of the Court of Cassation of 24 May 2016 (P.16.0244.N), to the definition of 'armed conflict' used by this Court and to the consideration that the ruling of the judge is incontestable on the facts in deciding whether certain acts should be regarded as the actions of armed forces in the sense meant here.

[7] This assertion must be supported.

[...]

[8] In this sense, there can be no doubt that it is the duty of the court sitting in chambers to decide whether in this instance the grounds cited for exclusion are admissible and from this to draw the conclusions laid down in the Act.

[9] In addition to ascertaining the existence of the offence, it is necessary to determine whether conclusive charges exist of such a nature that they could lead to conviction before the court hearing the main action.

Armed conflict?

[10] In its judgment P.16.0244.N of 24 May 2016, the Court of Cassation found as follows:

"An armed conflict within the meaning of international humanitarian law exists in the case of armed violence between States or sustained armed violence between government agencies and organized armed groups or between such groups within a State."

Whether sustained armed violence involving organized armed groups is taking place is determined primarily on the basis of the intensity of the conflict and the degree of organization of the parties involved.

Other criteria found in international jurisprudence are purely indicative criteria that can be used to determine whether the requirements have been met regarding the intensity of the conflict and the degree of organization of the parties.”

[11] In this context, it is completely insufficient merely to refer to the existence of so-called lists of terrorist organizations, given that – as the defence has argued – the decision as to whether or not to include an organization on such lists is inspired by political and/or geopolitical considerations, and it must be noted that as many countries disagree with such classifications as agree with them.

[12] In order to decide whether an ‘armed conflict’ is taking place, it is therefore necessary to examine the intensity of the conflict and the degree of organization of the parties.

[13] The Court of Cassation accepts that other criteria cited by the Criminal Court to support assessment of the intensity of the conflict and organization of the parties can be applied, such as the command structure of the group (responsible command, uniforms and insignia, etc.).

[14] The basis for determining whether an ‘armed conflict’ is ongoing should be sought in the Geneva Conventions, their additional protocols and the Rome Statute of the International Criminal Court of 17 July 1998.

[15] It is clear that the Geneva Conventions no longer apply exclusively to armed disputes between States, but also cover the territorially internal activities of armed forces.

(Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977).

[16] Protocol II excludes internal disturbances and tensions, such as riots and isolated and sporadic acts of violence, from its own field of application.

[17] The Rome Statute (17 July 1998) mentions protracted armed conflict between governmental authorities and organized armed groups.

[18] During the course of the hearing, counsel mentioned, *inter alia*, the history of the PKK, its activities and its political and military wings.

[19] In this context, the defence pointed out that the PKK had existed since the end of the 1970s and had been undertaking armed action against the Turkish State since 1984, the aim being to achieve self-determination for the Kurdish population of Turkey and the surrounding region.

Furthermore, the final requisition addresses not only acts carried out in Belgium and Turkey, but also makes explicit reference to other conflict zones, such as Iraq.

[20] The defence also refers to the large number of incidents, the use of heavy weapons (including air and artillery attacks) and the existence of a command structure that enables the carrying out of sustained and coordinated military operations.

In its statements, the defence also refers to various authoritative bodies (including the Red Cross) that refer to the Turkish-Kurdish question as an 'armed conflict'.

In its pleading, the defence also referred to the steps that the Kurdish movement had undertaken with the Swiss government, in which it declared that it would observe a number of international treaties, including those regarding child soldiers and landmines.

[21]

[22]

[23] As with many other conflicts, the situation has changed over time, in that at the outset it probably did not constitute an 'armed conflict' within the meaning of the Geneva Conventions and their additional protocols, but that currently such a conflict is indeed taking place.

[24] Nor is it possible to ignore the role that the Kurdish separatist movement is playing in the Syrian conflict and the fight against IS.

As mentioned in both statements and pleading, the resulting changes in the position of the international community are presenting the countries traditionally referred to as 'the West' with a difficult dilemma as regards the Kurdish question.

[25] The fact that in March 2013 Abdullah ÖCALAN, the spokesperson of the PKK, issued a call for a truce and asked the armed forces to withdraw from Turkish territory, not only indicates that the Kurdish fighters control territory in south-eastern Turkey, but is also an indicator of the relationships in the region; one can scarcely imagine a State negotiating a truce with a mere terrorist organization.

[26] Given the facts set out above, the court sitting in chambers finds that there is indeed an 'armed conflict' taking place, within the meaning of international humanitarian law. It would be difficult to claim that the

situation is purely one of riots or isolated or sporadic acts of violence or other acts of a similar nature. (See Protocol II).

[27] The facts adduced by the defence indicate the existence of an armed conflict that meets the criteria of intensity and organization, so that one must conclude that an armed conflict is ongoing for which grounds for exclusion under Article 141.2 of the Criminal Code apply.

[...]

[28] The [] charges presented by the Federal Prosecutor's office in the final requisition [...] relate [...] to acts of violence covered by the articles contained in Section 1.3 of the Criminal Code.

[29] The offences [...] include participation in a terrorist organization, whether or not in the capacity of a leader.

[30] As it has been established that the Kurdish movement is involved in an armed conflict against the Turkish State, discontinuation of criminal proceedings is imperative.

Discussion

I. Classification of the Conflict

1. (*Document B, para 15*) Do you agree with the Court's statement that 'It is clear that the Geneva Conventions no longer apply exclusively to armed disputes between States, but also cover the territorially internal activities of armed forces.'? (GC I-IV, Art. 3)2. (*Document B, para 10*) Do you agree with the definition of an IAC and NIAC of the Belgian Court of Cassation the decision of the Court of First Instance refers to? Where did the Court get these definitions? (GC I-IV, Art. 2 and 3)3. (*Document B, paras 10-26*) How would you classify the situation between the PKK and Turkey? Does it constitute an armed conflict, or is it more akin to a law enforcement situation? If it constitutes a NIAC, does it constitute a NIAC only in the sense of Article 3 common to the GCs, or would it also be covered by Article 1(1) AP II if Turkey were a party? How does the Court go about this question? Is its reference to the ICC Statute helpful? Is it complete? (GC I-IV, Art. 2 and 3; P II, Art. 1; ICC St., Art 8(2)(f))4. (*Document B, paras 13 and 19-25*) Which criteria does the Court mention to support its finding that the hostilities constitute a NIAC? Does it mention sufficient indicia? Are all of them relevant?5. (*Document B, paras 11 and 25*) Do you agree with the Court's reluctance to rely on any so-called list of 'terrorist organizations' when it comes to the determination of whether there is an armed conflict? Is it, under IHL, conceivable that a terrorist organization is engaged in an armed conflict? Does the Court refuse to let any 'terrorist label' affect its decision about the classification of the situation?

II. Acts of Terrorism and IHL

6. Are acts of terrorism prohibited by IHL? Is every type of terrorist action in an armed conflict covered by IHL? Should one distinguish between ordinary criminal acts of terrorism and those that have a nexus with the armed conflict? Are terrorists a distinct category of persons under IHL of NIACs? Of IACs? Can a person be a terrorist under domestic law, but a civilian under IHL? (GC III, Art. 4, GC IV, Arts 4 and 33; P I, Art. 51(2); P

I, Arts 2(1); P II, Arts 2(1), 4(1), 4(2)(d) and Art. 13(2))⁷. (*Document A; Document B, para 4*) Article 141(2) of the Belgian Criminal Code specifically excludes the possibility of armed forces committing 'terrorist' crimes in the circumstances of an armed conflict. Does the concept of armed forces in IHL cover equally rebel armed groups? Do you believe this exclusion is necessary? Are, for example, the acts contained in Art. 137, §2, 1° of the Belgian Criminal Code lawful under IHL? Are they always lawful? Does your answer change depending on whether they are executed for any of the purposes contained in Art. 137, §1 of the Belgian Criminal Code? (GC I-IV, Art. 3; P I, Art. 51(2); P II, Arts 1(1) and 13(2))⁸. (*Document B, para 30*) The Court of First Instance decides not to prosecute the accused. Under what circumstances could you make an argument that Belgium has an obligation to investigate and/or prosecute? (GC I-IV, Art. 1; GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; P I, Art 85 and 86; ICC St., preamble)

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