

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 17, 2014
CORRESPONDENTS' REPORTS

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THE NETHERLANDS

Cases — Preliminary Questions to the European Court of Justice regarding the application of Regulation (EC) 2580/2001 (European Terrorism List)

- Request of the Council of State to the European Court of Justice for a ruling on Preliminary Questions, 2 April 2014

Questions were posed by the Council of State (*Raad van State*) to the European Court of Justice (ECJ) with regard to the placement of the Liberation Tigers of Tamil Eelam (LTTE) on the list referred to in Regulation (EC) No. 2580/2001 (the European Terrorism List). The Netherlands Minister of Foreign Affairs had placed four alleged members of the LTTE on a national terrorism sanctions list. This national list was created to implement United Nations Security Council Resolution 1373. Among the reasons provided by the Minister for listing the individuals was the fact that the Council of the European Union had placed the LTTE on the European Terrorism List. The individuals had appealed their placement on the national list. They argued that the LTTE is not a terrorist organization because it is a party to an armed conflict with the Sri Lankan government, and that conflict is regulated exclusively by IHL. They also argued that the placement of the LTTE on the European Terrorism List was a political decision that has been contested before the ECJ.

At the core of the preliminary questions lies the issue of whether conduct regulated by IHL can also be qualified as a terrorist act, as defined in Regulation 2580/2001. In their Request, the Council of State referred to a number of terrorism conventions, such as the Terrorist Bombings Convention,¹ which exclude from their application activities of armed forces during an armed conflict, as those terms are understood under IHL, which are governed by that law. The Council stated that these provisions provide good arguments for the proposition that there is an international consensus that acts of parties to an armed conflict as defined by IHL cannot be considered acts of terrorism in the sense of Regulation 2580/2001. The Council however also took into consideration the prohibitions in IHL itself concerning terrorist acts in Article 33 Geneva Convention IV and Article 4 (2) Additional Protocol II. Basing itself *inter alia* on these articles, the Council suggested that activities of armed forces during an armed conflict are only excluded from being qualified as terrorist acts in so far as they do not target civilians or other persons not actively participating in hostilities.

Cases — Exclusion from prosecution of acts committed within the context of hostilities – Applicability of multiple legal regimes

¹ *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001).

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☛ Prosecutor v Syriagoer, District Court of The Hague, 1 December 2014

The District Court of The Hague addressed the question whether IHL stood in the way of the application of provisions in Dutch criminal law concerning terrorist offences to an individual who had travelled to Syria and joined a jihadist group there. The defendant argued that a non-international armed conflict (NIAC) was taking place in Syria and that as a consequence provisions in Dutch criminal law on terrorist offences were inapplicable. If it could be proven that the defendant participated in hostilities, he would be protected by the Geneva Conventions, which would mean that he could only be prosecuted if his acts amounted to war crimes.

The Court established that a NIAC took place during the relevant period in Syria. It stated that it follows from the Geneva Conventions, Additional Protocol II and case law, that members of organised armed groups in a NIAC are not entitled to use force. Civilians who take part in hostilities during a NIAC, whether or not as a member of an organized armed group, do not enjoy a status akin to combatant privilege. They therefore do not enjoy immunity from prosecution.

Additionally, the Court indicated that during a NIAC, IHL is not the only applicable body of law. Referring to an ECJ judgment of 16 October 2014,² it stated that application of the law of NIAC does not mean that domestic criminal law, including its provisions on terrorist offences, does not apply. Thus, during armed conflict several legal regimes can be applicable.

Government Policy — Defence Cyber Strategy

☛ Report of the General Debate (*Algemeen Overleg*) on the Defence Cyber Strategy, 21 May 2014

During a parliamentary debate, the Minister of Defence replied to questions from MPs concerning the cyber strategy of the Ministry of Defence. In this context, she stated that '[a]t the moment we use force in self-defence, we are of course bound by the rules of the law of war. In short, it is again exactly as in the physical world.'

Government Policy — Ratification of the Arms Trade Treaty

☛ Approval of the Arms Trade Treaty, done on 2 April 2013, New York (Trb. 2013, 143 en Trb. 2014, 45) 18 December 2014

After having signed the Arms Trade Treaty on 3 June 2013 in New York, the Kingdom of the Netherlands, in respect of the European and Caribbean part (the islands of Bonaire, Sint Eustatius and Saba) of the Netherlands, deposited its instrument of acceptance of the treaty on 18 of December, 2014. The treaty entered into force in respect of the said territories on 24 December 2014.

MARTEN ZWANENBURG AND NELLEKE VAN AMSTEL

² *Liberation Tigers of Tamil Eelam v Council* (European Court of Justice, T-208/11 and T-508/11, 16 October 2014).