International Centre for
Counter-Terrorism - The Hague

Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm

Dr. Christophe Paulussen LL.M. M.Phil.

ICCT Research Paper
August 2012

Abstract

In this ICCT Research Paper Dr. Christophe Paulussen explores whether the current international legal framework is sufficiently equipped to effectively deal with the threat of terrorism and counter-terrorism practices or whether it is in need of change. The paper specifically looks at whether the current jus ad bellum (the law regulating when inter-state force may be used) and jus in bello (the law of war, the law regulating the conduct of warfare) are still suitable in the current climate. This Paper clarifies a few concepts that are often heard, and sometimes misunderstood, in the counter-terrorism discussion: counter-insurgency (and then in particular its correlation with counter-terrorism) and asymmetrical warfare. The final section offers some concluding remarks.

About the Author

Dr. Christophe Paulussen LL.M. M.Phil. is a Research Fellow at the International Centre for Counter-Terrorism – The Hague, a senior researcher international humanitarian law/international criminal law at the T.M.C. Asser Instituut, and coordinator of the inter-faculty research platform 'International Humanitarian and Criminal Law Platform'. After having spent a year in France (Strasbourg and Angers), he studied law at Tilburg University, the Netherlands. After a propedeuse Dutch law (cum laude), a doctoral International and European Law (with distinction) and a research master (cum laude), he started working as a PhD candidate at the Department of European and International Public Law of Tilburg University in 2005. On 24 September 2010, Christophe defended his PhD thesis 'Male captus bene detentus? Surrendering suspects to the International Criminal Court'. On 9 December 2011, Christophe's PhD received an honourable mention from the jury of the Max van der Stoel Human Rights Award. After his PhD defence, and before moving to The Hague, Christophe worked as an assistant professor at Tilburg University. His areas of interest include: international humanitarian law, international criminal law, in particular the law of the international criminal(ised) tribunals, and counter-terrorism & human rights.

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Contact

ICCT – The Hague
Koningin Julianaplein 10
P.O. Box 13228
2501 EE, The Hague
The Netherlands

T +31 (0)70 800 9531
E info@icct.nl

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1. Introduction[1]

It has been asserted that terrorism brings about a "new kind of war",[2] which "cannot be forced into the mould of existing international law".[3] Hence, the argument goes, "the law of war must adapt and advance to accommodate the metamorphosis in the nature of conflict."[4] This statement, addressing the law of war, is often heard and is part of the broader and important discussion whether the current international legal framework is sufficiently equipped to effectively deal with the threat of terrorism and counter-terrorism practices or whether it is in need of change.[5] This paper will try to answer this important question. Elsewhere, this author has looked at several aspects of the legal framework in the *law enforcement* paradigm – discussing and providing recommendations on such matters as the (international) prosecution of terrorism suspects and the question of impunity.[6] As a result, this paper will focus on the other side of the coin, the *war* paradigm. In more detail, it will examine whether the current *jus ad bellum* (the law regulating when inter-state force may be used) and *jus in bello* (the law of war, the law regulating the conduct of warfare) *prima facie* are still suitable in the current state of affairs, in which the fight against terrorism plays such an important role.[7] However, before looking at the adequacy of the current *jus ad bellum* and *jus in bello* (Section 3), this paper will clarify a few concepts that are increasingly heard, and sometimes misunderstood, in the same discussion on how well-equipped the current international legal framework in countering terrorism actually is: counter-insurgency (and then in particular its correlation with counter-terrorism) and asymmetrical warfare (Section 2). The final section offers some concluding remarks.

2. Clarifying concepts

2.1. Countering terrorism and countering insurgencies

Even though there exists quite an overlap between the two terms 'countering terrorism' and 'countering insurgencies', they are definitely not the same. Indeed, the concepts have different operational, political and legal dimensions, which necessitates a clear explanation of their scope and correlation.

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[1] The author would like to thank Prof. dr. Terry Gill and Maj. Eric Pouw LL.M. for their valuable insights into this topic.

[2] W.K. Lietzau, 'Combating Terrorism: Law Enforcement or War?', in: Terrorism and International Law: Challenges and Responses. Contributions presented at the "Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law", organized by the International Institute of Humanitarian Law, Sanremo, 30 May – 1 June 2002 and the "Seminar on International Humanitarian Law and Terrorism", organized by the International Institute of Humanitarian Law in co-operation with the George C. Marshall Center, Sanremo, 24 – 26 September 2002 (available at: http://www.iihl.org/iihl/Album/terrorism-law.pdf (last accessed on 31 August 2012)), p. 80.

[3] *Ibid*.

[4] *Ibid*.

[5] See, e.g., N. Schrijver and L. van den Herik, 'Counter-terrorism strategies, human rights and international law: meeting the challenges, Final Report Poelgeest Seminar', *Netherlands International Law Review*, Vol. 54, No. 3 (2007), pp. 571-587, E. Kessels and A. Bunnik, 'Ten Years after 9/11: Evaluating a Decade of Intensified Counter-Terrorism', Report International Launch Conference ICCT – The Hague, February 2010, available at: http://www.icct.nl/download/file/ICCT-Launch-Conference-Report.pdf (last accessed on 26 June 2012), p. 7 and N. Schrijver and L. van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law', 1 April 2010, available at: http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf (last accessed on 31 August 2012), pp. 1-26.

[6] See Ch. Paulussen, *Impunity for international terrorists? Key legal questions and practical considerations*, ICCT Research paper, April 2012 (available at: http://www.icct.nl/download/file/ICCT-Paulussen-Impunity-April-2012.pdf (last accessed on 27 June 2012) (hereinafter: Paulussen 2012)).

[7] This paper does not allow for a comprehensive examination of these topics. On 10 and 11 January 2013, the T.M.C. Asser Instituut and ICCT – The Hague will organise a conference that will take a more detailed look into these matters.

To start with the first concept, there is no unequivocal definition of counter-terrorism (CT) measures, but this paper defines CT measures as actions by states and international organisations, such as the United Nations (UN),[8]

1) to address the conditions conducive to the spread of terrorism and

2) to prevent and combat terrorism.

As to the first category of measures, one could think of "initiatives and programmes to promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs and cultures".[9] With respect to measures to prevent and combat terrorism, an illustration mentioned in the UN Global Counter-Terrorism Strategy is "the apprehension and prosecution or extradition of perpetrators of terrorist acts".[10] One could of course, and in view of this paper's focus *especially*, also think of military action here, such as the use of unmanned aerial vehicles, also known as drones, against alleged (al Qaeda) terrorists in, for instance, Pakistan, Yemen and Somalia. As such, CT measures may be regulated by different fields of law, such as international humanitarian law (IHL), international human rights law, domestic law (implementing UN Security Council resolutions) etc. The second element that needs clarification is obviously what 'terrorism' or 'terrorists' mean. This author has concluded elsewhere that "it appears that there is still no internationally recognised definition/a distinct international crime of terrorism".[11] However, that does not mean that the essence of terrorist action cannot be captured.[12] It has been argued that terrorists are in essence persons who (threaten to) use deliberate force against civilians and civilian objects with the purpose of spreading terror.[13] This will also be the working definition for this paper. Finally, it must be noted that even though the problem with respect to the definition of terrorism cannot be denied and remains an issue that needs to be solved, it has not prevented the international community from responding to the phenomenon.[14]

Counter-insurgency (COIN) measures, by contrast, could be defined as "[c]omprehensive civilian and military efforts to defeat an insurgency and to address any core grievances",[15] with an insurgency meaning "[t]he organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority."[16] These groups or movements – like terrorists, non-state actors – may use a number of methods to reach their goal, including terrorist means, but this does not necessarily have to be the case. For instance, one could also think of other uses of force not involving necessarily terrorism, such as guerrilla warfare, or of methods not involving the use of force at all, such as propaganda or political mobilisation.[17] The main objective of insurgents is not to spread terror among the civilian population – the principal aim of terrorists – but

[8] See UNGA Res. 60/288 of 20 September 2006 ('The United Nations Global Counter-Terrorism Strategy'), available at: http://www.un.org/depts/dhl/resguide/r60.htm (last accessed on 8 June 2012). In the annex to this resolution, one will find the Strategy's 'Plan of action'.
[9] See again the annex to the UN Global Counter-Terrorism Strategy ('Plan of action'), p. 4 (para. 2).
[10] *Ibid*., p. 5 (para. 3).
[11] Paulussen 2012, p. 21.
[12] See *ibid*., p. 8.
[13] Prof. dr. Gill during the launch conference of the ICCT on 13 December 2010 (hereinafter: Gill 2010). Minutes and recordings on file with the author.
[14] See, e.g., Ch.J. Tams, 'The Use of Force against Terrorists', *European Journal of International Law*, Vol. 20 (2009), available at: http://ejil.oxfordjournals.org/content/20/2/359.full.pdf+html (last accessed on 29 June 2012) (hereinafter: Tams 2009), p. 361 and Paulussen 2012, pp. 10-11.
[15] Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 8 November 2010 (As Amended Through 15 April 2012), available at: http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (last accessed on 8 June 2012), p. 75.
[16] *Ibid*., p. 157.
[17] See U.S. Government, *Counterinsurgency Guide*, Bureau of Political-Military Affairs, January 2009, available at: http://www.state.gov/documents/organization/119629.pdf (last accessed on 10 June 2012), p. 6.

"to establish a competitive system of control over the population, making it impossible for the government to administer its territory and people."[18] Nevertheless, it can be argued that the moment an insurgent uses terrorist tactics, the moment (s)he seeks to spread terror among the civilian population, (s)he becomes a terrorist. Like CT measures, COIN measures can be taken both by international organisations, such as NATO's International Security Assistance Force (ISAF) in Afghanistan,[19] and by (an) individual state(s).[20] An important goal of especially recent COIN operations is to protect and to win the 'hearts and minds' of the local population so that support for the insurgents diminishes.[21] In that sense, COIN is more of a policy concept than a legal concept. Nevertheless, the idea that hearts and minds must be won might lead to a use of force that reduces as much as possible the risk of civilian casualties/destruction, of collateral damage, even beyond what is required by IHL.[22] IHL allows a certain, namely non-excessive or non-disproportional (in relation to the concrete and direct military advantage anticipated), amount of collateral damage.[23] However, in COIN operations, in a "war amongst the people",[24] such non-excessive, non-disproportional, and thus lawful collateral damage might still be fatal to the effort of winning the hearts and minds of the local people.[25] In the words of ISAF Commander General Stanley McChrystal:

> "Large scale operations to kill or capture militants carry a significant risk of causing civilian casualties and collateral damage. If civilians die in a firefight, it does not matter who shot them – we still failed to protect them from harm. Destroying a home or property jeopardizes the livelihood of an entire family – and creates more insurgents. We sow the seeds of our own demise".[26]

2.2. Asymmetrical warfare

The term 'asymmetrical warfare' is increasingly heard in discussions about the adequacy of the law (of armed conflict) and in relation to countering terrorism and countering insurgencies.[27] However, the argument can be

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[18] *Ibid*.

[19] See General Stanley McChrystal, ISAF Commander's Counterinsurgency Guidance, 26 August 2009, available at: http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf (last accessed on 9 June 2012).

[20] See U.S. Government, *Counterinsurgency Guide*, Bureau of Political-Military Affairs, January 2009, available at: http://www.state.gov/documents/organization/119629.pdf (last accessed on 10 June 2012).

[21] In the words of ISAF Commander General Stanley McChrystal: "Think of counterinsurgency as an argument to earn the support of the people. It is a contest to influence the real and very practical calculations on the part of the people about which side to support." General Stanley McChrystal, ISAF Commander's Counterinsurgency Guidance, 26 August 2009, available at:
http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf (last accessed on 9 June 2012), p. 3.

[22] Gill 2010.

[23] See Art. 51, para. 5 (b) of Additional Protocol I, which stipulates: "Among others, the following types of attacks are to be considered as indiscriminate: (…) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." One will not find this provision, which applies in international armed conflicts, in Additional Protocol II (which applies to non-international armed conflicts), but the ICRC has argued that state practice establishes this rule as a norm of customary international law, applicable not only in international armed conflicts, but also in non-international armed conflicts. See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*. Volume I: Rules, Cambridge University Press: Cambridge 2005 (available at:
http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf
(last accessed on 26 June 2012)), p. 46.

[24] This concept was coined by the British General Rupert Smith in his book *The Utility of Force: The Art of War in the Modern World*, Allen Lane: London [etc.] 2005.

[25] Gill 2010.

[26] General Stanley McChrystal, ISAF Commander's Counterinsurgency Guidance, 26 August 2009, available at: http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf (last accessed on 9 June 2012), p. 3.

[27] See, e.g., W. Heintschel von Heinegg, 'Asymmetric Warfare: How to Respond?', in: R.A. Pedrozo and D.P. Wollschlaeger (eds.), *International Law and the Changing Character of War*, International Law Studies, Vol. 87 (2011), Naval War College, Newport, Rhode Island (available at: http://www.usnwc.edu/Research---Gaming/International-Law/Studies-

made that in principle, there is nothing special or new about asymmetry in war. Indeed, *any* conflict in the world has been and will be characterised by a certain level of asymmetry as parties to the conflict will never be one hundred percent equal, for instance in terms of aims, intelligence capabilities, military capabilities, etc.[28] This *de facto* situation, which also demonstrates that asymmetrical warfare is not a legal, but a factual term,[29] entails that a party will have to apply those strategies and tactics that maximize its own strengths (and minimize its own weaknesses), while exploiting the weaknesses (and restricting the strengths) of its adversary.[30] Notwithstanding the fact that asymmetry will thus feature in any conflict in the world, one could argue that the term asymmetrical warfare is obviously best suited for conflicts where the parties in question are *truly* unequal,[31] for instance in the context of a (generally more powerful) state fighting a (generally weaker) rebel group. In addition, one could also think of the 'war'[32] between the US and terrorist organisations such as al Qaeda. In this respect, it is true that even though "[a]symmetry is certainly not a new phenomenon, (…) it is an increasing[ly] common feature of contemporary conflicts."[33] The link with terrorism has been made. Indeed, asymmetry cannot only be connected to aims and capabilities, but also to methods used.[34] There is a danger that militarily weaker parties, not only obvious terrorist organisations such as al Qaeda, will resort to terrorist means to fight their opponents: "Weaker parties have realized that, particularly in modern societies, to strike "soft targets" causes the greatest damage. Consequently, civilian targets frequently replace military ones."[35] This can lead to an even more dangerous vicious circle, where the militarily stronger party itself resorts to unconventional or illegal methods in an effort to counter this tactic, hereby applying *tu quoque* ('you too') reasoning.[36] This obviously must be rejected. Not only because such behaviour is illegal ("reciprocity invoked as an argument not to fulfil the obligations of international humanitarian law is prohibited"),[37] but also because it is often strategically unwise. As explained earlier, if the stronger party, at the same time, is also involved in a COIN operation, such tactics might be detrimental to the effort of winning the hearts and minds of the local population. In this sense, it is interesting to note that, whereas

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Series/documents/NavalWarCollegeVol-87.aspx (last accessed on 17 June 2012) (hereinafter: Heintschel von Heinegg 2011)), p. 463, M.N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law', *Air Force Law Review*, Vol. 62 (2008) (hereinafter: Schmitt 2008), p. 2 and T. Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, Vol. 87, No. 857 (March 2005) (available at: http://www.icrc.org/eng/assets/files/other/irrc_857_pfanner.pdf (last accessed on 15 June 2012) (hereinafter: Pfanner 2005)), p. 158.

[28] See *ibid*., pp. 150-151. See also Heintschel von Heinegg 2011, p. 465.

[29] See *ibid*.

[30] See also Schmitt 2008, p. 2.

[31] See also Pfanner 2005, p. 150.

[32] As explained before, this paper argues that asymmetrical warfare is not a legal concept. Hence, the existence of asymmetrical warfare between two parties does not necessarily imply that there is also a war (or more correct: armed conflict) in the legal sense of the word. As to the 'war on terror', the author of this paper is of the opinion that one cannot speak in general terms about a war or armed conflict between the US and terrorist organisations such as al Qaeda, but that one has to look at the specific situation on the ground to determine whether or not there exists an international or non-international armed conflict. For instance, in the context of the 'war on terror', at least two international armed conflicts – in Afghanistan and Iraq – have taken place. However, "[e]very operation within the context of the 'war on terror' not related to proper armed conflicts should be executed within the normal context of criminal justice." (Ch. Paulussen, *Male captus bene detentus? Surrendering suspects to the International Criminal Court*, Intersentia: Antwerp [etc.] 2010 (hereinafter: Paulussen 2010), p. 6, n. 18.)

[33] ICRC, International Humanitarian Law and The Challenges of Contemporary Armed Conflicts (official working document of the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007), available at: http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf (last accessed on 15 July 2012) (hereinafter: ICRC 2007), p. 13, n. 7.

[34] Pfanner 2005, p. 151: "The different forms include asymmetry of power, means, methods, organization, values and time."

[35] See *ibid* pp. 151-153.

[36] See *ibid*. See also Schmitt 2008, pp. 41-42. That *tu quoque* arguments have no place in current IHL was confirmed by ICTY, Trial Chamber II, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, 'Judgement', 14 January 2000, available at: http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf (last accessed on 12 July 2012), para. 511.

[37] Pfanner 2005, p. 161, n. 28.

a COIN context can lead to *more* respect for the rules of IHL, asymmetrical warfare as such (not within the context of COIN) can lead to *less* respect for the rules of IHL.[38] However, this does not mean that the law itself, to already briefly touch upon the subject of the next section, is inadequate or in need of adjustment. In the words of the International Committee of the Red Cross (ICRC):

> "The ICRC believes that the challenges posed to IHL by asymmetric and urban warfare cannot a priori be solved by developments in treaty law. It must be stressed that in such circumstances, it is generally not the rules that are at fault, but the will or sometimes the ability of the parties to an armed conflict – and of the international community – to enforce them, in particular through criminal law".[39]

3. Testing the adequacy of the current *jus ad bellum* and *jus in bello*

3.1. *Jus ad bellum*

It can be argued that the current *jus ad bellum*, literally the law (resorting) to war (the law regulating when inter-state force may be used), still appears to be adequate to respond to terrorists (threats) and not in need of expansion. The starting point of the *jus ad bellum* is of course the prohibition on the use of inter-state[40] force,[41] but there are two exceptions to this prohibition.[42]

First, if the Security Council determines pursuant to Article 39 of the UN Charter "the existence of any threat to the peace, breach of the peace, or act of aggression", it can take measures "to maintain or restore international peace and security". Article 42 of the UN Charter clarifies that if the Security Council considers that measures not involving the use of armed force pursuant to Article 41 of the UN Charter[43]

> "would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[44]

The UN Security Council has regarded several times in the past, for instance with regard to the terrorist events of 9/11, Bali and the Moscow theatre siege, "any act of international terrorism"[45] as a threat to

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[38] See also ICRC 2007, p. 14.
[39] *Ibid*. See also Heintschel von Heinegg 2011, p. 473.
[40] Hence, this prohibition does not address the use of force against terrorists within the territory of one state.
[41] See Article 2, para. 4 of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[42] In fact, there is a third one, see Artt. 53 and 107 of the UN Charter, but this exception, which has to do with the use of force against Second World War enemy states, has become obsolete.
[43] Examples of such measures can be found in the same Art. 41 of the UN Charter: "[C]omplete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
[44] Pursuant to Art. 43, para. 1 of the UN Charter, "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." In reality, however, states did not sign special agreements to make their armed forces available to the UN Security Council. They simply used force themselves, implementing a mandate by the UN Security Council. (See also Tams 2009, pp. 366 and 376.)
[45] See, e.g., UNSC Res. 1368 of 12 September 2001 (adopted after the 9/11 attacks), UNSC Res. 1438 of 14 October 2002 (adopted after the Bali attacks) and UNSC Res. 1440 of 24 October 2002 (adopted after the Moscow theatre siege). A more

international peace and security under Article 39 of the UN Charter, the pre-requirement before the Council can take measures under Articles 41 and 42 of the UN Charter. Thus, if the UN Security Council is of the opinion that measures against terrorists not involving the use of force under Article 41 would be inadequate or have proved to be inadequate,[46] it can authorise military force under Article 42. It is true that it has not done so until now,[47] but that does not support the idea that the existing legal framework might be inadequate or in need of change. It might have more to do, for instance, with the (often-present) political discussions within the Council to come to a certain decision.[48]

A second exception to the prohibition on the use of force is self-defence, which is regulated by both Article 51 of the UN Charter and customary international law. Article 51 of the UN Charter stipulates that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." This is a very broad provision, which only requires that there be an armed attack before a state can resort to self-defence. It does not require that the state be subjected to an armed attack *by another state*. Hence, as already clarified elsewhere, "acts of non-State actors, such as terrorists, might (…) lead to an armed attack, as a result of which a State can exercise its right of self-defence."[49] Professor Gill has argued that this is even the case for the non-state actor "which is capable of mounting an attack on its own."[50] Thus, there would not even be a need to attribute the armed attack of the non-state actor to a state.[51] In addition, Article 51 of the UN Charter and customary international law leave enough room for anticipatory (but not preventive!) self-defence, as long as a state respects the (customary international law) principles of necessity, immediacy and proportionality.[52] In short, it can be argued that the current law on self-defence is broad, capable of responding to terrorist threats and not in need of expansion. As a result, the fact that the international community appears to increasingly abandon certain limiting aspects of the law on self-defence, such as the principle of immediacy[53] and the obvious fact that measures must be defensive in nature,[54] thus broadening its

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general statement can be found in UNSC Res. 1566 of 8 October 2004, in which the Council condemned "in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security".

[46] Note that the UN Security Council has made extensive use of Art. 41 of the UN Charter in the fight against terrorism. In fact, it may even "have exceeded its competences more than once in the process." (Tams 2009, p. 376.)

[47] Although one can agree with Tams that it would probably have done so in the aftermath of 9/11 had the United States not chosen the option of self-defence. (*Ibid*., p. 377.)

[48] *Ibid*. Tams also notes that often, "military measures were not considered useful, and not contemplated by the victim state." (*Ibid*.)

[49] Paulussen 2010, p. 55, n. 116.

[50] T.D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Preemption, Prevention and Immediacy', in: M.N. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers: Leiden [etc.] 2007, p. 118.

[51] It must, however, be noted that there is debate on this point, see Paulussen 2010, p. 55, n. 116 for more information. See also Tams 2009, p. 385.

[52] This follows from the famous Caroline incident of 1837, where it was agreed that a government must show "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation". (As quoted in Paulussen 2010, p. 57.) For more information on the Caroline incident, see *ibid*., pp. 56-57. Although there is a basis for anticipatory self-defence in international law, this is not the case for the broader notion of *preventive* self-defence (cf. the Bush Doctrine), where the attack may not necessarily be imminent, but located in a more distant future, see *ibid*., p. 58, n. 128.

[53] Tams notes that even though not officially endorsed, the 'accumulation doctrine' has received increased support in recent practice. (Tams 2009, p. 390.) According to this doctrine, a series of smaller incidents can be taken together to lead to the armed attack threshold, justifying self-defence. Tams warns: "[i]f attacks can be accumulated, then a response will satisfy the immediacy requirement even if it comes too early or too late to repel the single incident which prompted it. The risks of such an approach are readily apparent – in the extreme scenario, a state facing continuous 'pin prick attacks' by a terrorist movement can rely on self-defence to justify the use of force *sine die*. While understandable as a means of re-defining the gravity of armed attacks, the 'accumulation doctrine' thus effectively undermines the immediacy requirement characterizing the temporal right of self-defence." (*Ibid*.)

scope even further, is unnecessary. In conclusion, the *jus ad bellum prima facie* does not seem to be in need of adjustment.

3.2. *Jus in bello*

Once an armed conflict has started, the *jus in bello*, literally the law in war (the law regulating the conduct of warfare) applies, whether or not it was lawful to start the war in the first place (this is what the *jus ad bellum* must determine). This *jus in bello* is also named IHL, which is defined by the ICRC as "a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare."[55] The question arises whether this *jus in bello*, or IHL, is still adequate when the war is fought against terrorists,[56] something that has been seriously questioned, see the introductory words of this paper. As explained in Subsection 2.2 (on asymmetrical warfare), there might indeed be serious problems here. For instance, one of the most important principles underpinning IHL is to make a distinction between a combatant and a civilian.[57] This fundamental rule is clearly ignored by terrorists,[58] who wish to spread terror among the civilian population. And how better to spread terror than to kill innocent civilians? In the words of Bin Laden: "We do not have to differentiate between military or civilian. As far as we are concerned, they are all targets".[59] Admittedly, it must be extremely frustrating if one side is not following the same rules that the other side has committed itself to.[60] However, that is not what concerns us here. The question is not to find out whether IHL is respected, but whether IHL *as such* is in need of change.

It must be stressed that IHL implicitly and explicitly addresses acts of terrorism. It does so implicitly as it recognises, in contrast to the practice of the terrorists, the fundamental principle to distinguish between combatants and civilians.[61] This principle is the basis for the prohibition of many acts that would be considered

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[54] See again Tams, who provides a number of examples (the US attack on Baghdad in 1993, the US bombardment of Sudan/Afghanistan in 1998, Russia's attacks on the Pankrisi Gorge and Iran's pursuit of Kurdish fighters into Iraqi territory) to argue "that in recent years states have invoked self-defence to justify conduct which primarily served non-defensive purposes." (*Ibid*., p. 391.)

[55] ICRC, 'War and International Humanitarian Law', available at: http://www.icrc.org/eng/war-and-law/index.jsp (last accessed on 15 July 2012).

[56] Again, it must be stressed that the context discussed here presupposes the existence of an armed conflict. If the minimum requirements for an armed conflict are not present (which very often will not be the case in the context of terrorism), terrorists should be dealt with, not by the armed conflict paradigm (IHL), but by the law enforcement paradigm, see n. 33.

[57] In fact, the very first rule of the ICRC's customary IHL study reads: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." According to the ICRC, "[s]tate practice established this rule as a norm of customary international law applicable in both international and non-international armed conflicts." See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*. Volume I: Rules, Cambridge University Press: Cambridge 2005 (available at: http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf (last accessed on 26 June 2012)), p. 3. See also ICRC 2007, p. 5, where the principle of distinction is qualified as "a cornerstone of IHL". For specific rules, see Artt. 48, 51 and 52 of AP I and 13 of AP II.

[58] Whether terrorist groups such as al Qaeda are legally bound by IHL is the object of debate. On the one hand, one could argue that they have not consented to these rules and thus, that they are not bound by them, cf. C. Ryngaert, 'Non-State Actors and International Humanitarian Law', Working Paper No. 146, January 2010, Institute for International Law, Katholieke Universiteit Leuven, available at: http://www.law.kuleuven.be/iir/eng/research/wp.html (last accessed on 12 July 2012), p. 7. On the other hand, one could also assert that certain rules are so crucial, fundamental and part of customary international law, such as the principle of distinction, that they apply to any party to the conflict, see Pfanner 2005, p. 163.

[59] 'Who is Bin Laden?', Interview with Osama Bin Laden (in May 1998), available at: http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html (last accessed on 11 July 2012). See also Pfanner 2005, p. 161.

[60] And, as explained earlier, it can lead to a dangerous vicious circle where the party fighting the terrorists resorts to illegal warfare itself.

[61] See n. 57.

terrorism, such as the use of human shields and hostage-taking.[62] In addition, IHL explicitly prohibits acts of terrorism.[63]

Furthermore, some of these terrorist acts can be qualified as 'grave breaches' or war crimes,[64] the alleged offenders of which states must either prosecute or extradite.[65] Besides national courts,[66] international courts can also play a role in the prosecution of suspects who have allegedly committed war crimes involving terrorist acts.[67] A famous and recent example is of course the conviction of Charles Taylor before the Special Court for Sierra Leone on 18 May 2012 for aiding, abetting and planning the commission of, among other things, acts of terrorism.[68]

Hence, it can be concluded that IHL effectively prohibits terrorist methods to fight a war and protects civilians against terrorist acts in armed conflicts, the two aims of IHL (see footnote 55 and accompanying text). Also here, the fact that IHL is not respected by terrorists is reason for concern (especially because it might lead to the above-mentioned risk that the terrorists' adversary will not respect IHL either), but that has nothing to do with the adequacy of the rules themselves.[69]

In fact, it can be argued that IHL could be *so* interesting for those fighting terrorists (as IHL rules on, for instance, the use of force, are much more permitting than rules on the use of force outside the armed conflict context),[70] that IHL might be resorted to when one can question the presence of an armed conflict in the first

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[62] See ICRC 2007, p. 5.

[63] See Art. 33 of Geneva Convention IV, Art. 51, para. 2 of AP I and Artt. 4, para. 2 (d) and 13, para. 2 of AP II.

[64] For the exact difference between these two concepts, see M.D. Öberg, 'The absorption of grave breaches into war crimes law', *International Review of the Red Cross*, Vol. 91, No. 873 (March 2009), pp. 163-183.

[65] That suspects of 'grave breaches' have to be either prosecuted or extradited is clear. There is still some debate whether this also goes for war crimes more generally, but the idea that international crimes as such (and war crimes are without a doubt international crimes) are subject to the rule 'either prosecute or extradite' is more and more accepted. See Paulussen 2012, in particular p. 14, n. 90.

[66] For examples of national cases where suspects were prosecuted for war crimes involving acts of terrorism, see the *Motumura* case in the Netherlands East Indies (1947) and the *Buhler* case in Poland (1948). See A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism*, Hart Publishing: Oxford and Portland, Oregon 2011 (hereinafter: Bianchi and Naqvi 2011), pp. 213-214 for more information.

[67] In Nuremberg, Seyss-Inquart and Rosenberg were found guilty of war crimes for having resorted to terrorist warfare, see Bianchi and Naqvi 2011, p. 212. On 5 December 2003, Stanislav Galić was found guilty by the International Criminal Tribunal for the former Yugoslavia (ICTY) for "Violations of the Laws or Customs of War (acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal." (ICTY, Trial Chamber I, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, 'Judgement and Opinion', 5 December 2003, para. 769.) The International Criminal Tribunal for Rwanda (ICTR) has explicit jurisdiction over acts of terrorism as war crimes, see Art. 4 under d of its Statute, but no such cases have been prosecuted until now. An explicit reference can also be found in Art. 3 under d of the Statute of the Special Court for Sierra Leone (SCSL) and this court has also convicted suspects for acts of terrorism as a war crime, see SCSL, Trial Chamber II, *PROSECUTOR Against Alex Tamba BRIMA, Brima Bazzy KAMARA and Santigie Borbor KANU*, Case No. SCSL-04-16-T, 'Judgement', 20 June 2007, paras. 2113 (Brima), 2117 (Kamara) and 2121 (Kanu). See also SCSL, Trial Chamber I, *PROSECUTOR Against ISSA HASSAN SESAY, MORRIS KALLON AND AUGUSTINE GBAO*, Case No. SCSL-04-15-T, 'Judgement' (Public Document), 2 March 2009, pp. 677 (Sesay), 680-681 (Kallon) and 684 (Gbao). Finally, the Rome Statute of the permanent International Criminal Court (ICC) does not contain a reference to the concept of terrorizing the civilian population, but scenarios comparable with the ones mentioned above may fall under the concept of war crimes as can be found in Artt. 8, para. 2 (b) (1) (in the context of an international armed conflict) and/or 8, para. 2 (e) (1) (in the context of a non-international armed conflict): "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities".

[68] See SCSL, Trial Chamber II, *PROSECUTOR v. Charles Ghankay TAYLOR*, Case No. SCSL-03-01-T, 'Judgement', 18 May 2012, para. 6994.

[69] See also ICRC 2007, p. 6.

[70] See also Y. Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror', Hebrew University International Law Research Paper No. 23-09, November 2009, available at: http://ssrn.com/abstract=1504106 (last accessed on 15 July 2012), p. 14: "The attractiveness of this new paradigm to governments is clear. An "armed conflict"

place.[71] This is a dangerous development.[72] IHL should only be applied in concrete situations of armed conflict, not in situations where the requirements for the existence of an armed conflict are not met (even if those situations might fall within what is sometimes rhetorically called the 'war against terrorism').

At the same time, the ICRC has also warned of another development, namely that some states have qualified certain situations as CT operations, even if those situations might be seen as non-international armed conflicts to which IHL applies.[73] This might seem to be in contrast to the earlier-mentioned development that states may opt for the 'attractive' (because broader) IHL, but the second development does not seem to be connected so much to the non-attractiveness of the rules as such, but rather to the fact that the state is afraid that the recognition of the situation as a non-international armed conflict might give the non-state actor(s) a certain status and legitimisation.[74]

Similarly to the *jus ad bellum*, it can thus be argued that the *jus in bello prima facie* does not seem to be in need of adjustment.[75]

4. Conclusion

In the context of today's conflicts, there have been many discussions whether the international legal framework in countering terrorism is still adequate or in need of change. This paper, which first clarified and explained the concepts of CT, COIN and asymmetrical warfare, looked at the legal frameworks that relate to armed conflicts, the *jus ad bellum* and *jus in bello*. While admitting that this paper does not allow for a very thorough examination of these issues on which entire books have been, and will be, written, and that more research on this topic is needed,[76] the preliminary conclusion can be drawn that these frameworks generally[77] are still adequate in the fight against terrorism. It is not alleged that there are no serious problems here, such as the disrespect for the law

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paradigm provides governments with a new "tool-kit" to handle terror threats, which may be more commensurate with the gravity of the perceived threat."

[71] Cf. ICRC 2007, p. 3.

[72] See also *ibid*., p. 8.

[73] ICRC, International Humanitarian Law and The Challenges of Contemporary Armed Conflicts (official working document of the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November 2011 - 1 December 2011), available at: http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf (last accessed on 19 July 2012), p. 13.

[74] See *ibid*.

[75] See also, e.g., J.J. Paust, 'There Is No Need to Revise the Laws of War in Light of September 11th', The American Society of International Law, Task Force on Terrorism, November 2002, available at: http://www.asil.org/taskforce/paust.pdf (last accessed on 19 July 2012), A. McDonald, 'Terrorism, Counter-terrorism and the Jus in Bello', in: Terrorism and International Law: Challenges and Responses. Contributions presented at the "Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law", organized by the International Institute of Humanitarian Law, Sanremo, 30 May – 1 June 2002 and the "Seminar on International Humanitarian Law and Terrorism", organized by the International Institute of Humanitarian Law in co-operation with the George C. Marshall Center, Sanremo, 24 – 26 September 2002 (available at: http://www.iihl.org/iihl/Album/terrorism-law.pdf (last accessed on 31 August 2012)), p. 71, G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"', *The Fletcher Forum of World Affairs*, Vol. 27, No. 2 (Summer/Fall 2003), p. 69, D. Fleck, 'International Humanitarian Law After September 11: Challenges and the Need to Respond', *Yearbook of International Humanitarian Law*, Vol. 6 (2003), p. 59 and Bianchi and Naqvi 2011, p. 384.

[76] See also n. 7 of this paper.

[77] This paper does not claim that there are no issues that need further clarification in the context of IHL and terrorism. There are. However, that does not necessarily mean that the law itself has to be changed. Cf. Bianchi and Naqvi 2011, p. 380, writing about the targeting of suspected terrorists (by CIA-operated drones): "The problem (…) does not seem to lie in the rules on proportionality or distinction as such, but rather in the way they are being applied or, as in the case of the drone attacks, in the issue whether IHL rules or international human rights standards should apply to certain factual situations. Therefore, even though there is no apparent need for the law to be revised, further clarification of how to properly apply these principles in complex contexts would appear to be an area of fruitful development."

by the terrorists (which can lead to less respect for IHL by the terrorists' adversary as well), but the law *as such* does not seem to be in need of change. (This statement is made, incidentally, while realising that many may not agree on this.) Hence, it is recommended that calls to modify or expand the law should be replaced by calls on how respect for the law can be improved. Looking at the party fighting the terrorists, it is argued that the former should not be triggered by the unlawful methods of the latter to do exactly the same. Only fighting by the rules will lead to the solid moral capital that is needed in the long-lasting conflicts of today's world in which the winning of the hearts and minds of the local population might prove to be essential to winning the conflict. Looking at the terrorists themselves, it is perhaps wishful thinking to believe that they will also make an effort to follow the law, as they try to realise their goals through illegal means. Therefore, the only thing that can be done is to show, over and over again, the moral bankruptcy of terrorists, while working to diminish their support. Obviously, this is best secured by a public trial. Admittedly, trials may take very long, may cost a lot of money and may lead to the acquittal of a suspect. A targeted killing will 'solve' those issues. However, only a public trial will allow the world to see the strength of judicial processes and the rule of law. Therefore, and if feasible, it might sometimes be wiser for a state to arrest and prosecute a suspect, even if the *jus ad bellum* or *jus in bello* allow that state to kill.[78]

[78] Cf. in that respect the controversial 'capture rather than kill' statement from Melzer: "[W]hile operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force [original footnote omitted, ChP]." (N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC: Geneva 2009 (available at: http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (last accessed on 23 August 2012), p. 82.)

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