Peace, Terrorism, Armed Conflict and War Crimes

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Abstract

Terrorism has often been associated with armed conflict. The so-called Islamic State is the most prominent example of a group that rose to power amidst armed conflict. Against this backdrop, it sounds rather strange to associate terrorism with peace. Terrorism, however, has also been called, "the peacetime equivalent of war crimes". This raises the question how the concepts of terrorism, peace, armed conflict and war crimes relate. This article defines these concepts and applies them in the context of International Humanitarian Law, which is also known as the law of armed conflict. It also discusses today's fight against IS in light of the November 2015 Paris Attacks, thereby questioning the consequences and desirability of a war paradigm.

Peace, Terrorism, Armed Conflict and War Crimes

Today, it sounds rather strange to associate terrorism with peace. Against the backdrop of Islamic State (IS) fighters slaughtering civilians in Syria and Iraq, it is hard to see how terrorism could be connected to a situation of peace. In the past, however, this association was often made.[1] Alex Schmid, possibly the most renowned terrorism scholar when it comes to defining terrorism, once said that, "terrorism is the peacetime equivalent of war crimes".[2] Schmid's definition did not incite an academic debate about what it means for the definition of terrorism when he offered it in 1992. Only in 2004 did his statement spark interest when the Indian Supreme Court used it to define terrorism in one of its terrorism court cases.[3] The academic community of terrorism scholars has paid little attention to what the idea of terrorism as the peacetime equivalent of war crimes means for our understanding of the concept and its possible legal implications. Currently, with an international coalition involved in a military fight against the terrorist organization IS, it is interesting to pick up the discussion launched by Schmid in 1992 and explore how terrorism relates to peace, armed conflict and war crimes.

This article aims to revive the debate within terrorism studies about the relationship between peace, terrorism and armed conflict by borrowing from disciplines outside of terrorism studies that provide insight into these concepts. It thus ventures into somewhat unfamiliar terrain by leaving the field of terrorism studies and entering the fields of peace studies and international humanitarian law (IHL).[4] As the law of armed conflict, IHL helps us to see how terrorism and armed conflict relate. It is, however, less helpful when it comes to terrorism and peace. For the link between these two concepts, we need to consult peace studies. The aim of this article is neither to add novel academic insight to these two disciplines nor to provide a thorough, rigorous overview of these fields. Rather, its aim is to find interesting points of departure for those who wish to define and study

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1   See for instance the "waves" of terrorism as proposed in D.C. Rapoport, "The Four Waves of Rebel Terror and September 11" in Anthropoetics, vol. 8, no. 1, 2002, pp. 1–17.

2   A.P. Schmid, The Definition of Terrorism. A Study in Compliance with CTL/9/91/2207 for the un Crime Prevention and Criminal Justice Branch, December 1992, Leiden: Center for the Study of Social Conflicts (COMT).

3   Singh v. Bihar, 2004 sol Case No. 264, 2 April 2, 2004, http://indiankanoon.org/doc/1537019/.

4   It must be noted that the author of the paper is not educated in the field of International Humanitarian Law. However, the author noticed that this field of study is quite often unchartered territory to terrorism scholars and that it would be beneficial to be aware of the main paradigms, questions, and challenges within the field of IHL related to terrorism. For those who are interested in truly legal, academic debates on terrorism and IHL, the author recommends the work of, amongst others, Helen Duffy, Hans-Peter Gasser, Michael P. Scharf, Andreas Bianchi and Yasmin Naqvi.

terrorism and its relationship with peace.

Somewhat paradoxically, the current debate and discourse surrounding terrorism is often void of any basic knowledge of IHL, whereas its implications are sometimes most clearly reflected and felt within this domain. This can, for instance, be observed in relation to the attack of IS on the city of Paris in November 2015, in the response of the international community against the threat posed by IS in the form of concerted military action, and in the speech by French President Hollande following the Paris Attacks, which he called an "act of war". These reactions following a war paradigm raise questions about how certain acts of violence or terror and our reaction to them are qualified in IHL (if at all), and what the consequences might be.

The outline of the article is as follows: it first provides a definition of peace as proposed by Johan Galtung, one of the most influential contributors to peace studies. It then briefly discusses a number of key definitions of terrorism. It points to some of the major issues of disagreement that need to be mentioned on the definitional question if we are to understand how terrorism relates to peace and armed conflict. After a brief discussion about the definitions of peace and terrorism, this paper considers how the concepts converge and diverge. The second part of the article examines how terrorism relates to armed conflict. This part specifically focuses on the discussion of terrorism within IHL. After identifying the main issues within IHL put forward by Michael P. Scharf and Helen Duffy, amongst others, the implications of dealing with terrorism under IHL are considered. The final part of the article summarizes how peace, terrorism, and armed conflict relate. It also reflects upon the current fight against IS and the implications of using the war paradigm to describe this fight.

Negative and Positive Peace: Origins and Meaning

When it comes to defining peace, the work of Johan Galtung, who has been called the "father of peace studies",[5] plays a pivotal role. Galtung was wary of defining peace in a merely negating manner as the absence of war or conflict. This tradition of defining peace was in place for a long time. In fact, the origins of the word peace can be traced back to the Latin word pax, which, via pais, eventually became peace. Emperors and rulers were most influential in defining the term. The Roman Emperor Augustus was credited with the Pax Romana: the so-called Roman Peace. After a long period of violence, the first Roman Emperor went to great lengths to re-establish peace and security within the Roman Empire—though he did not shy away from using force to slowly continue the empire's expansion. After his death, the Pax Romana was continued for almost 200 years. The Latin connotation of the term is that peace is the absence of war and conflict in some kind of power equilibrium, and this idea proved to be rather enduring.

Galtung effectively countered this long tradition of treating peace solely as the absence of war. His main contribution is the introduction of a distinction between positive peace and negative peace. Negative peace entails the more classical, Augustinian view of peace as the "absence of violence, absence of war"; positive peace denotes a rather abstract "integration of human society".[6] In later publications, Galtung explains how violence can either be direct or indirect. Indirect violence is a form of structural violence that may include poverty, inequality, discrimination, social injustice and the like. To speak of positive peace or the integration of human society, direct violence in this structural, indirect sense must be absent. As peace is essentially a social concept—it defines the state of relations between two or more parties—positive peace means more than the absence of violence or war: it means harmonious, positive relations that are based on equality and respect.

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5   Galtung Institut, accessed on 25 August 25, 2016, https://www.galtung-institut.de/en/home/ johan-galtung/.

6   Johan Galtung, 'A Structural Theory of Aggression', in Journal of Peace Research, 1964, vol. 1, no. 2, 1964. pp. 95–119.

Although there have been many other contributions to the field of peace-theory studies, and though different definitions of peace exist, the essence—although perhaps not all of the particularities—of Galtung's definition have been largely accepted. Accordingly, Galtung's definition and distinctions are used in this article.

Defining Terrorism

It is harder to provide one framework or definition of terrorism that comes close to the level of consensus that has been reached about the definition of peace. Terrorism scholars often start writing about terrorism by explaining that the term is highly contested and that a universally accepted definition has yet to be agreed upon.[7] Key points of disagreements arise on many aspects of the definition: the characteristics of the acting party, the characteristics of terrorist attacks, and the goals of terrorist activity.[8] Like peace, terrorism can be traced back to at least the Roman period. It descends from the verb terrier: to frighten. Many scholars regard the French Revolution as the first time terrorism was employed. La Terreur, as it was called, was meant both to eliminate and frighten opponents of the revolution, many of whom faced the guillotine. The main executor of terror in this case was a state actor during revolutionary France. The association of terrorism with state actors changed over the course of time.

The context in which terrorist acts occur has also varied widely over time. This is most clearly shown by American historian David Rapoport, who explained in his seminal article, "The Four Waves of Rebel Terror and September 11", how terrorism has changed its manifestations over time.[9] The first wave of modern terrorism, defined by Rapoport as the anarchist wave, was spearheaded by those who tried to topple the Tsarist regime in Russia. This was followed by an anti-colonial wave that started in the 1920s and targeted colonial powers such as the French in Algeria. In the 1960s, a "new left wave" emerged in which groups such as the Rote Armee Fraktion in Germany and the Brigate Rosse in Italy fought the capitalist system and saw themselves as vanguards for the "impoverished masses" of the Third World. Since 1979, there has been a religious wave, which is very much dominated by jihadist terrorism. Rapoport's waves theory helps us to understand that terrorism occurs in widely varying contexts—from "liberation struggles" against colonial powers to democratic, largely non-violent countries such as West-Germany and Italy.

Traditionally, terrorism has been seen as something that occurs during peacetime. During a meeting of the un Crime Prevention and Criminal Justice Branch in 1992, Alex Schmid proposed that we regard terrorism as, "the peacetime equivalent of war crimes".[10] This definition entered the picture again in 2004, when the Supreme Court of India adopted it in the Singh v. Bihar court case.[11] This definition is rather exceptional, as most definitions make no direct reference to either peace or conflict. An example of someone who has referred to peace is Ekaterina Stepanova. In The Routledge Handbook of Terrorism Research, edited by Alex Schmid, she proposes an interesting categorization of sub-types of terrorism. The first category is the, "'classic terrorism of peacetime' [which] is separate from any wider armed conflict, and includes 'stand-

7   A. Schmid, "'Terrorism-the Definitional Problem'", in Case W. Res. J. Int'lL, 2004, no. 36, 2004. pp. 375–419.

8   For a thorough overview of all these definitional issues, see: A.P. Schmid (ed.), The Routledge Handbook of Terrorism Research, Routledge, London and New York, 2011.

9   D.C. Rapoport, "'The Four Waves of Rebel Terror and September 11'", in Anthropoetics, 2002, vol. 8, no. 1. 2002.

10   A.P. Schmid, "'The Definition of Terrorism, A Study in Compliance with CTL/9/91/2207 for the U.N. Crime Prevention and Criminal Justice Branch'", Dec. 1992.

11   Singh v. Bihar, 2004 sol Case No. 264, 2 April 2, 2004, http://indiankanoon.org/ doc/1537019/.

alone' left- and right-wing terrorism".[12] The second type is, "conflict-related terrorism", in which terrorism is employed as a, "tactic incorporated into asymmetric armed conflict" and is used alongside other tactics such as guerrilla warfare. The third form, called "superterrorism", is the terrorism of groups with global agendas and existential, non-negotiable aims.[13] Although the latter category is of a somewhat different nature—because it describes the aims of terrorism rather than the context in which it occurs—it is rather unique in distinguishing between "peacetime" and "conflict-related" terrorism. Most definitions of terrorism do not make such explicit references to peace, or more broadly speaking, to the context in which an act of terrorism takes place. The main points of discussion among terrorism scholars and other parties (such as government agencies) who define terrorism concern the actors, targets, and goals of terrorism. Two examples that reflect some of the more contentious issues within this debate are the definitions proposed by Israeli terrorism scholar Boaz Ganor and the definition proposed by a governmental actor: the U.S. State Department. Ganor writes that, "terrorism is the deliberate use of violence aimed against civilians to achieve political ends".[14] The U.S. State Department defines terrorism as, "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents".[15] Interestingly, the U.S. State Department disqualifies state actors from being perpetrators of terrorism—an approach that is followed by many terrorism scholars. This approach, however, is different from that used in IHL, as is shown in the next section. Both definitions seem to suggest, albeit indirectly, that terrorism is an act that is conducted outside of the context of an armed conflict, or—if it occurs during armed conflict—an act that does not target the legitimate adversary (combatants of the other party). The two definitions differ in the specification of the targets between civilians (Ganor) and non-combatants (U.S. State Department). Also, it could be argued that there is a subtle difference between being motivated by political considerations (U.S. State Department) and aiming to achieve political goals (Ganor).

What is missing from these definitions, and what could help to distinguish terrorism from related types of political violence, is the element of fear. As shown in the categorisation of Stepanova, terrorism sometimes overlaps with other types of political violence. When terrorism is perpetrated in the context of an armed conflict, another part of the definitional question surfaces: What is the difference between insurgency and terrorism? This becomes particularly relevant, for instance, in the current situation regarding IS. Are they first and foremost a terrorist organization, or could they rather be called an insurgent movement? Insurgency has been defined as, "a technology of military conflict characterized by small, lightly armed bands practicing guerrilla warfare from rural base areas".[16] Isabelle Duyvesteyn and Mario Fumerton have aptly explained how insurgency and terrorism can be best understood by differentiating between strategies and tactics. They show how terrorism could function both as a tactic and a strategy. As a tactic, it can be used to inspire fear during insurgency (a strategy generally aimed to establish political-military control over a territory and its population by installing competing authority systems). Terrorism could also be a strategy in itself, which is then not so much aimed at overall political-military control over a territory and its population but is instead aimed to

12   S.V. Marsden and A.P. Schmid, '"Typologies of Terrorism and Political Violence"', in A.P. Schmid (ed.), The Routledge Handbook of Terrorism Research, 2011, Routledge, London and New York, 2011, pp. 158–200.

13   Idem.

14   B. Ganor, '"The Relationship Between International and Localized Terrorism"', in Jerusalem Issue Brief, 2005, vol. 4, no. 26. 2005.

15   22 U.S. Code § 2656f – Annual country reports on terrorism, retrieved on 15 February 15, 2016, https://www.law.cornell.edu/uscode/text/22/2656f.

16   '"Ethnicity, Insurgency, And Civil War"', in American Political Science Review, 2003, vol. 97, no. 1, 2003, pp. 75–90.

compel another actor to do or abstain from doing something by targeting a third party.[17] This distinction is relevant when discussing how terrorism can be distinguished from other types of political violence. This article, however, tries to determine how terrorism is present in different contexts. To this end, this article focuses on acts of terrorism. In other words, it focuses on terrorism as a tactic, recognising that terrorist acts can occur within diverse contexts. Terrorist attacks distinguish themselves from regular armed attacks by their clear focus on an indirect target and by their fear-inspiring nature. The presence of terrorism within armed conflicts is certainly not a new phenomenon. The transnational nature of terrorism is not surprising, as it became increasingly relevant after the attacks on 9/11, in the subsequent "War on Terror", and in light of the current fight against IS in Syria and Iraq.

Peace and Terrorism: Definitional Relationship

Now that we have defined peace and terrorism, we can see how they relate to each other. If we follow a strict interpretation of Galtung's negative peace—i.e., the absence of violence and war—then it cannot be aligned with terrorism, which is inherently violent. This strict interpretation would mean, however, that we can never truly speak of negative peace, as violence is present in virtually all communities. Negative peace refers to the absence of war, of armed conflict, and of frequent and intense occurrences of organized violence. The previous paragraph shows that terrorism can occur both within and outside the context of armed conflict. Before we delve deeper into the issue of terrorism within armed conflicts, we must establish that terrorism can indeed take place within a situation of negative peace. In fact, this confirms the view of terrorism as the peace-time equivalent of war crimes. Terrorism does not necessarily have to be linked to armed conflict.

More contentious is the question to what extent terrorism can also be aligned with the definition of positive peace. As explained above, positive peace is linked to ideas and values such as social justice, equality and respect. The crux here is that terrorist organizations often claim to act in response to social injustice, discrimination, and other concepts that are related to structural (indirect) violence. Extrapolating Galtung's later inclusion of "harmony" in positive peace to the discussion on terrorism would mean that grievances do not necessarily have to be based on real facts or even be truly experienced by the terrorists. The mere expression of and reference to these grievances could arguably be seen as some form of disharmony within a society and thereby constitute proof of the absence of positive peace. This strict interpretation, again, would mean that we can almost never speak of positive peace, as there is some disharmony in most societies.

Therefore, it might be better to refrain from interpreting positive peace as the complete absence of any form of disharmony or inequality, just as it has been argued that negative peace should not simply be seen as the complete absence of violence. Galtung himself wrote that positive peace allows for some occasional violence.[18] The question is how much disharmony or inequality would be regarded as a breach of positive peace. Does this disharmony need to be widely shared, or can the actions of one individual effectively cancel positive peace? Think of the example of the attacks by Anders Behring Breivik who killed 77 people in Norway in 2011: although there is no complete harmony in Norwegian society, the concept of positive peace does seem to fit quite well.

The question about the relation between positive peace and terrorism is perhaps most clear in some cases of transnational terrorism, in which terrorists perpetrate attacks in another country. It could, theoretically, be

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17   M.A. Fumerton and I. Duyvesteyn, '"Insurgency and Terrorism: What's the Difference?"' in C. Holmqvist-Jonsäter and C. Coker (eds.), The Character of War in the 21st Century, Routledge, Abingdon, 2009.

18   J. Galtung, Theories of Peace: A Synthetic Approach to Peace Thinking, International Peace Research Institute, 1967.

possible that there was positive peace in the country where the attack took place, whereas the attacker came from a country where there was no positive peace. Think for instance about a terrorist attack aimed to drag a country into a foreign conflict. However, this example can also be problematized. With respect to transnational terrorism, it would perhaps make more sense to transnationalize the idea of positive peace as well. Peace, as war, also contains a social element that qualifies the relations between certain actors. Consequently, we also must take into account the relations between the state or community where the attack took place and the state or community from which the perpetrator(s) came. The picture then becomes more complicated.

In sum, terrorism is usually associated with a situation of peace but also frequently occurs within the context of armed conflict. Most definitions of terrorism do not list any restrictions on the context in which it can occur. Galtung's definition of peace raises more questions. Terrorism as the, "peacetime equivalent of war crimes" can be easily aligned with negative peace. However, the meaning of positive peace is less clear. Theoretically, it is possible that terrorism occurs within a situation of positive peace. Whether this is also the case in practice depends on how strictly we interpret positive peace, and how the motivations of terrorists align with these interpretations.

Terrorism, War Crimes and Armed Conflict: The Practice of International Humanitarian Law

After this theoretical discussion on the definitions of peace and terrorism, we turn to consider peace and terrorism in legal practice. First, it is important to note that terrorism in peacetime can be prosecuted under a number of United Nations Terrorism Conventions, such as the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft or international criminal law.[19] As international law scholar Helen Duffy has shown, it would be overly optimistic to assume that terrorism is an accessible legal concept. It is as hard to find a universally accepted legal definition as it is to find a universally accepted academic one.[20] To evade this problem, most bodies of law do not define terrorism as such but instead define specific forms of terrorism. The absence of an overall definition has not hindered the prosecution of particular terrorist crimes; it might therefore be less of a legal problem than is sometimes assumed. States are continuously revising their domestic legislation to adapt to the changing nature of terrorism.

To discuss terrorism within the context of armed conflict, we must enter the domain of International Humanitarian Law. Shortly after the Second World War, the Geneva Conventions were adopted to guide the conduct of armed conflict and to limit civilian suffering as much as possible.[21] These conventions—and the additional protocols—are all linked to the "legitimate" conduct of war (jus in bello) and come into force in case of armed conflict.[22] The conventions make an important distinction between two types of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). The first encompasses a conflict with two or more states. A formal declaration of war does not have to be recognised by all parties and can even be absent.[23] Additional Protocol i to the convention extends this definition of an IAC to include armed

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19 See e.g. M.P. Scharf, '"Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects"', in Case W. Res. J. Int'lL. 2004, vol. 36, 2004, pp. 359–374.

20 H. Duffy, The '"War on Terror"' and International Law, Doctoral thesis, Leiden University, 2013, E.M. Meijers Instituut.

21 Although usually simply called '"Geneva Conventions"', this particular Geneva Convention is the Fourth Geneva Convention (1949). It builds upon earlier treaties, such as the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, that which was signed in 1864.

22 Scharf, '"Defining Terrorism as the Peacetime Equivalent Of War Crimes"'.

23 International Committee of the Red Cross (ICRC), '"How is the Term '"Armed Conflict"' Defined in International Humanitarian Law?"' ICRC Opinion paper, 2008.

conflicts in which "peoples" fight against colonial domination, alien occupation or racist regimes.[24] A non-international armed conflict occurs in the territory of a "High Contracting Party" (a state) and involves at least one or more non-governmental groups. There seems to be some disagreement about whether a state actor has to be involved. According to a Congressional Research Service Report prepared for the U.S. government, "an internal conflict involves a legitimate state engaged in conflict with an armed group that has attained international personality".[25] The International Committee of the Red Cross, however, asserts that the state on whose territory the conflict occurs does not necessarily have to be involved. Still, both statements can be true when a foreign state is involved in a conflict with a non-state actor on the territory of another state. However, as will be explained, this fact has incited a fierce debate within IHL about whether such a transnational conflict can still be called a NIAC.

When it comes to the case of an alleged NIAC, it must be determined how intense the hostilities must be to qualify as an armed conflict instead of as a mere internal disturbance or skirmish. Two criteria are usually employed to determine whether the violence can be called an armed conflict: (1) "the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces".[26] (2) "non-governmental groups involved in the conflict must be considered "parties to the conflict", which means that they possess organized armed forces. This means, for example, that these forces must be under a certain command structure and have the capacity to sustain military operations".[27] It is to be determined on a case-by-case basis whether such criteria are met.[28]

Whereas IHL applies to both IAC and NIAC, and though both provide strict regulations aimed to protect the civilian population and others from disproportionate or extreme suffering, there are a few important differences between the two that are worth mentioning. The most important difference is that in an IAC, captured prisoners of the opposing state are entitled to prisoner-of-war (pow) status, which protects them from torture and abuse, entitles them to receive humane treatment, and demands provides for their swift release after the conflict has ended. In case of a NIAC, the combatants of the opposing, nonstate actor do not enjoy such a legal status.[29]

IHL makes implicit and explicit references to terrorism. Article 33 of the Convention (iv) relative to the Protection of Civilian Persons in Time of War states that, "collective penalties and likewise all measures of intimidation or of terrorism are prohibited".[30] Furthermore, "acts of terrorism" are explicitly mentioned as

24   Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol i), 8 June 1977, Article 1, available at https://ihl-databases.icrc.org/ihl/INTRO/470.

25   J. Elsea, '"Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions"', CRS Report for Congress, 2011, http://fpc.state.gov/documents/ organization/7951.pdf.

26   International Committee of the Red Cross (ICRC), '"How is the Term '"Armed Conflict"' Defined in International Humanitarian Law?"'.

27   Idem, and see T. Hoffmann, '"Squaring the Circle?–International Humanitarian Law and Transnational Armed Conflicts"', in International Humanitarian Law and Transnational Armed Conflicts. Hague Academy of International Law, 2010, pp. 217–274.

28   International Committee of the Red Cross (ICRC), Internal Conflicts or other Situations of Violence – What is the Difference for Victims? 2012, https://www.icrc.org/eng/resources/ documents/interview/2012/12-10-niac-non-international-armed-conflict.htm.

29   Idem.

30   Convention (iv) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 33, available at https://www.icrc.org/applic/ihl/ihl.nsf/4e473c7bc885 4f2ec12563f60039c738/72728b6de56c7a68c12563cd0051bc40.

one of the acts that, "shall remain prohibited at any time and in any place whatsoever" in Article 4 of one of the Additional Protocols.[31] With regard to terrorism directed against the civilian population, another article states that, "acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited".[32] Essentially, this makes it possible to prosecute terrorism during armed conflicts as a war crime. This article has been invoked, for instance, during the trial against Stanislav Galić, commander of the Bosnian Serb forces, for his acts of terrorism against the civilian population near Sarajevo.[33]

Thus, when it comes to the question whether terrorism can be executed by a state actor, IHL takes a clear position: states can be involved in terrorism, and these acts of terrorism can be prosecuted as war crimes if it has been established that there is an armed conflict. In this sense, terrorism and war crimes clearly overlap.

Implications of Applying IHL to Terrorism

As illustrated, IHL can be used to prosecute terrorist acts, and there is no provision that would prohibit this. Regarding terrorism and IHL, there are two other challenges that seem more problematic. First, the nature of some of today's fights against terrorist organizations raises questions about whether they should fall under IHL. Second, some scholars worry that applying IHL to these cases would have serious repercussions. When it comes to the first question, part of the problem lies in the old dichotomy between IAC and NIAC. The Geneva Conventions remained rather vague about what can be called a NIAC.[34] This question became more pressing after the attacks on 9/11 and the subsequent global War on Terror. This war is linked to an interesting paradox that was identified by Helen Duffy, who writes that, "armed groups engaged in an armed conflict are often labelled 'terrorists' […]. Conversely, one of the unusual characteristics of the so-called War on Terror has been the labelling of terrorist organisations as 'enemy combatants' engaged in an armed conflict".[35] This practice has also led to ambiguity about whether a state actor (e.g., the U.S.) fighting a non-state actor/terrorist organization (e.g., Al Qaeda) in the territory of a third state (e.g., Afghanistan) should be seen as an NIAC, IAC or neither. This categorization is up for debate, and claims have been made to justify all three categorizations.[36] As a result, some scholars have proposed to use the term transnational armed conflict to better capture the non-state, international nature of such a conflicts.[37] The U.S. government made attempts to sell the War on Terror as an IAC, but this has not been legally established.[38] Against the backdrop of the current fight against

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31   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, Commentary of 1987, Fundamental Guarantees, Article 4, available at https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5cbb47a6753a2b77c12563cd00 43a10b.

32   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, Article 13, available at https://www.icrc.org/applic/ihl/ihl.nsf/4e473c7bc8854f2ec12563f6 0039c738/a366465e238b1934c12563cd0051e8a0.

33   L. Paredi, '"The War Crime of Terror: An Analysis of International Jurisprudence"', in ICD Brief 11, 2015, http://www.internationalcrimesdatabase.org/upload/documents/ 20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf.

34   A crucial case in defining armed conflict was the Tadic Case (1995) of the International Criminal Tribunal for the Former Yugoslavia, during which it was stated said that, "(…) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State", see ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

35   Duffy, The "War on Terror" and "Terror and International Law".

36   Hoffmann, '"Squaring the Circle?"'.

37   Idem.

38   M. Milanovic, '"Lessons for Human Rights And Humanitarian Law in the War On Terror: Comparing Hamdan and the Israeli Targeted Killings Case"', in International Review of the Red Cross, 2007, vol. 89, no. 866, 2007, pp. 373–393.

IS in Syria and Iraq, there may be legal arguments to revise the idea that this particular fight is neither an IAC nor a NIAC. Duffy mentions that there is an important exception to the common legal practice of defining an IAC only as a conflict between states (or the exceptions of colonial or alien occupation or racist regimes). This occurs when the actor exercises "quasi-state" functions.[39] Though this was arguably not applicable to the case of Al Qaeda and the war on terror, it might be regarded differently in the case of IS. IS has been an "extraordinary" terrorist organization in the sense that it could conquer, control and establish effective authority over large swaths of territory. It has also increasingly developed a state-like structure, expanding its bureaucracy, with several "governmental bodies" such as ministries. It has, for instance, opened ministries of agriculture, public health, and education, which are only indirectly related to the

conflict.[40]

Also, some of the reasons why the fight against Al Qaeda in Afghanistan could not be seen as a NIAC, appear less relevant in the case of IS. Duffy doubts whether Al Qaeda meets the criteria to be seen as an actor in a NIAC. These criteria include, "scope and membership, sufficient organisation and structure, and the capability of abiding by the rules of IHL".[41] IS would score a lot better on these criteria than Al Qaeda did. For instance, it has been reported that IS members need to fill out registration forms to join the group, which would make proving group membership much easier.[42] Also, IS seems to be more centralised than Al Qaeda, and members—referring to the Iraqi and Syrian battle zone—can be more easily recognised. This would arguably also mean that the leadership of IS should, in theory, be able to control its members and to ensure that they abide by certain IHL rules, which could turn them into actors in a NIAC.

The second point that needs to be mentioned concerns the alleged repercussions of calling a fight with and against a terrorist group an armed conflict. The United States, for instance, has claimed that Al Qaeda members are "unlawful enemy combatants" who do not fall under the protection of the Geneva Conventions.[43] However, to call the war on terror an IAC is to provide a serious upgrade in the status of the terrorists: they would be seen as legal combatants and would theoretically be entitled to pow status upon capture. Also, the articles in the Geneva Conventions and Additional Protocols outlaw most attacks on civilians but do permit attacks on combatants. This latter point, in fact, could justify attacks by terrorist organizations on military targets. These reasons have motivated Michael Hoffmann to argue that there is a clear "misfit" between current IHL and the characteristics of today's terrorist groups.[44] It might be difficult to argue that cases like the War on Terror could qualify as a NIAC, but there is even more reluctance to call it an IAC. Thus, it remains rather vague and ambiguous whether a military fight against a terrorist organization qualifies under IHL. This legal ambiguity is recognized as a serious issue by some IHL scholars such as Hoffmann, as it is necessary that any fight against terrorist organizations is also clearly and transparently bound by the rule of law.

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39   Duffy, The '"War on Terror"' and International Law.

40   D. Weggemans, E. Bakker and R. Peeters, Bestemming Syrië: Een exploratieve studie naar de leefsituatie van Nederlandse '"uitreizigers"' in Syrië, 2016. Universiteit Leiden/Universiteit van Amsterdam.

41   Duffy, The '"War on Terror"' and International Law.

42   E. MacAskill, "Isis Document Leak Reportedly Reveals Identities of 22,000 Recruits'", The Guardian, 9 March 9, 2016, http://www.theguardian.com/world/2016/mar/09/ isis-document-leak-reportedly-reveals-identities-syria-22000-fighters.

43   Milanovic, '"Lessons for Human Rights and Humanitarian Law in the War on Terror"'.

44   M.H. Hoffman, '"Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law"', in Case W. Res. J. Int'lL. 2002, vol. 34, 2002, pp. 227–230.

In sum, IHL provides sufficient grounds to prosecute terrorist attacks[45] regardless of who perpetrates them. The most pressing questions regarding IHL and terrorism seem to be the following: Are some of the military attempts to counter terrorism in fact armed conflicts that are guided by IHL? If so, are these international or non-international armed conflicts? If IHL is applicable, this might have legal repercussions for the terrorists, effectively upgrading their status.

Concluding Remarks

I wish to end by offering some reflections on today's fight against IS in Syria and Iraq and by raising some questions about the current war paradigm. After IS's rapid conquest of large parts of Iraq in 2014, the U.S.-led Combined Joint Task Force—Operation Inherent Resolve—was set up to coordinate the fight against IS. In November of 2015, a group of terrorists linked to IS perpetrated a terrorist attack on the territory of one of the coalition partners, France, thereby killing 130 citizens. French President Hollande immediately called the attacks an "act of war" and said that France was currently confronted with "war".[46] This was a clear move away from what other European leaders had declared in their speeches after the attacks in Madrid (2004) and London (2005), where the war paradigm was not mentioned. Hollande's speech sounded similar to the speech by U.S. President George Bush after the 9/11 attacks, in which he stated that the "enemies of freedom" had perpetrated an "act of war" against the U.S., thereby forcing the U.S. into a "war on terror".[47] Hollande referred to IS (Daesh, as he said) as a "terrorist army" rather than as a terrorist organization. Although these statements might invoke a strong moral reaction, their accurateness and desirability could be questioned.

First of all, an act of war, in legal terms, implies an ongoing armed conflict between the parties involved. An "act of war" does not have to be a war crime such as terrorism. In other words, an act of war can be perfectly legal within the framework of IHL, which is probably not what Hollande hoped to convey when he called the attack an act of war. Few would doubt that France and other countries are involved in an armed conflict with IS in Iraq,[48] but to include terrorist attacks in the territory of France in this armed conflict is a controversial extension.

Second, to call it a war also means that clarity is needed about the nature of this war. Does it fall under IHL, and which provisions guide it? Also, the reference to IS as a terrorist army creates the impression that it really is a state-like organization, and IS has gone a long way to present itself in this way. If it qualifies as an IAC, the repercussions mentioned earlier come into play: IS would then be recognized as a legitimate actor in this conflict, and IS militants would qualify as lawful combatants. This would mean that they—and France and the other states involved in the international coalition against IS—have to obey to the provisions outlined in IHL.

This status would, in a legal sense, prohibit attacks like the one in Paris, following Hollande's reasoning that the territory of France is included in this zone of armed conflict. Unfortunately, there is little reason to think

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45   For a more thorough overview of how IHL relates to prosecuting terrorism, see C. Paulussen, '"Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm"', 2012, ICCT, http://www.icct.nl/download/file/ICCT-Paulussen-Legal-Framework-for-Counter-Terrorism-August-2012.pdf.

46   '"President Hollande calls Paris attacks an '"act of war"' – video"', The Guardian, 14 November 14, 2015, http://www.theguardian.com/world/video/2015/nov/14/ president-hollande-paris-attacks-act-of-war-video.

47   '"Text of George Bush's Speech"', The Guardian, 21 September 21, 2001, http://www.theguardian.com/world/2001/sep/21/september11.usa13.

48   See for instance the Geneva Academy of International and Humanitarian Law, http://*www.rulac.org/countries/france*, accessed on 8 November 8, 2106.

IS would restrict its actions as outlined in IHL. Instead, it could use IHL to find justifying grounds for targeting military personnel and facilities in France and other parties involved in the conflict. Whereas acts of terrorism and other war crimes are outlawed, attacks against military personnel, generally speaking, are not. Also, in case of an IAC, captured militants of IS would qualify as POWs, which means that they would have to be released after the cessation of hostilities.[49]

Hollande's statements not only raise questions about their legal meaning and implications; they send out the wrong signals to the terrorists, and, paradoxically, could advocate the use of terrorism. On the one hand, these statements might serve as senseand meaning-making tools to explain to the French population what has happened and what it means for the country. Another positive aspect might be that Hollande speaks of a strong and determined France: a France that is not afraid. Such speech could boost domestic morale. On the other hand, there is no greater sign of recognition for a terrorist organization than a great power declaring that you, with your "army", have been able to deal a devastating blow and start a war.

Terrorists typically aim for an overreaction that will reinforce their own rhetoric of being oppressed or under attack. Osama bin Laden declared war on the U.S. already in 1996, but it took 9/11 before the U.S. accepted this declaration. It has also proven rather difficult to win a "war against terrorism". Although terrorist organizations can be defeated militarily, this does not necessarily mean that their ideology has been defeated as well. On the contrary, it is often strengthened by the same efforts, as we have seen in the past fifteen years. Thus, when speaking about terrorism, peace, and armed conflict or war, it might be useful to refrain from introducing the "war paradigm", especially when it comes to acts of terrorism that occur outside of conflict zones, as in the Paris Attacks. The link between armed conflict and terrorism, however, seems ever more present today. Therefore, it is high time to reopen the debate that was started by Alex Schmid in 1992 about the relationships of terrorism, peace, and armed conflict.

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49   Hoffman, "Terrorists Are Unlawful Belligerents, Not Unlawful Combatants'".

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