

International Relations Module – M02HIP

War, Law and Morality

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- 4000 - word Essay -

Title:

Can the principles of *jus ad bellum* and *jus in bello* be applied to the recently declared "war on terrorism" ?

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"The United Nations must continue to insist that, in the fight against terrorism (...) human rights and the rule of law must always be respected. As I see it, terrorism is in itself a direct attack on human rights and the rule of law. If we sacrifice them in our response, we are handing a victory to the terrorists."

Kofi A. Annan, UN-Secretary-General,
Speech from the 10th March, 2005, Madrid, Spain

A. Introduction

Much water has swirled around the rocks of the “war on terrorism” in recent academic literature. Both political and strategic as well as legal analysts have delineated their views on how best the world community should tackle the phenomenon of terrorism. The clash of competing demands of civil liberties, international law and domestic security and whether or not violent responses to violence render both sides morally indistinguishable are only some of the difficult questions that the current debate is facing.

It is often said, that the first casualty in “war” is the truth, and the second is law. While, in the present conflict, it might be an exaggeration to declare that *silent leges inter arma*, the law has certainly been used as an instrument by many in the debate, and its clarity has become increasingly obfuscated in the process.¹ The discussions about the anti-terrorism-laws in the British House of Commons in the first months of 2005 are, again, highlighting the fact that very different views can be held as to how the laws, the government and the society should retort to terrorist threats. Such discussions, quite clearly, do not only occur in the domestic sphere but also on the international echelon. The numerous recent Security Council Resolutions issued during the debate revolving around terrorism are a case in point.²

In this short paper we wish to firstly outline a few issues of a more general nature, drawing attention to some terminological particularities of the “war on terrorism” as well as some engaging moral aspects of the debate. Secondly, and being the main part of this paper, we will attempt to depict and analyse some of the aspects of both the “jus ad bellum” and the “jus in bello” in order to shed some light on the sometimes unclear legal situation regarding anti-terror measures.

Methodologically, we will approach the core answer to the essay-question from two angles. One will consist of an investigation into selected prominent regulations and concepts of international law. The second will comprise the analysis of contemporary world experiences that might reflect a shift in the perception of international law on an international level. Certainly, we should keep in mind that we ought to avoid the temptation of muddying the water of clear analysis by deducing general insights from single cases.³ However, in order to fully appreciate the impact of international law, the application to specific practical cases is indispensable.

¹ Compare the suggestions of Pham, P.J.: “Law, Human Rights, Realism and the “War on Terror”, Human Rights and Human Welfare, Volume 4, 2004, p. 95.

² See the official UN-website on terrorism: <http://www.un.org/terrorism/declarations.htm>.

³ Compare the warning remarks of George in his methodological instructions in: George, A.L., 1979: “Case Studies and Theory Development: The Method of Structured, Focused Comparison”, in Lauren, P.G., (ed.): Diplomacy: New Approaches in History, Theory and Policy, (New York: The Free Press.), p.43.

B. The analysis of the subject matter

Before engaging in the legal analysis of some selected aspects of both the jus ad bellum and the jus in bello, and in order to be able to appreciate what exactly will be the subject of our examination we will shortly shed some light on three points. Firstly, the controversial notion of “terrorism” will be commented upon. Secondly, we will provide a few deliberations on moral aspects of the debate revolving around the “war on terrorism. Thirdly, we will suggest a few thoughts on the concept of “war” in the specific context of terrorism.

Interestingly, until date, it remains highly questionable, what or who the terminology “terror” or “terrorism” exactly represents. Is it epitomized by the “sworn enemy” Osama Bin Laden and his notorious network Al-Quaeda, or the so-called “Axis of Evil” ? Or is it any group engaging in violent acts for their perceived political or other aims ?⁴ Quite generally, we could say that terrorism is condemned, but not yet thoroughly defined, since, so far, no definition has gained universal acceptance.⁵ Weinberger, for instance, remarks on the difficulty of defining terrorism that:

“due to this lack of agreement (...) the world community has demonstrated a remarkable readiness to condemn and punish as terrorist specified classes of politically related offences. The problem remains that the punishments seem somewhat arbitrary due to the vast discrepancies in the interpretation of terrorism, its sources, how terrorism differs from common law and local statutory crimes, and whether a terrorist is really a legitimate freedom fighter.”⁶

For the purposes of this paper, we wish to stick to the relatively clear definition of the “*High Level Panel on Reform of UN Policy and Institutions*”, which identified in what some of its members regard as a significant achievement, terrorism as:

⁴ For Terrorist Group Profiles as well as “Counter-Terrorism-Profiles” (special police forces etc.), see: <http://www.terrorism.com/modules.php?op=modload&name=TGroups&file=index>.

⁵ For interesting suggestions on the uneasy definition of terror see Weinberger, J.: “Defining Terror”, *Seton Hall Journal of Diplomacy and International Relations*, Winter/Spring 2003, p.68. For a very thorough theoretical discussion of the terminus of terrorism, see: Gupta, R.: “Changing Conceptions of Terrorism “, *Strategic Analysis: A Monthly Journal of the IDSA*, December 2001, Volume XXV, No.9).

⁶ Weinberger p.68.

“any action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act”.⁷

In the moral debate on the “war against terrorism” the most noteworthy string arguably circles around the question of whether terrorists should be granted the advantages of international law and how the measures taken against terrorists should be considered to be morally justified or proportionate.

Here, we are facing a parallel case to the national law systems in constitutional states. A terrorist amok runner is domestically treated like any other criminal. Only measures that are allowed according to the respective legal system are permissibly taken against him or her. He or she is brought before a judicial court and being tried according to the national criminal laws in place. Why should this modus operandi be different in the international system ? If we morally accept that domestic terrorists benefit from the rule of law, why should we not accept the same at the international level ?

In this vein, Ignatieff has offered thoughts on a system of consideration referring to the thought of the “*lesser evil*”. This “lesser evil ethic”, according to the author, holds that neither the moralists nor the consequentialists ought to be allowed an exclusive control of the government’s polity decision making process. As for measures taken against terrorist activities, there will be times when, in the fight against terrorism what *works* is not *right* and what is *right* will not *work*.⁸ As its name implies, the “lesser evil” approach agrees with the moralists that some actions are morally always incorrect, even if they are effective in the “war”. However, with the consequentialists, it maintains that there are circumstances in which consequences matter so much - say, for example, saving the lives of innocent people from an imminently threatening terrorist attack - that necessity may require that a liberal democracy’s principle of self-defence compels it to take a course of action that strays from its own foundational commitments.⁹ In such an emergency, the “body politic”

⁷ <http://news.bbc.co.uk/2/hi/americas/4365661.stm> (accessed on 21st March, 2005). A different wording has been set out by the United Kingdom Terrorism Act of 2000, which describes terrorism as “*The use or threat of use of action designed to influence the government or to intimidate the public or a section of the public for the purpose of advancing a political, religious or ideological cause.*” For Selected UN Activities to Address Terrorism since September 2001, see: <http://www.un.org/News/dh/infocus/overview.htm>. For special activities of the UN Office on Drugs and Crime in Vienna, see: <http://www.unodc.org/unodc/en/terrorism.html>.

⁸ Pham p. 93.

⁹ Ibid p. 93.

may opt for a morally problematic measure—doing so as a last resort and keeping it under a close scrutiny.¹⁰

However compelling and opportune the lesser evil principle might look at first sight, it offers, in our view, only very little guidance to ethical discernment with some of the most vexing issues, such as, for instance the indefinite detention of unlawful combatants, torture, and targeted killing.¹¹ Ignatieff puts forth only a very modest counselling as to how his theory should bring about morally appropriate measures when applied to real life situations. He does not offer anything beyond proposing four general tests for policy makers to examine in the adversarial process:

“Do the coercive measures violate individual dignity? Do they unnecessarily depart from existing due process standards? Will they make citizens more secure in the long run? Have less coercive measures been tried?”

Some people might want to argue that unlawful violent responses to terrorist violence (which are indeed allowed according to Ignatieff in case that they meet the criteria of his “tests”) render both sides morally like two peas in a pod. This might be true in a number of cases where counter-terrorism acts go far beyond what is legally acceptable. More strongly, however, it is the lack of dependable guidance and control that finally advocates, in our view, for the strict observance of the rule of law. It is indeed a (very practical) dilemma that some workable measures that might be necessary for an effective struggle against terrorist activities might have to be abandoned. Yet, the clash of the ever-competing demands of civil liberties and international law on the one hand and domestic or international security on the other must not get out of (legal) control. Rather, in case that the law does not offer workable measures, it is in our view a question of how a government can bring a change to the laws to respond to the existing threats. Thus, it will be insured that both legal changes and measures taken on the ground are kept under the scrutiny of the standard of modern constitutions, the “check of balances”, as well as the public judgment of the media and people. In any case, the fact that the law can by necessity only respond and be adapted to new threats and normally not be changed in advance should not give us reason to abandon the respect for the rule of law altogether.¹²

¹⁰ Probably, the suggestions uttered by Ignatieff describe quite realistically some of the courses of action of governments involved in the fight against terrorists. Again, compare the interesting remarks by: Pham p. 93.

¹¹ Ibid p.94.

¹² For a thorough review of moral principles in application to the war on terror and especially the military actions of the US-led coalition in Iraq in 2003, see Rosenthal, who suggests that the existing moral rules are sufficient but that they need to be applied to entirely different circumstances. See: Rosenthal, J.: “New Rules for War”, Naval War College Review, Summer/Autumn 2004, Volume. LVII, No. ¾, 2004, p.91-101.

Another nuisance that anyone has to face reading on the “war on terrorism” is the very notion of “war” in this particular milieu. It is necessary for our survey, to utter a few remarks on this terminus of “war” in the context of terrorism if we wish to appropriately apply the particular, relevant realm of international law which is concerned with the use of force and the conduct of warfare.

Is this term “war on terrorism” a mere buzz-phrase conveniently used in the public diplomacy of governments that are or perceive themselves to be on the forefront of the struggle or are we really witnessing a “war” that is being fought against the occurring terror ?¹³

Certainly, the “war on terrorism” is not a war in the strict traditional sense of the word. The terrorist attacks on the World Trade Centre in 2001 have highlighted that, if we really wish to call this conflict against terrorist activities a “war”, we have to bear in mind that it is an entirely different kind of war from conventional warfare between a set of opposed units. The “traditional” confrontations in the Clausewitzian thinking are usually expected to originate in organised entities whose assets (territorial and otherwise) offer a basis for effective deterrence, pre-emptive attacks or even destructive retaliation. But the “war” embarked upon by terrorists is very often being launched by the “have-nots” deriving of poor regions against the “have-it-all” of Western democracies – and is therefore to some degree a conflict “between the world where the developed state exists and the world where it does [practically] not”.¹⁴ Furthermore, unlike in conventional warfare, with a minimum application of force, a maximum of destruction can be achieved through terrorist actions, even if the latter might at times be of a more psychological than physical nature like, for instance, the loss of trust in the public security.

At the most abstract level, however, terrorism meets the same basic criteria as war. It represents, as Pham rightly points out, “consciously selected force applied for a specific end.”¹⁵ Moreover, it “employs kinetic, physical force to influence the enemy psychologically through the erosion of his will to continue to resist.”¹⁶ This modern terrorist tactic is a similar method in classical warfare. As is war, this (physical force) is easily measured by the degree to which the cohesion of the targeted entity is affected. Modern terrorists cells, like Al-Quaida and other groups, have proven they will go very far for their envisaged psychological and physical destruction and thus, terrorism represents a

¹³ The notion of the “war on terrorism” was introduced by US-President Bush, see, e.g., Address to a Joint Session of Congress and the American People (20 Sept. 2001) and Presidential Address (7 Oct. 2001), available at <http://www.whitehouse.gov/news/briefings/>.

¹⁴ Serfaty, S.: “The Wars of 9/11”, The International Spectator, Volume XXXVI, No. 4, October - December 2001, p.6.

¹⁵ Pham p. 92.

¹⁶ Ibid, p.92-93.

clash of wills between two or more contending parties. This is a similar type of clash of will as in classical warfare. If both parties employ force to resolve this clash of wills, and if both parties seek a political end through this conflict, then a state of war exists.¹⁷

Thus, the application of the jus ad bellum and the jus in bello, despite some limitations that we shall see later, is generally permissible.

It will therefore be our next step to have a closer look at a selected number of legal rules and to understand how these can be applied to the “war on terrorism”.¹⁸ First will be the review of the jus ad bellum as the part of law which has been used to justify the resort to military action in the international arena. Here, we will focus on Art. 51 of the UN-Charter, which has been subject to a lot of controversy in relation to the terrorist-debate. Secondly, we suggest an analysis of the jus in bello, as being the corpus legis attempting to subjugate the conduct of war to certain rules of behaviour. In that section, prominence will be given to the legal qualification of prisoners of war (POW).¹⁹

There are different interesting questions attached to the application of the jus ad bellum to the phenomenon of terrorism. Can, for instance, an act of terrorism be regarded as an act of aggression under Chapter VII of the UN-Charter, offering a window of opportunity for military actions of one country against another ? Can military retaliation of a state targeted against a terrorist group residing in a particular country be taken against the will of that sovereign nation ? As Dixon points out, there seems to be a dichotomy between the requirements of international law generally prohibiting the use of force – which in fact is a rule of jus cogens – and the ability and willingness of powerful states to achieve their goals by the use of aggressive force. While, for instance, most of the international community were outraged by the terrorist attacks against the property and the nationals of all countries in the United States in 2001, few have gone on to agree that the different actual military responses in Iraq in 2003 were lawful, whether that be on grounds of self-defence, legitimate reprisal, the apprehension of terrorists or as a means of averting a

¹⁷ Besides, it is questionable whether terrorism as a “war” can be clearly separated from a (serious) “crime”. Terrorism is not defined as a specific crime per se. There is nothing like a violation of a common (international) crime of terrorism. Weinberger therefore rightfully asks: “What distinguishes the common crimes of murder, larceny, kidnapping, assault and others from the identical crimes enacted and labelled terrorism”? See: Weinberger p.76.

¹⁸ Already for reasons of space, this analysis will by necessity be selective.

¹⁹ Besides the traditional rules of the jus ad bellum and jus in bello, there exists a whole variety of legal documents relating to the context of terrorism. Since 1963, 12 universal legal instruments aiming at the prevention and suppression of international terrorism have been elaborated. See the “Counter-Terrorism Executive Directorate - International Action Against Terrorism: “Summary of legal instruments””: http://www.un.org/News/dh/infocus/terrorism/CTED_legal_instruments.pdf.

potential threat to the peace and security of mankind (i.e. the threat that weapons of mass destruction could be obtained and used).²⁰

Both from a political as well as a legal viewpoint, it is interesting to see that the US has tried to involve as many states as possible in both the military actions in Afghanistan and Iraq in 2003. For instance, the UK, Germany, and Norway, among others – are directly involved in the Operation Enduring Freedom in Afghanistan. Politically, as Gray rightly points out, this can be seen as a quest for political legitimacy. It leaves the observer with the impression that the US is well aware about the ongoing controversy in the international political arena as to the legitimacy of invoking different parts of international law as a warrant for military operations. Legally, on the other hand, the bid of bringing as many states on board as possible, is being done in order to demonstrate a coherent *opinio juris* – one of the essential requirements for the establishment of international customary law that might allow for actions that are within the interests of a certain country.

If a group of terrorists, that resides in a state, decides to strike terrorist attacks in another country, these acts can normally hardly be seen as an “act of aggression” on the grounds of Art. 2 (4) UN-Charter. There would not be any law that could permit a state to take unilateral action in these circumstances. Certainly, it would be very difficult to explain why such action would not be in violation of the “territorial integrity or political independence” of the target state and not contrary to the purposes of the United Nations as reflected by the UN-Charter, and prominently by its Art. 2 (4) UN-Charter.²¹

In ascertaining in what form the *jus ad bellum* can be applied to the “war against terrorism”, Art. 51 UN-Charter is of paramount importance because it has been amply discussed in recent debates. Some authors hold that there has been a widening of the right to self-defence which would now encompass the ability to react using military force to an attack carried out by a non-state actor availing itself of the support of a third state.²² Although some minor developments can certainly be observed, it is very questionable, in our view, if the event of 9/11 led to a real fundamental reappraisal of the law on self-defence.

²⁰ Dixon, M.: Textbook on International Law, Oxford University Press, Oxford, 5th ed., 2005, pp. 303, 304.

²¹ *Ibid* p. 304.

²² Sommaro E.: “Law and Disorder ? The War on Terror and the International Legal System”, The International Spectator, 4/2002, p.109.

It is not untrue that the immediate international reaction after the attacks was one of impressive unity among governments. The UN Security Council and General Assembly passed unanimous resolutions condemning the terrorist attacks.²³ Security Council Resolution 1368 affirmed the right of self-defence in response to terrorist attacks for the first time. NATO invoked Article 5 of its treaty for the first time in its history and declared that the attack on the USA was an attack on all member states and that they were prepared to act in collective self-defence.²⁴ The ensuing US-led military operations in Afghanistan (“Operation Enduring Freedom”) were, according to the acting parties, legally being carried out on the grounds of Art. 51 UN-Charter, asserting that they were acting in individual and collective self-defence.²⁵ The US and other states have claimed that the Taliban regime in Afghanistan has actively sheltered and aided and abetted the Al-Quaida terrorist network and without going to deep into the evidence that is being presented for this allegation, it seems rather plausible that this has been the case. While the strikes might not have complied with the pre-September 11 *jus ad bellum* regarding forceful responses to state sponsorship of terrorism, that standard has evolved in a progressively permissive direction. In particular, international law now arguably permits a state to cross into another for the limited purpose of combating terrorists when the state in which the terrorists are based does not or cannot put an end to terrorist use of its territory.²⁶

The more challenging question arising out of 9/11 (and the struggle against terrorism in general) as far as international law is concerned, however, is whether Article 51 UN-Charter has undergone a revolutionary change such that it now even extends to attacks by non-state actors (like Al-Quaeda) in the absence of any state complicity. For many states and commentators the concept of self-defence against non-state actors was already problematic before 9/11.²⁷ The test which was generally accepted by states was always found in the Definition of Aggression, taken by the International Court of Justice in the Nicaragua Case. The ICJ stated that the use of force by individuals constituted an

²³ See Security Council Resolution (SCR) 1368 and 1373 and General Assembly Resolution (GA Res) 56/1. Resolution 1373 (28 September 2001) obliges UN Member States to (e.g.) criminalize the financing of terrorism and share information with other governments on any groups practicing or planning terrorist acts. Also, see the “Counter-Terrorism Executive Directorate - International Action Against Terrorism: “Summary of legal instruments”: http://www.un.org/News/dh/infocus/terrorism/CTED_legal_instruments.pdf.

²⁴ Compare the remarks by: Gray, C.: “The use of force against terrorism: a new war for a new century”, in: *International Law and the Use of Force*, 2nd edition, Oxford, Oxford University Press, 2004, p.159.

²⁵ Gray p.160. She also remarks: “*It is open to question whether these events have brought about a radical and lasting transformation of the law of self-defence or whether their significance should be narrowly construed in that Operation Enduring Freedom was essentially a one-off response to a particular incident based on Security Council affirmation and (almost) universal acceptance by states. Even in the immediate aftermath of 9/11 there was a certain lack of clarity as to the exact scope of the right to use force in self-defence against terrorism and as to whether such a right could be invoked unilaterally.*”

²⁶ Schmitt, M.N.: “International Law and the Use of Force: The Jus Ad Bellum” , *The Quarterly Journal*, Vol. II, No. 3, September 2003, pp.94, 95.

²⁷ Gray p.165.

armed attack only when there had been a “sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to acts of aggression”.²⁸

Here, it is interesting, for instance, to have a closer look at the events in Iraq before the beginning of the war in 2003. One of the allegations of the US-led coalition (made in favour of acting on the grounds of Art. 51 UN-Charter) had been that Iraq was in the possession of nuclear weapons that were ready for use in an armed conflict and that there was the possibility of President Hussein giving these into the hands of terrorists. The International Atomic Agency, however, had not been able to find hard evidence on the ground to ascertain this claim. The assertion that there had been a link between President Hussein and the Al-Qaida network was also not proven and then also not maintained by the US-coalition later.²⁹ Besides, the actions driven by the coalition were not being undertaken against Al-Qaida members residing in Iraq. Therefore, the justification relevant to our discussion brought forth in favour of a war against Iraq (implying that state’s complicity with terrorists being supported by Iraq) was not underpinned by reliable evidence. How then, could the coalition have acted on the grounds of Art. 51 UN-Charter ?

Strictly and legally speaking, the “revolutionary change” that some authors proclaim, must have been clearly shown by the behaviour of the society of states. Since no change has ever been made to the wording of Art. 51 UN-Charter (treaty law), it could have only been through customary law that the actions could have permissibly been taken on the grounds of a changed understanding of Art. 51 UN-Charter. Without being able to go in depth with the evidence, one can, however, note that, quite clearly, a notable number of governments was outrightly opposed to the military actions against Iraq. Hence, one of the basic conditions for the emergence/change of international customary law was not met: the existence of an *opinio juris* held by a substantially large and coherent number of the states of the world.³⁰ Evidently, international customary law is created in the practice of States and not in scholarly writings. Consequently, Art. 51 UN-Charter can not be applied on the grounds of the “war against terrorism” allegedly pursued in Iraq.³¹

²⁸ Nicaragua Case – ICJ Reports (1986), 14 at para 195.

²⁹ Now, in recent months, the term often invoked in US public diplomacy says “liberating the Iraqi people”.

³⁰ The US-led actions also gave rise to the newly invoked debate about pre-emptive military strikes against terrorism. Strong arguments in favour of pre-emptive military actions, for instance, are being proposed by: Sofaer, A.D.: “On the Necessity of Pre-Emption”, *EJIL*, Issue 14, 2003, p.209-226.

³¹ Also the breach of different Security Council Resolutions by Iraq has been used as an argument for the military actions in Iraq. However, this would be a point that can only be invoked in relation to Art. 39 in connection with Art. 42 UN-Charter when it is a question of the protection of international peace and security, but not a question of self-defence, which we are discussing here.

We will now turn to our last focal point of analysis, the corpus legis of the jus in bello which subjugates the conduct of war to a variety of regulations.

Here, from the outset and especially in relation to the “war on terrorism”, it is important to note that the law of war is based upon the basic principle that while the deliberate harming of soldiers during wartime is a necessary evil, and thus permissible, the deliberate targeting of civilians is strictly forbidden.³² Having said this, while war generally is thus subject to a certain code of behaviour, terrorists usually do not recognize such rules. The whole system relies on an implicit moral contract and, in modern times, an explicit juridical accord solemnized by treaty between “honorable men” whom circumstances rendered enemies to play by the same rules. Traditionally, two sides in a conflict understood that without these restraints, war would turn into a simple slaughter. The difficulty arises when the “warrior’s honour” meets a terrorist militancy that recognizes neither limits nor reciprocity.³³ This is a dilemma for both politicians and commanders as well as the soldiers on the ground.

Another point which is complicating the applicability of international humanitarian law, especially in the context of terrorist activities, is the traditional division between international and non-international armed conflict.³⁴ This distinction implies, for instance, that the hostilities between the US-led coalition and the Taliban and between the latter and the Northern Alliance ought to have been regulated by two different sets of rules. In the first case, the four Geneva Conventions from 1949 and their First Additional Protocol (to the extent to which it reflects customary law since it had not been ratified by Afghanistan) should have been respected, while the internal conflict between the Taliban and the armed groups opposing them should have been fought in accordance with the Common Article 3 to the Conventions and their Second Additional Protocol.³⁵

Prominent in both the general media as well as the academic literature is the issue of detention of (suspected) terrorists, either in Iraq (especially the notorious Abu Ghraib prison) or in Guantanamo Bay.³⁶ In order to be aware of the legal body governing this part of international law we wish to refer to one of the rules which is of importance for the qualification of unlawful combatants as POWs. Article 4 of the Third Geneva Convention prescribed specific protections to “lawful combatants,” that is, members of the armed

³² Weinberger p.73.

³³ Pham p. 96, 97.

³⁴ Compare the suggestions put forth by: Murphy, R.: “Contemporary Challenges to the Implementation of International Humanitarian Law”, *The Quarterly Journal*, retrieved from Ciaonet on 3rd March, 2005, p.99.

³⁵ Parts of the literature discuss the possibility that an internal conflict may be “internationalised” under certain conditions, for instance in the event that a direct armed intervention occurs by a foreign state. Compare *Ibid*, p.97.

³⁶ For a moral viewpoint on prison abuses, see: Rosenthal, J.: “Accountability: How to treat Unlawful Combatants”, *Carnegie Council on Ethics and International Affairs*, 2005.

forces of nations in conflict or members of militias and organized resistance movements of nations in conflict provided they are

- (1) *part of an organized command structure;*
- (2) *wear fixed insignia recognizable at a distance;*
- (3) *carry their weapons openly, and;*
- (4) *conduct their operations in accordance with “the laws and customs of war.”*

Those prisoners who meet these criteria are entitled “in all circumstance to respect for their persons and their honour” as POWs (Article 14). The state of Iraq is a party to the Geneva Conventions and the military personnel of the fallen Iraqi regime were entitled to POW status. Consequently, the abuses at Abu Ghraib, to name but this practical example, were violations of international humanitarian law insofar as those subject to abuse were legitimate POWs.³⁷ On this much the law is straightforward.

Yet, the case of members of Al-Quaeda and other terrorists is more complicated. The Islamist terrorists of Al-Quaeda and other groups represent no nation-states that are signatories to the Geneva Conventions. Furthermore, they do not even belong to the so-called “national liberation movements” that were accorded some limited recognition by the signatories of the 1977 Additional Protocol I. They wear no form of a distinctive uniform and generally do not carry their weapons openly. They deliberately target civilians and, where possible, do so in ways that maximize, rather than minimize, injury. In short, their *modus operandi* represents the antithesis of the “way of the warrior.” Consequently, it would seem that they are not the “honorable men” who qualify for the protected status of POWs because they do not satisfy *any* - much less all four - of the requirements of the Geneva Convention.³⁸

It is not untrue that this logic is at times being challenged my motions from human rights organisations like Amnesty International or Human Rights Watch. The rationale behind the lawful or unlawful combatant distinction, however, is clear from the philosophy motivating the laws of conflict. If professional armed forces in the field are to achieve military objectives with the minimum of incidental damage to the protected status of

³⁷ Pham p. 97.

³⁸ While the U.S. Supreme Court recently ruled in two suits brought on behalf of some of the detainees at Guantánamo - *Rasul v. Bush* and *Hamdi v. Rumsfeld* - that these prisoners have a right to petition for a writ of *habeas corpus* and an independent review of their status, it did not question the law underlying their classification as unlawful enemy combatants and the denial of POW status. For thoughts on American military jurisdiction over Al-Quaeda terrorists see the report published by the American Bar Association Task Force on Terrorism and the Law – Report and Recommendations on Military Commissions, January 4th, 2002; <http://www.abanet.org/leadership/military.pdf>.

civilians or non-combatants, they must be able to easily distinguish the enemy from a civilian. This is rather simple logic than complicated legal examination. Also, the possibility of protected status as a POW in the event of capture is the incentive for military personnel to play by these rules, without which it would be impossible to balance military necessity and humanitarian imperatives.³⁹

Hence, if people engaging in terrorist activities in a manner that does not meet the criteria of the Geneva Conventions, they have to be aware that they can not expect to be granted the benefits of international humanitarian law. Jus in bello does not apply to such individuals.⁴⁰

³⁹ Pham pp. 97, 98.

⁴⁰ However, although not mentioned in this short paper (for reasons of space and the focus of the essay question), there are still a number of basic human rights that do find application to any human being, and therefore also to terrorists. Importantly, these can under no circumstances be denied to any individual. Strongly conversely to our view, some of the authors openly advocate denying the application of even the most basic principles of human rights and the rule of law in general when it comes to terrorists. An example for this has been set by a speech of Hassner, who said: *“Of course, terrorists pose a special problem. Necessity may dictate executing them summarily in times of war. Necessity may also, in an emergency, lead to a selective disregard for legal guarantees in order to (...) .”* See: Hassner, P.: “Definitions, Doctrines and Divergences” in: “One Year On: A September 11 Anniversary Symposium”, The National Interest, Fall 2002.

C. Conclusion

As we have seen, the connotations of the concept of the “war on terrorism” reach into stratified layers of political, legal, ethical and moral nature. Many issues in the current debate are still subject to contention, or at least diverging interpretation. Further, each conflict brings unanticipated challenges and the “war on terrorism” is no exception. The potential threat of the use of atomic or biological weapons by terrorists in the quest for religious states or other goals is only one thinkable scenario that has to be prevented.⁴¹

More efforts will have to be made to change the laws of war to include new types of warfare that yield new types of combatants and novel wartime situations.⁴² Yet, any changes in the laws have to happen with care and deliberation in order to preserve the ethical ideals even while adapting the rules of warfare and criminal adjudication to the new and unwelcome circumstances.⁴³ The rule of law has to find its legitimate place in the “war on terrorism” in order not to open the door to arbitrary actions by states.

In addition, the present debate needs to acknowledge more amply the overlapping of the distinct but complementary concepts of war, (international) law and morality. Combined efforts from analysts from all schools of thought are needed for an answer to the phenomenon of terrorism that is both a just and workable compromise – a compromise strongly required in the face of the clashing imperatives of human rights (and other international law) and civil liberties on the one hand and domestic and international security on the other.

We hence wish to conclude by rehearsing the words of the UN Secretary General, Kofi A. Annan, who has said: “*Every time we make the rule of law stronger, we make terrorists weaker.*”⁴⁴

⁴¹ For a database of worldwide incidents in 1999 involving sub-national actors and chemical, biological, radiological, and nuclear materials, see: Cameron, G., Pate J., McCauley, D., DeFazio, L.: “1999 WMD Terrorism Chronology: Incidents Involving Sub-National Actors and Chemical, Biological, Radiological, and Nuclear Materials”, The Nonproliferation Review, Center for Nonproliferation Studies, Volume VII, Number 2, Summer 2000.

⁴² Weinberger p.73.

⁴³ Wedgwood, R.: “The Law's Response to September 11”, Ethics and International Affairs, Annual Journal of the Carnegie Council on Ethics and International Affairs, Volume 16, No.1, 2002.

⁴⁴ See: <http://www.un.org/apps/news/infocusRel.asp?infocusID=8&Body=terror&Body1=>

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