International Centre for Counter-Terrorism - The Hague

The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism

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This ICCT conference report provides a detailed overview from the two-day symposium entitled *The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism*, which was convened in The Hague in January 2013. The conference covered a range of issues that are relevant in debates about using force in counter-terrorism operations against non-state actors. Specifically, this paper elaborates on a number of key questions raised during the conference; these relate to the temporal and geographical limitations of armed conflict, the interplay between international humanitarian law and international human rights law, as well as the use of drones, the law enforcement approach to counter-terrorism and the possible need for a new framework for countering terrorism. The authors supplement participants' debates with detailed background information and theoretical discussions.

About the Authors

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ICCT – The Hague 2013

1. Introduction[1]

On 10 and 11 January 2013, the T.M.C. Asser Instituut and the International Centre for Counter-Terrorism – The Hague (ICCT), in cooperation with the International Humanitarian and Criminal Law Platform, the Konrad Adenauer Stiftung, the Municipality of The Hague and the Netherlands Ministry of Foreign Affairs organised a two-day symposium entitled *The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism*.

During the symposium, twenty-seven top panellists and moderators from academia, civil society, governments, the military and multilateral organisations discussed the contours of various approaches states take against non-state actors with the goal of countering terrorism. Specifically, the symposium addressed issues related to uses of force and how these may affect and define the geographic and temporal scope and limitations of the laws of armed conflict in relation to counter-terrorism. Besides this main theme, which operates within the armed conflict paradigm, the symposium also discussed and assessed the law-enforcement paradigm.

This research paper aims to highlight the main issues that were addressed during the symposium and in doing so, will follow the titles of the six panels:

- Whenever War?: Temporal Limitations to Armed Conflict (Section 2);
- Wherever War?: Geographic Limitations to Armed Conflict (Section 3);
- International Humanitarian Law and International Human Rights Law: Menu à la Carte? (Section 4);
- A Case Study on Targeted Killings and Drones (Section 5);
- Law Enforcement Approach in Counter-Terrorism (Section 6); and finally
- The Way Forward: The Need for a New Framework for Counter-Terrorism? (Section 7).[2]

A conclusion will be provided with a very brief summary of the symposium, including the areas that are in need of further research (Section 8). This specific paper does not allow for a comprehensive summary of all the different matters that were discussed during these two days,[3] but it addresses a selection of a few important questions raised and conclusions reached, including relevant background information.

During the symposium, one participant remarked that the relevance of such conferences was that they help to interpret the law and demonstrate just how far it can be stretched. Indeed, in the words of Professor Terry Gill, the keynote speaker of the first day: “If the legal community does not come up with some kind of consensus, then I am afraid that policymakers will use what they find most expedient. As lawyers we have a responsibility or we run the risk of becoming irrelevant”.

2. Whenever War?: Temporal Limitations to Armed Conflict

1.1. Introduction

The first panel was designed to address issues surrounding the temporal limitations to armed conflict, exploring the moments at which an armed conflict begins and ends, especially with respect to cross-boundary conflicts between state and non-state actors, the main focus of the symposium. Three main issues were explored in this panel: 1) the concept of “naked” self-defence and the *jus ad bellum* considerations in counter-terrorism, 2) the evolving concept of “imminence” with respect to self-defence, and 3) temporal considerations of armed conflict.

1.2. Discussion

The first issue addressed by the panel was that of “naked” self-defence, a concept defined as “resorting to force in self-defence, but in ways in which the means and levels of force used are not part of an armed conflict, as a matter of the technical law of war. Those circumstances include self-defence uses of force against non-state actors, such as individual terrorist targets, which do not yet rise to the NIAC [non-international armed conflict]

[1] The authors would like to thank Nadia Melehi, Orla Hennessy, Eva Entenmann and Robert Weaver for their substantive help in recording (and preparing the materials for) the symposium.
[2] See Annex 1 for the programme of the symposium and Annex 2 for the list of speakers.
[3] The authors and T.M.C. Asser Press intend to explore opportunities to publish a more comprehensive record of the symposium.

threshold".[4] In March 2010, US State Department legal adviser Harold Koh endorsed this notion when he stated that the legal standards of necessity, distinction and proportionality apply in this resort to self-defence.[5] Anderson says Koh arrived at this via customary international law rather than from obligations stemming directly from the technical laws of armed conflict.[6]

This particular notion of "naked" self-defence has been met with criticism, both outside the symposium[7] as well as during the panel discussion. For example, the point was raised that such a concept or interpretation of self-defence would be a misreading of international law and that the use of the self-defence paradigm does not mean that international humanitarian law (IHL) or international human rights law (IHRL) frameworks can be escaped. When state consent is questionable (e.g., Pakistan's consent to drone strikes, where consent is not clear), self-defence might permit going past article 2(4) of the UN Charter; however, it would not justify a disregard for IHL and IHRL – these frameworks remain applicable with their corresponding provisions (e.g., threshold for armed conflict and imminence). Additionally, this particular notion or interpretation of self-defence as the US purports to use, raised important questions regarding the roles and obligations of non-state actors, problems with state sovereignty, and the role of human rights within the armed conflict context as well as outside of it. One, perhaps controversial, remark was that the US may have felt as though it needed to use the law of armed conflict paradigm after 9/11 in order to detain and kill people who were not related to a conflict, and therefore the "war on al Qaeda" framework was implemented and complemented by this idea of "naked" self-defence in order to fulfil policy goals. This recalls Terry Gill's opening remarks of the symposium regarding his fear that without a legal consensus, policymakers would act out of expediency.

One panellist expressed regret that concepts specifically related to *jus ad bellum* were continually being mixed with those under *jus in bello*, while the two paradigms are meant to be kept separate. In his view, that mixture convolutes the discussion.[8] He opined that "naked" self-defence was purely theoretical – to really get to the crux of the matter, one must look at the facts on the ground to see whether IHL applies (i.e., whether there is an armed conflict).

Another issue is that regarding whether force can be used against terrorist suspects in anticipatory or pre-emptive self-defence before an armed attack has taken place; and, in the case of pre-emptive self-defence, even as a response to a persistent threat under which it is unclear when the attack will precisely take place but is unlikely to take place imminently.[9] Under the *Caroline* doctrine, anticipatory self-defence is recognised but limited to those cases in which an armed attack is imminent.[10] This is the case when "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation". This is the standard of imminence traditionally accepted in customary international law.

However, John Brennan, then Assistant to the US President for Homeland Security and Counter-Terrorism, has argued that there is increasing recognition by the international community that, when fighting terrorism, a more flexible understanding of "imminence" is appropriate.[11]

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[4] K. Anderson, *How We Came To Debate a Legal Geography of War*, SSRN paper (2010), p. 8.

[5] H. Koh, *Annual Meeting of the American Society of International Law Speech* (25 March 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

[6] K. Anderson, *How We Came To Debate a Legal Geography of War* (2010), p. 8.

[7] Marko Milanovic, *Drones and Targeted Killings: Can Self-Defence Preclude Their Wrongfulness?* (10 January 2010), http://www.ejiltalk.org/drones-and-targeted-killings-can-self-defense-preclude-their-wrongfulness/; M. Milanovic, *More on Drones, Self-Defense, and the Alston Report on Targeted Killings* (5 June 2010), http://www.ejiltalk.org/more-on-drones-self-defense-and-the-alston-report-on-targeted-killings/.

[8] *See also* Laurie Blank, "A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities", *Case Western Reserve Journal of International Law* 43, no. 3 (2011); Geoffrey S. Corn, "*Self-Defense Targeting: Blurring the Line between Jus ad Bellum and the Jus in Bello*", International Law Studies 88 (2012), pp. 57-92; and Keiichiro Okimoto, The Distinction and Relationship between Jus Ad Bellum and Jus In Bello (Oxford: Hart Publishing, 2011).

[9] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings,* A/HRC/14/24/Add.6 (28 May 2010), para. 45.

[10] Christopher Greenwood, "*The Caroline*", *Max Planck Encyclopaedia of Public International Law* (Last updated April 2009), para. 7, http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law9780199231690e261&recno=1&searchType=Quick&query=Caroline (subscription required).

[11] John O. Brennan, *Remarks addressing the Harvard Law School Brookings Conference* (16 October 2011), http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/. Additionally, a recently leaked White Paper from the US Department of Justice has surfaced reiterating this notion of imminence, but going even a step further: "First, the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future". Searchable text of the White Paper available at: http://en.wikipedia.org/wiki/020413_DOJ_White_Paper.

The issue to be debated is at what point a terrorist threat is "imminent". Brennan argues that a flexible approach must be taken towards the imminence concept in the terrorism context, for a terrorist threat differs from traditional conflicts.[12] On the one hand, al Qaeda does not have a traditional command structure, its members do not wear uniforms or carry arms openly, leading one to say they do not meet the requisite organisational criteria outlined in IHL. On the other hand, al Qaeda is capable of attacking unexpectedly and causing significant civilian and military damage, likening their acts to hostilities, which could be governed by IHL. According to Brennan, this calls for a broader possibility to strike against terrorists out of self-defence and therefore a broader concept of imminence.[13]

The US argues that a pattern of behaviour over several years can form an imminent threat when alleged terrorists had previously planned, conspired and perhaps acted in other places.[14] One panellist opined that the US government has used this standard but defined it beyond recognition. What John Brennan has said, and what a recently leaked White Paper from the US Department of Justice reiterates, is that its use needs to be broad and flexible – but this has led to a situation of too broad and too flexible that is beyond any *Caroline* manifestation of imminence. Another panellist stated that the exception formed in article 51 of the UN Charter is for an imminence likened to tanks massing on the border of one country aimed at another. In this panellist's view, the post-9/11 approach has been to de-couple imminence from the idea that an armed attack would happen by supplanting it with the idea that great harm might happen and the concept of this occurring was so bad, the temporal element of self-defence must be relaxed – essentially for security reasons. The majority of the panellists agreed that when it came to the imminence requirement, a careful, measured and strict interpretation was advised in order to prevent attacks and reprisals.

The question becomes whether the broadening of the principle of imminence has, to an extent, indeed become recognised by the international community or if it is forecasted to do so in the (near) future. This segues nicely into the third main issue discussed in the panel: temporal considerations of armed conflict.

When trying to define the beginning or ending of an armed conflict, many challenges arise, especially regarding conflicts between a state and a non-state actor. Derek Jinks has outlined guidelines about the initiation and cessation of armed conflict as well as defining what an armed conflict actually is.[15] He writes that regarding the initiation, international armed conflict (IAC) is more straightforward.[16] In case of a NIAC, one can turn to Common Article 3 of the Geneva Conventions, which provides that in armed conflicts not of an international character, minimum standards apply to each party. One integral issue identified in the literature is that there is no authoritative definition of armed conflict. The International Law Association's Use of Force Committee concluded a five-year study into this issue and delivered its findings in the 2010 Committee Report. In that report, the committee confirmed that at least two characteristics are found with respect to all armed conflicts: 1) the existence of organised armed groups that are 2) engaged in fighting of some intensity. In addition to these minimum criteria respecting all armed conflict, IHL includes additional criteria so as to classify conflicts as either international or non-international in nature.[17]

With regard to the end of the application of IHL, in both IACs and NIACs, the general rule is that IHL applies until the "general close of military operations".[18] However, the point at which that occurs, especially with regard to a conflict between a state and a non-state actor, is not clear. A peace treaty (though uncommon) is the

[12] Brennan, ibid.
[13] Ibid.
[14] Ibid.
[15] Derek Jinks, "The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts", *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law* (Cambridge, January 27-29, 2003), http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf. See also Rosa Brooks, "War Everywhere: Rights, National Security Law and the Law of Armed Conflict in the Age of Terror", *University of Pennsylvania Law Review* 153, no. 675 (2004).
[16] This is based on the fact that the Geneva Conventions apply in full to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them", or in "any cases of partial or total occupation of the territory of a High Contracting Party". Essentially, as Jinks points out, "Hostilities between states are, for the most part, governed by the laws of war irrespective of the intensity, duration, or scale of the conflict".
[17] International Law Association Use of Force Committee Report (2010), http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87.
[18] However, there are exceptions: the obligation to repatriate persons protected under the Third (POWs) and Fourth (Civilians) Geneva Conventions triggered by the "cessation of active hostilities" and the obligations of occupying powers extend beyond the "general close of military operations".

clearest method of ending a conflict.[19] But even in the absence of such a peace treaty, a complete cessation of hostilities and a *de facto* resumption of normal relations between the parties may occur.[20]

During the symposium, one panellist remarked that it is never easy to draw a line at the beginning or the end of armed conflict but the correct law nevertheless must be applied.[21] Another thought the relevant question was not necessarily about the beginning or end, but rather whether there is an IAC or a NIAC in any given situation.[22] Yet another reiterated that the need for organisation criteria applies and though the question is difficult regarding when to apply IHL, it is an important one that should not be abandoned.[23] Finally, the discussion with respect to the temporal dimension refocused on the US, demonstrating that the US government cites situations that occurred pre-9/11 in its justification of this current conflict with al Qaeda, going back to 1996 with Osama Bin Laden's *fatwa*.[24] Regarding the end of hostilities, some officials say "when Al-Qaeda has degraded to such an extent it is much more difficult to carry out an attack".[25] The US and NATO plan to drawdown troops in Afghanistan by the end of 2014,[26] and it will be interesting to see how the rest of the conflict on-going between the US and al Qaeda morphs once that occurs. Without the most solid link until now to an existing IAC, it remains to be seen what kind of legal framework the US will try to use once the IAC with Afghanistan draws to a close.[27]

3. Wherever War?: Geographical Limitations to Armed Conflict

3.1 Introduction

The idea behind this panel was to discuss issues related to the geographic scope of armed conflict, such as: where can a war be fought? Where is the battlefield in an armed conflict (i.e., does it have a territorial scope tied to a nation state or a geographic region)? Is an armed conflict related to a "hot battlefield" or does the conflict follow the participants wherever they may go? Does the consent of a territorial state matter in the use of force when a

[19] Jinks, "Temporal Scope of Application of International Humanitarian Law" (2003), at 3.

[20] Ibid. He writes: "[I]t is important to note that many commentators have suggested that the 'general close of military operations' standard is distinct from the 'cessation of active hostilities' standard. The latter refers to the termination of hostilities—the silencing of the guns—whereas the former refers to the complete cessation of all aggressive military maneuvers. On this reading, an 'armed conflict' might persist beyond the 'cessation of active hostilities.'"

[21] One panellist pointed out that even in the absence of a clear definition of armed conflict, the panellist would still be in favour of applying IHL—though of course torture and killing of prisoners of war is and remains illegal under all circumstances.

[22] The panellist went on to elaborate that in a NIAC there must be much more evidence of a conflict higher than IAC's threshold of hostilities based on the fact that states did not desire to tie their hands when it came to controlling internal disturbances. He illustrated his point by employing the following hypothetical situation: that with Pakistan's consent, the US killed an individual in Pakistan. This would not amount to an IAC, given that Pakistan consented, but traditionally it would not be seen as a NIAC either, and this goes back to the earlier comment about why US desires the whole world to be a battlefield—to treat al Qaeda as a single entity—for expediency, again harking back to Terry Gill's point. He also used the example of Israel-Hezbollah as a cross-border NIAC and asked: can you even qualify something as disparate as the "global war on terror" as a NIAC. No, not in its entirety, he argued. This may be true for some of the situations but not all. And that means that not every person killed by a drone strike is killed in a NIAC.

[23] With respect to Afghanistan, the criterion of intensity also matters—and once it is classified as an armed conflict, it remains so until a conclusion of peace. Even if there is an armed conflict, however, that does not mean the *jus ad bellum* becomes obsolete, especially when desiring to export the armed conflict to a third country. Either you have consent or you do not. If you have consent, one panellist's views were that IHRL will apply because a host-state cannot accept a third state's violations of IHRL as this would violate its own human rights obligations. Without consent, there are *jus ad bellum* restrictions as well.

[24] Osama Bin Laden's Fatwa, declaring a "holy war" against America and the West, 1996, translated into English, available at: http://www.pbs.org/newshour/updates/military/july-dec96/fatwa_1996.html.

[25] However, it was noted by the panellist, this can also pose problems especially with respect to terrorism as it can take as few as one or two people planning and executing an attack. So in that sense, it was a concern that this construction of a conflict with al Qaeda would never end. But on 30 November 2012, Department of Defense General Counsel Jeh Johnson stated: "on the present course, there will come a tipping point . . . at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed". Johnson added that "[a]t that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda". He also insisted, however, that he offered "no prediction about *when* this conflict will end, or whether we are . . . near the 'beginning of the end.'" Jeh Charles Johnson, General Counsel of the U.S. Department of Defense, *The Conflict Against Al Qaeda and its Affiliates: How Will it End?* (Oxford Union: Oxford University, 30 November 2012), http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

[26] See M. Spetalnick and M. Ryan, "NATO sets "irreversible" but risky course to end Afghan War", *Reuters* (21 May 2012), http://ca.reuters.com/article/topNews/idCABRE84J02C20120521?sp=true.

[27] For more information on the various comments and coverage of the end of the conflict between the US and al Qaeda, see the "End of War Timeline" on Lawfare, available at: http://www.lawfareblog.com/the-end-of-war-timeline/.

member of a non-state actor group finds him/herself there? The use of analogy between IAC and NIAC was also explored. Three main issues were identified in the discussion during the symposium: 1) the implication of territorial state consent, 2) the issue of the "hot battlefield", and 3) combatant status and location of hostilities.

3.2 Discussion

Consent provided by the territorial state (state A) to the state seeking to use force (state B) against non-state actors present in state A precludes the violation of the sovereignty of state A.[28] In other words, the use of force by one state on the territory of another is allowed when that state thereto consents and the violation of article 2(4) of the UN Charter's prohibition on the use of force is precluded.

However, whether consent has been given can be difficult to determine. Posner sets out what he calls "coercive consent".[29] The US justifies its use of drone attacks in Pakistan against terrorists there through Pakistan's consent. Publicly and officially, however, Pakistan has opposed the use of drones on its territory.[30] Nonetheless, the US claims such consent was given, and infers further and continuing consent from the fact that the "Pakistani military continues to clear airspace for drones and doesn't interfere physically with the unpiloted aircraft in flight".[31] To do otherwise would be risky, according to Posner, and Pakistan is not in the position to actually do something about the attacks.[32] Recently, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, conducted a country visit to Pakistan and after meeting with several government representatives concluded: "The position of the Government of Pakistan is quite clear. It does not consent to the use of drones by the United States on its territory and it considers this to be a violation of Pakistan's sovereignty and territorial integrity",[33] though this statement has been met with some critical reception.

A further issue then becomes whether consent can be inferred and what risks come with it. Regarding consent in international law, in the *Armed Activities* case before the International Court of Justice (ICJ), Judge Tomka stated that when the use of armed force is a lawful exercise of the right to self-defence, the force used falls outside of the scope of article 2(4)'s prohibition. Andre de Hoogh remarks that "this view appears to mischaracterise the relationship that exists between articles 2(4) and 51, which is one of general prohibition and justification. Any use of armed force necessarily falls within the scope of the prohibition, more so when territorial integrity is interpreted to mean territorial inviolability".[34] And he points to the Court's conclusion that Uganda violated the prohibition, to illustrate that "article 2(4) does not exclude certain specific armed measures or activities from its scope".[35] Therefore, this kind of use of force needs some kind of justification (e.g., either self-defence or Security Council authorisation). This is only relevant when considering consent. As De Hoogh points out, "if the territorial State agrees to the use of armed force by another State on its territory, e.g., to suppress armed bands or pursue terrorists, there will not be a violation of article 2(4) because such force will not be against the territorial integrity or political independence of the former State, nor inconsistent with the purposes of the United Nations".[36]

During the symposium, the case-by-case basis approach regarding classification of conflict was a theme that returned to this particular topic in order to assess the type of conflict, and analyse where it is occurring rather than trying to assign a "blurry" concept of a battlefield to it. It was posited that the concept of consent in IHL takes away the possibility of classifying the conflict as an IAC, but then the intensity and organisation of the

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[28] ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda)*, Judgment (19 December 2005), para. 165.

[29] Eric Posner, "Obama's Drone Dilemma", *Slate Magazine* (8 October 2012), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probably_illegal_will_it_stop_.single.html.

[30] Pakistani officials have made several statements such as that found here deploring the drone deployment: Eric Randall, 'Pakistan says no more drones', *The Atlantic Wire* (20 January 2012), http://www.theatlanticwire.com/global/2012/01/pakistan-says-no-more-drones/47674/.

[31] E. Posner, "Obama's Drone Dilemma" (2012).

[32] Ibid.

[33] OHCHR, "Pakistan: Statement by the UN Special Rapporteur on human rights and counter-terrorism", *News* (15 March 2013),http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13148&LangID=E.

[34] Andre de Hoogh, *The Armed Activities Case: Unasked Questions, Proper Answers* (30 January 2006), http://www.haguejusticeportal.net/index.php?id=2510.

[35] Ibid.

[36] Ibid.

parties must be examined in order to see whether a situation rises to the threshold of a NIAC – where IHL would govern – or not – where IHRL and the law enforcement paradigm would be more appropriate. In conclusion, it was offered that it is not the consent, but rather the facts on the ground that determine the classification of an armed conflict.

Regarding the issue of the "hot battlefield", John Brennan has addressed the US' position regarding the geographic scope of armed conflict. He made reference to al-Qaeda's leadership base as being in Pakistan and that the "affiliated forces" are "in places like Pakistan, Yemen, and countries throughout Africa".[37] This serves to concretise some ideas about how the US perceives the battlefield (i.e., naming particular countries where operations have already happened or may yet occur). Brennan directly addressed the geographic scope by stating that the US was not "restricted solely to 'hot' battlefields like Afghanistan" as the armed conflict with al-Qaeda allows the US to use force against these non-state actors under a self-defence regime, but without the requirement to do "a separate self-defence analysis each time".[38]

One panellist remarked that with non-state actors, it is easy for conflicts to spread and therefore we should link the physical footprint (i.e., where the non-state actors find themselves) to the on-going conflict.[39] Panel discussion further identified the fact that there is a widespread use of the term "hot battlefield" without it even being mentioned in the Geneva Conventions. When describing the permissible boundaries, one panellist remarked that the question really revolved around the distance allowable from the hot battlefield and thought that a training facility located, for example, in Somalia, ought to be legitimately classified as part of the battlefield, mainly based in using the law of neutrality by analogy.[40]

Another issue that arose relates to the status of the combatant and the location of hostilities. The crux of the issue is whether the conflict follows a participant wherever he may be found. The US position is that killing suspected members of al-Qaeda in today's conflict is, by analogy, just as legally defensible as killing Japanese General Yamamoto in the Second World War.[41] "For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group's members continue to engage in hostilities against that state (either on the 'hot battlefield' or from their new location.)".[42] This has been challenged by some scholars because applying IAC standards in a NIAC by analogy is inherently problematic.[43] Additionally, according to the International Committee of the Red Cross (ICRC), the US theory that "a person directly participating in hostilities in relation to a specific ongoing NIAC 'carries' that armed conflict with him to a non-belligerent state by virtue of continued direct participation (the nexus requirement) and remains targetable under IHL" is a novel view in contrast with the underlying object and purpose of the Geneva Conventions.[44] This is demonstrated in the same ICRC report, given

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[37] J. O. Brennan, *Remarks addressing the Harvard Law School Brookings Conference* (2011).

[38] Ibid.

[39] One panellist gave examples of a related string of attacks or attempted attacks in order to illustrate the point: the attack in 1998 on the USS Cole, the US embassy in Kenya, the shoe bomber. Because Somalia is very close to Yemen, there are reasonable reports that it has been used as a staging ground and training ground, making it a legitimate basis for extending the territory to include this area. To take steps reasonably tailored to address this particular physical footprint, a state has a right to, in a tailored fashion, respond to threats that are posed in another state when proportional. The problem in this case however was that the response was not proportional-it was a glorified territory grab. For more on this issue, see R. Norton-Taylor, "Somalia is training ground for British would-be terrorists, report warns", *The Guardian* (7 February 2012), http://www.guardian.co.uk/uk/2012/feb/07/somalia-training-ground-british-terrorism.

[40] For an overview of the argumentation regarding the applicability of neutrality law to contemporary armed conflicts with non-state actors, see Karl Chang, "Enemy Status and Military Detention in the War against Al-Qaeda", *Texas International Law Journal* 47, no. 1 (2011), pp. 1-73.

[41] See also, Jack L. Goldsmith, "A Just Act of War", *New York Times Editorial* (30 September 2011), http://www.nytimes.com/2011/10/01/opinion/a-just-act-of-war.html?_r=2&ref=opinion; John Tabin, "The Awlaki Precedent", *The American Spectator* (30 September 2011), http://spectator.org/blog/2011/09/30/the-awlaki-precedent/print.

[42] A. Deeks, "Pakistan's Sovereignty and the Killing of Osama Bin Laden", *ASIL Insights* 15, no. 11 (5 May 2011).

[43] See generally Kevin Jon Heller, "The Law of Neutrality Does Not Apply to the Conflict With Al-Qaeda, And It's a Good Thing Too: A Response to Chang", *Texas International Law Journal* 47, no. 1 (2011), pp. 115-141; Rebecca Ingber, "Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda", *Texas International Law Journal* 47, no. 1 (2011), pp. 75-114; Kevin Jon Heller, "The Folly of Comparing Al-Awlaki to Admiral Yamamoto", *Opinio Juris blog entry* (1 October 2011), http://opiniojuris.org/2011/10/01/the-folly-of-comparing-al-awlaki-to-admiral-yamamoto/.

[44] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, report prepared in conjunction with the 31st International Conference of the Red Cross and Red Crescent (Geneva Switzerland: October 2011), 22, 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.

that the legal expansion of this theory allows for an application of the rules governing the conduct of hostilities to a globally limitless battlefield.[45]

In discussion, one panellist found the idea that the conflict follows the participant very problematic given that this construct was not envisioned by the Geneva Conventions or the subsequent protocols. Going back to Common Article 3 of the Geneva Conventions (which states that each party to the conflict shall be bound to apply, as a minimum, certain provisions, "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"), he argued, it says "in the territory of *one* of the High Contracting Parties" not two or three. Additional Protocol II stipulates "in the territory of *a* High Contracting Party" which is slightly more flexible. In looking at the Afghanistan/Pakistan situation, spill-over is geographically problematic. The panellist urged the audience to look at attacks on a case-by-case basis, so those in Pakistan remained separate from those in Afghanistan. The next step is to then ask the requisite questions: is this a new IAC? If there is consent from the territorial state (see discussion on consent on pages 7-8), this might make a difference in classification of the conflict (NIAC v. IAC), but again, it is not the consent, it is the facts on the ground that determine the decision involving classification of the armed conflict.

Another panellist offered three relevant different operational lenses to view the issue through: prospectively (where can a soldier go?), real-time (where can a soldier find his/her enemy?) and post-hoc accountability (what law applies?), while also emphasising that the answers to these questions may depend on who is trying to answer them. A military perspective might say that a global battlefield is preferable – an easy answer, but not necessarily the right one. The level of threat perceived will also have a bearing on what decisions are made, as you cannot divorce law from policy. Looking to the fundamentals of the law can be helpful when IHL is not clear in that lawyers must balance principles of IHL.[46] One conclusion may be that "geographical limitations cannot be found on a map" as one panellist suggested. Another panellist reiterated an idea already discussed: the real question is whether there is an IAC or a NIAC, and there is a need for careful analysis on a case-by-case basis, rather than an overly broad application of IHL across the entire globe. If there is a NIAC, is it indigenous and where is the NIAC located? Only once you have answered this can IHL be applied, and it is applied, geographically, across the entire territory of hostilities.[47] Yet another panellist thought that it was not up to IHL to govern the geographical scope of armed conflict but that this was rather a *jus ad bellum* question about where force was being used and whether the amount of force rose to the requisite intensity and organisation, in which case IHL follows the hostilities rather than determines them.

Regarding the notion of status, in a NIAC only those who directly participate in hostilities (DPH) might be targeted under international law. The ICRC published a study on guiding the interpretation of DPH in 2009 and posits that DPH implicates "individual (civilian) involvement of a person in hostilities (i.e., the resort by the parties to the conflict to means and methods of injuring the enemy)".[48] But it does not stop there. In this interpretive guidance, the conclusions drawn about civilians taking direct part in hostilities have the following three constitutive elements: 1) a threshold of harm must be reached, 2) there must be direct causation by the direct participant to have reached this harm, and 3) there must be a belligerent nexus between one party causing the harm to another party to the conflict.

In terms of other statuses assigned to individuals involved in hostilities, it must be said that membership within a particular group, such as al-Qaeda, cannot be based on "abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse".[49] Instead, it must depend on whether one's "continuous function corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict".[50] This continuous combat function role is crucial to distinguishing those who fight

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[45] Ibid. See also Laurie Blank, "Defining the Battlefield in Contemporary Conflict and Counter-terrorism: Understanding the Parameters of the Zone of Combat", *Georgia Journal of International Law* 1 (2010).

[46] Military necessity when thinking about IHL is a threat-driven approach. That is one tool for undermining the narrow geographical idea. How would the principle of humanity be relevant? There is a lot of protective aspects of IHL so it is important in this sense that the conflict would have a broad scope. In pure principles of humanity – you do not want to live in a conflict zone – you want to limit the conflict zone. You need to look at what the law is trying to achieve.

[47] See Statement by ICRC's Washington D.C. Legal Advisor: Daniel Cohen, "Why and how IHL applies in Syria", *Intercross Blog (*27 July 2012), http://intercrossblog.icrc.org/blog/why-and-how-ihl-applies-syria. In pertinent part: "As a matter of legal principle, when a NIAC between two or more parties occurs, the geographical scope of application of IHL/LOAC covers the whole territory of the affected State".

[48] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009), 51-2; This distinction is also apparent in article 15(1)(b) GC IV.

[49] Ibid.

[50] Ibid.

in an organised armed group from those who directly participate in hostilities on a merely spontaneous, sporadic or unorganised basis, or who assume exclusively political, administrative or other non-combat functions.[51]

4. International Humanitarian Law and International Human Rights Law: Menu à la Carte?

4.1 Introduction

When there is an armed conflict, the question arises about which law is applicable. This raises additional questions such as the extraterritorial applicability of certain human rights treaties, principles of non-derogation, and ideas about whether IHL is the *lex specialis* and therefore always controls within an armed conflict or if there can be concurrent application of IHRL in certain situations or times where IHRL fully controls in an *in bello* framework. Two main issues were explored in-depth in the panel session: 1) IHL as *lex specialis* or IHRL as *lex generalis* in counter-terrorism, and 2) the complementarity of IHL and IHRL via the discussion of the killing of Osama Bin Laden. However, as the issues were handled with such synchronicity, the overlap dictates that they are handled concurrently in this paper.

4.2 Discussion

In terms of the US conflict with al-Qaeda, Ohlin has set out the discussion in US federal courts on the application of the Authorization to Use Military Force (AUMF) by Congress for the President to fight the war on terror.[52] The Justice Department of the Obama Administration claims that the AUMF should be interpreted in a manner consistent with international law, that the AUMF gives the President authority in accordance to what is allowed under international law and IHL specifically. Within the support of this view another disagreement is apparent: there are those that claim that the AUMF should be interpreted both in light of IHL *and* IHRL. For Ohlin this is an impossible position because IHL is a *lex specialis* "in the sense that it displaces other bodies of law, including domestic criminal law, with a set of radically different norms based on reciprocity, namely that combatants can kill each other with impunity but must protect civilians and others *hors de combat*".[53] He claims further that the ICRC is of the opinion that both IHL and IHRL can apply at the same time based on the Israeli Supreme Court's *Targeted Killings* case. Ohlin dismisses this by pointing to the fact that there is no other precedent.[54]

In response, Gabor Rona states that international jurisprudence accepts the logic and necessity of applying IHRL in times of armed conflict, while the explicit terms of both instruments are in accordance with each other.[55] Ohlin's response was that the rule exclusion means that if there is an applicable rule of IHL on a specific issue, then IHL applies and IHRL does not,[56] pointing again to the Israeli Supreme Court *Targeted Killings* case.[57] The Court there applied a rule of IHL that allows the targeting of civilians taking DPH. However, the Court went further and concluded that a civilian taking DPH cannot be attacked when other less harmful means can be employed. The Court seems then to be reading IHRL norms on proportionality into the IHL proportionality norm applicable in that case. To Ohlin this kind of co-applicability, where IHRL and IHL apply to the same rule, is strange because, in his view, IHL is *lex specialis* and it always displaces IHRL when there is overlap in armed conflict situations. Concluding, he agrees that there exist *lacunae* in the relative scope of IHL and IHRL application to be filled by international law, but this is no reason to scrap the idea of concurrent application altogether.

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[51] Ibid.

[52] Jens David Ohlin, *IHL and IHRL,* LieberCode (14 January 2012), http://www.liebercode.org/2012/01/ihl-and-ihrl.html.

[53] Ibid.

[54] He disagrees with the concurrent application of IHRL and IHL for three reasons. First, the most basic principles of IHRL such as the right to life do not make sense in armed conflict. Second, IHL is a much older body of norms that govern the humane treatment of prisoners and others *hors de combat*. Lastly, he points to the fact that states continue to develop IHL in the area of humane treatment; something that would not be necessary if IHRL applies.

[55] Gabor Rona, "A Response to Ohlin About IHL and IHRL", *Opinio Juris* (17 January 2012), http://opiniojuris.org/2012/01/17/a-response-to-ohlin-about-ihl-and-ihrl/.

[56] Jens David Ohlin, "Response to Gabor Rona", *LieberCode* (17 January 2012), http://www.liebercode.org/2012/01/response-to-gabor-rona.html.

[57] *The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel (the "Targeted Killings Case"),* Israeli Supreme Court, sitting as the High Court of Justice (11 December 2005), http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

The killing of Osama Bin Laden in May 2011 by US Navy Seals raised issues on the applicability of IHL and/or IHRL standards. The issue was whether the legality of the killing depended on the question whether Bin Laden could have been captured through non-lethal means rather than killed and if that would have been the preferred measure.[58] Starting from the premise that both IHL and IHRL apply to this killing, Milanovic sets out in his article the relationship between both legal regimes. Under IHL, targeting takes place on the basis of status, meaning that Bin Laden, either as a combatant or a civilian taking DPH, could be attacked at any time while the status persists as long as he is not *hors de combat.* Under IHL there is no necessity requirement for attacking a target that has such a status so there is no obligation to first use non-lethal means or to capture or detain before going for the kill. This is different under IHRL, which proscribes the use of non-lethal means primarily, and only if those means are not practically feasible, can lethal use of force be lawful. Depending on the facts, the killing of Osama Bin Laden could be lawful where the risk to the life of others, including that of the US soldiers, in attempting to capture him alive and the risk of escape outweighed his right to life. The killing would not have been lawful only on the basis that it was vastly easier to kill him than to capture and prosecute him.[59]

The real disagreement now lies in how norms of IHL and IHRL should interact.[60] Models of co-application exist according to Milanovic. One is based on the *Nuclear Weapons* Advisory Opinion of the ICJ and would be that any IHL-compliant taking of life is *by definition* not arbitrary for the purpose of article 6 of the International Covenant on Civil and Political Rights (ICCPR).[61] IHL is then used to interpret article 6 ICCPR as a norm of IHRL, though other IHRL norms do not leave such interpretative space.

Another model asks the question whether IHRL sets additional requirements for the lawfulness of a killing under IHL and whether these requirements can be less stringent than those developed in human rights jurisprudence in and for times of peace.[62] Milanovic would cautiously answer yes to both questions. The question whether we can expect militaries to abide by more stringent and humane rules than what is strictly necessary under IHL depends on treaty interpretation. The Israel Supreme Court *Targeted Killings* decision is an example where the Court held that a capture-before-kill requirement of IHRL was needed because of the degree of control the Israeli military exercises over the occupied territories.[63] This is the preferable approach according to Milanovic because it shows a reflection of the object and purpose of IHL and IHRL treaties in their best light, while at the same time reflecting the demands of universality of human rights and practical considerations of effectiveness. The question remains: how far should IHL allow IHRL into its domain without compromising itself?[64]

During discussion at the symposium, one panellist stated that the international legal community has reached the point in 2013 that the answer the ICJ gave in its 1996 *Nuclear Weapons Advisory Opinion* is no longer sophisticated enough. In IHRL, killing is a last resort. IHL is actually about killing people in order to win battles and wars and there are cases where the two bodies of law will contradict. The killing of Bin Laden is one prime example. If we assume this killing took place within an IHL conflict, and that he was targetable because of his status (e.g., continuous combat function), he can still be killed. In IHRL this is not the case. Another panellist stated that the *lex specialis* has always been a rule of interpretation to establish priorities enacted by the same legislator, which is not the case for these two distinct sets of laws. Yet another wondered what the "gaps" were in

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[58] Marco Milanovic, "When to Kill and When to Capture?", *EJIL: Talk!* (6 May 2011), http://www.ejiltalk.org/when-to-kill-and-when-to-capture/.

[59] Ibid.

[60] In his contribution, Milanovic sets out several competing models. The first one is one of separation advocated by the US government in its war on terror. Even if these bodies of law do not exclude each other technically, IHL as a *lex specialis* rules out IHRL application. Milanovic believes this view is incorrect because of the derogation clauses found in IHRL treaties, these treaties' object and purpose and the jurisprudence of the ICJ. A second model advocated by O'Connell takes the following view: 1) terrorism is a crime; 2) crime should be dealt with by law enforcement and so 3) targeted killings are generally illegal as they are not available methods under law enforcement (except in extreme circumstances). (Ibid.) Milanovic also views O'Connell's model as incorrect as there is no legal barrier between armed conflict and law enforcement and between IHL and law of peace, meaning that IHL will apply whenever its criteria are met.

[61] Ibid.

[62] Ibid.

[63] Ibid. For more on the capture versus kill discussion, see Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", *European Journal of International* Law 24 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213960. Additionally, surrounding this article, there has been rich discussion on legal blogs. See Kenneth Anderson, "Jens Ohlin Posts Response to Ryan Goodman on Paper on Capture over Kill", *Opinio Juris* (8 March 2013), http://opiniojuris.org/2013/03/08/jens-ohlin-posts-response-to-ryan-goodman-paper-on-capture-over-kill/ for a summary of various posts and see "Guest Post: Ryan Goodman Responds to Kevin Heller", *Opinio Juris* (1 April 2013), http://opiniojuris.org/2013/04/01/guest-post-goodman-responds-to-heller-on-capture-v-kill/.

[64] Ibid.

IHL. If they are present, would they be filled with IHRL? These questions and more were analysed and discussed before concluding that more work must be done with the development of the application of IHL and IHRL.

5. A Case Study on Targeted Killings and Drones

5.1 Introduction

Against these discussions and theoretical background, this panel looked at a specific and concrete case study on targeted killings and drones.

First of all, it was observed that drones, as a weapons system, are not inherently unlawful: they are not indiscriminate and do not cause unnecessary suffering. In fact, drones could be more precise as they can stay longer in the air surveilling the target and can gather more information before attacking the target. Their accuracy was also mentioned, although this point was also questioned.[65]

However, their *use* in specific situations may be unlawful and needs to be considered on a case-by-case basis. The three main problems identified with respect to targeted killings and drones concern 1) the *jus ad bellum*, 2) the personal dimension (i.e., the person that is being targeted) – again something that has to be considered on a case-by-case basis, and 3) accountability and transparency.[66]

5.2 Discussion

Concerning the topic of the *jus ad bellum*, the point was made that the US is blurring the lines between the *jus ad bellum* and the *jus in bello* when it uses both paradigms at the same time ("we are in an armed conflict *and* act under self-defence") without elaborating on the specifics to justify targeted strikes in counter-terrorism operations. It was noted that blurring can lead not only to less clarity for the soldiers (and hence to less mission effectiveness) as the permissiveness of IHL is blurred, but also to a weakening of IHRL norms/less protection.

In the context of the *jus ad bellum*, the topic of imminence (discussed above, see Panel 1 of the symposium or Section 2 of this paper), was again addressed. One panellist, referring to a recent article,[67] argued that this concept must be reframed and that the probability of an attack, the scale of a planned attack and the question whether this is the last opportunity to disrupt the attack must be considered. (This "last clear chance doctrine" may temporally not be very close to the actual attack, but may be the last chance to interrupt). A further element in attacking in self-defence for purpose of stopping an attack can be not only the targeting of those responsible but also of those who provide material support essential to the attack, such as the manufacturer of bombs.

On the other hand, the point was made that the US administration uses the concept of imminence as a justification for force, not out of what it perceives to be legal necessity but as a matter of government policy, and that the concept of imminence generally has two parts: an impending attack, and a specific and identifiable attack that is about to happen. The idea of an impending attack (e.g., with regard to weapons of mass destruction) may justify a loosening of the requirement for imminence. But this will not be the situation in many counter-terrorism cases.

The concept of naked self-defence (see again Panel 1 of the symposium or Section 2 of this paper) was revisited and it was generally concluded that this concept is not very useful as it is straddling two things, namely trying to justify the use of force in another country and trying to justify the use of force against a target. The

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[65] Cf. the report *Living Under Drones. Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, International Human Rights and Conflict Resolution Clinic, Stanford Law School and Global Justice Clinic, New York University School of Law (September 2012) http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf, which concluded: "In the United States, the dominant narrative about the use of drones in Pakistan is of a surgically precise and effective tool that makes the US safer by enabling "targeted killing" of terrorists, with minimal downsides or collateral impacts. This narrative is false [original footnote omitted]" (Ibid., p. v.).

[66] Note that also another, less legal problem, was identified, namely that they represent the furthest extension of the individualisation of armed conflict and the epitome of a "remote-controlled" armed conflict. On the other hand, the point was made that drones are perhaps the most personalised form of warfare, as the operator follows the target around for extended periods of time prior to the killing and also sees his/her target dead as a confirmation. Indeed, there are studies showing that drone operators suffer similar psychological problems as 'ordinary' soldiers, see e.g., E. Bumiller, "Air Force Drone Operators Report High Levels of Stress", *New York Times* (18 December 2011), http://www.nytimes.com/2011/12/19/world/asia/air-force-drone-operators-show-high-levels-of-stress.html?_r=0 .

[67] D. Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors", *American Journal of International Law* 106 (2012), pp. 770-7, http://www.asil.org/pdfs/ajil/Daniel_Bethlehem_Self_Defense_AJIL_ARTICLE.PDF.

consensus was that it should be abandoned. In any case, naked self-defence cannot provide any legal basis to assess questions such as what individual to target, what kinds of weapons to use and so on.

When discussing the topic of personal dimension, the so-called "kill lists", which have caused deep concern in the media, were addressed. Nevertheless, from an IHL point of view, such lists, it was argued, are not necessarily problematic (that is: provided it is agreed that IHL is applicable, for instance in Afghanistan). In fact, IHL even *requires* such individual tests to be conducted in order to ensure adherence to IHL and target only those directly participating in combat. The main problem is of course that this is the case when IHL applies (in the case of an armed conflict) and that in many targeting situations, the US may not be engaged in an armed conflict.

It was stressed that sometimes, the wrong questions are asked or answers are not found in the right contexts. According to one panellist, there is a need to clarify what the real problems are. Within IHL, this means identifying an armed conflict in the first place. However, IHL does not apply to many drone strikes. If IHL does not apply, the question is "what does"? In such situations, resorting to IHRL has often been defended. It was stressed that IHRL does allow for the lethal use of force albeit with more red-tape. There needs to be clearer reasons and planning processes involved, but in extreme situations, IHRL does not prohibit shoot-to-kill, see, for instance the *McCann* case.[68] Does it exclude situations where other people may get killed? While the IHRL test is stricter than the IHL test, this is of course still possible.

When a person from the audience asked how IHRL is applicable when drone strikes occur outside a state's jurisdiction, a panellist responded with another question: could it be that no law is applicable? If the basic principles of IHL do not apply, other paradigms such as law enforcement or IHRL need to be used: it cannot be that there is a black hole here, that no law can be applied. Another panellist noted that the idea that killing from a distance is not regulated by IHRL (see e.g., the *Banković* case, where it was decided that the rights of the European Convention on Human Rights are in principle territory-based)[69] is wrong and that it only invites people to do exactly that: killing from a distance. According to this panellist, there is a big problem with basing applicability of IHRL to the distance between the attacker and the victim. It is also important to consider the interplay between the two. One needs a contextual approach here. In this panellist's view, IHRL carries more weight the further one goes away from the battlefield. There is a definite need to explore the interplay between IHRL and IHL.[70]

Finally, as to accountability and transparency, one panellist talked about transparency in the US context and noted that the US determined 11 years ago that the law enforcement framework was no longer adequate. However, it was never analysed or asked why this was the case. According to this panellist, the US is currently "seduced" (in the words of Robert Grenier, the former head of the CIA's Counterterrorism Center) by drones, which are creating more enemies than killing them.[71] As to the involvement of CIA operatives in drone attacks, it was remarked that those within that organisation who carry out targeted killings have sometimes been termed "unlawful combatants".[72] Whereas this is incorrect[73] – there is in principle no problem with the CIA targeting

[68] See ECtHR (Grand Chamber), *Case of McCann and Others v. The United Kingdom*, Application no. 18984/91, Judgment (27 September 1995).

[69] See ECtHR (Grand Chamber), "Decision as to the Admissibility of Application No. 52207/99 by Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Joksimović and Dragan Suković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom" (12 December 2001), para. 61: "The Court is of the view (…) that Article 1 of the Convention ["The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."] must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".

[70] In this context, a question was asked from the audience whether the Declaration of Turku was a possible starting point for addressing the limbo between IHL and IHRL. However, it was remarked that this declaration is too general and impossible to operationalise. See Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51ste Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Declaration of Turku), http://www1.umn.edu/humanrts/instree/1990b.htm.

[71] See Paul Harris, "Drone attacks create terrorist safe havens, warns former CIA official", *The Guardian* (5 June 2012), http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad. See also n. 66 xx (and its reference to the *Living Under Drones* report).

[72] See, e.g., Mary Ellen O'Connell, "Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009", Notre Dame Law School, *Legal Studies Research Paper* 09-43 (July 2010), p. 22.

[73] See for this controversy more generally P. Alston, *Report of the Special Rapporteur* (28 May 2010), para. 70 and "U.S. House of Representatives. Committee on Oversight and Government Reform. Subcommittee on National Security and Foreign Affairs. Subcommittee Hearing: "Drones II", Wednesday, April 28, 2010. Rayburn House Office Building. Written Testimony Submitted By Kenneth Anderson. April 26, 2010", paras. 16-36,

individuals – this DPH by civilians can have consequences, such as the fact that there is no immunity from prosecution under domestic law and that they themselves may be targeted and killed.[74] For this panellist, the covert nature of the operations was especially problematic.[75] Some judicial bodies in the US have acknowledged that there are problematic issues with regards to the limits of power of the government to, on the one hand, acknowledge targeted killings but not to disclose information on the other. Basically, the issue of drones, according to this panellist, boils down to a "trust us" approach by the government. However, it was argued that calls for more information and transparency as well as investigations to ensure clarity are justified.

With regards to transparency, another speaker pointed out that it is often claimed that mainly senior al-Qaeda leaders are targeted, although in practice it appears that most are low-level suspected militants who are involved in insurgencies against their own governments rather than against the US or its allies.[76] Moreover, in Pakistan and Yemen, the US frequently calls victims of targeted killings "combatants" unless there is clear evidence after the fact that a victim was not a combatant. Such investigations, however, are rarely conducted.

The investigation point was also taken up by another panellist, noting the apparent impunity and lack of oversight and accountability in drone activity. One of the biggest problems is of course that there is not much information from the ground and that estimates about civilian casualties vary. If there is no information, then how can investigations be triggered? It was argued that if the US conducted clear investigations into the bigger cases of targeted killings, there would be less controversy in the media and less involvement of or pressure from IHRL bodies.

Another panellist noted, however, that it is very difficult to investigate incidents in a place like Pakistan where the US does not have control, and that in other countries such as Afghanistan, there have arguably even been artificial inflations of civilian casualties by other victims dropped at the scene after the attack.

It was wondered, while agreeing that the difficult reality of such investigations on the ground must be taken into account, how there are indeed so many inconsistencies by different parties in estimating civilian deaths caused by drone strikes. This speaker noted that there is a need to consider whose responsibility and whose burdens of proof such investigations are.[77]

6. Law Enforcement Approach in Counter-Terrorism

6.1 Introduction

In the previous panel, the link with the law enforcement approach to countering terrorism was briefly made. Although this conference had a focus on situations of armed conflict, this panel took a different approach and looked at countering non-state actors within the law enforcement paradigm. Can terrorism be effectively countered via the normal peacetime procedures of arresting, detaining and prosecuting suspects?

6.2 Discussion

It was remarked that prior to 9/11, the law enforcement approach was the prominent mode for counter-terrorism operations in the US. After 9/11, the military paradigm took over, but the law enforcement paradigm continued to loom in the background. 9/11 gave rise to reforms, most notably surveillance laws, to aid the intelligence community to anticipate acts of terrorism (think of the Patriot Act). However, between 9/11 and the

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http://democrats.oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/Anderson_Statement.pdf.

[74] See also 'Written Testimony of Hina Shamsi, Senior Advisor to the Project on Extrajudicial Executions, Center for Human Rights and Global Justice, New York University School of Law. Before the U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs. Hearing on "Rise of the Drones II: Examining the Legality of Unmanned Targeting" (April 28, 2010), http://democrats.oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/4.28.10_Drones_II/Shamsi_Statement_for_the_Record.pdf; P. Alston, *Report of the Special Rapporteur* (28 May 2010), para. 71.

[75] Indeed, states may use intelligence operatives for such operations as to shield them from IHL and IHRL transparency and accountability requirements. P. Alston, *Report of the Special Rapporteur* (28 May 2010), para. 73.

[76] See also *Living Under Drones. Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, International Human Rights and Conflict Resolution Clinic, Stanford Law School and Global Justice Clinic, New York University School of Law (September 2012), p. 31, http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf.

[77] A few interesting recommendations in that respect can be found in the report "Counting Drone Strike Deaths", *Colombia Law School, Human Rights Clinic* (October 2012), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf.

first inauguration of Obama, things flipped in the US. As law enforcement efforts got better, they were criticised for not being "tough" enough. If there was doubt, one had to detain militarily. Military committees were created by Presidential fiat. Despite a reform of the US Justice Department and a lot of positive changes, problems regarding secrecy and transparency remained.

According to this panellist, with the war in Afghanistan winding down and al-Qaeda deteriorating, the law enforcement approach is set to re-gain its prominence.[78] However, there are serious problems in the law enforcement domain, which are not solely confined to the US. One could, for example, think of charging under the material support statute. The *Holder v. Humanitarian Law Project* decision[79] has been telling with regards to the dangers involved in using criminal law. According to the Center for Constitutional Rights, the US Supreme Court in this case ruled to criminalise speech. The Center stated that "[a]ttorneys say that under the Court's ruling, many groups and individuals providing peaceful advocacy could be prosecuted".[80] While the decision is limited, it indicated that law enforcement can sweep up the protected freedom of expression.

One panellist noted that militaries are uncomfortable with unclear legal mandates, and that there is no luxury in discussing law extensively in the practical setting of military reality. This speaker was of the opinion that in armed conflicts, the law is clear. It is based on IHL (IAC or NIAC) and all the customary law that applies. In the context of hostilities, there is no place for IHRL. It is regulated by the law of armed conflict. The speaker was also of the opinion that one should stick to these obligations under the law of armed conflict. Hence, it was advised not to start mixing laws, as the capture-rather-than-kill approach suggests,[81] as it will not be helpful for the soldiers on the ground. There should be a clear division between IHL and IHRL and their application. In the opinion of this panellist, the war paradigm should continue to apply in counter-terrorism operations amounting to an armed conflict.

Another panellist noted that according to article III of the US Constitution, civilian courts should – and indeed are – the preferred option for trying terrorism suspects in the US, where the vast majority were prosecuted in civilian courts.[82] However, sometimes this is not feasible, for example, when a soldier captures someone on the battlefield. Echoing the view of the previous panellist, this speaker also felt that the military are not equipped to gather evidence, nor are they available to testify in court, and so on. If suspects are going to be released because of these circumstances, then what is the point of having this trial? And the answer is not making the soldiers more like police officers – they have enough to deal with. As such military commissions can be the right answer for certain trials.

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[78] See speech of Jeh Charles Johnson, General Counsel of the U.S. Department of Defense, "The Conflict Against Al Qaeda and its Affiliates: How Will it End?", (2012):"In the current conflict with al Qaeda, I can offer no prediction about *when* this conflict will end, or whether we are, as Winston Churchill described it, near the "beginning of the end". I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counter-terrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats". Another panellist was of the opinion that the 'rebirth' of the law enforcement approach would have especially been true if the Benghazi attacks of 11 September 2012 had not occurred, which required a high level of organisation, coordination and sophistication. However, the Benghazi attacks showed that al Qaeda still poses a danger as a group with striking capabilities. This is, in the view of this speaker, why there is a need to continue to use the war paradigm, even if there are no major al Qaeda attacks in the coming years.

[79] Supreme Court of the United States, *Holder v. Humanitarian Law Project*, Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 08-1498 (21 June 2010) http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf.

[80] Center for Constitutional Rights, "Supreme Court Ruling Criminalizes Speech in Material Support Law Case" (21 June 2010), http://ccrjustice.org/newsroom/press-releases/supreme-court-ruling-criminalizes-speech-material-support-law-case.

[81] Cf. N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC: Geneva, 2009, http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, p. 82: "[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".

[82] See also K. Herodotou, "Let the Numbers do the Talking: Federal Courts Work", *Human Rights First* (7 December 2012), http://www.humanrightsfirst.org/2012/07/12/let-the-numbers-do-the-talking-federal-courts-work/: "To anyone who doubts the ability of federal courts to effectively handle terrorism-related cases, know this: since September 11, there have been 494 convictions in federal court. (…) By contrast, the military commissions at Guantanamo have convicted only seven people since their inception".

Nevertheless, this point was also challenged. One speaker pointed out that crimes are a problem to be dealt with by law enforcement, and armed conflict should be dealt with via hostilities. When you call the fight against terrorism a war, you make the adversaries equal, whereas they are simply criminals. This gives them advantages and favours the idea of identification – of belonging to a party – whereas they should merely be seen as individuals. This panellist did not agree that the military should not be able to apply IHRL. Even in an armed conflict, you might have to apply the law enforcement paradigm, for instance *vis-à-vis* protesting civilians. Furthermore, the disadvantages of law enforcement, according to this panellist, can also be overcome within IHRL: States can derogate from IHRL in counter-terrorism situations. Interestingly, a military advisor in the audience noted that it is the military commander who can take the capture-rather-than-kill decision and that despite there not being any obligation under IHL to capture, in practice, this is frequently done for a variety of reasons. This advisor stressed that IHRL is as necessary as IHL for soldiers.

One speaker noted that Europe uses the traditional law enforcement approach when it comes to countering terrorism (with the exception of clear and specific armed conflicts such as in Afghanistan). According to this panellist, the law is not a question of choice, but based on the situation. In Europe we do not have a war so it is based on the criminal justice framework, an effective system (as is evidenced by the hundreds of prosecutions of terrorist suspects) and a sustainable and successful route which does not lead to further radicalisation. According to this speaker, terrorist acts can be prevented by criminalising conduct before the attack occurs and there are currently also considerations to criminalise the travel of foreign fighters to participate in training camps.

7. The Way Forward: The Need for a New Framework for Counter-Terrorism?

7.1 Introduction

Influenced and informed by all previous panels, this last session gave the experts a forum to reflect on the conference's discussions and contributions in order to parse a way forward regarding future approaches to counter-terrorism.

7.2 Discussion

It has been argued that terrorism brings a new kind of war that cannot fit perfectly within existing international law. This leads to the opinion that the law of war needs to be adapted to encompass this new kind of war. Are the existing *jus ad bellum* and *jus in bello* adequate to counter terrorism? Or should they be adapted to the new kind of war between states and terrorist non-state actors?[83] In other words, is there a need perhaps for a new protocol to the Geneva Conventions to encapsulate the idea of a transnational armed conflict (a third category) and prescribe new rules for countering terrorism, or does the *lex lata* (both IHL and IHRL) sufficiently cover all potential situations in countering terrorism?

The first panellist urged to look at existing *lex lata* and to improve it in the sense of better means of cooperation and implementation. There is a lot of overlap between the various branches (IHL, IHRL) and one has to look into similarities and complementarities. In doing so, it is not of primary importance to look into specifics, but rather to attempt and consider what we would like to achieve internationally and multilaterally. Hence, this speaker did not think that the current framework is in need of change but that we need a better understanding of its different branches.

The second panellist noted that it is a mistake to believe that we must do something because of urgent necessities. The current interpretations and development of our legal frameworks are decisive for the future. When one applies the law in a sober way (as lawyers do without agenda), then very reasonable results will be attained. The cry for a new law is the sign of desperation, rather than a sober analysis of what the law says and what it calls for. We need to cope with changing situations under the existing legal frameworks, which are sufficient. The speaker warned not to mess around with the law of armed conflict. Do not believe that armed conflicts belong to the past; armed conflicts will continue to exist in the future and perhaps counter-terrorism is the exception rather than a rule. It might be true that there are some grey areas, but these uncertain areas are not too big to just change what has been built up in 150 years.

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[83] See for more information C. Paulussen, "Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm", *ICCT Research Paper* (August 2012), http://www.icct.nl/publications/icct-papers/testing-the-adequacy-of-the-international-legal-framework-in-countering-terrorism-the-war-paradigm.

Another participant agreed with this and argued that many of the problems may be a matter of fixing policy rather than law. It is important to remember the function and purpose of each different area of law – IHL is a set of rules set up to regulate armed conflict, and IHRL is set up to regulate the government and its inhabitants – while avoiding a blurring of boundaries. There are indeed a few grey areas (e.g., military detention, fair trial rights and the use of lethal force outside the realm of armed conflict) and there is room for further development and clarification here, but they do not warrant new laws. The current frameworks are sufficient.

The next panellist likewise argued that he is not in favour of rewriting the laws of armed conflict because the current legal frameworks are sufficient for the situations faced today on the ground. Nevertheless, there is a need to better understand and adjust to changing situations. This speaker noted that it should be considered how current rules are interpreted, for instance with respect to detention, the *jus ad bellum*, and the use of drones outside the context of an armed conflict.[84] On these issues, there are simply not yet answers nor interpretations of the current legal framework that are sufficiently clear and satisfactory, or which enjoy a broad consensus. A further argument for taking a new look at our current legal setting is that there has been a growing international shift and increased discussion about the expansion or flexibility of what an armed conflict is. We should therefore rein this in before a precedent about armed conflict is established. In short: this speaker was not talking about a new agreement, but about a better interpretation of the current agreements and how the current frameworks inter-relate.

The international shift was also identified by the next speaker, who went one step further. According to this panellist, the world is witnessing the development of a distinct corpus of counter-terrorism law. Even though it seems that al-Qaeda is degrading, terrorism, in this speaker's view, is not going to disappear in the near future. To deal with this very unconventional threat, very unconventional responses have been used. Some modifications, for better or worse, have been sloppily drawn up. But, the panellist continued, it appears that states are learning from some of those mistakes and are adapting, which may lead to a new corpus of law.

In this context, an interesting observation was made from the audience, namely, that any new framework for addressing terrorism may be difficult given that the international community cannot even agree on a definition of terrorism.[85] Nevertheless, it was also noted that the lack of a definition of terrorism should perhaps not be over-exaggerated; even without an internationally agreed definition, the international community has been able to conclude 13 sectoral conventions on terrorist-related activities.

The final speaker concluded that existing bodies of law are adequate. According to this panellist, it is not correct to say that many countries accept new modifications to the existing frameworks, to the contrary. There is currently no sufficient state practice to suggest that a new paradigm has emerged. What *is* important though is to establish more clearly which countries are using these new measures.

The moderator of this final panel summarised the current debate saying that there are several positions supporting the idea that the current legal frameworks are adequate, but that there is also the view that (customary) law is perhaps developing in a certain direction. In the latter instance, it was noted, it has to be ascertained in what direction this will continue to develop and which the influential states are in shaping this shift. While these two basic positions may seem different, the dichotomy is not overly strong since law is never fixed but ever evolving. With this in mind, there is clearly a need for more clarity on this issue, and these shifts and developments should be closely monitored.

8. Conclusion

This two-day symposium covered a range of issues that continue to be important in the on-going debate about using force in counter-terrorism operations against non-state actors.

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[84] Cf. A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism*, Hart Publishing: Oxford and Portland, Oregon 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".

[85] See for more information C. Paulussen, "Impunity for international terrorists? Key legal questions and practical considerations", *ICCT Research Paper* (April 2012), http://www.icct.nl/download/file/ICCT-Paulussen-Impunity-April-2012.pdf.

The first day looked at the geographic and temporal scope of armed conflict along with the interplay of international humanitarian law and international human rights law. As outlined above, though much progress was made through the panels and discussion, we were able to identify three main areas that still need attention. The first is the definition of armed conflict as a legal concept. Though it may seem strange that such a common term as armed conflict is not precisely defined in international treaty law, that is the case. A definition with respect to non-international armed conflict has been used by the ICTY (from its *Tadic* judgement[86]) but controversy still remains about the precise requirements for "protracted" violence as well as the level of organisation of the armed groups required. Another area that would benefit from additional research is the effect of consent on uses of force against non-state actors. Section 3.2. above outlines some of the particular issues, one of which questions what precisely constitutes consent from a state and at what point might it be adjudged that a previously given consent no longer exists. These issues may become more and more relevant as conflicts with non-state actors working from territories of states without a clear and centralised government (i.e., Somalia) increase. The final issue from the symposium's first day that deserves further research is the need for a clearer understanding of the role for IHRL in armed conflict and the interplay of IHRL and IHL in counter-terrorism operations.

The second day's panels, exploring drones, targeted killings, the law enforcement paradigm in countering terrorism and forging a way forward also identified three main areas that would benefit from further research and analysis: First of all, it was often heard that controversial weapon systems such as drones are not necessarily problematic, but that in many situations in which they are used, there might not even be an armed conflict situation in the first place. Hence, what is important is to get more clarity on the basic starting point, meaning on the question when (temporal boundaries) and where (geographical boundaries) one can qualify a certain factual situation on the ground as an armed conflict. It was also reiterated that more research is needed on the interplay between IHL and IHRL, again a point that was already alluded to during the first day of the symposium. Finally, and regarding one of the most important questions – are the existing *jus ad bellum* and *jus in bello* adequate to counter terrorism or should they be adapted to the new kind of war between states and terrorist non-state actors? – two views were identified: The first was that the current legal frameworks are sufficient (even though it might be useful to get more clarity on how the current rules are interpreted and applied to new situations, for instance with respect to detention, the *jus ad bellum* and the use of drones outside the context of an armed conflict). The second was that (customary) law is perhaps already developing in a certain direction and that, if this is indeed the case, it is time to examine in what direction this will continue to develop and which the influential states are in shaping this shift.

Echoing the statement made at the beginning of the symposium, it should be reiterated that if the legal community does not want policy makers to provide the answers regarding these pertinent questions, it must come up with answers itself to guide the policy. This symposium aimed at constituting a new step in that important direction.

[86] 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, which, in pertinent part states: "whenever there is […] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".

Annex 1: Programme Symposium

Day 1: Thursday 10 January, 2013

09:30 – 10:00	Registration/Coffee and Tea
10:00 – 10:05	Opening and Announcements, Christophe Paulussen
10:05 – 10:15	Keynote, Terry Gill
10:15 – 11:00	**Panel I:** *Whenever War?: Temporal Limitations to Armed Conflict* Panellists: Dieter Fleck, Marco Milanovic, Wolff Heintschel von Heinegg, Tom Ruys, Joanne Mariner Moderator: Terry Gill
11:00 – 11:45	Discussion
11:45 – 13:30	Lunch
13:30 – 14:15	**Panel II:** *Wherever War?: Geographic Limitations to Armed Conflict* Panellists: Laurie Blank, Noam Lubell, Jelena Pejic, Michael Lewis, Peter Margulies, Robert Heinsch Moderator: Wouter Werner
14:15 – 15:00	Discussion
15:00 – 15:30	Coffee/Tea Break
15:30 – 16:15	**Panel III:** *International Humanitarian Law and International Human Rights Law: Menu à la Carte?* Panellists: Joanne Mariner, Marko Milanovic, Marco Sassoli, Jann Kleffner, William Schabas, Paul Ducheine Moderator: Theo van Boven
16:15 – 17:00	Discussion
17:00 – 17:15	Summary and Announcements, Jessica Dorsey
19:00 – 22:00	Dinner for panellists

Day 2: Friday 11 January, 2013

09:30 – 10:00	Registration/Coffee and Tea
10:00 – 10:05	Opening and Announcements, Christophe Paulussen
10:05 – 10:15	Keynote, Gilles de Kerchove
10:15 – 11:00	**Panel IV:** *A Case Study on Targeted Killings and Drones* Panellists: Hina Shamsi, Noam Lubell, Peter Margulies, Laurie Blank, Anthony Dworkin Moderator: Liesbeth Lijnzaad

11:00 – 11:45	Discussion
11:45 – 13:30	Lunch
13:30 – 14:15	**Panel V:** *Law Enforcement Approach in Counter-Terrorism* Panellists: Christiane Höhn, Marco Sassoli, Michael Lewis, Chris De Cock, William Banks Moderator: Nico Schrijver
14:15 – 15:00	Discussion
15:00 – 15:30	Coffee/Tea Break
15:30 – 16:15	**Panel VI**: *The Way Forward: The Need for a New Framework for Counter-Terrorism?*[87] Panellists: Anthony Dworkin, Christiane Höhn, Wolff Heintschel von Heinegg, Dieter Fleck, William Banks Moderator: Andre Nollkaemper
16:15 – 17:00	Discussion
17:00 – 17:15	Summary and Closing Remarks, Jessica Dorsey
17:15 – 19:00	Reception

[87] Based on A. Dworkin, *Beyond the "War on Terror": Towards a New Transatlantic Framework for Counter-terrorism*, European Council on foreign Relations Policy Brief, May 2009, available at: http://ecfr.eu/content/entry/counter_terrorism_eu_us_dworkin/ (last accessed on 24 July 2012).

Annex 2: Speakers Symposium

William C. Banks, Board of Advisors Distinguished Professor of Law; Professor of Public Administration and International Affairs; Director, Institute of National Security and Counter Terrorism, Syracuse University

Laurie Blank, Professor Emory Law School, Director IHL Center at Emory University

Theo van Boven, Professor Emeritus of International Law, Maastricht University

Chris de Cock, Chief Operational Law Section, Belgian Ministry of Defence

Jessica Dorsey, Researcher, TMC Asser Instituut, PhD candidate University of Amsterdam

Paul Ducheine, Associate Professor of Cyber Operations, Dutch Defence Academy; Legal Advisor to the Netherlands Army Legal Service

Anthony Dworkin, Senior Policy Fellow at European Council on Foreign Relations, executive director Crimes of War Project, member Terrorism/Counter-Terrorism Advisory committee of Human Rights Watch

Dieter Fleck, Editor *Handbook of IHL*, co-editor of *The Handbook of the International Law of Military Operations;* formerly with the German Defence Ministry.

Terry Gill, Professor of International Law, University of Amsterdam; Military Professor, Netherlands Defence Academy; Associate Professor, Utrecht University

Wolff Heintschel von Heinegg, Stockton Professor of Law, US Naval War College, Professor Public International Law, European University Viadrina, Frankfurt

Robert Heinsch, Assistant Professor, Grotius Centre for international Legal Studies, Leiden University

Christiane Höhn, Advisor to the EU Counter-Terrorism Coordinator

Gilles de Kerchove, EU Counter-Terrorism Coordinator

Jann Kleffner, Head of International Law Centre and Associate Professor of International Law, Swedish National Defence College; Assistant Professor of Law, University of Amsterdam

Michael W. Lewis, Professor of Law, Ohio Northern University Claude Pettit College of Law

Liesbeth Lijnzaad, Extraordinary Professor Maastricht University, Legal Advisor Dutch Ministry of Foreign Affairs

Noam Lubell, Reader in the School of Law, University of Essex

Peter Margulies, Professor of Law, Roger Williams University School of Law

Joanne Mariner, Human Rights Program Director, Hunter College CUNY; recently appointed as Senior Crisis Response Advisor, Amnesty International (from 1 February 2013)

Marko Milanovic, Lecturer in Law, University of Nottingham School of Law

Andre Nollkaemper, Professor of Public International Law and Vice Dean for Research at the Faculty of Law, University of Amsterdam; External Advisor to the Dutch Minister of Foreign Affairs and Vice President of the Board of European Society of International Law

Christophe Paulussen, Senior Researcher International Humanitarian Law and International Criminal Law, T.M.C. Asser Instituut; Coordinator of the International Humanitarian and Criminal Law Platform and Research Fellow at the International Centre for Counter-Terrorism—The Hague

Jelena Pejic, Legal Advisor at the ICRC Legal Division, Geneva

Tom Ruys, Attorney at the Brussels Bar (Stibbe, PG European and Competition Law), Senior member of the Leuven Centre for Global Governance Studies and lecturer in Public International Law

Marco Sassòli, Professor of International Law and Director of the Department of International Law and International Organization, University of Geneva; Chairman of the Board of Geneva Call

William A. Schabas, Professor of International Law, Middlesex University (London); Professor of International Humanitarian Law and Human Rights, Leiden University; Emeritus Professor of Human Rights, National University of Ireland Galway; Honorary Chairman, Irish Centre for Human Rights

Nico Schrijver, Professor of International Law, Leiden University

Hina Shamsi, Director ACLU National Security Project

Wouter Werner, Professor of International Law VU University Amsterdam

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