

A Lack of Language – Waging War or Combatting Crime? The Blurred Rule of International Law in the Face of the Attacks of September 11, 2001

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Suggested Citation: Claus Binder, *A Lack of Language – Waging War or Combatting Crime? The Blurred Rule of International Law in the Face of the Attacks of September 11, 2001*, 2 German Law Journal (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=108>

"War is directed against those who cannot be held in check by judicial process."(*) (1)

[1] After the terrorists' attacks of September 11, 2001, a lot of war rhetoric came out of the public and private sphere within the United States of America. On October 7, 2001, however, the rhetoric turned into reality as President George W. Bush countered the terrorist attacks and the threat of future terrorism with military means. While waging that new war U.S. governmental officials constantly make one important point, and that is that the United States are just exercising their right of self-defense. Moreover, on the day after the attacks, the Security Council of the United Nations unanimously reaffirmed the inherent right of self-defense as recognized by the Charter of the United Nations.(2) Does that mean that international law is just that clear?

[2] According to Bruno Simma, a professor of International Law at the University of Munich, who was interviewed by the *Süddeutsche Zeitung* after the attacks, the answer seems to be "yes." In this interview, Professor Simma argued that, in the face of such attacks, customary rules of international law changed spontaneously, therefore, military action with the intent of self-defense was now justified even against those states that did not themselves attack or put the terrorists forward as a front for their official military, but simply harbored the terrorists.(3) These statements must be seen as an attempt to address a fundamental dilemma of the international legal system: Its laws of war offer a framework which is designed for managing conflicts between states but not between states and terrorists.

[3] The central feature of this framework is expressed by Article 2 (4) of the United Nations Charter, which provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations." Building upon this statutory rule, which is also part of the body of customary international law, Article 51 of the Charter provides a narrow exception to the cited principle. It forms the legal basis for a state's right of self-defense in case of an "armed attack." States retain their right of self-defense only "until the Security Council has taken measures necessary to maintain international peace and security." Clearly there is disagreement about the scope of the right of self-defense. And Article 51 of the Charter does not use the legal term "war," but "armed attack." However, Article 51 can only be invoked if the armed attack is perpetrated by another state because international law regularly addresses only the relations among states. The same is true for another exception enshrined in the elaborate system of political, economic and military enforcement measures outlined in Chapter VII of the Charter that may be taken in response to aggression, in accordance with which collective military action is allowed upon determination of the Security Council.

[4] Article 5 of the North Atlantic Treaty (NATO) has been evoked by the United States of America and its allies in the aftermath of the terrorist attacks. In Article 5 of the NATO Treaty, the parties have agreed "that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and subsequently they [have] agreed that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." Article 5 of the NATO Treaty, therefore, explicitly builds upon Article 51 of the United Nations Charter. Hence, it can not be invoked for anything other than the circumstances identified by the Charter itself.

[5] The United Nations Charter as well as the NATO Treaty reflect the paradigm of shock in a post World War II order, and, therefore, did not address the threat of terrorism. Nevertheless, international law is not silent towards such sort of stateless attacks. It offers a framework, apart from the laws of war, for fighting terrorists and hijackers in particular. Most states have signed treaties designed to prevent terrorism in the skies.(4) These treaties are all structured in the same way as they pledge to make hijacking a criminal offense, and construe a duty(5) to either prosecute or extradite hijackers encountered within their territories. Moreover, the United Nations General Assembly(6) and Security Council(7) have regularly condemned terrorism and asked for the prosecution of terrorists, as they have again done after September 11, 2001.

[6] With such a precedent in mind it seems reasonable to suppose that the attacks of September 11, 2001, being terrorism after all, demand a response in line with the laws and processes of criminal procedure, which entails the rule of law, due process, and other carefully drawn constraints on criminal investigations. It is not surprising that the FBI in the U.S. or the state police in Germany have been strictly observing their obligations put into force by the criminal justice process. Consequently, the U.S. government assumes that bringing Mr. bin Laden to justice (as the prime suspect in the attacks), will mean that he will be tried in U.S. courts in the case that he gets captured alive rather than dead.

[7] Nevertheless, there is something different which distinguishes the new scope of terrorism from the controlling

precedent. As has been said above, soon after the attacks the rhetoric of war was on everyone's lips. The lasting imprint of the dramatic events, which have been reproduced by television over and over again, made even decision-makers look helpless. No wonder that the metaphor of a second "Pearl Harbor" was so easily invoked throughout the United States. Joining in with CNN, CBS, and other media, President George W. Bush soon rephrased the "apparent terrorist attacks on our country" into "acts of war."⁽⁸⁾

[8] From a legal perspective, defining something as being "war" or merely using the rhetoric of war makes a huge difference: It is the difference between waging war or combating crime. It is the difference between the laws of war or the laws of criminal justice. One could feel tempted to use George W. Bush's bipolar phrases in a somewhat different way: It is either war or it is crime. However, at this point we should pause, and ask whether we have missed something.

[9] In spite of the fact that we are situated in a postmodern world, we still tend to maintain dichotomies. We love to use *either* and *or* comparisons. While talking about September 11, 2001, we like to contrast *good* with *bad*, or even *civilization* with *evil* and *barbarity*, and the like. For sure, talking black-and-white might be of help in times of chaos and might be of help to reassure everyone's solidarity. Thus, quite a few people will condemn those who want to get into a discussion about these categories as having missed the conclusive point. Moreover, some will want to link the events causally with postmodern relativism and condemn it for having weakened the country's resolve.⁽⁹⁾ However, it is definitely not as simple as that.⁽¹⁰⁾ As has been shown by the preceding commentary, we need to address the problems from a legal point of view as soon as possible (preferably immediately) as the recent framework of international law lacks definitions of and means to encounter international terrorism of a scale that has been called the second Pearl Harbor. For sure, it is not only a lack of international law, our daily language or our emotions too do not have words to respond to such terrorism. While talking in terms of war might help to bridge speechlessness, it nevertheless means speaking the same language the terrorists use.⁽¹¹⁾

[10] As the old schools of positivism are still with us, it might be elaborate to address the problem as Bruno Simma did in the aftermath of the attacks. A spontaneous change of law in the light of the cruelty and intensity of terrorism – and there is a clear rule of self-defense which allows military action where there was no rule before. But again, it is not as easy as that. Customary law does not change on one day like a statute which enters into force at the time appointed by the legislature. Regarding international (customary) law as an ongoing flow of legal, political and military decision-making,⁽¹²⁾ the attacks of September 11, 2001, will no doubt have an impact on international law.⁽¹³⁾ Moreover, the terrorists' attacks will finally change the paradigm of threat as we conceived it in 1945 to another one more fit for 2001. The new paradigm will lead to a different vision of wars,⁽¹⁴⁾ and to different laws which will apply.⁽¹⁵⁾ Nevertheless, its impact will not occur in a rush, instead we need to adjust our international laws within an ongoing international dialogue embracing enforcement efforts such as the establishment of a permanent International Criminal Court which is, even after a century's debate,⁽¹⁶⁾ not yet in existence.⁽¹⁷⁾ Such a court will be on the agenda, for sure, but its establishment will mark the end of that road which has yet to be taken. In the meantime, we should think about a tribunal solution such as an *ad hoc* tribunal with jurisdiction over all terrorists' acts on or after September 11, 2001. Such a global court should consist of western, Islamic⁽¹⁸⁾ and other judiciary as this seems to be the only way to address all different values, to take the terrorists' motives into account, and help to concentrate on the crimes which have already been committed: and those are not appropriately defined by the vague and unhelpful term of "terrorism" but rather by the one of "crimes against humanity." Up to October 7, 2001, there was at least some hope that such a dialogue focussing on an international court solution would have been put forward carefully, albeit using the rhetoric of war that only oversimplifies a much more complex situation.

(* I wish to thank Professor Benjamin B. Ferencz and Professor Anne-Marie Slaughter, who inspired me at Harvard while drafting this article.

(1) Demosthenes (ca. 341 B.C.), quoted by Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, 1624, Prolegomena, para. 25 (On the Law of War and Peace, translated by Francis W. Kelsey, 1925).

(2) Resolution 1368 (2001), adopted by the Security Council on September 12, 2001 (S/RES/1368 (2001)), available on the internet at <http://www.un.org/terrorism/sc.htm>.

(3) SÜDDEUTSCHE ZEITUNG (<http://www.sueddeutsche.de>), September 14, 2001, p. 6.

(4) Convention on Offences and Certain Other Acts Committed on Board Aircraft of September 14, 1963 (Tokyo Convention), 2 I.L.M. 1042 (1963); Convention for the Suppression of Unlawful Seizure of Aircraft of December 16, 1970 (Hague Convention), 10 I.L.M. 133 (1971); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of September 23, 1971 (Montreal Convention), 10 I.L.M. 1151 (1971).

(5) However, no effective enforcement machinery was created to cooperate in suppression of acts of hijacking and in international terrorism. In this regard, mention can be made of various declarations adopted at G-7 summits calling

for collective action against countries harboring airline terrorists. See the Bonn Declaration of July 17, 1978, 17 I.L.M. 1285 (1978). Subsequent declarations can be found at 20 I.L.M. 956 (1981) or at 25 I.L.M. 1005 (1986).

(6) Resolution adopted by the General Assembly on September 12, 2001, on Condemnation of Terrorist Attacks in the United States (A/RES/56/1); Resolution adopted by the General Assembly on January 30, 2001, on Measures to Eliminate International Terrorism (A/RES/55/158), available on the internet at <http://www.un.org/terrorism/ga.htm>. Both with references and reaffirmations to former resolutions.

(7) Resolution 1373 (2001), adopted by the Security Council on September 28, 2001 (S/RES/1373 (2001)); Resolution 1368 (2001), *supra* note 2, available on the internet at <http://www.un.org/terrorism/sc.htm>. Both with references and reaffirmations to former resolutions.

(8) German officials, however, have tried to avoid the rhetorics of war. Having done that just after the attacks, German Chancellor Gerhard Schröder re-adjusted his language. On the party convention of the Labour Party of Great Britain at Brighton, England, on October 1, 2001, Schröder "honored Samuel Huntington" and spoke of the need to resist to get involved in a "clash of cultures" as the terrorists want to promote it. Gerhard Schröder, Wider die gesichtslose Barbarei, at http://www.zeit.de/reden/Weltpolitik/Schroeder_10.01.2001.html. See also SÜDDEUTSCHE ZEITUNG (<http://www.sueddeutsche.de>), October 2, 2001, p. 1.

(9) See Stanley Fish, Condemnation Without Absolutes, NEW YORK TIMES (<http://www.nytimes.com>), October 15, 2001, Op-ed., A23, addressing those critics who demand the end of postmodernism.

(10) "Not so. Postmodernism maintains only that there can be no independent standard for determining which of many rival interpretations of an event is the true one. The only thing postmodern thought argues against is the hope of justifying our response to the attack in universal terms that would be persuasive to everyone, including our enemies. Invoking the abstract notion of justice and truth to support our cause wouldn't be effective anyway because our adversaries lay claim to the same language. (No one declares himself to be an apostle of justice.)" Fish, *id.*

(11) *Id.*

(12) In the end, the reaction to the attacks of September 11, 2001, and its impact on international law might show that international law is, in fact, more open towards pragmatic policy arguments than admitted by the schools of positivism, and might prove the New Haven School's arguments as being not as off-path as being constantly put forward. For that school see e.g. David Kennedy, A New Stream of International Law Scholarship, 7 WIS. ILJ 6 (1988); Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 AJIL 205 (1993).

(13) See for an elaborate approach to that issue Florian Hoffmann, Watershed or Phoenix from the Ashes? – Speculations On The Future Of International Law After The September 11 Attacks, 2 GERMAN L.J. 16 (October 1, 2001) (<http://www.germanlawjournal.de>).

(14) See e.g. Wilfried von Bredow, Die Zukunft des Krieges. Gewalt, Politik, Staat, FRANKFURTER ALLGEMEINE ZEITUNG (<http://faz.net>), September 27, 2001, p. 11, who redefines the term "war" in the light of the new paradigm "global terrorism" as being a military conflict which does not necessarily need state actors on both sides.

(15) See Jürgen Habermas, Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral, DIE ZEIT, April 29, 1999, p. 1, 6 and 7, at 1 or at http://www.zeit.de/1999/18/199918_krieg.html, who foresees a transformation of international law to a law of world citizen ("*Recht der Weltbürger*"). An English translation of this highly controversial article is available at <http://www.theglobalsite.ac.uk/global-library/011habermas.htm> (translated by Franz Solms-Laubach).

(16) This is not the place to unfold the complex issue of the establishment of the International Criminal Court again. Nevertheless, it is worth to mention that talks about the establishment of a permanent International Criminal Court go back to the early 20th century. From the perspective of legal history cf. Vespasien V. Pella, La Criminalité Collective des Etats et le Droit Pénal de L'Avenir (Bucarest 1925); Hellmuth von Weber, Internationale Strafgerichtsbarkeit (Berlin 1934); Vespasien V. Pella, La Cour Pénale Internationale et la Répression du Terrorisme, 18 REVUE DE DROIT PÉNALE ET DE CRIMINOLOGIE 409 (1938); Sheldon Glueck, War Criminals, their Prosecution and Punishment (New York 1944), who expressed the wish that an international criminal court would get jurisdiction over "certain peacetime offences of a particular international interest" such "as acts of political terrorism". *Id.* at 91 note 2. Moreover, the concept of a permanent International Criminal Court is not without precedent, and was discussed even in the respect of "terrorism". A proposal of for an International Criminal Court was made by Baron Deschamps of Belgium while being in the process of drafting the Statute of the Permanent Court of International Justice (PCIJ) in

1920. It was miscarried, however. *Cf.* League of Nations, *The Records of the First Assembly, Plenary Meeting, 1920*, p 764. Another attempt to establish an International Criminal Court was initiated after the assassination of Alexander I of Yugoslavia at Marsailles in 1934. *Cf.* Convention for the Creation of an International Criminal Court, opened for signature at Geneva, November 16, 1937, in 7 INTERNATIONAL LEGISLATION 878 (Manley Ottmer Hudson ed., Washington, D.C. 1941); Convention for the Prevention and Punishment of Terrorism, opened for signature at Geneva, November 16, 1937, *id.* at 862. Neither of these agreements was ratified.

(17) See Rome Statute of the International Criminal Court (Rome Statute) of July 17, 1998, 37 I.L.M. 999 (1998). The Rome Statute was adopted at the close of a diplomatic conference in Rome from June 15 to July 17, 1998 against the U.S. opposition, see Thomas W. Lippmann, *Worldwide War Crimes High Court is Approved. Delegates overrule U.S. objections*, WASHINGTON POST (<http://www.washingtonpost.com>), July 18, 1998, A1. The U.S. refuse to ratify the Treaty ever since.

(18) See Anne-Marie Slaughter, *Terrorism and Justice*, FINANCIAL TIMES (<http://www.ft.com>), October 12, 2001, Op-ed., p. 23.