

**The Fight against Terrorism and the Rules of International Law -
Comment on papers and speeches of John B. Bellinger, Chief Legal Advisor to the
United States State Department¹**

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During the last months John B. Bellinger, Chief Legal Advisor to the United States State Department, is engaging in dialogue with politicians and legal scholars in European countries as there are – from his point of view – a number of misimpressions that have become prevalent over the last years, particularly in Europe, in regard to the US positions on questions of the legal basis and legal limits of the “war on terror” and the treatment of detained terrorists.

However, in my view, for enhancing the dialogue concerning these matters it is important – as a first step - to make very clear what are the differences in the interpretation of the relevant legal rules, as, for instance the limits of the law of self defence; the applicability of the laws of war; lacunae in the laws of war; the question of “unlawful combatant” versus “offensive civilian”; the question of who is a prisoners of war; the treatment of detainees which are not prisoners of war: the legal limits of the Third Geneva Convention and of common Art. 3 of the Geneva Convention; the applicability of human right treaties; the core principles of humane treatment; the range of procedural rights; the interpretation of the prohibition of torture, etc.

The following statement tries to lay down a “European” approach to answer the legal questions concerning the fight against terrorism and makes a proposal how to avoid misperceptions and misunderstandings in the future.³

1. Putting the problem in focus

When a state fights or prevents terrorism the question is, which international rules apply. Or rather the question is: do any of the traditional international rules apply? The UN-Charter, the

¹ See Bellinger, Press Conference, Opening Statement, Monday, March 13, 2006, Berlin, Germany , at http://www.usembassy.de/germany/bellinger_dvc.html and Bellinger, 38 *George Washington International Law Review* 2006, 501.

See as well on his views in the German press FAZ 14.10.2006, 35; 24.10.2006, 7 and <http://www.tagesspiegel.de/politik/archiv/13.10.2006/2832625.asp>; <http://www.tagesspiegel.de/meinung/archiv/08.10.2006/2816379.asp>.

² Head of Junior Research Group, Max-Planck-Institute of Public International Law, Heidelberg, cf. <http://www.mpil.de/ww/de/pub/organisation/nachwuchsgruppe/svoeneky.cfm>.

³ For further details on my views see Vöneky, „Die Anwendbarkeit des humanitären Völkerrechts auf terroristische Akte und ihre Bekämpfung, in *Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte*“, Dieter Fleck (ed.), 2004, 115-130 and Vöneky, „The Fight against Terrorism and the Rules of the Law of Warfare“, in *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Christian Walter/Silja Vöneky et al (eds.), 2004, 925-950.

ius in bello and human rights? My answer will be yes: These rules are applicable and they give us reasonable standards.

It must be stressed that I am neither disputing that international terrorism poses an immense threat to peace and security of the international community as a whole. Nor I am disputing that international terrorism was not foreseen in its quality, when the international treaties were drafted and the rules were developed.

However, it is not the question whether the rules are old or new – it is the question whether the rules give us reasonable guidance to our problems. It is a long established rule of international law that it is not so much decisive what the intention of the drafters of treaties had originally been; it is the wording and the object and purpose of a provision, which play the central role as regards its interpretation.

I will illustrate that the rules of international law are wiser than its drafters. They are flexible enough to cope with international terrorism and they provide an elaborated system which gives sufficient guidance to our problems. I will exemplify this in regard to the laws of war and the human rights treaties.

2. The *ius ad bellum*: the right to self defence

I am not dealing with the question of the *ius ad bellum*, which means the right of a state to defend itself according to Art. 51 of the UN-Charter after a terrorist attack from outside its territory took place. Let me only pinpoint to the wording of Art. 51 of the Charter. It speaks of an “armed attack” and not of an “armed attack by a state”, so the wording does cover large scale acts of terrorism of private groups. It is therefore not unconvincing to qualify for instance the 9/11 attacks *per se* – without the attribution to a state - as armed attacks, justifying the exercise of self-defence. It is however another question, who can be the addressee of such acts of self defence. And it is another question as well, for how long such a right to self defence may be exercised: immediately after the attacks, a month later, a year later etc. The challenge is to interpret Art. 51 so that it does not become an empty shell. I think we all agree, that the main aim of Art. 51, not to allow a state to use military means without any limitation, is today as true as it was in 1945.

But let me now turn to the laws of war.

3. The laws of war

The laws of war are applicable in both cases: first if there are transnational terrorist acts and second if states fight terrorists by military means outside their country.

I do not say that states should fight terrorists by military means; but if they have a right to self defence according to the UN-Charter, they can use military means - this is a political decision I do not comment on. I just want to stress that if states fight terrorists by military means the traditional laws of armed conflict apply:

These are not just transnational police actions and it is not the case that the terrorist groups are so evil and have so different modes of fighting that the traditional laws of war are not appropriate. A broad interpretation of the Geneva Conventions is in accordance with the object and purpose of these treaties.

At first sight it seems clear that transnational terrorist acts of non-state actors differ fundamentally in quality from normal acts of inter-state war: terrorists are private groups, they use a hit and run tactic, it is impossible to predict when and where the attacks will occur.

On the other hand there is no provision in international law, which says that the law of armed conflict is not applicable in the case of terrorist acts by private groups. On the contrary, common Article 2 of the Geneva Conventions clearly states that only two elements have to be met for the full application of the Convention: first, an armed conflict is needed, second, the armed conflict has to be between subjects of international law.

This means that first of all the actual use of armed force is decisive. The 9/11 attacks have tragically proven that terrorist attacks can have a force of destruction similar to a major military attack by a state. Irrespective of that it is settled law that the *ius in bello* applies already from the beginning of any situation constituting an armed conflict. It is not necessary that two or more sides use armed forces.

Yet, as indicated, the Geneva Conventions do only apply, if a second requirement is met: two subjects of international law have to be involved into the conflict.

Terrorist groups in focus, such as *Al Qaida*, are not subjects to international law. They *cannot (!)* become a party to an international armed conflict.⁴ This shall not be disputed.

However, it must be stressed that even if terrorists are not a party to a conflict their acts can be covered by the laws of war. This is the case if one condition is met: the acts of the terrorist group must be attributable to a particular state. In such a case there is an international armed conflict between two states: the victim state and the state to which the terrorist act is

⁴ There are two exceptions, however without practical relevance: First, according to Art. 1 (2) AP I international armed conflicts includes wars of national liberation; see as well Art. 96 (3) AP I). Secondly, non-State actors can become a party to an international armed conflict if they are recognized as belligerents by a state, if the dimension of the rebellion is of some magnitude.

attributable. With regard to *Al Qaida* this means: although it is obvious that *Al Qaida* cannot become a party to an international armed conflict, for instance the attacks of 9/11 are covered by the laws of war, as these acts were attributable to the Afghan State.⁵

The same is true *vice versa*: the law of war is applicable in regard to counter-terrorist military measures, if (first) those have a certain level of intensity and (second) if the force is used by a subject of international law against another subject of international law. The first requirement of a certain level of intensity was met – for instance – when the states started the bombing campaign in Afghanistan, Iraq or Lebanon. The threshold would not be met, however, with regard to a single attack against certain terrorist leaders or single attacks against operational bases of terrorists.

The second requirement leads again to the problem that terrorists are non-state actors. To clarify this point: as the US bombed *Taliban* fighters and the *Taliban* were to be considered an unrecognised *de facto* regime representing the state of Afghanistan, the US used force against another state and the full application of the Geneva Conventions was unquestioned. But what would have been the case if we assume that the US had attacked only *Al Qaida* fighters in Afghanistan? Or if a state attacks operational bases of *Al Qaida* in Yemen or Sudan and not the armed forces of these states? Do they use force against another state? I would argue: when a state objects to counter terrorist military operations taking place on its territory, military operations are – at the same time and necessarily – military operations against that state. I cannot see how it could be argued differently keeping in mind the sovereignty and territorial integrity of the state which objects to the military means. Hence an international armed conflict exists between that state and the state which fights terrorists.

Thus, it can be maintained that the whole set of laws of armed conflict especially the Geneva Conventions are applicable to, first, terrorist acts of non-state actors which reach a certain level of intensity if the requirements of attribution are met and, second, to counter-terrorist military measures in a third state with a certain level of intensity if the host state objects to the military operations.

But is that the end of it? Is there not a *lacuna* in the laws of war, if a terrorist attack is not attributable to a state or if a state agrees to large scale military measures against terrorists in its country? My answer is: no, there is no *lacuna*. In such cases common Article 3 of the Geneva Conventions is applicable, which states very clearly that “in the case of an armed conflict not of an international character” the minimum standards listed there bind each party to the conflict (without affecting the legal status of this party). This provision is broad enough to cover acts of terrorist groups not attributable to a state and military measures in a country

⁵ See for the criteria of attribution, Vöneky, in Walter/Vöneky, *Terrorism as a Challenge for National and International Law*, cf. note 1, 933 et seq.

which agrees to them. This reasoning was confirmed by the *US Supreme Court* in its *Hamdan*-judgement.

4. Reasonable standards by the laws of war

As we have now seen that either the whole set of laws of war or at least Article 3 cover the terrorist attacks and the fight against terrorism it is the question whether we gain reasonable standards from this. The answer is again: Yes, the law of war gives us reasonable standards and terrorists do not gain undue privileges from this application. Let me give just some examples in that respect:

The *ius in bello* prohibits the worst and typical terrorist attacks with regard to both civilians and combatants. It is prohibited in the Geneva Convention and the Hague Regulations to attack civilians or civilian objects, take hostages, use poison, treacherously kill combatants etc.

Besides of this: grave breaches of the Geneva Conventions – as for instance – offences against protected persons as civilian – are war crimes for which there is universal jurisdiction (such persons have to be prosecuted or extradited). This means that the application of the law of war helps the state which is a victim of a terrorist attack to resort to criminal law sanctions.

Terrorists are not allowed to attack military targets or combatants: such attacks are only lawful if and only if a person has combatant status, which means that they have to belong to a party (1); and have to be under a command of a responsible person (2); and have to have a fixed distinctive recognizable sign (3), and have to carry their arms openly (4), and have to act in accordance with the laws and customs of war (5) (Art. 4 GC III). These criteria are typically not met by terrorists.

Terrorists are persons, who take a direct part in hostilities without being entitled to do so, they are so-called offensive civilians. That there exist offensive civilians is not surprising and not an alien situation for the laws of war (it's the same for guerrillas or saboteurs): according to the laws of war offensive civilians are lawful targets of military attacks. They keep their status as civilians, but they lose the special protection according to the laws of armed conflict (Art. 51 (3) AP I). This means that the law of armed conflict does not protect terrorists against legitimate counter-terrorist military measures, i.e. such military measures which are in accordance with the right to self-defence.

However, this does not mean that members of terrorist groups are at every time in every place legitimate targets of wartime killing. It is decisive when and for how long a terrorist

is an offensive civilian. Thus, a close look on how we interpret the phrase “taking a direct part in hostilities” is necessary. I would argue: as the concept of offensive civilians is an exception from the aim of the laws of war to protect civilians, it has to be interpreted narrowly; **only terrorists who have a combat mission, (i.e. they do or will take part in terrorist attacks) can be killed lawfully.**⁶ **Because of this restrictive interpretation the status as offensive *civilian* is important and the label of “unlawful enemy combatants” is misleading.**

The same is true for objects which are used by terrorists as operational bases: even when they are hidden in a private house they are military objects according to the broad definition of military objects in the law of armed conflict. However, they must not be attacked according to the laws of war if the loss of civilian life or the damage to civilian objects is excessive.

There are as well reasonable rules of the *ius in bello* that cover terrorists if they are detained:

The first question is, whether they are prisoners of war. The rules of the laws of war are very simple: if you are no combatant, you are not a prisoner of war; as long as *Al Qaida* members are not members of any regular armed forces, do not carry their arms openly, have no fixed distinctive signs and aim their attacks deliberately against civilians, they are no combatants and no prisoners of war. In this regard they differ clearly from the *Taliban* fighters which constituted the regular armed forces of the Afghan State in 2001 and hence were at this time combatants and prisoners of war when captured. **Because of this it is – in my view - inconsistent with the Geneva Convention that the Military Commission Act 2006 classifies Talibans *per se* to be “unlawful enemy combatants”.**⁷

However, it seems clear as well from Geneva Convention III, that if – for instance during the fights in Afghanistan – *Al Qaida* members are members of any regular armed forces, do carry their arms openly, have fixed distinctive signs and act in accordance with the laws and customs of war, they are combatants and hence prisoners of war.

But if this is the case, this is not an undue privilege: if they meet the strict requirements of Geneva Convention III, then they have acted as combatants and not as terrorists. Besides of this their status as prisoner of war does not prevent a criminal trial. This is

⁶ The interpretation has to be coherent with the lawful aims of measures of self defence: when it is lawful to attack terrorist by military means with regard to the *jus ad bellum*, it would be inconsistent if those persons were fully protected as civilians by the laws of war.

⁷ § 948a (1) Military Commission Act 2006.

clearly laid down in Chapter III of the third Geneva Convention. However it is clearly stated there as well: “Prisoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of the present convention.” (Art. 85 GC III) and “in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.” (Art. 84 (2) GC III).

Besides of this, in cases of doubt, if it is unclear whether a terrorist fulfils the criteria of a prisoner of war, there is a very reasonable rule in Geneva Convention III again: in cases of doubt “such person shall enjoy the protection of the Convention until their status has been determined by a competent tribunal”.

And here I see no reasons, why courts-martial are not suitable for this review and why the basic procedural rights, the guarantees of independence and impartiality, and, in particular, the rights and means of defence cannot be fulfilled in those cases.⁸ As the *US Supreme Court* stated in the *Hamdan*-judgement I have to say: “Without underestimating the danger and threat of terrorism it is not evident to us why those guarantees are unreasonable or impracticable to apply.”

Besides of this, it is very reasonable as well that the law of war provides for minimum standards, if there is no international armed conflict or the criteria for the prisoner of war status are not met by terrorists:

These minimum standards are the protections of Common Article 3 of the Geneva Conventions and of Article 75 AP I as far as it reflects customary law. These rules do not privilege captured terrorists but they provide the most basic safeguards that they are treated humanely. They reflect as the *ICJ* stated “elementary considerations of humanity”:

They prohibit violence to life and person (murder, cruel treatment and torture); humiliating and degrading treatment.

And they guarantee the basic rights of a fair trial:

- that the detainee shall be informed promptly, in the language he understands, of the reasons why these measures have been taken;

⁸ The provisions which shall not apply to trial by military commission, are enumerated for instance in § 948b (d) Military Commission Act 2006.

- that he shall be released as soon as the circumstances justifying the detention have ceased to exist;
- that no sentence may be passed except by an impartial and regularly constituted court;
- the rule of *nulla poena sine lege* must not be violated ;
- the there is the presumption of innocence;
- and they guarantee the right to be tried in one's presence.

I would strongly oppose to everyone, who would say that the standards in Common Article 3 of the Geneva Conventions are old rules for different times and different problems. I cannot see why they are unsuitable, unreasonable or impractical standards: Why should humiliating and degrading treatment be allowed in regard to terrorists? Why are the *habeas-corporis* and fair trial rights outdated?

Perhaps our times are only at first sight so different from the times when the Geneva Conventions were drafted in 1949. After the Second World War and the fight against *Hitler* and the *Third Reich* the state parties were well aware that there are situations when the world peace is threatened by an irrational, suicidal and evil aggressor. *Golo Mann*, a German historian, wrote in regard to *Hitler* and the crimes of the *Third Reich*:

“In einer Welt in der das möglich war, wird immer alles möglich sein.”

(In a world where this could happen, always everything can happen).

The signatories of the Geneva Conventions knew this and they came to the conclusion that there have to be minimum standards of humane treatment. They came to this conclusion, not because they were unrealistic or dogmatic but because they knew that otherwise they were defeating their own case. Therefore it is not *although* we all want to prevent and fight terrorism that we need to apply these minimum standards; it is *because* we want to prevent and fight terrorism that we have to apply them. If these minimum standards are not granted by the states which fight terrorism in my opinion those states destroy their own case – morally and practically.

From the practical point of view the need for minimum standards is recognized – for instance – by the US Defence Department. The Department of Defence issued a new Army Field

Manual on interrogation techniques in September this year.⁹ It covers every detainee in Defence Department custody anywhere in the world and it states clearly in regard to torture and inhuman treatment: “All prisoners and detainees, regardless of their status, will be treated humanely.” It goes on by saying “use of torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the detainee to say what he thinks the collector wants to hear.”¹⁰

Why should this not be true with regard to terrorists captured and held by the CIA? And if it is said that *Al Qaida* members are instructed, when captured, to allege torture, even if they were not subject to abuse, then in my view the best way to deal with this is that States give no reason at all that people can entertain suspicion that detainees are tortured.

5. Applicability of human rights treaties

Before I close let me make some short comments in regard to the applicability of human right standards. In my opinion it is convincing that human right treaties are applicable during the fight against terrorism and bind the state parties.

First of all: The law of armed conflict is not meant to be the only regulation for protection of human beings during armed conflict. To give only one example: the so-called Martens-Clause, which is part of customary law of armed conflict, provides the possibility of supplementing the laws of war with “dictates of public conscience”. The dictates of public conscience, however, include considerations of humanity and protection of fundamental human rights.

This means the “*lex specialis derogate lege generali*”-argument (that the law of war as specific law governs over human rights as general law) is not convincing in our context. More important the *lex specialis*-thesis runs the danger of begging the question as it cannot be proven that the states commonly hold that the protection of human beings shall be determined only by the laws of war.

Secondly, the human rights treaties entail derogation clauses. They state that in times of war and/or public emergency a State Party may take measures derogating from the obligations under the convention.¹¹ *E contrario* such clauses show that human right treaties apply during an armed conflict otherwise these clauses would be meaningless. In the same line the

⁹ Field Manual 2-22.3, Human Intelligence Collector Operations, Headquarters Department of the Army, 6 September 2006, see www.us.army.mil.

¹⁰ Field Manual 2-22.3, Human Intelligence Collector Operations, Headquarters Department of the Army, 6 September 2006, 5-21, see www.us.army.mil.

¹¹ Art. 4 Covenant; Art. 15 ECHR, Art. 27 ACHR.

Convention against Torture states very clearly: “No exceptional circumstances whatsoever, whether a state of war or a threat of war ... may be invoked as a justification of torture.”

Hence it is not surprising that it is the view of the *ICJ* that the protection of the human right treaties does not cease in times of war, except if certain provisions are derogated from.¹² Thus in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another. They are sharing a common core of non-derogable human rights: The right to life, to humane treatment, the freedom from ex post facto laws, and the judicial guarantees essential for the protection of such rights.

These non-derogable rights are a common legal and moral basis of state conduct and expressions of humanity and human dignity. Let me repeat: I can not see why they are outdated or impracticable. ¹³

6. Where can we go from here?

I think the dialogue concerning the legal standards of the fight against terrorism will improve, if we leave behind the disputes about the general applicability of law of war and human rights law. We should accept, as the International Court of Justice does, the human right treaty bodies and courts do and the Supreme Court has done, that the international legal order lays down minimum standards concerning humane treatment of detainees and fair trial rights and that they are applicable in regard to terrorist as well. **Terrorists are no “outlaws” even if one would agree that they are the “enemies of mankind”.**¹⁴

But those standards have to be spelled out. Areas of doubt in regard to concrete questions have to vanish and persons involved in the field of the prevention and fight of terrorism have to know what they are allowed to do.

So we have to be very specific in regard to the grey areas and spell out in more detail:

- What kind of interrogation techniques are prohibited as torture or impermissible coercion? No sleep, no food, loud noise? What are the limits?

¹² Cf. Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons.

¹³ The human right treaties state that a State Party has to ensure “to all human beings within its territory and subject to their jurisdiction the free and full exercise of those rights” (see for instance Art. 2 Covenant). It seems to be an interpretation of good faith of this clauses to give them a broad meaning in the light of the object and purpose of the treaty: if a detainee remains wholly within the authority and control of a state, there seems to be no convincing reason why a state should not fulfil its obligations to protect the human rights of this person. This interpretation is supported by the US Detainee Treatment Act 2005 which prohibits any torture of a human being if he or she is “under custody or physical control of the US government”.

¹⁴ For a different view see Bellinger, 38 *George Washington International Law Review*, 2006, 501.

- What are the limits of incommunicado detention?
- How long may a terrorist be detained without seeing a judge? Four days or fourteen days but certainly not four years.
- What are the strict conditions and limits of administrative detention?

These indications shall not suggest the drafting of new international rules; they merely concern the interpretation of the existing rules in regard to concrete questions. However this is what we should work on together and the results should be laid down in military manuals and other national directives.

A striking example that there seems to be an immense need for further elaboration in detail is again the new interrogation manual of the Department of Defence. There it is stated that “certain interrogation techniques may approach the line between permissible actions and prohibited actions; but it may often be difficult to determine where prohibited actions begin”.¹⁵

7. Closing remarks

The Economist wrote in its issue some weeks ago in regard to the 9/11 attacks:

“It stands to reason that 19 men cannot change history. But they did.”

I would like to add: it stands to reason that 19 men cannot change the international legal system. And I hope they did not. And this is not because the existing rules are all we need to protect - it is because we must not lose our own ground.

¹⁵ Field Manual 2-22.3, Human Intelligence Collector Operations, Headquarters Department of the Army, 6 September 2006, 5-21, see www.us.army.mil.