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FORUM

The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'

By Jost Delbrück

A. Introduction

Few acts of international violence and the reaction to them have triggered a more intense international legal debate than the heinous terrorist attacks on the New York World Trade Center, the Twin Towers, and the United States Department of Defense, the Pentagon. Numerous articles and comments have been written in international legal journals and leading newspapers or have been communicated to the public via the internet.¹ This intense debate was certainly triggered by the unprecedented way by which this horrendous act of terror was carried out, *i.e.* the use of four hijacked civilian aircrafts, with hundreds of passengers on board, as a means of

¹ See, *inter alia*, Christian Tomuschat, Der 11. September und seine rechtlichen Konsequenzen, Europäische Grundrechte Zeitschrift (EuGRZ), vol. 28, 2001, 535; Christian Tietje/Karsten Nowrot, Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus, Neue Zeitschrift für Wehrrecht, 2002, 1; Thomas Bruha/Matthias Bortfeld, Terrorismus und Selbstverteidigung, Vereinte Nationen (VN), vol. 49, 2001, 161; Jasper Finke/Christiane Wandscher, Terrorismusbekämpfung jenseits militärischer Gewalt, VN, vol. 49, 2001, 168; Nico Schrijver, Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom?', Netherlands International Law Review (NILR), vol. 48, 2001, 371; Alain Pellet, No, This is not 'War', available at: http://www.ejil.org/forum_WTC/; Antonio Cassese, Terrorism is also Disrupting Some Crucial Categories of International Law, *id.*; Carsten Stahn, Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do not Say, *id.*; Frédéric Mégret, 'War'? Legal Semantics and the Move to Violence, *id.*; Giorgio Gaja, In What Sense Was There an 'Armed Attack?', *id.*; Pierre-Marie Dupuy, The Law after the Destruction of the Towers, *id.*; Terrorist Attacks on the World Trade Center and the Pentagon, ASIL Insights, with contributions by Frederic L. Kirgis, Gregory H. Fox, Jordan Paust, John Cerone, Arnold N. Pronto, B. Welling Hall and Said Mahmoudi, available at: <http://www.asil.org/insights/insigh77.htm>.

mass destruction. Furthermore, the attacks on the Twin Towers and the Pentagon were immediately understood by the public as attacks on two symbols of Western/American economic and military power and thus as attacks on not only the United States but also on the civilized world in general. Last but not least, the fact that the attacks, causing the death of thousands of civilians – mainly from the United States but also from many other countries –, were carried out by a relatively small group of terrorists right under the eyes of the public around the world, contributed to the almost universal involvement in the debate over the causes and the moral, political, and legal implications of this act of terror.² But the extraordinary concern of the international legal community with the events of 11 September 2001 also has to do with the fact that the extent and impact of the terrorist attacks by private individuals (although also supported by the governments of a few states) has brought to light the new dimensions of the threats of violence by a non-territorialized, borderless global terrorism that clearly transcends not only the traditional but also the modern concepts of international warfare.³ As *Christian Tomuschat* in his recent lucid and comprehensive article on “*Der 11. September 2001 und seine rechtlichen Konsequenzen*” (September 11 and its Legal Consequences, translation by the author) has aptly observed: New challenges and new dangers require new answers.⁴ It is exactly this aspect of the attacks of September 11 that shall be addressed in the following paper. The focus will be on the critical question whether the responses to the attacks by the US-lead world-wide coalition against terrorism properly fit the legal preconditions and requirements for the lawful exercise of individual or collective self-defense and the political implications that will or could entail from the present strategy followed by the United States and the coalition (C.). The paper will also discuss the collective, United Nations based efforts to rebuild Afghanistan as a viable lawful state, and it will ultimately discuss whether there may have been a viable alternative approach to the undoubtedly necessary enforcement measures based on the principle of collective or individual self-defense, thereby testing whether a truly new answer to the new threat scenarios could be conceived of and what its political consequences, particularly for the future campaign against global

² In this regard the September 11 attacks differ from other disastrous events that caused even more casualties – like the air raid on Dresden – but occurred as part of interstate war by military forces or – like at Pearl Harbor – as an act of aggression by military forces on the order of the Japanese Government.

³ For an excellent account of the events of 11 September in the light of the process of globalization see *David Held*, *Violence, Law and Justice in a Global Age*, *Indiana Journal of Global Legal Studies*, vol. 9, 2002 (forthcoming); also available at: <http://www.ssrc.org/sept11/essays/held.htm>; for an earlier comprehensive analysis of the impact of globalization on the concepts of war and violence see *Mary Kaldor*, *New and Old Wars*, 1998; *id.*, *Reconceptualizing organized violence*, in: *Daniele Archibugi/David Held/Martin Köhler* (eds.), *Reimagining Political Community*, 1998, 91.

⁴ *Tomuschat* (note 1), 535.

terrorism, could be expected to be (D.). At the beginning, however, a few methodological remarks are in place (B.), since in dealing with highly sensitive political problems, the international jurist faces the dilemma that he or she has to rely on the available information that is necessarily incomplete and sometimes even tenuous because the national and international decision-making process, as matter of course, is not open to the public.⁵

B. Methodological Prolegomena

Besides the problem of a potential or actual informational gap that the international jurist faces, there are further methodological problems that need to be addressed before going into the substantive argument. One is that the outcome of the legal assessment of the responses to the September 11 attacks undertaken by the United States and the coalition and – to some extent – by the United Nations depends on whether one looks at these actions from an *ex ante* or from a later point of time like, for instance, the time when such assessment is made. In the first alternative, the assessment has to be based on the facts and the information available to the decision-makers as well as to the assessing writer at that earlier time. A later critique would have to assess the earlier evaluations without taking cognizance of information disclosed later. For example, to resort to an act of self-defense presupposes a clear knowledge as to who is the attacking state or other actor. In the early days following the attack on the Twin Towers, that was not clear at all. Thus, some authors writing just about two weeks after the event vigorously denied that the attack by the hijackers brought about a state of war as hitherto defined by international law.⁶ Other writers clearly indicated that the attacks were of a novel character, but argued that we were witnessing a widening of the concept of self-defense that is now to include ‘armed attacks’ by non-state actors like terrorists.⁷ Today we know more about the involvement of the Taliban regime in the support of the terrorists, thus the legal argument can be made on somewhat firmer ground. Still, there is no clear-cut answer to the question from which point of time – *ex ante* or a later date – the legal assessment of given countermeasures is to be undertaken. The

⁵ Correctly *Tomuschat* (note 1), 535.

⁶ See *Pellet* (note 1), arguing that the attacks did not constitute war; *Cassese* (note 1) observing that ‘war’ in this case is a “misnomer”; this is also clearly stated by *Tomuschat* (note 1), 536; *Paust* (note 1) who, however, argues that self-defense according to Art. 51 UN Charter extends to attacks by non-state actors.

⁷ Whether the argument of an ongoing change of the meaning of the concept of self-defense is a tenable position to take need not be decided at this point. The fact is that this argument reflects the insecurity of the respective authors with regard to the factual situation obtaining at the time of their legal assessment: could the attacks be attributed to a state and could the attacks be classified as ‘armed attack’ in the sense of Art. 51 UN Charter?