

Response - 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 Department

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A. Introduction

In the last year John B. Bellinger, III, Chief Legal Adviser to the United States Department of State, has been engaging in a dialogue with politicians and legal scholars in European countries. These speeches and public appearances, like the remarks delivered at the London School of Economics in 2006 and republished in this issue of the *German Law Journal*, were meant to address the misimpressions, as Mr. Bellinger sees it, that have become prevalent in Europe over the last few years with respect to the US positions on questions of the legal basis and legal limits of the “war on terror” and the treatment of detained terrorists.¹

In order to enhance the dialogue concerning these matters, it is important—as a first step—to make very clear the differences that exist in the interpretation of the relevant legal rules. Those concern, 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 defining the terms “unlawful combatant” versus “offensive civilian;” the question of who is a prisoner of war; the treatment of detainees who are not prisoners of war; the legal limits of the Third Geneva Convention and of Common Art. 3 of the Geneva Conventions; the applicability of human right treaties; the core principles

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¹ See John B. Bellinger III, Legal Adviser to the Secretary of State, Digital Video Press Conference, Mar. 13 2006, http://www.usembassy.de/germany/bellinger_dvc.html; Bellinger, *Introductory Remarks*, 38 *GEORGE WASHINGTON INTERNATIONAL LAW REVIEW* 501 (2006); see also *FRANKFURTER ALLGEMEINE ZEITUNG* (FAZ), Oct. 14, 2006, at p. 35; FAZ, Oct. 24, 2006, at p. 7; <http://www.tagesspiegel.de/politik/archiv/13.10.2006/2832625.asp>; <http://www.tagesspiegel.de/meinung/archiv/08.10.2006/2816379.asp>.

of humane treatment; the range of procedural rights; and the interpretation of the prohibition of torture.

The following statement tries to find “European” approaches and answers to the legal questions relating to the fight against terrorism. It serves as a European response to Mr. Bellinger’s recent invitation for dialogue. Importantly, this response goes so far as to propose how misperceptions and misunderstandings might be avoided in the future.²

B. Putting the Problem in Focus

Which international rules apply when a state is fighting or is trying to prevent terrorism? Do any of the traditional international rules apply? The UN Charter, the *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 not disputing that international terrorism poses an immense threat to the peace and security of the international community as a whole. Moreover, the current scale of international terrorism was not envisaged when the international treaties were drafted and the rules were developed.

However, the question is not whether the rules are old or new—it is whether the rules give us reasonable guidance for our problems. It is a long established rule of international law that the original intention of the drafters of treaties is not decisive but, rather, the wording and the object and purpose of a provision play the central roles in its interpretation.³

I will show that the rules of international law are wiser than their framers. They are flexible enough to cope with international terrorism and they provide an elaborated system that gives sufficient guidance for the solution of our problems. I will demonstrate this with regard to the laws of war and the human rights treaties.

² See generally Silja N. U. Vöneky, *Die Anwendbarkeit des humanitären Völkerrechts auf terroristische Akte und ihre Bekämpfung*, in RECHTSFRAGEN DER TERRORISMUSBEKÄMPFUNG DURCH STREITKRÄFTE 115-30 (Dieter Fleck ed., 2004); 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? 925-90 (Christian Walter and Vöneky eds., 2004).

³ See also Vienna Convention on the Law of Treaties, arts. 31, 32 (1969).

C. The *ius ad bellum*: The Right to Self Defence

I am not dealing in detail with the question of the *ius ad bellum*, which means the right of a state to defend itself in accordance with Art. 51 of the UN Charter following a terrorist attack from outside its territory. But let me highlight 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 covers large scale acts of terrorism by private groups. It is, therefore, not unconvincing to characterize the 9/11 attacks *per se*—without attribution to a state—as armed attacks, justifying the exercise of self-defence. Who or what entities can be the addressees of such acts of self defence, however, is another matter. And it is another question, too, to ask how long after the original event may such a right to self defence be exercised: immediately after the attacks, a month later, a year later? The challenge is to interpret Art. 51 in such a way that it does not become an empty shell. I think everyone agrees that the main aim of Art. 51, not to allow a state to use military means without any limitation, is as valid today as it was in 1945.

But let me now turn to the laws of war.

D. 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 claim that states should fight terrorists by military means; but if they have a right to defend themselves in accordance with the UN Charter, they can use military means. This is a political decision upon which I do not comment here. I want to stress, however, 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 terrorist groups are so evil and have such different methods of fighting that the traditional laws of war are not appropriate. A broad interpretation of the Geneva Conventions, encompassing the threat and conflict associated with modern terrorism, is compatible with the object and purpose of these treaties.

On one hand, it seems clear that transnational terrorist acts committed by non-state actors differ fundamentally in quality from normal acts of inter-state war: terrorists are private groups, they use hit and run tactics, it is nearly impossible to predict when and where attacks will occur.

On the other hand, there is no provision in international law that says that the law of armed conflict does not apply to terrorist acts by private groups. On the contrary, common Article 2 of the Geneva Conventions clearly states that only two conditions must be met for the full application of the Convention: first, an armed conflict has to take place; and second, the armed conflict has to be between subjects of international law.

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

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

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

The same is true in reverse. The law of war applies to military counter-terrorist measures if (first) they 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 coalition states started the bombing campaign in Afghanistan or Iraq. The threshold would not be met, however, with regard to a single attack against certain terrorist leaders or individual attacks against terrorists' operational bases.

⁴ There are two exceptions, however without practical relevance: first, consistent with Arts. 1 (2) and 96 (3) of the First Additional Protocol to the Geneva Conventions, international armed conflicts include wars of national liberation; second, 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.

⁵ See Vöneky, *The Fight against Terrorism and the Rules of the Law of Warfare*, *supra* note 2, at 933.

The second requirement leads again to the problem that terrorists are non-state actors. To clarify this point: as long 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 the US had attacked only *Al Qaida* fighters in Afghanistan? Or if a state attacked operational bases of *Al Qaida* in Yemen or Sudan and not the armed forces of those states? Does that constitute the use force against another state? I would argue that, 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. It is hard to see how it could be argued differently, bearing in mind the sovereignty and territorial integrity of the state that objects to the military means. Hence in those cases an international armed conflict exists between that state and the state that is fighting terrorists.

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

But is that the end of it? Is there a *lacuna* in the law 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 applies, 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 its legal status). This provision is broad enough to cover acts of terrorist groups not attributable to a state and military measures in a country which agrees to them.⁶ This reasoning was confirmed by the *US Supreme Court* in its *Hamdan* judgment.⁷

E. Reasonable Standards Under the Laws of War

Either the whole set of laws of war, or at least Article 3, covers terrorist attacks and the fight against terrorism. The question remains, however, whether we can obtain reasonable standards from this. The answer is again yes, the law of war gives us

⁶ *But see* Bellinger, *Introductory Remarks*, *supra* note 1, at 501, 505.

⁷ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

reasonable standards and terrorists do not gain undue privileges from its application. Let me give some examples in that respect.

The *ius in bello* prohibits the worst and most typical terrorist attacks with regard to both civilians and combatants. The Geneva Conventions and the Hague Regulations prohibit, *inter alia*, attacks on civilians or civilian objects, the taking of hostages, the use of poison, and the treacherous killing of combatants. Furthermore, grave breaches of the Geneva Conventions—like offences against persons protected as civilians—are war crimes for which there is universal jurisdiction (the perpetrators have to be prosecuted or extradited). This means that the application of the law of war helps the state that 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 lawful if and only if a person has combatant status, which means that he or she has to: (1) belong to a party; (2) be under a command of a responsible person; (3) have a fixed distinctive recognizable sign; (4) carry his or her arms openly; and (5) must act in accordance with the laws and customs of war.⁸

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.⁹ That offensive civilians act is not surprising and not a situation alien to the laws of war (it is the same for guerrillas or saboteurs). According to the laws of war, offensive civilians are lawful targets of military attacks. They retain their status as civilians, but they lose the special protection of the laws of armed conflict.¹⁰ This means that the law of armed conflict does not protect terrorists against legitimate military counter-terrorist measures, i.e. military measures which are in accordance with the right to self-defence.

However, this does not mean that members of terrorist groups are at all times and everywhere legitimate targets of wartime killing. It is decisive when and for how long a terrorist is an offensive civilian. Thus, it is necessary that we take a close look at how we interpret the phrase “taking a direct part in hostilities.” I would argue that, as the concept of offensive civilians is an exception to humanitarian law’s aim of protecting civilians, it has to be interpreted narrowly. Only terrorists who have a

⁸ Third Geneva Convention art. 4.

⁹ Anne-Marie Slaughter and William Burke-White, *An International Constitutional Moment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 1 (2002).

¹⁰ First Additional Protocol to the Geneva Conventions art. 51(3) (1977).

combat mission (i.e. they do or will take part in terrorist attacks) can be killed lawfully.¹¹ Because of this restrictive interpretation the status of offensive *civilian* is important and the label of “unlawful enemy combatants” is misleading.

The same is true for objects 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.¹² However, according to the laws of war, they must not be attacked if the loss of civilian life or damage to civilian objects is excessive.¹³

There are also 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 a non-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 non-combatants and cannot be prisoners of war. In this regard they clearly differ from the *Taliban* fighters which constituted the regular armed forces of the Afghan State in 2001 and hence were at that time combatants and prisoners of war when captured. Because of this it is—in my view—inconsistent with the Geneva Conventions that the Military Commission Act 2006 classifies *Taliban per se* as “unlawful enemy combatants.”¹⁴

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

¹¹ The interpretation has to be coherent with the lawful aims of measures of self defence: when it is lawful to attack terrorists by military means with regard to the *jus ad bellum*, it would be inconsistent if those people were fully protected as civilians by the laws of war. For combatants there is a similar approach as they may not be attacked if they are “out of combat.” Cf. US Operational Law Handbook 2.12 (2002), https://www.jagcnet.army.mil/JAGCNET_Internet/Homepages/AC/CLAMO-Public.nsf/bf25ab0f47ba5dd785256499006b15a4/1af4860452f962c085256a490049856f!OpenDocument (Combatants are lawful targets unless “out of combat.”).

¹² First Additional Protocol to the Geneva Conventions art. 53(2) (1977).

¹³ *Id.* at art. 51(5b).

¹⁴ Military Commission Act of 2006 (MCA), Pub. L. No. 109, § 948a (1).

If this is the case, this is not an undue privilege. If they meet the strict requirements of the Third Geneva Convention, then they have acted as combatants and not as terrorists. Besides, their status as prisoners of war does not rule out a criminal trial. This is clearly laid down in Chapter III of the Third Geneva Convention. However it is also clearly stated there: "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"¹⁵ 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."¹⁶

Moreover, in cases of doubt whether a terrorist fulfils the criteria of a prisoner of war, there is a very reasonable rule in the Third Geneva Convention. In these cases "such person shall enjoy the protection of the Convention until their status has been determined by a competent tribunal."¹⁷

And here I see no reason 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.¹⁸ As the United States Supreme Court stated in the *Hamdan* judgment: "Without underestimating the danger and threat of terrorism it is not evident to us why those guarantees are unreasonable or impracticable to apply."¹⁹

Besides, it is also very reasonable that the law of war should provide for minimum standards, if there is no international armed conflict or the criteria for 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 of the First Additional Protocol, at least as far as they reflect customary law. These rules do not privilege captured terrorists but they provide the most basic safeguards that they are treated humanely. Common Article 3 reflects, as the International Court of

¹⁵ Third Geneva Convention art. 85.

¹⁶ *Id.* at art. 84(2).

¹⁷ *Id.* at art. 5(2).

¹⁸ The provisions which do not apply to trials by military commissions are enumerated, for instance, in MCA § 948b(d).

¹⁹ *Hamdan*, *supra* note 7.

Justice stated, “elementary considerations of humanity.”²⁰ Article 75 contains “fundamental guarantees”²¹ “to which all persons in the hand of an enemy are entitled.”²² Both 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 a language he understands, of the reasons why these measures have been taken;
- that he shall be released as soon as the circumstances justifying his detention have ceased to exist;
- that no sentence may be passed that was not arrived at by an impartial and regularly constituted court;
- that the rule of *nulla poena sine lege* must not be violated;
- that there is the presumption of innocence; and
- the right to be tried in one’s presence.

I would strongly challenge any claim that these standards 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 with regard to terrorists? Why are *habeas corpus* and fair trial rights outdated?

Perhaps our times are only superficially different from those when the Geneva Conventions were drafted in 1949. After the Second World War and the fight against Hitler and the Third Reich, the states parties were well aware that there were situations in which world peace would be threatened by an irrational, suicidal and evil aggressor. Golo Mann, a German historian, wrote with regard to Hitler and the crimes of the Third Reich:

²⁰ Nicaragua v. U.S., I.C.J. Reports 2006 p. 14 at para. 218, available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

²¹ This is recognized by the US State Department as well. See M. J. Matheson, former Deputy Legal Advisor, Department of State, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 427 (1987) (“We support in particular the fundamental guarantees contained in article 75.”).

²² See William H. Taft, IV, former Legal Advisor, Department of State, *The Law of Armed Conflict after 9/11: Some Salient Features*, 28 YALE JOURNAL OF INTERNATIONAL LAW 319, 322 (2003).

“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 to the Geneva Conventions knew this and they came to the conclusion that there had 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 *despite the fact that* 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 that are fighting terrorism, in my opinion, those states undermine their own case—morally and practically.

From the practical point of view the need for minimum standards is recognized—for instance—by the United States Department of Defence. The Department of Defence issued a new Army Field Manual on interrogation techniques in September of last year.²³ It covers every detainee in Defence Department custody, anywhere in the world, and it states clearly with regard to torture and inhuman treatment: “All prisoners and detainees, regardless of status, will be treated humanely”. It goes on to say: “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 source to say what he thinks the HUMINT collector wants to hear.”²⁴

Why should this not be true with regard to terrorists captured and held by the CIA?²⁵ 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 for a State to give no reason at all for people to entertain suspicions that detainees are being tortured.

²³ Army Field Manual 2-22.3, Human Intelligence Collector Operations (2006).

²⁴ *Id.*, 5-74, page 5-21.

²⁵ In November 2006, Bellinger distanced himself from US Vice-President Dick Cheney’s comments regarding torture and waterboarding; Bellinger refused to rule out the use of such techniques by the CIA however. See generally Interview by BBC Press Office–World Service with John B. Bellinger III (2003), available at http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/11_november/03/bellinger.shtml.

F. Applicability of Human Rights Treaties

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

First, the law of armed conflict is not meant to be the only scheme of regulation for the protection of human beings during armed conflict. To give only one example, the so-called “Martens Clause,” which is part of the customary law of armed conflict, provides for the possibility of supplementing the laws of war with “dictates of public conscience.”²⁶ The dictates of public conscience, however, include considerations of humanity and the protection of fundamental human rights.

This means that the argument that the *lex specialis* derogates from *lege generali* (that the law of war as specific law overrides human rights as general law) is not convincing in our context. More important the *lex specialis* thesis runs into the danger of begging the question as it cannot be proved that states commonly hold that the protection of human beings is to 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.²⁷ *E contrario* such clauses show that human right treaties apply during an armed conflict. If not, such clauses would be meaningless. In the same line the 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 International Court of Justice that the protections provided by the human rights treaties do not cease in times of war, unless certain provisions are derogated from.²⁸ Thus, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce each other. They share a common core of non-derogable

²⁶ Fourth Geneva Convention, pmb1.

²⁷ See International Covenant on Civil and Political Rights (ICCPR) art. 4, 999 U.N.T.S. 171 (1966); European Convention on Human Rights art. 15, 312 U.N.T.S. 221 (1950); American Convention on Human Rights art. 27.

²⁸ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. REPORTS 1996 p. 66 at para. 25, available at <http://www.icj-cij.org/docket/files/93/7407.pdf>.

human rights: the right to life, to humane treatment, 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 cannot see why they are outdated or impracticable.²⁹

G. Where Can We Go From Here?

I think the dialogue concerning the applicable legal standards in the fight against terrorism will improve if we abandon disputes about the general applicability of the law of war and human rights law. We should accept, as the International Court of Justice, the human rights treaty bodies, and courts like the United States Supreme Court do, that the international legal order lays down minimum standards concerning humane treatment of detainees and fair trial rights and that they are applicable with regard to terrorists as well. Terrorists are not “outlaws” even if one would agree that they are the “enemies of mankind.”³⁰

But those standards have to be spelled out. Areas of doubt regarding concrete questions must vanish and people involved in the field of the prevention of and fight against terrorism must know what they are allowed to do.³¹

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

- What kinds of interrogation techniques are prohibited as torture or impermissible coercion? No sleep, no food, loud noise? Waterboarding?³² What are the limits?
- What are the limits of incommunicado detention?

²⁹ Human rights 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.” ICCPR, *supra* note 27, at art. 2. It seems to be a good faith interpretation of this clauses to give it a broad meaning in 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 such person. This interpretation seems to be 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.” Detainee Treatment Act of 2005, 119 Stat. 2739.

³⁰ For a different view see Bellinger, *Introductory Remarks*, *supra* note 1, at 501, 506.

³¹ See Sergeant Erik Saar and Viveca Novak, *INSIDE THE WIRE* (2005) for a soldier’s eyewitness account of work at the detainee camp at Guantanamo Bay.

³² *Supra* note 25.

- How long may a terrorist be detained without seeing a judge? Four days or fourteen days but certainly not four years.³³
- What are the strict conditions and limits of administrative detention?

These indications do not suggest the drafting of new international rules; they merely concern the interpretation of the existing rules regarding 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 of the fact that there is an immense need for further elaboration of the details is, again, the new interrogation manual of the United States Department of Defence. There it states that “certain applications of approaches and techniques may approach the line between permissible actions and prohibited actions. It may often be difficult to determine where permissible actions end and prohibited actions begin.”³⁴

H. Closing Remarks

Regarding the 9/11 attacks, some months ago *The Economist* wrote

“It stands to reason that 19 men cannot change history. But they did.”³⁵

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

³³ The Military Commissions Act of 2006 does not solve the problem as there is no right to speedy trial. See MCA, *supra* note 14, at § 948b(d). See J. G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 26 (2007) for further inconsistencies of the act with the Geneva Conventions.

³⁴ *Supra* note 23, 5-76, page 5-21.

³⁵ *Five Years On*, THE ECONOMIST, Sep. 2, 2006, at 9.