

## THE STRUGGLE AGAINST TERRORISM. CHANCES AND LIMITS OF MODERN PUBLIC INTERNATIONAL LAW

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### I. WAR AGAINST TERRORISM: AFGHANISTAN, IRAQ AND BEYOND

After the devastating terrorist attacks against the United States of September 11, 2001<sup>1</sup> President George W. Bush proclaimed a worldwide

<sup>1</sup> The September 11 attacks have given rise to a tremendous amount of new international law writings. Here some examples from a German point of view (which of course had to be supplemented by an American or by a Mexican respectively Iberoamerican point of view—the UNAM—congress is a good opportunity to do so): Tomuschat, Ch., Der 11. September 2001 und seine rechtlichen Konsequenzen, *EuGRZ* 2001, S. (page) 535 ff. (and following); Bruha, Th. and Bortfeld, M., Terrorismus und Selbstverteidigung. Voraussetzungen und Umfang erlaubter Selbstverteidigungsmaßnahmen nach den Anschlägen vom 11. September 2001, *VN* 2001, S. 161 ff.; Finke, J., and Wandscher, Ch., Terrorismusbekämpfung jenseits militärischer Gewalt. Ansätze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus, *VN* 2001, S. 168 ff., 168; Williams, I., Amerikas Krieg gegen den Terrorismus. Neue Wertschätzung für die Vereinten Nationen in Washington, *VN* 2001, S. 209 ff.; Condorelli, L., “Les attentats du 11 septembre et leurs suites: où va le droit international”, *Revue Générale de Droit International Public*, 105, 2001, S. 829 ff. To the topic of terrorism in general: Oeter, S., Terrorismus ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit, *Die Friedenswarte* 76 (2001), S. 11 ff.

“War against Terrorism”.<sup>2</sup> His words expressed the feelings of a deeply traumatised nation.<sup>3</sup> They became the creed of all those to lead the struggle against terrorism, they could—to a great extent—unify the World Community approving of armed measures against the Taliban Regime in Afghanistan. However, the “War against Terrorism” deeply split the same World Community when facing its cruel reality in Iraq.<sup>4</sup> In the Post-Iraq-War-Period terrorist attacks continue, new and new escalations of violence shake the Near East in an increasing crisis. The question is whether this fight against terrorism is a “war” in definition of public international law; whether public international law is an adequate mean for effective anti-terror-regulation as well as an effective anti-terror-practice.

The UN-Charter does not use the term “war” any more, it speaks of “armed conflicts”,<sup>5</sup> describing armed hostilities between combatants and legally defining a status which does not refer to the purpose of killing merely civil victims respectively, the civil population.<sup>6</sup> Sofar, *A. Pellet’s dictum against G. W. Bush: “No, This is not War”*<sup>7</sup> corresponds to a well established dogmatic of today’s public international law. Nevertheless, the global terrorist threat might give rise to some important changes in its theory and practice which shall be examined in the following.

<sup>2</sup> Addressing the American People via national television on September 16, 2001, see SZ (one of the biggest daily German newspapers), September 18, 2001.

<sup>3</sup> In his speech addressing the German Parliament, the Bundestag, on May 23, 2002, George Bush again used very strong words, comparing the September 11 attacks to *Pearl Harbour* or the *blockade of Berlin*.

<sup>4</sup> See Murswiek, D., *Die amerikanische Präventivkriegsstrategie und das Völkerrecht*, NJW 2003, S. 1014 ff.; Blumenwitz, D., “Der Präventivkrieg und das Völkerrecht”, *Politische Studien* 54 (2003), Heft 391, S. 21 ff.; *id.*, “Die völkerrechtlichen Aspekte des Irak-Konflikts”, *Zeitschrift für Politik*, 2003, S. 301 ff.; Rudolf, P., *Der 11. September, die Neuorientierung amerikanischer Außenpolitik und der Krieg gegen den Irak*, in: *id.*, S. 257 ff.; Siedschlag, A., *Der 11. September, der Irak-Krieg und die Nonproliferation von Massenvernichtungswaffen*, in: *id.*, S. 281 ff.

<sup>5</sup> Ipsen, K., in: *id.*, *Völkerrecht*, 2nd ed. 1999, § 65 Rn. 7.

<sup>6</sup> Ruffert, M., *Terrorismusbekämpfung zwischen Selbstverteidigung und kollektiver Sicherheit*, ZRP 2002, S. 247 ff., 249 with some further reference.

<sup>7</sup> Pellet, A., “No, This is not War, EJIL world Trade Center Forum”, <http://www.ejil.org/forumWTC/index.html>; in the same way Tomuschat, Ch., *Der 11. September 2001 und seine rechtlichen Konsequenzen*, EuGRZ 2001, S. 535 ff., 536.

## 1. *Regulations Against Terrorism in the Globalized World of the 21st Century, the International Perspective*

Many constitutional states reacted to the threat of terrorism with a new and very strict national legislation such as the “Patriot Act” in the United States or the “Anti-Terror-Regulations” in Germany.<sup>8</sup> The terrorist attacks of September 11 have also led to an increased treaty activity on part of the United Nations individual member states. As early as November 2001, 79 states participated in the “United Nations Treaty Event: Multilateral Treaties on Terrorism”.<sup>9</sup> On June 3, 2002, the Organization of American States (OAS) was the first to come up with an international anti-terrorism treaty since the September 11 attacks.<sup>10</sup> About two years earlier, a draft for a “Comprehensive Convention for the Suppression of International Terrorism”<sup>11</sup> had been submitted to the United Nations by India,<sup>12</sup> the purpose of which was and is to fill the gaps left open by many already existing conventions. However, the success of this project cannot be taken for granted since some crucial questions are not resolved yet. They are especially related to a possible exemption for parties during an armed conflict from the general ban of terrorism. Furthermore, if today on a global level the “war” metaphor should be understood as the civilized nations’ response to “terror”, one has to raise a preliminary question: What are the outlines, what the structures of “international terrorism” described in the aforementioned and various other agreements?<sup>13</sup> The UN-Charter does not use the term “terrorism”. The Friendly Relations Declaration (October 1970) says:

<sup>8</sup> See Koch (ed.), *Terrorismus – Rechtsfragen der äußeren und inneren Sicherheit*. Symposium für Hans Peter Bull und Helmut Rittstieg am 31. Mai 2002, 2002; Rau, M., Country Report Germany, in Walter, CH. *et al.* (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, 2003.

<sup>9</sup> See “The Treaty Event: Multilateral Treaties on Terrorism” [[http://untrety.un.org./English/Summary\\_Terrorism.pdf](http://untrety.un.org./English/Summary_Terrorism.pdf)].

<sup>10</sup> Inter-American-Convention Against Terrorism, AG/Res./1840, XXXII-O/02 of June 3, 2002.

<sup>11</sup> Report to the Security Council Committee established pursuant to Resolution 1373 (2001), Counter-Terrorism-Committee (2001).

<sup>12</sup> Draft Comprehensive Convention on International Terrorism. Working Document submitted by India, A/C.6/55/1 of 28 August 2000.

<sup>13</sup> See Bruha, Th. and Bortfeld, M., *Terrorismus und Selbstverteidigung*, VN 2001, S. 161 ff.; Stuby, G., *Internationaler Terrorismus und Völkerrecht*, *Blätter für deutsche und internationale Politik*, 2001, S. 1330 ff.; Tomuschat, Ch., *Der 11. September 2001 und seine rechtlichen Konsequenzen*, *EuGRZ* 2001, S. 535 ff., 536 ff.; Schmalenbach, K., *Die*

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>14</sup>

In 1985, the United Nations General Assembly qualified all deeds of terrorist organizations as “criminal acts”, no matter where and by whom they have been committed.<sup>15</sup> However, a general definition of terrorism was not given.<sup>16</sup> The reason for this is very simple. As already mentioned regarding the Draft Comprehensive Convention, the topic is more than controversially discussed by the international community. What is terrorism, what is war of liberation, what simply violence? Is there any difference between private and state terrorism, is the qualification dependent on the subjective motivation of the actors? Facing these uncertainties, many specific international agreements choose a rather pragmatic approach: The Tokyo Convention Act (Cap 327) gives effect to the Convention on Offences and Other Certain Acts Committed on Board of Aircrafts (1963).<sup>17</sup>

Beurteilung von grenzüberschreitenden Militäreinsätzen gegen den internationalen Terrorismus aus völkerrechtlicher Sicht, NZWehrR 2000, S. 177 ff.; Cassese, A., Terrorism is Also Disrupting some Crucial Legal Categories of International Law, EJIL 12 (2001), S. 993 ff.; see already *id.*, The International Community’s “legal” Response to terrorism, ICQL 38 (1989), S. 589 ff.; from an American point of view Wedgood, R., “Responding to Terrorism: The Strikes Against bin Laden”, *Yale Journal of International Law*, 24, 1999, S. 537 ff.; Campell, L. M., “Defending Against Terrorism: A legal Analysis of the Decision to Strike Sudan and Afghanistan”, *Tulane Law Review*, 74, 2000, S. 1067 ff.

<sup>14</sup> Friendly Relations Declaration, for the German translation see: Erklärung über völkerrechtliche Grundsätze für freundschaftliche Beziehungen und Zusammenarbeit zwischen den Staaten im Sinne der Charta der Vereinten Nationen, Resolution 2625 (XXV) der Generalversammlung. Deutscher Text in VN 1978, S. 138 ff., sowie in der Textsammlung Sartorius II unter Ziff. 4.

<sup>15</sup> Resolution 40/61 dating from December 9, 1985, printed in: VN 1986, S. 182 f.

<sup>16</sup> Finke, J., and Wandscher, Ch., Terrorismusbekämpfung jenseits militärischer Gewalt. Ansätze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus, VN 2001, S. 168 ff., 168; for the different scholarly approaches and the practice of public international law see Kolb, R., “Universal Criminal Jurisdiction of International Terrorism. Some Reflections on Status and Trends in Contemporary International Law”, *Revue Hellénique de Droit International*, 50, 1997, S. 43 ff., 48 ff.

<sup>17</sup> *United Nations Treaty Series* (UNTS), 704, S. 219 ff.

So also do the Hague Convention for the Suppression of Unlawful Seizure of Aircrafts (so called Hijacking Convention, 1970),<sup>18</sup> the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and the supplementary Montreal Protocol (1988)<sup>19</sup> or the UN-General Assembly's Resolution against Terrorist Bomb Attacks (1997).<sup>20</sup>

The International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999,<sup>21</sup> tries to give an abstract description of terrorism in its article 2, 1 b:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The definition gives proof of the contrast between *terrorism* and an *armed conflict* in the sense of article 39 and article 51 UN-Charter. It draws a clear line of distinction between criminal law sanctions against acts of terrorism and the right to self-defense according to article 51 UN-Charter. However, the Convention also shows that not only the terrorist organizations themselves have to be suppressed but also all actors, may be private or state actors, which support the infrastructure, global networking or the financing of these organizations.<sup>22</sup>

On a regional level, the fight against terror became a topic of utmost importance too. The European Parliament adopted a definition of interna-

<sup>18</sup> The complete text can be found in *United Nations Treaty Series* (UNTS), 860, S. 105 ff., as well as in: BGBl. 1972 II, S. 1505 ff.

<sup>19</sup> Text: BGBl. 1977 II, S. 1229 ff.

<sup>20</sup> Resolution 527164 of the General Assembly (Dec. 1997), VN 1999, S. 34 ff. See furthermore Finke, J. and Wandscher, Ch., *Terrorismusbekämpfung jenseits militärischer Gewalt. Ansätze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus*, VN 2001, S. 168 ff., 169, giving more examples of international anti-terror conventions or agreements.

<sup>21</sup> Resolution 54/109 of the General Assembly dating from December 9, 1999. A complete version of the text can be found in: VN 2001, S. 21 ff.

<sup>22</sup> For further reference see again: Finke, J. and Wandscher, Ch., *Terrorismusbekämpfung jenseits militärischer Gewalt. Ansätze der Vereinten Nationen zur Verhütung und Beseitigung des internationalen Terrorismus*, VN 2001, S. 168 ff., 170 f.

tional terrorism in 1996.<sup>23</sup> During the October 2001 APEC-Summit in Shanghai, the member states described terrorism as a threat for peace and the wellbeing of all humankind.<sup>24</sup> The same direction takes a Declaration by the ASEAN States (November 2001, Brunei Darussalam).<sup>25</sup> The September 11 attacks gave birth to a new generation of terrorism, forcing the international community to react. One visible reaction is a new “*soft law in becoming*”. Regardless of all disputes in detail, a comprehensive scheme of legally binding anti-terrorism measures is an urgent desire of our times. Today, terror is a *global* phenomenon motivated by national or ethnical ideologies, social-revolution-ideals or religious beliefs.<sup>26</sup> Three generations of international terrorism can be distinguished. The terrorism of the first generation was locally limited, mostly related to regional conflicts. In course of an ongoing internationalization and globalization,<sup>27</sup> a second generation of terrorism wanted to enforce regional interests using international networks and public worldwide. The third generation or what we call world terrorism is of a new *quality* and *quantity*. All local limitations are abolished by global actors and a global infrastructure. Most dangerous means including the use of weapons of mass destruction shall put a unique

<sup>23</sup> ABl. C 55 dating from February 24, 1997; see also Stein, T. and Meiser, Ch., Die Europäische Union und der Terrorismus, Die Friedenswarte 76 (2001), S. 33 ff., 36; finally K. Schmalenbach, Der Internationale Terrorismus – Ein Definitionsversuch, in: Neue Zeitschrift für Wehrrecht 42 (2000), S. 15 ff.

<sup>24</sup> Printed in *Internationale Politik* 57 (2002), S. 97 ff.

<sup>25</sup> Also printed in *Internationale Politik* 57 (2002), S. 105 ff.

<sup>26</sup> See Münkler, H., Terrorismus als Kommunikationsstrategie. Die Botschaft des 11. September, *Internationale Politik* 56 (2001), S. 11 ff., 14; especially the kinds of terrorism motivated by religion: Heiligsetzer, E., Religiös-fundamentalistischer Terrorismus im Vergleich: Extremistischer Protestantismus in den USA und fundamentalistische Gewalt im islamischen Orient, *Friedenswarte* 76 (2001), S. 81 ff. Some further literature as to the term, the theory and the social reality of terrorism see e. g. Laqueur, W., *Terrorism*, 1977, as well as *The Age Terrorism*, 1987; moreover Badey, Th. J., “Defining International Terrorism: A Pragmatic Approach”, *Terrorism and Political Violence*, 10, 1998, S. 90 ff.; Schmalenbach, K., Der Internationale Terrorismus – Ein Definitionsversuch, in: Neue Zeitschrift für Wehrrecht 42 (2000), S. 15 ff.; Daase, Ch., Terrorismus – Begriffe, Theorien und Gegenstrategien. Ergebnisse und Probleme sozialwissenschaftlicher Forschung, *Die Friedenswarte* 76 (2001), S. 55 ff. with some further reference.

<sup>27</sup> Thüerer, D., Der Verfassungsstaat als Glied einer europäischen Gemeinschaft, *VVDStRL* 50 (1991), S. 97 ff., 125; see also Sommermann, K. P., Der entgrenzte Verfassungsstaat, in: D. Merten (Hrsg.), *Der Staat am Ende des 20. Jahrhunderts*, 1998, S. 19 ff., 34; U. Hingst, Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge, 2001, S. 109 ff.

threat to *the whole* international society, *the whole* world community.<sup>28</sup> International violence is being executed by private actors, the state responsibility is anything but clear, once strictly separated categories of individual or collective self-defense on the one hand, criminal law reactions on the other hand merge into one another.<sup>29</sup> “War” might become an maybe necessary but for sure indifferent answer to this “melting pot of violence”.

## 2. *International Terrorism as a Threat of Peace “Sort of War”*

Taking the just described development into account, the question is whether terrorism qualifies as a crime, as a new variation of “war” or as a new form of violence *sui generis*.<sup>30</sup> In this context it should be mentioned that some social scientists saw a historical relation between international terrorism and the anti-colonial wars of liberation. A well disputed thesis reads: “Urban terrorism is a sort of urban guerilla warfare”.<sup>31</sup> At least one aspect of this idea is quite considerable. Both, guerilla warfare and terrorism, do not consider themselves bound to the *ius in bello*, but they refer to an obscure *ius ad bellum* between social revolution, war of liberation and a

<sup>28</sup> See also Stein, T. and Meiser, Ch., *Die Europäische Union und der Terrorismus*, Die Friedenswarte 76 (2001), S. 33 ff., 34.

<sup>29</sup> As to the international criminal law discussion: Cassese, A., *Terrorism is Also Disrupting Some Legal Categories of International Law*, EJIL 2001, S. 993 ff., 994 f.; Oeter, S., *Terrorismus – ein völkerrechtliches Verbrechen? Zur Frage der Unterstellung terroristischer Akte unter die internationale Strafgerichtsbarkeit*, Die Friedenswarte 76 (2001), S. 11 ff.; Krohne, S. W., “The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism”, *Indiana International and Comparative Law Review*, 8, 1997, S. 159 ff. ; Carberry, J. A., “Terrorism: A Global Phenomenon Mandating a United International Response”, *Indiana Journal of Global Legal Studies*, 6, 1999, S. 685 ff.; Reisman, W. M., “International Legal Responses to Terrorism”, *Houston Journal of International Law*, 22, 1999, S. 3 ff.; Guillaume, G., “Terrorisme et droit international”, *Recueil des Cours de l’Académie de Droit International*, 215, 1989, S. 327 ff. The Staute of Rome does not know a specific international crime of terrorism. However, the international conference drafting the Statute, came up with a resolution describing terrorist acts as “serious crimes of concern to the international community“, see UN-Doc. A/CONF:/183/10, S. 7 f.

<sup>30</sup> Daase, Ch., *Terrorismus – Begriffe, Theorien und Gegenstrategien. Ergebnisse und Probleme sozialwissenschaftlicher Forschung*, Die Friedenswarte 76 (2001), S. 55 ff., 62 f.

<sup>31</sup> To the discussion id., S. 62 f., with some important further reference to the publications of R. Taber and R. Clutterbuck.

pseudo-religious sense of mission. In that regard, international terrorism of the third generation is a threat to peace *sort of war*. Terrorist attacks lead to a war which nobody has declared;<sup>32</sup> they disregard the regulations of the international *ius in bello*; terrorists attack not only the combatants but also the civil population.<sup>33</sup> The result of these attacks is not a “state of war” as classical international law would have defined it, but the violence and escalations are at least as dangerous as the situation of an international armed conflict. And why? First and foremost because the third-generation-terrorism does not know any limits regarding *time* and *space*. As US-Vice Secretary of State R. Armitage put it in November 2003 focusing on the situation in Iraq: Iraq is still not only a zone of crisis, Iraq is a “zone of war”.<sup>34</sup>

### 3. *The International Law Framework*

#### A. *Self-Defense Against Armed Attacks of Private Terror Groups. The Problem of Preemptive Measures*

Article 2 Nr. 4 UN-Charter says: “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 Purposes of the United Nations”.<sup>35</sup> Chapter 7, especially articles 39 and 51 have to be understood in a much more restrictive sense. Only *armed attacks* can legitimately lead to the right of self-defense. Article 51 UN-Charter is an obvious exemption in the United Na-

<sup>32</sup> Very precise Hofmann, B., *Terrorismus – der unerklärte Krieg. Neue Gefahren politischer Gewalt*, 1999. For the metaphor of a “Grey War”: D. v. Drehle, “World War, Cold War Won. Now, the Grey War”, *The Washington Post*, September 12, 2001; the same metaphor is used by Kreft, H., *Vom Kalten Krieg zum ‘Grauen Krieg’*. *Uneingeschränkte Bündnissolidarität mit den USA*, *Internationale Politik*, 56 (2001), S. 43 ff., 43.

<sup>33</sup> Münkler, H., “Terrorismus als Kommunikationsstrategie. Die Botschaft des 11. September”, *Internationale Politik* 56 (2001), S. 11 ff., 12.

<sup>34</sup> *Süddeutsche Zeitung* (German daily newspaper), November 9, 2003, S. 1.

<sup>35</sup> See e. g. Schindler, D., *Die Grenzen des völkerrechtlichen Gewaltverbots*. *Berichte der Deutschen Gesellschaft für Völkerrecht*, Heft 26 (1986), S. 11 ff.; M. Bothe, *Friedenssicherung und Kriegsrecht*, in: W. Graf Vitzthum (ed.), *Völkerrecht*, 2. Aufl. 2001, Rn. 3 ff. with further reference.

tions' scheme of securing peace.<sup>36</sup> All attempts to establish a natural, inherent right to self-defense beyond the limits of Article 51 UN-Charter have to fail. This is specially true for the global fight against terrorism.<sup>37</sup>

#### a. Terrorist Attacks as Armed Attacks According to Article 51 SVN

Only an armed attack can trigger off the right to individual or collective self-defense.<sup>38</sup> In 1974, the General Assembly tried to define the term "agresion"<sup>39</sup> and the International Court of Justice used this definition for the interpretation of article 51 UN-Charter in the *Nicaragua-Case*.<sup>40</sup> The definition says that a state or another *subject of international law* has to be responsible for the armed attack.<sup>41</sup> However, in the globalized world of today states are no longer the only, not even the main actors on the international level. The reality of international relationships shows the increasing importance of "Non-State-Actors" exercising a kind of *public power* that in the past was exclusively reserved to state actors. All mechanisms established by the United Nations have to take this fundamental change into ac-

<sup>36</sup> Very early Brownlie, I., *International Law and the Use of Force by States*, 1963, S. 251 ff.; Ranzelzhofer, A., in: Simma, B. (Hrsg.), *The Charter of the United Nations. A Commentary*, Article 51, Rn. 4 ff.; Bryde, B. O., "Self-Defense", in Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, vol. IV, 2000, S. 361 ff.; Graf Vitzthum, W., Begriff, Geschichte und Quellen des Völkerrechts, in: ders. (Hrsg.), *Völkerrecht*, 2. Aufl. 2001, 1. Abschn., Rn. 52 ff.; Bruha, Th. and Bortfeld, M., Terrorismus und Selbstverteidigung. Voraussetzungen und Umfang erlaubter Selbstverteidigungsmaßnahmen nach den Anschlägen vom 11. September 2001, VN 2001, S. 161 ff., 162.

<sup>37</sup> Admittedly, some new aspects can be emphasized after the September 11 attacks, see e. g. Tomuschat, Ch., Der 11. September 2001 und seine rechtlichen Konsequenzen, EuGRZ 2001, S. 535 ff., 538 ff.

<sup>38</sup> Ranzelzhofer, A., in Simma, B. (Hrsg.), *The Charter of the United Nations. A Commentary*, Article 51, Rn. 18-18.

<sup>39</sup> General Assembly Resolution 3314 (XXIX); for fundamental remarks to this resolution see Bruha, Th., *Die Definition der Aggression*, 1980.

<sup>40</sup> ICJ Reports 1986, S. 14 ff.

<sup>41</sup> Cassese, A., The International Community's legal Response to Terrorism, ICQL 38 (1989), S. 589 ff., 596 ff.; Bruha, Th. and Bortfeld, M., Terrorismus und Selbstverteidigung. Voraussetzungen und Umfang erlaubter Selbstverteidigungsmaßnahmen nach den Anschlägen vom 11. September 2001, VN 2001, S. 161 ff., 164; Krajewski, M., Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen. Der 11. September 2001 und seine Folgen, AVR 40 (2002), S. 182 ff., 188; Ruffert, M., Terrorismusbekämpfung zwischen Selbstverteidigung und kollektiver Sicherheit, ZRP 2002, S. 247 ff., 247 f.

count. More and more often, armed attacks are exercised by private powers.<sup>42</sup> The consequence should be not the *formal* aspect of “statehood” or “international law subjectivity”, but the *quality* of the attack is the decisive criterion whether or not article 51 UN-Charter can be applied to the case. Of course, such a *material* approach implies the risk of abuse.<sup>43</sup> Therefore, a material understanding of article 51 UN-Charter demands a restrictive interpretation and a “genuine link” between self-defense and the international community’s obligation to secure and re-establish peace. The classical theory of state responsibility (state control, logistic or material support, granting a “safe haven”) is not sufficient.<sup>44</sup> As constitutional statehood itself, the right of self-defense has its roots in the inherent right and value of *human dignity*. The state has to grant life, liberty, equality and security to all citizens. Whoever endangers these rights has to face state reaction, the *ultima ratio* of which is the article 51-right to self-defense *as* defense of the peoples’ and the citizens’ rights and human dignity. New international customary law after the September 11 attacks<sup>45</sup> may reflect the same tendency to a material understanding of article 51 UN-Charter. It is bound to the same limits, finally to the *human dignity of all men*.

### b. The Quality and Intensity of Non-State Armed Attacks

Article 51 UN-Charter requires a high intensity of armed attacks.<sup>46</sup> This is the most important if one has to distinguish between criminal deeds with a terrorist motivation and terrorist attacks that amount to threat of international peace “sort of war”. The criteria are: Who are the actors, do they use

<sup>42</sup> Eppler, E., “Weder Krieg noch Frieden”, *Der Spiegel* (weekly German news magazine), 41, 2001, S. 56.

<sup>43</sup> Krajewski, M., Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen. Der 11. September 2001 und seine Folgen, AVR 40 (2002), S. 182 ff., 190 ff., give some important examples with regard to the PLO.

<sup>44</sup> *Idem*.

<sup>45</sup> See the extensive work of Krajewski, M., Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen. Der 11. September 2001 und seine Folgen, AVR 40 (2002), S. 182 ff., 198.

<sup>46</sup> Ruffert, M., Terrorismusbekämpfung zwischen Selbstverteidigung und kollektiver Sicherheit, ZRP 2002, S. 247 ff., 247; Randelzhofer, A., in Simma, B. (Hrsg.), *The Charter of the United Nations. A Commentary*, Article 51, Rn. 19; slightly different Fischer, H., Friedenssicherung und friedliche Streitbeilegung, in: H. Ipsen, *Völkerrecht*, 4. Aufl. 1999, § 59, Rn. 28.

weapons in the same or a comparable way a state would use them in course of an armed attack? Do the private actors make use of a *quasi-state* infrastructure and organizational network? Who are the victims (unlimited amount of victims)? What are the means of destruction (e.g. weapons of mass destruction)?<sup>47</sup> Only if the attacks have the quality of a threat to the *whole people*, not to a limited group (e.g. the horrible suicide bombings) the terrorist attacks amount to a “quasi-state” armed attack and the peace securing mechanisms of the UN-Charter can be accordingly applied.

### c. The Present Armed Attack

Self-defense is only allowed against a *present* armed attack.<sup>48</sup> As soon as a singular armed attack has been brought to close, the right to self-defense expires. Preventive self-defense has to be rejected because the risk of abuse is too high – power politics enforced by military means in the name of a natural, inherent right to self-defense would destroy the peace securing scheme the United Nations emphatically stand for.<sup>49</sup> However, the execution and the infrastructure specially of the September 11 attacks force international law scientists (as well as courts) to develop new criteria of what makes an armed attack *present*. Terrorist organizations such as Al Quaida form an *omnipresent, ubiquitous* enemy. Their threats have the most intensive effect since one can not be sure by whom and when the attacks will be realized. As the enemy, the threat is *omnipresent, ubiquitous*. Nevertheless, there has to be a direct connection between the attack and the corresponding defense action. Politics of preventive military action, what some already call a *Bush* doctrine, described by former Secretary of State G. Shultz as

<sup>47</sup> *Idem*.

<sup>48</sup> Fischer, H., Friedenssicherung und friedliche Streitbeilegung, in Ipsen, H., Völkerrecht, 4. Aufl. 1999, § 59, Rn. 38; Bothe, M., Friedenssicherung und Kriegsrecht, in Graf Vitzthum, W. (Hrsg.), Völkerrecht, 2. Aufl. 2001, Rn. 19; Randelzhofer, A., in Simma, B. (Hrsg.), *The Charter of the United Nations. A Commentary*, Article 51, Rn. 34 m. w. N.

<sup>49</sup> As to the dispute regarding preventive self-defense see the reference at Krajewski, M., Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen. Der 11. September 2001 und seine Folgen, AVR 40 (2002), S. 182 ff., 201, and Randelzhofer, A., in Simma, B. (Hrsg.), *The Charter of the United Nations. A Commentary*, Article 51, Rn. 34 f.

transition from “hot pursuit” to “hot pre-emption”,<sup>50</sup> could not be justified by the right of self-defense. A very limited pre-emption, if at all, could only be based upon a UN-Security Council’s Resolution.<sup>51</sup> The criterion of a present armed attack shows again that one very thoroughly has to draw a line of distinction between military actions such as self-defense and criminal prosecution under national or international criminal law.<sup>52</sup>

#### d. The Traget Group of Permissible Self-Defense Measures

It is *self-evident* that self-defense using military means can only be directed towards the aggressor.<sup>53</sup> Here, one has to make a distinction between the terror organization itself and the state of residence supporting and protecting the terrorists.

a) Without any problem the members of terror organizations themselves can be confronted with self-defenses measures as far as the sovereignty of a state is not affected, *e. g.* on the high seas. In practice, however, this will be a rare case. Usually, terror groups start their attacks from the territory of a sovereign state, the territorial sovereignty and integrity of which has to be respected according to international law. However, the state can be held responsible for the relevant actions if it granted a safe haven to terrorists, or, even worse, offered them any kind of support. In so far, a violation of the territorial sovereignty and integrity would be justified. Given the link between the state and the terror group might not be that obvious, the law of neutrality should be applied. According to the neutrality regulations, a state being attacked is allowed to direct all necessary self-defense actions towards the neutral state if the latter one is not *willing* or *able* to stop the aggressions.<sup>54</sup> Modern interna-

<sup>50</sup> Koydl, W., Amerika bekräftigt Recht auf Präventiv-Schläge, SZ dating from June 03, 2002, S. 8; id. S. 4: “Recht des Stärkeren”.

<sup>51</sup> For this question see Ruffert, M., Terrorismusbekämpfung zwischen Selbstverteidigung und kollektiver Sicherheit, ZRP 2002, S. 247 ff., 250 ff.

<sup>52</sup> *Ibidem*, S. 248.

<sup>53</sup> Krajewski, M., Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen. Der 11. September 2001 und seine Folgen, AVR 40 (2002), S. 182 ff., 202 ff.

<sup>54</sup> In general to the question of neutrality Hailbronner, K., “Der Staat und der Einzelne als Völkerrechtssubjekte”, in Graf Vitzthum, W. (Hrsg.), Völkerrecht, 2. Aufl. 2001, 3. Abschn., Rn. 149 ff.; Neuhold, H. (Hrsg.), *The European Neutrals in the 1990s: New Challenges and Opportunities*, 1991.

tional law does neither know an *absolute* concept of sovereignty nor an *insurmountable* shield of territorial integrity.<sup>55</sup>

b) So far, it is clear that the state of residence can be affected by military self-defense measures, if they are first and foremost directed towards the terror groups. Another question is, however, whether the state itself purposefully can be exposed to armed counter-attacks.<sup>56</sup> The benchmark of international law is high and rightfully so. In the *Nicaragua-Case* as well as in the *Teheran-Hostage-Case*, the International Court of Justice held that the aforementioned state itself has to qualify as an aggressor. The merely passive toleration of private attacks was not sufficient to justify a direct counter-attack. Even logistic support or the delivery of weapons –certainly qualifying as “use of force” according to article 2 Nr. 4 UN-Charter– gave no sufficient reason to qualify these measures as an “armed attack” that would allow armed counter-measures of military self-defense, so the Court. Facing internationalized and globalized terror networks today, the complex reality demands a somewhat different concept. Attacks versus the positions of private terror groups can not be exactly separated from attacks versus the state as such. A military strategy, which makes sense, will necessarily also affect the state that means the people, the citizens. The only criterion to be asked for is the following: The defense-measures have to be directed first and foremost towards the aggressors and the innocent population has to be

<sup>55</sup> To the question of sovereignty: Kelsen, H., *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2. Aufl. 1928; Heller, “Die Souveränität (1927)”, in *ders.*, *Gesammelte Schriften*, Bd. 2, 1971, S. 31 ff.; Häberle, P., *Zur gegenwärtigen Diskussion um das Problem der Souveränität (1967/78)*, in *ders.*, *Verfassung als öffentlicher Prozess*, 3. Aufl. 1998, S. 364 ff.; Quaritsch, H., *Staat und Souveränität*, Bd. 1, 1970, S. 243 ff.; *ders.*, *Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jh. bis 1806*, 1986; Wildhaber, L., *Entstehung und Aktualität der Souveränität*, FS K. Eichenberger, 1982, S. 131 ff., 133 ff.; Verdross, A., and Simma, B., *Universelles Völkerrecht*, 3. Aufl. 1984, S. 25 ff.; Saladin, P., *Wozu noch Staaten?*, 1995, S. 28 ff.; Ranzelzhofer, A., *Staatsgewalt und Souveränität*, in: HStR, Bd. I, 2. Aufl. 1995, § 15, Rn. 13 ff.; Müller, J. P., *Wandel des Souveränitätsbegriffs im Lichte der Grundrechte*, in: *Symposion L. Wildhaber*, 1997, S. 45 ff. For reference to the “classics” such as H. Preuß, C. Schmitt, H. Heller, H. Kelsen, A. Haenel, L. Duguit, H. J. Laski and N. Politis see the study of Baldus, M., *Zur Relevanz des Souveränitätsproblems*, *Der Staat* 36 (1997), S. 381 ff., 381-388.

<sup>56</sup> Krajewski, M., *Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen*. *Der 11. September 2001 und seine Folgen*, AVR 40 (2002), S. 182 ff., 205 ff.

spared as far as possible. The *proportionality* of the counter-measures must be guaranteed.

#### e. The Proportionality of Self-Defence Measures

Self-defense against an armed attack must follow the rules of *proportionality*.<sup>57</sup> This is true for the counter-measures as a whole as well as for every single action. International humanitarian law gives some orientation, but one has to admit that there remains an aporia. Whenever life is weighed up against life human dignity is at stake. Nevertheless, there have to be ethical and legally binding regulations for the *ius in bello*, there have to be criteria for the proportionality. The following aspects must be taken into consideration: the distinction between combatants and victims amongst the civil population, the distinction between military and civil targets, the supplies for the civil population, the migration that has to be expected, the duration of the armed attacks, last but not least the kinds of weapons that will be used (no use of weapons of mass destruction!).

## II. THE TREATMENT OF IMPRISONED MEMBERS OF TERROR GROUPS

Members of terror groups do not qualify as combatants and therefore they do not enjoy all the privileges granted to prisoners of war by international law such as the human treatment according to article 13 of the III, Geneva Convention (1949). They are to be treated according to the rules of –national as well as international– criminal law.<sup>58</sup> That means, however, *according to the rule of law*. The international community anxiously awaits an upcoming decision of the US-Supreme Court. Two prisoners of “Camp X-Ray”, Guantanamo Bay, have filed a claim to have standing in US-Courts. Should the Supreme Court grant standing, this would strengthen the gradual emergence of an *international rule of law*, too.

<sup>57</sup> Nicaragua, S. 94, Ziff. 176.

<sup>58</sup> With regard to the very difficult to be answered ethical questions Koydl, W., Einsperren und den Schlüssel wegwerfen. Das Verhalten der US-Behörden gegenüber den nach dem 11. September Internierten stößt mehr und mehr auf den Protest von Bürgerrechtlern, SZ vom 17. Juni 2002, S. 3; furthermore Tomuschat, Ch., Der 11. September 2001 und seine rechtlichen Konsequenzen, EuGRZ 2001, S. 535 ff., 536.

### III. THE JUSTIFICATION OF ANTI-TERROR-MEASURES ACCORDING TO PUBLIC EMERGENCY REGULATIONS

A final word as to the justification of anti-terror-measures applying the “Public Emergency” Regulations. These regulations can be found in national and international criminal law, they also can be found in the most important international covenants on human rights. To give only one example: article 4 Nr. 1 of the “International Covenant on Civil and Political Rights” reads as follows:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 15 section 1 of the European Charter on Human Rights, the model for the cited phrase of the International Covenant, has the same intention. “Public emergency rules”, whether written down in international treaties or national Constitutions, open a limited way to suspend the states from some obligations as to the respect of human rights. Of course, only to a strictly restricted amount and in extreme situations. In such extreme situations, a new balance between liberty and security has to be found. “*Security in Liberty*” changes into “*Liberty thanks to Security*”.<sup>59</sup> However, the right to life must never be suspended. In so far, public emergency rules cannot justify military self-defense measures. Human dignity and liberty are the core values at the very heart of the constitutional State. We never may allow terrorists to destroy them, not in the way, they act, and not in the way, we react.

<sup>59</sup> Denninger, E., Freiheit durch Sicherheit? Anmerkungen zum Terrorismusbekämpfungsgesetz, StV 2002, S. 96 ff.

#### IV. CONCLUSION

The debate about regulations against international terrorism and about legally and ethically justified counter-measures broke new ground in the science of public international law.<sup>60</sup> Facing a tremendous change and manifold uncertainties as to the permissible reactions of those facing a terrorist attack, a comprehensive convention of anti-terror regulations is more than desirable. International and national regulations should go well with each other. The national constitutional states have to be aware of their duty to enforce international law regulations by implementing them into national law. We may not forget that the fight against terror is not war but that it sometimes has the quality of an armed conflict “sort of war”. The September 11 attacks, the war in Afghanistan and Iraq describes a new international reality, a reality of change. Therefore one has to keep in mind what the American international public law scholar J. Cerone said making his “September 11 comment”: “...it is necessary to bear in mind that international law is highly adaptive and subject to dynamic interpretation”.<sup>61</sup>

<sup>60</sup> Tomuschat, Ch., Der 11. September 2001 und seine rechtlichen Konsequenzen, EuGRZ 2001, S. 535 ff., 545.

<sup>61</sup> Cited according to Tomuschat, Ch., Der 11. September 2001 und seine rechtlichen Konsequenzen, EuGRZ 2001, S. 535 ff., 535.