

## EDITORIAL

John B. Bellinger III, principal legal counsel to Condoleezza Rice, gave a speech at the London School of Economics on October 31, 2006. His subject was the legality and legitimacy of the United States' actions in its 'global war on terrorism', with a special focus on the issue of the Guantánamo detention camp. Subsequently, the speech was published in the *German Law Journal*, which is the version of the speech referred to here.<sup>1</sup> In London, Bellinger described as 'vexing' the situation whereby 'so many myths and misunderstandings about United States policies [had] proliferated' and wanted 'to provide a comprehensive public explanation' (Bellinger 2007a, 735).

Bellinger's first point was that the United States is not conducting police action, but rather waging a genuine war against an identifiable enemy, the Taliban, formerly the government of Afghanistan, and al Qaida. Some of the critics had argued that the war must have ended when the Taliban were removed from power and the new government was installed. According to Bellinger, this is an incorrect view in that it wrongly presumes that there can be war only between nation states. The Taliban group and al Qaida still exist and continue fighting the United States, in Afghanistan and elsewhere. Thus, the war-is-over argument is evidently not 'consistent with the facts on the ground' (*id.* 737). It is these *facts on the ground* that determine whether there is a war still going on.

Other critics, according to Bellinger, admit that it is appropriate to consider the United States action as war. Yet the United States should not, according to those critics, be conferred the rights of a warring state anywhere on the globe: it should limit its military action to Afghanistan. This, for Bellinger, is wishful thinking. If al Qaida restricted its activities to the territory of Afghanistan all would be fine, he maintains, but 'that is not the reality we face' (*id.* 739). According to Bellinger, the United States has the right to use military force in the territory of another country, if that country fails to prevent terrorists using its soil (*ib.*). The United States does not

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<sup>1</sup> The speech is also available on the London School of Economics homepage <[www.lse.ac.uk](http://www.lse.ac.uk)>, search 'Bellinger', and on the United States' Department of State homepage <[www.state.gov/s/l/rls/76039.htm](http://www.state.gov/s/l/rls/76039.htm)>. Doctor Silja N.U. Vöneky from the Heidelberg-based Max Planck Institute for Comparative Public Law and International Law responded to Bellinger's speech in the same issue of the *German Law Journal*. In reply to Vöneky, Bellinger wrote another piece that was published in the *German Law Journal* in September this year. See Vöneky 2007 and Bellinger 2007b.

exactly have the right, judging by Bellinger's speech as a whole, but rather the *reality we face* necessitates that the United States has the right.

So we come to the consequence of Bellinger's *facts on the ground* and *reality we face*: there are no limits – neither in time (what is the duration of war?), nor in space (where is war conducted?) – to the prevailing suspension of the normal state.<sup>2</sup> Hence, again, 'the "state of emergency" in which we live is not the exception but the rule' (Benjamin 1979, 259). In a state of exception, the juridical order, no longer capable of maintaining social order, is deleted or withdrawn *in tutto totalmente*. The executive and military authorities assume boundless powers. They use whatever means they think efficacious for the purpose of restoring order.<sup>3</sup>

So, the world is now placed in a state of exception, and most important tangible consequences ensue. These are concrete and direct for the individuals concerned and symbolic and indirect for the public at large. The most striking among these consequences is the United States practice of capturing people from various places in the world without treating them as 'criminal suspects'.<sup>4</sup> This status would afford them definite legal protection, most basically the *habeas corpus*. But the detainees are something other than criminal suspects.

What is this other? Surely they are prisoners of war? But here we come to the second of Bellinger's points. Detainees of this war are not prisoners of war (POW) in the sense of the Geneva Conventions. This time, says Bellinger, their exclusion is not due to facts or reality, but is instead 'a matter of treaty structure' (Bellinger 2007a, 742). Indeed, the third Geneva Convention, relative to the Treatment of Prisoners of War (1949), stipulates that the Convention applies to wars 'between two or more of the High Contracting Parties' (Art 2). To be a prisoner of war, the war in question needs to be, this time, between states.

The United States claims its *jus ad bellum*, right to war, but denies the responsibilities of the *jus in bello*, laws in war, as to the detainees. According to Bellinger's commentator in the *German Law Journal*, Silja N.U. Vöneky, this is not

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<sup>2</sup> Such exceptional situations are not determined by law but decided by the 'sovereign', says Carl Schmitt in the famous postulate which opens his *Political Theology* (1985, 11).

<sup>3</sup> Carl Schmitt says that here 'the exception reveals a specifically juridical form element, the decision, in its absolute purity'. To be valid and meaningful, the juridical order requires a state of normality in the political society, and the concrete decision to declare a state of emergency (not the decision as pervasive form element of law) is about whether the normal or exceptional situation prevails. See Schmitt 1985, 19.

<sup>4</sup> On the secret CIA flights and detention centres, see the report by the Committee on Legal Affairs and Human Rights of the Council of Europe, Parliamentary Assembly. Doc. 10957 of 12 June 2006, attached to Resolution 1057 of the Parliamentary Assembly. Available at <[http://assembly.coe.int/ASP/Doc/ATListing\\_E.asp](http://assembly.coe.int/ASP/Doc/ATListing_E.asp)>.

right. It is a political choice whether states decide to fight terrorists by military means or not, but ‘if states fight terrorists by military means, the traditional laws of armed conflict apply’ (Vöneky 2007, 749). Vöneky declares ‘[i]t is settled law that the *ius in bello* applies from the beginning of any situation constituting an armed conflict’ (*id.*, 750).

Yet the crucial question remains: *what* are the detainees according to the *ius in bello* definition, if they are not POWs? According to Bellinger, they are ‘unlawful combatants’ (Bellinger 2007a, 744). Vöneky says they are ‘offensive civilians’ (Vöneky 2007, 752). Vöneky’s definition exempts the states from the *ius in bello* obligation to refrain from attacking civilians, but does not create a lacuna by making them outlaws bereft of all legal protection. They are still civilians. Hence, if detained, *habeas corpus*.

What, for Bellinger, does ‘unlawful combatant’ entail as a term designating a legal status? Bellinger says that it is a term long used in international law, but does not elaborate further as to what meaning has been established for it there.<sup>5</sup> Instead, he demonstrates a new product, namely, a purpose-built ‘comprehensive framework of legislative rules and administrative procedures to govern the detention, treatment, interrogation, and trial of suspected members of al Qaida and Taliban’ (Bellinger 2007a, 742). This, according to Bellinger, consists of administrative review procedures, judicial review procedures, and clear rules about standards of treatment (*id.* 742–744).

This is fine as far as it goes. One should no longer, urges Bellinger, ‘focus on the theoretical’, but turn to examining how the United States legal actors in the new framework ‘work in practice’ (*id.* 744). Moreover, as the distinction between ‘offensive civilian’ and ‘unlawful combatant’ really does not make much difference in practice, he says, one should now confront the issue ‘directly’ and not ‘engage in theoretical arguments about legal categories’ (Bellinger 2007b, 876). In fact, in May 2007, the United Nations Special Rapporteur Martin Scheinin paid a visit to the United States precisely for those purposes – the examination of the work in practice and the direct engagement with the issue. Scheinin, however, ‘was not provided with access to places of detention, including at Guantánamo Bay, with guarantees permitting private interviews of detainees’.<sup>6</sup> Thus, it seems, what Bellinger suggests is not yet possible.

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<sup>5</sup> On this point, see Rosas 1976, 311–312, 353–358.

<sup>6</sup> Office of the United Nations High Commissioner for Human Rights Press Release, published on 29 May, 2007, ‘Preliminary Findings on Visit to United States by Special Rapporteur on Promotion and Protection of Human Rights while Countering Terrorism’. Available at <[www.ohchr.org/english/press/newsFrameset-2.htm](http://www.ohchr.org/english/press/newsFrameset-2.htm)>.

In the meantime, a glance at history might be in order here. In the classic treatise on the subject, *The Legal Status of Prisoners of War* by Allan Rosas, one finds a passage showing considerable tragic irony as to the present debate. The following is a quote from a letter sent in August 1965 by the authorities of the Democratic Republic of Vietnam (denying captured United States pilots POW status) to the International Committee of the Red Cross. In the letter, the Vietnamese explain that they

[...] consider the actions of the US Government and its agents in Saigon as acts of piracy and regard the pilots who have carried out pirate-raids, destroying the property and massacring the population of the Democratic Republic of Vietnam, as major criminals caught in *flagrante delicto* and liable for judgement in accordance with the laws of the Democratic Republic of Vietnam, although captured pilots are well treated.<sup>7</sup>

But let us go to the core of the present disagreement. Vöneky's point is that even though the Geneva Conventions were not framed with the present situation in mind, they should still be preserved. They are applicable and guide us well – 'the rules of international law', she notes, 'are wiser than their framers' (Vöneky 2007, 748). Bellinger's main thrust is precisely the opposite: his 'hope is that this conversation will result in the recognition that the threat posed by al Qaida does not neatly fit within existing legal frameworks' (Bellinger 2007b, 878). Thus, while Vöneky tries to reintroduce clarity into the prevailing law by way of interpretation, Bellinger's advocacy is based on the thesis of insurmountable legal haziness and inapplicability.

I can see that many on the 'European' side are afraid that the international community is about to stumble really badly here. They are genuinely worried for the precious achievements of the 20th century in the field of humanitarian law. What Vöneky says, reflecting on the post World War II drafting situation of the Geneva Conventions, is convincing. Al Qaida may be amorphous, but it is not a greater evil than the Nazis. Fighting injustice with injustice still defeats one's own case, practically and morally – 'it is not *despite the fact that* we all want to prevent and fight terrorism that we need to apply these minimum standards [of humanitarian law]; it is *because* we want to prevent and fight terrorism that we have to apply them' (Vöneky 2007, 756).

Bellinger says that the 'existing rules' of international law 'still serve a critical role in dealing with the situations for which we developed them' (Bellinger 2007a, 736), but the situation created by the events of September 11th in New York is not

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<sup>7</sup> Rosas 1976, 177. Rosas gives a reference to the *5 International Review of the Red Cross* 1965, 527–528.

among these (*id.* 741). These events constituted bare factual necessity. *Necessitas legem non habet*, necessity has no laws, as the old adage has it – but there is another one too: *e facto oritur ius*, law arises from fact (Agamben 2005, 26–29). Should one perhaps, for the future, worry not so much about the violations of the existing law, but about some wholly new type of law only just emerging?<sup>8</sup>

The ‘counterterrorist action’, a term implying that the methods utilized resemble those of the terrorists themselves, will perhaps not be conducted in such an openly obscene way after the next United States presidential elections. Yet it may be the case that President Bush did us all a service by not being able to keep his camps and other centres of torture secret: now we know. But what in fact do we know? Is the world dramatically changing and an entirely new type of law emerging? Or is it merely the old type showing the venom it has carried all along?

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<sup>8</sup> The law of ‘terrorist lists’ might serve as an instance of this new, emerging type of law. See: <[www.statewatch.org/terrorlists/terrorlists.html](http://www.statewatch.org/terrorlists/terrorlists.html)>. Kimmo Nuotio, focussing on the deeper level of legal-cultural change observable in the impact of transnational criminal law on the classical criminal law, issues an urgent warning: ‘We should not let the “militarism” of counter-terrorism militarize criminal justice’ (Nuotio 2006, 1016).

Vöneky, Silja N. U.: *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. 8 (7) German Law Journal (2007), 747–759.  
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