Watershed or Phoenix From The Ashes ? – Speculations On The Future Of International Law After The September 11 Attacks

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[1] In the first place, I should like to stress that the emphasis of my rather ambitious-sounding subtitle is on ‘speculation', and not on ‘the future of international law'; for one, it is, at least at the time of writing, entirely speculative to think about the mid- and long-term consequences of the September 11 attacks, since, so far, the announced response to the attacks by the United States, the ‘West' and the ‘civilised world', has not yet happened. We are in a strange state of limbo, where everything seems possible, from secret James Bond-type operations to outright military attack of Afghanistan by the US and NATO troops, from civil war in Pakistan to biological –or even nuclear- counterattacks by the terrorist fold, from ‘business as (almost) usual' to ‘the world is out of joint'. At such times, to speculate is not only all one can do, but it is, I believe, positively encouraged for those who professionally and/or passionately deal with the structure and meaning of social reality, as, *inter alia*, international legal academics do. Secondly, the emphasis is also on speculation because, evidently, it would be quite preposterous to pretend to set out, in a very brief comment written ‘out of the moment', what all this will come to mean for so richly textured an academic discourse as international law. Yet international law and international lawyers are in everyone's mouth at this moment, and so it seems precisely apt to ‘speculate' –and no more-, in rough sketch, about the consequences the events of September 11 and their political-military aftermath could have on the theory and practice of the ‘law of nations'. [2] The ‘terrorist attacks' on two highly charged symbols of American(1) , and, indeed, ‘Western', politico-economic might, and the inevitably emotional and zealous responses they are likely to trigger, have suddenly brought international law to a critical juncture, which could prove decisive for the future role and relevance of the discourse and the discipline. Though it may just scrape by the first of the alternatives alluded to in the main title, namely death without resurrection, international law, as it has heretofore been conceived, will find it very difficult to pass over these "polarised and confusing times"(2) by mere professional self-affirmation and remain unscathed. Indeed, intellectual honesty, rather than professional integrity, probably demands that the second alternative, death followed (perhaps) by transfigured resurrection, is seriously contemplated by international lawyers, and that, hence, the September 11 events are approached, early on, as defining moments that may leave a profound mark on how the normative network of inter-state relations can be conceived. [3] *Prima facie*, the problem seems simply to be that, as John Cerone has put it, "[the terrorist attacks and possible reprisals do not] fit the model that international law provides"(3) . Although there is, of course, not one model provided by international law but many, the issue of non-state actors, how their actions can be classified and what responses can be given to them, as well as whether - as individuals - they can or could be held accountable before national or ad-hoc tribunals, or the ICC, must, by definition, go to the core of a law conceived of as governing the relations between sovereign states. And, *prima facie* unlike the Gulf War, which was generally held to have been, by and large, legal according to the classical canon, and the Kosovo intervention, which, despite many efforts to argue it into legality, had, in the end, been considered illegal by most commentators, in the present case, the question is not (yet) whether actual and potential actions are legal or illegal, but how they can be legally dealt with, given the fact that many aspects of them are simply outside of the classical canon of international law. On a superficial reading, this fact does not have to overly disturb mainstream international lawyers since, in a way, September 11 could be seen as just another, perhaps only slighter harder, hard case, in line with the Kosovo intervention, namely one involving *lacunae* in the canon, or the uncertain penumbrae of such otherwise well-established terms as ‘armed conflict', ‘legitimate self-defence', or ‘crimes against humanity' etc. Although such ‘gaps' and uncertainties are potentially threatening to law's completeness and determinacy - a presumption inherent in the classical conception of law as a system of hierarchically related norms -, most modern international lawyers have few qualms to ‘argue over' such gaps. Indeed, many are currently already doing so by means of the two-sided argument typical for mainstream international law discourse and which Martti Koskenniemi has usefully identified as being in between apology and utopia(4) . On the apology side, mainstream scholars have been trying, more or less easily or uneasily, to legally bolster ‘Western governments' ' current rhetoric by arguing, among others, that either war or armed conflict are applicable categories to the September 11 events and the potential military reaction by the US and its allies, that that reaction could constitute legitimate self-defence, and that this kind of terrorism constitutes a crime against humanity potentially indictable before the ICC(5) . On the utopia side, most commentators have formulated the (legal) conditions that armed reactions should fulfil in order to be considered legal according to the canon, namely to not violate the Charter and, most of all, to be authorised by the Security Council at all times(6) . This way, what seemed to be a ‘gap' is brought back into the fold of international law and the latter's integrity as a hierarchically ordered and all-encompassing system of norms which can be objectively asserted is assured under the motto ‘as long as it is legal, it is OK'. [4] Yet, is it really all that easy ? Can discipline and profession really let themselves off the hook of "September 11" merely by applying the usual layers of constructivist plaster ? Or is there not a danger that international law will thus be heading straight into its realist nemesis - which it ordinarily tries to suppress -, namely of being phenomenally besides the point ? If one looks, for example, at the

extraordinary – and extraordinarily dangerous - coalition most if not all of the big international players have forged overnight, and their joint determination to deal terrorism a heavy blow, as well as the implications this may have for international peace and security and domestic and international human rights, it seems nearly preposterous that (one of the) only comments international lawyers seem to have is that it would be desirable to have Security Council authorisation for all that follows; as if, under current conditions, that organ, dominated by precisely those players, whose collective determination was cemented far outside of its chambers, and which will only speak in the broadest and most non-committal language, really made any serious difference simply by formally authorising this or that reprisal action. Indeed, in extreme times such as these, the mere insistence on the formal criteria of legality flies in the face of any serious attempt to assess the role and relevance of norms in international relations. This is, however, not to say that at times when state practice is in danger of ignoring the canon of international law, a 'might-makes-right' type realism would be the best way to describe the situation; nor does it mean that the Security Council is worthless and has no role in normativising state conduct. Rather, the point is that events such as those of September 11 are constitutive moments in which the structure and the substance of international law is radically put into question and in which the normative universe of international actors needs to be rethought, re-described and, perhaps, even eventually re-codified. [5]One possible starting point is an analysis of what precisely has been shattered in international law by the September 11 attacks. Like the City of New York, international law may have lost its Twin Towers, i.e. two of the central pillars of the system. One, which was already alluded to, is the law's internal coherence and determinacy, the other is its rigid separation from external social reality. Yet, unlike the Twin Towers (and the Pentagon), in the case of international law, the events of September 11 do not represent a sudden and entirely unexpected explosion of otherwise rock solid foundations but rather the (temporary) apex of a process of erosion which has been taking place for some time, or which, indeed, may be inherent to international law as a discrete discipline. As to the first Tower, the already mentioned lacunae that surround the (not yet quite) category of non-state actors can also be seen in light of two contradictory trends: on one hand, the original, Westphalian 'project' of international law is based on the domestication of the state of nature among sovereign nation states by means of law, complemented, in the aftermath of 1789, by the (domestic) democratic legitimation of that sovereign power(7) . On the other hand, however, that chess-board image of international society has been increasingly cross-cut both by processes of nation-state fragmentation as well as globalisation and transnationalisation, in which the primary actors are super- or, more often, sub-state entities and, ultimately, individuals. State-based international law has always had difficulties in dealing with these 'alien' creatures and its responses have been varied: the probably earliest and best known is in relation to human rights, where a separate (sub-)discipline has differentiated itself off its parent discipline. Yet already international human rights law has come to increasingly challenged state-based international law by making ever growing inroads into the traditional concept of sovereignty and inter-state relations. And, seemingly to the consternation of (some) international lawyers, states themselves have partially begun to play the game, not so much by voluntarily surrendering sovereignty, but by, for example, strategically using human rights as a legitimatory device for infringements of other states' sovereignty. The –perhaps unintended- consequence is, of course, a further shift away from the normativisation of inter-state relations, and towards the normativisation of relations between groups and individuals, or, as Habermas puts it, from the law of peoples to the law of world citizens . This has, of course, little to do with the liberal utopia of states happily converging towards (liberal) world society, as some international legal scholars have it, but it is rather a sign of the increasing de-hierarchisation, and de-centring of legal relationships; a reading of social reality which spells disaster on canonical international law, since it destroys the supposed objectivity, determinacy, certainty and unity of the law, and, indeed, introduces instead a multiplicity of applicable laws . While this is arguably a process under way for some time, the September 11 events could turn out to be at least a temporary high point; its complex entanglement of state and non-state actors has been causing much confusion and seems to have instilled in many legal commentators an uneasiness which betrays definite discomfort at having to tread new lands, and anxiety about possibly being in (all too thin) air; it is, for example, (almost) comic to compare how, during the Kosovo intervention, carried out by states against a state, a considerable effort was made to not classify the high altitude bombings as an act of war, whereas now, an even greater effort is being made to be able to call the terrorist attacks, carried out by non-states –namely a highly multinational group of individuals-, an act of war. In addition, states 'harbouring' terrorists, it is argued, may legally be held accountable and/or included in 'defensive/preventive' action, i.e. attacks on Afghanistan and terrorist strongholds in otherwise 'friendly' states, as well as possibly on Iraq may be carried out (if authorised by the Security Council), yet, as far as is currently known, all the actual perpetrators lived freely in and used the infrastructure of most European countries, and, indeed, the US itself; these states will, evidently, not be attacked, and efforts instead focus on genuinely multilateral co-operation in security matters; hence states seem to need to justify their conduct viz. non-nationals in their territory, even if these non-nationals may have no formal or effective link with the government of the states they are in. Lastly, though not exhaustively, it is also a remarkable development that Usama Bin Laden and others could, according to the prevailing view, be accused of crimes against humanity, even though his criminal acts are not at all linked to any state, and not even to a territorial insurgency by non-state actors striving to establish a new state or to replace the government of an existing one. Here, too, the trend is clearly towards a 'world criminal law' –the term 'international' being precisely misleading-, part of a 'world citizens' law' which is not, however, based (yet -though it may never be) on the institutionalised hierarchy characteristic of domestic (state) law. For this reason, these trends are at best projections, which may, however, in themselves create expectations and harden into (soft) normative frameworks guiding

international actors; however, any normative hardening or even institutionalisation is unlikely to ever establish the equivalent of hierarchically organised state law on the world level, and, hence, normative content is going to emerge, as it already frequently though unacknowledgedly does, through an ongoing process of *bricolage*. [6] The second Tower that has possibly fallen into shambles concerns one of the foundational dogmas of law as a distinct discipline, namely the separation of 'is' and 'ought', or of concreteness and normativity(10) , which has its methodological equivalent in the Hartian distinction between internal and external perspective. Ultimately, this distinction also concerns the relationship between law and morality, or legality and legitimacy. Unlike domestic law, where at least legal positivists could, to a large extend, rely on the fact that the 'ought', indeed, is, i.e. that law is institutionally backed up and, that it is to those under it simply a fact of life, international lawyers would seem to have always faced the double task of, in the first place asserting what the law is, and only then to proceed to its systematisation and dogmatisation. The complex discursive dynamics of that assertion, as well as its recursive interaction with the law's subjects –i.e. states- goes beyond the ambit of this note, but what is relevant here is that for international lawyers the internal and external perspective has always been closer together than for their domestic equivalents, except that this has not generally been acknowledged; leaving the extreme apologism of policy science and hard-core realism aside, most mainstream international lawyers seem to have arranged for themselves a disciplinary niche in which the 'is-ness' of international law is taken for granted, even if certain challenges to it are occasionally admitted. And it is from that niche that international lawyers can set out to discuss the legality and illegality of state –and non-state- actions, even if faced with prima facie contradictory state practice, utter disobedience of the prescripts of international law, or simple ignorance. Yet, unlike in the domestic realm, where institutionally backed-up, and (ideally) democratically generated law assures social integration and order by precisely not relying on (moral) persuasion(11) , but on real and effective sanctions, the affirmation of legality in international law often amounts to nothing more (or less) than precisely a moral appeal; in a sense, there lies a procedural 'should' hidden behind the 'ought' which conveys to the international actor that the only way he/she can legitimate his/her action is by it being legal. The discipline-sustaining formula of "*legitimacy through legality*" ultimately bases its justification on the basic Hobbesian idea of overcoming a brutal state of a-legal anarchy and chaos, which, funnily enough, still features prominently in certain international lawyer's admonitions in the wake of September 11: respect international law, or risk falling back into the state of nature. Yet this is precisely what the fall of the Towers seems, *prima facie*, to signify, namely the return of a very basic survival instinct of at least certain states, and the consequent replacement of international diplomacy by nationalist rhetoric –'we want him dead or alive'-, as well as of international law by the 'clash of civilisations'. Of course, the scenario is not quite so bleak as yet, but, it is potentially as lethal to the 'law-ness' of international law as it is to persons and property. Although it would be preposterous to claim to know what should be done in the face of disaster, the one thing international lawyers should not do is to close ranks within their niche and pretend that this episode can be overcome by the mere restatement of 'the law'. Instead, this could be an opportunity to open up to the above mentioned multiplicity of normative constellations, and, most of all, to acknowledge the rhetorical-persuasive, and in that sense (only), moral, character of international law. For there will be much to persuade international actors about. [7] The preceding paragraphs are, evidently, only a very brief sketch of how September 11 may affect international law; some of the assertions may be overly hasty, and much has to worked out. Although some may detect a hidden realism, or scepticism, behind some of the assumptions made, this is not the intention at all. On the contrary, much of the argument is meant to show that international law is, indeed, at a critical juncture, and that it now has the option to either loose its theoretical and practical grip on international relations by going on with 'business as usual', or to take this watershed as an opportunity to reinvent itself, not radically, nor revolutionarily, but step-by-step by opening up to the current and future developments. This could include, *inter alia*, the shedding of the (almost) exclusive focus on the state and the reconception of the subjects of international law as a host of state and non-state actors, a forward looking theory of sources, and the substantive reassessment of international organisations with regard to their representativity and overall functioning. In the end, international law may rise again, like phoenix from the ashes.

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(1) The use of the term ‚American' rather than ‚US', or ‚US American' is for the sake of simplicity only, and is not meant to subscribe to the notion that the US has the monopoly over 'American-ness', as is, unfortunately, occasionally done.
(2) Roth, K.: Letter to the members of the Human Rights Watch community, Human Rights Watch, September 21, 2001, at http://www.hrw.org/campaigns/september11/community.htm
(3) Cerone, J.: "Comment: Acts of War and State Responsibility in ‚Muddy Waters': the non-state actor dilemma", in ASIL Insights: terrorist attacks on the World Trade Centre and the Pentagon, September 2001, at http://qqq.asil.org/insights/insigh77.htm
(4) Koskenniemi, M.: *From Apology to Utopia*, Helsinki: Finnsih Lawyers' Publishing Company, 1989, p. 22ff.
(5) *See* the various contributions in the ASIL Insights: terrorist attacks on the World Trade Centre and the Pentagon, September 2001, at http://qqq.asil.org/insights/insigh77.htm
(6) *See, for example*, Pellet, A.: „Non, ce n'est pas la guerre !", in Le Monde 20/09/2001, at http://www.lemonde.fr/rech_art/0,5987,222831,00.html

(7) Habermas, J.: „Bestialität und Humanitaet – Ein Krieg and der Grenze zwischen Recht und Moral-", in Die Zeit, 18, 1999, also available at http://www.zeit.de/1999/18/199918_krieg.html
(8) *Ibid.*
(9) For a good account of such ‚law without a state, *see*, among others, Teubner, G.: „Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts", in Brunkhorst, H./Kettner, M.: Globalisierung und Demokratie, Frankfurt a.M.: Surkamp, 2000
(10) Koskenniemi (1989), p. 2
(11) *See* Habermas, J.: *Faktizitaet und Geltung – Beitraege zur Diskurstheorie des Rechts und des Demokratischen Rechtsstaats*, 4th ed., Frankfurt a.M.: Suhrkamp, 1994.