

MILITARY INTERVENTION AS A MATTER OF DISPUTE IN TRANSATLANTIC RELATIONS

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ABSTRACT

The allied invasion in Iraq and its aftermath highlight considerable discrepancies in the attitude towards the use of force between the current US administration and most EU member States. Still, both sides of the Atlantic are firmly committed to the UN Charter and the binding force of public international law. There is considerable unity in the possible justification of humanitarian intervention. The main point of contention lies in the different perception of preventive self-defense.

Together with other members of the international community, the US and the European Union should work towards a common set of criteria for intervention which clearly respects the prerogatives of UN Security Council for the maintenance and restoration of peace and international security.

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INTERVENCIÓN MILITAR COMO PUNTO DE CONTENCIÓN EN LAS RELACIONES TRANSATLÁNTICAS

RESUMEN

La invasión aliada de Irak muestra marcadas discrepancias con relación al derecho internacional público en las relaciones transatlánticas. Hay en particular percepciones distintas del uso de la fuerza militar y su posible justificación. La mayoría de los Estados miembros de la Unión Europea (“la Europa antigua”) rechaza conceptos bastante audaces de la auto-defensa en ausencia de una amenaza tangible, de la ejecución unilateral de resoluciones del Consejo de Seguridad o del llamado cambio de régimen como título de intervención. Finalmente hay diferencias entre los Estados europeos y la actual administración de Estados Unidos sobre el tratamiento de miembros de organizaciones “enemigas-no estatales” en un conflicto armado.

Sin embargo, falta resaltar que Estados Unidos y los países de la Unión Europea comparten una base común: ambos lados fundamentan su política exterior y de defensa en el reconocimiento del derecho internacional público y su normatividad vinculante respecto de las opciones políticas. Ambas partes reconocen la prioridad del Consejo de Seguridad para el mantenimiento de la paz y la seguridad internacional. La intervención de varios miembros europeos de la OTAN y de Estados Unidos en el conflicto del Kosovo, se basa en la justificación común de la intervención humanitaria en casos de genocidio y de similares violaciones masivas de derechos humanos.

Persisten diferencias importantes en la justificación de la autodefensa preventiva en las doctrinas de seguridad de la Unión Europea y de Estados Unidos. Los cinco criterios para la intervención colectiva (relativos al Consejo de Seguridad) propuestos por el “Panel de Alto Nivel” con miras a la reforma de la ONU podrían servir como base común para una intervención unilateral, si el Consejo de Seguridad no logra cumplir de manera efectiva su responsabilidad según la Carta de la ONU.

Palabras clave: *Derecho internacional; Carta de la ONU; intervención humanitaria; auto-defensa; Europa; EE.UU.*

I. UNITY AND DIVERSITY IN TRANSATLANTIC RELATIONS

In the aftermath of the US- and British-lead military intervention in Iraq much emphasis has been put on the rift which separates the United States and Europe in their attitude to international law. The United States is often portrayed as the hegemon which, in pursuing its national interest in global affairs, has severed itself from the ties of international law, while the European States which did not join the “coalition of the willing” are idealised as faithful defenders of normativity and multilateralism in international relations. Robert Kagan’s *Paradise and Power* couches these clichés in the imagery of Venus and Mars¹.

However, there is a far more complex blend of unity and diversity in the transatlantic discourse on the proper role of international law. In fact, a sober stock-taking reveals that on balance there is more unity than diversity across the Atlantic in defining the legal limits of military intervention in international affairs.

1 Robert Kagan, *Paradise and Power: America and Europe in the New World Order*, 2004.

II. AREAS OF CONSENSUS

A. INTERNATIONAL LAW AS A BINDING CONSTRAINT ON THE UNILATERAL USE OF FORCE

It is vital to recall that both sides of the Atlantic stand firmly on the ground of the UN Charter and public international law. This observation holds also true for the US National Security Strategy of 2002 and 2006 which – while clearly exposing the inadequacy of the traditional Charter mechanism of collective security in view the new global challenges of terrorism and “weapons of mass destruction” – remains firmly committed to international law and recognises in principle that multilateral action mandated by the Security Council should take precedence over any unilateral use of force.

The highly contentious doctrine of pre-emptive self-defense introduced by the US National Security Strategy does not as such question the constraints which the UN Charter puts on military options. It rather tries to move the border posts of international law by a process of dynamic interpretation. The US National Security Strategy hence does not declare the Charter dead, but rather attempts to reanimate it by treating it as a “living instrument” which adapts itself to new global challenges. Its merit lies in squarely addressing the palpable risks emanating from inherently aggressive regimes and terrorist organisations having weapons of mass destruction at their disposal. The traditional reading of the UN Charter and its rules on self-defence still prevailing in Old Europe focuses on actual or imminent attacks rather than such risks which cannot be handled by any action *ex post facto*.

While there appears to be a wide consensus between the US and Europe on the basic principles governing the use of force in international relations (*ius ad bellum*), the treatment of detainees in Guantanamo Bay and the CIA practice of “rendition” flights point to serious disagreements as to the legal constraints imposed by the Geneva Conventions (*ius in bello*). However, the recent

Supreme Court judgment in the case *Hamdan v. Rumsfeld*² which held common Article 3 of the Geneva Conventions applicable to the detainees in Guantanamo Bay signals the prospect of a growing transatlantic consensus with regard to the humanitarian imperatives of the *ius in bello*. Recent US legislation on illegal combatants again adds darker colours to this picture.

The differences which remain in the transatlantic perception of the role of international law as a constraint on military might therefore mainly concern a question of legal policy: Is the existing Charter framework still adequate for today's challenges to international security? Or have we – as US international lawyers have recently put it – reached the “limits of international law”³ and do we therefore need a radical overhaul of the current system of collective security lest international law loses its “pull to compliance”?

B. HUMANITARIAN INTERVENTION

With regard to the so-called doctrine humanitarian intervention the United States and Europe have *jointly* pushed the limits of international law. Both the United States and its European NATO partners agreed that NATO's military intervention in Yugoslavia with the aim of saving the Albanian population in Kosovo from “ethnic cleansing” did not only follow a moral command but was also *legally* justified (despite the lack of authorisation by the Security Council). It is important to recall that the legality of such humanitarian interventions remains highly controversial in the international community. In fact, the joint contention of the US and Europe that individual States or regional organisations may, in extreme cases (if the Security Council is unable or unwilling to react effectively), prevent or stop massive violations of human rights by military force, meets with little enthusiasm amongst the other members of the United Nations. The more than 130 non-aligned states of the so-called Group of 77 have recently reiterated

2 126 S.Ct. 2749 (2006).

3 Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law*, 2005.

their unequivocal rejection of “the (...) ‘right’ of humanitarian intervention” as having “no legal basis in the United Nations Charter or in the general principles of international law”⁴.

With a view to this phalanx of rejection, Europe’s and the United States’ assertion that the concept of humanitarian intervention may nevertheless provide a justification for the unilateral use of force points to a radical departure from the traditional perception of international law as (essentially) being based on the consent of the members of the international community.

C. THE “TRANSATLANTIC” VISION OF INTERNATIONAL LAW AS AN “ORDER OF VALUES”

We witness a new “transatlantic” vision which qualifies the international legal order is transformed into an international “order of values”. International law is perceived as being founded on certain substantive “constitutional” values which do not only encompass the prohibition of the use of force but also certain other values such as the self-preservation of each State and the protection of certain fundamental human rights. The prohibition of the use of force is therefore not considered an *absolute* value but may – in certain extreme cases– be subject to being balanced against other core values of the international community.

It remains, however, doubtful whether such a dynamic value-oriented approach may also trump the will of the overwhelming majority of States. The task incumbent on Europe and the United States will therefore primarily lie in convincing the other members of the international community that the risks involved in standing by idly when “the conscience of humanity” calls are higher than the risk of humanitarian interventions being abused for ulterior motives. This can only be attained by facilitating a universal consensus on strict criteria against which the legality of unilateral humanitarian

4 Para. 2 of the Second South Summit Declaration, Doha, 12-16 June 2005, in conjunction with para. 54 of the First South Summit Declaration, Havana, 10-14 April 2000.

interventions can be tested. The catalogue of criteria which the European Parliament formulated as early as 1994⁵ could serve as a useful starting point for this process.

III. PREEMPTIVE SELF-DEFENCE ACCORDING TO THE US NATIONAL SECURITY STRATEGY

The doctrine of pre-emptive self-defence which the United States first formulated in its 2002 National Security Strategy (NSS)⁶ remains the major bone of contention in the transatlantic discourse on the “limits of international law”. On the basis of the observation that international law “[f]or centuries (...) recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack”, the NSS maintains that the concept of imminent threat must be adapted “to the capabilities and objectives of today’s adversaries”. Covert strategies of terrorists and the destructive potential of weapons of mass destruction in the hand of rogue states make it necessary –according to the NSS– to move the threshold for justified self-defence forward:

“The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack”.

Although the European Union’s Security Strategy of 2003 also recognises that international law must be adapted to new “dynamic” threats, it has stopped short of endorsing the United States concept of pre-emptive engagement and instead emphasises the need for more effective multilateral action⁷.

5 Gazeta de la UE 1994 No. C 128, p. 225.

6 The National Security Strategy of the United States of America, September 2002, available at www.whitehouse.gov/nsc/nss.html See also The National Security Strategy of the United States of America, March 2006, available at www.whitehouse.gov/nsc/nss/2006.html

7 A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003, available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>

In assessing the merits of the US Security Strategy an important point needs to be clarified at the outset: The discourse on the legitimacy of the doctrine of pre-emptive self-defence has so far been largely conducted under the immediate impression of the military intervention in Iraq. Iraq was, however, not a case which could be reasonably understood as an instance of pre-emptive self-defence. The Iraq-invasion does therefore not “contaminate” the National Security Strategy because, on its own terms, it could plainly not be regarded as pre-emptive self-defence. The military intervention in Iraq accordingly neither corroborates nor detracts from the legitimacy of the US Security Strategy.

At the heart of the discussion about the legitimacy of pre-emptive self-defence lies the question how much leeway the United Nations system of collective security can grant to unilateral measures without putting its *raison d'être* at risk. However, conversely, the question has to be asked how much room such a multilateral security system must allow for unilateral action with a view to securing its acceptance and legitimacy. The United Nations can only claim legitimacy for denying its member States the unilateral resort to force if the system of collective security offers reliable and effective protection in return.

IV. CHALLENGES FOR THE FUTURE

Hence, if international law and the Charter system of collective security are to preserve their “pull to compliance” two challenges must be met:

1. The effectiveness of the UN system of collective security has to be enhanced in view of the new threats to international peace and security posed by international terrorism and weapons of mass destruction. The members of the Security Council –and in particular the five permanent members-- have to be reminded of the fact that they act as trustees on behalf of the entire international community. This fiduciary duty with which the Security Council and each of its members has been entrusted lies at the heart of the “responsibility

to protect” which the 2005 World Summit endorsed as an emerging norm of international law⁸.

2. The unilateral resort to force – and in particular pre-emptive self-defence – (which given the inadequacy of the current system of collective security appears to be inevitable in certain instances) has to be conditioned on clear objective criteria. As in the case of humanitarian intervention the doctrine of pre-emptive self-defence will only be perceived as legitimate by the international community if its exercise is subjected to strict universally recognised conditions. First of all, any legitimate action must be based on persuasive evidence that a manifest potential of mass destruction may be deployed at any given time. A useful list of additional criteria has been provided by the “High Level Panel” on the reform of the United Nations which formulated five criteria as benchmarks for the legitimacy of the use of force in international relations. (Although these criteria are primarily aimed at providing guideposts for the Security Council in authorising or endorsing the use of force, they equally seem to be applicable to measuring the legitimacy of the unilateral military interventions):

“(a) *Seriousness of threat*. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? (...)”⁹.

(b) *Proper purpose*. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) *Last resort*. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

8 2005 World Summit Outcome, GA Res. 60/1, UN Doc. A/RES/60/1 24 Oct. 2005, paras. 138-139.

9 “In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?”.

(d) *Proportional means*. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) *Balance of consequences*. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?"¹⁰.

Even if a universal consensus on such criteria were to be attained, a certain degree of legal indeterminacy and insecurity would remain. This does not, however, necessarily have to be deplored.

Legal insecurity may well have a deterring, dissuasive effect on a potential aggressor because the aggressor State does not know exactly whether it has already crossed the threshold beyond which other States have the right to pre-emptive military measures. On the other hand, a State which intends to act on the basis of the right to pre-emptive self-defence is well advised to undertake all possible efforts to ensure that the other members of international community also consider such action legitimate.

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10 A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/569, Annex (2 Dec. 2004), para. 207.