Law and Force in International Relations – European and American Positions

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I. Introduction

The current transatlantic debate on the legal regime governing the resort to force in international relations ought to be seen against the backdrop of fundamental changes in world politics after the end of the Cold War. Three such transformations will be outlined as particularly relevant to the issues under discussion. Moreover, differences between the United States and many of its European partners in their respective approaches to the use of armed force have recently been highlighted. These general observations set the stage for a legal analysis of three controversial cases where force was employed in recent years: "Operation Allied Force" in 1999, "Operation Enduring Freedom" in 2001, and "Operation Iraqi Freedom" in 2003.

Two further preliminary remarks are in order: When discussing a given U.S. measure in the area of foreign and security policy, one ought to ask whether the decision follows a continuous pattern which may be traced back to the very foundation of the United States; whether it was made possible by the post-Cold War transformation of the international system irrespective of the party in power in Washington D.C.; or whether it reflects policies specific to the present Bush administration. Moreover, it should be borne in mind that many issues relating to the use of (armed) force produce no single position common to all European states.

II. The Post-Cold War International System: Some Important Changes

In the wake of the "fall of the (Berlin) wall", epitomising the end of the East-West conflict in 1989, three fundamental innovations in international relations worth mentioning in the present context can be observed:

1) With the disintegration of the Soviet Union and the decline of the Russian Federation as the core power of the former USSR, the bipolar post-World War II system has given way to a unipolar structure, with the United States as the only remaining super-, or as the former French foreign minister Hubert Védrine called it, "hyper-power" ("*hyperpuissance*").[1] U.S. domination is based on three

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[1] Although Samuel Huntington has rightly characterised the present international system as uni-multipolar: The United States cannot solve any global problem – from the ecology and energy to health and security – alone but needs the co-operation of at least one other major actor, be it the EU, Russia, China or Japan. However, none of these problems can be solved without the participation of

pillars: overwhelming military superiority, continued ranking as the world's leading economy, and last but not least its "soft power".[2]

As a result of the present military imbalance, the United States and its allies or ad hoc partners may now employ armed force against most other states with impunity, without anymore having to fear a devastating response from an equally powerful adversary. In institutional/legal terms, Western powers can now risk the recourse to force beyond self-defence under Art. 51 of the UN Charter without the authorisation of the UN Security Council, in other words without the consent of the other major powers holding permanent seats on the Council. The military gap between the United States and possible challengers keeps growing. Furthermore, President George W. Bush has made it clear in the controversial National Security Strategy of the United States of America published in September 2002 that his country will not allow rivals to catch up with, let alone surpass American (military) power.[3]

2) On the "ideological front", the end of the East-West conflict sealed the victory of Western values, first and foremost individual-oriented human rights, democracy, the rule of law and market economics, over the alternatives offered by communism. The United States remains the principal champion of these ideals which it propagates with greater missionary zeal than ever. Claiming to act on behalf of the entire international community, America is also ready to resort to force in order to impose its values. This mission is, however, not radically new; it can be traced back to the Pilgrim fathers, to the idea of America's "Manifest Destiny" proclaimed in the 19th century and later extended beyond the conquest of the North American sub-continent, or to President Franklin D. Roosevelt's call to make the world "safe for democracy".[4] Incidentally, such grand visions are not unknown to Europeans, who "exported" Christianity to the rest of the world and later shouldered the "White Man's (colonial and imperial) Burden" or undertook a "*mission civilisatrice*" in past centuries Today, however, the inhabitants of the "old continent" are less Manichean than their partners on the other side of the Atlantic.

What irritates non-Americans in this context is the double standard practiced by the United States. While the United States tirelessly reprimands other states for their human rights violations, it has been highly reluctant to ratify even the most

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the United States. Samuel P. Huntington, The Lonely Superpower, 78 Foreign Affairs, No. 2, 35 (March/April 1999).

[2] Joseph S. Nye, Jr., The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone, Oxford etc. 2002; id., Soft Power: The Means to Success in World Politics, New York 2004.

[3] "Our forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States." <http://www.whitehouse.gov/nsc/nss/pdf 30>. Karl-Heinz Kamp, Von der Prävention zur Präemption? Die neue amerikanische Sicherheitsstrategie, 57 Internationale Politik, Nr. 12, 19 (Dezember 2002); François Heisbourg, A Work in Progress: The Bush Doctrine and Its Consequences, 26 The Washington Quarterly, No. 2, 75 (Spring 2003).

[4] Jürgen Moltmann, Die "Erlöser-Nation" – Religiöse Wurzeln des US-amerikanischen Exzeptionalismus, 78 Die Friedens-Warte 161 (2003).

basic human rights conventions; when it has, it has eroded its treaty obligations through far-reaching reservations, understandings and declarations.[5]

3) Contrary to some optimistic expectations after the "fall of the wall", the end of the Cold War has not ushered in an era of global peace and harmony. The New World Order, which President George H. Bush envisioned in the early 1990s, has failed to materialise. What has changed is the weight of the main threats and risks during and after the Cold War. Indeed, the probability of armed conflict between states, especially between great powers, has decreased. By contrast, the principal threats today are posed by transnational terrorist organisations[6] and "rogue states"[7] on the one hand and the proliferation of weapons of mass destruction (WMD)[8] on the other. Access to nuclear, radiological, biological and chemical weapons has become much easier than in the past.[9] This observation applies to the acquisition of the necessary materials and the availability of the appropriate technology as well as to the need for testing and developing adequate delivery systems. These weapons are therefore already in the possession or within reach of terrorists and "rogue states". What makes these two types of international actors so dangerous is their readiness to use WMD not merely as means of last resort but for other purposes as well. The strategy of deterrence which prevented a major armed confrontation between the two blocs during the Cold War is bound to fail against terrorists ready to

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[5] Catherine Redgwell, US Reservations to Human Rights Treaties: All for One and None for All?, in: Michael Byers/Georg Nolte (eds.), United States Hegemony and the Foundations of International Law, Cambridge etc. 2003, 392.

[6] On some political and legal aspects of international terrorism see Hanspeter Neuhold, Post-Cold War Terrorism: Systemic Background, Phenomenology and Definitions, in: Société Francaise pour le Droit International (ed.), Les nouvelles menaces contre la paix et la sécurité internationales. New Threats to International Peace and Security, Paris, 2004, 13. See also Walter Laqueur, The New Terrorism: Fanaticism and the Arms of Mass Destruction, Oxford 1999; Christopher C. Harmon, Terrorism Today, London and Portland, Or 2000.

[7] According to the "Bush Doctrine", these states share are number of attributes. They brutalise their own people and squander their national resources for the personal gain of the rulers; they display no regard for international law, threaten their neighbours, and callously violate international treaties; they are determined to acquire WMD, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes; they sponsor terrorism around the globe; and they reject basic human values and hate the United States and everything for which it stands. The National Security Strategy of the United States of America (note 3), 14. See also Robert S. Litwak, Rogue States and U.S. Foreign Policy, Washington 2000.

[8] John F. Sopko, The Changing Proliferation Threat, Foreign Policy No. 105, 3 (Winter 1996/97); Richard K. Betts, The New Threat of Mass Destruction, 77 Foreign Affairs, No. 1, 26 (January/February 1998).

[9] In addition to these weapons, "info-terrorism" or "cyber-warfare", i.e. the use of information technology for illegal purposes, has to be reckoned with. Bruce Berkowitz, Information Warfare: Time to Prepare, Winter 2000, <http:/nap:ecu/issues/17.2/berkowitz.htm>; Mark M. Pollitt, CYBERTERRORISM – Fact or Fancy? 2001, <http.//www.cs.georgetown.edu/denning/infosec/pollitt.html>. Another monstrous threat, "cyber-tech terrorism", the combination of computer and biotechnology, looms on the horizon. Ralph Eugene Stephens, "Cyber-Biotech Terrorism": Going High Tech in the 21st Century, in: Harvey W. Kushner (ed.), The Future of Terrorism, London and New Delhi 1998, 195.

commit suicide for their cause and regimes willing to face harsh economic sanctions and even to sacrifice the lives of many of their nationals.

III. Mars versus Venus?

Robert Kagan has triggered another round of the debate on the different approaches to security on the two sides of the Atlantic.[10] According to him, Americans hail from Mars, while Europeans are said to originate from Venus. This means that the United States relies heavily on the use of force in order to achieve its objectives in its external relations and, if necessary, by going it alone. Americans attach less importance to multilateralism, international organisations and international law than Europeans. However, the United States might be willing to involve the United Nations with a view to enhancing the legality and legitimacy of its policies through the collective backing of UN member states. It will nevertheless ignore the world organisation if the latter's members refuse to support U.S. positions, including the recourse to force. The United States in general and in particular the U.S. Senate, whose advice and consent is needed for the ratification of international treaties under constitutional law, is rather reluctant to limit U.S. sovereignty by subscribing to international legal obligations. Given its primarily military notion of security, the United States prefers to leave peace- and nation-building efforts to other countries. In geographical terms, the U.S. concept of security is global, especially in the struggle against world-wide terrorism and the proliferation of WMD. Americans believe in quick fixes on the basis of high technology.[11] The basic American position is reflected in the above-mentioned National Security Strategy which also claims the right of anticipatory self-defence.[12]

As pointed out above, the definition of the European stance on international security, especially on the use of armed force, is more problematic because of differences of opinion among European states both on principles and specific issues. In fact, quite a few Martians seem to be still living in Europe as well, above all within the borders of the two major military powers Great Britain and France. These two states are still prepared to use the military "stick", in particular in order to restore order in their former colonies.

In general, however, it is safe to say that the two catastrophic world wars which all European nations lost undermined the confidence in the efficacy of military force. Europeans therefore prefer comprehensive political settlements which address the root causes of internal and inter-state conflicts and favour economic and political incentives over military coercion. This choice "carrots" instead of "sticks"

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[10] Robert Kagan, Of Paradise and Power: America and Europe in the New World Order, New York 2003.

[11] A recent example of this attitude is the Missile Defence project which is designed to protect the United States from small-scale missile attacks by "rogue states".

[12] See below 271 et seq.

may be derided as a case of "sour grapes", but the reluctance of European governments to increase their defence budgets could also be the result of a deliberate decision.

Europe attaches more importance than the American superpower to multilateralism, international organisations and international law, with a firm belief that the United Nations ought to play a strong role. The member states of the EU, a unique supranational international organisation, have accepted unprecedented restrictions on their sovereignty. Moreover, Europeans tend to adopt a less radical outlook; they do not see world politics as a struggle between good and evil to the same extent as Americans. Europeans are more sceptical about "high-tech quick fixes". The European concept of security focuses on the "near abroad", i.e. the Caucasus, the Mediterranean region and the Near and Middle East. The nations of Europe have learned to live with vulnerability and insecurity. Europe's ambitions are limited to becoming one of several major actors in a multipolar world, without aspiring to a hegemonic position.

This approach is reflected in the security strategy of the EU entitled "A secure Europe in a better world" which the European Council endorsed in Rome on 12 December 2003.[13] The threat perception on which the Union's strategic concept is based is very similar to the main challenges emphasised by the United States. The EU's strategic concept focuses on five key threats: terrorism, the proliferation of WMD, regional conflicts, state failure and organised crime. However, when it comes to addressing these challenges, the U.S. and the EU's strategies differ considerably. According to the "Solana Doctrine"[14], the new problems cannot be solved by military means only. Security is to be built primarily in Europe's neighbourhood by promoting a ring of well governed countries to the east of the EU and on the borders of the Mediterranean.

What international lawyers will find particularly heartening is the emphasis on "the development of a stronger international society, well functioning international institutions and a rule-based international order". The EU and its members are "committed to upholding International Law", with the UN Charter providing the fundamental framework for international relations. Included amongst the institutions mentioned in the document as relevant to European security defined in a broad sense is the ICC, which finds few if any advocates in Washington and is categorically rejected in the "Bush Doctrine".[15]

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[13] <www.iss-eu.org/solana/solanae.pdf>.

[14] As the document is named sometimes for the EU High Representative for the CFSP, Mr. Javier Solana.

[15] "We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC) and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC. We will implement fully the American Servicemen Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials." The National Security Strategy of the United States of America (note 3), 31.

IV. "Operation Allied Force" (1999)

In terms of the above-mentioned parameters, the air campaign launched by NATO member states in the spring of 1999 illustrates the exploitation of the West's new military superiority. Since no member of the alliance had been attacked by the Federal Republic of Yugoslavia (FRY), the use of armed force could not be justified as the exercise of the right of collective self-defence. "Operation Allied Force" was nonetheless undertaken without the authorisation of the UN Security Council. The purpose of the air strikes against the regime of President Slobodan Milošević was to prevent "ethnic cleansing" of the Albanian majority in Kosovo, in other words to enforce fundamental, universal values.

After the autonomous status of their Province was abolished in 1989, the Albanians in Kosovo initially adopted a policy of peaceful resistance; this strategy, however, was of no avail. The Kosovo issue was excluded from the settlement of the conflict in Bosnia-Herzegovina finalised in the Dayton/Paris peace agreement of 1995. Radical Kosovo Albanians eventually resorted to guerrilla attacks, to which Serbian forces responded with increasing brutality toward the civilian population.[16]

On the legal level, the air strikes raised the issue of the lawfulness of "humanitarian intervention" as another exception to the prohibition of the threat or use of force.[17] "Humanitarian intervention" should be defined in this context as military action taken against a state in order to prevent it from committing large-scale violations of basic human rights against its own nationals on its territory. The NATO allies were not alone in asserting the legality of their operation. Other governments, as well as large parts of public opinion and many international lawyers at least in the West, also regarded the resort to force against a "rogue" regime on the European continent as lawful.

It was pointed out that respect for human rights had evolved into one of the cornerstones of modern international law since its inclusion in the UN Charter. Enshrined in numerous universal and regional treaties as well as "soft-law" documents, it had become a rule of *jus cogens* with *erga omnes* effects. Those claiming the lawfulness of "humanitarian intervention" *de lege lata* pointed out that the use of armed force to this end had to meet several prerequisites. According to this view, it is only permissible if fundamental values of the international community are being violated and if a breach has been clearly proven. Furthermore, recourse to force in order to safeguard basic human rights is only considered legal as a means of last resort after the methods for the peaceful settlement of disputes have been exhausted. Armed force has to be an adequate tool to terminate the violations and

[16] For background information on the non-legal aspects, see Erich Reiter (ed.), Der Krieg um das Kosovo 1998/98, Mainz 2000.

[17] On the legal dimension of "Operation Allied Force" Hanspeter Neuhold, Collective Security After "Operation Allied Force", 4 Max Planck UNBY 73 (95 et seq.) and the numerous writings in favour and against the lawfulness of the operation quoted there.

must not exceed the minimum level necessary to achieve its purpose. Some collective legitimation is desirable, preferably by a politically representative international institution with universal membership.[18]

Those who argue in favour of the legality of "humanitarian intervention" face the difficulty of proving their contention under existing international law. No treaty has been concluded which would legalise the use of armed force in order to protect foreign nationals against their own state. Nor is there sufficient evidence for the emergence of a customary rule to this effect. International practice is scarce and ambiguous.

(Only) three main precedents in post-World War II history for the use of force by individual states claiming to act for humanitarian purposes are usually mentioned in this context: 1) military action by India in East Pakistan in 1971 which helped the secessionist forces to eventually establish the state of Bangla Desh; 2) by Vietnam in Cambodia in 1978 against the genocidal regime of the Khmer Rouge which led to the installation of a pro-Vietnamese government in the country; 3) and by Tanzania in Uganda in 1979 against the murderous dictatorship of President Idi Amin.[19] However, in these instances the right of self-defence was also invoked in order to justify the resort to force. What is more, in all three cases there was widespread international protest. The same is true of the air attacks by the United States and Great Britain (joined initially by France) in the 1990s against the regime of President Saddam Hussein in Iraq in order to protect the Shiites in the south and Kurds in the north of the country.[20]

In 1986, both the British Foreign and Commonwealth Office[21] and the ICJ in the *Nicaragua* case[22] concluded that "humanitarian intervention" was unlawful.

It is also highly doubtful whether a general principle of international law can be established as the legal basis for the use of force for humanitarian purposes.

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[18] Most of these criteria have been echoed by the International Commission on Intervention and State Sovereignty established by the Government of Canada in response to a request by UN Secretary-General Kofi Annan. The Commission, which was composed of twelve members and co-chaired by the former Australian foreign minister Gareth Evans and the Special Advisor to the UN Secretary-General Mohamed Sahnoun from Algeria, also coined the term "responsibility to protect" instead of "humanitarian intervention". For the Commission's report entitled "The Responsibility to Protect" and published in 2001, see <http://www.dfait-maeci.gc.ca/iciis-ciise/report2-en.asp>.

[19] In addition, French troops helped to oust Jean-Bedel Bokassa, the Emperor of the Central African Empire; in 1979. Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks, Cambridge etc. 2002, 151 et seq.

[20] The sending of armed forces by ECOWAS to Liberia in 1990 and Sierra Leone in 1997, where civil strife had entailed humanitarian catastrophes, is also worth mentioning in this context. Military action was taken without the prior authorisation of the Security Council as required under Art. 53 of the UN Charter. However, the Council subsequently approved the operations. Franck, ibid., 155 et seq.

[21] British Foreign and Commonwealth Office, Foreign Policy Document No. 148, 57 BYIL 614 (1986).

[22] "In any event, while the United States might form its own appraisal of the situation as to the respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect." ICJ Reports 1986, 14 (134).

Furthermore, similar scepticism is warranted with regard to the emergence of the lawfulness of "humanitarian intervention" *de lege ferenda.* For states which fear the abuse of such a right by great powers as a matter of principle or whose negative human rights record makes them a possible target for the application of this rule are both likely to oppose it.

Finally and most importantly, it ought to be borne in mind that the prohibition in Art. 2 para. 4 of the UN Charter also belongs to the realm of *jus cogens* with *erga omnes* effects. In the age of WMD, this principle should not be tampered with, all the more so since the danger of abusing a right of "humanitarian intervention" is real.

It is also worth mentioning that "substitute action", *"Ersatzvornahme"*, by members of the international community was also invoked in order to justify "Operation Allied Force". According to this view, the Security Council had defined the situation in Kosovo as a threat to peace and security in the region in two resolutions. Moreover, the last resolution did not contain a previous reference to the consideration of further action by the Council in the event of non-compliance by the FRY. Hence the Security Council had set the stage for action; if it failed to take the necessary measures, UN member states able and willing to do so would then be allowed to step in.

However, it ought to be emphasised that it is one thing for the Security Council to agree on the existence of one of the three situations listed in Art. 39 of the UN Charter as a prerequisite for activating the system of collective security under Chapter VII. It is another thing for the Council to decide on the appropriate action to deal with a given crisis. Its members may still disagree in good faith on whether the means for a peaceful solution have been exhausted, whether economic and political sanctions suffice, or whether military enforcement action is required.

To summarise, the Kosovo crisis of 1998/1999 confronted the international community with a legal dilemma: the conflict between two of the most important cornerstones of modern international law, the prohibition of the threat or use of force and respect for human rights, to which there is no satisfactory solution. The Declaration on Principles Guiding Relations between Participating States in the Helsinki Final Act of the CSCE, which includes both rules, is quite significant in this respect by avoiding a clear answer to the question. Instead, it states that "All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others." – a formula of little help to judge the lawfulness of "humanitarian intervention". Aware that there is no satisfactory solution to this "legal zero-sum game" between two contradictory norms, each of which ought to be fully observed as a matter of principle, this writer has somewhat hesitantly concluded that "Operation Allied Force" was unlawful, but morally tenable (in other words legitimate) and politically inevitable in light of the refusal by President Milošević to comply with the ultimatum presented by NATO.[23]

In any event, the NATO states participating in the operation set a precedent. They did not approach the Security Council prior to the air campaign, convinced

that two permanent members, China and the Russian Federation, would vote against a resolution authorising the use of force. It should also be noted that the principal Western powers, including France and Germany, took part in the operation. Thus there was no disagreement on "humanitarian intervention" between the United States and its European allies, at least in the Kosovo crisis.

V. "Operation Enduring Freedom" (2001)

The facts of the terrorist attacks on the symbols of U.S. economic and military power, the World Trade Centre in New York City and the Pentagon in Washington D.C., on 11 September 2001 do not have to be recounted here; the horrific images of the burning and collapsing towers in Manhattan which have been shown on television time and again are still vividly remembered. The United States responded with a military operation in Afghanistan against Al Qaeda members believed to be present in this country and the Taliban regime supporting the terrorists.

So far as the political developments outlined above are concerned, on the one hand "9/11" dramatically highlighted the new dimensions of the threat posed by transnational terrorist networks and "rogue states" aiding and abetting their activities. On the other hand, "Operation Enduring Freedom" impressively demonstrated the military superiority of the United States. The government in Washington essentially preferred to "go it alone", although on 12 September 2001 NATO invoked the security guarantee in Art. 5 of the Washington Treaty for the first time in the history of the alliance.[24] The Bush administration, however, neither needed nor wanted the military assistance of its NATO partners. It did not need it, since the allies had little to contribute to its high-tech military campaign; it did not want it, because it wished to avoid another "war by committee" as experienced in "Operation Allied Force", in which the allies maintained their say on military decisions.

At the legal level, "Operation Enduring Freedom" reopened the debate on the modalities of the right of self-defence laid down in Art. 51 of the UN Charter. In the preamble to resolutions 1368 and 1373 of 12 and 28 September 2001 respectively, the UN Security Council recognised the right of self-defence in general terms. Art. 51 is based on the assumption of a military attack by the armed forces of a state (or group of states) on another state or several other states, a scenario radically different from that of "9/11". Therefore, several issues had to be addressed.[25]

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[23] Neuhold (note 17), 102.

[24] <http://www.nato.int/docu/basics/htm>. Antonio Franciso Fernández Tomás, El recurso al artículo quinto del Tratado de Washington tras las acontecimientos del 11 de septiembre: mucho ruido y pocas nueces, 53 Revista Española de Derecho Internacional 205 (2001).

[25] Javier A. González Vega, Los atentados del 11 septiembre, la operación "Libertad duradera" y el derecho de legítima defensa, ibid., 247; Noëlle Quénivet, The Legality of the Use of Force by the United States and the United Kingdom against Afghanistan, 6 Austrian Review of Inter-

1) To begin with, did the use of hijacked civilian aircraft by a non-state actor constitute an armed attack in accordance with the UN Charter? The international community overwhelmingly answered this and the following questions in the affirmative. The crucial criterion for the definition of a weapon was seen in the effect of the tool used. Moreover, the right of self-defence could not only be exercised against a state but also against a transnational terrorist organisation, were it only because Art. 51 did not specify the perpetrator of the armed attack.

2) Could military action in self-defence also be taken against the government of a state accused of sheltering Al Qaeda? After all, the terrorists were not organs of the state of Afghanistan; nor had they, according to the available evidence, acted on that state's instructions or under its direction and control, as required by the ICJ in the *Nicaragua* case and the ILC's articles on state responsibility.[26] However, it was argued that the victim of deadly terrorist attacks must be permitted to effectively protect itself. Furthermore, the Taliban regime had ignored earlier Security Council demands to stop providing sanctuaries and training to international terrorists and to extradite Osama bin Laden, the leader of Al Qaeda.[27] To make matters worse, the Taliban had not distanced themselves from the attacks of 11 September but had even threatened further strikes.

3) Was "Operation Enduring Freedom" lawful, although the attacks had been completed and the members of the terrorist commandos of "9/11" were all dead? This question raised the issue of anticipatory self-defence on which opinions had previously been sharply divided.

Those opposing the extension of lawful self-defence to future attacks emphasised the ordinary meaning of the wording of Art. 51, which is regarded as decisive according to the rules of interpretation set forth in Art. 31 of the Vienna Convention on the Law of Treaties of 1969 ("if an armed attack *occurs*"[28]). A teleological interpretation of the Charter provisions leads to the same conclusion, since the main objective of the United Nations is to limit the resort to force in international relations. Moreover, since Art. 51 is an exception to the rule in Art. 2 para. 4 of the Charter, it has to be construed restrictively. More tenuous is the assertion that a

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national and European Law 205 (2001); Nico Schrijver, Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"?, 48 Netherlands International Law Journal 271 (2001); Olivier Corthen/François Dubuisson, Opération «liberté immuable»: une extension abusive du concept de légitime défense, 106 Revue Générale de Droit International Public 51 (2002); Judith Miller, Comments on the the Use of Force in Afghanistan, 35 Cornell International Law Journal 605 (2002); Jordan J. Paust, Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond, ibid., 533; Carsten Stahn, International Law at a Crossroads? The Impact of September 11, 62 ZaöRV/HJIL, 183 (2002); Christian Tomuschat, Der 11. September 2001 und seine rechtlichen Konsequenzen, 28 EuGRZ 535 (538 et seq.) (2002.); Rüdiger Wolfrum, The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?, 7 Max Planck UNYB 1 (27 et seq.) (2003).

[26] Art. 8. UN document A/RES/56/83.

[27] Security Council resolutions 1214 (1998), 1267 (1999), 1333 (2000).

[28] Italics by the author.

state which feels threatened need not sit idly by, but can rather prepare its defence against the presumed aggressor and look for support by the United Nations, regional organisations and allies or other friendly states. At the strategic level, the prohibition of anticipatory self-defence was in line with the deterrence doctrine of the great powers; thanks to their invulnerable second-strike capabilities, they could wait for an attack to actually occur and still inflict unacceptable damage on the aggressor.

In favour of the lawfulness of anticipatory self-defence the qualification of the right in Art. 51 as "inherent" was stressed. This adjective is to be read as a reference to a general principle of law and the state of customary law in 1945 which did include a right of anticipatory self-defence. Moreover, an analysis of the *travaux préparatoires* of the Charter reveals that the founding fathers of the United Nations did not intend to modify existing law but rather to ensure the lawfulness of regional systems of collective self-defence, first and foremost in the Americas. In political and military reality, the prohibition of anticipatory self-defence would reward the aggressor who could choose the time and the location of his armed attack and thereby gain a crucial advantage over the innocent victim of his unlawful action.

Most importantly, it can now be argued that the strategy of deterrence, which resulted in an uneasy but stable non-war situation between the two blocs in the bipolar Cold-War system, fails to impress those who pose the main threats in today's world. The certainty to lose their lives does not dissuade suicide terrorists from lethal attacks. The same is true of "rogue states", whose governments are ready to accept crippling economic sanctions and even the loss of numerous lives among their own civilian populations. Therefore, what in strategic parlance is referred to as "preemptive" self-defence ought to be considered lawful within the purview of Art. 51.[29] This means that an attack is imminent and highly probable because the potential aggressor has not only expressed his intention to launch an armed strike but also taken concrete and clearly established steps to carry out his plans, in particular by mobilising his military forces. These requirements are also met by terrorist networks. As a rule, terrorism is not limited to a single attack. It must rather be understood as an ongoing process. After an attack has been completed, and even if it has resulted in the death of the attackers, the surviving members of the organisation will try to strike again in the future.

In contrast, "preventive" self-defence against a merely possible attack in the more distant future still remains a breach of international law. Yet, such a right is claimed by the United States, notably in the controversial National Security Strategy of 2002. The "Bush Doctrine" asserts that international law recognised the right of nations to defend themselves against imminent attacks. However, the U.S. strategy goes beyond pre-emptive self-defence, as it also states that the concept of imminent threat must be adapted to the capabilities and objectives of today's adver-

[29] Kamp (note 3), 20.

saries. The following passage evidently includes the preventive dimension of self-defence as defined above:

"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*.[30] To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively."[31] President George W. Bush stressed this point again more recently when he declared in a television interview on 8 February 2004: "... it is essential that when we see a threat, we deal with those threats before they become imminent. *It's too late when they become imminent.*"[32]

It is also worth noting that the United States did not seek the authorisation of the Security Council for its military campaign against Al Qaeda and the Taliban. The preference for Art. 51 is understandable, because reliance on the right of self-defence left the U.S. government more freedom of action at the legal level. Instead of sharing the ultimate authority for "Operation Enduring Freedom" with the other 14 members, the United States was merely required under Art. 51 to report the measures taken by it to the Council.

European solidarity with Americans after "9/11" and support for their struggle against terrorism was unambiguous and unanimous. This backing included the acceptance of an updated redefinition of the right of self-defence against terrorist organisations and their sponsors. However, a division between the United States and European states, as well as among the countries of Europe, emerged on the scope of anticipatory self-defence which was to be exacerbated in the next major crisis.

VI. "Operation Iraqi Freedom" (2003)

This crisis was triggered by Iraq's continuous failure to comply with obligations decided by the Security Council in the wake of "Operation Desert Storm" in 1991. A coalition of able and willing states led by the United States, which had been duly authorised by the Security Council in resolution 678 (1990), liberated Kuwait from Iraqi invasion forces. Security Council resolution 687 (1991) provided for a cease-fire and imposed on Iraq a ban on WMD and delivery systems to be monitored by international on-site inspection.

All the changes in the international security constellation mentioned in the first part of this article were relevant to the US-led military campaign against the regime of Saddam Hussein in the spring of 2003. The rapid success of the operation itself was due to the military superiority of the United States and its partners who

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[30] The National Security Strategy of the United States of America (note 3), 15; italics added.

[31] The document does not offer a precise definition of the meaning of the term "pre-emptive". See also Heisbourg (note 3).

[32] Brian Knowlton, Bush Calls War Valid Because of "Madman", International Herald Tribune of 9 February 2004, 1 and 4. Italics added.

could afford to act without being clearly authorised by the Security Council to use armed force. Military action was taken against a "rogue state" accused of the unlawful possession of WMD[33] and having links to international terrorism, although neither accusation has been up to now substantiated. Therefore, a third justification was emphasised: the necessity to remove a dictatorial regime guilty of large-scale violations of human rights and to implant Western values of universal validity. The main objective became the democratisation of Iraq from which a positive domino effect on other countries in the region was expected – in other words "to make the Near and Middle East safe for democracy". However, at the time of this writing, the United States is learning the hard way that it may be easier for a superpower to win a war than to win a lasting peace. The foreign forces have become bogged down in terrorist and guerrilla-type warfare and are increasingly seen as occupiers and not liberators by the Iraqi population. To make matters worse, the image of the United States as champion of human rights has been severely tarnished by outrageous abuses committed by guards and interrogators against Iraqi prisoners.

The legal debate has mainly revolved around the claim by the United States and its partners that "Operation Iraqi Freedom" had received a sufficient basis through resolutions of the Security Council. In his ultimatum speech on 17 March 2003 President George W. Bush invoked the above-mentioned resolutions 678 and 687 as well as resolution 1441 (2002). His arguments were reiterated in all letter by the Permanent Representative of the United States, Ambassador John Negroponte, to the President of the Security Council three days later, and echoed by Great Britain, the main partner of the United States not only in the campaign against Iraq.[34]

This position can be summed up as follows: In resolution 1441, the Security Council decided that false or incomplete statements in the required declarations to be submitted by Iraq on its programmes concerning the development of prohibited weapons as well as failure to fully cooperate in the implementation of the resolution, which, in particular, provided for on-site inspection by UNMOVIC and the IAEA, would constitute a further material breach of Iraq's obligations. Upon receiving a report of such a breach, the Council would immediately convene and consider the situation and the need for full compliance with all its relevant resolutions in order to secure international peace and security. Moreover, the Security Council recalled that it had repeatedly warned Iraq of serious consequences as a result of continuous violations of its obligations.

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[33] Lee Feinstein and Anne-Marie Slaughter have argued for a "duty to prevent" the proliferation of WMD similar to the "responsibility to protect" (note 18). It would be limited to military action as a means of last resort against non-democratic regimes trying to acquire or already having WMD or the means to deliver them and supporting international terrorism. Lee Feinstein/Anne-Marie Slaughter, A Duty to Protect, 83 Foreign Affairs, No. 1, 136 (January/February 2004).

[34] The U.S. position has been elaborated on by William H. Taft IV, the Legal Adviser of the Department of State, and Todd F. Buchwald, the Assistant Legal Adviser for Political-Military Affairs of the Department of State, Preemption, Iraq, and International Law, 97 AJIL 557 (2003). For the British view, see the UK Attorney General Lord Goldsmith, Legal Basis for Use of Force Against Iraq, <http//www.labour.org.uk/legalbasis>; <http://www.fco.gov.uk>. See also Adam Roberts, Law and the Use of Force After Iraq, 45 Survival No. 2, 31 (40) (Summer 2003).

According to the position of the United States and its coalition partners, no additional Council resolution(s) determining the commission of a further material breach of its relevant obligations by Iraq and authorising the use of force was necessary. Individual member states were entitled to conclude that the regime of Saddam Hussein was guilty of yet another grave violation of its disarmament and inspection obligations. All that was then required was another meeting of the Council in accordance with the procedure laid down in resolution 1441. The "serious consequences" did not have to be specified by the Security Council either; everybody was aware that they included military action when resolution 1441 was voted upon.

Moreover, because of Iraq's breach of its obligations stemming from resolution 687, the states which had participated in "Operation Desert Storm" had the right – also individually[35] – to suspend the cease-fire established by this resolution, both under the law of treaties and armistice law.[36] It was even contended that they were responsible for the enforcement of those obligations.[37]

Finally, the authorisation "to use all necessary means" to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore peace and security in the area in resolution 678 had not expired. The resolutions referred to included all relevant resolutions adopted by the Security Council after resolution 660, above all also resolution 687, the "mother of all cease-fires".[38] The precedents of military action by the United States, Great Britain and France with a view to making Iraq comply with resolution 687, notably "Operation Desert Fox" in December 1998, as well as to protect the Shiites in southern and the Kurds in northern Iraq, were also invoked to bolster the argument. Moreover, it was contended that states willing and able were allowed to have recourse to armed force against the threat posed by the Iraqi dictator and his regime on another legal ground, since they still had the right to use all necessary means in order to restore international peace and security in the area, which had not been defined in resolution 678.[39] According to this view, if the Security Council had intended to set a time-limit for its authorisation or to terminate it at a given point in time, it would have expressly stated this decision.

However, the above chain of arguments is by no means the only possible – and, in the eyes of this writer, an incorrect – interpretation of the three Council resolutions at hand.[40] Before enforcement action could be taken, the Security Council

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[35] John Yoo, International Law and the War in Iraq, 97 AJIL 563 (569) (2003).

[36] Art. 40 of the Regulations annexed to the (Fourth) Hague Convention on the Laws and Customs of Land Warfare. Ibid., 569.

[37] Taft/Buchwald (note 34), 559.

[38] Thomas M. Franck, What Happens Now? The United Nations After Iraq, 97 AJIL 607 (612) (2003).

[39] Yoo (note 35), 567.

[40] See Franck (note 38); Christian Schaller, Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht, 62 ZaöRV/HJIL 641 (2002); Michael Bothe, Der Irak-Krieg und das völkerrechtliche Gewaltverbot,

had to determine that Iraq had committed a material breach of its obligations under resolution 1441. Although the weapons inspectors complained that Saddam Hussein's regime failed to fully cooperate, their reports were not entirely negative; hence it made sense to give them more time for trying to complete their tasks.[41] Furthermore, it was for the Council to decide which sanctions ought to be applied against Iraq's non-compliance, in particular that armed force ought to be used. Significantly, the Security Council decided that it remained seized of the matter in resolution 1441.[42] Those arguing otherwise had to explain why the coalition of the willing, first and foremost the United States and Great Britain, sought an additional resolution providing for such an authorisation prior to launching "Operation Iraqi Freedom".

The 1991 cease-fire was an agreement between Iraq and the United Nations represented by the Security Council and not the states that had conducted "Operation Desert Storm". Consequently, only the Council had the right to suspend or terminate the armistice in response to a serious breach by Iraq of its obligations under resolution 687.[43]

Finally, the authorisation in resolution 678 had lapsed with the liberation of Kuwait from Iraqi invasion forces. In this context, a statement by President George H. Bush at the time was worth quoting: "The U.N. resolutions never called for the elimination of Saddam Hussein. It never called for taking the battle into downtown Baghdad."[44]

Underlying these differences of opinion are divergent concepts of the role of the Security Council in the maintenance of international peace and security. Those who consider "Operation Iraqi Freedom" illegal believe in the continued relevance, in spite of its deficiencies and flaws, of the system of collective security as designed by the authors of the UN Charter, with the Security Council as the "central operator" of the system. Those advocating the lawfulness of the military campaign against the "rogue regime" of Saddam Hussein, which, as pointed out above, was not the first operation of its kind, underline the need for effective action against new threats and for the enforcement of basic values.

In the final analysis, resolution 1441, the "mother of all misunderstandings", was an "agreement not to agree". It was meant to buy time for international inspections, although there was widespread scepticism as to whether Saddam Hussein

41 ArchVR 255 (2003); Christian Tomuschat, Iraq – Demise of International Law?, 78 Die Friedens-Warte 141 (2003); Wolfrum (note 25), 11 et seq.

41 The objection to this argument was that the climatic conditions in Iraq only permit a military campaign during the relatively cool months. Had the coalition led by the United States waited much longer, the operation would have had to be postponed for several months. Cf. Ruth Wedgwood, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense, 97 AJIL 576 (581) (2003).

42 Para. 14.

43 One could not ignore the decision of the Security Council in the final para. 34 of the resolution not only to remain seized of the matter but also to take such further steps as may be required for the implementation of the resolution and to secure peace and security in the region.

44 Franck (note 38), 612 (note 18).

would understand the message that he was given a final opportunity to comply with his country's obligations[45] and heed the warnings of the international community this time. Whereas the permanent representative of France to the UN, Ambassador Jean-David Levitte, underlined the absence of a provision on the "automacity" of the use of force in the text, his U.S. counterpart John Negroponte stressed that the resolution did not "constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security."[46]

It is also interesting to note that the United States did not primarily rely on the right of anticipatory self-defence, although the new U.S. National Security Strategy had set the stage for this argument a few months before "Operation Iraqi Freedom" commenced. After all, the threat allegedly emanating from Iraq – a "rogue state" with WMD ambitions and ties to international terrorism – constituted a case *par excellence* for the application of the "Bush Doctrine". However, the coalition of the willing led by the United States apparently preferred the enhanced legitimacy, if not legality, granted by the international community which it hoped to attain through the support of the Security Council.[47]

Nor was the right of "humanitarian intervention" brought into play, although the dictatorship of Saddam Hussein undoubtedly was one of the most inhumane and repressive regimes of the world. Yet, it had not in the months preceding the crisis dramatically stepped up atrocities against its citizens like the Yugoslav forces in the case of Kosovo in 1998/1999. Moreover, as mentioned above, "regime change" had initially taken a back seat amongst the justifications for the military campaign against Iraq.

Regarding the transatlantic dimension of the debate, European governments were sharply divided over the political wisdom and the legality of "Operation Iraqi Freedom". On the one hand, some Western European states led by Great Britain, Spain and Italy sided with their American ally. The same was true of the post-communist countries, in particular the candidates for NATO membership. This solidarity was expressed, for instance, in an open letter by the political leaders of Denmark, Great Britain, Italy, Portugal and Spain, as well as the Czech Republic, Hungary and Poland, published in leading newspapers on 30 January 2003. It was followed by a similar declaration of support from the "Vilnius Ten" (the seven candidates admitted to NATO in the spring of 2004, i.e. Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia, with the addition of Albania, Croatia and Macedonia) on 5 February 2003.

On the other hand, many other European states derided by U.S. Secretary of Defence Donald Rumsfeld as the countries of the "old Europe", first and fore-

[45] Para. 2 of the resolution.

[46] Wedgwood (note 41), 580.

[47] However, in the opinion of U.S. international lawyers the right of self-defence also provided a solid legal basis for the operation. See, for instance, Yoo (note 35), 571 et seq.; Wedgwood (note 41), 582 et seq.

most France and Germany, felt that the weapons inspectors in Iraq should be given more time and that recourse to military action was premature. They also questioned the lawfulness of "Operation Iraqi Freedom". Their concerns and criticisms were shared by large segments of public opinion, also in countries siding with the United States, and by most international lawyers.

VII. Conclusion

How deep, then, is the gulf between U.S. American and European positions on the political and legal aspects of the use of force in international relations? True enough, European NATO allies participated in what some regard as the "original sin", the air strikes against Yugoslavia without Security Council authorisation, however laudable the underlying humanitarian motives may have been. Moreover, Europeans staunchly stood by the Americans after "9/11".

There is, however, disagreement with the United States in Europe – among governments, albeit not unanimously, the public at large, and political scientists and scholars of international law – on critical points. Although the legality of "preemptive" self-defence is also widely accepted on this side of the Atlantic, the extension of the right of "preventive" defence against less imminent and certain threats is generally rejected.

Moreover, many Europeans worry about U.S. unilateralism and the state of transatlantic relations which have been overshadowed by numerous controversies in various areas. These range from economic disputes, for example over U.S. tax breaks and tariffs on steel imports, to the rejection of the Kyoto Protocol on the reduction of greenhouse gas emissions by the current Bush administration and its hostility to the ICC.[48] Hence there is a real danger of growing estrangement between the two sides of the Atlantic.

Disagreements on legal questions, in particular on issues involving the resort to force, certainly heighten perceptions of alienation. European international lawyers note with alarm the announcement by an influential American scholar of the demise of the regime based on Art. 2 para. 4 of the UN Charter as a result of frequent violations of this prohibition.[49] They do, however, find reassurance in those of their colleagues in the United States who reject this contention[50] and share their conclusion that "Operation Iraqi Freedom" was unlawful.

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[48] See above 267 et seq.

[49] Michael J. Glennon, Why the Security Council Failed, 82 Foreign Affairs, No. 3, 16 (May/June 2003). Some commentators even worry about the end of the entire Westphalian legal order based on the sovereign equality of states, which are protected by the prohibition of the threat or use of force and the principle of non-intervention in internal affairs.

[50] See the sophisticated and thorough analysis offered by Franck (note 19).