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Defense White Paper and International Law

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Defense White Papers deal with the deployment of the Armed Forces of a State, either defending its borders or to restore security in the interior, if the Constitution so allows, and nowadays is thought more and more in the context of peacekeeping, peacemaking or peace enforcing in other parts of the world.

For a government to order such deployment beyond the borders of the State, it should be enough that the deployment is compatible with international law. The constitutional situation in Germany is a bit different, ever since the Constitutional Court decided in 1994 that any deployment of the Armed Forces beyond the country's borders and for purposes other than the defense of the country requires prior approval from the national parliament.[1] This approval is nowadays regulated by law2 and often carries a number of "caveats" (restrictions) regarding the size of the force, the weapons to be used and a time limit for the deployment. If that concerns a multinational peacekeeping effort, such "caveats" are not overly popular among Germany's allies.

But, to mention a few of the problems a State might face in that respect, what are the instruments from international law that have to be respected in such a case? First: Under Art.2 No.4 of the United Nations Charter, the use of (military) force is prohibited unless justified by individual or

[1] Federal Constitutional Court, 12 July 1994, Case 2 BvE 3/92, BVerfGE 90,286.

[2] Entsendegesetz (Deployment Act) of 18 March 2005, BGBl (Federal Gazette) I, 775.

collective self-defense, or by a mandate or the authorization of the Security Council of the United Nations under chapter VII of the Charter.

We all know that "true" United Nation's forces never became a reality and that in all of the rare cases in which the Security Council authorized the use of force, it had to appeal to a "coalition of the willing". International law experts debate until today, whether Resolution 678 of the Security Council regarding the Iraq-Kuwait War in 19903 was just reminding States of the right to collective self-defense on the side of Kuwait, or ordering a military sanction under Article 42 of the UN Charter.

Undoubtedly, no State is obliged under international law to be "willing". States are only prepared to engage in foreign conflicts with their armed forces if they see their own interests at stake. Articles 43 and 45 of the UN Charter never became effective.[4] Why did the Member States of NATO intervene in the Yugoslav crisis? Because they were afraid of massive refugee flow into their own countries. Why did the same States not intervene in the genocide in Rwanda? Because that was far away and a rare topic in the 8 o'clock TV news. One might condemn that attitude from a moral standpoint, but that is the reality.

Also a very controverted debate was during the Kosovo conflict, the question was whether a group of States or an international organization like NATO could take things into their or its own hands in the case that the Security Council was unable to decide due to an announced or expected veto.[5] "We could not simply look on further to ethnic cleansing" was the argument. But one should be careful in construing "Operation Allied Force", as the NATO air strikes were called at the time, as the beginning of customary international law. There is certainly a difference between one or two States intervening with military force into a conflict in their neighborhood, and an alliance of at the time 19 democratic States doing the same. But the customary rule that could develop would not be one only for democratic States, governed by the Rule of Law. And another question would be: who is responsible in the end, for the operation as a whole or for singular violations of the humanitarian law applicable in armed conflicts?[6]

And also the new concept of "Responsibility to Protect", discussed and adopted by the General Assembly of the United Nations in 2005 and 2009[7], is not a "carte blanche" for unilateral interventions. The concept is composed of three principles:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is

[3] Resolution 678 (1990)

[4] Cf. B.Simma, The Charter of the United Nations, A Commentary, Vol I, Arts. 43 and 45 (Oxford 2002)

[5] Cf. Ch. Tomuschat (ed.), Kosovo and the International Community, A Legal Assessment (Kluwer 2002), passim.

[6] Cf. T. Stein, Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts.Responsibility of NATO or of its Member States?, in: Ch.Tomuschat, Ibidem., p.181S

[7] A/Res/60/1 of 25 October 2005 and A/63/677 of 12 January 2009 (Report of the Secretary General).

manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations

But it is for the international community to decide whether sovereignty no longer protects a State from foreign interference, if that State does not live up to its duty to protect. And the international community is first and foremost represented by the UN Security Council. The Security Council, by the way, sharpened the concept of responsibility to protect in its Resolution on Libya, concerning the protection of the civilian population and authorizing UN Member States willing to do so to "take all necessary measures" (which denotes the use of force).[8] But the Security Council might gamble away its primacy if it is constantly blocked by veto, as we see nowadays in the Syrian conflict, and should not be too surprised if other international organizations seize control. The fact that they hesitate to do so is mainly due to doubts as to which group of up risers one should support.

Speaking of sovereignty: The situation is different, when mere peacekeeping is at stake, or, as international lawyers say, "Chapter 6 ½" of the UN Charter. Peacekeeping presupposes the consent of the sovereign territorial State on whose territory foreign peacekeeping forces shall be deployed, and that State has a say also regarding the Rules of Engagement. It certainly helps, if the UN Security Council is involved, but that is not necessarily a precondition.

One does, however, need the Security Council, if it turns out that peacekeeping is not enough and that peace enforcement is necessary, probably against the will of the territorial State. That cannot be attained just through a "mission creep", but needs a robust mandate from the Security Council, as we have seen in Bosnia-Herzegovina, when IFOR became SFOR.[9]

One additional, but different, aspect, finally: It is not only general international law (UN law), that comes into play, but nowadays also the Rome Statute of the International Criminal Court (ICC),[10] when States decide to engage their armed forces in conflicts abroad. The Statute of the International Criminal Court lists in Art.8 all grave breaches under the Geneva Conventions and Additional Protocols, as well as (albeit a bit imprecise) the violations of the prohibitions under the UN Weapons Convention and related Protocols, as "war crimes". The Statute becomes relevant when States have ratified it (as Brazil did in 2002), if troops are deployed to the territory of a State that has done so, or if the Security Council decides to report a situation to the ICC; in that case adherence to the Statute by the States involved would be irrelevant.[11]

If States decide to participate in peacekeeping or peacemaking operations abroad, that is mostly done within the framework of a multinational force. In Kosovo as well as in

[8] Resolution 1973 (2011) of 17 March 2011

[9] Resolutions 770 (1992), 787 (1992) and 816 (1993) and 836 (1993).

[10] UNTS Vol. 2187, p. 90; ILM 37 (1998), p. 1002.

[11] Cf. Arts. 12 and 13 of the Statute of the ICC.

Afghanistan we had at times way over 30 national contingents, different in size. And not all of them were bound by all the Geneva Conventions and Additional Protocols, and even less by the UN Weapons Convention and Protocols.

The provisions of the Geneva Conventions are mostly considered today as customary international law, but certainly not the Additional Protocols or those of the UN Weapons Convention. Are national contingents only bound by what their own State has accepted? Or bound by everything listed in Art.8 of the ICC Statute, if they operate on the territory of a contracting State? Can the Commander of a multinational force say, "Let the troops from State X do it, they are (nationally) not prohibited from using, e.g., Napalm, laser weapons, plastic ammunition or booby traps?" That commander could face personal criminal responsibility under Art. 28 of the ICC Statute, even if he has not ordered, but simply had not thought about it. Still an open question.[12]

[12] Cf. T. Stein, Zur international-strafrechtlichen Verantwortlichkeit des Befehlshabers einer multi-nationalen Streitmacht (The international criminal responsibility of the commander of a multi-national force) in: Frowein et.al. (ed.),Verhandeln für den Frieden (Springer Berlin 2003) p. 449