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THE FIGHT AGAINST INTERNATIONAL TERRORISM AND THE QUESTION OF INTERNATIONAL SECURITY

WHAT ROLE WILL NATO PLAY IN THE FUTURE?

Dirk Peters

The terrorist threat has not been averted. Fear is returning to New York. The city has been incredibly lucky – as was Germany in 2006 when the detonators in suitcase bombs on trains failed. This was written by German newspaper “Die Zeit” on May 3 2010.

In April 2010 alone – a statistically average month – 800 terrorist attacks cost just under 1,500 lives worldwide. Around half of these attacks occurred in the theaters of operation of various NATO alliance partners, in Afghanistan, on the coast of Somalia and in Iraq. Additionally, forty-three German soldiers had died in Afghanistan in International Security Assistance Forces operations as of April 2010. The public does not want to get used to the thought that this situation is expected to become normal. It is even more unbearable to imagine that it is only a question of time until a terrorist network succeeds in committing another major attack using dirty bombs.

Reason enough to ask how NATO should coordinate itself in future in the fight against international terrorism. And yet it is not exactly as if the alliance has ignored this problem up until now. The fight against international terrorism is high on NATO’s agenda. Not even twenty-four hours after the attacks on September 11 2001, NATO declared collective defense under Article 5 of the NATO agreement for the first

time in its history. Two days later, eight measures¹ had already been passed to support the USA. The first anti-terror operations ensued, as well as the decision of the NATO foreign minister in Reykjavik in May 2002 to involve NATO – wherever and whenever necessary – in the fight against terrorism, and the Prague summit in November 2002, where the fight against international terrorism was conceptually included in NATO's orientation. Shortly afterwards, on December 6 2002, NATO voted in favor of MC 0472, a military concept for combating terrorism. Significantly, in clarifying the characteristics of new threats at the Riga summit in 2006, it was declared that terrorism and the proliferation of weapons of mass destruction will very probably be the greatest threat to NATO for the next ten to fifteen years.

TERRORISM: THE NATURE OF THE THREAT – DEFINITION

What is particular about the terrorist threat? How does it differ from previously known challenges? In contrast to threats from other states, independence movements or uprisings, terrorism has a dimension which makes it elusive: the indiscriminate killing of the highest possible number of people calls into question any idea of state, where the state dedicates itself to the protection of its citizens, and attacks the fundamental values on which the social existence of the alliance partners rests. Whoever commits such an act denies the value of human life and social order as the basis for lasting peace.²

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Terrorism is aimed at spreading fear and dread among potential victims, provoking a reaction from those attacked, and exploiting any over-reaction for the real aim of the terrorism. The helplessness of national authority should

1 | These include: exchange of intelligence information, relief of American forces deployed in the fight against terrorism, extended overflight permissions in allied territory, posting of naval forces in the eastern Mediterranean, deployment of AWACS planes to support anti-terrorist operations.

2 | Cf. Prof. Dr. Chr. Tomuschat, "Internationale Terrorismusbekämpfung als Herausforderung für das Völkerrecht", *Die öffentliche Verwaltung*, May 2006: 357 et seq.

be exposed, in order to shake the basic values of human coexistence and the rules of national and international order.³

Precisely here is the challenge for the community of nations: the reaction to terrorist attacks must be based on the principles of legality, legitimacy and proportionality, and in this respect must take place on the basis of careful situation analysis coordinated between nations, so as to avoid furthering the terrorists' goals through over-reaction.

TERRORISM: DEFINITION

First it is necessary to clarify what is signified by the term "terrorism". The term originates from the time of the French revolution and following the Jacobin reign of terror originally described politically motivated attacks by individuals, de facto familiar since the time of the Roman Empire. Terrorism in the form of destabilizing actions by entire groups did not occur until the twelfth and thirteenth centuries, and was linked with the name "assassins", a fanatical Islamic sect which chose its victims from among both Christians and less strictly devout Muslims.⁴

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However, fundamental elements of terrorism have always been the intention to destabilize state or other authorities, the "removal of boundaries" in the choice of methods, and the unpredictability of its actions.

The once again current phenomenon of piracy differs significantly from terrorism with regards to its aims, but the use of force is similar. Thus piracy, in contrast to terrorism, is recognized under international law as an international crime and reflected in relevant conventions. The phenomenon of piracy was first countered by a multi-national agreement under the Geneva Convention in

3 | Cf. "Asymmetrien als Herausforderung: Rahmenkonzept für eine ressortübergreifende Sicherheitspolitik", Bundesakademie für Sicherheitspolitik, 2007, 13.

4 | For more detail cf. Friedlander and Marauhn, *EPIL* IV (2000): 845 et seq.; Tietje and Nowrot "Völkerrechtliche Aspekte militärischer Maßnahmen gegen den Internationalen Terrorismus", *NZWehrr* 1 (2002), 1 et seq.

1937.⁵ At the third UN Convention on the Law of the Sea in 1982, the prosecution of piracy under international law was further codified. Germany ratified this convention in 1994. Unfortunately, the third UN Convention on the Law of the Sea regulates only a few further offences beside action against piracy, such as a ban on the transport of slaves, trading narcotics, or less relevant, action against unlicensed radio broadcasts at sea.⁶ There is no comparable basis for action against the trade or proliferation of weapons of mass destruction or against terrorism.

Until the start of the 1990s, the picture of international efforts with regards to fighting terrorism was rather sobering. All regulation efforts were characterized by the difficulty of isolating terrorism from the right to autonomy and the legitimization of national liberation movements derived from this. Moreover, the ideological contrast between states in the western world, socialist nations and the third world prevented a common denominator from being found. Against this backdrop, an agreement on a universal definition of terrorism was not possible.⁷ Not until the end of the Cold War did the discussion gain new impetus.

However, it is sobering to note that there is still no universal and internationally recognized definition.

On the other hand, the formulation of a statutory offence is now used, as described in the 1999 International Convention for the Suppression of the Financing of Terrorism:

Art. 2 Para. 1b: Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out... Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when

5 | Tietje and Nowrot, 2.

6 | Cf. Third UN Convention on the Law of the Sea, Articles 99-110.

7 | *ibid.*

*the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*⁸

This formulation adds further characteristics to the conventional understanding of terrorism, in that terrorism can also be directed against population groups and not only against national authority, that it regularly affects non-participants, and that it fundamentally aims to coerce third parties.

However, on closer examination the weak point of this alternative definition becomes clear, as it regards terrorism essentially in the context of an armed conflict, which is not the case in reality.

CAUSES OF TERRORISM

With regards to the question of how to counter terrorism, the tenet that it is surely better to remove the causes than to cure the symptoms should be indisputable. A look at known causes can potentially provide valuable starting points for NATO's orientation and possible actions.

Unfortunately, the problem is complex – there are no single causes for the emergence of terrorism. Similarly to cancer, it is more a series of factors and circumstances which encourage the development of terrorism. Poverty among the population, a lack of education, democratic shortcomings, fragile statehood and a negative perception of the western world and its community of values produce a lack of prospects and hate, and aside from the specific psychological profiles of individual perpetrators are the best known factors and the breeding ground for terrorism.

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It is clear that an alliance such as NATO cannot be the primary tool for solving the problems of poverty in certain regions of the world. The same applies to the area of

8 | UN Doc. A/Res/54109, December 09, 1999, in force since April 10, 2002.

education. However, on the basis of bi- or multi-lateral agreements or a mandate from the UN Security Council, NATO can certainly contribute to creating security and stability in states or regions through education and training missions. With the presence of military forces, for instance, NATO can guarantee free elections or protect national structures from attacks.

Legitimacy and morality in its actions contribute considerably to the credibility and acceptance of NATO activities in all areas of deployment. As paradoxical as it may be, it is the frequently criticized media in particular whose reporting from the front line is to thank for the attention to legitimacy and morality in action. This "CNN factor" gains increasing importance in the media age.

NATO – AN INSTRUMENT OF INTERNATIONAL SECURITY IN THE FIGHT AGAINST TERRORISM?

But what role can NATO now play in this context? What opportunities does it have to maintain a balance between the most effective possible active defense on the one side and attention to the legitimacy and legality of national and above all military actions on the other side?

Germany has been a member of NATO for over fifty years – as long as its modern armed forces have existed. The alliance has guaranteed our security since the mid 1950s. During the Cold War, NATO held together both sides of the Atlantic and provided reassurance as to the security of the Federal Republic of Germany which was so close to the boundary in the East-West conflict. At the fall of the Berlin Wall, it was thanks to its investment in NATO that a re-nationalization of German security policy was prevented. NATO will also remain the strongest anchor for our mutual security in future. It unites Europe and America, is the basis for collective defense, and possesses a unique political and military arsenal for the maintenance and restoration of peace.

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Changes in the security policy landscape since the end of the Cold War have made it necessary to adapt the orientation and interests of the alliance. The NATO of today is different to the NATO during the East-West conflict. The original sixteen member states have now become twenty-eight – and more are approaching the alliance to become members or work with NATO as partners. NATO's one-dimensional concentration on the alliance's collective defense now belongs to the past. Today a multi-dimensional spectrum of new challenges and risks, among them international terrorism, demands new answers. These are key questions about the future orientation of NATO, which will provide the basis for a new strategic concept at the Lisbon summit in November.

TERRORISM: INTERNATIONAL DIMENSION

The most painful turning point in the security policy landscape for the alliance and above all for the USA was the attacks of September 11 2001, when NATO's leading power was attacked not peripherally as usual, but in its very heartland. The unimaginable had happened, bringing the USA to the painful realization that they were also vulnerable on that side of the Atlantic. And the alliance was faced with the irrefutable necessity of assessing how to deal with this type of threat in the future. Further devastating attacks in Madrid in 2004 and in London in 2005 reminded European allies that this new form of terrorism is not an exclusively American problem. It also became clear that no individual state – not even the superpower USA – can successfully act alone against international terrorist networks. As long as the terrorist threat exists, including the use of weapons of mass destruction, NATO cannot ignore this as an organization which takes responsibility for the security of member states. This is all the more valid as terrorist attacks have reached a size which equals the scope of military conflicts and which, at least broadly, can only be faced with military means.

TERRORISM: A CHALLENGE FOR INTERNAL AND EXTERNAL SECURITY

Terrorism thereby affects both internal and external security. Only armed forces have the necessary means to

effectively deal with attacks where weapons of mass destruction, planes and ships are in the hands of terrorists. The attacks in the past ten years have illustrated that a clear distinction between internal and external security or on an international level between "security" and "defense" can barely been sustained. However, the question of how widely military resources can be deployed in the fight against terrorism and how the primacy of politics can be guaranteed is debatable.⁹ In Germany, this topic drew public attention when a runaway sports plane caused fear and terror over Frankfurt. This event was the starting point for the hurriedly passed airspace security law, whose technical flaws became apparent in a judgment by the Federal Constitutional Court. Among other things, it was declared by the Federal Constitutional Court that the deployment of military forces for the qualitative support of the originally responsible police forces was not permissible under German legal interpretations. This problem has still not been solved. The necessary deployment of military forces to safeguard the visit of President Bush and the G8 summit in 2007 in Heiligendamm was discussed. As a justification for the deployment of military resources to protect these major events, legal concepts and interpretations were consulted that are still controversial today. Even so, the pressure of public opinion led to the necessary decision-making processes being set in motion. Thus for instance it is no longer readily tolerated that naval forces operating on the ground are not allowed to participate extensively in UN-mandated NATO anti-piracy operations in order to protect shipping lanes important to Germany, just because national jurisdiction regulations do not allow for this. If questions of domestic jurisdiction regulations are a complex matter even in Germany, it is easy to imagine how much more difficult it is to answer such questions by common accord in an alliance with twenty-eight member states.

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9 | Prof. Joachim Krause, "Schwierigkeiten von Demokratien im Umgang mit Terrorismus", in: *Jahrbuch des Terrorismus 2009* (Kiel: University of Kiel Institute for Security Policy, 2009).

NATO'S ADAPTABILITY

However, in the context of the new strategy to be passed in November, it is now necessary to succeed in designating the role of military forces within an interconnected security architecture, and in particular to define the military contribution to the prevention of international terrorism. Until now, a considerable strength of the NATO alliance has been the ability to change and to adapt to changing situations in security policy.

The starting point for development and necessary adaptations is the still valid strategic concept from 1999, which conceptually reinforced the functions adopted in the 1990s for the purpose of peacekeeping and peace-making measures. Alongside deployments mandated by the UN Security Council such as the second Gulf War against Iraq in 1991, these operations included various peacekeeping operations – also under a UN mandate – in the Balkans (IFOR, SFOR, KFOR), and non-mandated peacekeeping operations at the request of a party to the conflict in Macedonia, such as operations “Essential Harvest” or “Amber Fox”.

Operation “Active Endeavour” as an anti-terrorism operation and NATO’s further commitment against terrorism after the September 11 2001 attacks now require the conceptual superstructure which should be guaranteed by the new 2010 strategic concept.

Even the concept of 1999 contained the statement that all measures, even outside of Article 5 operations, must be “consistent with international law”. This formulation, incorporated primarily at the request of the European alliance partners sets the framework for the still open discussion of what degree of military force is admissible for NATO under international law.¹⁰ The readiness of the international community to continually expand military leeway is clearly recognizable.

10 | Michael Bothe, “Die NATO nach dem Kosovo Konflikt und das Völkerrecht”, *SZIER* 2 (2000), 177 et seq.

DETERRENCE AND TERRORISM

Attacks in the recent past have shown that NATO's strategy towards terrorists during the Cold War, based equally on nuclear and conventional deterrence and détente, cannot be effectively developed. Such a strategy cannot hold an opponent who defies even the most elementary principles of the laws of war – which are based on rationality, the “humanitarian parity” of opponents and the recognition of the reciprocity of military resources – through suicide bombings. Deterrence is based on the recognition that the use of force can be appropriately reciprocated. It remains a form of political power and avails itself of diverse resources: legal and economic, political, police and military. It remains a political security concept with the addition of military resources, but of only limited effectiveness against terrorists who, for their part, are not trying to protect a community of values from reprisals.¹¹

The understanding of security on which the NATO treaty is based originally related to the integrity of alliance territory, the protection of alliance partners from military attacks, and the integrity of citizens and preservation of political freedom.

Now, of course, it must be asked what contribution can and should the alliance provide in order to best meet its core mission, guaranteeing the security of alliance partners? What, indeed, should be understood by the term “security” in light of a terrorist threat? What limits of international law must be considered and what limits of legitimacy must be heeded in order to gain the support of the population and the international community for the alliance?

NATO'S FUNCTION: SECURITY IN THE SENSE OF PROTECTION AND FREEDOM?

The understanding of security on which the NATO treaty is based originally related to the integrity of alliance territory, the protection of alliance partners from military attacks, and the integrity of citizens and preservation of political freedom. This concept of security emphasized the perspective of states. The international order, as it was conceived at the end of the Second World War, represented a community of coordinative states with equal sovereignty, made up of the United Nations, whose essential rights

11 | Michael Stürmer, “Die Macht der Abschreckung”, *Die Welt*, April 19, 2010.

included that of dealing with their own internal issues alone and independently. In contrast, the task of the United Nations is to guarantee international security.¹² The guarantee of security by the Security Council also concerns a national perspective. The use of police or military force against terrorism is reserved as an "internal matter" for sovereign states.

However, the extent of numerous attacks in the recent past has led the UN Security Council to deal with the problem. The UN Security Council has passed numerous resolutions authorizing the use of military force by individual states and by NATO to fight terrorism, in that it designates the connivance of Al Qaeda through the Taliban as a threat to world peace and international security, and sees the fight against international terrorism as a considerable contribution to maintaining these.¹³ The then General Secretary of the United Nations, Kofi Annan, defined security in a major report¹⁴ as the "prevention of catastrophic terrorism" under the term "freedom from fear", requiring

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an international and interdisciplinary strategy including the prevention of the proliferation of weapons-grade material and weapons of mass destruction. Here can be found a key to the current and future positioning of NATO: for the purposes of what is described in NATO as a "comprehensive approach" (without there being a consistent definition agreed upon), an intensification of close international cooperation with various organizations is required. NATO must more precisely define its contribution to alliance partners' security as "freedom from fear".

12 | Article 2 Para 1, Article 1 Para. 1 of UN Charter. Cf. Peter-Tobias Stoll, "Die zwei Seiten der Sicherheit: Internationale Kooperation zur Bekämpfung des Terrorismus und die Wahrung von Rechtsstaatlichkeit und Menschenrechten", in: *Zukunft des Völkerrechts in einer globalisierten Welt* (2006).

13 | Peter-Tobias Stoll, "Die zwei Seiten der Sicherheit: Internationale Kooperation zur Bekämpfung des Terrorismus und die Wahrung von Rechtsstaatlichkeit und Menschenrechten", in: *Die Zukunft des Völkerrechts in einer globalisierten Welt* (2006).

14 | UN Doc. A/59/2005: "In größerer Freiheit: Auf dem Weg zu Entwicklung, Sicherheit und Menschenrechte für alle", report by the General Secretary, May 21, 2005.

CORE CAPABILITIES OF THE ALLIANCE FOR FIGHTING TERRORISM

Experiences not only in Afghanistan and previously in the Balkans have taught us that military force is by far the last, but in no way the only resource that NATO can use. The complex nature of terrorism requires a series of initiatives by NATO which encompass political, operational, military, technological, scientific and economical aspects. These also include public relations work which should ensure transparency and acceptance of NATO's actions in all areas.

Thus NATO's contribution to fighting terrorism consists of the most varied components: firstly, NATO offers a forum which allows consultations to be translated into decisions. Secondly, NATO has the considerable military capabilities of member states at its disposal for the implementation of relevant decisions. Thirdly, NATO is part of a network of partners which includes not only states but also international organizations.

PERMANENT CONSULTATION FORUM

One of NATO's core capabilities is to provide a permanently established, permanently available forum for consultation in security policy questions. Since the fight against terrorism has belonged to NATO's core missions, continuous discussions on this subject have taken place between alliance partners, other states and relevant organizations. This capability represents a quite considerable strength of the alliance: while the different session formats allow the integration of all relevant dialog partners, at the end of a broad opinion-forming process, the alliance partners can develop a coordinated position. The readiness of alliance partners to back this position, such as with the deployment in Afghanistan, is the basis for all of the alliance's actions. This basis rests on the principle of unanimous decision-making, known as the consensus principle. This principle guarantees the cohesion of the alliance against third parties.

At the request of alliance partners, NATO assists with the protection of major events such as the Olympic Games in Athens or various summit meetings through the provision of special capabilities including the AWACS airborne early warning system and units for the detection of and defense against chemical, biological or nuclear weapons.

ANTI-TERROR OPERATIONS

Beside consultations, there are of course numerous operations in progress, some directly and some indirectly related to terrorism.

OPERATION ACTIVE ENDEAVOUR (OAE)

NATO naval forces have been policing the Mediterranean for years as part of Operation Active Endeavour, searching for terrorists and protecting shipping lanes. OAE, as one of eight measures supporting the United States after the September 11 attacks, also allows the involvement of non-NATO states.

OPERATIONS IN AFGHANISTAN

Since August 2003, the NATO-led International Security Assistance Force (ISAF) has been supporting the Afghan government in stabilizing the country and ensuring security, in order to prevent terrorist networks from using the country as a refuge for training and planning further attacks.

OPERATIONS IN THE BALKANS

In the Balkans, NATO supports the stabilization of the region through peacekeeping operations in close cooperation with local authorities, in order to dry up sources of finance for terrorists through weapons, drug and human trafficking.

PROTECTION OF MAJOR INTERNATIONAL EVENTS

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DEVELOPMENT OF INNOVATIVE TECHNOLOGY

NATO possesses the opportunity to develop joint, modern technology and develop abilities to protect soldiers, civilians

and critical infrastructure from terrorist attacks, such as by early detection of explosive devices (IEDs), the threat of weapons of mass destruction and protection against rocket attacks by planes and helicopters.

ESTABLISHMENT OF THE DEFENSE AGAINST TERRORISM PROGRAM OF WORK

The Defense Against Terrorism Program of Work was developed by NATO's Armaments Directors and adopted as a component of the anti-terrorism package created at the Istanbul summit in 2004. This program concentrates on ten different areas in which the consequences of a terrorist attack can be minimized with the help of future technology developments. This includes protection for helicopters and planes against small arms fire and protection against handheld missiles, measures for protection against mines, protection measures against mortar attacks, protection of critical infrastructure etc.

INITIATIVES FOR DEFENSE AGAINST CHEMICAL, BIOLOGICAL, RADIOLOGICAL AND NUCLEAR WEAPONS

These particularly menacing weapons, as well as their illegal proliferation, are the subject of numerous NATO investigations and initiatives, to which separate "Centers of Excellence" (CoE) in the Czech Republic and Turkey are dedicated. The CoE for the combating of terrorism in Turkey deals not only with the technical aspects of defense against terrorist attacks. Among other things, a weekly and monthly review is created which documents all terrorist activities, especially in Iraq and Afghanistan.

"CYBER DEFENSE"

The protection of communications, guidance and information systems has been a further urgent task of the alliance since the terrorist attacks against Estonia in the spring of 2007.

COOPERATION WITH INTELLIGENCE SERVICES

Comprehensive cooperation with intelligence services allows threats to be recognized when and where they

arise. This should put the alliance in a position to recognize and thwart attacks in the planning stage.

WORKING PARTNERSHIPS

Cooperation with non-NATO states in a special program, by involving Russia and neighbor states to NATO operations such as in the Mediterranean, allows systematic tracking of terrorist activities beyond the borders of the alliance.

SUPPORTING THE POPULATION AND ALLIANCE PARTNERS AFTER DISASTERS

For worst case scenarios, NATO has built up extensive capabilities to be able to guarantee adequate crisis management and rapid emergency aid and provisions for the victims of catastrophes. In addition, a network of 350 civilian experts has been formed to support the "EURO-ATLANTIC Disaster Response Centre".

This short inventory of existing ongoing activities illustrates what NATO is in a position to do – overall, NATO is an organization with outstanding capabilities for countering terrorism.

Supported by the authority of the twenty-eight member states, taking into account important or regionally affected partners, NATO can provide capabilities as no individual state can.

ORIENTATION OF NATO IN VARIOUS PHASES OF FIGHTING TERRORISM

Only in a cross-agency, integrated approach, operating under the term "comprehensive approach", can the state of peace and system of values of western democracies be protected against inhuman attacks. This approach requires consideration of all relevant factors for the terrorist threat and the use of necessary state resources. Above all, NATO possesses military means, as well as tools for political coordination. A constant adaptation of NATO's capabilities towards terrorist threats and the proliferation of weapons of mass destruction is described in the strategy paper "Comprehensive Political Guidance", passed at the Riga

summit in 2006. It is less a matter of building up NATO's civilian capabilities, and far more the creation of interfaces to be able to usefully integrate civilian capabilities into NATO operations.

PREVENTATIVE MEASURES

In the area of preventative measures, NATO has more of a supporting role in the "comprehensive approach". The reduction of poverty, democratization of states and rectification of educational deficits are preventative measures against terrorism for which civilian authorities have overall control. Military forces such as the alliance can support the authorities originally responsible for internal security where the borders between internal and external security are blurred; that is, everywhere where the capabilities of military forces are needed to guarantee the protection of citizens and states. According to German legal interpretation, this action is subsumed under the concept of administrative assistance. It cannot be in the interests of the military forces or the alliance to displace national powers and responsibilities in favor of military forces. Only sensible integration must be possible. In the case of Germany, this means supplementing the basic law with Article 35a Paragraph 4, which allows the qualified deployment of military-specific weapons, such as air defense missiles, within the scope of administrative assistance. In the preventative area, NATO military forces provide support through close coordination as well as in an advisory capacity. NATO can also be usefully involved in the early detection and reconnaissance of terrorist activities. Airborne early warning systems and biological, chemical and nuclear weapons detection capabilities can support the police in their reconnaissance work. Cooperative projects with third countries, such as training and education missions for their security forces, are a further tool that NATO can use in the area of prevention.

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MILITARY INTERVENTION: LEGALITY / LEGITIMACY OF ACTIVITIES

In the area of self defense under Article 51 of the UN Charter, in other words defense against the immediate threat of a terrorist attack, which is legally comparable to an attack by a third nation, the alliance has a leading role. Through consensus by the nations represented in NATO, the aim is to find an adequate response in the use of military means which, if necessary, can be accompanied by measures by civilian authorities. NATO's use of military force must be measured against the standards of legality and legitimacy.

In connection with the September 11 attacks and the triggering of collective defense under Article 5, the use of military force was the first public reaction of the alliance. Military force is certainly not the only promising element in the fight against terrorism and to guarantee international security. However, there is much to suggest that

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means and opportunity will also command a prominent role for military forces in the fight against international terrorism in the future. Military force is thus in the public eye. The air strikes on two hijacked tankers in Afghanistan with civilian casualties increased the public's attention and critical awareness of the proportionality, legitimacy and morality of military force even in the fight against international terrorism.

It is thus necessary to explain the basis on which military forces may be used to fight terrorism. The limits of what is legally permissible are at the same time the limits of NATO's actions.

The UN Charter does not explicitly use the term terrorism, but the international community's interpretations of Article 2 Paragraph 4 of the UN Charter in conjunction with various Security Council resolutions allow the conclusion that the goal of the UN is to prevent international terrorism in all its forms. The increasing expansion of the terms of the threat to peace under Article 39 of the UN Charter and the associated expansion of intervention options due to authorization by the Security Council and the almost

unanimous agreement of the international community to deployment in Afghanistan are ample proof that it is considered justifiable to proceed with military means against massive terrorist attacks.¹⁵

However, it is for the Security Council to clarify, for each individual case if necessary, what scope relevant measures may have. In Germany, the Federal Constitutional Court declared, in conjunction with the judgment on the airspace defense law, that a serious terrorist attack is comparable with an attack by a third nation, and that the deployment of military forces would thus be justified for its defense. This also applies if the attack has not yet taken place but is imminent.

Nonetheless, a terrorist attack does not automatically amount to an international armed conflict in the sense of a "traditional war" between nations. Such an analogy must be avoided, as then the use of military force would be limited to a certain extent.¹⁶ The starting point for the assessment under international law of military action against terrorism is the prohibition of force under Article 2 Item 4 of the UN Charter. The deployment of NATO forces within the scope of foreign deployment against non-governmental armed groups such as terrorists on the sovereign territory of other states imperatively requires justification under international law.¹⁷

Military deployment can be so justified in various contexts:

The right to self defense comes into consideration under Article 51 of the UN Charter. For the September 11 attacks, this was accepted by the UN Security Council in relation to the subsequent military action of the USA against Afghanistan.¹⁸ Immediately after the attacks, the Security Council passed three resolutions addressing the danger of international terrorism (UNSR 1368, 1373, 1377). The Security Council condemned the attacks as armed attacks against

15 | Bothe, in: *Völkerrecht*, 2nd Edition, ed. Graf Vitzthum (2001), 603 (615 et seq.)

16 | For further details cf. Prof. Jens Meierheinrich, "Analogies at War", *Journal of Conflict & Security Law* 11 (2006): 1-40.

17 | Christian Schaller, "Humanitäres Völkerrecht und nicht-staatliche Akteure", *SWP Studie* (2007), 14 et seq.

18 | Cf. Tietje and Nowrot, 5.

the United States and supported the right to individual and collective self defense.¹⁹ A pre-requisite for this, beside the existence of an armed attack, is the accountability of the state that actively supported this action or harbored the masterminds and perpetrators. The applicability of the self defense right is controversial in the case of states who neither approved of the terrorist act nor were otherwise involved in any way.²⁰

In light of the uncertainty associated with this, military actions of the NATO alliance towards territorially "failed states" that cannot or insufficiently exert their sovereignty should not be justified solely by the self defense right under Article 51 of the UN Charter.

Instead, only a resolution under Chapter VII of the UN Charter is considered as a justification by the Security Council. At any rate, combating the terrorist threat is first and foremost a task for the Security Council, which is entitled according to Chapter VII of the UN Charter to initiate sanctions against a state which tolerates or even supports terrorist activities on its soil.²¹

Also controversial as a justification for the violation of the prohibition of force is NATO's self-imposed mandate, such as during military deployment in the Balkans from March to June 1999 to compel political behavior.

Besides fighting military organized terrorists or the defense against attacks with military means, crisis management and the protection and care of victims will in future be a primary task of the NATO alliance.

Although the still valid strategic concept of NATO from 1999 allow for actions that are "out of defense, out of area" as well as "out of UN", in the event that there is serious damage to the security interests of NATO states²², this is no license to fundamentally question the monopoly of power of the UN Security Council.

Both a highly stretched interpretation of the self defense right under Article 51 of the UN Charter, which was

19 | For criticism cf. Prof. Dr. Norman Paech, "Afghanistan Krieg, Bundeswehreinsatz und Völkerrecht", AG Friedensforschung at the University of Kassel, November 12 , 2001

20 | Tietje and Nowrot, 11.

21 | Tomuschat, 358.

22 | August Pradetto, "Funktionen militärischer Konfliktregelung durch die NATO", *Aus Politik und Zeitgeschichte*, 2002, 12 et seq.

consulted by the USA as a justification for the Iraq War in 2003, and the NATO alliance's self-imposed mandate for the protection of security interests hold the risk of an extremely controversial public perception or schisms among alliance partners. We may remember the inauspicious development of the "coalition of the willing", which could have endangered NATO's cohesion as a result of the non-participation of many alliance partners in the 2003 Iraq War.

Therefore I find it useful, in the interests of the cohesion of alliance partners, to extend the indisputable pre-requisites for the legality of NATO's deployment of military force by various criteria of legitimacy. These could for instance consist of the severity of a potential threat, the appropriate intentions of alliance partners, an assessment of proportionality and an appraisal of possible consequences.²³

Besides fighting military organized terrorists or the defense against attacks with military means, crisis management and the protection and care of victims will in future be a primary task of the NATO alliance, in cooperation with other organizations and authorities.

STABILIZATION – RECONSTRUCTION

After military intervention in another country, a stabilization phase takes place whose aim must be to deprive terrorists of their breeding ground for renewed development of their activities. In such a phase, the military forces take on the role of preventing infringements from all sides against the peace treaty and generally creating the security conditions for reconstruction and development.²⁴ The importance of military forces decreases with increasing stabilization of the area of deployment, and relevant tasks can be increasingly handed over to civilians while the military presence is reduced.²⁵

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23 | For more details cf. Gareth Evans, "Völkerrecht und Vereinte Nationen: Zum Einsatz militärischer Gewalt", *Zukunft des Völkerrechts in einer globalisierten Welt* (2006).

24 | "Asymmetrien als Herausforderung", 37.

25 | *ibid.*, 38.

REPRESSIVE MEASURES

With regards to repressive measures against terrorism, the use of civilian authorities is once again in the foreground with respect to crime detection. NATO military forces provide support here through appropriate reconnaissance means and through the provision of numerous other capabilities that, as the review has shown, are either already available or in development.

FORECAST: NATO AS AN INTEGRAL COMPONENT IN FIGHTING TERRORISM

Solid experience in anti-terrorism operations, a whole spectrum of highly developed capabilities ranging from consultation to worldwide military intervention, and legality and legitimacy of action on the basis of the resolution of twenty-eight western democracies establish NATO well in any anti-terrorism strategy of the international community. With regards to certain capabilities in the military sector, there is no better alternative to NATO as a mandate bearer in large parts of the world for the UN.

For the future, there is a need for optimization of the consistent, smooth cooperation of civilian and military participants from the international community. This includes more intensive coordination of military action with civilian-led prevention and stabilization measures.

The alliance must also continue to adapt its capabilities and structures for the purpose of transformation in such a way that terrorism can be effectively countered. Crisis provisions, reconnaissance and information exchange, the development of more modern guidance technology, reconnaissance techniques and the protection of critical infrastructure are key fields of action. The NATO armament program "Defense against Terrorism" and the "Center of Excellence" against terrorism can provide valuable impetus here.

An intensification of the dialog with non-NATO partner states that already takes place in the course of ongoing operations, as well as harmonization with further important participants in the "comprehensive approach" – primarily

the EU – is desirable and should be established in the coming strategic concept. Cooperation with Russia on the subject of terrorism should also be intensified. An action plan is already providing initial approaches.

Although NATO is an integral component in the fight against international terrorism, the UN Security Council, as the only legitimate agency with responsibility for the maintenance or restoration of international security and world peace, remains responsible for the mandating of military deployments and other sanctions. In the future, self-imposed mandates by NATO should be fundamentally avoided, because unilateral actions are not only precarious under international law, but also risk the cohesion of alliance partners.

For NATO to combat terrorism, its actions must satisfy the highest demands of the community of values that it represents.

For NATO to combat terrorism, its actions must satisfy the highest demands of the community of values that it represents. Only in this way can the international community's trust in the alliance be further strengthened. This includes, besides dealing with powerful tools, a more transparent and comprehensible decision-making process in the relevant committees.

NATO's participation in anti-terrorist missions should always take place alongside other participants if significant added value can be achieved. It is certain that the alliance is on the right track – necessary initiatives have been instigated and are bearing their first fruits. We now look forward with hope to the new strategic concept, which should significantly reinforce the existing promising approaches.

The security of alliance partners, "freedom from fear", is worth the necessary efforts.

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