ABHANDLUNGEN

American-European Dialogue: Different Perceptions of International Law - Introduction

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The idea of organizing a Workshop entitled 'American-European Dialogue: Different Perceptions of International Law' has proceeded from the double assumption that there are such different perceptions and that there is some merit in discussing them.

Before dealing with some of the particular issues of the general topic I would like to formulate several caveats. International law seems to be in a stage of transition. It is, thus, in my view, premature to generalize about developments or events, such as attempted reformulations of the right to self-defense, as advocated by some authors and some politicians from the United States, and to draw wide-ranging conclusions therefrom concerning the legitimacy of the use of force under international law or even the relevance of international law in general. The same is true in respect of conclusions on the development of international law being drawn from the perceived unilateralism of the United States. It is still to be seen whether such unilateralism is of a general nature, which are its roots and at impact it may have on the development of international law. Finally, the developments in international law should be considered as a whole. The ongoing discussion very much proceeds from contemporary or future developments concerning the legitimacy of the use of force. There is no doubt that this is a central issue. Nevertheless, the body of international law is shaped by the development of other issues, too, which equally have to be taken into account. Concerning some of them different perceptions seem to exist also. This is true, in particular, concerning the present and potential role of international organizations, above all, the United Nations, and the formulation and implementation of norms for the protection of interests common to the community of States. Therefore, I am glad that my colleagues have agreed to address various aspects of international law. The workshop will include the following participants and contributions: Professor Neuhold: 'Law and Force in International Relations – European and American Positions'; Lt. Col. Lietzau: 'The Role of Military Force in Foreign Relations, Humanitarian Intervention and the Security Council'; Professor Reisman: 'The Economic Dimension of Relations Between Europe and America'; and Professor Koskenniemi: 'Perceptions of Justice: Walls and Bridges Between Europe and the United States'. In my introductory re-

marks I will focus on the role of international law for the conduct of international relations in general, the legitimacy of the use of military force and the development of what is frequently termed international governance. Further issues will certainly come up in the subsequent discussion.

The Role of International Law for the Conduct of International Relations

In spite of some voices to the contrary,[1] the relevance of the regulatory function of international law for the conduct of international relations can hardly be questioned in general. To put the relevance of international law into question does not reflect the realities of international relations where the rule of law is an established principle on which even States exercising hegemonic powers have relied in the past and will rely in the future. For example, none of the States which in 2003 participated in the military intervention in Iraq has asserted that international law in general or its prohibition on unilaterally having recourse to military force was not binding. On the contrary, they, and in particular the United States and the United Kingdom, have made every attempt to justify their actions *vis-à-vis* the Security Council and the community of States at large. Stating this is not meant to diminish or even to deny the existence of a profound divergence of views between those advocating the unilateral use of military force against Iraq – and thus advocating a reinterpretation or modification of existing international law in that respect – and those opposed thereto. There is a disagreement on the status and scope of the international law prohibition on the use of military force in international relations and the factors legitimizing such use of force. Although one may disagree with their reasoning in substance, such reasoning constitutes a confirmation that recourse to unilateral military force needs justification under international law. This conclusion is confirmed if account is taken of the extent to which the United States relies on or participates in international law-making. It is a well-known and an often referred-to fact that the United States ratifies less international agreements than most western European States. This is not a recent phenomenon, though. Nevertheless, the United States has in the past promoted and still promotes the negotiation of international agreements to the extent it feels that this best serves American interests. For example, it was the United States which promoted the Comprehensive Test Ban Treaty, the United Nations Framework Convention on Climate Change, the Convention on the Marking of Plastic Explosives, the Convention on Chemical Weapons, the Vienna Convention on the Protection of the Ozon Layer and the var-

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[1] See amongst others J. R. Bolton, Is there Really "Law" in International Relations, Transnational Law & Contemporary Problems vol. 10 (2000), 1; R. Kagan, Power and Weakness – Policy Review No. 113; see on this approach M. Koskenniemi, The Gentle Civilizer of Nations, 2002, at 415 et seq.

ious treaties on international trade adopted at the conclusion of the Uruguay Round, or at least it heavily influenced their content in the negotiation process.[2] Recently, the United States is engaged in building up an international legal network of rules to commit other States to the fight against international terrorism. These examples could easily be expanded and I will come back to this point under a different heading. However, the examples should be sufficient to show that the United States, even as a hegemonial power, is relying on international law as a support for its international policy.

Legitimacy of the Use of Military Force Under International Law

As already indicated an issue which divides policy-makers and scholars is under which conditions the resort to unilateral military force is legitimate.

The prohibition of the unilateral recourse to military force, as codified in Article 2, paragraph 4, of the UN Charter, is considered a central element in modern international law.[3] It marks a decisive evolution of international law in the last century.[4] The prohibition generally held to be a principle of customary international law[5] and to constitute a peremptory norm of international law (*ius cogens*).[6] The scope of the evolution international law has undergone concerning the prohibition of the use of force becomes apparent by comparing Article 2, paragraph 4, of the UN Charter with Article I of the Kellogg-Briand Pact of August 27, 1928,[7] which itself already constituted a major step in the progressive development of international law in this respect.[8] Article I of this Pact abandons the unrestricted freedom to resort to war as a feature of State sovereignty for a universal and general prohibition of war as an instrument of national policy in the relations amongst States. In com-

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[2] See P. Klein, The effects of US predominance on the elaboration of treaty regimes and on the evolution of the law of treaties, see in: M. Byers/G. Nolte, United States Hegemony and the Foundations of International Law, 2003 at 363 et seq. (365).

[3] There is an overwhelming literature dealing with the international prohibition of the use of force in particular: Y. Dinstein, War, Aggression and Self-Defence, 3rd ed., 2001; T. M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks, 2002; C. Gray, International Law and the Use of Force, 2000; H. Neuhold, Internationale Konflikte – Verbotene und erlaubte Mittel ihrer Austragung, 1977; A. Randelzhofer, Art. 2 (4), in: B. Simma (ed.), The Charter of the United Nations, 2nd ed., 2002; J. Zourek, L'interdiction de l'emploi de la force en droit international, 1974.

[4] See, in this respect, for example: Dahm/Delbrück/Wolfrum, Völkerrecht I/3, at 816 et seq.

[5] ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), Merits, ICJ Reports 1986, 14, para. 188.

[6] ICJ (note 5), para. 190; Dinstein, (note 3) at 93 et seq.; M. N. Schmitt, Preemptive Strategies in International Law, Michigan Journal of International Law 24, 2003, 513 at 525.

[7] LNTS vol. 94, 57, Treaty for the Renunciation of War as an Instrument of National Policy.

[8] The system of the League of Nations constituted the first attempt under modern international law to limit the right of States to have recourse to war.

parison thereto Article 2, paragraph 4, UN Charter has broadened this prohibition by also covering the use and the threat to use force. Such prohibition to use force unilaterally is meant to be implemented, enforced and supplemented through a system of collective security against any offender as provided for under Chapter VII of the UN Charter.

The arguments advanced to justify the armed intervention in Iraq reveal some of the differences on the perception of the international law prohibition on unilateral use of force. These arguments may be summarized – which inevitably results in some simplification – as follows: It was held that Iraq constituted a threat to international peace and security and/or to the security of the United States since it was in the possession of weapons of mass destruction or at least it had made attempts to acquire them. It is further argued that the military intervention was enforcing the resolutions of the Security Council taken under Chapter VII[9] or that this military intervention was even mandated by them.[10] Finally, it is held that the government of Iraq had grossly and persistently violated human rights and that this military intervention had to be seen as enforcing international human rights standards.

This is not the place to deal with these arguments, particularly not on the basis of the facts as they present themselves months after the end of the war. It is the underlying philosophy which is of interest. The first and the third arguments essentially presume that the prohibition of unilateral use of force may have to yield to higher values, such as non-proliferation of weapons of mass destruction or the protection of human rights, respectively. The underlying different perceptions of scope and content of the international law prohibition to resort unilaterally to armed force can be described as follows: One side perceives that the prohibition to resort unilaterally to armed force is – apart from cases of individual or collective self-defense – absolute, whereas the other side holds that there are other causes which may justify such recourse to armed force. This also reflects a difference in perception on the nature of the prohibition to have recourse unilaterally to military force. For one side, unilateral recourse to military force can never be an appropriate enforcement mechanism, whereas it is for the other side, which argues that military force may and should ultimately be used to enforce international law.

Considering these differences in perception, some remarks on the meaning of the prohibition of the use of force in international law are called for. Through that principle – and that is its most traditional reading – the very existence of each member of the international community is guaranteed as well as its right to participate in the formation of common values and norms. But the prohibition of the use of

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[9] See letter of 20 March 2003 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (UN Doc. S/2003/352, 21 March 2003; "... The objective of the action is to secure compliance by Iraq with its disarmament obligations as laid down by the Council ..."; in this respect, an identical letter has been sent by the Permanent Representative of the United Kingdom (UN Doc. S/2003/350, 21 March 2003).

[10] See, for example, W. H. Taft IV/T. F. Buchwald, Preemption, Iraq, and International Law, AJIL vol. 97, 2003, 557 et seq.; R. Wedgwood, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense, AJIL 97, 2003, 576 et seq.

force is more than a limitation on the means through which States may pursue their political intentions. It also reflects a value judgment of the international community: Namely, that no objective pursued by a State justifies recourse to force in international relations, except where international law so provides. The qualification of the prohibition of force as a reflection of a value judgment transpires from the wording of Article 1 of the Kellogg-Briand Pact as well as from that of Article 2, paragraph 4, of the UN Charter. The basic question which deserves discussion is whether this assumption is still valid.

The practice of the Security Council moves in the direction of considering the enforcement of international human rights standards through military force as being compatible with the UN Charter. The Security Council has opened this possibility by redefining Article 39 of the UN Charter. This reflects a realization that neither international common values nor the international normative order are static; they are in permanent evolution. One legitimate way to reflect value changes in the international community is to redefine notions which are open for interpretation such as the 'threat to peace'. In doing so, the Security Council has modified the possibility to use or to authorize military force under Chapter VII of the UN Charter, transforming it from a mechanism to protect a member of the international community to a mechanism to protect the international normative system as such. The possibilities for the Security Council to agree to or to authorize the use of force do not contradict the qualification of the prohibition of the use of military force as a value judgment. What has been outlawed is the use of force as a mechanism to enforce national policy. The use of force under the authority of the community of States, the Security Council, does not come under this proscription. It is, however, an exceptional mechanism, an instrument to enforce international law standards.

Those who consider a unilateral military intervention for humanitarian or other reasons as being legitimate in fact refer to this development under Chapter VII. They do, and that is crucial, add one decisive element, though, namely, that one state may decide to militarily intervene to enforce international standards on behalf the international community. It has been argued in this context that the international protection of human rights has been elevated to an "imperative level of international law".[11] From that it has been concluded that, in cases of gross and persistent human rights violations and in the absence of consensus in the Security Council to take remedial action, democratic States may do so unilaterally, thus replacing the dysfunctional decision-making in the Security Council. Reserving humanitarian intervention to democratic States cannot be reconciled with one of the leading

[11] M. Reisman, Unilateral Action and the Transformation of the World Constitutive Process: Special Problems of Humanitarian Intervention, EJIL 11, 2000, at 7-8. It is quite questionable whether the protection of human rights enjoys priority over the prohibition of the use of military force. Such prohibition also reflects the view that the wars of the past have resulted in the most atrocious violations of human rights.

principles of international law, namely the sovereign equality of States.[12] This again is a difference in perception: Namely, that there is a particular international law – or that such international law may be developed – for a specific group of states.

The arguments advanced in favor of military humanitarian intervention could also be used in a different context. The non-proliferation of weapons of mass destruction and the elimination of terrorism are equally international concerns. Do they have the same relevance as the protection of international human rights standards? Is it conceivable that they justify military enforcement action? Nobody would question the possibility of the Security Council to take enforcement measures under Chapter VII of the UN Charter, since such situations may amount to threats to international peace. In the end, international law cannot evade the question of how to react to national regimes that gravely violate the value system of the community of States. First and foremost, it is the Security Council as an organ mandated by the UN Charter to act on behalf of the community of States. However, if the Security Council is unable or unwilling to take appropriate action, is it then left for an individual State or a group of States to assume the function or responsibility to enforce international law? The Secretary General of the United Nations has identified this dilemma in respect of the protection of human rights while addressing the Kosovo conflict.[13] This is certainly an area, important for the future development of international law, where perceptions differ concerning possible solutions.

One has to acknowledge that the increasing corpus of international norms is not matched by a coherent and efficient enforcement system. It is further evident that the proliferation of weapons of mass destruction and international terrorism pose a threat to individual States and the community of States. No mechanisms have yet been developed to cope with those threats. This is a major challenge; if no mechanism can be developed based upon the cooperation of States, unilateral actions may become more frequent.

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[12] A.-M. Slaughter, International Law in a World of Liberal States, EJIL 6, 1995, 503 et seq. At 504 refers to the liberal international relations theory in this context which mandates "a distinction among different types of States based on their domestic political structure and ideology".

[13] "To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those darkdays and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War ..." (GAOR 54, 4th Plenary Meeting, 20 September 1999, A/54/PV.4).

Development of International Governance

It is evident that there is a marked difference in perspectives as to the future development of the international system, in particular, whether it should move toward some form of international governance. This question embraces at least two different issues: the progressive development of international law and the increasing role of international organizations as well as non-governmental organizations.

As already indicated, the United States has refrained from acceding to several international agreements such as the Kyoto Protocol, the Rome Statute, the Additional Protocols to the Four Geneva Conventions and a number of human rights treaties. This has been referred to as American exceptionalism or as an indication of American unilateralism. But historically the insistence of a powerful State on not adhering to international agreements which do not meet its interests is completely unremarkable. What makes the current situation a particular one is that an increasing number of international agreements have an objective normative function and, thus, are a surrogate for international legislation.[14] The United States, in particular, has refrained from becoming party to such international agreements but the respective regimes are being established nevertheless. Thus, a corpus of norms is in the process of being developed to which the majority of States is committed, but not the United States. This American exceptionalism may be the result of a divergence of interests, but it may also result from the American perception that the commitments resulting from such agreements do not conform to the American commitment to democratic self-government.

Without going into details, one has to concede that the negotiation of international agreements in most countries is a prerogative of the executive. As long as international agreements covered issues of little or no direct relevance for a country's citizens, this was a matter of consequence. This no longer so, when it becomes increasingly difficult to distinguish between matters of external and internal affairs. The problem of democratic legitimacy, or rather the lack thereof, is aggravated if international organizations take up legislative or quasi-legislative functions.[15]

The problem of democratic legitimization also arises in an additional, but related, context. Although the development of international norms increasingly shifts from the national to a regional or the international level, the enforcement of the respective rules remains mostly with national authorities. Thus, it is increasingly appropriate to consider law from the perspective of a multi-level system where the formulation of norms takes place on different levels. Accordingly, democratic accountability for the development of norms and for their enforcement falls apart.

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[14] J. Delbrück, Comments on Chapters 13 and 14, in: M. Byers/G. Nolte (eds.) (note 2), 416 et seq., at 417.

[15] See, for example, E. Stein, International Integration and Democracy: No Love at First Sight, AJIL 95, 2000, 489 et seq. at 490.

This phenomenon has been recognized and attention has been drawn to the increasing role of non-governmental organizations, as if they would be able to represent world public opinion and, thus, fill the democratic legitimacy gap.[16] Without questioning the relevance of non-governmental organizations this role exceeds their capability.

The differences in perception of the future of the international legal system are apparent. They may result in the development of two tracks of international law. Before proclaiming the breakdown of the international legal system as such, one should consider to what extent a substantial part of the rules enshrined in international agreements is likely to become customary international law and which efforts can be made to foster this process. The First Additional Protocol to the Geneva Conventions is a case in point.

Conclusions

A legal system is the reflection of a given social order. It interacts with the value system of and the competing interests present in the given society. This is also true for the international legal system. At the moment, the international legal system is faced with a plurality of challenges. Only a few of them have been addressed in these introductory remarks, such as the growing complexity of international law, which increasingly takes the character of a value-based normative order, and the increasing number of actors in international relations. The task of meeting these challenges is a complex undertaking due to several factors: Demands for changing the perception of some core principles on which international law has been based so far; new threats to international security which require the development of new response-mechanisms; and the need to improve the legitimacy of the international legal system. These challenges can only be met by reorganizing the existing fora for an accommodation of the various positions and the underlying perceptions or by designing rules which do not exacerbate the value conflicts that exist. This is the main challenge for the moment. As indicated by the problems posed by the reorganizing of Iraq, even the United States is dependent upon international assistance. But, by the same token, the international community is dependent upon the participation of the United States.

[16] See the assessment of, for example, K. Anderson, The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society, EJIL 11, 2000, 91 et seq.; B. Kohler-Koch, Organized Interests in European Integration: The Evolution of a New Type of Governance, in: H. Wallace/A. R. Young (eds.), Participation and Policy-Making in the European Union, 1997, 50 et seq.