Humanitarian Intervention Against States Supporting Terrorism

I. Terminology - Working Definition

The notion of "humanitarian intervention" has been subject to solemn debates, especially since the end of the Cold War. As a political symptom of the unipolar international system it raises grave international legal issues as well, making a conflict among some of the basic rules and principles of contemporary international law.

The basic contradiction is between the *genus proximus* and the *differentia specifica* of this term. The principle of non-intervention is based on the sovereign equality of States; consequently it regards interests of States primarily, while humanitarian law protects individuals directly. This interpretation renders humanitarian intervention a conflict of interests, and this way the resolution of this conflict should contain a hierarchy of the interests involved.

This hierarchy can be established not just morally, but also based upon existing international law. The doctrine had been long upholding that however States are the primary subjects of this law, its rules concern individuals, and the post-war development clearly has shown, that their interest often precedes rights and interests of States.²

As a consequence of the aforesaid arguments, humanitarian intervention seems not just acceptable, but almost necessary. Nevertheless, the fact, that this is still an intervention must not be overlooked: in this regard humanitarian intervention should be an armed protection of individuals, possibly the citizens of another State, even against their home State. Armed action in or against the territory of another State is an international armed conflict in the generally accepted terminology.³ Therefore another interpretation of humanitarian intervention can properly state: "what we witness today in the field of international law is not progress but, in terms of humanity and of an awareness of the legal implications of transnational action, regression in the direction of the anarchy of power politics".⁴

Clearly, this threat is real: humanitarian intervention is most easy to misuse; The International Court of Justice has declared as early as 1949, that “The United Kingdom has stated that its object was to secure the mines as quickly as possible for fear lest they should be taken away by the authors of the mine laying or by the Albanian authorities: this was presented either as a new and special application of the theory of intervention, by means of which the intervening State was acting to facilitate the task of the international tribunal, or as a method of self-protection or self-help. The Court cannot accept these lines of defence."⁵ Later the ICJ, in the Nicaragua Case the ICJ had also affirmed, that contrary to the US arguments, those “acts of

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intervention [...] which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State.6

Consequently humanitarian intervention needs strict legal regulation, to describe the requirements, that intervention must meet to be accepted as humanitarian. I am convinced that these requirements must cover at least the grounds for starting humanitarian intervention against another State and the distinctive rules of this special warfare. In other words the regulation - theoretically - should include possible reasons as well as methods of the legal use of force by a State for humanitarian purposes.

In the present paper I shall examine the support of terrorism by a State as a possible justification for humanitarian intervention; subsequently I shall also add a brief analysis on the humanitarian questions of the recent situation.

II. The Taliban Regime in Afghanistan

The fact that international terrorism is threatening international peace and security had long been realized and accepted by the UN Security Council. In the preamble of a 1992 resolution the Security Council had declared, "that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved is essential for the maintenance of international peace and security".7 This conviction is not so clear as another requirement of the very same preamble that interprets Art. 2 (4) of the UN Charter, extending the meaning of the threat or use of force to include international terrorism. This argument clearly applies to States supporting terrorism as well, thus hereinafter I shall take this wording as a system of requirements, describing what is considered as a support of international terrorism by a State. According to the resolution "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force".8 This resolution was concluded to condemn and isolate Libya; its binding nature is clear from the form "acting under Chapter VII of the Charter".

Just some years later, in 1998 the Taliban gained power in Afghanistan, defeating the forces of the pre-existing Government in this latest section of the long Afghan war. A series of Security Council resolutions and presidential statements followed, but these were not of a binding nature up until October 1999. As early as 1998 resolutions consisted most of the sins of the Taliban, and also the threat to regional and international peace and security was clearly realized.9 This particular resolution tries to protect ethnic and religious-based minorities, in particular the Shiites. Moreover there is cultural heritage, Afghan sovereignty mentioned and "protected" under this resolution. There is a paragraph of the preamble, which demands verbatim quotation: "Deeply disturbed by the continuing use of Afghan territory, especially

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7. UNSC Res. 748. (1992), 31 March 1992
8. Ibid.
areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts, reiterating, that the suppression of international terrorism is essential for the maintenance of international peace and security." Nevertheless, the UNSC had not acted at that time under Chapter VII, and had not introduced serious sanctions against the Taliban, in spite of the fact, that some of their most grave wrongs had already had some reputation.

The relevant resolution of the UNSC from October 1999 was the first to mention a direct link between Afghanistan and Usama Bin Laden. Acting again under Chapter VII the UNSC had ordered sanctions, more stern than before, against Afghanistan and surprisingly, Usama Bin Laden and his group. Deriving from these UNSC resolutions some internationally relevant acts of the Taliban are as follows: destruction of mankind’s cultural heritage; increase in illicit drug trafficking; discrimination of women; racial and religious-based discrimination; atrocities and wilful killing of Iranian diplomats; and the obvious support of terrorism.

This list should be convincing enough that an international action duly should have been taken place in Afghanistan, as early as 1999. The Security Council was nevertheless more patient, and in December 2000, developed further its previous resolutions regarding the situation in Afghanistan. Acting under Chapter VII again, recalling most of the facts, that already had been mentioned, the Security Council had still not allowed the States to stop the Taliban breaches of international law by all means, i.e. the use of force against the Taliban was not allowed, at the moment when the Al - Qaida attacked the Twin Towers in New York. Furthermore, this later UNSC Res. 1333 (2000) was the first to mention this terrorist network. In my opinion this purports that there shall be a distinction between the Taliban and the Al - Qaida terrorists, although there are close relations between each other, these groups are not at all equal. This leads my examination further, and in the next section I shall discuss, how the US intervention against the Taliban could be legal, if a private network such as Al - Qaida, had attacked them.

III. Legal Grounds for the US Intervention

Although the linkage between the Taliban and Bin Laden's organization is approved by UNSC resolutions, there are still many questions arising from the US intervention against the Taliban in Afghanistan. The purposes of this section is to highlight some issues, based on this factual example, that are possibly suitable for deciding an intervention, whether it is in compliance with the requirements of humanitarian intervention. Naturally, these requirements are neither codified, nor existing as customary law. General political and legal tendencies however show, that humanitarian intervention - though evident it may sound - must be started for humanitarian reasons, and - by analogy - must apply the most humanitarian methods of warfare, international humanitarian law must be respected outstandingly during such an action.

The first possible justification of the US intervention under existing international law is however the practice of the right of self-defense, and not humanitarian intervention. Under

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10 Ibid.
12 UNSC Res. 1267 (1999), para. 5
the UN Charter this means an inherent right of all States if an armed attack has occurred.\textsuperscript{14}

The \textit{conditio sine qua non} of this article is the term "armed attack", and the international legal doctrine upholds, that this is only possible by a State. According to Giorgio Gaja, armed attack is a subcategory of aggression, "as explicitly said in the French text of Article 51".\textsuperscript{15} Aggression by its recent definition\textsuperscript{16} can only be committed by a State. (Under the ICC Statute the situation would be much different, but this document is neither in force nor include a definition of aggression, mainly because of the opposition of the UNSC permanent members, in particular the USA.\textsuperscript{17} This is a trap, when the US defended its position bearing in mind that the borderline - mentioned by Schwarzenberger\textsuperscript{18} - between self-defense and aggression is always thin. In the present case US interests turned just the opposite in this regard as they were half a year ago.)

As the US was not attacked by a State, but a terrorist organization, the right of self-defense should not apply to this case. My above argumentation however purports, that in this very case there is a clear and legally already accepted link between the terrorists and a State, namely the Talibans' Afghanistan. In my interpretation this is the situation M. Pellet had characterized as it is "not a war; it is something else, to which our own legal arsenal is poorly adapted."\textsuperscript{19} In this new situation I believe that international law has two possibilities: developing a totally new regulation for such situations, or trying to implement existing rules to this unseen "hyperterrorism". Nevertheless, none of these two possibilities is some kind of 'magic potion'; the best result can be achieved by combining the two, and while respecting existing norms as much as possible, international law should be adopted to this new situation by introducing new regulations.

So close are these linkages, that by analogy of the US Diplomatic and Consular Staff in Tehran decision of the ICJ, the Afghan state can be held liable for this inaction. As the ICJ declared in 1979: "The Court points out that the conduct of the militants on that occasion could be directly attributed to the Iranian State only if it were established that they were in fact acting on its behalf. The information before the Court did not suffice to establish this with due certainty. However, the Iranian State - which, as the State to which the mission was accredited, was under obligation to take appropriate steps to protect the United States Embassy - did nothing to prevent the attack, stop it before it reached its completion or oblige the militants to withdraw from the premises and release the hostages."\textsuperscript{20} Considering the WTC attack, the Afghan state was under the obligation not to support the Al - Qaida network, to eliminate the training camps within its territory etc\textsuperscript{21}. Nevertheless this argumentation does not answer the problem of self-defense. Due to the very nature - in accordance with Article 51 of the UN Charter - of the inherent right of self-defense" is limited in time and also substantively. In the present case the tragedy had already occurred, the US had been attacked, by an organisation, which in this interpretation is a \textit{de facto} organ of a State\textsuperscript{22}. Nevertheless, as Antonio Cassese noted, the right of self-defense should have met the following conditions:

\textsuperscript{14} Article 51
\textsuperscript{15} Gaja, G.: \textit{In What sense was there an armed attack?}, in EJIL Discussion Forum, www.ejil.org/forum_WTC
\textsuperscript{16} UNGA Res. 3314/1974
\textsuperscript{19} Pellet, A: \textit{No, This is Not a War!}, www.ejil.org/forum_WTC
\textsuperscript{20} ICJ Rep. 1979, United States Diplomatic and consular staff in Tehran Decision, para. 57.
\textsuperscript{21} See the relevant UNSC Resolutions cited above
\textsuperscript{22} Gaja, op. cit.
"(i) The necessity for forcible reaction must be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’ (according to the famous formula used by the US Secretary of State Webster in 1842 in the Caroline case and taken up by many for post-1945 self-defence);

(ii) The use of force was to be exclusively directed to repel the armed attack of the aggressor state; (iii) force must be proportionate to this purpose of driving back aggression;

(iv) The use of force must be terminated as soon as the aggression had come to an end or the Security Council had taken the necessary measures;

(v) States acting in self-defence must comply with the fundamental principles of humanitarian law (hence, for instance, respect the civilian population, refrain from using arms causing unnecessary suffering, etc.)." 23

I think that without deep elaboration of these issues I can accept as a basis for further examination, that a reaction taking place after a month of the armed attack - if an armed attack it was anyway - cannot form a basis for this otherwise inherent right of States. Nor can be self-defense a ground for a preventive military action against a State supporting terrorism.

Thus the justification of the US intervention should be sought elsewhere. Under the UN Charter there is only one more exception from the ban on the threat or use of force, i.e. authorization by the UNSC. Nevertheless, due to the renowned voting procedure of this organ, this second option under the UN Charter has a low - or almost no - efficiency, when the interests of the five permanent members confront. Furthermore, humanitarian intervention should prevent threats of international peace and security, and as this prevention is the primary "responsibility" of the UNSC, it is most logic under existing international law, that a UNSC authorization is required for such an action. The legal evaluation of terrorism is a highly controversal issue as well as unilateral humanitarian intervention. Nevertheless, since September 2001, the combination of these two issues theoretically had been resolved. The UNSC had "reaffirmed" in a binding resolution "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts"24.

This resolution clearly declares, that terrorism is a threat to international peace and security, and the accustomed wording of UNGA resolutions, "to combat by all means" should include that supporting terrorism can be a justification for the use of force in the future. It is too hard to find out all the options this resolution might induce. As this new hyperterrorism outgrows all known forms of terrorism, it is rather probable, that some legal solution will be developed to authorize the use of force against States and organizations suppressing terrorist acts. It is understandable, that States considered to be "primary targets" want to use this authorization in advance: to prevent attacks to happen.

Concluding my results so far I must highlight again, that international law only recognizes unilateral use of force in cases self-defense, or with the will and consent of the UN Security Council. The US intervention in Afghanistan meets none of these two requirements, though misses both just slightly. Therefore, according to the tremendous political aspects of the WTC attack, I am convinced that one of these terms shall gain a broader sense in the near

23 Cassese, A.: Terrorism is also Disrupting Some Crucial Legal Categories of International Law, EJIL Discussion Forum,
future. Nonetheless, weakening of the ban on war is undoubtedly hazardous.

Applying self-defense to terrorist attacks should also involve the adaptation of the rules of this inherent right to the special requirements and circumstances of the fight and possibly "war" against terrorism. This adaptation would be capable of rendering self-defense a mere tool of the management of geopolitical interests. I outlined above some of the most dangerous possible outcomes of such an interpretation, such as preventive attacks, not even to mention the lack of the rules of evidence and procedure of how a State is proven to be supporting terrorism.

IV. Humanitarian law and "war" against terrorism

After the terrorist attack on the Twin Towers, almost all headlines in the Western press were about "war against...". International legal doctrine was however considerably unified, stating that this term is a misnomer in the present case, for a number of various reasons. Later in the course of events the US was waging war against Afghanistan, the State that was behind the 11 September terrorist attacks. Finally, in spite of the smaller conflicts in Afghanistan, I daresay that this phase of the war is over, and military action against the Taliban has been won. In the present section I will discuss these three phases of this "war" in particular the application of humanitarian law during the relevant period, as a distinctive element of humanitarian intervention in my terminology.

a.) The attack against the WTC was clearly directed against the civilian population; in this regard the strike on the Pentagon building was not an exception, for the "weapon" used was a civilian aircraft. The attacks were also well organized, or systematic and - as recent press generally states - its financial and structural background rendered it widespread as well. Therefore, according to the practice of the UN ad hoc criminal tribunals and the Statute of the International Criminal Court, the attack on the WTC was a crime against humanity. Al - Qaida terrorists occupied the airplanes by almost "traditional" terrorist methods, and as a consequence the Third Geneva Convention is not applicable to them - respectively to members of this group, since they do not comply with none of the requirements of the special protection.

b.) War itself began when the US first attacked Afghanistan. This was an attack by a State against another one, i.e. an international armed conflict. In order to accept that this use of force was humanitarian intervention, one should prove, at least in my position, that the reason and the methods applied are humanitarian in nature. As for the reason, UNSC resolutions show that, this requirement had been met. The methods applied by the US had also met the basic requirement of international law, existing since the earliest ideas of 19th century, i.e. the attack was aimed at the breaking of the Taliban military force. According to press reports, the US attempted to give humanitarian aid to the Afghan civilian population, meanwhile attacking the Taliban forces. Thus so far the US actions against the Taliban can be considered

25 p.e. Cassese, Pellet, in EJIL, see Discussion Forum at www.ejil.org
26 see p.ex. Jean Paul Akayesu Case ICTR 96-4, 2 September 1998
27 ICC Statute, Art. 7 para. 1
28 Cassese, op.cit.
29 Article 4 para. 2 (a)-(d)
to be humanitarian intervention, regardless of the still open question of the international legal authorization of the use of force in the present case.

On the Taliban's side the fulfillment of these rules is not even relevant, as they declared - based on a unique interpretation of Islamic law - that the law of Geneva is not opposable to them. In spite of the fact that this unilateral denial of a set of norms of international *ius cogens* is irrelevant substantially, this professes the intent not to comply with these rules.

Nevertheless, there is yet another issue to discuss in this section: namely the events after the military action has ended.

c.) The attack on the WTC, as well as the war afterwards highlighted again that international humanitarian law and the law of armed conflict must not be subordinated to a great power's political interest. First the US stated, that there is a war - against terrorism. Second, it waged a war against Afghanistan. Third, it declared that it will prosecute Al-Qaida terrorist at domestic, *ad-hoc* military tribunals, and that its hostages at Guantanamo Bay are not prisoners of war.

I am convinced, that these hostages should be distinguished from each other. Terrorists of the Al - Qaida network, as I have already mentioned, are indeed outside the scope of the relevant Geneva Convention, because of the requirements of Article 4 paragraph 2. One should suppose for the first sight, that sub-paragraph (d) leads to the same result regarding the Taliban warriors. As they did not even wanted to accept the rules of international law, they must not be treated as prisoners of war. Not even under Protocol I, which states that combatants “shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.” Nevertheless, there is another regulation in the cited article of the 1949 Third Convention, which states that the scope of the convention includes prisoners, if they were "Members of regular armed forces [professing] allegiance to a Government or an authority not recognized by the Detaining Power." Therefore the Taliban should be under the scope of the Geneva Convention. There are obvious difficulties in the implementation of this distinction: as a consequence, Al-Qaida terrorists can be held under custody, but the Taliban, if they are prisoners of war, should be allowed to return home, after the military action is over. Nonetheless, there is an overwhelming international interest in the custody of terrorists, and probably these two groups highly overlap each other. Until this clarification is made, the custody is acceptable for both groups, although a different treatment should be applied. Naturally, this would increase the difficulties of the investigation for terrorists, and would close this diabolic circle, and add another paradox to this recent controversial situation. I am convinced, that the international prosecution of these detainees would ease this situation. With all due respect to the American legal system I must add, that formally an international court, even a tribunal would increase the legal safety and number of guaranties. The present judicial plans are truly regressions, and seem to neglect the last fifty years' development of this law.

V. Conclusions

30Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 43 para. 1
31Third Geneva Convention, 1949, Art. 4. para. 3
32I.e., Art. 118
Concluding my paper I should like to stress again, that terrorism, and the State support of such acts are grave breaches of existing international law, although efficient action against them does not have a clear procedural regulation. Extensive interpretation of the present rules banning warfare is obviously dangerous. Regarding the WTC case, a possible justification can however be outlined, as follows. UN Security Council regulations decided, which acts of States support terrorism directly. A sort of passive aggression is included. I must emphasize a conviction of mine again, namely that the ICC Statue would be capable of extending the efficiency and easier applicability of aggression to such acts of hyper-terrorism, without even support from any State. Such a solution would also increase legal safety and would guarantee a higher degree of objectivism as well as efficiency.

The present crisis has also revealed some new, so far ignored aspects of humanitarian intervention. First, we must recognize, that not only intervention should be humanitarian, but all acts of State regarding the action, even after the actual end of military actions. Second, not even the hegemonic State shall be allowed to subordinate humanitarian needs to its own geopolitical interest. Third, terrorism is a threat to mankind as a whole, thus can form a basis for action. Finally, a practical, and not legal consequence is that this new situation will require new regulations. Traditional international methods are not suitable for efficient action against terrorism, and a sufficient regulation – that also consists of enough guarantees for State sovereignty against a new colonialization – will be most hard to achieve.