Afghanistan and Great Power Interventionism as Self-Defense

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We are still in the process of assessing the outcomes of 20 years of Western military and humanitarian presence in Afghanistan, and of a heartless and chaotic withdrawal. While international lawyers have been discussing the human rights obligations in relation to those abandoned in great danger and consider the relationship with the new Taliban-led government, many political comments on the end of the military operations involve a substantial amount of Western soul-searching: are our values still attractive in other parts of the world? Are we perhaps too weak to export them successfully?

These current and somewhat self-centred debates may obscure not only that the post-9/11 war in Afghanistan so far has led to the death of at least 172.000 human beings, including 47.000 civilians, but also that it came with considerable collateral legal nihilism. For, with the US intervention in 2001 and the conceptual identification of “Islamist terrorism” as the absolute evil to be annihilated, central legal distinctions became blurred; such as the ones between unilateral military retaliation and self-defense, international criminal prosecution of terrorists and international armed conflict, fair trial and arbitrary executions by drone-strikes, as well as the distinction between imprisonment of convicted criminals and infinite detention in torture-camps (i.e. Guantanamo). In this short piece, I will only deal with one of these legal issues, namely the broader implications of the 2001 US-led intervention in Afghanistan for the notion of self-defense.

My main argument is that the re-interpretation of Art. 51 UN Charter by the US in the context of the so called “war on terror” was (and still is) an attempt to re-introduce new legal justifications for old forms of great power interventionism. The claimed early 20th century right of great powers to police and punish in one’s own semi-periphery in the form of unilateral self-help measures and retaliation had been outlawed in 1945. Various attempts to re-introduce this right under a new concept of self-defense had been thwarted by the UN and the ICJ throughout the 20th century. With 9/11 and Western reactions to the attacks, the outcome of the ongoing struggle to defend a restrictive understanding of the notion of self-defense in international law became uncertain.

I. A right to self-defense against Al-Quaeda?

Politically, the 2001 US intervention in Afghanistan was justified as a punishment of both Al-Qaeda and the Taliban-led Afghan government for the mass murderous September 11th attacks on the Twin Towers and other targets in the US. Legally, however, the US referred to the right to self-defense under Art. 51 of the UN Charter, the only remaining justification for unilateral military operations under the Charter.

While condemning the attacks, the UN Security Council had not been able to authorise military intervention in Afghanistan. The Council did not even qualify the attacks on the Twin Towers as a “breach” of the peace in the sense of Art. 39 UN-Charter, but only as a “threat to peace”, and only referred to “self-defence” in a preambular paragraph of the resolution. International law debates since then have focused on when and how military operations against non-state actors (“terrorists”) on foreign soil could be justified under the right to self-defense. This focus on a new right of self-defense against non-state actors, created by George W. Bush’s declared post-2001 “war on terrorism” in Afghanistan and elsewhere, has arguably been misleading at best, and ideological “newspeak” at worst. Inevitably, unilateral military measures against *non-state* actors abroad without the consent of the respective states will always involve a violation of the territorial integrity of *state-actors*. There simply is no such thing as an isolated right to self-defense against *non-state* actors.

Like many other Western interventions in the Middle East over the last 50 years, the war in Afghanistan was waged against a foreign state and even included fully-fledged external regime change. Fighting Al-Qaeda quickly became a side-show in Afghanistan. As I attempt to illustrate in this historical sketch, the US, by claiming a right to self-defense against non-state actors, managed to reframe an outlawed imperial right to punish and police the periphery as a novel self-defense claim. The justifications advanced for the intervention have lured a whole generation of international lawyers into an at times highly apologetic debate about a new right of self-defense against non-state actors [1)]For an overview, see Max Planck Institute for Comparative Public Law and International Law, Self-Defence against non-state Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War, MPIL Research Paper Series, No. 2017-07 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941640); with a critical assessment of the debate, Jochen von Bernstorff, Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions, 5 ESIL Reflections, Issue 7 (2016) (https://esil-sedi.eu/post_name-122/); Oliver Corten, The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?, 29 Leiden JIL Issue 3, pp. 777-799 (https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/unwilling-or-unable-test-has-it-been-and-could-it-be-accepted/A136F06AE6A397B93804F7BFA7F87CA2)..While previous attempts to re-conceptualise self-defense as a broader right of unilateral intervention had consistently been thwarted by the Third World and a broad coalition of smaller states in the UN, as well as by the ICJ, the re-branding of these efforts in counter-terrorism semantics after 2001 proved to be more resilient [2)]On the historical debates, Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, CUP 2010, pp. 389 et seqq; cf. with a focus on the transformation of the proportionality requirement under Art. 51, Nehal Butha/Rebecca Mignot-Mahdavi, Dangerous Proportions: Means and Ends in Non-Finite War, in: Nehal Bhuta/Florian Hoffmann et. al., The Struggle for Human Rights: Essays in honour of Philipp Alston, OUP 2021, pp. 301-327 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790612).. But let me start with the 19th century origins of great power interventionism in international law.

II. A right to intervene in case of “chronic wrongdoing or impotence” abroad

Policing and punishing actors in one’s own semi-periphery had been part and parcel of European and US imperialism since the late 19th century. The US had already claimed this alleged right in the notorious 1904 Roosevelt Corollary for interventions in Latin America, which also provided the semantic toolbox for the three post-2001 US administrations in introducing the new notion of self-defense, including the “unwilling or unable” argument (I have attempted to depict these historical patterns elsewhere in more detail). The Corollary claimed a right to intervene under the following circumstances:

“Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. […]”

In the same vein, Europe’s great powers during that era in a routine fashion intervened collectively or unilaterally in their zones of interest in Latin America, the Middle East and East Asia, often referring to prior foreign breaches of standards owed in their view to nationals and representatives from “civilized” states. Up until the Second World War, these great power interventions outside of the formalized colonial empires in case of alleged breaches of international law were justified as armed “reprisals”, “self-help” or “measures short of war”. Under this justification, great powers would *inter alia* intervene in reaction to non-payment of debts, expropriations, land reforms or in cases of perceived vital security risks, such as new governments threatening free access to the Panama/Suez Canal. Establishing puppet regimes and temporary occupation after these interventions was not uncommon. Upholding “civilized” standards of European international law was portrayed as the great power’s burden by Western jurists and as such considered a lawful instrument of foreign policy. Stylised humanitarian or moralized motivations for such interventions helped governments convince critical domestic publics and parliaments that these military missions were worth the effort. Another common feature of such forms of interventionism in the early 20th century was that the interests of foreign local populations played a marginal role in decisions on when and how to intervene and withdraw. Western interventions claimed to bring “civilization” or “humanity” to “uncivilized” foreign places. What’s not to like?

Geopolitical, economic or security prerogatives as well as promises made in election campaigns in Washington or European capitals prompted interventions and withdrawals, while the concrete and often disastrous short-, mid- and long-term effects of these interventions on national and local communities could be ignored. For the interest of Western media and public opinion was bound to abate anyway after the withdrawal of one’s own troops.

III. The US contribution to outlawing great power interventionism in 1945

A significant legal problem faced by the US-administration after the September 11th attacks, as well as by previous US administrations, was that policing risks and punishing wrongdoings unilaterally in the periphery had been outlawed by the UN Charter. The UN Charter had deliberately closed legal loopholes for unilateral great power interventions by setting out a broad prohibition of the use of force in Art. 2 (4) and by restricting exceptions to collective action authorized by the Security Council and to a narrowly worded right to self-defense.

Ironically, it was the US delegation which at the San Francisco Conference in 1945 insisted that Art. 51 UN Charter should be constructed as restrictively as possible. Both France and the UK were concerned about losing their perceived right to unilateral military measures in cases where Council action would be blocked by a veto power. During the negotiations, France had proposed the insertion of a clause according to which, in case of inactivity of the Security Council and in face of a breach of peace, "*member states reserved themselves the right to act as they may consider necessary in the interest of peace, right and justice*". The UK delegation supported this proposal in principle and proposed a slightly amended version in informal bilateral consultations with the US, allowing for unilateral military measures "*for the maintenance of right and justice*" under Art. 51 UN Charter in case of a veto.

One of the chief negotiators of the US delegation, Harold Stassen, in commenting in a joint meeting of the two delegations on the British proposal, pointed out that "*it had some of the defects of the proposed French amendment in that it opened very widely the field for the exercise of the right of self-defense*" and that it could damage the entire organization. The British Foreign Secretary Anthony Eden according to the minutes "*cited again the specific case of the position of Great Britain in the event of a Bulgarian attack upon Turkey, and the Soviet Union's vetoing measures by the Security Council. Under such circumstances, he said he wanted Great Britain to be free to act and to take such measures as it might deem necessary for its self-defense in the Middle East*." The US made clear that it could not accept the British proposal. According to the minutes "*Mr. Dulles said, that in his view, Mr. Eden wanted to go further in his proposal than the United States did and that if he understood correctly, Mr. Eden disliked the United States proposal because of its limitations on the right of self-defense. Mr. Stassen (U.S.) stated that with a proviso such as suggested by the British draft, the international organization would fail before it started; that the British amendment could not be written into the Charter without destroying the Organization in advance*."

In these bilateral negotiations between the US and the UK, the joint proposal for what became Art. 51 UN Charter was developed, which in line with the US position restricted the right to self-defense to a lawful reaction against "armed attacks" only. A new and broad understanding of self-defense that could re-introduce the contentious "measures short of war" through the backdoor was emphatically ruled out. Harold Stassen and John Foster Dulles thus became the US-architects behind a strictly

confined right to self-defense in the UN Charter. Great power usage of “measures short of war” or armed reprisals had increasingly been perceived as problematic, not only in the affected countries, but also in Western public opinion. It had been gradually banned by universal (Drago-Porter Convention (1907)) and regional treaty instruments. US delegations were well-aware of the fact that unilateral military enforcement of the so-called “minimum standard” or other alleged international legal rules in 1945 was no longer a legally justifiable option in the Americas. Inserting a broad self-help clause under the concept of “self-defense” in the UN-Charter would have led to significant protests and criticism from smaller states not only from the region.

IV. The Anglo-American revolts against the restrictive 1945 consensus

That the world perceived great power interventionism in strategic zones of interest as outlawed by the UN Charter was proved during the Suez war in 1956, which after the unilateral Anglo-Franco intervention led to a global outcry rejecting the UK’s justification that it had to defend vital interests in the region. A public outcry forced the then British Prime Minister Anthony Eden to resign. After the Suez fiasco, two British international lawyers, Humphrey Waldock and D. W. Bowett, seconded by the US scholar Julius Stone, initiated the first Anglo-American post-war revolt against the perceived straight jacket imposed by Art. 2 (4) and Art. 51 UN Charter on great power interventionism. Soviet governmental elites followed suit, also claiming a right of the Soviet Union to intervene whenever socialist standards were endangered by “counter-revolutions” in the semi-periphery, which for the Kremlin included Afghanistan, prompting also the Soviet intervention in 1978.

It was the Third World and a broad coalition of small states, which during the cold war consistently defended the restrictive consensus regarding unilateral violence in international relations reached in 1945. Hence, both the UN Friendly Relations Declaration (see Principle 1, e.g., renouncing forceful reprisals) and the UN Definition of Aggression (for aggressive acts by private actors and “indirect aggression”, see Article 3 (g)) confirmed the tight strictures or at least resisted to give in to the Anglo-American revolt. Nonetheless, during the 1980s and 90s, the US justified military retaliation measures on foreign soil without the consent of the respective governments as measures of self-defense, even though neither the scale- nor the time-requirement of an ongoing grave military attack set out in the narrow strictures of Art. 51 UN Charter (“if an armed attack occurs”) were met by these measures. Remarkably, the ICJ in the *Nicaragua* case confirmed the narrow strictures of Art. 51 and clarified that violence by non-state actors could only be attributed to a state if the latter had effective control over the respective forceful measures (paras. 115, 193 et seq., 228). And that unilateral military retaliation or punishment violated Art. 2 (4) UN Charter, and as such had nothing to do with self-defense, was stated by the ICJ as early as 1948 in the *Corfu Channel Case* (p. 35).

Nonetheless, the US government in 1993 characterized a missile raid on Baghdad punishing Iraq in response to an alleged assassination attempt on President Bush

(senior) as self-defense. This incidence prompted the then highly prominent US scholar Michael Reisman to assess the military measures as follows: „*Despite the fact that the United States sought to characterize the Baghdad raid as an act of self-defence, the raid fits at least as comfortably, if not more so, under the classic rubric of reprisal.*" But rather than stating their illegality under Art. 2 (4) UN Charter, Reisman apologetically identified a new trend under Art. 51 UN Charter, hereby aiming to facilitate a re-introduction of the old measures short of war as self-defense. When President Clinton ordered cruise missile strikes on a pharmaceutical company in Khartoum in 1998, in order to punish the Al-Qaeda-friendly Sudanese government for Al-Qaeda attacks on US Embassies in Africa, the notion of self-defense again was used to justify unilateral military retaliation measures.

In other words, the endless post-9/11 debates about whether or not Art. 51 UN Charter allows for measures of self-defense against terrorists obscured that the re-interpretation of Art. 51 UN Charter in this context was just another attempt to re-introduce legal justifications for outlawed forms of great power interventionism in the periphery, whenever vital interests of a great power were at stake. Accordingly, subsequent US interventions in the Middle East, including the 2018 missile strikes punishing the Syrian government for chemical attacks in Douma, and the more recent US killing of the high ranking Iranian general Soleimani in Iraq proved that the application of the new cored self-defense doctrine was by no means limited to threats created by non-state actors. Unfortunately, this claimed right to police und punish in the periphery on the basis of undisclosed intelligence information about potential threats as "self-defense" would bring back the old "measures short of war", at a time when great powers like the Russian Federation and China have begun to assert regional prerogatives in a much more robust fashion. Without a concerted rejection of a right of unilateral military self-help, retaliation and punishment as "self-defense", the 2001 US intervention in Afghanistan could eventually go down in history as the beginning of the end of the assertion of a broad UN-Charter based prohibition of the use of force.

John Foster Dulles and Harold Stassen would be turning in their graves.

References

- For an overview, see Max Planck Institute for Comparative Public Law and International Law, Self-Defence against non-state Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War, MPIL Research Paper Series, No. 2017-07 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941640); with a critical assessment of the debate, Jochen von Bernstorff, Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions, 5 ESIL Reflections, Issue 7 (2016) (https://esil-sedi.eu/post_name-122/); Oliver Corten, The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?, 29 Leiden JIL Issue 3, pp. 777-799 (https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/unwilling-or-unable-test-has-it-been-and-could-it-be-accepted/A136F06AE6A397B93804F7BFA7F87CA2).
- On the historical debates, Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, CUP 2010, pp. 389 et

seqq; cf. with a focus on the transformation of the proportionality requirement under Art. 51, Nehal Butha/Rebecca Mignot-Mahdavi, Dangerous Proportions: Means and Ends in Non-Finite War, in: Nehal Bhuta/Florian Hoffmann et. al., The Struggle for Human Rights: Essays in honour of Philipp Alston, OUP 2021, pp. 301-327 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790612).
