“We are not in a Seminar”: Some Thoughts on the Legislative’s and Executive’s Prerogative in Determining International Law

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On Friday, December, 4th, the German parliament consented – under the impression of the egregious terrorist attacks in Paris on November, 13th – upon a constitutionally required request of the German government to a deployment of soldiers of the German Federal Army within the fight against ISIS (BT Drs. 18/6866). The government referred to a potpourri of provisions to justify this deployment from the perspective of international and supranational law: It invoked collective self-defense in conjunction with Security Council resolutions 2170 (2014), 2199 (2015) as well as 2249 (2015) besides Art. 42 VII TEU. Much has been written on the persuasiveness of this line of argument (see e.g. blogs by Anne Peters. Jasper Finke, Carolyn Moser or Sophia Müller and Chris Gutmann). The multitude of justifications introduced indicates that each of them stands on shaky grounds.

What, however, also deserves a closer look is the German government’s position on the significance of international law which became apparent during the questions session following up on the debate: Being asked about the prerequisites of Art. 51 UNC and its scope with regard to “armed attacks” by non-state actors the German Minister of Foreign Affairs *Frank-Walter Steinmeier* contended: “We are not in a seminar here but in a parliament […]. I think, after eight attacks in total, this not the hour to explain to the French people that they do not need to feel attacked, after 130 dead people, which were solely caused on November, 13th of this year” (see Plenarprotokoll 18/142, column 13879; free translation by the author). He was seconded by a representative of the Christian Democratic Party who called upon the parliament to leave aside “seminar-like differentiated lines of argument” (translation of author) with regard to self-defense for the sake of solidarity with France (column 13891).

To put these propositions in a nutshell: France feels that it has been attacked and this is sufficient for invoking self-defense. In any case it does not matter what international law precisely says. Both of these suggestions are more than dubious.

First of all, a mere “feeling” of being attacked does not trigger Art. 51 UNC. The notion of “armed attack” is a legal term with a specific – although not undisputed – content. Art. 51 UNC legitimizes the neutralization of an ongoing attack serving the preservation of the integrity of the attacked state. Being an extraordinary “emergency” measure it gives the allegedly attacked state the “upper hand” in the beginning: The invocation of self-defense is a subjective decision of the targeted state in the first place which flows from the competence of the Security Council to intervene afterwards (Art. 51 1st sent. UNC). But: A state’s decision to resort to force is subject to retrospective evaluations and the state bears the burden of proof for the prerequisites of Art. 51 UNC. Referring to a “feeling” of being attacked will not suffice here.

Secondly, I submit that both the legislative as well as the executive are - contrary to *Steinmeier’s* contention - constitutionally obliged to take into account what international law as it stands says. Neither the legislative nor the executive have a constitutional prerogative or margin of appreciation in determining the content of the right to self-defense which constitutes both international treaty law as well as customary law.

The notion of “parliamentary sovereignty” is alien to the German constitution. The legislative is bound by the constitutional order as Art. 20 III Basic Law provides. Art. 25 1st sentence Basic Law incorporates international customary law into the German legal order (“Rechtsanwendungsbefehl”) and ranks it above ordinary statutes but below the constitution (BVerfGE 6, 309 (363)). The Federal Constitutional Court (FCC) has repeatedly stressed that

the Basic Law is characterized by a certain “commitment” to international law (“Völkerrechtsfreundlichkeit”). The German state is not sealed off but rather permeated by other legal orders (“offener Verfassungsstaat”). The FCC deduced from this premise the presumption that in cases of doubt the parliament does not intend to violate international law or derogate from it by the statutes it adopts. Hence, they are to be interpreted in conformity with international law unless the contrary objective of the parliament becomes apparent. This principle is particularly relevant for international treaties which rank via the parliamentary acts transforming them (Art. 59 II 1st sent. Basic Law) equal to federal statutes hence being theoretically alterable by subsequent legislation. The idea of “commitment” to international law, however, limits the principle of *lex posterior derogat legi priori*. It is yet to be explored how the special rank of international customary law relates to the competences of the legislative. Even if it is assumed that the legislative may under certain circumstances derogate from specific norms of customary international law in a constitutionally valid manner, its radius of action has to be - in light of their higher rank - even more restrained by the principle of “commitment” to international law than in cases of transformed international treaties. In any case the parliament has no constitutional authority to determine what the exact content of a norm of customary international law is. This is presupposed by Art. 100 II Basic Law which obliges lower courts to call upon the FCC if, “in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual.”

According to Art. 20 III Basic Law the executive is bound by “law” and “justice”. The term “law” encompasses legal acts in the formal sense including transformed international treaties. Customary international law as part of the German legal order via Art. 25 Basic Law fits (at least) into the category of “justice”. Art. 20 III, together with Art. 25 as well as the parliamentary statutes transforming international treaties (Art. 59 II 1 Basic Law) bind the government to international law *qua constitutione*. However, the FCC appears to have relativized this principle within its *Hess* decision (2 BvR 419/80, Decision of 16th December 1980). Here the it stressed that no body with obligatory jurisdiction existed on the international plane (para. 43). Hence – it went on – the legal position of states regarding the interpretation of international law had to be given more weight. The Court emphasized the importance to speak with one voice as a state on the international plane. In its view this very aspect requires courts to be very reluctant to reject the executive’s interpretation of international law – as long as it is not arbitrary. The Administrative Court of Cologne has recently confirmed this position within a judgment on the case of Jaber vs. Germany (3 K 5625/14; judgment of 27th May 2015). Here the Court had to rule on the question whether Germany violated the constitution by allowing the military base Ramstein to be used as a relay station in the course of drone attacks conducted by the USA in Yemen. The court stressed that it only had the competence to examine the tenability and non-arbitariness of the government’s legal position on the international legality of targeted killings (cf. para. 84 et seq.). Such a limitation of judicial review appears to be highly problematic: It is true that international law is volatile and not easy to capture with the binary code of legal/illegal since these opposite categories tend to blur. However, to limit judicial review on questions of international law to a test of mere non-arbitrariness of the government’s position conflicts with both the obligation of the executive to obey constitutionally binding international law (Art. 20 III Basic Law) as well as the authority of the FCC to determine what the content of customary international law is. Art. 19 IV Basic Law which guarantees access to the judiciary for individuals in cases rights’ violations likewise raises severe doubts in this context. It is true that the Basic Law grants the executive a rather broad freedom of action in the realm of foreign policy, cf. Art. 32 I Basic Law. However, this only means that the federal government has a prerogative to decide on foreign action *within* the limits of constitutionally incorporated international law but its prerogative does not concern the *determination of the limits of international law*.

Steinmeier on the contrary conveys the dangerous message that neither the executive nor the parliament are constitutionally bound by the “black letter” of international law but rather what they consider to be politically opportune and necessary. It is one thing, however, to state the government’s interpretation of certain international norms – contentious as it may be – thereby contributing to the norm-generative discourse on international law. It is something completely different to argue that political decision-making could ignore the generally acknowledged reading of international law. What else are “seminar-like lines of argument” than an emanation of the rule of law?

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