

1. Introductory remark

Before beginning with my short presentation let me make it clear that the topic of your public hearing today has not been dealt with officially by the Austrian Presidency so far. A discussion of the criteria for the use of force by the EU is a matter which requires a careful, and I should like to add a cautious, approach. After all we are considering serious matters where life and death and the very foundation of the international legal system are at stake. Let me therefore stress that I am speaking here in a personal capacity although I am a representative of the country that holds the current presidency of the Council. I wish to mention that the topic is of utmost interest to me as I spent many years dealing with these issues in my previous capacity as Legal Adviser in the Austrian Foreign Ministry. So I hope my reflections may provide some added value to your debate.

2. The EU and the development of a common foreign, security and defense policy

At the outset it is useful to recall that before the development of a common foreign and security policy by the EU and the gradual development of a common security and defense policy with the prospect of a future common defence, the problem of the use of force by the EU could easily be neglected. However, with the entry into force of the Maastricht treaty (1992) and its amendments by the Amsterdam treaty (1997) the EU has definitely become a political union with a strong mandate for an active role as a global player in international relations. In assuming these functions the EU and its member states are obviously obliged to face the challenges of the new responsibilities which may possibly involve the use of force. The future European constitution – if it were to enter into force – goes even a step further by introducing a clause of mutual assistance in case of aggression. It is evident that this clause adds a further dimension to the determination of criteria for military intervention.

3. The prohibition to use force in interstate relations

In my view we must place every consideration of our topic within the framework of the basic rules and principles of international law and in particular within the framework of the relevant provisions of the UN-Charter. Before such a distinguished audience there is no need to extensively elaborate the full scope of Article 2, Para. 4, of the UN-Charter that obliges all members to refrain in their international relations

from the threat or use of force against the territorial integrity or political independence of any state. This fundamental rule in conjunction with Article 51 of the Charter stipulating individual or collective self defense as the two exceptions to the prohibition to use force can be considered as the cornerstone of the international legal system. These rules are complemented by the provisions of Chapter VII of the Charter which confers upon the Security Council (SC) the primary responsibility for the maintenance of international peace and security. The SC determines the existence of a threat to or a breach of the peace or act of aggression (Article 39). It is also for the SC to activate the system of collective security in accordance with Chapter VII of the Charter for instance in response to grave violations of Article 2, para.4. Enforcement action involving military means, in other words the use of force, may be decided and taken under the authority of the SC (Article 42). In the definition of the objectives of the CFSP (Article 11 para. 1 TEU) there are two explicit references as to the conformity of the goals pursued by the CFSP with the principles of the UN-Charter. Given the central place of the prohibition to use force among these principles it can be clearly concluded that the EU-member states thus solemnly reaffirmed their commitment to the ground rules of international relations as enshrined in the UN-Charter.

4. New security threats and the EU

The collective security system of the UN was established in the wake of the catastrophe of WW II. Its main purpose was to prevent and to restrain new wars between states. Written more than 60 years ago the Charter could not foresee the fundamental changes of world politics that occurred over the last decades, such as the end of the Cold War and the collapse of the Soviet Empire. The founding fathers of the Charter could not envisage either the emergence of new security threats which are so aptly described in the European Security Strategy (ESS) proposed by Javier Solana and adopted on 12 December 2003 by the European Council. These are terrorism, the proliferation of weapons of mass destruction, regional conflicts, state failures and organized crime.

Compared to the world that existed in 1945 interstate conflicts are no longer the primary reason for our security concerns. The security threats of the 21st Century do not solely emanate from states but come increasingly from non-state actors. Another feature of the new threats is often their global nature. Since some of them have a transnational character they are often difficult to grasp. By the same token the simple patterns that used to characterize the international system in which the sovereign

states were the primary actors no longer provide an answer as to how the international community should react to these new security risks. The UN-Charter appears oddly outdated in that respect.

It is fitting to note that the ESS too stresses the commitment of the EU to uphold international law and refers to the UN Charter as the fundamental framework for international relations. Effective multilateralism is the keyword here. At the same time it can be observed that the EU takes a broad and comprehensive approach to the concept of security.

Crisis situations are to be addressed as the conflict develops in various stages (conflict prevention, conflict management and post-conflict resolution).

5. EU – responses and tasks

Within the EU-framework the question as to when the issue of the use of force may become relevant was extensively discussed in connection with the so called Petersberg tasks. These missions were included in the TEU (Article 17 para.2) by the Amsterdam Treaty. Three tasks are mentioned:

- Humanitarian and rescue tasks,
- peace keeping tasks and
- tasks of combat forces in crisis management, including peace making.

Among these three tasks peace keeping missions are likely to necessitate the use of force although basically only in self defense. Combat missions are by definition conducted by military means involving the use of force.

The Helsinki European Council (10/11 December 1999) gave a further boost to the development of a common European policy security and defense by taking important decisions on developing the Union's military and non-military crisis management capability.

6. Legitimizing the use of force under the authority of the EU

The first test:

Whenever a resolution of the SC, adopted under Chapter VII of the Charter, authorizes, mandates or enables peace keeping or peace making, including peace enforcement, missions of UN-member states a joint action duly adopted by the

Council of the EU based on such UN-SC resolution provides sufficient legality for a possible use of force in compliance with the UN-Charter.

The second test:

Another legitimizing element could be the explicit agreement or invitation addressed to the EU by the state where the respective EU-operation is to be conducted.

I would like to cite two recent cases in which the Council adopted joint actions involving crisis management operations the legal basis for a possible use of force could be found in the relevant resolutions of the UN-SC.

The first case for the EU-military operation in the DR Congo (operation ARTEMIS) launched on the basis of the Council's joint action adopted on 5 June 2003 UN-SC-Resolution 1484 (2003) of 30 May 2003 provided the necessary mandate.

The second case is the EU-military operation in Bosnia-Herzegovina (joint action 2004/570/CFSP of 12/7/2004), which found its UN-backing in the UN-SC-Resolution 1551 (2004) adopted on 9 July 2004 welcoming the EU's intention to launch an EU-mission to B-H, including a military component.

So far so good. These matters become definitely more delicate in the absence of an enabling SC-Resolution or of an explicit consent of the State concerned to the mission in question. The provisions of the TEU on the CFSP and in particular on the Petersberg tasks are conspicuously silent about the requirement of a SC-Resolution authorizing the EU to carry out peace keeping tasks and tasks of combat forces in crisis management operations.

It has been argued that the absence of any reference to the UN-SC in this respect was deliberate leaving the possibility open that the EU engages in operations entailing the possible use of force even without a corresponding mandate of the UN-SC. From a strictly legal point of view, this interpretation of the relevant CFSP-provisions is correct. The EU has the possibility to take action, even without an explicit mandate of the UN, on the understanding, however, that such action would be strictly in conformity with the rules of international law and in particular with the principles of the UN-Charter.

This proviso together with the stringent decision-making procedures in the EU and the active involvement of member states provide for strong safeguards against any lighthearted engagement. In particular I would like to mention that decisions by the

Council such as Joint Actions which also encompass those having military or defense implications have to be taken unanimously.

The question whether the EU should resort to the use of force without a SC mandate will most likely occur only in the case of serious violations of human rights and if the SC is unable to take a decision. In this context we have to bear in mind that the concept of humanitarian intervention is still controversial and lacks universal acceptance.

Therefore, we may conclude that the existence of an enabling resolution of the UN-SC is not a condition sine qua non for our engagement in a mission decided and launched within the EU-framework. It is clear, however, that any such mission – in view of Article 11 TUE – has to be “in accordance with the principles of the Charter of the United Nations”, which leaves very little room for missions which would be controversial under international law. At any rate, from a political perspective it would be certainly highly desirable to provide for an enabling resolution of the UN-SC when an EU-mission is envisaged involving the possible use of force. It goes without saying that the existence of an enabling resolution of the UN-SC would also facilitate the decision of governments in favor of a participation in the respective mission.