Collective Security and the International Enforcement of International Law: French and American Perspectives

Ana Peyró Llopis
COLLECTIVE SECURITY AND THE INTERNATIONAL ENFORCEMENT OF INTERNATIONAL LAW: FRENCH AND AMERICAN PERSPECTIVES

Ana Peyró Llopis*

I. INTRODUCTION

Is the American perspective on the enforcement of international law compatible with the French perspective? For American legal scholars, the term enforcement is sometimes used as the equivalent of the following French notions: mise en œuvre, application, and also coercition. The American term enforcement appears to be used in situations where the French prefer legal terms that are closer to the connotation of implementation rather than that of enforcement. What are the consequences of the use of such different terms? Is there, behind the use of different language, with different meanings and approaches, a different perspective on the enforcement of international law as between France and the United States?

The question of the enforcement of international law can be examined from at least two perspectives. On the one hand, it is possible to analyze the way international law is enforced in domestic legal orders and municipal law. But international law can also be enforced using international mechanisms. This Article will analyze enforcement in the field of collective security, as it is the most controversial field of enforcement action. The relevant mechanisms in this field are mainly economic sanctions and armed interventions.

One should note that in the field of economic sanctions, the French position is better viewed as part of the European position. Indeed, the power to adopt sanctions against third-party States has been delegated by member States to the European Community. In this sense, it is not possible to identify a uniquely French position.

Military sanctions are the other tool used to enforce international law that are analyzed in this Article. International practice has recently made military measures somewhat commonplace, presenting them as merely another way of enforcing international law. Currently, it is still possible to speak about a real French perspective — and not a European one — as military intervention remains mainly within the power of States, and is a responsibility that has only been partially delegated to the European Union. Moreover, European practice in this field is strongly influenced by the French experience.

Furthermore, the interest of analyzing these two mechanisms of enforcement is that they illustrate an erroneous but common position, namely that the United States has a broader notion of the enforcement of international law than other States, and notably, one that is broader than its continental European allies. American and French perspectives on the enforcement of international law are in fact not as distant as one would imagine.

---

* Maitre de conférences en droit public, Université de Cergy-Pontoise (Paris).
This Article will examine and compare enforcement actions led by the United States and by France, and the underlying justifications for each country’s respective actions. Such an examination raises many questions: What arguments are used to justify enforcement action in the field of collective security? Which arguments are invoked by the United States? Are the arguments France invokes as different as we currently assume? Does the United States truly have a broader conception of the legality of enforcement actions, one closer to the notion of legitimacy, while France defends a narrow conception of international legality? The answers to these questions are different than one might expect, and require further discussion. But first of all, clarification of the relevant words used by each country in this area of law is merited. Are the two countries speaking the same language when the United States talks about ‘enforcement,’ and France talks of coercition?

II. ENFORCEMENT AND COERCITION: COMMENTS, DIGRESSIONS ON WORDS, AND DIVERSION OF MEANING

A. The English Language: the Notion of Enforcement

The Oxford English Dictionary defines the term enforcement as “[t]he action or process of enforcing.” Then it specifies, inter alia, “[t]he action or process of increasing the strength of anything (esp. an armed force, etc.); [] a reinforcement,” “[e]nergetic activity; an effort,” “[t]he urging [of] a demand, pressing home an argument, representation, or statement,” “[t]he action of bringing force to bear upon, doing violence to, or overcoming by force (a person or thing),” and “[c]onstraint, compulsion; a constraining or compelling influence.”

The World Book Dictionary contains the following definition of enforcement: “[T]he act or process of enforcing; putting into force.” In addition, the term to enforce means: “1. to force obedience to; cause to be carried out; put into force; 2. to force; compel; 3. to urge with force; emphasize.” Finally, the World Book Encyclopedia refers to law enforcement as “the means by which a community, state, or country keeps order.”

Therefore, it appears that the term enforcement is defined broadly and that it implies in any case a certain degree of force.

B. The French Language: The Notion of Coercion

The French Dictionary Petit Robert defines the term coercition as the act or process of constraining, enforcing, and/or compelling (“[a]ction de contraindre”). To enforce, or contraindre, means to force someone to act against her will (“[f]orcer (qqn) à agir contre sa volonté”), and furthermore, to oblige her by law (“[o]bliger par voie de

1. 5 OXFORD ENGLISH DICTIONARY 245 (2d ed. 1989).
2. Id.
4. Id.
droit").\(^7\) Professors Alain Pellet and Patrick Daillier define the term *contrainte* in their treatise on international law as “any kind of pressure other than the use of force, so serious as to change the decision of a physical being [representative of the State] or a moral being [the State itself] to whom the pressure is applied.”\(^8\)

The Dictionnaire de droit international public—in French, although edited by the Belgian Professor Jean Salmon—proposes the following doctrinal definitions of *coercition*: first, the “act of constraining,”\(^9\) and second, “constraint in any form”\(^10\) referring to the General Assembly Resolution 2625 (XXV) adopted on October 24, 1970. Such a definition, however, remains too general and is not sufficient to clearly define the French notion of enforcement, of *coercition*.

Although *coercition* and *contrainte* are synonymous in this Dictionary, the definition of the latter brings us further information. From a general perspective, *contrainte* is the “act or threat of coercion against a subject of international law or its representative.”\(^11\) *Contrainte* can also be a “coercive measure prohibited by a primary rule of international law [or] violence of an illegal nature.”\(^12\) But constraint can be legal in the following circumstances:

1. If [the action] is a political, economic or military act of constraint, authorized by a secondary rule of international law as a reaction to an internationally wrongful act, or if provided for by the constitutional treaty of an international organization empowering it to react to a treaty violation. These acts of constraint—decentralized or institutional—tend primarily to exert pressure on the errant State to make it cease its wrongful conduct.\(^13\)

Therefore, *coercition* is neither legal, nor wrongful *per se*. Such a qualification depends on the existence of a previous wrongful act.

Gérard Cornu defines *coercition* as the “[c]onstraint from the State, against an individual (imprisonment) or his property (seizure), consisting of the use of force in the service of the Law (for the execution of an obligation) by Lawful means, except

\(^{7.}\) Id. at 515.

\(^{8.}\) PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 929 (2002). My translation of “Toute forme de pression autre que le recours à la force, d’une gravité suffisante pour pouvoir inflever la décision de la personne physique (représentant de l’État) ou de la personne morale (l’État lui-même) auxquelles cette pression est appliquée.”


\(^{10.}\) Id. My translation of: “Contrainte quelle que soit sa forme.”

\(^{11.}\) Id. at 253. My translation of: “[A]cte ou menace de coercition exercés à l’encontre d’un sujet de droit international ou de son représentant.”

\(^{12.}\) Id. My translation of: “Mesure coercitive interdite par une règle ‘primaire’ du droit international. Violence ayant un caractère illicite.”

\(^{13.}\) Id. My translation of:

“[L]a contrainte peut être licite lorsqu’elle est une mesure coercitive d’ordre politique, économique ou militaire, autorisée par une règle ‘secondaire’ du droit international général, en guise de réaction à un fait internationalement illicite, ou prévue par le traité constitutif d’une organisation internationale pour sanctionner la violation du traité. Les mesures de contrainte en question—qu’elles soient décentralisées ou institutionnelles—tendent avant tout à faire pression sur l’État défaillant pour qu’il cesse son comportement illicite.”
assault."\textsuperscript{14} The act of constraining is thus the use of a legal force, which has as its general objective the performance of legal obligations by one subject thereto.

C. Lost in Translation

The terms of enforcement and \textit{coercition} are translated in an interesting way for the purposes of this paper. Translating from English into French, we can identify the following:

- coercion = \textit{coercition}, contrainte
- enforcement = \textit{mise en application}, imposition
- to enforce = \textit{mettre en application}, appliquer, faire obéir ou faire respecter, imposer, appuyer
- forcible = de/par force

Note that the noun enforcement, or its verb, to enforce, are translated in a broad way. On the other hand, we find that the equivalent of \textit{coercition} is coercion and not enforcement. The same situation appears in the opposite direction. From French into English, we find that:

- \textit{coercition} = coercion
- \textit{contrainte} = constraint
- \textit{mise en œuvre} = implementation
- \textit{exécution} = enforcement

Thus, from a semantic perspective, it seems that the English term enforcement is broader than the French terms used in the field of collective security, that is, \textit{coercition} or \textit{contrainte}. The way international law makes use of both terms confirms that they have a different meaning.

D. The International Definition

Some fundamental international legal documents include the translation of the English term enforcement into French. The different meanings identified above are recognized, but in the field of collective security, it appears that the terms enforcement and \textit{coercition} are often used as synonyms.

First, although the English version of the United Nations Charter uses the term enforcement, the French version uses the term \textit{coercition}. For example, the English version of Article 2(5) reads as follows: "All Members . . . shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."\textsuperscript{15} The French version of this same section of the Charter, however, refers to \textit{action préventive ou coercitive}.	extsuperscript{16} Furthermore, the English version of Article 2(7) reads as follows: "[T]his principle shall not prejudice the application

\textsuperscript{14} GÉRARD CORNU, VOCABULAIRE JURIDIQUE 160 (3d ed. 2002). My translation of: "Contrainte, d'origine étatique, exercée sur les biens d'un individu (saisie) ou sa personne (emprisonnement) comportant l'emploi de la force au service du Droit (pour l'exécution d'une obligation) par des moyens conformes à la loi (par les voies de droit) à l'exclusion des voies de fait."

\textsuperscript{15} U.N. Charter art. 2, para. 5.

\textsuperscript{16} \textit{Id.} (French text).
of enforcement measures under Chapter VII." The French version of this passage reads: "[C]e principe ne porte en rien atteinte à l’application des mesures de coercition prévues au Chapitre VII." The English version of the Charter thus uses a broader term than the French version. Several Articles of the United Nations Charter refer to enforcement measures or enforcement actions; however, these references do not give any further information on the scope of these terms. As Georg Ress and Jürgen Bröhmer have pointed out, the expression enforcement action should not be interpreted in an overly narrow fashion. The Language and systematic structure of the Charter does not warrant such a restrictive view and form a teleological point of view. The term should, as Walter has shown, be read as any action which would otherwise be in violation of the prohibition of the use of force as spelled out in Art. 2(4). Thus, the original meaning of the term "enforcement" is, in the field of collective security, close to the notion of "force". Therefore, enforcement will be legal or illegal, depending on its conformity with the United Nations Charter requirements. In the same vein, the General Assembly, in Resolution 2625, stated that "[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence." The French text reads: "Tout Etat a le devoir de s’abstenir de recourir à toute mesure de coercition qui priverait les peuples....

18. Id. (French text). Article 5 of the United Nations Charter uses the term enforcement as well: "A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council." U.N. Charter art. 5. In French this provision becomes: "Un Membre de l’Organisation contre lequel une action preventive ou coercitive a été entreprise par le Conseil de sécurité peut être suspendu par l’Assemblée générale, sur recommandation du Conseil de sécurité, de l’exercice des droits et privilèges inhérents à la qualité de Membre." Id. (French text).

mentionnés ci-dessus, dans la formulation du présent principe de leur droit à disposer d'eux-mêmes, de leur liberté et de leur indépendance."21

Second, Article 52 of the Vienna Convention on the Law of Treaties, adopted in 1969, provides that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."22 The title of Article 52 is: "Coercion of a State by the threat or use of force" while the title of French Article 52 is: "Contrainte exercée sur un Etat par la menace ou l'emploi de la force."23 One should note that a non-binding declaration was adopted by the United Nations Conference on the Law of Treaties, entitled the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.24 The first paragraph of the declaration "solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent."25 Coercion is therefore considered as a "pressure" to perform a specific act.

Therefore, it is possible to identify the meaning of "enforcement" in the framework of the United Nations. On the one hand, the French version of the United Nations Charter, uses the expression mesures coercitives as equivalent to the English term of "enforcement measures." On the other hand, if we read the Charter together with the General Assembly Resolution and the Vienna Convention on the Law of Treaties, it seems that narrower terms are sometimes preferred, such as "forcible" in the former and "coercion" in the latter. "Coercion" is seldom used in English and, in the Vienna Convention, its use is limited not just to the use of force, but to the use of armed force. Thus, enforcement has a broader meaning than the use of armed force and than the use of force tout court, in the sense of Chapter VII of the United Nations Charter. There is enforcement whenever there is a certain degree of force, and coercion measures will be the ultimate degree of enforcement measures.

Beyond the field of collective security, the term enforcement is usually translated as exécution. For example, the notion of enforcement has been incorporated in the Rome Statute of the International Criminal Court, part 10 of which is entitled "Enforcement" and contains the following articles:

103, Role of States in enforcement of sentences of imprisonment; 104, Change in designation of State of enforcement; 105, Enforcement of the sentence; 106, Supervision of enforcement of sentences and conditions of imprisonment; 107, Transfer of the person upon completion of sentence; 108, Limitation on the prosecution or punishment of other offences; 109, Enforcement of fines and forfeiture measures; 110, Review by the Court concerning reduction of sentence; and 111, Escape.26

21. Id. (French text) (emphasis added).
23. Id. (English and French texts).
25. Id. ¶ 1 (emphasis added).
In French, this part of the Statute is not called Coercition but Exécution, and wherever enforcement is used in the English version, the French word exécution is used.

The terminology used in these provisions differs from the provision of the United Nations Charter dealing with the enforcement judgments of the International Court of Justice. Article 94(2) of the Charter provides:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.27

In French, however, Article 94(2) refers to the “mesures à prendre pour faire exécuter l’arrêt.”28 Thus, the French version uses the term exécution for judgments, while in English the term enforcement has been increasingly employed. Thus, it appears that enforcement is translated by coercion in the field of collective security and by exécution where judgments are concerned.

However, there are some “enforcement measures” that are neither coercion measures stricto sensu, nor the result of a judgment. To implement these measures, a certain degree of force is necessary—a force that could violate territorial sovereignty. Although the use of force is possible in such situations, the term exécution in French is preferred. For example, in the Fisheries Jurisdiction (Spain v. Canada) case, the court opined:

The Coastal Fisheries Protection Regulations Amendment of May 1994 specifies in further detail that force may be used by a protection officer under Section 8.1 of the Act only when he is satisfied that boarding cannot be achieved by “less violent means reasonable in the circumstances” and if one or more warning shots have been fired at a safe distance (Sections 19.4 and 19.5). These limitations also bring the authorized use of force within the category familiar in connection with enforcement of conservation measures.29

In the French version of the judgment, exécution is translated as enforcement. The court subsequently explained that “[b]oarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a ‘natural and reasonable’ interpretation of this concept.”30 Thus, it seems that the French expression mesures coercitives is reserved for United Nations Charter Chapter VII-like measures.

To conclude this discussion on terminology, the English term enforcement is clearly broader than the French term coercition. However, in the field of collective security, the two terms are used as if they were synonymous. The problem of the term coercition is that it does not cover all situations of enforcement in the field of collective security. The problem with the term enforcement is that it covers too many notions, incurring the risk of diluting its meaning.
It appears that the term *exécution* could also be used in French in the field of collective security, and that the use of the notion of *coercition* should be limited to circumstances where the enforcement implies the use of coercive measures. Although the term enforcement covers coercive measures, the latter expression should be used only when one is clearly referring to measures that imply the use of force—not necessarily armed force—with the purpose of modifying the behavior of its recipient. Moreover, the term *exécution* is full of nuances. Although often used as an equivalent of *mise en œuvre* or *application*, the term can also mean the *obtention par la contrainte de l’accomplissement d’une obligation*, that is, the accomplishment of an obligation using coercion. For example, coercive measures that do not imply the use of armed force will frequently be enforced in the sense that there will be simply an application of these measures. At other times, these measures will be imposed. It is important to distinguish between these two modalities of enforcement, because they have different legal bases. Although an application is linked to the consent of the State that enforces, the legality of an imposition will rely on another basis, such as Security Council authorization.

This Article will now proceed to an analysis of the practice of the enforcement of International Law by France and the United States in order to see if such linguistic differences imply different perspectives on what constitutes enforcement within the field of collective security. Both States have sought legal justification for enforcement action, and both States mix a *stricto sensu* legal approach with the invocation of important moral values.

### III. THE *STRICTO SENSU* LEGAL APPROACH TO ENFORCEMENT ACTIONS

Both France and the United States have consistently professed the legality of their enforcement actions in the field of collective security. There are several examples illustrating this, and which assist in the identification of those arguments that have concretely been invoked. To identify these arguments, the following most paradigmatic enforcement actions in recent practice are considered:

- NATO's intervention in Kosovo in 1999
- Intervention in Afghanistan in 2001
- Intervention in Iraq in 2003
- Intervention in the Ivory Coast in 2003
- Intervention in Haiti in 2004

From these examples, it appears that the arguments invoked are, classically, Security Council authorization, self-defense, consent, and the legality of countermeasures.

31. “Application” is defined as: An operation, which gives effect to a rule of law or an administrative or judicial decision, of a fixed type or in the majority of specific situations. DICTIONNAIRE SALMON, supra note 10, at 73. My translation of: “Opération consistant à donner effet à une règle de droit ou à une décision administrative ou judiciaire, dans une espèce déterminée ou dans une généralité de cas particuliers.”

32. Id. at 478.
A. The Security Council as the Source of Legality

Article 39 of the United Nations Charter—the first Article of Chapter VII—provides that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Articles 41 and 42 provide for a set of measures known in French as mesures coercitives and in English as enforcement measures. Where these Chapter VII conditions are met, enforcement actions will be legal.

How have the United States and France been using these provisions of the United Nations Charter in recent practice? The NATO intervention in Kosovo is the point of departure in the search of legality in Security Council Resolutions, even though the resolutions in question did not explicitly authorize the intervention. Indeed, in the resolutions the Security Council adopted before the intervention, there was never an explicit authorization of the use of armed force. As a result, the existence of implicit authorization, or even of a tacit authorization, arose as notions.

Before the commencement of NATO military operations, the Security Council adopted three Resolutions, none of which authorized the use of armed force. The Security Council considered that the situation was a threat to international peace and security and invoked Chapter VII, but it only called on States “to make available personnel to fulfill the responsibility of carrying out effective and continuous international monitoring in Kosovo until the objectives of this resolution and those of resolution 1160 (1998) are achieved.” The Security Council then resolved, “should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, [that it would] consider further action and additional measures to maintain or restore peace and stability in the region.”

34. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

U.N. Charter art. 41.
35. Article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. Charter art. 42.
37. S.C. Res. 1199, supra note 36.
38. S.C. Res. 1160, supra note 36.
40. Id. ¶ 16 (emphasis added).
During NATO’s intervention in Kosovo, the Security Council did not adopt any Resolution until after the conclusion of the Rambouillet agreement, when it adopted Resolution 1244 (1999), deciding that “a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.” This annex was a statement by the Chairman at the conclusion of a meeting of the G-8 Foreign Ministers and adopted on May 6, 1999. One of the principles enunciated in the statement was the “[d]eployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives.” Therefore, the Security Council authorized the establishment of an “international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfill its responsibilities.” Thus, in this case, there was neither an implicit, nor a tacit authorization of military operations, chiefly aerial bombardment, of the Federal Republic of Yugoslavia (FRY). But the actions of NATO States, seeking such a legal basis, demonstrated that such a foundation was a fundamental justification for their armed intervention.

The intervention in Iraq is another clear example of the desire to use Security Council Resolutions to justify the legality of intervention. For example, in a letter addressed to the President of the Security Council, the Permanent Representative of the United States to the United Nations explained why the Security Council Resolutions provided a legal basis for armed intervention in Iraq:

> These operations are necessary in view of Iraq’s continued material breaches of its disarmament obligations under relevant Security Council resolutions, including resolution 1441 (2002). The operations are substantial and will secure compliance with those obligations. In carrying out these operations, our forces will take all reasonable precautions to avoid civilian casualties.

> The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990).

What is important here is not the reality of the legal basis but the necessity of finding it, whatever it may have been. Moreover, the legal basis for the Iraq intervention was transformed from one based on Resolution 687 into one based on the need to eliminate weapons of mass destruction. In a letter addressed to the President of the Security Council, the Permanent Representatives of the United Kingdom and the United States to the United Nations explained that:

---

43. Id. at Annex 1 (emphasis added).
44. Id. ¶ 7.
The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people.46

In the case of Kosovo, the American and French positions were consistent, as they are both member States of NATO. With respect to Iraq, however, France did not support the American position.

Yet, France decided to send troops to Afghanistan after the Security Council recognized that the September 11 attacks allowed a response based on self-defense. Although Security Council authorization was not necessary for action in Afghanistan (if indeed this was a case of self-defense), it seems that Security Council recognition of the legality of the action was important for France. As was stated in a letter:

On instructions from my Government, following the terrorist attacks perpetrated in the United States of America on 11 September 2001, I have the honor to inform you that, in accordance with the exercise of the inherent right of individual or collective self-defense (Article 51 of the Charter), referred to in Security Council resolution 1368 (2001), and in response to the encouragement addressed to Member States by the Council in paragraph 5 of its resolution 1378 (2001), France has undertaken action involving the participation of military air, land and naval forces.47

The legal basis of the intervention in Afghanistan transcends a Security Council Resolution, which seems to be more like an endorsement. It rests ultimately on the right of individual or collective self-defense, which is a fundamental exception to the prohibition of the use of force.

B. Extension of the Self-Defense Exception

Self-defense is also invoked by France and the United States to justify the legality of enforcement action. The Permanent Representative of the United States to the United Nations, in a letter addressed to the President of the Security Council, after the September 11, 2001 attacks, declared:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.48

48. Letter dated 7 October 2001 from the Permanent Representative of the United States of America
Thus, not only the United States, but at least all the members of the Security Council accepted the intervention in Afghanistan on the basis of self-defense, although the September 11th attacks created a situation in which it was more than difficult to rely on self-defense as an argument. The first problem was to determine against whom force could be exercised in self-defense. Al-Qaida was and is not a State, and it was impossible to use such an argument directly against a terrorist organization. Therefore, due to the link between Al-Qaida and the Taliban regime in power in Afghanistan, it was considered that self-defense could be used to justify the use of force against the latter. This argument can be rejected for purely formalistic reasons, or accepted if one recognizes the de facto link between Al-Qaida and the Taliban regime. But this is not the major criticism of the reliance of self-defense in the Afghanistan case. The most serious problem is the non-observance of the notion of self-defense itself. Indeed, if one examines this practice in light of United Nations Charter Article 51, it is clear that the members of the Security Council have strayed from their responsibilities. Article 51 provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. 49

However, in Afghanistan, the Security Council never took such “measures necessary to maintain international peace and security.” Although there was dire need to maintain and restore international peace and security in the aftermath of the September 11, 2001, attacks, the Security Council never exercised its responsibility. In that sense, it is arguable that other members of the Security Council, and notably France, were accomplices to the United States in undermining the Security Council’s powers and, in reality, the whole system of collective security. By failing to respond proactively, the Security Council ignored an important breach of international peace and security and, in doing so, seemed to accept the breach itself.

C. State Consent

Another argument used to justify the legality of armed intervention has been the consent of the State in which the intervention takes place. For example, in the Ivory Coast, France contended that the Government and the rebels had asked France to monitor the cease-fire that they had reached. The parties to the Linas-Marcoussis agreement welcomed the cease-fire, which was “made possible and guaranteed by the deployment of ECOWAS forces supported by French forces.” 50

49. U.N. Charter art. 51 (emphasis added).
The Western European Union (WEU) clearly recognizes the legality of interventions in States that have consented to an intervention. For example, with respect to French interventions in several African States, the Rapporteur of the Defence Committee declared that “[b]eyond the evacuation of French citizens protected by the French consulate and other Foreign citizens, and the protecting of French property, these interventions are generally made with the objective of reestablishing order, suppressing rebellion and crushing insurrections at an early stage.” The organization then concluded that, as long as these interventions were based on prior defense agreements, United Nations authorization would be unnecessary.

It appears, therefore, that both the United States and France have a utilitarian appreciation of the United Nations Security Council, as enforcement actions are often justified on behalf of a Security Council authorization. However, legal arguments do not stand alone; they frequently underlie a moral conception of what the international order should be, thereby indicating that the relationship between law and morals remains undefined.

IV. LEGITIMATE ENFORCEMENT ACTIONS: WHERE AND WHEN LAW MEETS MORALITY

Other arguments, which go further than legality stricto sensu, have been invoked to justify enforcement actions. Indeed, States sometimes invoke moral values, often in addition to the legal arguments examined earlier in this Article. A real tension appears then between enforcement actions and certain moral values. It is often very superficially said that the United States has a moral approach to international relations and that the arguments Americans invoke are far from being merely legal. But this is not only an American characteristic. If we examine recent enforcement actions led by the United States and/or France, we see that they have both argued moral considerations in order to legitimize actions, which were often clearly illegal.

A. Tension Between Legality and Legitimacy

Very often, legality and legitimacy justifications for enforcement actions are mixed. For example, during the 1993 crisis in Haiti, the Security Council determined that the situation there threatened international peace and security. Afterwards, the Council of the European Communities specified which facts had created such a threat: “[t]he Community and its Member States, meeting within the framework of political cooperation, have repeatedly expressed their concern about the persistent absence of...”


52. Id.

53. S.C. Res. 841, ¶ 14, U.N. Doc. S/RES/841 (June 16, 1993) (determining “that, in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region”).
democracy and the rule of law in Haiti and the need for effective action to end this situation. 54

Thus, from the European perspective, it was the absence of democracy and the rule of law that had justified an enforcement action against Haiti. At the time, however, it was not clear whether or not there had been a violation of international law. Instead, European values and the European conception of what the international order should be served as acceptable reasons for the Security Council's adoption of a Resolution to intervene in Haiti.

More recently, during the 2004 crisis in Haiti, the French Foreign Affairs Minister, Dominique de Villepin, made the following declaration:

The situation in Haiti is continuing to deteriorate.

A race in [sic] under way between those who support violence and those who are still hoping for a peaceful solution. Haiti is now threatened with chaos. It is the duty of the international community to assume its responsibility to preserve the country from disorder and violence.

All of the above must be legitimized and implemented by the international community.

- Our proposals could be submitted to the OAS and CARICOM and the plan, thus strengthened, could be conveyed to the United Nations for adoption by the Security Council. 55

Foreign Minister Villepin's declaration invokes other ill-defined notions to justify international intervention: disorder, violence and chaos.

The NATO intervention in Kosovo was probably the clearest example of the tension between law and morality. We have already examined the different legal arguments advanced to justify this intervention. In addition, however, non-legal arguments were put forth to justify the NATO intervention. NATO declared during its Washington Summit on Kosovo:

NATO's military action against the Federal Republic of Yugoslavia (FRY) supports the political aims of the international community, which were reaffirmed in recent statements by the UN Secretary-General and the European Union: a peaceful, multi-ethnic and democratic Kosovo where all its people can live in security and enjoy universal human rights and freedoms on an equal basis. 56

In this regard, General Wesley K. Clark, Supreme Allied Commander in Europe justified the aerial intervention in the Federal Republic of Yugoslavia by describing the scene in moral terms:

Allied military forces were confronted daily with the horrific consequences of "ethnic cleansing"—the deliberate violent expulsion of an entire people from their native land. Even from 15,000 feet above Kosovo, the evidence was all too clear: empty, destroyed villages; hundreds of thousands of people on the move; the smoke of thousands of burning homes. On the ground, the stories of cruelty and abuse—summary executions, organised rape and beatings perpetrated on young and old alike—bore even closer witness to the campaign of terror waged by the Federal Republic of Yugoslavia against its Albanian minority.57

The attacks by the Allied Force were therefore justified on behalf of "the values for which NATO has stood since its foundation: democracy, human rights and the rule of law."58 Actions undertaken by the Federal Republic of Yugoslavia were considered to be "the culmination of a deliberate policy of oppression, ethnic cleansing and violence pursued by the Belgrade regime under the direction of President Milosevic."59 Thus, atrocities against the people of Kosovo by Yugoslav military, police, and paramilitary forces "represent a flagrant violation of international law."60

Earlier, the European Union had adopted a declaration on the NATO intervention, considering whether the intervention was justified by humanitarian reasons. The European Council pointed out that the objective of NATO actions was "to put an end to the humanitarian catastrophe in Kosovo."61

The argument of countermeasures has also been used to justify enforcement actions in the field of collective security. These countermeasures—mainly economic sanctions—are a means to enforce international law. How do the United States and the European Union justify the adoption of economic sanctions? They usually invoke a previous violation of existing international obligations by the sanctioned country. But such a violation usually accompanies the existence of a threat to international peace and security and underlies the violation of a plethora of ill-defined moral values.

For example, although the United States argues that the adoption of sanctions results from a country's breach of democratic principles, the European Union will build democratic principles into treaties with third States and, when these principles have been violated, will terminate the treaty as a countermeasure.

Therefore, the international regime for economic sanctions adopted against third States has to follow the countermeasures regime. Accordingly, countermeasures are taken by a State that has been injured by the violation of an obligation. However, the International Law Commission's (ILC) Draft Articles on State Responsibility has created major controversies over whether or not States other than the injured State have the right to adopt countermeasures. In its commentary, the ILC explains that:

58. Statement on Kosovo, supra note 56, ¶ 1.
59. Id.
60. Id. ¶ 11.
One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached. For example, in the case of an obligation owed to the international community as a whole the International Court has affirmed that all States have a legal interest in compliance. Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

This statement shows the lack of agreement in the ILC on this question and the subsequent choice to let the question remain open instead of clearly establishing whether or not third States can adopt countermeasures.

In some cases, the threat to international peace and security has been considered a violation of a collective interest. When Iraq occupied Kuwait, and also during the NATO intervention in Kosovo, the European Community adopted several enforcement measures like embargos, legislation permitting assets to be frozen, and bans on flights. For some of its Member States, such a prohibition made it impossible to enforce several bilateral aerial agreements:

Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's... worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply." These measures serve as an intervention responding to a threat to international peace and security. States have therefore claimed that they were adopted for the protection of a collective interest. The ILC Draft provides that any State other than an injured State is entitled to act in response if "[t]he obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest.

64. More specifically, Germany, France, and the United Kingdom.
of the group.” The validity of this provision is more than uncertain. In this sense, even the ILC noted that:

[T]he current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

Therefore, Article 54, as it has been presented by Rapporteur J. Crawford remains unsupported by contemporary practice. Article 54 does not codify international law but contains instead a saving clause which leaves open a question to be decided at a later date. The ILC commentary thus implies that, for States other than the injured State, international practice only recognizes the possibility to react with legal measures but not with unlawful measures no matter how legitimate they may seem. Thus, this Article is very limited, as it only reaffirms the legality of retaliatory measures.

Treaty practice also demonstrates the importance of certain values and how a treaty violation could form the basis for enforcement action. In Europe, the inclusion of conditionality provisions in treaties between an organization and a third State has been conceived as a tool to further respect for human rights, democratic principles, the rule of law, and good governance in public affairs (bonne gestion des affaires publiques). The partnership agreement between the members of the African, Caribbean, and Pacific Group of States and the European Community and its member States provides: “Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.”

66. Id. at 318.
67. Id. at 355.
Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement."71

Article 96 of the same agreement provides that there will be consultations in the event that these principles are violated. Furthermore, it provides that: “If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared.”72 Similarly, the Common Position of June 2, 1997 of the European Union Council concerning conflict prevention and resolution in Africa provides that in order “to contribute better to the prevention and resolution of conflicts in Africa,” the European Union shall notably seek “to use the various instruments available coherently to promote effective conflict prevention and resolution.”73 For that purpose, the Council notes that:

[In accordance with the relevant procedures, steps will be taken to ensure coordination of the efforts of the European Community and those of the Member States in this field, including with regard to development cooperation and the support for human rights, democracy, the rule of law and good governance.74

Thus, the European Union Council considers that conditionality provisions in treaties with African states are a conflict prevention and resolution measure. For example, the expulsion of the Head of the European Union Electoral Mission from Zimbabwe on February 16, 2002, led to the European Union’s adoption of a common position which expressed serious concern about the situation in Zimbabwe and notably about “recent legislation in Zimbabwe which, if enforced, would seriously infringe on the right to freedom of speech, assembly and association, mainly the Public Order and Security Act and the General Laws Amendment Act.”75 The EU Council then decided that it would close “the consultations conducted under Article 96 of the ACP-EC Partnership Agreement and implement targeted sanctions.”76

B. Confusion Between Legitimacy and National Interests

In a declaration, the WEU Rapporteur considered that Europe should take the place of the United States, as it had abandoned any global responsibility, as long as its

71. Id.
72. Id. art. 9 at 40. This article specifies what “appropriate measures” are:
The “appropriate measures” referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.

Id.
74. Id.
76. Id.
security or its national interests were not affected.\textsuperscript{77} He affirmed in this regard that “if Europe wishes to play or is forced to play a more important role in certain regions of the world where its security and vital interests are at stake, it should be prepared to take measures that could end in deployment of force and military intervention.”\textsuperscript{78}

However, if French interventions are closely examined, it is hard to see how France is assuming global responsibility in the field of international peace and security. France will only intervene when it has an interest in such an intervention. Unilateral peacekeeping operations demonstrate this phenomenon very well. These operations have not been initiated by the United Nations, the Security Council, or by any subsidiary body. The operations have been undertaken outside the United Nations System, except for United Nations authorization. For example, the French Opération Licorne in the Ivory Coast was authorized by Resolution 1464 (2003)\textsuperscript{79} and the Multinational Interim Force in Haiti by Resolution 1529 (2004).\textsuperscript{80} Thus, the United Nations only authorized these operations and the possible use of force should it become necessary to defend their missions.

Therefore, sixty years after the creation of the United Nations and a major effort to have global operations led by the United Nations, the prevalence of operations led by an individual country is a huge step back. Instead of trying to find new ways to reinforce the United Nations system, States like the United States or France have preferred to go back to the solution of individual actions. Although they are probably more efficient in the short-term, in the long-run, it is difficult to say that they will create acceptable solutions for the States where they intervene. In any case, though, it is a clear breach of the United Nations collective security system. Moreover, the examples of the FIAS in Afghanistan, the Multinational Interim Force in Haiti, the Opération Licorne in the Ivory Coast, or ECOFORCE and ECOMIL in Western Africa indicate that States only deploy troops when they have an interest to defend.

\textbf{V. CONCLUSION: DETERIORATION OF THE COLLECTIVE SECURITY SYSTEM BY FRANCE AND THE UNITED STATES}

In a 2001 Resolution, the Security Council declared that it was ready “to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.”\textsuperscript{81} At the end of the day, however, the Security Council, although it had been taking some controversial measures to combat terrorism, never responded to the September 11th attacks, failing to assume its responsibilities under the United Nations Charter. As Alain Pellet noted, regarding the failure of the Security Council

\begin{itemize}
\item \textsuperscript{77} WEU Committee Report, supra note 53, ¶ 135, at 24. In French, M. Masseret’s original statement declared that the United States “se sont déchargés de toute responsabilité à l’échelle mondiale, dès lors que leur sécurité et leurs intérêts nationaux ne sont pas directement touchés.”
\item \textsuperscript{78} Id. My translation of: “Si l’Europe souhaite ou n’a pas d’autre choix que de jouer un rôle plus important dans certaines régions du monde où sa propre sécurité et ses intérêts vitaux sont en jeu, elle devra se préparer à prendre des initiatives qui pourront aboutir au déploiement d’une force d’intervention militaire.”
\end{itemize}
to adopt retaliatory measures in response to the September 11th attacks: “Even though peace and global international security are threatened, The United Nations leaves the playing field wide open to the United States. This conforms neither to the spirit of the [United Nations] Charter, the Declaration of Intention of September 12th, nor to the concept of collective security.”

No proper vehicle has been found, therefore, for the Security Council to exercise its powers, despite the euphoria resulting from the end of the Cold War and the subsequent revitalization of Chapter VII of the Charter.

Jürgen Habermas wrote an interesting essay after the 2003 Iraq intervention in which he tried to clarify the differences between “the continental European and the Anglo-American powers” over strategies for justifying military actions:

The Europeans had drawn the lesson from the disaster at Srebrenica: they understood armed intervention as a way of closing the gap between efficiency and legitimacy that had been opened by earlier peacekeeping operations, and thus saw it as a means for making progress toward fully institutionalized civil rights. England and America, conversely, satisfied themselves with the normative goal of promulgating their own liberal order internationally, through violence if necessary. At the time of the intervention in Kosovo, I had attributed this difference to contrasting traditions of legal thought—Kant’s cosmopolitanism on the one side, John Stuart Mill’s liberal nationalism on the other. But in light of the hegemonic unilateralism that the leading thinkers of the Bush Doctrine have pursued since 1991 (see the documentation by Stefan Frölich in the FAZ from April 10th, 2003), one suspects in hindsight that the American delegation had already led the negotiations at Rambouillet from just this peculiar viewpoint.

We think that, indeed, the differences between the Anglo-American conception regarding international law and the Continental-European conception cannot be found in a legalistic approach. We cannot clearly state, however, that while Continental-Europe wants to progress toward fully institutionalized civil rights, America wants only to impose a liberal order. French practice demonstrates that France acts not only when necessary to protect civil rights, but also when necessary to protect national interests. Similarly, the United States acts to impose a liberal order, but actually appears more driven to engage in enforcement actions when necessary to defend national interests.

In the same article, Habermas asserts that the American decision to consult the Security Council “certainly didn’t arise from any wish for legitimation through international law, which had long since been regarded, at least internally, as superfluous. Rather, this rear-guard action was desired only insofar as it broadened the basis for a ‘coalition of the willing,’ and soothed a worried population.”

Similarly, the Security Council adopted Resolution 1464 after France initiated Operation Licorne

---


84. *Id.* at 704 (emphasis added).
in the Ivory Coast. In addition, France only consulted the Security Council for an "endorsement" rather than for authorization.

In conclusion, an examination of recent practice shows that individual States—not only the United States but other States including France—have contributed to the fragility of the collective security system designed by the United Nations Charter. The Security Council and its member States, however, have also significantly contributed to the disintegration of the collective security system. On the one hand, the Security Council is expanding its powers beyond what is envisioned in the United Nations Charter, as exemplified by its actions in defining terrorism. On the other hand, however, the Security Council has not been assuming full responsibility when there is a threat to or breach of international peace and security. Thus, for other States to point to the United States as the main culprit in the decline of the United Nations is a failure of those States to assume responsibility for their own complicity in this failure. Although France is often considered an ardent defender of the useful "machin," as General de Gaulle referred to the United Nations, its actions are paradigmatic of the bad faith of other States, and mainly of the members of the Security Council who still benefit from the veto power.

CONTRASTING PERSPECTIVES ON PREEMPTIVE STRIKE: THE UNITED STATES, FRANCE, AND THE WAR ON TERROR

Sophie Clavier

I. INTRODUCTION
II. THE USE OF FORCE: FROM CONGRUENCE TO DIVERGENCE
III. IS IRAQ A DANGEROUS PRECEDENT?
IV. THE GREATER CONTEXT OF THE FRANCO-AMERICAN QUARREL
V. CONCLUSION