



OVERVIEWS

EUROPE AND SYRIA: DIPLOMACY, LAW AND WAR

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I. As the fifth anniversary of civil war in Syria nears, civilians continue to die in large numbers. These deaths, as well as injuries and destruction, are now a result of fighting among the many armed militant groups whose alliances keep shifting. “New conflicts are emerging in which civilians are caught up between all these actors”, according to the political adviser to the Independent International Commission of Inquiry on the Syrian Arab Republic.¹ He said “[w]hile the Islamic State militants are losing territory in northern Syria [...] it’s also giving way to unstable dynamics on the ground. [...] The war is not winding down”.²

The International Committee of the Red Cross (ICRC) declared that violence in Syria crossed the line from civil unrest to armed conflict in mid-July 2012.³ Efforts at peace-making show few signs of succeeding any time soon. The EU is among the international actors that have failed to advance those efforts. Europe’s failure can be linked, in part, to a belief – perhaps even a growing belief – found across the continent in the efficacy of using military force in situations like the Syria crisis.⁴

This observation may come as a surprise. A decade and a half ago, the American foreign policy commentator, Robert Kagan, famously called Europe “Venus” and America “Mars” because of the willingness, in his view, of the United States to use military

¹ R. GLADSTONE, *U.N. Documents Syrian War Crimes, But Prosecution Moves Slowly*, in *New York Times*, 24 April 2017, www.nytimes.com.

² *Ibidem*.

³ BBC, *Syria in a Civil War, Red Cross Says*, in *BBC News*, 15 July 2012, www.bbc.com. The criteria used by the ICRC to make the determination track those identified in International Law Association, Committee on the Use of Force, *Report on the Meaning of Armed Conflict under International Law*, 2010, www.ila-hq.org.

⁴ See S. BLOCKMANS, *In Search of a Role to Play: The EU and the War in Syria*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 9 *et seq.* for an example. See also the search for legal justifications by Europeans for humanitarian intervention associated with the concept of “Responsibility to Protect” introduced in 2001, following NATO’s use of force in Kosovo. E.g., C. KENNY, *The Responsibility to Protect: A Future After Syria?*, in V. SANCIN (ed.), *Are ‘We Manifestly Failing’ R2P?*, Ljubljiana: University of Ljubljiana Faculty of Law, 2017, papers.ssrn.com, p. 69.

force in contrast to Europe. When Kagan said, "Americans are from Mars and Europeans are from Venus" he meant:

"The transmission of the European miracle to the rest of the world has become Europe's new mission civilisatrice. [...] Rather than the threat of force and unilateralism, Europe believes conflicts are best resolved through peaceful diplomacy and multilateral engagement. [...] [T]he most important reason for the divergence in views between Europe and the United States. America's power and its willingness to exercise that power – unilaterally if necessary – constitute a threat to Europe's new sense of mission".⁵

The facts do not bear out the distinction. Kagan was attempting to explain why the United States was willing to go to war against Iraq prior to the 2003 invasion, while Europe seemed reluctant. The actual invasion force included troops from four States, two were European: United Kingdom and Poland. The fourth was Australia. The other major post-Cold War inter-state armed conflicts prior to 2003 were Afghanistan and Kosovo. Both included European States and very little diplomacy. France has likely used military force on more occasions than the United States during the Cold War and post-Cold War periods.⁶ United Kingdom has a long list as well. France and United Kingdom led the charge to intervene in Libya in 2011, where virtually no attempt at diplomacy occurred.⁷ They also argued for an expansive interpretation of the United Nations Security Council authorization for the use of force in Libya.⁸ The resolution limited the purpose of military force to civilian protection. The United Kingdom and France argued that meant, implicitly, removing Libya's leader.⁹ Within months of NATO ending its Libya intervention, leaving a disastrous civil war behind, France began using military force in Syria.¹⁰ In 2015, the British carried out an American-style targeted killing operation using a drone in Syria.¹¹

II. As this set of examples indicates, the belief in military force and the political will to use it may not be so different in Europe from the United States. A subtle distinction

⁵ I. DAADLER, *Of Paradise And Power, America and Europe in the New World Order* by Robert Kagan, in *New York Times*, 3 March 2003, www.nytimes.com.

⁶ See the report by A. HANSEN, *The French Military in Africa*, in *Council on Foreign Relations*, 8 February 2008, www.cfr.org. Since the report was issued, France has intervened in Mali, Central African Republic, and Syria.

⁷ H. ROBERTS, *Who Said Ghaddafi Had to Go?*, in *London Review of Books*, 2011, p. 8 *et seq.*

⁸ Security Council, Resolution 1973 of 17 March 2011, UN Doc. S/RES/1973 (2011).

⁹ H. ROBERTS, *Who Said Ghaddafi Had to Go?*, cit. See also P. GOODENOUGH, *Russia, China Accuse West of Exceeding UN Resolution, Making Libyan Crisis Worse*, in *CNS News*, 29 March 2011, cnsnews.com.

¹⁰ In early 2014, France was arming opposition forces. Cf. Agence France-Presse, *France Delivered Arms to Syrian Rebels, Hollande Confirms*, in *France 24*, 21 August 2014, www.france24.com.

¹¹ S. ACKERMAN, *Drone Strikes by UK and Pakistan Point to Obama's Counter-terror Legacy*, in *The Guardian*, 9 September 2015, www.theguardian.com.

might be found in the somewhat greater European interest in claiming legal justification for military force. The United States provided no official legal justification for the Kosovo intervention or the punitive attack on Syria on 6 April 2017. Certain European States tried to find a legal justification for Kosovo after the use of force.¹² The United Kingdom sought – unsuccessfully – to get a specific Security Council resolution for the Iraq invasion of 2003. The United States seemed content with one from the 1990-91 Gulf War. US Secretary of State Colin Powell also took the position that the US had the same legal authority to use force against Iraq in 2003 as it did against Kosovo in 1999.¹³ A former British government legal official developed several new, open-ended arguments for the legal right to carry out targeted killing following 9/11.¹⁴ A Parliamentary subcommittee report on the United Kingdom's 2015 targeted killing in Syria refers to most of them.¹⁵ The United States has cited some of these new proposals but only 14 years after it began the practice.¹⁶ On 6 April 2017, US President Trump ordered an attack on Syria. His government issued no legal justification, but France and Germany made a joint statement finding the Syria attacks “just and proportionate”.¹⁷

The legal justifications for using force are being produced by the many scholars and government officials who specialize in this area of international law in Europe. By contrast, interest in the non-binding methods of peaceful settlement of disputes seems to languish. International courts and tribunals draw significant attention, but not negotiation, good offices, mediation, inquiry, or conciliation.

III. The relative disinterest in peaceful settlement is seen over the course of the Syrian conflict. Mass opposition inside Syria to the regime of Bashar al Assad began in March 2011, just as NATO was preparing to intervene in Libya. Peaceful protest was aban-

¹² Sweden convened the Independent Kosovo Commission, which declared the use of force by NATO against Yugoslavia in 1999 was unlawful but nevertheless “legitimate”. See Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response and Lessons Learned*, 2000, reliefweb.int, p. 164.

¹³ See D. LINZER, *U.S. Deploys Slide Show to Press Case Against Iran*, in *The Washington Post*, 14 September 2005, www.highbeam.com.

¹⁴ D. BETHLEHEM, *Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors*, in *American Journal of International Law*, 2012, p. 773.

¹⁵ UK House of Lords, House of Commons, Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing: Second Report of Session 2015-16*, 10 May 2016, www.publications.parliament.uk. See C. HENDERSON, *Introducing perspectives on the Joint Committee's drones report*, in *Journal of International Law on the Use of Force*, 2016, p. 194 *et seq.*

¹⁶ B. EGAN, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: some Observations*, in *American Society of International Law*, 1 April 2016, www.state.gov.

¹⁷ C. PALAZZO, P. FOSTER, *Assad Bears Full Responsibility: How the World Reacted to Donald Trump's Missile Strike on Syria*, in *The Telegraph*, 7 April 2017, www.telegraph.co.uk. See also A.Z. BORDA, *The Precedent Set by the US Reprisal Against the Use of Chemical Weapons in Syria*, in *EJIL: Talk!*, 1 May 2017, www.ejiltalk.org.

done and armed opposition groups formed leading to an all-out civil war a year later. Since then the death toll has exceeded 400,000 and 12 million people have fled their homes. A large percentage of those seeking asylum outside Syria are in Europe. Destruction of irreplaceable cultural heritage has been rampant, along with the built and natural environments.

And, yet, the EU played only a small role in the first round of mediation led by former United Nations Secretary General Kofi Annan.¹⁸ The talks began prior to the outbreak of armed conflict, when the best chance of preventing war was at hand. Annan produced a six-point plan that had the support of the EU, the five permanent Security Council members, and the Arab League. Despite this support, the plan was doomed from the start because the talks that led up to its formation and the plan itself did not proceed on the basis of impartiality. According to a 2016 report of the International Peace Institute (hereinafter, the IPI report), bias against Assad and disunity among the opposition parties infected the proceedings.¹⁹ The fractious opposition was emboldened by support of the United States and France, so that when Assad pulled back his military assault, as required by the plan, the opposition took advantage and pressed ahead. Assad responded predictably. By August 2012 Annan had quit, admitting failure.

In Syria, the EU and Member States, France and the United Kingdom, have adopted a role analogous to the one they assumed in the Libyan civil war. French president Sarkozy and British Prime Minister David Cameron were early and strong proponents of military intervention in the Libya conflict. Diplomacy and non-violent solutions were bypassed.²⁰ In Syria, "the main concessions that [the Assad regime] sought, notably a requirement that external powers stop financing and arming the opposition, were rebuffed".²¹ Despite this, Annan was able to get a ceasefire. The IPI report, citing a paper on Annan's failed effort, explains:

"[F]or six weeks, the regime ceased using heavy weapons and opened the country to the UN observers and international journalists although it did not cease lower-level violence against opponents (even skeptics admitted the violence decreased). Moreover, UNSMIS assumed a certain role in mediating between regime and opposition forces. The result was that, as the regime pulled back, peaceful opposition groups solidified control over

¹⁸ For an in-depth analysis of the efforts by the first two UN appointed mediators in the Syria conflict, see, R. HINNEBUSCH, I.W. ZARTMAN, *UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi*, International Peace Institute, March 2016, www.ipinst.org.

¹⁹ *Ibidem*.

²⁰ H. ROBERTS, *Who Said Ghaddafi Had to Go?*, cit.

²¹ R. HINNEBUSCH, I.W. ZARTMAN, *UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi*, cit., p. 7.

anti-regime areas, just as Annan hoped and Assad feared. Perhaps for this reason, the cease-fire soon started to unravel”.²²

The investigators conclude that the plan’s main weakness was relying on outside powers to pressure the regime without providing positive incentives to Assad.²³ Europe did little to convince the opposition to accept any compromise. It did little to even organize the now over 70 competing groups into a coherent negotiating body. France went further, standing by the opposition demand that Assad be forced to step down. By early 2014, France was unlawfully supplying weapons to the opposition.²⁴

By contrast France and Germany brokered the Minsk I and II Agreements between Ukraine and Russia. The two EU Members put heavy pressure on Ukraine to make concessions for the sake of peace.²⁵ Similarly, France, Britain, Germany and the European Union all played significant roles together with the United States, Russia and China to succeed in achieving the Iran nuclear agreement.²⁶

The difference between Ukraine and Iran on one hand and Syria, Libya, and Serbia on the other may well lie in Europe’s fear of war with Russia and Iran. The positions of various EU States respecting the 2003 Iraq War can be explained using the same calculation. Recall that the United States and United Kingdom had been bombing Iraq since the end of the Gulf War. France dropped out of that legally questionable practice and forged better relations with Iraq, together with Russia. France was likely in a better position to know the costs of invading Iraq. At any rate, France plainly stood to gain more by holding out for a new Security Council authorization, including the gain to its reputation for upholding international law.

Is Syria then just another case proving the adage that the strong do as they please while the weak suffer what they must – “strong” and “weak” – being contingent on the States involved? Is the idea that Europeans really care about law and diplomacy based on the thinnest veneer of concern to find legal cover for military force? At this point in history, we cannot say for certain because State leaders have heard advice for decades that a legal justification can be always be found the use of military force.

Still, the fact that concern for international law persists despite this cynical attitude offers some evidence of its strength. In a wide-ranging discussion at *EJIL* Talk! on Trump’s Syria attack, it is noteworthy that some scholars wrote with depth and exper-

²² *Ibidem*, p. 8, citing T. HILL, *The Strategic Thought of Kofi Annan: What Annan was Trying to Do in Syria in 2012 and Why He Quit*, unpublished paper, 2015, pp. 10-12.

²³ R. HINNEBUSCH, I.W. ZARTMAN, *UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi*, cit., p. 10.

²⁴ Agence France-Presse, *France Delivered Arms to Syrian Rebels, Hollande Confirms*, cit.

²⁵ Details of the Minsk Agreements are available at the website of the Organisation for Security and Cooperation in Europe, www.osce.org. See also, I. PRUDNYK, *Cacophony of the Minsk Agreements*, in *Stockholm International Peace Research Institute*, 16 May 2016, www.sipri.org.

²⁶ BBC, *Iran Nuclear Deal: Key Details*, in *BBC News*, 16 January 2016, www.bbc.com.

tise on the *jus cogens* nature of the prohibition on the use of force and the importance of rejecting interpretations that undermine it.²⁷

We have reached an imperative moment to speak this truth to power as indications mount of a United States plan to attack North Korea. International law prohibits such an attack under present circumstances. The Security Council would have to authorize a use of force not in response to an armed attack occurring.²⁸ Even then, the Security Council would have to ensure the use of force was necessary and proportionate, that using force had a high likelihood of success and was a last resort.²⁹ These restrictions on resort to force have been argued away on so many occasions since the end of the Cold War, it should be understandable if President Trump is advised they pose no obstacle to war with North Korea.

In the past following the catastrophes of major war – the American Civil War, the First World War, the Second World War, and others – great strides have been made toward advancing international law against the use of force and in favor of diplomacy and institutions. A war beginning on the Korean Peninsula could be just the sort of Armageddon that could result in new interest in the international law and the alternative means of dispute resolution. Pope Francis sees the chance of a better outcome than this history predicts. He has called for mediation with North Korea, asking for a truly neutral and impartial party, such as Norway, to take the lead.³⁰ Norway played a key role using quiet diplomacy to assist in settling the 50-year military conflict between the Revolutionary Armed Forces of Colombia (FARC) and the government of Colombia. It should also be possible to prevent war with North Korea and to find an end to the brutality in Syria as well as Libya, South Sudan, Somalia, Nigeria, The Philippines, and Afghanistan.

The Pope would not use Venus as a metaphor, of course. He has other feminine icons to model the virtues of peace, diplomacy and the rule of law over violence, militarism, and war. The world has a secular symbol, the blind female figure of justice. She holds a sword but also a balanced scale. She is neutral and impartial, holding the sword for enforcement of the law, not its undermining.

IV. Some prefer a “more realistic” foreign policy for the EU over the commitment to peace through law recommended here.³¹ “Realism” in the foreign policy world is another way of saying the use of military force. If that is what is intended, it is a grave mis-

²⁷ See, e.g., F. PADDEU, *Excusing Humanitarian Intervention: A Reply to Jure Vidmar*, in *EJIL: Talk!*, 27 April 2017, www.ejiltalk.org.

²⁸ Art. 51 of the Charter of the United Nations.

²⁹ See M.E. O'CONNELL, *The Limited Necessity of Resort to Force*, in D. STEPHENS, P. BABIE (eds), *Imagining Law: Essays in Conversation with Judith Gardam*, Adelaide: University of Adelaide Press, 2016.

³⁰ M. PENGELLY, *Pope Urges North Korea-US Mediation, as Trump Hedges on Military Action*, in *The Guardian*, 29 April 2017, www.theguardian.com.

³¹ S. BLOCKMANS, *In Search of a Role to Play*, cit., p. 9 *et seq.*

take. Military intervention has a tragic record of failure. In the case of the EU, it would also conflict with the EU's treaty obligation to promote international law.³²

The better way forward for the EU is to embrace Kagan's description. Adopt a consistent pro-international law foreign policy with the potential for creating a unifying and coherent core to EU foreign policy, in line with its constituent instruments. Start with robust engagement in the Syria peace process on the basis of international law.

Indeed, the EU can lead more generally on international law, which needs a global champion. President Trump seems to care even less about international law than his predecessors. President Putin and President Shi cite international law when it suits their purposes but not otherwise. The promotion of authentic international law is a role that the EU can embrace in the midst of its current moment of transition and search for identity. The French elections in support of a pro-Europe candidate should provide a breathing space. Instead of an all-consuming focus on winding down the EU as was feared under Marine Le Pen, the EU can strive to carry out a role it has yet to fully take up: promoting the rule of law over the madness of war.

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³² *Ibidem*.

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