Rule of Law Implications for Supranational Military Cooperation

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The Constitutionally Tamed Force

Throughout history, military force has been considered a guarantor of state sovereignty. Due to the autonomous organisational structures of the military and the penetrating power of military force, it has gained a special position within the states' entire apparatus, and has been used throughout history as a tool to enforce political interests. With the rise of parliamentary democracies in the frame of constitutionalism the control over, and the limitation of, the use of executive state power have become essential. Thus, as military force became embodied in such a constitutional frame, the rule-of-law-control mechanisms became applicable to the use of military force as clearly assignable to the executive branch of state powers.

The actual extent as to which modern constitutional states regulate the deployment of their military might be, apart from all rule-of-law considerations, influenced by the general attitude of the democratic society towards its own military culture. The basic acceptance, however, also by the military itself, that the use of military force on behalf of the constitutional state must be constrained, and that the military is obliged under the constitution to act legitimately in accordance to the given law, including human rights, is a major accomplishment of the modern constitutional state.

Moreover, as an execution of state power, the use of military force has become subject to legal accountability and judicial review by civilian courts. However, deviations from a strict rule-of-frame do occur. This is obvious when the military is deployed as an executive instrument in a state of emergency such as war, and on top of this, outside of the state's own territory. The regime of the ius in bello, if applicable, follows a different rationale than that of the national legal regime applying to the limitation of the exercise of force.

The use of military power as ultima ratio does not need to stand the same strict proportionality test as is required for any other use of executive state power (e.g. the police). It only needs to be not excessive. The political question doctrine is also more likely to be invoked and limit the judicial review of military acts, and also the application of state liability principles for wrongful acts is more limited in scope (cp. e.g. the Kunduz-Case, BGH, 06.10.2016 – III ZR 140/15). Nevertheless, it is generally accepted that the execution of military force, also within the frame of international cooperation, needs to comply with rule of law standards. Here, a common ground needs to be determined. One which allows for effective military cooperation, but still follows a set of accepted rules and complies with the sovereignty reservations of the states involved.

The Exercise of Military Force in the EU Context

As an entity „sui generis", the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States (cp. Art. 2 TEU) and also apply to their military forces regardless of the different military cultures of the Member States (e.g. France, Great Britain and Germany). Within this frame, a directly applicable supranational legal order with primacy over the national law and a judicial review system has been created.

Art. 42 para. 5 TEU indicates the frame of EU military cooperation: The Council may entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's

values and serve its interests. It needs to be stressed, however, that so far, the Member States have not transferred further law-making competences in the field of the Common Security and Defence Policy (CSDP) to the European Union, as it is, for example, more obviously the case regarding some other policy fields in the Area of Freedom, Security and Justice also aiming at classical executive state powers (cp. e.g. the Schengen Border Code, Regulation (EU) 2018/1240). It remains, in particular, the national decision of the states, whether or not, and to what extent, they wish to cooperate (e.g. by establishing a permanent structured cooperation with other Member States, cp. Art. 42 para 6 TEU), and whether or not they wish to participate in EU missions, that still need an international mandate as a legal basis, too, at all. The integration of military cooperation is far less advanced than, e.g. in the case of the Integrated Border Management (Art. 77 TFEU).

The intergovernmental component based on international law principles remains quite strong in this policy field. Moreover, the European Court of Justice shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions (Art. 275 TFEU). However, the Council appears as a key decision-making body with regard to launching EU military missions, and determining the structural details (command and control). And a Council decision is – as an actual legal act of the EU – binding for the Member States. This certainly raises the question on which level of the multi-level legal system effective rule-of-protection mechanisms are in fact embedded.

What goes around, comes around

In 2012 the German Administrative Court in Cologne (VG Köln, 25 K 4280/09) had to decide about a complaint for declaratory judgment as provided for in the German Administrative Courts Procedure. It would have been business as usual if it was not for the multi-level legal setting of the case. The claim against the Federal Republic of Germany was brought by an alleged Somalian pirate who was detained in the Golf of Aden by a German military ship and later handed-over to Kenyan authorities for prosecution. The plaintiff claimed that his detention was illegitimate and violated his right to fair trail. The German military ship was part of the EU-led Naval Force (EUNAVFOR) operating in the frame of the EU-military mission ATALANTA launched by a EU Council decision based on a UN-Security Council resolution.

Interestingly, while usually the sovereignty argument remains strong within the Common Defence Policy, and keeping control over the own military force remains crucial, the German government argued, in fact, that it was the wrong party to the case. The detention of the plaintiff and his handing-over to the Kenyan administration by the German military members was, Germany argued, not an act of German state power. The military forces did not act on behalf of Germany, but as the supranational EUNAVALFORCE (EUNAVFOR) under the operational command of the EU.

The administrative court struck down this argument by applying international law accountability standards created by the European Court of Human Rights (e.g. case Behrami). However, if the court had evaluated the “effective operational control” level of the EU differently, it would not have had jurisdiction over the case due to the lack of executive power held by the German state. However, neither would have the European Court of Justice. The Appellative Administrative Court, therefore, took a different argumentative approach (OVG NRW, 4 A 2948/11). It identified the act as a case of the execution of EU law and applied the mechanism of legal protection that is recognised in this regard: Acts of Member States executing EU law are subject to judicial review by national courts of the Member States.

Indeed, such an approach provides more predictability and limits the possibility of a loophole in the rule-of-law protection system, which can occur in cases of international military cooperation under the umbrella of an international organisation such as the UN, when the „effective operational control“ lies with the international organisation, and not with the state providing its military forces. It overlooks, however, the fact that the use of military force within an EU

launched military mission is not exactly the same situation as the execution of an EU regulation by the administration of the Member States.

Generally speaking, the case proves the commitment to the rule of law and shows the tendency to allocate the rule-of-law-protection mechanism in the context of supranational military cooperation on the national, rather the supranational level. The case is, however, also a paradigmatic example of the open questions regarding the execution of military force under the rule of law and within the supranational, multi-level umbrella of the EU, particularly, if the emphasis between the national and the supranational shall shift.

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