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FORUM

Is Public International Law Dead?

By Jochen Abr. Frowein

A. Even a Dramatic Violation of International Law Does not Kill Public International Law

After the armed intervention of the United States and Great Britain in Iraq there are many voices which see public international law as threatened. Most public international lawyers are of the opinion that this intervention was illegal. Therefore, a revision of the rules of public international law and of the Charter of the United Nations is seen as an important issue. Even if that is not a very realistic perspective, one should take the concern seriously. It can probably be said that between the fall of 2002 and the summer of 2003 the importance of public international law was seen much more clearly by the general public than before. The use of armed force against a state without clear justification is certainly a dramatic violation of fundamental rules of public international law as enshrined in the United Nations Charter. But even a dramatic violation should not be seen as a reason that the international legal order is put into question. Public international law is not only concerned with the prohibition of the use of force. The number of treaties under public international law which are the basis for international commerce, telecommunication and traffic as well as the rules concerning the protection of international human rights are not affected by a violation of the kind at issue here. Every expert knows that the majority of public international law rules are observed without any difficulty by the states concerned. This is the same as with the rules of domestic law where a fundamental breach does not put into question the general legal order.

B. The Prohibition of Force is Generally Recognized

It is rather surprising that even authors who claim expertise in public international law put forward the proposition that with the Iraq events the prohibition of

use of force as enshrined in the United Nations Charter is no longer valid.[1] In support of this, the position is advanced that the negotiations concerning Security Council Resolution 1441 in November 2002 and the behavior of the United States have shown that there is no longer an *opinio iuris,* that is to say a recognition that the prohibition to use force under Article 2 para. 4 of the United Nations Charter is binding on all states. It is certainly correct that the behavior of states should be studied and analyzed with respect to public international law. It is also true that customary public international law presupposes that states abide by practice and the so called *opinio iuris, i.e.* the opinion that the rule is valid. Treaty law as the law of the United Nations Charter can, under certain circumstances, be derogated by practice. However this is a process which is recognized only in very exceptional cases. For such a process it is required that all or the great majority of states bound by the treaty in question show in their behavior and in their legal declarations that they deny its binding force . Only in such an exceptional case can one discuss whether a specific treaty as the United Nations Charter has lost its validity. In that respect it is of particular importance that single states – even the mightiest ones bound by the treaty-regime cannot by their behavior and by declarations derogate a treaty binding under public international law.

It is here where the dramatic misjudgment of the proposition that the prohibition under Article 2 para. 4 of the United Nations Charter is no longer in force should be seen. There is not one Member State of the United Nations which in the context of the Iraq issues has – either in the Security Council or outside – taken the position that the Charter is no longer a binding treaty. This position has not even been taken by either the United States or Great Britain. Both states have in the clearest manner possible shown that they recognize the binding force of the Charter. In this context it is particularly relevant how the United States and Britain have explained their actions in their formal declarations *vis-à-vis* the Security Council. The general public is of course concerned with the political declarations by the United States President. Where the analysis is concerned with public international law however, the sort of position taken in the legally relevant declarations *vis-à-vis* the Security Council is much more important. In formal letters to the President of the Security Council on 20 March 2003 the United States and Great Britain justified their military action against Iraq.[2] Australia has given its explanation in the same way. All three states have expressly referred to the resolutions of the Security Council which according to them allow for armed intervention where Iraq violates its obligations under these resolutions. It is in particular the resolution mandating the use of force for the liberation of Kuwait in 1990 (Resolution

[1] *Michael J. Glennon,* Why the Security Council Failed, Foreign Affairs, vol. 82, 2003, 16 *et seq.*

[2] See UN Doc. S/2003/351 of 21 March 2003.

678[3]) which is referred to in that respect and the states concerned take the position that Resolution 1441 of 2002 clearly presupposes the continuing validity of this old resolution. I am of the opinion that this legal position is wrong. The practice of the Security Council, in particular the armistice Resolution 687,[4] clearly shows that it is only the Security Council which could authorize a new armed intervention. What is important in our context, however, is that the position of the United States and Britain, which had been advanced many times before, is not something completely unheard of in public international law. The United States had taken the position several times that in case of a violation of the disarmament obligations by Iraq the United States would consider that this is a material breach of the armistice conditions which, under general international law, could justify the continuation of armed action. Although I do not agree with this line of argument one must recognize that the justification advanced is one which is within the security system laid down by the United Nations Charter and cannot be interpreted as putting into question the Charter itself.

It is of particular importance that this justification does not advance the theory according to which the intervention against Iraq can be justified on the basis of the right to self-defense under Article 51 of the United Nations Charter. This would have had a completely different dimension. It is correct that the declaration to the President of the Security Council by the United States, in contrast to those from Britain and Australia, also refers to the wider context of the action. The United States argues:

> The actions that coalition forces are undertaking are an appropriate response (to the violations). They are necessary steps to defend the United States and the International Community from the threat posed by Iraq and to restore international peace and security in the area. Further delay would simply allow Iraq to continue its unlawful and threatening conduct.

The United States uses the notion "defend." However, it is certainly not by accident that the declaration by the United States does not refer to Article 51 of the Charter and does not use the technical term "self-defense." This last paragraph must be seen as an additional argument by which the action is being put into the context of maintenance of peace. Since the Security Council had, in many resolutions, recognized that Iraq threatens international peace and security as in Resolution 1441 in 2002,[5] this is completely understandable.

However, this analysis shows that armed intervention in Iraq should not be seen as an example for an extended right of self-defense in the sense of prevention or pre-emption but as an action which, according to the acting states, was based on a Security Council mandate. Even if that is seen as wrong, as is the position of

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[3] SC Res. 678 of 29 November 1990.

[4] SC Res. 687 of 3 April 1991.

[5] SC Res. 1441 of 8 November 2002.