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## FORUM

### **International Law and the Use of Military Force Against Iraq**

By Rainer Hofmann

#### **A. Introduction**

At the time of writing of this contribution, *i.e.* in the first week of February 2003, there is a strongly increasing probability that the United States of America and its allies, in particular the United Kingdom, will resort to the use of armed force against Iraq in order to destroy weapons of mass destruction allegedly held, or being developed, by that state. The United States administration has made it clear that it would strongly prefer if such action could be based upon a pertinent United Nations Security Council resolution expressly authorizing, under the provisions of Chapter VII of the United Nations Charter, such use of armed force; nonetheless, it has also insisted on its position that, in view of Iraq's persistent failure fully to comply with relevant Security Council resolutions, it would be legally entitled to "act alone," to use armed force without such a prior, express authorization by the Security Council.

The profoundly differing views on that issue have resulted not only in a serious deterioration of the political relations between the United States and some of its NATO partners on the one hand and other NATO Member States, such as in particular Germany, on the other hand. They have also resulted in a deep friction between European Union Member States as witnessed by the "open letter," signed by five Heads of Government of present European Union Member States (Denmark, Italy, Portugal, Spain, and the United Kingdom) and one Head of State and two Heads of Government of three European Union Candidate Countries (Czech Republic, Hungary, and Poland), which was made public on 29 January 2003. In light of the joint declaration of the ministers of foreign affairs of the 15 European Union Member States adopted on 27 January 2003, such action is hardly compatible with the letter and spirit of Article 11 of the European Union Treaty and generally considered as a serious blow to the formulation of a common foreign and security policy of the European Union.

In such a situation which seems increasingly affected by profoundly differing views on how to conduct international politics and relations, it is essential to take once more a close look at the applicable law. After all, it was the commonly held view of the founders of the United Nations that, in the post-World War II era, international relations should be governed by the rule of law.

Thus, this contribution examines whether and under what circumstances the use of armed force against Iraq with the goal of destroying its weapons of mass destruction (nuclear, biological, and chemical weapons) might be compatible with present international law. Notwithstanding the fact that the United States administration has frequently stated that the resignation and future exile of President *Saddam Hussein* might considerably contribute to the peaceful solution of the Iraq crisis, it is clear that a change of government in Baghdad would be a most welcome effect of a potential military intervention into Iraq but is not presented as the primary goal thereof. In the context of this contribution, it is irrelevant whether this position is motivated by the correct understanding that current international law, in view of fundamental legal principles such as equal sovereignty of states and non-intervention into domestic affairs, does not – as a rule – allow for any military intervention aimed at the overthrow of a particular government in a foreign country; what is important is the fact that the United States, and its allies, have clearly indicated the internationally controlled destruction of Iraqi weapons of mass destruction as their major political goal which, under various aspects of international law, would justify the use of armed force against Iraq. Hence, this paper deals exclusively with the question whether the use of armed force against Iraq in order to secure the destruction of its weapons of mass destruction would be compatible with present international law.

In order to do so, it seems appropriate to start by briefly presenting the current state of international law regarding the use of armed force in international relations and by – equally briefly – referring to the – publicly accessible – information concerning the quantity and quality of weapons of mass destruction allegedly in the possession of Iraq.

### I. The Use of Armed Force and International Law

Since the entry into force of the United Nations Charter in 1945 (hereinafter: the Charter), the international community is based upon a legal foundation binding upon all states. It consists of several fundamental legal norms – not only political principles of a program-type character! Among them, the prohibition of the use of force in Article 2 para. 4 of the Charter is the most important one. It is – correctly – generally referred to as the cornerstone of the international legal order erected by the Charter. It expressly prohibits any threat or actual use of force directed against the territorial integrity or political independence of a state or otherwise incompati-

ble with the goals of the United Nations. This prohibition of any threat, or use, of armed force is not only embodied in the Charter, thus constituting treaty law, but is also an essential part of international customary law. Moreover, it is generally held to constitute a peremptory norm of international law (*jus cogens*).<sup>1</sup>

1. It is, however, clear that the drafters of the Charter, which must be seen as a reaction to the wars of aggression waged by Germany and Japan, were of course aware of the fact that an ideal world, in which every single state would scrupulously respect the norms of international law, might not be created over night. Therefore, the Charter system, as any legal order, provides not only for norms prohibiting certain conduct of states, but also for rules on how to sanction breaches of such norms, and how to implement them, if need be, by recourse to armed force. Thus, Chapter VII of the Charter stipulates that, in the event of a threat to, or a breach of, international peace and security such as was the case when Iraqi troops attacked and occupied Kuwait in August 1990, the Security Council is competent to order, in a resolution binding upon all Member States, the use of armed force against the state responsible for the threat to, or the breach of, international peace and security, or to authorize the use of such armed force by United Nations Member States with a view to securing, or to maintaining, or to restoring international peace and security.

At the time of writing of this contribution, the Security Council has, however, not yet adopted any such resolution *expressly* authorizing the use of armed force against Iraq.

As any legal order, international law entitles the victim of an armed attack to defend itself; this is the right to self-defense as enshrined in Article 51 of the Charter. This concept has recently become the object of an intensive discussion regarding the question under what circumstances states might resort to the use of armed force in “response” to armed attacks which have not yet occurred but are considered to be either imminent (anticipatory self-defense) or likely to occur in a not too distant future (preemptive self-defense).<sup>2</sup>

2. At this stage, however, it is important to stress that present international law prohibits, by virtue of the prohibition of the use of force as laid down in Article 2 para. 4 of the Charter and as recognized in international customary law, the use of armed force in the international relations between states. Such recourse to armed force may, however, be *exceptionally* – and it is important to stress: *exceptionally* –

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<sup>1</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, 100; see also, e.g., *Yoram Dinstein, War, Aggression, and Self-Defence*, 3rd ed., 2001, 93 *et seq.*; and *Albrecht Randelzhofer, Use of Force*, in: *Rudolf Bernhardt* (ed.), *Encyclopedia of Public International Law* (EPIL), vol. IV, 2000, 1246.

<sup>2</sup> See generally *Brun-Otto Bryde, Self-Defense*, in: *Bernhardt* (ed.), EPIL, vol. IV, 2000, 361.