

## Viewpoints

### A NEW ATTACK AGAINST IRAQ WILL WEAKEN INTERNATIONAL LAW\*

The UN Security Council's support of self-defence against terrorism and NATO's acceptance of the use of force have brought about a change in international law. However, as long as no connection has been documented between Al-Qaeda and Iraq, Security Council support for the concept of self-defence against terrorism cannot provide justification for an invasion of Iraq. NATO's bombing of Kosovo was justified through reference to a massive violation of human rights. The military action in Afghanistan was meant to fight terrorism. Now the USA wants to use force in Iraq. But what are the implications of the international law prohibition against use of force?

International law only permits the use of force either with the approval of the UN Security Council or in self-defence. Both grounds for the use of force against Iraq were present when Kuwait was invaded. According to Chapter VII of the UN Charter, the Security Council permits the use of force if there has been a breach of the peace or if the peace is threatened. The latter condition has been interpreted to apply to the comprehensive violation of humanitarian principles, as in Bosnia and Herzegovina, Somalia and Rwanda, among others. This expansion of the authority of the Security Council is by and large a welcome development in international law. However, an expansion of the right of states to use force without the authorization of the Security Council is both controversial and dangerous.

In the case of the violations in Kosovo, the Security Council stipulated that binding sanctions should be imposed, but it proved impossible to pass a resolution that authorized the use of force. In spite of this, NATO

carried out a bombing campaign and ultimately compelled Serbia to sign a peace agreement. Emphasis was placed on the fact that Security Council Resolution 1199 (1998) referred to Chapter VII of the UN Charter, and it was argued that the Security Council thereby meant that peace and security had been threatened.

It has also been claimed that the Security Council authorized the use of force *retrospectively* by recognizing the subsequent peace agreement with Serbia in Resolution 1203 (1998). However, neither of these resolutions authorized the use of force. The alarming thing about ascribing to resolutions of the Security Council more than was intended by them is, of course, that one thus unlawfully gives legitimacy to actions carried out in its name. Moreover, such an approach can also stand in the way of agreement on future resolutions.

The NATO action in Kosovo can be seen as one element in the development of a kind of international law that places greater emphasis on the preservation of human rights than on protection of state sovereignty. The UK, in particular, went quite far in recognizing a right to humanitarian intervention. While most scholars agree that international law does not allow such intervention without Security Council authorization, NATO's Kosovo campaign can be seen as an expression of the willingness of some states to use force to protect human values. In this way, the bombing may contribute to creating new international law. Still, even if the resort to force is made with the best intentions, such actions still open for an erosion of the prohibition against the use of force. The terrorist attacks against the USA last year also provoked a demand for the use of force against Al-Qaeda's bases in Afghanistan and its supporters in the Taliban. The USA did not ask the Security Council for authorization at the time, though it hoped for its political backing.

With regard to Afghanistan, the relevant Security Council resolutions referred only to the right to self-defence in accordance with the UN Charter and supported operations with the aim of eliminating terrorism. This differed, for example, from Resolution 678 on Kuwait in 1990, which expressly authorized the use of force. The action against Afghanistan thus had the support of the Security Council, but was not authorized by it in legal terms. From the standpoint of the USA and the UK, the use of force was justified by the right to self-defence. But did the USA have the right to use force against Afghanistan by virtue of its right to self-defence? Even if there was close contact between Al-Qaeda and Taliban, there is little to suggest that the terrorist acts of 11 September were carried out on behalf of those in power in Afghanistan.

The Security Council's political support for self-defence against terrorism, together with the acceptance of a right to use force by NATO and a considerable number of other states, may be said to have changed international law. It is understandable that states do not accept being exposed to terrorist attacks by groups based on the territory of other states. But the right to the use of force against other states in the case of terrorist attack opens for a further undermining of the prohibition against the use of force and creates difficulties in determining the limits of such use. Which of the 60 countries that have allegedly supported terrorists are to be attacked?

US threats against Iraq must be put into the context of President Bush's 'axis of evil'. This axis originally comprised Iraq, Iran and North Korea, but Cuba, Libya and Syria were subsequently added. In his June 2002 speech to the US Military Academy at West Point, Bush pointed out the need for 'pre-emptive action', that is, the need to carry out actions before an attack has taken place. But to what degree are actions against Iraq covered by existing Security Council resolutions and the rules of self-defence?

It has been claimed that the Security Council resolutions adopted in connection

with the Gulf War cover the use of force in Iraq. It can be argued that the resolution on the use of force – Resolution 678 (1990) – comes back into effect in the event of severe violation of the armistice resolution 687 (1991). Nonetheless, these provisions cannot provide the right for a state like the USA to potentially collaborate with the UK and other allies in undertaking an invasion of Iraq on their own terms several years after the liberation of Kuwait. (In addition, the continuous bombing of Iraq by the USA and the UK since 1991 can also serve as an example of the use of force on dubious legal grounds.)

Moreover, no link between Al-Qaeda and Iraq has yet been documented. Therefore, the argument of self-defence following the terrorist attacks of 11 September and the political support given by the Security Council in that context cannot be called upon as a basis for an invasion of Iraq. Even if terrorists were traced to Iraqi territory, that would not necessarily give the right to use force. According to Article 51 of the Charter, the right to self-defence is valid if an attack has taken place, but the article's wording does not permit the use of force pre-emptively. To be sure, it has been discussed whether it is permissible to defend oneself against an immediate and imminent attack, but most states at present hold that international law does not allow for such preventive use of force.

Regardless, the USA has not established as probable that Iraq has concrete plans of attack. Nor can fear of Iraqi weapons of mass destruction provide the basis for a use of force. International law does not give existing nuclear states permission to hinder other states from obtaining weapons of mass destruction. Furthermore, if a right to pre-emptive action were recognized, this would cause a further lowering of the threshold for the use of force according to international law.

International law's prohibition against the use of force was one of the great breakthroughs of the 20th century. Valid grounds may certainly be given for the claim that the use of force should be allowed in the case of

massive violations of human rights. It is also understandable that states defend themselves against terrorist attacks from other states that either will not or cannot control terrorists. Nonetheless, the international community must be on the watch for any erosion of the prohibition against the use of force. International law is a dynamic reflection of what states find acceptable at any given time. It thus remains the respon-

sibility of states themselves to actively oppose the undermining of the prohibition against the use of force, which both can be a threat to international peace and open for the abuse of power.

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