

“Freiburg Lawyers’ Declaration” of 10 February 2003 – On German Participation In A War Against Iraq*

By Kai Ambos, et. aux.

[Editors’ Comment: As is well known, opposition to a possible war against Iraq has been, within the Western world, among the strongest in Germany. Accurately sensing an overwhelming rejection of any armed intervention in Iraq among the German populace, the Social-Democrat / Green coalition government led by Chancellor Gerhard Schröder and Foreign Minister Joschka Fischer began to take a stance against the forcible disarmament of Iraq and the toppling of the regime of Iraqi President Saddam Hussein during their re-election campaign in the fall of 2002. Since then, and in the face of an ever more undisguised intention on part of the Bush administration to go ahead with a war under all circumstances, Schröder and Fischer have reiterated and reinforced their position, going as far as to rule out any active German participation in an armed intervention even if such was eventually called for by the Security Council. The German government’s position has been complicated by the fact that Germany is currently an elected member of the Security Council, and held its rotating presidency in the month of February. Its relations with the United States have been strained on account of the incompatibility of views on how to resolve the Iraq crisis, and Germany has increasingly found itself in an isolated position on the international plane, though it has recently been joined by France and Russia in its attempts to yet avoid a war. The Christian-Democratic and Liberal opposition have alleged that the Schröder government has internationally isolated the country, and, worse, alienated it from its traditionally strongest ally, the United States, in order to distract from its current domestic unpopularity. Be this as it may, it is probably true to say that the great majority of Germans across all sections of society are genuinely strongly opposed to a war. Such pacifist sentiments link back to the peace movement of the late 1970s and 1980s which saw an equally broad cross-section of society march side by side to protest against the military build-up of the Cold War, and which, among others, brought about the Green party itself. Critics have alleged then and now that such radical pacifism is both naïve and the wrong lesson to be learned from Germany’s omnipresent Nazi-past. Interestingly, the non UN-sanctioned intervention in Kosovo had the strong support of both this just re-elected government, as well as the general public, although the more mainstream adherents of a German ‘no’ to an Iraq intervention point to the very different circumstances in that case.

() Translation by Florian Hoffmann, Florence/Tübingen.

The open letter to the Chancellor, the Cabinet, and Members of Parliament re-printed below, which has been named the "Freiburg Lawyers' Declaration" by its authors, has to be seen in the context of these pacifist sentiments. Its authors are academics and practicing attorneys from the small but venerable southwest German university town of Freiburg – noted, among others, for a long line of partly world-famous academics, of which the philosopher Martin Heidegger is, perhaps, the best known, as well as for recently having elected the first Green Party mayor in Germany. The fact that the "Declaration" was subsequently signed by more than one-hundred jurists, both academics as well as private attorneys, judges and public prosecutors, shows that the anti-war feeling runs deep and is not strictly tied to party political allegiance. The Declaration's particular take on the legality of the different intervention scenarios is, however, far from uncontroversial, and GERMAN LAW JOURNAL has opted to publish it in order to show the plurality of opinion on this issue, and to encourage serious debate in a climate which is generally marked by mutual prejudice, simplification and misunderstanding. GERMAN LAW JOURNAL, of course, does not thereby substantially endorse or reject this particular point of view.]

Open Letter to the Federal Chancellor of the Federal Republic of Germany, the members of the Federal Government, and the members of the German Bundestag

10 February 2003 – 5:00 p.m.

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The US administration has offered several different justifications for a war against Iraq. Yet, in essence, the planned military intervention comes down to an act of aggression against Iraq, the characterization of which as a "preventive" war does nothing to alter its illegality under international law. Every such act of aggression violates the prohibition of the use of force stipulated in Art. 2 (4) of the UN Charter. The use of force in self-defense under Art. 51 of the Charter is only permitted in order to repel an actual or imminent military attack. The danger of such an attack must be concrete. Any justification of an armed attack under Chapter VII of the Charter would have to be premised on a prior determination by the Security Council that Iraq threatens international peace and security through the production of weapons of mass destruction and that peaceful means to contain that threat are no longer sufficient. A Security Council resolution which would authorize the use of military force against Iraq without having made such a determination, and without having made clear the *ultima ratio* function of military measures, would itself vio-

late the Charter (Art. 39 read together with Arts. 41 and 42), and, thus, be illegal under international law.

As to a German Participation in a War Against Iraq, Three Possible Scenarios:

Scenario 1: Participation in an illegal war of aggression led by the United States

An active participation by the Federal Republic in an illegal attack on Iraq would not only violate Art. 26 of the German Basic Law (*Grundgesetz*),¹ but it would also entail the criminal responsibility of those in command for the preparation of a war of aggression (*Vorbereitung eines Angriffskrieges*) (Section 80 of the German Criminal Code - *Strafgesetzbuch*). The Federal Republic has most recently reconfirmed its commitment to the prohibition of wars of aggression in Art. 2 of the Two-Plus-Four Treaty, which states that "only peace will emanate from German territory."

As far as participation in a war of aggression within the framework of NATO is concerned, such as the granting of rights of passage through its air space, the Federal Republic, since the Two-Plus-Four Treaty (Art. 7, para. 2), possesses full sovereignty, including sovereignty over its air space. Those rights of free passage without prior consent for NATO contingents which are laid down in the 1994 Additional Protocol of NATO's Status of Forces Agreement (SOFA) and which are meant to enable the fulfillment of NATO's operational tasks, transcend the limits set by both the Basic Law and international law: in case of a war illegal under international law, or contrary to the letter and spirit of NATO, the Federal Republic is not only entitled, but, indeed, constitutionally obliged to refuse the use of German air space to the United States and its allies.

Even the possibility of a deployment of US forces stationed in Germany in an Iraq campaign, the use of military command facilities, or the transfer of military material to the Persian Gulf, would go beyond the limits of the law: according to Art. II of NATO's SOFA, troops stationed in a member state are obliged to respect the law of the host state, as well as to "abstain from any activity incompatible with spirit of this agreement [...]." The relevant law of the host state Federal Republic of Germany is the Basic Law (*Grundgesetz*), and specifically the prohibition of the planning of any war of aggression. Art. 26 of the Basic Law (*Grundgesetz*) therefore prohibits a participation in an illegal war not only to the organs of the Federal Republic, but also to the NATO troops stationed in Germany. The federal government is,

¹ Art. 26(1) reads: "Acts which are capable of, and are undertaken with the intention to disturb the peaceful coexistence of all peoples, and especially those acts aimed at the preparation of a war of aggression, are unconstitutional. They are to be punished by law."

thus, already obliged by German constitutional law to prevent the involvement of NATO forces stationed in Germany in such a war.

The prohibition of the planning of a war of aggression also includes the rendering of military assistance, such as the provision of the Patriot anti-ballistic missile system and AWACS reconnaissance aircraft, at least insofar as they turn out to directly assist such a war. The Federal Constitutional Court has only recently decided that the Federal Republic may not be a member of a collective security system which does not serve the preservation of peace, or, indeed, engages in the preparation of a war of aggression (Official Collection of Decisions by the Federal Constitutional Court - *Bundesverfassungsgericht*: BVerfGE Vol. 104, pp. 5 ff., 22 f.).

Scenario 2: Participation in a war authorized by the Security Council but, nonetheless, illegal

A military campaign mandated by the Security Council, which is, thus, formally effective, though materially illegal under international law, still transcends the legal limits outlined above: before it authorizes the use of force according to Art 42 of the Charter, the Security Council has to determine, according to Art. 24, that a threat to international peace and security exists. Although the latter requirement has been somewhat relaxed in recent times, Art. 24 still locates the competence to determine an international breach of the peace in the Security Council; economically motivated military attacks or military reprisals are, hence, forbidden. In any case, an *ultra vires* act by the Security Council neither alters the law of the UN Charter nor does it set aside the prohibition of a war of aggression under Art. 26 of the German Basic Law. The Federal Republic would, therefore, not merely be forbidden to participate in such a war, but, as a non-permanent member of the Security Council, she would additionally also be obliged to abstain from voting in favor of a legally doubtful UN mandate which had only come about through political pressure.

Scenario 3: Participation in a war which is legal under international law

Should the Security Council find that Iraq has significantly infringed resolution 1441 (2002) and should it determine this to constitute a threat to or breach of the peace according to Art. 39 of the Charter, it may authorize member states to take military enforcement measures. Such use of force would not represent an illegal war of aggression, and the Federal Republic would not be prohibited by Art. 26 of the Basic Law from tolerating, or indeed, from actively rendering assistance to such enforcement action.

Another question, however, concerns an *obligation* on part of the Federal Republic to render assistance in case of legally mandated enforcement action. The Charter explicitly foresees the use of regional arrangements or agencies for the implementation of enforcement measures (Art. 53 (1)). Whether NATO, as a classic defense alliance, falls under this category is controversial. It is, however, without doubt that the obligations arising through the NATO alliance, as set out in Art. 3 of the North Atlantic Treaty, the SOFA and its Additional Protocols, as well as the bilateral Assistance Agreements between the Federal Republic and the United States of 1955 and 1982, are strictly tailored to the original and core objective of the organization, namely collective self-defense. The expansion of NATO's operational tasks into peace-keeping and conflict prevention through an enlarged concept of security, as set out in the new Strategic Concept of 1999, cannot alter the Treaty's purpose or the obligations of member states arising there under; if anything, these new tasks are, as yet, no more than sub-conventional "soft law" which does not substantially alter the Treaty (BVerfGE 104, 151 ff., 199ff.). This is especially the case with the new US doctrine of "preventive self-defense," which is merely a unilateral governmental declaration from which no multilateral obligations can arise. The Federal Republic is, hence, even in case of *legal* enforcement action by means of NATO (according to Art. 42), not bound to tolerate or to actively participate in an armed intervention in Iraq. In particular, the Federal Republic retains, on account of its full sovereignty under international law, the option to refuse permission of the use of its air space by NATO forces under Art 57 of the Additional Protocol of the SOFA. "Obligations of friendship" do not exist under international law. Neither does the "mutual assistance" clause in the Charter (Art. 49) mandate German military involvement in a war declared by the Security Council.

It can therefore be concluded that even a legal mandate from the Security Council cannot establish an obligation of the Federal Republic under international law to participate in a war against Iraq. Hence, regardless of any political judgement of the matter, a refusal by the Federal Republic to participate in the war is, in all possible circumstances, in conformity with international law, and in case of an illegal war, it is even mandated. The Federal Government and the *Bundestag* are, therefore, called upon to develop and support, in accordance with the Charter, all non-violent means which serve the maintenance of peace.