

Was the War on Iraq Illegal? – The German Federal Administrative Court’s Judgement of 21st June 2005

By Nikolaus Schultz*

A. Introduction

The US/UK-led war against Iraq, and Germany’s contribution to this war, met with *gravierenden völkerrechtlichen Bedenken* (grave concerns in terms of international law), as evidenced by the extensive judgement of the *Bundesverwaltungsgericht* (BVerwG – German Federal Administrative Court) from 21 June 2005.¹ This is a landmark decision in at least two respects. First, it appears that the BVerwG’s opinion is the first on the legality of the war on Iraq by a court of law.² Second, the Court took a broad view regarding the question of law with which it had been presented: under what circumstances may an army officer lawfully refuse to follow the order of a superior on the grounds of his constitutional right to freedom of conscience?

The outcome of the judgement may, therefore, have wide repercussions on the functioning of the German Federal Armed Forces (“*Bundeswehr*”). In this note I will only discuss the former issue at some length and deal with the latter merely to the extent that it is necessary for a proper understanding of the reasoning of the BVerwG. As will become apparent in the following, the BVerwG did not take as clear-cut a position with respect to the question of the legality of the war on Iraq as

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¹ BVerwG, 2 WS 12.04, 21 June 2005, available at <http://www.bundesverwaltungsgericht.de>. For media coverage, see FRANKFURTER ALLGEMEINE ZEITUNG, 23 June 2005, at 1; FRANKFURTER ALLGEMEINE ZEITUNG, 1 October 2005, at 4; FRANKFURTER ALLGEMEINE ZEITUNG, 14 October 2005, at 11.

² In a criminal law case regarding protest actions involving the blockade of the U.S. airbase at Frankfurt, Germany, in March 2003 by “*Pax Christi*” decided by the Higher Regional Court (“*Oberlandesgericht*”) in Frankfurt, the court acquitted the protesters on different grounds. See OLGSt Frankfurt, Case No. 1 Ss 11/05, 9 September 2005; see also *infra* note 51 (on pertinent decisions of foreign courts, which were hesitant to even touch the issue of the legality of the war on Iraq).

a first glance might suggest. The Court decided this issue only *obiter dicta* because it interlinked this issue with the personal decision the respondent made while exercising his right to freedom of conscience.

B. The Facts of the Matter and the Outcome of the Case

The respondent, an army officer in the rank of a major, was subjected to disciplinary proceedings in a military court, *inter alia*, for refusing to obey an order to participate in the development of a software programme for a military weapons system. This IT-project is aimed at enhancing the efficiency of the German Federal Armed Forces. The respondent did not follow the order of his superiors, arguing that the software could also be used in combat operations in Iraq. The respondent invoked his basic right to freedom of conscience provided by Art. 4, para. 1 of the *Grundgesetz* (GG – Basic Law).³ The military court found him guilty of malfeasance and demoted him to a captain. He appealed the decision of the military court before the BVerwG,⁴ which acquitted him.

In essence the Court held that the respondent is indeed able to rely on Art. 4, para. 1 GG, which reads, in part, as follows: “Freedom ... of conscience shall be inviolable.”⁵ In the opinion of the BVerwG, in order to establish whether a person’s decision of conscience is valid, there must be factual evidence to support the conclusion that it is serious, deep and inalienable in the sense that it is absolutely binding. However, the test to be applied does not include a judgement as to whether the decision is erroneous, wrong or right. Against this background the BVerwG ruled that the respondent’s decision of conscience was valid and, thus, lawful. The Court argued that this decision of conscience was made in the context of special circumstances and deemed it necessary to present an opinion on the legality of the war in Iraq. In this context the Court ruled that the war in Iraq, as well as the contributions made by the German Federal Government, carried “grave concerns” in terms of public international law.

³ GRUNDGESETZ [GG] [Constitution] art. 4, para. 1 (F.R.G.). German translation provided by the German Federal Government *available at* http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf.

⁴ The Attorney of the Federal Armed Forces (“*Wehrdisziplinaranwalt*”) also appealed the decision, because he wanted the respondent to be expelled from the army.

⁵ GRUNDGESETZ, art. 4, para. 1.

C. The Court's Reasoning

I. Article 2.4 of the United Nations Charter: Prohibition of the Threat or Use of Force

In determining the legality of the war on Iraq the BVerwG began its reasoning with an interpretation of Art. 2.4 of the Charter of the United Nations (hereinafter "the Charter"), which reads as follows:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁶

With reference to the jurisprudence of the International Court of Justice (ICJ)⁷ the Court identified this provision as a rule of international *jus cogens*.⁸ As such it obligates all states regardless of their membership in the United Nations.⁹ In Germany this prohibition forms part of the law of the land subject to Art. 25 GG,¹⁰ as a general rule of public international law. It pertains to the body of federal laws thus superseding conflicting municipal laws.¹¹ The BVerwG further held that the provision of Art. 2.4 of the Charter actually grants rights to German citizens and generates obligations by virtue of Art. 25 GG. However, whether Art. 25 GG must be so construed remains questionable. From an earlier passage in the judgement,¹² it is clear that the BVerwG only wanted to reiterate that organs of state and public officials acting in their official capacity, including the respondent, must refrain from any undertaking that violates general rules of public international law. In my view, this is the correct reading of Art. 2.4 of the Charter and Art. 25 GG. This provision is

⁶ U.N. CHARTER art. 2, para. 4.

⁷ Military and Paramilitary Activities Merits (Nicar. v. U.S.), 1986 I.C.J. 14, 97, paras. 183 *et seq.* (June 27) (merits).

⁸ See Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331.

⁹ The total membership of the United Nations currently amounts to 191 states, therefore, only very few states are bound by the provision only by virtue of international *jus cogens* and not at the same time by the treaty law of the Charter.

¹⁰ "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." GRUNDGESETZ art. 25.

¹¹ BVerwG, 2 WS 12.04, 21 June 2005, 72, available at <http://www.bundesverwaltungsgericht.de>.

¹² BVerwG, 2 WS 12.04, 21 June 2005, 34 *et seq.*, available at <http://www.bundesverwaltungsgericht.de>.

capable of providing the status of directly enforceable law only to such general rules of public international law that can be construed in a way to give subjective rights to or require subjective duties from citizens. Art. 2.4 of the Charter does not belong to this category of provisions since it is clearly addressed solely to states as subjects of international law.¹³

II. Lacking Justification

The BVerwG further reasoned, by implication, that the use of military force by the U.S.-led “coalition of the willing” against Iraq constitutes a *prima facie* violation of Art. 2.4 of the Charter. Assuming this violation, the Court then applied a test to determine whether there are public international law grounds to justify the use of force. The BVerwG identified two possible grounds: Art. 39 and Art. 51 of the Charter. The BVerwG did not qualify both provisions as exceptions to Art. 2.4 of the Charter, but rather as grounds for justification (“*Rechtfertigungsgrund*”), thereby, avoiding the common misconception which argues that all military enforcement measures taken by the Security Council of the United Nations (SC) subject to Chapter VII of the Charter qualify as an exception.¹⁴ However, since Art. 2.4 of the Charter is not addressed to the SC, but to states, only the right to self-defence of states enshrined in Art. 51 of the Charter may be referred to as an “exception” to the prohibition on the use and threat of force established by Art. 2.4 of the Charter.¹⁵

Art. 39 of the Charter gives the SC the authority to act in the face of an act of aggression, a breach of the peace, or any threat to the peace. It also authorises the use of military force either in its own right and responsibility,¹⁶ or by states¹⁷ or

¹³ Thus, citizens, for example, do not have standing in German courts to enforce the observance of Art. 4.2 of the Charter *vis-à-vis* the German Federal Government let alone other states, for that matter.

¹⁴ For example Albrecht Randelzhofer, *Article 51, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY* (Bruno Simma ed., 2d ed. 2002); U.N. CHARTER art. 2, para. 4, para. 39; U.N. CHARTER art. 51, para. 3.

¹⁵ ZIMMER, TERRORISMUS UND VÖLKERRECHT – MILITÄRISCHE ZWANGSANWENDUNG, SELBSTVERTEIDIGUNG UND SCHUTZ DER INTERNATIONALEN SICHERHEIT 98 (1998); *see also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 244 (July 8). Where the ICJ does not refer to Art. 51 of the Charter and to Chapter VII measures as exceptions of the prohibition of the use of force. This is an important observation, since exceptions to rules must be construed narrowly also in public international law. Therefore, the SC enjoys a wide margin of discretion when and to what extent to authorise the use of force in international relations. The members of the SC do not have to adhere to Art. 2.4 of the Charter when acting in this capacity.

¹⁶ U.N. CHARTER art. 42, art. 43. Notwithstanding this power of the United Nations this option has never materialised in the history of the Organisation since it has, for various reasons, never established a standing military force of its own.

regional systems in terms of Art. 53 of the Charter.¹⁸ By virtue of Art. 51 of the Charter a state may resort to military force in self-defence either alone or together with other states acting in its support if that state has been the victim of an armed attack, provided that the SC has not yet acted on the situation (individual and collective self-defence).¹⁹ The BVerwG held that neither ground could justify the war in Iraq. The Court went further to state that without sufficient justification in terms of a permissive resolution of the SC subject to Chapter VII of the Charter, or in accordance with Art. 51 of the Charter, the state violates international *jus cogens* and commits an act of aggression.²⁰

1. Art. 39 of the United Nations Charter: The Security Council's Resolutions on Iraq

In its analysis the BVerwG first turned to the argument submitted by the governments of the US and the UK, which were outlined in two formal diplomatic notes to the SC issued on the day after the military operations began.²¹ The notes supposed that SC Res. 678 (1990) and 687 (1991), concerning the occupation by Iraqi military forces of Kuwait in 1990, provided sufficient justification for the war on Iraq in 2003. The BVerwG held that this clearly was not the case. Even though SC Res. 678 (1990) authorised Kuwait's allies to use any means necessary, including military force, in order to liberate Kuwait from the Iraqi aggressor, in the BVerwG's view, it could not be invoked to justify the use of force against Iraq more than a decade later. The Court reasoned that the goal of these SC Resolutions, namely the liberation of Kuwait, had been achieved in 1990/1991, thus terminating their authorising power. Furthermore, the Court reasoned, the SC Resolutions did not go

¹⁷ U.N. CHARTER art. 48.

¹⁸ "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

¹⁹ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. CHARTER art. 51.

²⁰ BVerwG, 2 WS 12.04, 21 June 2005, 73, available at <http://www.bundesverwaltungsgericht.de>.

²¹ Diplomatic Notes by the United States, U.N. Doc. S/2003/351 (2003); Diplomatic Notes by the United Kingdom, U.N. Doc. S/2003/350 (2003).

as far as authorising the disarming of Saddam Hussein's regime in Iraq, let alone changing the political system, which occurred as a result of the 2003 war.²²

Further, in the Court's view, SC Res. 687 (1991) could not justify the actions of the US and its allies. In essence, the BVerwG recalled that with SC Res. 707 (1991) the SC did not lift the formal cease-fire offered to Iraq in No. 33 of SC Res. 687 (1991) even though the SC, at the same time, held in SC Res. 707 (1991) that Iraq had not fulfilled all conditions laid out in the extensive SC Res. 687 (1991). The BVerwG also held that SC Resolutions addressing the situation in Iraq (SC Res. 688 (1991), 715 (1991), 986 (1995) and 1284 (1999)) neither lifted the cease-fire nor provided authorisation for the U.S.-led coalition to use military force to act on a threat to international peace and security as identified by the US and its allies. Therefore, none of the aforementioned SC Resolutions could provide sufficient justification to go to war with Iraq.²³

The BVerwG then turned to the unanimously adopted SC Res. 1441 (2002),²⁴ which proved to be the most disputed Resolution as regards the question whether it contained any authorisation to attack Iraq, occupy the country and oust Saddam Hussein's regime. The US and its allies claimed that the wording of No. 13 of this Resolution, stating that Iraq would face "serious consequences as a result of its continued violations of international obligations," provided sufficient grounds for justification for a war on Iraq.²⁵ The BVerwG, however, disposed of this argument giving a variety of reasons. The Court concluded that, first, the SC did not substantiate how "serious consequences" should appear. Second, the SC decided to remain seized of the matter,²⁶ thereby explicitly stating, in the view of the BVerwG, that it would not abandon its own responsibility for the issue and its further development and allow single members of the United Nations to seize the SC's responsibility. In the Court's opinion, No. 13 of SC Res. 1441 (2002) did not contain more than a definite warning addressed to Iraq. Third, the BVerwG claimed that had SC Res. 1441 (2002) meant to authorise a military attack on Iraq it would have had to state that unequivocally in its text. Fourth, any actual or alleged "mental reservation" of the representatives of the governments of the permanent members of the SC, the US and the UK, when voting on this Resolution, was irrelevant in

²² BVerwG, 2 WS 12.04, 21 June 2005, 73 *et seq.*, available at <http://www.bundesverwaltungsgericht.de>.

²³ BVerwG, 2 WS 12.04, 21 June 2005, 74 *et seq.*, available at <http://www.bundesverwaltungsgericht.de>.

²⁴ SCOR Res. 1441, U.N. SCOR., 57th Sess., S/Res/1441 (2002).

²⁵ *Id.* at para. 13.

²⁶ One might want to note, however, that almost every Resolution of the SC finishes with this set phrase.

terms of public international law. Thus, both states could not successfully argue that they would not have approved the Resolution had it not contained, in their view, substantial leeway as to how to interpret what “serious consequences” might entail. Finally, this conclusion is supported by the fact that, at a later stage, the US, the UK and Spain attempted to introduce yet another draft Resolution. The wording of this draft Resolution would have explicitly and directly authorised the use of military force against Iraq, but was eventually not submitted for a vote in order to avoid defeat in the SC.²⁷ Therefore, one could argue that the very reason that these states were trying to negotiate and vote on another draft Resolution authorising the use of force provided evidence that, in the US’s, the UK’s and other states’ opinion, SC Res. 1441 (2002) could not justify to go to war against Iraq.

2. *Art. 51 of the United Nations Charter: The Right to Self-Defence*

As to the second possible ground for justification, the right to individual and collective self-defence, the BVerwG did not develop a proper reading of Art. 51 of the Charter,²⁸ but only referred to the fact that a variety of doubtful questions surrounded its scope. However, it is safe to state that, in the Court’s view, no armed attack by Iraq had occurred within the meaning of this provision that would have warranted (counter)action by the US and its allies. The BVerwG then turned to the academic dispute as to whether the right to self-defence as a rule of customary international law could be given an extensive meaning so as to provide for a right to resort to preventive self-defence. The Court admitted, with reference to the so called *Webster* formula,²⁹ that some governments have, in the past, claimed that such a rule exists, but the Court noted at the same time that others have always opposed its existence. Hence, in the opinion of the BVerwG, a new rule of customary international law has not emerged. It further argued that even the governments of the US and the UK had never alleged an “instant, overwhelming [necessity], leaving no choice of means and no moment of deliberation” with respect to an immediate threat presented by an alleged Iraqi nuclear, biological and chemical weapons programme in place, apart from that which the BVerwG considered mere political declarations. Most strikingly, the Court explicitly referred

²⁷ BVerwG, 2 WS 12.04, 21 June 2005, 75, available at <http://www.bundesverwaltungsgericht.de>.

²⁸ U.N. CHARTER art. 51.

²⁹ Letter from Secretary of State Webster to Lord Ashburton (Aug. 6, 1842), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm> (concerning the famous *Caroline* case together with an explanatory note on *Caroline*). The *Webster* formula taken from this letter is as follows: “Undoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the ‘necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”

to an interview given by the Vice Secretary of Defence, Paul Wolfowitz to *Vanity Fair* magazine in order to support its conclusion. In this interview Vice Secretary Wolfowitz was quoted as saying that the official reasons given for the attack on Iraq were meant for the public and had been developed in order to overcome “bureaucratic” opposition in the US Administration, whereupon it was a more important goal that a success in Iraq would render the presence of US troops in neighbouring Saudi-Arabia superfluous.³⁰ The BVerwG closed its deliberations on the right to self-defence with a reference to a statement of the Secretary-General of the United Nations, Kofi Annan,³¹ that the war in Iraq constituted an illegal act.³²

III. Judging Germany's Actions in Support of the War

The BVerwG then turned to the issue of the legality of Germany's contribution to the war on Iraq. Factually, it was established that Germany granted the US and the UK the right to fly above German territory, to allow for the use of the country's “facilities” and Germany agreed to protect these facilities. Furthermore, the German Federal Government approved the further deployment of German soldiers in AWACS aircrafts “for the surveillance of Turkish airspace.” The BVerwG had grave concerns about the legality of such acts of support in terms of international law. According to the Court a violation of the prohibition of the use of force as provided for by Art. 2.4 of the Charter cannot be negated by the fact that German soldiers would not participate in actual combat as the government of the Federal Republic has repeatedly expressed in public. Assisting military action at odds with public international law may be effected not only through actual military participation in armed conflicts, but also through different means. An internationally wrongful act, so the Court held, may be committed either by positive action or by an omission, if there is an obligation for action in terms of international law. Aiding an internationally wrongful act in itself constitutes an internationally wrongful act.³³

According to the BVerwG, the legal regime against which the aiding of a non-conflict party in favour of a belligerent state has to be tested is to be derived, *inter alia*, from the “Definition of Aggression,” agreed upon by way of consensus by

³⁰ Interview by *Vanity Fair* with Paul Wolfowitz, Vice Secretary of Defence (2003) available at <http://www.defenselink.mil/transcripts/2003/tr20030509-depsecdef0223.html>.

³¹ Statement by Secretary General of the United Nations Kofi Annan (Sept. 16, 2004) available at http://news.bbc.co.uk/1/hi/world/middle_east/3661640.stm.

³² BVerwG, 2 WS 12.04, 21 June 2005, 78, available at <http://www.bundesverwaltungsgericht.de>.

³³ BVerwG, 2 WS 12.04, 21 June 2005, 80, available at <http://www.bundesverwaltungsgericht.de>.

General Assembly (GA) Res. 3314 (XXIX) of 1974, from the work of the International Law Commission (ILC) as well as the right to neutrality in terms of international law. The latter, in the opinion of the BVerwG, rests in customary international law and in the V. Hague Convention (hereinafter “the V. HC”).³⁴

The Court referred to Art. 3. lit. (f) of the Definition of Aggression, which provides that “the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State ... qualifies as an act of aggression.” The BVerwG held that, as rule, it can be deduced from the foregoing provision that if the organs of a state allow acts of an armed attack by another state to happen from its territory or refrain from preventing such military operations the actions can also be attributed to the territorial state. However, the Court qualified this statement by arguing that the GA of the United Nations and the states represented in the GA, at the time the resolution was adopted, did not claim that it codified public international law in a binding manner. At the same time, however, the BVerwG identified the definition of aggression as an essential element of the process of establishing universal consent in international law and, therefore, of codification of customary international law.³⁵

The Court further applied Art. 16 of the “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” adopted by the International Law Commission (ILC) at its fifty-third session on 26th July 2001 (hereinafter “the Draft Articles”). Art. 16 of the Draft Articles reads as follows:

Aid or assistance in the commission of an internationally wrongful act. A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: That State does so with knowledge of the circumstances of the internationally wrongful act; and The act would be internationally wrongful if committed by that State.

³⁴ Vienna Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Hague V, Oct. 18, 1907 [hereinafter Hague Convention V].

³⁵ BVerwG, 2 WS 12.04, 21 June 2005, 82, available at <http://www.bundesverwaltungsgericht.de>. On the “Definition of Aggression” as an expression of law, see *Military and Paramilitary Activities Merits* (Nicar. v. U.S.), 1986 I.C.J. 104, para. 195 (June 27) (merits).

The Court did not dwell on the interpretation and application of Art. 16 of the Draft Articles to the circumstances of the case before it. The reason for this hesitation might be that the Draft Articles do not as yet enjoy the status of international law.³⁶

Having elaborated on this, the BVerwG qualified Germany as a “neutral state” with respect to the war on Iraq and further identified certain obligations *vis-à-vis* the conflicting parties deriving from this status pursuant to the V. HC.³⁷ Accordingly, Germany’s territory was inviolable,³⁸ and any act of war conducted on it was impermissible. It was specifically “forbidden to move troops or convoys of either munitions of war or supplies across” Germany’s territory.³⁹ The conflicting parties’ military aircrafts were prohibited from entering the jurisdiction of Germany as a neutral power.⁴⁰ Germany had to take positive actions against any of the belligerent states of the war on Iraq since a neutral power “must not allow any of the acts referred to in Articles 2 to 4 [of the V. HC] to occur on its territory.”⁴¹

³⁶ After almost 50 years of work the ILC could finally adopt the Draft Articles which were taken note of by the GA on 12th December 2001. U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (2002). During the 59th GA session the Sixth Committee of the GA again considered the Draft Articles. In a GA Res. of 16th December 2004 the GA put the Draft Articles again on the provisional agenda of its sixty-second session in 2007. U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/35 (2004). During the 59th GA session it was discussed on how to proceed with the Draft Articles, whether to convene an international conference to negotiate an international convention or, by taking into account that international courts and tribunals have in the past since the adoption of the Draft Articles already referred to and applied several provisions of them, or to refrain from transforming the Draft Articles into international Treaty law. See summaries of the work of the Sixth Committee, www.un.org/law/cod/sixth/59/summary.htm, item 139, in which speakers are quoted that the United Nations Secretariat should be requested to prepare a collection of international practice in the area of the interpretation and application of the Draft Articles to assist the Sixth Committee in deciding how to proceed. See U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/35, no. 3 (2004) (with which the GA indeed approved this suggestion). The ICJ has already applied single provisions of the Draft Articles in its advisory opinion on July 9th, 2004. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, reprinted in 43 ILM 1009- 1098, para. 140 (2004).

³⁷ BVerwG, 2 WS 12.04, 21 June 2005, 83, available at <http://www.bundesverwaltungsgericht.de>.

³⁸ “The territory of neutral Powers is inviolable.” Hague Convention V art. 1

³⁹ “Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.” Hague Convention V art. 2.

⁴⁰ Art. 40 of the Draft Hague Rules of Air Warfare, 19th February 1923, which have never been formally adopted, but made reference to by the BVerwG in its judgement since they are, like other rules of war concerned, incorporated by means of a “Central Regulation of Service” (“*Zentrale Dienstvorschrift*”) issued by the German Federal Minister of Defence.

⁴¹ “A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.” Hague Convention V art. 5, para. 1.

“Belligerents are likewise forbidden to:

The BVerwG then went to great lengths to explain that neither the NATO Treaty,⁴² nor NATO Status of Forces Agreement,⁴³ nor the Presence of Foreign Forces Convention⁴⁴ exempted Germany from its obligations under international law, regardless of the fact that Germany, together with the US, the UK, and other members of the “coalition of the willing” are NATO partners, too.⁴⁵ This exercise appears to be futile since it reaches an obvious conclusion. A mere reference to Art. 103 of the Charter would have sufficed, where it is provided that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under *any* other international agreement, their obligations under the present Charter shall prevail.”⁴⁶ One of these obligations is the prohibition of the use of force entrenched in Art. 2.4 of the Charter. This prohibition, as I have submitted above, is directly binding on all branches of the German government by virtue of Art. 25 GG, and has been, according to the BVerwG, violated by the US, the UK and other states, so that Germany’s involvement in the war constituted an internationally wrongful act.

(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.”

Hague Convention V. art. 3

Hague Convention V art. 4 is not relevant in this context. *But see* Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Hague XIII, Oct. 18, 1907, art. 2, 9, 24 [hereinafter Hague Convention XIII; *see also* Hague Convention XIII art. 11, para. 1, “A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.”

⁴² North Atlantic Treaty, Apr. 4, 1949, 34 U.N.T.S. 243.

⁴³ Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, BGBl. II at 1190, as revised by the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany (Supplementary Agreement), August 3, 1959, BGBl. II at 1218, in the authoritative version of the Agreement, May 18, 1993, 1994 BGBl. II at 2594, 2598) [hereinafter, together with the NATO Treaty, collectively referred to as the “NATO Agreements”].

⁴⁴ Convention on the Presence of Foreign Forces in the Federal Republic of Germany, October 23, 1954, 1955 BGBl. II at 253.

⁴⁵ BVerwG, 2 WS 12.04, 21 June 2005, 85, *available at* <http://www.bundesverwaltungsgericht.de>.

⁴⁶ *Emphasis added.*

The BVerwG probably referred to the NATO Agreements and the Presence of Foreign Forces Conventions in order to disprove the statements of the German Federal Minister of Defence and the German Chancellor to the contrary that obligations under the NATO Agreements required Germany to assist the states waging war on Iraq.⁴⁷ The court indeed expressly mentioned Art. 103 of the Charter. But it apparently did so only to develop an argument that obligations under the Charter supersede any other obligation undertaken in international agreements with respect to some *secret* international agreement between the US and its allies on the one side and Germany on the other, but whose existence the BVerwG eventually questioned.

The BVerwG then applied this test to the conduct of Germany with respect to the war on Iraq. The Court held that Germany failed to take positive actions against the use of its territory in connection with the war in Iraq as required by Art. 2.4 of the Charter, Art. 5 V. HC and other applicable rules of international law. According to the BVerwG, granting US and UK military aircraft fly-over-rights, allowing them to dispatch troops, to transport weapons and military supply, and generally facilitating and even supporting combat operations in Iraq, gives rise to grave concerns in light of public international law.

Whether the same applies to the involvement of German soldiers in AWACS surveillance flight operations on Turkish territory in the region bordering Iraq during the war, and their use in the protection of barracks and other military or civil facilities of the US armed forces in Germany, the Court did not say. In the opinion of the BVerwG, the outcome of a test of legality applied with respect to these operations is dependent on whether the data gathered during the AWACS flights were of significance for combat operations in Iraq and whether the US and the UK actually had *de facto* access to this data, and whether the German military fulfilled tasks of foreign armed forces stationed in Germany on behalf of these foreign forces in order to render possible or at least facilitate the withdrawal of US and UK troops from Germany to Iraq, respectively. The BVerwG, however, did not dwell on these issues and was satisfied with its holding that the legality of granting fly-over-rights already met with grave concerns in terms of public international law and, thus, triggered Germany's state responsibility.⁴⁸

⁴⁷ BVerwG, 2 WS 12.04, 21 June 2005, 85, available at <http://www.bundesverwaltungsgericht.de>.

⁴⁸ BVerwG, 2 WS 12.04, 21 June 2005, 95, available at <http://www.bundesverwaltungsgericht.de>.

D. Comments

With respect to the legality of the US led war on Iraq, the BVerwG 's judgement generates a somewhat odd conclusion. The BVerwG apparently took great pains to state their findings cautiously, that both the war itself and Germany's involvement in it meet with grave concerns in terms of the rules of public international law. However, the BVerwG did not make it totally clear that, in its opinion, the war and the contributions to it by the German Federal Government were outright illegal, notwithstanding that it argued at great length that the prohibition of the use of force in international relations as provided for in Art. 2.4 of the Carter and corresponding *jus cogens* was *prima facie* violated. It further held, that this violation could not be justified by any Chapter VII SC Resolution, by Art. 51 of the Charter, or by an equivalent right to self-defence rooted in customary international law. Finally, it held that Germany's actions taken in support of the war were also at odds with applicable international (treaty) law, thereby causing the state to commit an internationally wrongful act under the draft articles on state responsibility of the ILC. These findings were watered down to an extent by the Court when it used the cautious *proviso* that the actions of the states involved only gave rise to grave concerns before arguing the respective issues at stake. By doing that, the Court shifted the burden to the individual soldiers and their decision of conscience whether to obey an order rather than reaching the conclusion that participating in a war violating rules of international law, and even constituting an act of aggression, as the court held, would be illegal and, therefore, justify insubordination.

I. Did the Case Raise a "Political Question?"

The reason for this cautious approach does not rest in any "political question" doctrine recognised in other jurisdictions,⁴⁹ because it is not known in German law.

⁴⁹ On 24th of February 2003, a U.S. federal court, the U.S. District Court for the District of Massachusetts, on political question grounds, dismissed a lawsuit filed by U.S. soldiers, parents of U.S. soldiers, and Members of Congress against the President of the United States, George W. Bush, and the Secretary of Defense, Donald H. Rumsfeld, challenging the President's authority to wage war against Iraq in the absence of a congressional declaration of war or equivalent action, *see Doe v. Bush*, 240 F. Supp. 2d 95 (D. Mass. 2003). The appellate court, the U.S. Court of Appeals for the First Circuit, on 13th of March 2003, affirmed, albeit on different grounds, namely, that the suit was not ripe for judicial review, *Doe v. Bush*, 322 F.3d 133 (1st Cir. 2003); rehearing denied by *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003). *See also Callan v. Bush*, Civil Action No. 4:03CV3060, memorandum and order from April 30, 2003 of the U.S. District Court for the District of Nebraska, in which the court refused to entertain in substance the allegations of a former Congressman that President Bush violated American law and the Charter by invading Iraq, for a lack of standing but also on political question grounds. Affirmed by the U.S. Court of Appeals for the Eighth Circuit on 26 July 2004, case No. 03-4047. The U.S. Supreme Court later refused to grant *certiorari* on 10th January 2005, and eventually denied a rehearing of the case on 4th April 2005, *see Callan v. Bush*, 125 S.Ct. 932 (2005), available at www.supremecourtus.gov/docket/04-738.htm. On

The *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) has always reserved the right to adjudicate on government conduct that may be qualified as political in nature, including an act that falls under the ambit of foreign affairs, as long as there are legal criteria provided by constitutional and international law to determine the acts' legality. In a 1987 decision on the justiciability of governmental acts the BVerfG held:

According to Art. 25 GG general rules of international law are to be observed when shaping the municipal legal order and when interpreting and applying provisions of domestic law by the executive and the courts (references omitted); ... From this it particularly follows that public authorities and courts of the Federal Republic of Germany by virtue of Art. 25 GG are, as a rule, barred from interpreting and applying municipal laws in a way that violates the general rules of international law.⁵⁰

II. Seven Grounds for Insubordination

The grounds for the careful reasoning of the BVerwG may lie, apart from a possible general exercise of judicial self-restraint, in the severe consequences that are at stake. According to the German constitution, partaking in an illegal war in terms of international law may not only have to face the verdict of unconstitutionality, but could also trigger criminal liability for the members of government and other actors involved. The BVerwG indeed identified this problem when it addressed whether the respondent was entitled to refuse to obey orders of a superior. The Court developed seven grounds which could, under German law, justify or even render mandatory such conduct:

the political question doctrine as applied by U.S. courts in general see JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 125 (7th ed., 2004); with respect to foreign affairs see *id.* at 129.

In the UK the High Court of Justice, Queen's Bench Division (Divisional Court), on 17th December 2002, dismissed, *inter alia*, on royal prerogative grounds, an application for declaratory relief that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further SC Resolution in addition to SC Res. 1441 (2002), see Campaign for Nuclear Disarmament v. The Prime Minister of the United Kingdom et al., [2002] EWHC 2777 (Admin), para. 50 (Brown LJ); see also R v Jones and Another; R v Olditch and Another; R v Richards [2004] EWCA Crim 1981, in which *Latham LJ* held that it was not necessary to consider the question whether or not the legality of the war in Iraq was a justiciable issue.

⁵⁰ See BVerfGE 75, 1 (18, *et seq.*); see also BVerfG, 2 BvR 1481/04 of Oct. 14, 2004, paras. 33 *et seq.*, available at http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html.

- (i) The military order violates the right to human dignity as provided for in Art. 1, para. 1 GG,
- (ii) The order is given for purposes outside the ambit of the military service a soldier is obliged to render,⁵¹
- (iii) Following the order would result in the commitment of a crime,
- (iv) The order is not binding for other reasons, such as following it is objectively impossible, is contradicting in terms or has become moot for a change of facts,
- (v) Giving the order or obeying it had to be qualified as an act which is "tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression"⁵² and, hence, being unconstitutional,
- (vi) The order is in variance of the general rules of public international law pursuant to Art. 25 GG,⁵³ or
- (vii) The order is unreasonable upon balancing all relevant facts and circumstances.⁵⁴

The BVerwG failed to answer the question whether any of the abovementioned grounds for insubordination were present.⁵⁵

III. The Decision of the Attorney-General

⁵¹ GRUNDGESETZ art. 87a.1 provides that the German Federal Armed Forces are constituted only for defensive purposes. However, such defensive purposes could, so the BVerwG held without expressing a definite opinion, also include actions taken in collective self-defence against an armed attack which has occurred against a third state, since the wording of the provision is not confined to the defence of the German state, but extends to defence in general, which includes the occurrence of an armed attack on a NATO member in terms of Art. 5 of the NATO Treaty as long as Art. 51 of the Charter is observed. BVerwG, 2 WS 12.04, 21 June 2005, 30, available at <http://www.bundesverwaltungsgericht.de>.

⁵² GRUNDGESETZ art. 26.1. The second clause of this Article further provides that such acts shall be made a criminal offence, which is to be found in the German Criminal Code, Section 80; see note 57 *infra*.

⁵³ See GRUNDGESETZ art. 25.

⁵⁴ BVerwG, 2 WS 12.04, 21 June 2005, 28, available at <http://www.bundesverwaltungsgericht.de>.

⁵⁵ *Id.* The Court only expressly held that there were no other grounds which would have made the order to the respondent not binding (see (iv)).

Based on the comments of the BVerwG, the question as to (v) above warrants a closer look. On 21 March 2003, one day after the war in Iraq began, the German Attorney-General at the *Bundesgerichtshof* (BGH – Federal Court of Justice (“*Generalbundesanwalt beim Bundesgerichtshof*”), issued a press release.⁵⁶ The Attorney-General, upon a complaint received, stated that there were no sufficient grounds for prosecuting the German Chancellor, other members of the German government or third parties, for committing the crime of preparing for a war of aggression in terms of Section 80 of the *Strafgesetzbuch* (StGB – German Criminal Code).⁵⁷ The BVerwG referred to this decision of the Attorney-General, but did not further elaborate on it.⁵⁸ However, the judgement of the BVerwG and the decision by the Attorney-General not to prosecute are not contradictory. The Attorney-General denied that the decision of the German Federal Government to undertake AWACS surveillance flights resulted in a crime in terms of Section 80 StGB for two reasons: first, the Attorney-General qualified such flights as mere failure to prevent an armed attack from occurring on the part of the German Federal Government. As the Attorney-General argues, this act of omission as such makes the members of the German Federal Government not liable for prosecution. Second, the Attorney-General refused to assume that these actions put Germany in peril of war as required by Section 80 StGB. The Attorney-General did not deal with the question of legality of the war on Iraq itself, since this was irrelevant for an assessment of Section 80 StGB. Therefore, the question as to whether the war on Iraq and Germany’s supportive actions were illegal in terms of international law, with which the BVerwG dealt with in parts of its judgement, and the question of criminal liability were two completely different ones.

It is obvious from the reasoning of the BVerwG that, in answering the ultimate question whether the respondent was rightfully punished for disobeying an order, the Court tried to boil down the issue to the validity of the decision of conscience the respondent had made. In doing so the BVerwG merely held that this decision of conscience indeed stood the two-fold test to be applied, because the war on Iraq and Germany’s contributions to it met with grave international law concerns and, further, under these circumstances the respondent, being a legal layman, could

⁵⁶ See German reprint in the BVerfG, JURISTENZEITUNG 908 (2003); or see DER IRAK-KRIEG UND DAS VÖLKERRECHT 173, (K. Ambos & J. Arnold eds., 2004).

⁵⁷ § 80 StGB available at <http://www.iuscomp.org/gla/statutes/StGB.htm#80>. This section reads as follows: “Whoever prepares a war of aggression (GG art. 26, para. 1) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.”

⁵⁸ BVerwG, 2 WS 12.04, 21 June 2005, 33, available at <http://www.bundesverwaltungsgericht.de>.

invoke his right to freedom of conscience. The BVerwG used Art. 4, para. 1 GG as a catalyst for disposing of the underlying issues of (il)legality elegantly. Nonetheless, the Court spent much effort on the question whether the war and the conduct of the German Federal Government could be justified in terms of applicable international law, even though they ultimately left this question unanswered. It remains to be seen whether the BVerwG just intended to utter a warning to the Federal Government in order to prevent similar actions from happening in the future. A more rule based approach rather than leaving individual soldiers of the Federal Armed Forces alone with the difficult task of applying a moral judgement subject to the right to freedom of conscience, however, would have been intellectually more honest and helpful.

IV. Pertinent Current Developments in the Codification of International Law

The BVerwG also refused to follow claims from some quarters⁵⁹ that the rules on the right to self-defence should be construed more broadly so as to permit pre-emptive or even preventive strikes in order to be able to respond to the threats of modern times. For example, in order to be able to respond to the threat international terrorist organisations pose to international peace and security, or to overcome deadlocks in the SC in case of a veto. It is important to note in this connection that neither the High Level Panel⁶⁰ nor the General Assembly (GA)⁶¹ on the occasion of the 60th Session on UN Reform of this year have supported any rewriting or reinterpretation of the right to self-defence as entrenched in Art. 51 of the Charter.

⁵⁹ National Security Strategy of the United States of America, Sept. 2002 available at www.whitehouse.gov/nsc/nss.pdf.

⁶⁰ See *A more Secure world: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges and Change, at <http://www.un.org/secureworld/report2.pdf> ("Article 51 needs neither extension nor restriction of its long-understood scope, and Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront. The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has"); see also *Id.* at p. 63, para. 192, ("We do not favour the rewriting or reinterpretation of Article 51").

⁶¹ U.N. GA, Draft Outcome Document, Sept. 16, 2005, para. 79 at http://www.un.org/summit2005/Draft_Outcome130905.pdf, stating, "We also reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We also stress the importance of acting in accordance with the purposes and principles of the Charter." Albeit this paragraph is couched in very general terms, it is safe to state that the right to self-defence shall not be rewritten or reinterpreted according to the more than 150 Heads of State and Government who approved the world summit outcome document.

The BVerwG, however, was not inclined to add significantly to the undertaking of shaping a uniform and undisputed definition of an act of aggression with the quality of binding international law. The Court did not express an opinion as to whether the war on Iraq constituted an act of aggression in the first part of its judgment when dealing with the exceptions of the obligation of a German member of the Federal Armed Forces to obey orders.⁶² At a later stage in the written reasons, however, it jumped to the conclusion that a state, which resorts to military force without justification and, therefore, violates the prohibition of the use of force provided for by Art. 2.4 of the Charter, at the same time commits an act of military aggression.⁶³ The (non-binding) Definition of Aggression of the GA attached to its Res. 3314 (XXIX) is broad enough to support this conclusion. However, it has to be recalled that the State Parties to the Rome Statute of the International Criminal Court (ICC)⁶⁴ could not agree on a definition of the crime of aggression. The Rome Statute includes the following compromise provision in Art. 5, para. 2:

The court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.⁶⁵

No definition of the crime of aggression has been agreed upon and been incorporated into the Rome Statute so far.⁶⁶ The Review Conference foreseen in Art. 123 of the Rome Statute, to which Art. 5, para. 2 of the Rome Statute refers, provides that a definition of the crime of aggression shall be adopted in the year 2009, seven years after the entry into force⁶⁷ of the Rome Statute.⁶⁸

⁶² BVerwG, 2 WS 12.04, 21 June 2005, 32, available at <http://www.bundesverwaltungsgericht.de>.

⁶³ BVerwG, 2 WS 12.04, 21 June 2005, 73, available at <http://www.bundesverwaltungsgericht.de>.

⁶⁴ Rome Statute of the International Criminal Court, 17 July 1998, 37 ILM 999 (1998) [hereinafter Rome Statute].

⁶⁵ Rome Statute art. 5, para. 2.

⁶⁶ For an account of the preparatory work of the Preparatory Commission for the International Criminal Court, the Working Group on the Crime of Aggression and the Assembly of State Parties to the Rome Statute see <http://www.jus.unitn.it/users/nesi/pubblicazioni/CrimeofAggression/home.html>. The latest document on the issue from the Working Group from 29th June 2005 can be retrieved from the website http://www.icc-cpi.int/library/asp/ICC-ASP-4-SWGCA-INF1_English.pdf. See Zimmermann, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 5 paras. 16 (Otto Triffterer ed., ed. 1999).

⁶⁷ The Rome Statute entered into force on 1st July 2002.

E. Résumé

To conclude, the decision of the BVerwG is in line with the predominant opinion on the legality of the war in Iraq amongst legal scholars not only from Germany,⁶⁹ but also from the rest of the world.⁷⁰ Thus, the judgement of the BVerwG is not groundbreaking for what it has to say on the (il)legality of the war on Iraq, but for the fact that it is a court of law, more specifically the highest German court for administrative law matters, that has expressed an opinion on this issue. It remains to be seen what impact this rare judgement will have in the future. Certainly, it will have to be featured on the list of international practice regarding the interpretation

⁶⁸ On aggression see, HUMMICH, DER VÖLKERRECHTLICHE STRAFTATBESTAND DER AGGRESSION, 2001; Irina Kaye Müller-Schieke, *Defining the Crime of Aggression Under the Statute of the International Criminal Court*, 14 LEIDEN J. INT'L L. 409 (2001); Grant Dawson, *Defining Substantive Crimes within the Subject Matter of the Jurisdiction of the International Criminal Court: What is the Crime of Aggression?* 19 N.Y. L. SCH. J. INT'L & COMP. L. 413 (2000); Justin Hogan-Doran & Bibi T. van Ginkel, *Aggression as a Crime Under International Law and the Prosecution of Individuals by the Proposed International Criminal Court*, 43 NETH. INT'L L. REV. 321 (1996); Carpenter, *The International Criminal Court and the Crime of Aggression*, 64 NORDIC J. INT'L L. 223 (1995); DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 117 (1988).

⁶⁹ See, e.g., Bothe, *Der Irakkrieg und das völkerrechtliche Gewaltverbot*, 41 ARCHIV FÜR VÖLKERRECHT 255 (2003); Murswiek, *Die amerikanische Präventivkriegsstrategie und das Völkerrecht*, 56 NEUE JURISTISCHE WOCHENSCHRIFT 1014 (2003); Kurth, *Der dritte Golfkrieg aus völkerrechtlicher Sicht*, 36 ZEITSCHRIFT FÜR RECHTSPOLITIK 195 (2003); Breitwieser, *Vorweggenommene Selbstverteidigung und das Völkerrecht*, 47 NEUE ZEITSCHRIFT FÜR WEHRRECHT 45 (2005), available at http://www.deutsches-wehrrecht.de/Aufsaeetze/NZWehrr_2005_045.pdf. The BVerwG made frequent reference to these law journal articles in its judgement. It further has to be noted that one of the three judges of the Second Senate for Military Service Matters ("*Wehrdienstsenat*") of the BVerwG who signed the judgement had been active before in publishing on the illegality of the war on Iraq and Germany's action supporting it. See, Deiseroth, *Deutschland im US-Irak-Krieg – NATO-Bündnisverpflichtungen im Konflikt mit Verfassungs- und Völkerrecht?*, in DER IRAK-KRIEG UND DAS VÖLKERRECHT 131 (K. Ambos & J. Arnold eds., 2004); see also DEISEROTH, STÄRKUNG DES VÖLKERRECHTS DURCH ANRUFUNG DES INTERNATIONALEN GERICHTSHOFS? (2004) (with extensive reference to decisions of foreign courts cited in footnote 51). Also see the statement of many leading German international law scholars made on behalf of the World Federalist Movement, undated, available at <http://homepage.hamburg.de/weltfoederalisten/voelkerrecht/voelkerrecht-und-irak.html>, and the statement of the Scientific Advisory Groups of the German Bundestag ("*Wissenschaftliche Dienste des Bundestages*") from 2nd January 2003, reprinted in DER IRAK-KRIEG UND DAS VÖLKERRECHT 224 (K. Ambos & J. Arnold eds., 2004).

⁷⁰ See only the press release from the International Commission of Jurists as of 18th March 2003, which was supported by some 60 lawyers, http://www.icj.org/IMG/pdf/Iraq_war_18_03_03_.pdf, the statement as of 7th March 2003 signed by teachers of international law, available at <http://www.guardian.co.uk/letters/story/0,3604,909275,00.html>, and O'Connell, ASIL Insights, Addendum to Armed Forces in Iraq: Issues of Legality, April 2003, at <http://www.asil.org/insights/insigh99a1.htm>.

and application of provisions of the Draft Articles prepared by the UN Secretary-General.⁷¹

⁷¹ See GA Res. *supra* note 36 and accompanying text.