The War in Iraq and the Contemporary *Jus ad Bellum*

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1. Introduction

The topic of this essay is the influence of the recent war against Iraq upon the international law relating to the use of armed force, in particular the law relating to the use of force in self-defense.

In this context, a number of separate, but related questions will receive attention. Firstly, some description of the state of the law prior to the outbreak of the conflict is unavoidable. Clearly, one can only determine whether the law has changed in relation to a starting point for the purposes of comparison, and this would seem to be the logical place to begin. Secondly, we will examine whether the events which occurred and the attitudes which were expressed in the lead-up to the outbreak of the conflict demonstrate a shift in opinion in the direction of a new set of legal rules and principles relating to the use of force. Finally, we will assess the influence of the course of the conflict and its immediate aftermath upon the question whether we are in a process of change with respect to the legal regulation of the use of armed force.

In view of the fact that the primary justification put forward for the use of force against Iraq, at least prior to and during the course of the conflict, was the right of self-defense, specifically in relation to suspected terrorist threats and repressive and hostile regimes allegedly in possession of weapons of mass destruction, this aspect of the topic will correspondingly receive the most attention. However, other relevant points will receive some degree of attention, to the extent necessary to help answer the central question. In the concluding paragraph, the answers to our main question will be summarized while taking into account the present state of international relations – in particular the virtually unprecedented position which the United States presently holds within the international system.

2. The State of the Law Prior to the Iraq War

2.1 General Description and Assessment of the Law Regulating the Use of Force

The international legal regulation of the use of armed force contained in the UN Charter and in customary law has always been subject to a significant degree of controversy on a number of points. This is often seen as a weakness of this particular branch of international law, if not of international law in general. The points of

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controversy have generally related to the scope of the prohibition of the use of armed force and the scope of the right of self-defense respectively.

The controversy relating to the scope of the prohibition has centered upon the question whether all uses of force except those specifically excepted in the UN Charter, were covered by the prohibition. In particular, two possible additional exceptions have been put forward in both State practice and the relevant doctrine. These are, of course, humanitarian intervention and certain types of national liberation struggles, both of which have had their supporters and detractors over the years. In recent years, humanitarian intervention seems to have gained a growing degree of acceptance, while the relevance of national liberation struggles has diminished as a result of the end of the Cold War and the virtual disappearance of colonial (type) rule.

The controversy relating to the scope of the right of self-defense has, to a considerable extent, revolved around the question as to what kind of prior armed attack or threat of attack triggers the right to use force in self-defense. There has been controversy on other points, but the question of what constitutes an armed attack and when an armed attack can be countered by action in self-defense, has been and undoubtedly still is the aspect of the law relating to self-defense which has caused the most disagreement.

Notwithstanding these controversies, there always has been a considerable degree of agreement on the fundamental aspects of the *jus ad bellum*. The prohibition of the use of armed force was generally considered to cover all forms of the use of force between States, not covered by specific Charter exceptions, with possible additional exceptions in extreme cases relating to either humanitarian intervention or national liberation struggles in the view of the respective supporters for these types of action.

With regard to the recognized exceptions to the prohibition there was likewise a large degree of consensus on the main points. These were the primacy of the UN Security Council in the maintenance of peace and security, including, in particular, the authorization of military enforcement action in cases where the Council was able to reach consensus. With regard to the law relating to self-defense, State practice and legal opinion were in broad agreement that the use of force in self-defense was contingent upon the occurrence of some form of prior armed attack, or at least a clear and immediate threat of an attack, and was subject to the conditions of necessity and proportionality, as well as to the ultimate authority of the UN Security Council to either endorse, condone or reject a claim of self-defense.

The terrorist assault of 11 September 2001 and the US and international reaction to it did not fundamentally change this understanding of the law. The US immediately approached the Security Council, which accepted, in principle, the