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Attacking Iraq, Subverting International Law

Article 2(4) of the U.N. Charter states that nations “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .” The Charter was signed by President Truman and ratified by the U.S. Senate in 1945. Under Article VI, Clause 2 of the U.S. Constitution, the Charter is therefore part of “the supreme Law of the Land.”

The Charter contains only two exceptions to the use of force: when such force is employed in self-defense or when it is authorized by the U.N. Security Council. Thus far the Security Council has been unwilling to authorize a U.S. attack against Iraq. This refusal, reflecting the widespread international sentiment against war with Iraq, makes any unilateral U.S. attack on Iraq illegal under international law.

(a) Self-defense

Article 51 of the Charter sets forth the exception for self-defense. A nation can employ self-defense only “if an armed attack occurs,” or, as a number of authorities have argued, in response to an imminent attack. None of the reasons given by the Bush Administration for attacking Iraq, including destruction of claimed weapons of mass destruction or overthrowing Saddam Hussein, constitute self-defense under the U.N. Charter. The Bush Administration has presented no evidence that Iraq currently presents an imminent threat of attack against the U.S.

In a speech to the West Point graduating class in the summer of 2001, Bush set forth a doctrine that rejected this critical legal principle that force can only be used in self-defense. He built on that idea in his State of the Union address in 2002 where he warned the “axis of evil” nations that the United States would not wait “while dangers gather,” and then articulated the doctrine of pre-emptive strikes. In this radically new approach Bush proclaims that the United States can use military force against any state the administration perceives to be hostile. **This new U.S. position, obviously aimed at justifying an attack on Iraq, is a public renunciation of the U.N. Charter’s limitation on the use of force.**

Pre-emptive strikes are different from an earlier doctrine that was labeled “anticipatory self-defense” under which the United States and some other countries argued that they had the right under the U.N. Charter to attack a country that was planning an armed attack. This latter doctrine at least gave lip service to the restrictions on the use of force embodied in the Charter that force could only be used in self-defense or as authorized by the Security Council under Article 42. Past administrations viewed pre-emptive strikes on other nations as illegal, as evidenced by the Reagan administration’s vote in the Security Council that unanimously condemned Israel’s pre-emptive strike on Iraq’s nuclear facility in 1981. The doctrine of pre-emptive strikes moves beyond the restrictions of the Charter by stating that force will be used even if there is no immediate threat. It may well take the world back to a period prior to World War I when the employment of force had no legal restraints; countries could use force when and where they wanted. The creation of the U.N. Charter made the world safer; pre-emptive strikes will make it more dangerous.

The administration and now the Congress have abandoned the U.N. Charter’s core legal restraints in favor of a system in which the United States unilaterally decides which regimes warrant replacement by force. By at least rhetorically supporting the heart of the U.N. system over the past 54 years, the United States has supported its continuance. The doctrine of pre-emptive strikes wounds the U.N. system irrevocably.

The consequences of this new doctrine are frightening and will result in the exercise of unabashed imperial power. This path will lead to more terror against the peoples of the world and the people of the U.S.

(b) U.N. Authorization

The United States has for almost a decade claimed that it does not need a new Security Council resolution authorizing force against Iraq. The U.S. claim is that Iraq has materially breached Resolution 687, the cease fire resolution ending the 1991 Gulf War. This material breach, according to the United States, resurrects Resolution 678 which authorized U.N. members to use force “to oust Iraq from Kuwait and so restore international peace and security in the area.”

A majority of the permanent members of the Security Council - France, Russia and China - have consistently rejected this U.S. legal position. During the last crisis with Iraq over inspections in 1998, a majority of all the Security Council members disagreed with the U.S. position and argued that no existing Security Council resolution authorized the U.S., Britain or any other member state to enforce Iraq’s disarmament obligations imposed by Resolution 687. France, Russia, China and other nations argued that only a new, explicit Security Council resolution authorizing force against Iraq could provide a legal basis for such U.S./British action.

On November 8, 2002 after almost eight weeks of negotiation and tremendous pressure by the United States, the United Nations unanimously adopted Resolution 1441 which set a new timetable and a new regime of inspections for Iraq. What it did not do, no matter what the United States claims about the resolution, is to authorize any country to use force against Iraq. The United States still must as a matter of law go back to the U.N. Security Council for authority to use force. Its claim that it need not do so is not law; it is an exercise of sheer power.

Resolution 1441 represents a compromise between the French/Russian view and the American/British perspective. The Council acquiesced to the U.S. by deciding that Iraq “was and remains” in “material breach” of prior resolutions, including Resolution 687. It also decided that any future “false statements or omissions...and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach.” Finally, &13 of the Resolution recalls that the Council has repeatedly warned Iraq that it will face “serious consequences” as a result of its continued violation of its obligations. The “material breach” and “serious consequences” language will be used by the United States to argue that the Security Council has essentially allowed it to use force in response to any Iraqi non-compliance. Moreover, the United States can also argue that the Resolution does not explicitly require another Council vote on authorization of military force, as the French and Russians had sought.

The Resolution also has clear language supporting the French, Russian and Chinese position. Paragraph 4 declaring that any failure by Iraq to comply with the Resolution will constitute a “material breach” also requires that such a breach “will be reported to the Council for assessment in accordance with paragraph 11 and 12” of the Resolution. Those paragraphs require the Chairman of the Inspection Team to report to the Security Council which will itself convene “immediately” to consider the situation and decide what to do. It seems clear from the Resolution that no member state should be able to use any violation by Iraq, whether very minor and technical or more serious, as legal justification to attack Iraq. The U.S. position leads to the absurd conclusion that any mistake by Iraq would justify U.S. military action, a conclusion at odds with common sense, international opinion and the U.N. Charter. The Resolution requires the Security Council to meet immediately and decide what to do about an Iraqi violation - a requirement inconsistent with member states taking their own, unilateral action. Indeed, France, Russia and China, which provided the critical votes to pass the Resolution, issued a statement upon its enactment that “Resolution 1441...excludes an automaticity in the use of force” and that only the Security Council has the ability to respond to a misstep by Iraq.

The United Nations Security Council and international law have thus far slowed the Bush Administration’s mad rush to war against Iraq. Resolution 1441 reflects U.S. coercion and heavy-handedness, but also the enormous international and domestic opposition to the Bush Administration’s goal

of war against Iraq. Resolution 1441 obviously doesn't resolve the issues. That Resolution and the U.N. Charter do provide a framework for continued opposition to war against Iraq. The National Lawyers Guild strongly condemns the Bush Administration's disregard of international law and the U.N. Charter and supports resolution of the current conflict with Iraq within the parameters set forth by the Charter. Any U.S. military action now would not constitute self-defense. Therefore, no war against Iraq can be initiated without the explicit approval of the Security Council, which it has clearly not yet given.

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