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THE UNITED NATIONS CHARTER AND THE USE OF FORCE AGAINST IRAQ

The United Nations Charter is a treaty of the United States, and as such forms part of the “supreme law of the land” under the Constitution, Article VI, Clause 2. The UN Charter is the highest treaty in the world, superseding states’ conflicting obligations under any other international agreement. (Art. 103, UN Charter)

Under the UN Charter, there are only two circumstances in which the use of force is permissible: in collective or individual self-defense against an actual or imminent armed attack; and when the Security Council has directed or authorized use of force to maintain or restore international peace and security. Neither of those circumstances now exist. Absent one of them, U.S. use of force against Iraq is unlawful.

Self-Defense

Article 51 of the UN Charter recognizes the inherent right of self-defense. It states:

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.

Under Article 51, the triggering condition for the exercise of self-defense is the *occurrence* of an armed attack (“*if an armed attack occurs*”). Notwithstanding the literal meaning of that language, some, though not all, authorities interpret Article 51 to permit anticipatory self-defense in response to an *imminent* attack. A generally recognized guide to the conditions for anticipatory self-defense is Daniel Webster’s statement regarding the *Caroline* affair of 1837: Self-defense is justified only when the necessity for action is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” (Letter from Daniel Webster, Secretary of State, to Lord Ashburton, August 6, 1842, reprinted in 2 John Bassett Moore, *A Digest of International Law* 409, 412 (1906)). A modern version of this approach is found in *Oppenheim’s International Law: Ninth Edition*, 1991, p. 412 (emphasis added):

The development of the law, particularly in the light of more recent state practice, in the 150 years since the *Caroline* incident suggests that action, even if it involves the use of armed force and the violation of another state’s territory, can be justified as self defence under international law where:

- (a) an armed attack is launched, *or is immediately threatened*, against a state’s territory or forces (and probably its nationals);
- (b) there is an *urgent necessity* for defensive action against that attack;
- (c) there is *no practicable alternative* to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
- (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, *i.e.* to the needs of defence...

The application of the basic law regarding self-defense to the present U.S. confrontation with Iraq is straightforward. Iraq has not attacked any state, nor is there any showing whatever that an attack by Iraq is imminent. Therefore self-defense does not justify the use of force against Iraq by the United States or any state.

Also relevant is that the Security Council authorized an armed response to Iraq’s invasion of Kuwait in 1990, and then after the termination of hostilities required Iraq to end its missile and chemical, biological, and nuclear weapons programs. Thus under Article 51 “the Security Council has taken measures necessary to maintain international peace and security,” and the right of self-defense against an armed attack, applicable until the Security Council has done so, is no longer in effect. While few would argue that the Security Council’s assumption of responsibility precludes self-defense in response to a future attack by Iraq, it weighs heavily against attempts to extend the boundaries of self-defense to justify use of force by the United States and selected other states.

There is no basis in international law for dramatically expanding the concept of self-defense, as advocated in the Bush administration's September 2002 "National Security Strategy," to authorize "preemptive" - really *preventive* - strikes against states based on *potential* threats arising from possession or development of chemical, biological, or nuclear

weapons and links to terrorism. Such an expansion would destabilize the present system of UN Charter restraints on use of force. Further, there is no claim or publicly disclosed evidence that Iraq is supplying weapons of mass destruction to terrorists.

The Bush administration's reliance on the need for "regime change" in Iraq as a basis for use of force is barred by Article 2(4) of the UN Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any state."

Security Council Authorized Use of Force

There is only one legal basis for the use of force other than self-defense: Security Council directed or authorized use of force to restore or maintain international peace and security pursuant to its responsibilities under Chapter VII of the UN Charter.¹ Article 42 of that chapter provides:

Should the Security Council consider that measures [not involving the use of force] provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

It was under Chapter VII that in 1990 the Security Council by Resolution 678 authorized all "necessary means" to eject Iraq from Kuwait and to restore international peace and security in the area. Following the formal cease-fire recorded by Resolution 687 in 1991, there has been no Security Council resolution that has clearly and specifically authorized the use of force to enforce the terms of the cease-fire, including ending Iraq's missile and chemical, biological, and nuclear weapons programs.

Such a resolution is required for renewed use of force. It is the Security Council that has assumed responsibility regarding Iraq, and it must be the Security Council that decides, unambiguously and specifically, that force is required for enforcement of its requirements. Past Security Council resolutions authorizing use of force employed language universally understood to do so, regarding Korea in 1950 (prior to General Assembly action, Security Council Resolution 83 recommended that UN member states provide "such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area"), and Kuwait, Somalia, Haiti, Rwanda, and Bosnia in the 1990s ("all necessary means" or "all measures necessary"). In all these instances, the Security Council responded to actual invasion, large-scale violence, or humanitarian emergency, not to potential threats.

¹ Some contend that intervention to prevent genocide, crimes against humanity, and other gross human rights violations is authorized by the UN Charter and other international law even absent Security Council action under Chapter VII. This is not a principal rationale offered for use of force against Iraq.

Any claim that “material breach” of cease fire obligations by Iraq justifies use of force by the United States is unavailing. The Gulf War was a Security Council authorized action, not a state versus state conflict; accordingly, it is for the Security Council to determine whether there has been a material breach *and* whether such breach requires renewed use of force.

It is fundamental that the UN Charter, Article 2(3) and (4), gives priority to the peaceful settlement of disputes and the non-use of force. Article 2(4) barring the threat or use of force has been described by the International Court of Justice as a peremptory norm of international law, from which states cannot derogate. (*Nicaragua v United States*, [1986] ICJ Reports 14, at para. 190) Strained interpretations of Security Council resolutions, especially when opposed, as in the case of Iraq, by a majority of other Security Council members, cannot overcome those fundamental principles. Rather, given the values embedded in the Charter, the burden is on those who claim use of force has been authorized.²

Despite U.S. claims over the years that resolutions subsequent to Resolution 687 have provided the basis for U.S. use of force against Iraq, the Bush administration is now seeking a new resolution authorizing use of force should Iraq continue to fail to comply with Security Council requirements. Practically speaking, then, the Bush administration accepts that existing resolutions do not authorize use of force.

Conclusion

Under the UN Charter, there are only two circumstances in which the use of force is permissible: in collective or individual self-defense against an actual or imminent armed attack; and when the Security Council has directed or authorized use of force to maintain or restore international peace and security. Neither of those circumstances now exist. Absent one of them, U.S. use of force against Iraq is unlawful.

² For elaboration of these and other reasons why existing Security Council resolutions do not authorize use of force against Iraq, see Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime,” 93 *American Journal of International Law* (January 1999, no. 1) 124-154; Rabinder Singh, QC, Alison Macdonald, Matrix Chambers, London, “Legality of use of force against Iraq: Opinion,” September 10, 2002, on-line at www.lcnp.org.