

Lawyers Statement on UN Resolution 1441 on Iraq

The Bush administration claims that it does not legally need Security Council authorization to attack Iraq if the United States concludes that Iraq breaches its obligations to comply with UN Security Council Resolutions. As Professors of Law and practicing attorneys, we believe that the administration's legal position is incorrect and poses a grave danger for the future of international law, the United Nations, and a peaceful international order.

Article 2(4) of the UN Charter prohibits any nation from using force. The Charter contains only two exceptions: when such force is employed in self-defense or when it is authorized by the UN 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.

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 UN Charter. The Bush administration has presented no evidence that Iraq currently presents an imminent threat of attack against the U.S.

UN Authorization

Throughout the now more than decade-long dispute over Iraq's compliance with its disarmament obligations under UN Security Council Resolution 687 which ended the 1991 Gulf War, a majority of both the Security Council- and a majority of its permanent members- have consistently argued that it is for the Security Council as a whole, and not individual states such as the U.S. or Britain, to decide how to enforce its resolutions. For example, during the last crisis with Iraq over inspections in 1998, a majority of the Security Council 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 UN Security Council unanimously adopted Resolution 1441, which set a new timetable and a new regime of inspections for Iraq. That Resolution does not authorize the United States to use force against Iraq.

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, and recalls that the Council has repeatedly warned Iraq that it will face “serious consequences” as a result of its continued violation of its obligations. Although, the “material breach” and “serious consequences” language will be used by the United States to argue that the Security Council has implicitly authorized the use of force in response to any Iraqi non-compliance, that is not a legally correct interpretation of the Resolution. Let us be clear: The Security Council resolution does not change the decade-long position of the Security Council that only it can decide how to enforce its own resolutions.

Although the resolution does not explicitly require another Security Council vote on authorization of military force, it is significant that Paragraph 4 of Resolution 1441 declaring that any failure by Iraq to comply with the resolution will constitute a “material breach” does require that such a breach “will be reported to the Security 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 is clear from the resolution that no individual member state is authorized to use any violation by Iraq, whether very minor and technical or more serious, as legal justification to attack Iraq. 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 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. Mexico’s Ambassador was explicit in casting his country’s vote for the resolution. He stressed that the use of force is only valid as a last resort, “with the prior, explicit authorization of the Security Council.”

As law professors and practicing lawyers, we are encouraged that the Security Council has placed itself front and center for the resolution of this issue concerning the disarmament of Iraq. The United Nations charter is a treaty binding on the United States and is part of our supreme Law of the land, by virtue of Article VI of the United States Constitution. We urge the Bush administration to comply with the Constitution, to comply with the UN Charter, and not unilaterally attack Iraq.

(Drafted by Jules Lobel, Professor of Law, University of Pittsburg, November 27, 2002.)

(If you are a law professor or practicing attorney, please consider adding your name to this statement. The statement, sponsored by Foreign Policy In Focus, will be presented to Congress and the media on December 10. Send your endorsement by December 8 to Erik Leaver <erik@fpif.org>.)