

2002

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Recommended Citation

Turner, Robert F. (2002) "Military Action against Iraq Is Justified," *Naval War College Review*: Vol. 55 : No. 4 , Article 7.
Available at: <https://digital-commons.usnwc.edu/nwc-review/vol55/iss4/7>

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MILITARY ACTION AGAINST IRAQ IS JUSTIFIED

Robert F. Turner

A controversial issue now in the news is whether under international law, it would be lawful for the United States, either alone or as a member of an international coalition, to use lethal force against Saddam Hussein personally or against Iraq.

Under international law lethal force can never be used unless it is necessary and proportional. If nonviolent remedies are available that can protect a nation's

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Naval War College Review, Autumn 2002, Vol. LV, No. 4

rights, they must be pursued. Force cannot be used to resolve traditional political or economic grievances. It is permitted only when necessary to protect against the threat or use of unlawful force. Thus the key issue here is whether Iraq's current regime constitutes a threat to the peace against the United States or other countries.

Saddam Hussein is truly unique. He is the only living head of state who has been denounced as an aggressor by the United Nations Security Council, for his attacks on Iran and Kuwait. He is the only head of state who has clearly used illegal weapons of mass destruction against his neighbors, and even against his own citizens. He is one of the few national leaders to have provided widespread support for international terrorism, including plots to murder a former president of the United States. In further violation of Security Council resolutions, Saddam has never

even pretended to denounce terrorism as a tool of international intercourse. He continues to encourage, incite, and support terrorism against Israel to this day.

Now that the Taliban has been removed from the political scene, at this writing Saddam stands alone in his long-standing refusal to comply with numerous UN Security Council resolutions, which demand that he allow international inspections of Iraq to determine if he is continuing to develop weapons of mass destruction. These resolutions are the result of Saddam's documented efforts to acquire such weapons, his unlawful use of these weapons, his history as a major international aggressor, and his frequent threats to use such weapons against other states. The purpose of the United Nations, set forth in Article 1 of its charter, is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace." The Security Council has made it clear that Saddam is a major threat to international peace and security.

At the San Francisco Conference of 1945, which produced the UN Charter, the committee that drafted Article 2 expressly stated that "the use of arms in legitimate self-defense remains admitted and unimpaired" by the charter. Indeed, the right of individual and collective self-defense was viewed by many as among the most important provisions of the charter. Senator Arthur Vandenberg, chairman of the committee that drafted Article 51,* governing self-defense, later told the Senate, "If the omission [of the right of collective self-defense] had not been rectified there would have been no Charter. It was rectified, finally, after infinite travail, by agreement upon Article 51 of the Charter. Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance."

In a 1949 speech to the Inter-American Bar Association, Senator Vandenberg emphasized that the fact that Security Council action could be blocked by a veto was a major factor in the decision to adopt Article 51. "If the Security Council fails to act—or is stopped from acting, for example, by a veto—Article 51 continues to confound aggression. The United Nations is thus saved from final impotence. So is righteous peace."

Historically, the United States has taken the view that the right of self-defense is implicit in every treaty and cannot be taken away. Thus when the international

* Article 51: "Nothing in the present Charter shall impair the inherent right of the individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense 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."

community sought, in the 1928 Kellogg-Briand Treaty, to outlaw the use of force as an instrument of policy, several states expressed an intention to include a reservation preserving their right to use force in self-defense. The United States responded by sending a diplomatic note to foreign offices around the world stating that it “believes that the right of self-defense is inherent in every sovereign State and implicit in every treaty. No specific reference to that inalienable attribute of sovereignty is therefore necessary or desirable.” Early on in the Kellogg-Briand negotiations, the United States also argued, “Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.”

There was a time when the “better view” thought it preferable that the aggressor actually strike the first blow. Only when a neighbor’s first platoon crossed the border and attacked could a state defend itself. There is a controversial doctrine in international law called “anticipatory self-defense,” holding that a state clearly about to be attacked need not willingly suffer the first blow when the evidence of attack is overwhelming. A classic example of this doctrine was Israel’s decision to strike first when the armies of Egypt, Jordan, and Syria massed on its borders in June 1967. I share the view that Israel was lawfully defending itself against an imminent attack.

What, however, if international law permitted countries to attack first on allegations alone? Would that not provide a legal loophole to mask aggression? It is an understandable concern, but one I believe to be no greater than what we face with false allegations of grounds for traditional self-defense. When Adolf Hitler invaded Poland, he alleged that Germany was attacked first. In 1950, Kim Il Sung alleged that South Korea had invaded the North and that he was acting in self-defense. The world saw through both lies.

Tyrants are still likely to lie, but the world can still pass judgment. Kuwait is neither going to invade Iraq nor mass its forces on its borders in preparation for invasion. The legal presumption must be strongly against anticipatory self-defense. However, in a setting like that of the Middle East in 1967, a victim of imminent aggression should not be forced to absorb the first blow. I submit the same holds true when a “repeat offender” like Saddam flagrantly rebels against Security Council resolutions in preparation for aggression.

This is all the more important in an age when the first attack could involve the slaughter of literally millions of innocent people. There is not the slightest reason why Saddam Hussein should be permitted a “free kick” with weapons of mass destruction against the United States or any other peace-loving country. He faces no present military threat that is not directly tied to his violation of Security Council resolutions, a fact that supports the conclusion that he intends to

use such weapons again. Article 25 of the UN Charter requires that all members “accept and carry out the decisions of the Security Council.” What Saddam is doing is illegal and threatens the security of the United States and the world community.

Following Iraq’s 1990 invasion of Kuwait, the Security Council passed Resolution 660, demanding Iraq’s immediate withdrawal. Saddam ignored the resolution and continued to rape and pillage Kuwait. Resolution 678, which the Security Council has repeatedly emphasized has never been repealed, authorizes the use of lethal force against Iraq if Saddam’s forces were not withdrawn by 15 January 1991. Saddam finally agreed to the conditions of Security Council Resolution 678, which included permitting UN weapons inspectors to monitor the termination of his weapons of mass destruction programs, but then he reneged on his promise. In my view, until Saddam fulfills the terms of the cease-fire agreement, Resolution 678 remains in force and Iraq remains a serious threat to international peace and to the security of all states. Since 1990 the Security Council has passed no fewer than sixty resolutions dealing with Iraq. If the Security Council lacks the courage to uphold the Charter, enforce its edicts, and protect international peace and security after recognizing the existing threat that Saddam poses to the world community, the states that are threatened by his unlawful behavior have a right to protect themselves.

Twenty-five hundred years ago, the great Chinese military strategist Sun Tzu wrote in the *Art of War*, “To win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.” I share Sun Tzu’s view.

I hope that Saddam Hussein has seen what has happened to his friends in al-Qa’ida and will now find it in his best interest to comply. However, if he does not, and the Security Council proves to be impotent, I believe it will be both legal and in the interest of world peace for the United States to work with other nations to remove Saddam from power.