

Waving a big stick

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Getting the world riled up over Iraq has served two purposes even if war does not materialize: shaking up Iraq and putting three permanent members of the Security Council (France, Russia and China) on notice that their inaction would result in the Council's marginalization.

Both tactics were successful, but that is only Part I. Part 2, dealing with actual use of force if needed, raises issues of legitimacy and is more complicated.

The United Nations Security Council, after eight weeks of negotiation and debate, on Friday approved a resolution strongly warning Iraq to disarm and clearing the way for military action if Saddam Hussein does not comply.

The debate that is not taking place is about the legitimacy of use of force in international relations.

After WWI, the U.S., realizing that powerful states invoked the right of preventive self-defense against weaker states, sought to punish that kind of bullying.

In 1919, the U.S. joined its allies in drafting the Treaty of Versailles, which stipulated the prosecution of the German emperor. It was the first time in history that a head of state would be prosecuted for what is now called aggression. The emperor sought refuge in the Netherlands, which found that no such crime existed in international law.

To avoid a recurrence of such evasion, the U.S. and France in 1928 signed the Kellogg-Briand Pact, named after the U.S. secretary of state and the French foreign minister. The treaty renounced war as an instrument of national policy.

It was on that basis that the U.S., France, the United Kingdom and the USSR signed an agreement in 1945 that established the Nuremberg International Military Tribunal, which

included a provision for the prosecution of "crimes against peace."

In 1946, the U.S. also proclaimed the Tokyo Charter for the prosecution of Japanese leaders. There, too, "crimes against peace" were included.

At Nuremberg and Tokyo, the U.S. insisted that an unprovoked armed attack by one state against another was such a crime. Arguments by the accused concerning preventive self-defense were categorically rejected.

After these trials, to make sure there was no doubt about it, the U.S. urged the drafters of the UN Charter to reject preventive use of force. The conclusion, Article 2(4), could not be clearer: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . "

Self-defense right inherent

This does not mean that a state is precluded from using force in self-defense, including anticipatory self-defense in cases of necessity. That right is described in the UN Charter as "inherent." The analogy to individual self-defense is that no one has to wait to be struck first before using force.

Iraq does not constitute an imminent, immediate or even short- term foreseeable threat against the U.S. that warrants anticipatory self-defense. Consequently, there is no legal or factual basis for the U.S. to resort to unilateral use of force at this point.

The International Court of Justice already condemned the U.S. once, during the Reagan administration, for its mining of the Nicaraguan harbors and for sending armed rebels from Honduras in an attempt to change the Sandinista regime by force.

Assuming the U.S. has no legitimate basis under international law to attack Iraq at this time, how can Congress resolve to authorize the president to use force, as he sees fit and when he sees fit?

Aside from the questionable constitutionality of Congress' delegation of its war power to the president, can Congress legitimize the use of force in violation of international law?

The answer is no.

This may be why the early beating of war drums for unilateral U.S. action gave way to the urging of those such as Secretary of State Colin Powell, who said a Security Council resolution authorizing force was necessary. If nothing else, such a resolution is the best shield against a charge of "aggression," though more likely the reason for seeking it was political opposition.

Unlike the first Bush administration, in which the president, vice president and secretary of state were lawyers sensitive to the values of the law, this president, vice president, secretary of defense and national security adviser are neither lawyers nor sensitive to the law.

This may well be why they are attracted to a theory of force that is contrary to international law.

No matter what the arms inspection fate may be, and no matter how the U.S. interprets the Security Council resolution, before resorting to the use of force, there should be a finding by the council that Iraq has materially breached portions of Security Council resolutions relevant to the preservation or maintenance of international peace and security.

Only such a finding can confer legitimacy on multilateral use of force.

The U.S. correctly wants to make sure that, in this first resolution, there would be no question that such a finding would be made if the Iraqi regime materially breaches the inspections. That is not an unreasonable position.

But the final judgment should be made by the Security Council.

In following this approach, the U.S. would be the champion of world order and world peace, and not its bully.

Victory without bloodshed

In the meantime, if arms inspection cleans Iraq of its weapons of mass destruction, and the U.S. continues its containment policy, the victory would be complete and without bloodshed.

Now the U.S. should put its efforts behind another Security Council resolution to establish, as it did for the former Yugoslavia in 1992, a commission to investigate Iraq's violations of international humanitarian law and of human rights.

It was the Yugoslavia commission (which I headed) that generated enough evidence to persuade the Security Council to establish the International Criminal Tribunal for the Former Yugoslavia in The Hague.

Today, Slobodan Milosevic stands accused before this tribunal of war crimes and crimes against humanity. Maybe tomorrow Saddam Hussein can be in the same situation.

If that occurs, the administration would have served peace and justice, and the world would be indebted to this country for its enlightened leadership.