Pace Law Review

Volume 30
Issue 2 *Winter 2010*

Article 18

January 2010

International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy

Geoffrey Corn
South Texas College of Law

Dennis Gyllensporre
Swedish Army

International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy

Geoffrey Corn[*] and Dennis Gyllensporre[♣]

In 1967, Israel faced a genuine strategic dilemma produced by the intersection of self-interest and international law defining the permissible authority for the use of military force.

---

[*] Associate Professor of Law at South Texas College of Law. Prior to joining the faculty at South Texas, Mr. Corn served as the Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, and Chief of the Law of War Branch, U.S. Army Office of the Judge Advocate General International and Operational Law Division. Mr. Corn also served as a member of the U.S. Army Judge Advocate General' Corps from 1992-2004. Previously, he was a supervisory defense counsel for the Western United States; Chief of International Law for U.S. Army Europe; and a Professor of International and National Security Law at the U.S. Army Judge Advocate General's School. Mr. Corn has served as an expert consultant to the Military Commission Defense team, and has published numerous articles in the field of national security law. He is a graduate of Hartwick College and the U.S. Army Command and General Staff College, and earned his J.D., *highest honors* at George Washington University and his LL.M., *distinguished graduate,* at the Judge Advocate General's School. He frequently lectures on law of war and national security law topics.

[♣] Dennis Gyllensporre is colonel in the Swedish Army, currently serving as Chief Executive Officer at the Swedish Armed Forces Headquarters in Stockholm. He is also PhD fellow at the Maastricht Graduate School of Governance, the Netherlands. Recent assignments include: Chief of Staff at Regional Command North, ISAF, Mazar-e-Sharif, Afghanistan; Chief of Doctrine and Concepts Branch, European Union Military Staff, Brussels, Belgium; Chief Operations Officer, Joint Military Commission, Tillo, Sudan; and Military Adviser at the Ministry of Defense, Stockholm, Sweden. He holds a master's degree in Military Arts and Science from U.S. Army Command and General Staff College and a MBA degree in Strategic Management from Warwick Business School, United Kingdom.

With mounting evidence that a coordinated attack by its Arab neighbors was imminent,[1] Israel confronted a truism in international law: the *prima facie* illegality of any initiation of armed hostilities absent authorization by the United Nations ("U.N.") Security Council.[2] Constrained by the obligation to conform its conduct to the use-of-force legal framework enshrined in the U.N. Charter,[3] Israel was ultimately required to choose between two legal courses of action. It could have presented the evidence of the imminent attack to the U.N. Security Council in an effort to obtain international sanction and perhaps assistance in preventing the attack; or, as it ultimately chose to do, it could have invoked the inherent right of self-defense codified in Article 51 of the Charter and thus act unilaterally to defend itself from what it concluded was an imminent attack.[4]

Neither of these options was especially desirable for Israel from the perspective of international legitimacy. Ideally, a state in Israel's position would choose the first option, a decision consistent with the fundamental international legal prohibition against aggressive use of force and the underlying purpose of the U.N. Charter: the prevention of war through the mechanism of the Security Council's collective process.[5] Israel's decision to act unilaterally[6] and to confront the almost inevitable international approbation produced by a potentially

---

1. *See* AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD 237-38 (2000).

2. *See, e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 182 (4th ed. 2005) ("the general prohibition of the use of inter-State force . . . [is] part and parcel of customary international law, as well as the law of the [U.N.] Charter").

3. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39. *See also* MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 223-25 (2005) (discussing Article 39).

4. Article 51 of the U.N. Charter states, in pertinent part, that "[n]othing 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 . . . ." U.N. Charter art. 51. *See also* O'CONNELL, *supra* note 3, at 226 (discussing Article 51).

5. *See* DINSTEIN, *supra* note 2, at 278-83 (defining collective process, or "collective security," as well as discussing its origin).

6. *See* SHLAIM, *supra* note 1, at 241.

invalid invocation of the right of self-defense reveals, however, a perceived delta between the ideal and the geostrategic reality of the U.N. collective security process. In the end, Israel chose to accept the burden of rebutting the presumption that a unilateral initiation of armed conflict is illegal, and to stand on its belief that the pre-emptive strike that initiated the Six Days War was a lawful act of self-defense.[7]

Six years later, Israel once again faced mounting evidence of an imminent, coordinated attack from its Arab neighbors.[8] Unlike 1967, however, the price of fighting the international legitimacy struggle at this time outweighed the perceived strategic value of a pre-emptive strike. As a result, Israel prepared for the inevitable and chose to forgo the military advantage that initiating hostilities would have undoubtedly offered.[9] On Yom Kippur in 1973, the coordinated attack predicted by Israeli intelligence became a reality, and Israel's decision to avoid the difficult challenge of fighting against not just a battlefield enemy, but also the presumption of international illegitimacy, very nearly led to a military and strategic catastrophe.[10] Nonetheless, Israel reaped virtually no benefit by attempting to claim the high ground of legitimacy and by waiting to become the victim of actual aggression. Instead, the collective security mechanism of the U.N. remained stalemated and Israel once again fought alone to achieve its strategic objective—only this time, by also having handed to its enemies precious operational initiative.[11] When confronting subsequent threats, and equipped with the experience of pursuing both options, Israel saw little merit in foregoing a preventive self-defense legal strategy. Thus, in 1981, when the nation once again faced an imminent threat,

---

7. *Id.* at 241-42. *See also* DINSTEIN, *supra* note 2, at 192 (arguing that "Israel did not have to wait idly by for the expected shattering blow . . . but was entitled to resort to self-defence as soon as possible").

8. *See* SHLAIM, *supra* note 1, at 319 (noting that Israel "had exceptionally detailed and precise information about the military capabilities and operational plans of the enemy").

9. *Cf. id.* (arguing that, rather than choosing to forgo the initiation of hostilities, Israel simply failed to anticipate the attack because its intelligence branch misread the available information).

10. *See id.* ("Military history offers few parallels for strategic surprise as complete as that achieved by Egypt and Syria . . . . [T]he Arab attack represented not just an intelligence failure but, above all, a policy failure.").

11. *See id.* at 318-19.

Israel asserted the provisions of Article 51 to justify airstrikes against an Iraqi nuclear facility.[12] This pattern has continued as the legal basis for virtually all military actions launched by Israel since 1973.

Thirty years later, the United States faced a similar dilemma. Convinced that Iraq was developing and stockpiling weapons of mass destruction ("WMD"), and that those weapons could easily end up in the hands of transnational terrorists for use against the U.S. homeland, President George W. Bush concluded that military action to eliminate the regime of Saddam Hussein was essential to protect the nation.[13] In retrospect, it is almost universally accepted that once he concluded that this threat existed, war against Iraq became inevitable.[14] What was not inevitable, however, was that the U.N. Security Council would sanction such action under the authority of Chapter VII of the Charter. Nonetheless, despite an unyielding belief that Iraqi WMD posed a legitimate threat,[15] the United States, unlike Israel in 1967 and 1981, chose to pursue the path of collective security rather than that of inherent self-defense as the legal basis for accomplishing its strategic objective.[16]

The Bush Administration's decision to oust Saddam Hussein from power would ultimately lead to Operation Iraqi Freedom.[17] While President Bush achieved his objective of

---

12. *See* DINSTEIN, *supra* note 2, at 47-48 (describing Israel's act of self-defense as "represent[ing] another round of hostilities in an on-going armed conflict" between Israel and Iraq).

13. *See, e.g.*, BOB WOODWARD, PLAN OF ATTACK 41-42 (2004) ("The mission in an Iraq war was clear: Change the regime, overthrow Saddam, eliminate the threats associated with him—the weapons of mass destruction, the terrorist ties, the danger he posed to his neighbors . . . .").

14. *See, e.g.*, *id.* at 27.

15. *See, e.g.*, *id.* at 92 (discussing President Bush's State of the Union Address where he asserts that Iraq has WMD). *See also* Address Before a Joint Session of Congress of the State of the Union, 2003 PUB. PAPERS 82 (Jan. 28, 2003).

16. *See* WOODWARD, *supra* note 13, at 284-85 (discussing Secretary of State Colin Powell's unsuccessful meeting with the U.N. Security Council and the formation of the "coalition of the willing"). *See also infra* note 38 (discussing the "coalition of the willing").

17. *See* Address to the Nation on Iraq, 2003 PUB. PAPERS 281, 281-82 (Mar. 19, 2003) (announcing the commencement of Operation Iraqi Freedom). *See also* O'CONNELL, *supra* note 3, at 66-68 (discussing the March 19, 2003 Presidential Address); *infra* note 37.

eliminating the Hussein regime, he utterly failed in his effort to obtain Security Council authorization for this action.[18] This ultimately led to the creation of the "coalition of the willing"[19] and an assertion of pre-existing Security Council authorization[20] that was regarded by most scholars and experts as incredible.[21] Thus, in the eyes of many, Operation Iraqi Freedom destroyed not only the Iraqi military, but the credibility of the United States as a nation committed to international rule of law. The perception of illegality regarding the United States's decision to initiate the war ran so deep that even the Secretary General of the United Nations condemned the action as a violation of international law.[22]

From a pure international law perspective, the decision of the United States to persist in its collective security theory of legality is certainly understandable. Although invocation of the 1990 Security Council authorization to use force against Iraq[23] provided a dubious legal basis for Operation Iraqi Freedom, it nonetheless reflected a commitment to the collective security paradigm of the U.N. Charter. It was the United States, after all, that submitted the matter to the Security Council, which essentially estopped the United States from then asserting an independent right of self-defense as a legal basis for its action. Such a view is consistent with the general understanding of the relationship between the inherent right of self-defense and the collective security mechanism established by the Charter.[24]

---

18. *See* WOODWARD, *supra* note 13, at 284-85.

19. *See id.* at 285; *infra* note 37.

20. *See* O'CONNELL, *supra* note 3, at 54-55.

21. Critics argue that the ad hoc arrangements between the United States, Micronesia, and Mongolia had little credibility as a coalition, and that the "coalition of the willing," *see infra* note 38, failed to meet the qualitative requirements of a multilateral intervention, *see* Sarah E. Kreps, *Multilateral Military Interventions: Theory and Practice*, 123 POL. SCI. Q. 573, 575 (2008-2009).

22. *See Iraq War Illegal, Says Annan*, BBCNEWS.COM, Sept. 16, 2004, http://news.bbc.co.uk/2/hi/3661134.stm ("The United Nations Secretary-General Kofi Annan has told the BBC the US-led invasion of Iraq was an illegal act that contravened the UN charter.").

23. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) (delineating the terms and conditions of the ceasefire that Iraq was to be bound by and thus ending the First Gulf War).

24. *See, e.g.*, DINSTEIN, *supra* note 2, at 286.

But international law—and, in particular, the law related to the use of force by States—is not an island unto itself. As events related to the war served to remind the United States and the world, strategic legitimacy and international law are inextricably intertwined. As Professor Anthony D'Amato so eloquently noted:

> The question the political analyst will ask . . . is not simply whether the acts at issue have violated some preexisting norm but rather, whether expectations entertained by effective elites about what is permissible may be inferred from their behavior. The question is eminently practical, for even those who do not regularly use the word "law" in their discourse, and even those who snicker when others use it, must make estimates about the subjectivities of allies and adversaries alike. These subjectivities necessarily include what those actors think is right. In a world in which allies and adversaries do not submit to intensive interviews and rarely volunteer or are permitted to tell the whole truth (if any part of it), deeds—actions and reactions—become one of the few available windows to what others are thinking, either consciously or unconsciously.[25]

It seems undeniable that decisions about the legality of military force have such profound influence on the perception of international legitimacy. The challenges for decision-makers confronted with the competing options of inherent self-defense and collective security are daunting. In addition to the strategic cost-and-benefit calculus, the legal and political ambiguity surrounding the concept of self-defense adds significant complexity to the process. Neither has the United Nations authoritatively narrowed down the interpretation of Article 51, nor do commonly accepted definitions exist to provide a clear distinction between preemption and preventive

25. INTERNATIONAL LAW ANTHOLOGY 53-54 (Anthony D'Amato ed., 1994).

war.[26] Like Israel decades before, the United States confronted a choice between the two competing theories of legality; and, as with Israel, neither seemed ideal. Asserting a right of self-defense as a legal basis for Operation Iraqi Freedom would have undoubtedly been considered overbroad by a majority of legal experts, and arguably inconsistent with the Charter paradigm once the Security Council had "seized" the issue of Iraq. But while we have learned much about the invalidity of the factual basis for launching the war since 2003, we have also learned that the U.S. effort to operate within the collective security framework of the United Nations fared little better. Indeed, much ink has been spilt by international law scholars and experts on the invalidity of the "authorization resurrection" theory ultimately adopted by the United States.[27]

What has received far less attention is the question of whether, from a broader perspective of international relations, the United States might have been better served by following the same course of action adopted by Israel in 1967. There is virtually no question that an assertion of a right of self-defense as its legal basis for Operation Iraqi Freedom would have earned the United States widespread criticism, particularly from legal scholars. But did the United States ultimately lose more than it gained by accepting the practical burden of convincing the Security Council that an authorization for the use of force was justified? What seems clear is that either "legal basis" course of action involved risk once the necessity

---

26. *See* DAVID M. ACKERMAN, CONGRESSIONAL REPORT SERVICE REPORT FOR CONGRESS: INTERNATIONAL LAW AND THE PREEMPTIVE USE OF FORCE AGAINST IRAQ 3 (2003), *available at* http://assets.opencrs.com/rpts/RS21314_20020923.pdf ("The exact scope of this right of self-defense . . . has been the subject of ongoing debate."). *See also* DINSTEIN, *supra* note 2, at 183 (discussing competing interpretations of Article 51).

27. *See generally, e.g.*, William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification For the Bush Doctrine of Preventative War*, 79 NOTRE DAME L. REV. 1365 (2004); Lori Fisler Damrosch & Bernard H. Oxman, *Agora: Future Implication of the Iraq Conflict: Editors' Introduction*, 97 AM. J. INT'L L. 553 (2003); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004); Winton P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004); Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law?*, 27 HASTINGS INT'L & COMP. L. REV. 457 (2004); Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT'L L.J. 1 (2003).

for war had been determined. Thus, it seems fair to ask whether asserting a self-defense basis for action could have produced second- and third-order effects that might have served U.S. and coalition interests better than pursuing the collective security course of action.

The events surrounding Operation Iraqi Freedom, like those surrounding the alternative approaches adopted by Israel decades earlier, raise an interesting and potentially important question: should a State that confronts what it believes is an inevitable and necessary use of force to protect its self-interest always assume the burden of persuasion for collective action? If, as indicated by its subsequent actions, the United States did not consider such an authorization necessary,[28] might it have been possible, at least in practical terms, to essentially shift the burden of persuasion to opponents of military action by invoking the right of self-defense, even if that invocation was considered by many to be premature? Considering the reality that both the United States and the United Kingdom had already committed politically to the conflict,[29] it is clear that any proposed U.N. Security Council resolution in opposition to the operation would have fallen victim to veto. Thus, while critics could have challenged the assertion of a self-defense-based right of action, it was not conceivable that their opposition could have been confirmed in the form of a U.N. Security Council resolution condemning that invocation. How then might this burden-shifting have impacted the perception of legality for the inevitable operation?

It is of course difficult in retrospect to ignore the reality of what actually transpired during the course of Operation Iraqi Freedom, and in particular, the failure of the United States to validate its assumption that Iraq was continuing to develop WMD.[30] But it is equally important to critique the process adopted by the United States from a prospective, rather than retrospective, point of view. This Article will explore the relationship between the application of the U.N. Charter's use of force provisions[31] and how compliance with those provisions

28. *See, e.g.*, WOODWARD, *supra* note 13, at 184 (describing President Bush's "if-you-don't-we-will challenge to the UN").

29. *See id.* at 178.

30. *Id.* at 435.

31. *See, e.g.*, U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their

impacts the "International Public Information"[32] effort related to the decision of a state or states to use military force. To this end, the United States's decision to seek U.N. Security Council authorization for the intervention in Iraq will serve as an illustration and provide context for the discussion. The purpose here is not to validate or condemn this decision. Indeed, there are many plausible reasons why a state might pursue such a course of action, even when it assumes that force can be employed based on an independent source of legality, such as the inherent right of self-defense.[33] Instead, the purpose of the Article is to simply explore whether the assumption that a state that plans to use force must always seek Security Council authorization is overbroad, and whether the structure of the U.N. Charter might even provide a subtle incentive for states facing a perceived threat to bypass the collective security apparatus in favor of assertions of self-defense, thereby shifting the burden of persuasion to opponents

---

international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ."). *See also* DINSTEIN, *supra* note 2, at 85 (discussing Article 2).

32. International Public Information is the subject of "a secret Presidential Decision Directive—PPD 68," which was issued by President Clinton in 1999. International Public Information (IPI) Presidential Decision Directive PPD 68 (Apr. 30, 1999), http://www.fas.org/irp/offdocs/pdd/pdd-68.htm. The purpose of the Directive was to leverage all components of the U.S. government in the effort to influence the international perception of U.S. policy and actions. *Id.* According to the Federation of American Scientists:

> The International Public Information [IPI] System is designed to "influence foreign audiences" in support of US foreign policy and to counteract propaganda by enemies of the United States. The intent is "to enhance U.S. security, bolster America's economic prosperity and to promote democracy abroad," according to the IPI Core Group Charter. The Group's charter statess [sic] that IPI control over "international military information" is intended to "influence the emotions, motives, objective reasoning and ultimately the behavior of foreign governments, organizations, groups and individuals." The IPIG will encourage the United Nations and other international organizations to make "effective use of IPI . . . in support of multilateral peacekeeping."

Id.

33. See DINSTEIN, *supra* note 2, at 175 (calling self-defense a "fundamental right of States" for states' survival).

of the conflict.

The authors acknowledge at the outset that considering the potential information payoff derived from such a policy and legal strategy might appear fundamentally inconsistent with the Charter's use-of-force legal framework.[34] But our purpose is neither to endorse nor condemn that framework. Instead, it is simply to acknowledge and consider the broader consequences produced by how states interpret and invoke that framework. Nor do we believe that this is a purely retrospective issue. Indeed, our purpose is more prospective. Like Israel in 1967 and President Bush in 2003, it seems that the United States, South Korea, and other like-minded allies are presently confronting their own potential use-of-force dilemma created by an increasingly bellicose and dangerously armed North Korea.[35] If, at some point, the United States and its allies, committed to preventing the dangerous reality of a nuclear capable North Korea, decide that military action is necessary, would presentation of the issue to the U.N. Security Council be the wisest course of action? It would certainly be difficult to ignore the reality that the Council is now seized of the issue.[36] But it would also be difficult to ignore the reality that several permanent members would be highly unlikely to support an authorization for the use of force against North Korea.

If, and the authors certainly hope this will not be the case, President Obama reaches his own "decisive point" for taking military action, would a more effective course of action be to follow the Israeli approach from 1967? Like Israel's actions, such an approach would undoubtedly produce widespread criticism. But would military action following a failed attempt to obtain Security Council authorization be more damaging to the overall perception of credibility? This is not an easy question to resolve, but if this Article does nothing more than to highlight the geostrategic reality that selecting a legal

34. *See id.* at 85.

35. *See, e.g.*, Kwang-Tae Kim, *South Korea Says North Fires Seven Missiles Off East Coast*, CHINAPOST.COM, July 5, 2009, http://www.chinapost.com.tw/asia/regional-news/2009/07/05/214934/South-Korea.htm.

36. *See* S.C. Res. 1874, ¶ 34, U.N. Doc. S/RES/1874 (June 12, 2009) (The Security Council decided to "remain actively seized of the matter" involving North Korea's nuclear program).

course of action is far from a "zero sum" game—that following either course of action involves the inherent risk of perceived illegitimacy, and therefore that it might be logical to select the choice that mitigates that risk to the greatest extent possible—the authors will have accomplished their limited purpose.

International Legality and National Security

Operation Iraqi Freedom[37] provides a classic example of the profound relationship between the perception of compliance with international law and the legitimacy of actions executed to implement national security objectives. The efforts of the Bush Administration to create a public perception of international legitimacy for the conflict— first by seeking to persuade the U.N. Security Council to authorize military action, and subsequently, through the conduit of the "coalition of the willing"[38] and the not-so-subtle marginalization of the Security Council[39]—illustrate that the legal basis for military action is a critical component in shaping the overall perception of the legitimacy of state action to implement national security imperatives.

Complicating the importance of the perception of legality is the reality that the use of military force to implement national

37. *See* CATHERINE DALE, CONG. RESEARCH SERV., OPERATION IRAQI FREEDOM: STRATEGIES, APPROACHES, RESULTS, AND ISSUES FOR CONGRESS, at i (2009), *available at* http://fas.org/sgp/crs/natsec/RL34387.pdf (stating that "Operation Iraqi Freedom (OIF), the U.S.-led coalition military operation in Iraq, was launched on March 20, 2003, with the immediate stated goal of removing Saddam Hussein's regime and destroying its ability to use weapons of mass destruction or to make them available to terrorists."). *See also* Address to the Nation on Iraq, 2003 PUB. PAPERS 277, 278 (Mar. 17, 2003) (giving a 48-hour ultimatum to Saddam Hussein and his sons).

38. "Coalition of the willing" is a term first used by President Bush in a speech at a North Atlantic Treaty Organization ("NATO") Summit in Prague in November 2002, in which he said that "the United States will lead a coalition of the willing to disarm [Saddam Hussein]." *Bush: Join Coalition of the Willing*, CNN.COM, Nov. 20, 2002, http://edition.cnn.com/2002/WORLD/europe/11/20/prague.bush.nato (the term was used to refer to the forty-nine countries that verbally or militarily supported the 2003 invasion).

39. *See, e.g.*, NAT'L LAWYERS GUILD, ATTACKING IRAQ, SUBVERTING INTERNATIONAL LAW 2, http://www.pegc.us/archive/Organizations/NLG_iraq_fact_sheet.pdf (last visited Oct. 18, 2009) (noting that Security Council members France, Russia, and China have consistently opposed U.S. intervention in Iraq).

or international security interests is rarely without controversy.[40] This is the result of a simple truism: use of force is today considered a measure of last resort in seeking to achieve national or international strategic objectives.[41] Accordingly, the legitimacy of any employment of combat power by a state will inevitably be critiqued by testing its compliance with international law governing the use of force. Operation Iraqi Freedom and the first Gulf War in many ways reflect opposite ends of this "legitimacy" spectrum.[42] However, the post-9/11 paradigm of treating transnational threats posed by non-state actors as "armed conflicts,"[43] along with the continued risk of conflict triggered by nuclear proliferation, suggest that future military actions by the United States and other states may very well continue to tend towards the Operation Iraqi Freedom-end of the legitimacy spectrum. Indeed, the post-9/11 recommendations by the Secretary General of the United Nations that emphasized the need to enhance the responsiveness of the United Nations' collective security mechanism to such emerging threats, seems to reflect this reality.[44] However, unless and until such reforms are implemented, the challenge in executing national security policy in a manner that is perceived as legitimate under international law will remain significant.

---

40. *See* DINSTEIN, *supra* note 2, at 124 (stating that "the criminality of aggressive war has entrenched itself in an impregnable position in contemporary international law").

41. *See id.*

42. *See id.*; O'CONNELL, *supra* note 3, at 22-82 (discussing the two invasions of Iraq as a case study in international legality for the use of force).

43. *See* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 796-803 (2008). *See also* Memorandum from Attorney General Alberto Gonzales to President George W. Bush, Decision Regarding Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *available at* www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf (articulating the basis for the conclusion that Al Qaeda detainees are not covered by either Common Article 2 or the humane treatment obligations of Common Article 3 of the Geneva Convention).

44. *See* Patrick E. Tyler & Felicity Barringer, *Annan Says U.S. Will Violate Charter if it Acts Without Approval*, N.Y. TIMES, Mar. 11, 2003, at A10 ("Secretary General Kofi Annan warned today that if the United States fails to win approval from the Security Council for an attack on Iraq, Washington's decision to act alone or outside the Council would violate the United Nations charter.").

How the international law regarding the use of force relates to this challenge—or, perhaps more precisely, how informational burdens of persuasion related to that law impact the relative perception of legitimacy—is therefore a critical issue in the intersection between international law and national security policy. Using the example of Operation Iraqi Freedom, this Article will question whether the diplomatic and associated informational courses of action adopted by the Bush Administration made the most effective use of the pragmatic burdens of persuasion related to articulating a legitimate legal basis for armed conflict. The Article will suggest that asserting an alternate—and, in the view of many, an equally viable[45]—theory of international legality might have enhanced the perceived legitimacy of Operation Iraqi Freedom. Finally, the essay will consider whether asserting a self-defense right of action in the face of an emerging threat could functionally shift the informational burden of persuasion to opponents of the use of military force, and how such a shift in relation to Operation Iraqi Freedom might have helped the United States obtain support—or, at a minimum, mitigate opposition—from traditional European diplomatic and security partners.

This is not, however, an issue isolated to a retrospective assessment of Operation Iraqi Freedom. Indeed, as this Article was being written, North Korean leaders are threatening war against the United States, and President Obama has publicly stated that North Korea's nuclear ambitions pose a "grave threat" to the world,[46] and that the nation cannot be permitted to possess nuclear weapons.[47] Should he conclude that the use of force is necessary to ensure this strategic imperative, President Obama could soon find himself confronting a dilemma similar to that faced by his predecessor. Should the United States seek authorization for such a use of force

45. *See generally, e.g.*, PAUL SCHOTT STEVENS, ANDRU E. WALL & ATA DINLENC, THE FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, THE JUST DEMANDS OF PEACE AND SECURITY: INTERNATIONAL LAW AND THE CASE AGAINST IRAQ (2002), *available at* http://www.fed-soc.org/doclib/20070325_iraqfinalweb.pdf.

46. United States President Barack Obama & Republic of Korea President Lee Myung-Bak, Joint Remarks (June 16, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-President-Lee-of-the-Republic-of-Korea-in-Joint-Press-Availability.

47. *Id.*

through the Security Council? Or would a more effective course of action be to assert the right to act in individual and collective self-defense, and thereby shift the burden of discrediting this assertion to opponents of military action? Although a "rearview mirror" perspective of Operation Iraqi Freedom renders it difficult to consider that event as a paradigm for the cost-benefit equation associated with such a course of action, the continuing reality of global insecurity makes it a worthwhile endeavor.

I. Background

Although the United States initially suggested that it was committed to obtaining authorization for the conflict through the U.N. Security Council,[48] its inability to persuade fellow Council members that there was a legitimate *causus belli* ultimately resulted in a dilemma for the United States. It was clear to almost all observers that by the time the United States sought and failed to obtain express Security Council authorization for Operation Iraqi Freedom, it had already committed to war. What then could be asserted as a legal basis for the action? And how could the United States proceed without implicitly undermining the United Nations collective security process? The United States's answer reflected a schizophrenic reaction to its failure to obtain authorization. Its refusal to revert to a pure self-defense theory of legality can be seen as a validation of the limits of such assertions and a

48. *See* Address to the United Nations General Assembly in New York City, 2002 PUB. PAPERS 1572, 1576 (Sept. 12, 2002). In his address, President Bush expressed an intent to work and cooperate with the United Nations in regards to Iraq:

> My Nation will work with the U.N. Security Council to meet our common challenge. If Iraq's regime defies us again, the world must move to deliberately, decisively to hold Iraq to account. We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced—the just demands of peace and security will be met—or action will be unavoidable.

Id.

commitment to continue to operate through the collective security process. However, by using the 1990 U.N. Security Council Resolution authorizing the first Gulf War[49] as a legal basis for its 2003 action, in spite of the fact that the Security Council had considered and rejected the call for a new "all necessary means" authorization,[50] the United States impliedly rejected the United Nations' use-of-force authorization process. Additionally, as if to complicate matters more, even after it sought a "resurrected" Resolution 687 authority for action, the United States continued to suggest an independent right of individual and collective self-defense, as reflected in the following excerpt from a letter submitted by the United States to the Security Council immediately after initiating military action to depose Saddam Hussein:

> Iraq repeatedly has refused, over a protracted period of time, to respond to diplomatic overtures, economic sanctions and other peaceful means, designed to help bring about Iraqi compliance with its obligations to disarm and to permit full inspection of its weapons of mass destruction and related programmes. The actions that coalition forces are undertaking are an appropriate response. *They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.* Further delay would simply allow Iraq to continue its unlawful and threatening conduct.[51]

While the public posture of the Bush Administration suggested that the final U.N. Security Council Resolution, which referred to "serious consequences" for continued

---

49. *See* S.C. Res. 687, *supra* note 23.

50. *See generally* SEAN D. MURPHY, 2 UNITED STATES PRACTICE IN INTERNATIONAL LAW, 2002-2004 (2005).

51. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003) [hereinafter Letter from the Permanent Representative] (emphasis added).

resistance to inspections,[52] served as a justification for the conflict, that Resolution standing alone never served as the United States's official theory of international legality.[53] Instead, in what many experts perceived as an act of desperation,[54] the United States asserted that the "serious breach" language of Security Council Resolution 1441 essentially nullified the cease-fire of 1991, thereby resurrecting the original 1990 Resolution 687's "all necessary means" authorization as a legal basis for military action.[55] While this

52. S.C. Res. 1441, ¶ 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (stating that "the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violation of its obligations").

53. *See generally* John C. Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

54. *See* Mary Ellen O'Connell, *Addendum to Armed Force in Iraq: Issues of Legality*, AM. SOC'Y INT'L L. INSIGHTS (2003), http://www.asil.org/insigh99a1.cfm (last visited Oct. 18, 2009).

> The Council passed resolution 1441 on November 12, 2002, but it provided no new authorization for using force. It states in paragraph 12 that a meeting of the Security Council will be the first step upon a report by inspectors that Iraq obstructed their activities. Russia, France and China have all stated they understood resolution 1441 permitted no automatic use of force. Subsequently, in fact, members of the Council were unwilling to adopt a proposed resolution that would authorize force to enforce Iraqi disarmament. Resolution 1441 states affirmatively that in the event of a material breach by Iraq of its obligations to cooperate, serious consequences would follow. But, again, the resolution does not say what serious consequences would follow. Nor did it provide any right of unilateral US/UK enforcement.

Id.

55. *See* Letter from the Permanent Representative, *supra* note 51. According to this letter:

> Coalition forces have commenced military operations in Iraq. These operations are necessary in view of Iraq's continued material breaches of its disarmament obligations under relevant Security Council resolutions, including resolution 1441 (2002). The operations are substantial and will secure compliance with those obligations. In carrying out these operations, our forces will take all reasonable precautions to avoid civilian casualties.
>
> The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of

may have been a plausible theory of legality, many other governments obviously considered it disingenuous,[56] particularly because the United States had aggressively pursued a new "use of force" resolution even after passage of the "serious consequences" resolution,[57] but had abandoned that effort when failure seemed inevitable.[58]

In seeking a Security Council resolution to authorize the conflict during its march to war, the United States clearly

---

> obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).

Id. *See also* S.C. Res. 687, *supra* note 23. Several of the conditions listed in Resolution 687 were later violated and then used by the Bush Administration as support for Operation Iraqi Freedom.

56. See NAT'L LAWYERS GUILD, *supra* note 39.

> 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.

Id. at 2.

57. S.C. Res. 1441, *supra* note 52.

58. *See* Yoo, *supra* note 53, at 563.

accepted the informational burden of persuading other members of the Security Council that military action was necessary to oust Saddam Hussein from power and to facilitate the accomplishment of the United States's national strategic objectives. In retrospect, it is appropriate to question whether accepting this burden ultimately undermined the legality, as well as the legitimacy, for Operation Iraqi Freedom. Would it have been more effective to "shift" this burden to those members of the Security Council opposed to military action by asserting an alternative legal basis? While this essay will necessarily summarize alternate legal theories for the conflict, it is not the intent of the authors to provide a comprehensive analysis of this body of law. Instead, our purpose is to highlight the relationship between the selection of a theory of legality for the use of force as it relates to emerging threats and the development of international support for responsive military actions. Ultimately, what we suggest is that, because there was no theory of legality immune to legitimate criticism, adopting a theory that shifted the burden of persuasion to those opposed to the conflict might have substantially contributed to the political objective of mobilizing international support for the conflict, or, at a minimum, mitigated the risk of international opposition.

II. Theories of International Legality for the Use of Force[59]

Prior to World War I, the authority to wage war was considered a sovereign prerogative of nation-states.[60] While

59. This article is based on the premise that the U.N. Charter use-of-force paradigm will continue to be regarded by the international community as the definitive source of authority for the legal employment of force by states, and that the United States will continue to aver from "outside the Charter" theories of legality for the use of force. For an excellent analysis of why the use-of-force paradigm reflected in the U.N. Charter is no longer viable, either legally or pragmatically, see Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2001-2002) (arguing that the concept of self-defense reflected in Article 51 of the U.N. Charter is inconsistent with the pre- and post-Charter practice of states, and with the pragmatic needs of national security).

60. *See* DINSTEIN, *supra* note 2, at 75 (stating that "the predominant conviction in the nineteenth (and early twentieth) century was that every State had a right—namely, an interest protected by international law—to

international law did establish certain procedural requirements related to such decisions[61] and provided the authority for determining the legal effects of war,[62] there was virtually no requirement that states establish an international legal basis for their decisions to wage war. Following World War I, the international community began to alter this paradigm in an attempt to limit the resort to war as a means of achieving state objectives. These efforts culminated in two groundbreaking—but ultimately ineffective—international legal developments. The first was the attempt to establish a collective security mechanism in the form of the League of Nations.[63] The second was the attempt to outlaw war by treaty in the form of the Kellogg-Briand Pact.[64] Unfortunately, the well intentioned efforts of the international community to ensure that World War I was truly the "war to end all wars"[65] proved ineffective, and the world once again descended into the abyss of global conflict. While World War II clearly revealed the failures of the prior efforts to eliminate war as a tool of national policy, it also resulted in a renewed commitment to establish a truly effective source of international regulation on the use of force.[66] The end result of this commitment was the

---

embark upon war whenever it pleased").

61. *See, e.g.*, The Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 205 Consol. T.S. 263 (Third Hague Convention) (mandating a declaration of war).

62. *See* Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, Consol. T.S. 277 (Fourth Hague Convention).

63. *See* League of Nations Covenant.

64. *See* Treaty between the United States and Other Powers providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), U.S.-Fr., Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

65. President Woodrow Wilson is generally regarded as given authorship to this quote. *See, e.g.*, RALPH KEYES, THE QUOTE VERIFIER 240-41 (2006). *See also, e.g.*, EDWARD M. COFFMAN, THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I (1998).

66. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22-23 (Jean S. Pictet ed., 1960). *See also* U.N. Charter art. 1, ¶ 1. The U.N. Charter states that some of the purposes of the U.N. include:

> 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, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the

creation of the United Nations, and the vesting of that body with the principal responsibility for the maintenance of international peace and security.[67]

The Charter of the United Nations is generally regarded today as establishing the exclusive international legal criteria for determining—and by implication, critiquing—the legality of the use of force by states.[68] The legal authority for states to use force is found in two principal articles of that treaty. The first is Article 42, which provides that:

> Should the Security Council consider that measures 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.[69]

Because this article is found in Chapter VII of the Charter, Security Council resolutions invoking the authority of this article are customarily referred to as "Chapter VII" mandates, and historically include the requisite "all necessary means" language.

However, it is essential to understand the relationship

> principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . ."

Id.

67. *See* JOHN NORTON MOORE, FREDERICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW 47 (1990).

68. While there have always been, and continue to be, theories of use-of-force legality "outside" the Charter paradigm—such as a customary international law right of humanitarian intervention—analysis of such theories is beyond the scope of this Article. Furthermore, there is no indication that the United States has ever officially endorsed the validity of such "outside the Charter" theories of legality. For a comprehensive analysis of the international legal basis for Operation Iraqi Freedom, see Michael N. Schmitt, *The Legality of Operation Iraqi Freedom Under International Law*, 3 J. MILITARY ETHICS 82 (2004).

69. U.N. Charter art. 42.

between this article and other articles involving the Security Council's authority to maintain international peace and security.[70] Because the Charter paradigm endeavors to ensure that resort to force in international relations is a genuine measure of last resort, prior to authorizing member states to use force under the provisions of Article 42, the Security Council must satisfy two conditions precedent. First, the Council must make a finding pursuant to Article 39 that there has been a "threat to the peace, breach of the peace, or act of aggression."[71] Second, the Council must make a finding that measures short of the use of force (such as sanctions, embargoes, etc.) would either be inadequate, or have already proved to be inadequate.[72] Thus, while there is no requirement that the Council exhaust all non-use-of-force-methods prior to authorizing use of force to restore or maintain international peace and security, there must be an explicit determination by the Council that the use of anything short of force would be ineffective.

The second provision of the Charter related to the use of force is Article 51, which provides:

> 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

70. *See generally* DINSTEIN, *supra* note 2.

71. U.N. Charter art. 39. This article, also known as the "Collective Peace Theory," states that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

72. *Id.* art. 42.

international peace and security.[73]

Article 51 includes several critical sub-provisions related to the authority of states to engage in armed conflict. First and foremost, it was included in the Charter as an express recognition that, even though the Security Council was vested with "primary"[74] responsibility for the maintenance of international peace and security, member states would never be divested of their individual right to defend themselves against aggression. Second, this article explicitly endorsed the authority of states to act collectively in response to aggression. Prior to this development, there was virtually no dispute that states had the authority to defend themselves against aggression.[75] Indeed, the article's reference to an "inherent" right has traditionally been regarded as an acknowledgment that the authority to act in self-defense was an essential aspect of sovereignty, and not a "right" established by the Charter.[76] But Article 51 went one step further by acknowledging the right of collective self-defense.[77] In short, this was an explicit effort to allow the "good" big guys to help the "good" little guys against the "bad" big guys—a theory that has been employed by the United States to justify initial actions in several major conflicts, including Korea, Vietnam, and the first Gulf War.[78] It seems clear from the terms of the article that exercise of this right was intended to be a temporary measure pending assumption of the security situation by the Security Council. However, there is no stated limit to the recognized authority of states to act in their own self-defense or in collective defense against aggression.

---

73. *Id.* art. 51.

74. *Id. See also* U.N. Charter art. 24, ¶ 1 (stating that "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf").

75. *See* Glennon, *supra* note 59, at 541-42 (discussing the traditionally understood requirement of "armed attack" as the trigger for the right of self-defense).

76. *See* Leo Van Den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 73 (2003).

77. *See* DINSTEIN, *supra* note 2, at 178-79.

78. *See generally id.*

Perhaps the most controversial aspect of Article 51 has been the "trigger" for when a state or states may rely on this authority for the use of force.[79] The plain language of the article refers to an "armed attack" as the condition precedent for the lawful invocation of this authority.[80] However, this authority has historically been interpreted more expansively than this language suggests.[81] Under customarily accepted theories of international law, the "armed attack" provision is satisfied when such an attack is "imminent."[82] Although the definition of this term has always been the source of some debate around the edges, the essence of the "imminent attack" standard has historically been understood as allowing states to act in individual or collective self-defense when they determine that an act of illegal aggression is immediately impending and inevitable.[83]

Historically, narrowly defining the scope of individual and collective self-defense authority was considered essential to prevent abuse of that authority as a subterfuge for acts of

---

79. *See id.* at 183 (arguing that states may only rely upon self-defense as authority for a use of force where an "armed attack" has, in fact, occurred).

80. U.N. Charter art. 51.

81. *See generally* DINSTEIN, *supra* note 2; Van Den Hole, *supra* note 76.

82. *See* DINSTEIN, *supra* note 2, at 182 (suggesting that "the imminence of an armed attack . . . does indeed justify an early response by way of interceptive self-defence"). *See also* THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf; Yoo, *supra* note 53, at 563, 571-72. The George W. Bush Administration articulated the U.S. position post- 9/11, in regards to the issue of "imminence":

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

THE WHITE HOUSE, *supra*, at 15.

83. *See generally* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963). *See also* DINSTEIN, *supra* note 2, at 182 (stressing that a state may only assert self-defense as a lawful basis for a use of force when there is an imminent armed attack and there is "no longer a mere threat").

illegal aggression.[84] However, it seems apparent that endorsing a limited scope of self-defense was only one aspect of preventing such abuse. The language of Article 51 illustrates a construct that acknowledges the inherent authority of states to make the initial judgment of when an action of self-defense is authorized, but then relies upon the collective security mechanism established by the Charter—i.e., the Security Council—to critique that judgment, and, where necessary, take actions to reverse an unjustified assertion of the inherent right of self-defense.[85] Accordingly, any state asserting an inherent right of individual or collective self-defense pursuant to Article 51, as a legal basis for military action, is obligated to immediately report the action to the Security Council.[86] The authority for such action may be subsequently superseded if, in response to such a report, the Security Council authorizes measures to restore international peace and security. Thus, the Security Council serves as the primary monitor for the legitimate exercise of Article 51 authority.[87]

It is therefore apparent that international law does not grant states *carte blanche* authority to invoke the inherent

---

84. *See generally* Van Den Hole, *supra* note 76.

85. The text of Article 51 reflects an obvious balance between the authority of states to make this initial self-defense judgment and the complementary authority of the Security Council to critique that judgment and respond as it deems necessary to address the security situation.

> 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.

U.N. Charter art. 51.

86. *Id.*

87. *See id.* arts. 24, 39. Article 39 states that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. Charter art. 39.

right of individual or collective self-defense, but instead, places limits on that right through both customary definitions related to legitimate invocations and the grant of authority to the Security Council to functionally assume authority over situations triggering state invocation of this right. However, it is equally apparent that states are vested with the authority—and, from their individual perspectives, the obligation—to interpret conditions establishing a *prima facie* trigger of this right. Like the invocation of any right provided by law, the further removed the invocation becomes from accepted definitions, the more difficult it becomes for the party invoking the law to sustain support for that interpretation. However, because of the deliberate and unquestioned intertwining of state authority to act in self-defense and Security Council authority to ensure international peace and security, the practical inter-relationship of these authorities produces significant informational second- and third-order effects.

III. Burdens of Persuasion and the U.S. Approach to Operation Iraqi Freedom

Reflecting back on the strategy employed by the United States to garner international support for military action against Iraq, it is virtually impossible to dispute an initial policy preference in favor of obtaining a use-of-force authorization from the Security Council. To this end, the United States effectively lobbied the Council to pass Resolution 1441.[88] This Resolution, which was touted extensively by the Bush Administration during the build-up to the conflict, noted Iraq's continuing violation of previous Security Council Resolutions; found Iraq in "material breach" of prior obligations

88. S.C. Res. 1441, *supra* note 52. The Security Council held Iraq in "material breach" of its obligations under previous resolutions and consequently decided to afford it a "final opportunity to comply" with its disarmament obligations, which had been established in Resolution 687 (1991). *Id.* ¶ 2. *See also* S.C. Res. 687, *supra* note 23. By its unanimous adoption of Resolution 1441, the Council ordered that the resumed inspections begin within forty-five days, and also decided that it would convene immediately upon the receipt of any reports from inspection authorities stating that Iraq was interfering with their activities. S.C. Res. 1441, *supra* note 52, ¶ 5. It recalled, in that context, that the Council had repeatedly warned Iraq that it would face "serious consequences" as a result of continued violations. *Id.* ¶ 13.

imposed by the Security Council; granted Iraq a "final opportunity to comply with . . . disarmament obligations";[89] and "recalled" that the Security Council had repeatedly warned Iraq that it could face "serious consequences" for continued non-compliance with prior Security Council Resolutions.[90]

Experts in international law would ostensibly have a simple explanation for why the United States chose the "collective security" path: it was the path most consistent with international law. This indeed may be true, especially considering the undisputed fact that the United States had been working within that process since the crisis with Iraq began in 1990. However, it is also undisputed that, by following that path, the United States in effect accepted a burden of persuasion—a burden that it ultimately failed to satisfy.[91] Contrary to the arguments ultimately advanced by the United States and other members of the Coalition, it is highly questionable whether Resolution 1441 provided a genuine legal basis for military action against Iraq.[92] In fact, although the Bush Administration routinely cited the "material breach" and "serious consequences" language of that Resolution, the United States never claimed that the Resolution, standing alone, established such a basis. Even after failing to secure a subsequent "all necessary means" resolution from the Security Council, with the accordant declaration by President Bush that the Security Council had "not lived up to its responsibilities,"[93] the United States continued to assert a basis of international legality firmly rooted in the U.N. Charter use-of-force paradigm. In a scarcely publicized letter issued after the initiation of combat operations in Iraq and written by U.S. Ambassador to the United Nations John Negroponte to the Secretary General of the United Nations, the United States cited as its international legal basis for the action the prior "all necessary means" Security Council resolution from the first Gulf War:

89. S.C. Res. 1441, *supra* note 52, ¶ 2.
90. *Id.* ¶ 13.
91. *See, e.g.*, Yoo, *supra* note 53, at 563.
92. *See generally* Schmitt, *supra* note 68.
93. Address to the Nation on Iraq, *supra* note 37.

> The actions being taken are authorized under existing Council resolutions: including resolution 678 (1990) and resolution 687 (1991). Resolution 687 imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were the conditions of the cease-fire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).[94]

This letter indicates quite persuasively that the United States was unwilling to pursue an "extra-Charter" legal theory for Operation Iraqi Freedom.[95] However, this excerpt also provides conclusive evidence of the Bush Administration's recognition that Resolution 1441 did not, standing alone, provide the authority to initiate hostilities against Iraq, but only added weight to the Resolution 687 "resurrection" argument, to which Coalition members were forced to resort.

The failure of the United States to secure passage of a new use-of-force resolution following the unanimous passage of Resolution 1441, and the subsequent need to resort to reliance on Resolutions 678[96] and 687 as a legal basis for military action

---

94. Letter from the Permanent Representative, *supra* note 51.

95. *See* Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT'L L. 804, 807 (2003) ("Furthermore, hegemonist policies were placed within, and not outside, the law. Importantly, all the actors involved . . . argued from within, not outside, the system. This practice underlines that the normativity of the Charter framework was not itself called into question.").

96. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (authorizing states to use "all necessary means to uphold and implement" prior resolutions directing Iraq to withdraw from Kuwait).

against Iraq, reveals the consequence of accepting the collective security burden of persuasion. There is virtually no doubt that the United States recognized, even at the time of its passage, that Resolution 1441 failed to provide sufficient authority for use of force against Iraq. Indeed, the Resolution was explicit in its requirement that the Security Council would take additional action in the event of further Iraqi non-compliance, and that other permanent members of the Council had relied upon this to support their views on the invalidity of a subsequent resort to Resolution 687.[97] Instead, it appears that

97. *See* Joint Declaration From Russia, Germany and France (Feb. 11, 2003) (Russ.), http://www.ln.mid.ru/bl.nsf/900b2c3ac91734634325698f002d9dcf/3fbc1d99bafe867843256cca004a4865?OpenDocument. This declaration noted:

> Russia, Germany and France, in close coordination, reaffirm that disarming Iraq, in accordance with the relevant UN resolutions since U.N. Resolution 687, is the common objective of the international community and that it must be achieved as soon as possible.
>
> There is a debate on how this should be done. This debate must continue in the spirit of friendship and respect that characterises our relations with the United States and other countries. Any solution must be inspired by the principles of the United Nations charter as were recently quoted by the secretary general Kofi Annan.
>
> U.N. Resolution 1441, adopted unanimously by the U.N. Security Council, provides a framework of which the potential has not yet been thoroughly exploited.
>
> The inspections led by the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) have already produced results. Russia, Germany and France favour the continuation of the inspections and a substantial reinforcement of their human and technical capacities through all possible means and in liaison with the inspectors, in the framework of the U.N. resolution 1441.
>
> There is still an alternative to war. The use of force can only be considered as a last resort. Russia, Germany and France are determined to ensure that everything possible is done to disarm Iraq peacefully.
>
> For the inspections to be completed, it is up to Iraq to actively cooperate with the IAEA and the UNMOVIC. Iraq must fully accept its responsibilities.
>
> Russia, Germany and France note that the position they are expressing is similar to that of a large number of countries within the Security Council.

the United States considered Resolution 1441 as an important aspect of "setting the conditions" for the use-of-force authorization that it sought, but ultimately failed, to obtain.[98] In selecting this legal authorization course of action, the United States accepted the burden of persuading other members of the Security Council not only that the use of military force against Iraq was justified as a collective security enforcement measure under Article 42 of the Charter, but also that the use of force must proceed according to a timetable dictated by the United States and its Coalition partners.[99]

Perhaps the Bush Administration genuinely believed that it would prevail in carrying this burden of persuasion. Certainly the build-up to the *causus belli* presentation by Secretary of State Colin Powell reflected an all-out effort by the United States to satisfy this burden.[100] While there has been much criticism directed at the veracity of the information presented, there has been little consideration of the practical corner the United States effectively backed itself into through this process. By accepting the burden of persuasion, the United States conceded to opponents of military action the *de facto* power to define both legality and legitimacy. Only by satisfying this burden *vis-a-vis* the four other permanent members of the Security Council[101]—and thereby eliminating

---

Id.

98. Colin Powell, Sec'y of State, Address to the United Nations Security Council (Feb. 5, 2003), http://www.guardian.co.uk/world/2003/feb/05/iraq.usa.

99. *Bush's Speech on Iraq: "Saddam Hussein and His Sons Must Leave"*, N.Y. TIMES, Mar. 18, 2003, at A14.

100. *See Powell's Address, Presenting "Deeply Troubling" Evidence on Iraq*, N.Y. TIMES, Feb. 6, 2003, at A18.

101. The composition of the Security Council is set forth as the following:

> The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

the risk of veto—could the United States achieve the objective that it imposed upon itself to obtain a use-of-force resolution.[102] Certainly, achieving this objective would have provided a virtually indisputable international legal basis for military action against Iraq, eviscerating opposition to the action. In this regard, the effort does appear logical. However, the consequences of failing to obtain such an unassailable legal basis for military action calls into question the wisdom of the legal strategy adopted by the United States.

Consider the ultimate consequence of this course of action. The United States made a determined effort to obtain a new use-of-force resolution.[103] Nonetheless, opponents of the war, the timetable, or both, remained unconvinced that such an authorization was justified. As a result, several permanent members of the Security Council made it well known that should the United States or the United Kingdom table a use-of-

---

U.N. Charter art. 23, ¶ 1.

The voting process for the Security Council is as follows:

> Each member of the Security Council shall have one vote.
>
> Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
>
> Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

U.N. Charter art. 27, ¶¶ 1-3.

102. It is, perhaps, possible that the Bush Administration actually anticipated the ultimate failure to achieve Security Council consensus on the need for military action against Iraq. Perhaps this was part of a broader strategy to marginalize the significance of the Council. This seems somewhat consistent with President Bush's reaction to the inability to obtain a new use-of-force resolution, in which he condemned the collective security process as a failure. However, it seems far more plausible that the President genuinely believed that Secretary of State Powell's presentation would produce the desired consensus.

103. *United States Reportedly Gaining Security Council Support*, UN WIRE, Oct. 25, 2002, http://www.unwire.org/unwire/20021025/29875_story.asp.

force resolution, they would exercise their veto power to ensure it did not pass.[104] As the conflict drew ever closer based on the timetable announced by President Bush, the United States was left with few options. It could test the commitment of these opponents to the conflict by tabling a new use-of-force resolution; but if their opposition proved genuine, the result would be disastrous—a failed use-of-force resolution on the eve of initiating the conflict. As is now well-known, the United States and its coalition partners chose not to assume this risk. Instead, they accepted the inability to satisfy the burden of persuasion, condemned the collective security process as a failure, and then resorted to a questionable theory as their international legal basis for the military action that was, by that point, inevitable. Thus, while avoiding the most problematic outcome—the inability to obtain passage of a new use-of-force resolution—the course of action pursued by the United States ultimately armed opponents to Operation Iraqi Freedom with the ability to assert international illegality as the result of the decision by the United States to abandon the Security Council process.[105]

It is plausible to argue that, by initially attempting to obtain a use-of-force resolution, the United States validated the benefit of the collective security process. An equally plausible argument, however, recognizes that, by abandoning that process, the United States undermined the credibility of the U.N. collective security system. Neither judgment is relevant to this analysis. Instead, the potential consequence of approaching the conflict with Iraq from a different perspective, and thereby shifting the burden of persuasion from the proponent of military action to the opponents, will be

104. *See Germany Rules Out Iraq War Support*, BBCNEWS.COM, Jan. 22, 2003, http://news.bbc.co.uk/2/hi/europe/2682313.stm (Chancellor Gerhard Schröder declared that Germany intended to abstain in a future vote in the Security Council. Germany does not have veto power in the Security Council). *See also Quelles Que Soient Les Circonstances, la France Votera Non [Whatever the Circumstances, France Will Vote No]*, LE MONDE, Mar. 11, 2003 (Fr.), *available at* http://www.lemonde.fr/international/article/2003/03/11/quelles-que-soient-les-circonstances-la-france-votera-non_312437_3210.html (President Chirac stated that "France will vote 'no' because she considers this evening that there is no need to make a war to achieve the goal we set ourselves, that is to say the disarmament of Iraq" (translated by author)).

105. *See* Tyler & Barringer, *supra* note 44.

considered.

IV. Enhancing Legitimacy by Shifting the Pragmatic Burden of Persuasion Through the Auspices of Article 51

It is a well-established tenet of international law that the inherent right of individual and collective self-defense codified in Article 51 of the U.N. Charter provides limited authority to engage in armed action absent Security Council authorization.[106] This authority, however, has been historically limited to a response to actual or imminent armed attack.[107] Although the concept of an imminent attack has traditionally been narrowly interpreted, it is plausible that the United States could have proffered this rationale as a legal basis for military action against Iraq. Indeed, the United States suggested that it was invoking this authority, at least in part, in the notice it ultimately submitted to the Security Council after Operation Iraqi Freedom began.[108]

It is not the intent of this essay to extensively critique the legitimacy of this theory of legality. Indeed, this field has been thoroughly plowed by scholars following the start of the Iraq war, with many concluding that Article 51 never provided a viable legal basis for war.[109] It is, however, indisputable that the United States did perceive a self-defense necessity for military action, and that some scholars endorsed the assertion of this right and the expanded interpretation of "imminent threat" inherent in this invocation.[110] What is far more

106. *See, e.g.*, DINSTEIN, *supra* note 2, at 212 ("The Security Council is the sole international organ mentioned in Article 51. Nevertheless . . . the legitimacy of recourse to self-defence may also be explored—in appropriate circumstances—by the International Court of Justice. . . . The Court [has held that] because self-defence is a right, it has legal dimensions and judicial proceedings [that] are not foreclosed in consequence of the authority of the Council.").

107. *Id.* at 182 (arguing that a "mere threat" does not justify a state's use of force).

108. *See* Letter from the Permanent Representative, *supra* note 51.

109. *See generally, e.g.*, Glennon, *supra* note 59; Schmitt, *supra* note 68; Stahn, *supra* note 95.

110. *See* Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9 J. CONFLICT & SECURITY L. 3, 16, 24 (2004) (stating that unilateral preemption by the United States against Iraq was unwarranted but with appropriate Security Council resolutions the doctrine could be legitimately

significant for this analysis is the decision of the United States *not* to rely primarily on Article 51 as a right of action. Because the primary basis ultimately relied on by the United States—that the military action was authorized by Resolutions 678 and 687—was itself of questionable legitimacy, the important question of whether approaching the legality and legitimacy challenge from the alternate direction of self-defense would have provided a more effective policy posture for the United States is raised.[111] Certainly the same factors that the United

---

used in the future); Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DEN. J. INT'L L. & POL'Y 150, 174 (2004); Adam Tait, *The Legal War: A Justification For Military Action in Iraq*, 9 GONZ. J. INT'L L. 96 (2005); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 574–75 (2003).

111. The potential negative impact such an assertion might have had on the creation of the "coalition of the willing" is beyond the scope of this Article. However, it is certainly plausible that nations inclined to join the United States in the effort to effect regime change in Iraq would find a self-defense based theory of legality an unacceptably expansive view of the Charter paradigm, which would undermine their willingness to provide support. This perception has been summarized by one author as follows:

> It cannot be said that the law has evolved to the point of allowing for the use of force in the absence of Security Council authorization. Such evolution would stand the Charter system on its head by placing the burden of terminating such action on the Council, while permitting any permanent member to prevent the Council from interfering.

Stahn, *supra* note 95, at 812 (internal citations omitted). There is no doubt that the United States could have used its veto power to ensure that the Security Council did not take action to halt a military operation justified on the grounds of self-defense. However, the dialogue and debate that might have surrounded such an effort by opponents of the conflict, while not binding, would have had a significant impact on the perceived legitimacy of the United States' claim. Thus, had the United States and the United Kingdom confronted near unanimous opposition from the Security Council, and been forced to employ the veto to defeat a resolution demanding termination of military operations, the legitimacy of the action would have been severely undermined. However, substantial division among the members of the Security Council, with opponents of the military action unable to garner near unanimous support for their efforts to demand termination of the action—an equally plausible scenario—would have greatly enhanced the credibility of the United States' assertions. Indeed, even Stahn acknowledges that the diplomatic interaction that takes place at the Security Council in relation to use of force decisions, even when states act on their own initiative, plays an important role in determining the ultimate legitimacy of a use of force action:

States relied upon in its attempt to persuade the Security Council that military action was not only necessary and justified, but also could not be delayed, would have supported such a theory. The focus of debate would have therefore been narrowed to one issue: the meaning of "imminent" threat.

Even a cursory review of practice and scholarship related to the Article 51 right of self-defense indicates that the concept of an imminent threat has traditionally been confined to acts against an enemy who is about to launch an attack—not one that is merely in the preparatory stages of such an attack.[112] The line between these two markers has never been conclusive, and there has always been a tension between the need of states to protect their territories and populations, and the risk of acting prematurely with the consequence of initiating a conflict that might have been avoided. The Six-Day War of 1967 provides a classic example of the diplomatic risk associated with a national judgment that a threat has attained a level of imminence justifying the exercise of self-defense. That war began when Israel launched a pre-emptive strike on a number of Arab states which Israel determined were massed and poised to launch an imminent strike. The decision to initiate hostilities was the result of Israel's determination that an Arab attack was inevitable, and that waiting for an actual initiation of hostilities by the Arab states would produce a strategic catastrophe, endangering Israel's very existence.[113] Therefore, Israel launched the attack that resulted in a resounding victory, and asserted the inherent right of self-defense as the legal basis for its action. However, even in the face of compelling evidence supporting the Israeli judgment of

---

> But this evolution has initiated a departure from the formal framework of the Charter by transforming the Council de facto from an executive authority presiding over authorization of the use of force to an arbiter of the lawfulness of nonauthorized action that uses various techniques of explicit or implicit post hoc endorsement to assess the consequences of its own displacement.

Id.

112. *See generally* U.N. Comm. on the High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

113. *See* SHLAIM, *supra* note 1, at 242.

imminence and the potential consequences of inaction, many states condemned Israel for an unjustified invocation of self-defense that produced an act of aggression.[114]

What is the lesson to be drawn from Israel's experience? One apparent consequence was Israel's reluctance to follow the same path six years later when Arab forces were again massing in opposition. That decision is viewed by some historians as producing the greatest threat to Israel in its history: the Yom Kippur War.[115] Whether Israel was right in the first instance and wrong in the second, or vice versa, is not critically relevant for this discussion. What is relevant is the reality that any invocation of the inherent right of self-defense in response to a threat, short of an actual armed attack, involves an inherent diplomatic and informational risk of condemnation by the Security Council. Thus, once a state determines that use of force is necessary to achieve a vital national security interest, risk of perceived international illegality is inherent in either the collective security process or in the assertion of the right of self-defense. The ultimate difference between these two courses of action is the potential impact of the pragmatic information burden of persuasion.

The juxtaposed examples of the Six-Day War and the Yom Kippur War provide an instructive illustration of this dynamic. In attempting to achieve the perception of legitimacy by acting clearly within the collective security paradigm, Israel assumed tremendous strategic risk in 1973 by foregoing the benefits of preemption against its Arab enemies. This was motivated in large measure by the consequences of that same operational strategy six years earlier. But did Israel gain any meaningful advantage by accepting this risk? Some might debate this point, but it seems difficult to ignore the historical record: Israel's effort to avoid the international approbation triggered by its pre-emptive strike in 1967 almost produced a strategic catastrophe, but reaped virtually no informational benefits.[116]

---

114. *See id*. at 241-42. *See also* DINSTEIN, *supra* note 2, at 192 (responding to the view that Israel's use of force was unjustified and pointing out that Israel "reasonably interpreted" and acted upon the information available at the time).

115. *See* SHLAIM, *supra* note 1, at 321 (noting that Israel suffered 2,838 deaths and 8,800 injuries and lost 103 aircraft and 840 tanks in the Yom Kippur War).

116. *See id.* at 319 (discussing the faulty assumptions made by Israel in

As in 1967, Israel stood alone operationally during the conflict, and could rely upon only the United States to provide the critical support necessary to prevail. In fact, it was only when it became clear that Israeli forces had withstood the initial Arab onslaught and were poised to make substantial strategic gains against Egypt and Syria that the Security Council process became somewhat effective.[117]

Since 1973, whenever Israel has chosen to act militarily against a perceived threat, it has done so through an assertion of its inherent right of self-defense. These assertions are often met with criticism.[118] However, this pattern of behavior suggests that the lesson learned by Israel, as a result of the Six-Day War—Yom Kippur War dichotomy, was that criticism is virtually guaranteed whenever military force is used against a threat, irrespective of the asserted legal basis. Invoking the inherent right of self-defense, therefore, not only preserves the sovereign's prerogative to decide when military action should be initiated, but it also places the burden of proving illegality on Israel's opponents. More importantly, short of a Security Council resolution condemning such an invocation and requiring a termination of hostilities, debate over the legitimacy of the invocation remains just that: debate.

Within this broader context, the diplomatic strategy adopted *vis-a-vis* Operation Iraqi Freedom seems more suspect. It certainly raises the question of whether nations, like the United States, have a not-so-subtle incentive to press for expansion of the historically uncertain limits of the concept of an imminent threat as a valid justification for an action in self-defense. In this regard, the nature of the threat faced by a state, and perhaps more importantly, the anticipated consequences of complying with a narrow definition of imminence, seem to be valid considerations in the interpretation and implementation of this right. Even former U.N. Secretary-General Kofi Annan implicitly acknowledged

---

its decision to refrain from attacking and the general intelligence failure of the Israel Defense Force).

117. *See id.* at 321-22.

118. *See* DINSTEIN, *supra* note 2, at 230 ("No country in the world seems to have adhered more consistently to a policy of defensive armed reprisals than the State of Israel. For those who negate the entire concept of defensive armed reprisals under the Charter, all acts labelled [sic] as such are lumped together in one mass of illegality.").

the necessity of ensuring that the definition of an imminent threat matches the realities of the contemporary strategic environment. In an article that discussed the future of the United Nations, Annan stated: "[T]oday we also face dangers that are not imminent but that could materialize with little or no warning and might culminate in nightmare scenarios if left unaddressed."[119] With regard to Iraq, such a contextual definition of imminence should have allowed consideration of the potentially catastrophic consequences of delaying military action, the potential for Iraq to continue its efforts to acquire or produce WMD, and the potential transfer of those weapons to terrorist enemies of the United States. In short, from the perspective of a state determined to exercise its inherent right to defend itself, at what point does such a threat become imminent?

This theory was in fact central to the United States in its National Security Strategy of 2002.[120] According to that document:

> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.[121]

This strategy statement indicates the perceived necessity on the part of the United States to ensure that the concept of an imminent threat, as related to the exercise of the right of self-defense, evolves to effectively address emerging

---

119. Kofi Annan, *"In Larger Freedom": Decision Time at the U.N.*, 84 FOREIGN AFF., May-June 2005, at 63, 69.

120. *See generally* NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), *available at* https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf; PETER PACE, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002), *available at* www.defenselink.mil/pdf/NMS-CWMD2006.pdf; THE WHITE HOUSE, *supra* note 82.

121. THE WHITE HOUSE, *supra* note 82, at 15.

transnational terrorist threats. In fact, this evolution is reflected in the joint resolution passed by Congress in 2002, which authorized the use of military force against Iraq, and that, in addition to citing Resolution 678 as a legal basis for military action, also included the following provision:

> Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself . . .[122]

In retrospect, the failure to validate the asserted presence of WMD renders it tempting to conclude that no valid basis existed for the United States to assert an inherent right of self-defense as its justification for military action against Iraq. However, this alternate theory must be critiqued *pro*spectively—not *retro*spectively. At the time the United States decided to initiate military action, the perceived imminence of the threat posed by Iraq clearly motivated that decision. In fact, the perception of "imminence" seems to have been corroborated by the United States's unwillingness to acquiesce to suggestions that the requested Security Council action be postponed in order to provide additional time for the inspection process.

What if the United States had adopted the same approach that Israel adopted in 1967—namely, to unequivocally assert that it intended to act against Iraq pursuant to its inherent right of self-defense? Such an assertion would have no doubt generated opposition from members of the international community. However, unlike the course of action adopted by the United States, this approach would have placed the burden

122. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1499 (2002).

of "proving" illegality onto the opponents of the military action, and would have allowed the United States to defend a theory, rather than to obtain a consensus.

In this regard, it is once again instructive to consider the construction of Article 51. As previously noted, Article 51 acknowledges the sovereign prerogative of member states to make judgments as to when action in individual or collective self-defense is necessary. However, the article also apparently acknowledges that this prerogative is subject to abuse. It therefore provides that member states must report to the Security Council any action taken pursuant to such an assertion of authority. Furthermore, it provides that the Security Council may, in a sense, "assume" responsibility for the situation that resulted in the purported self-defense action. These aspects of Article 51, when read in conjunction with Articles 39, 41, and 42, provide a mechanism to check the abusive or unjustified exercise of the right of self-defense.

As a result, reliance by the United States on Article 51 as a legal basis for the initiation of Operation Iraqi Freedom would have led to two immediate consequences. First, it would have focused the debate on one clear issue: the meaning of imminent threat. This focus could have conceivably accrued to the benefit of the United States and other allies who supported military action. The litany of evidence indicating Iraqi non-compliance with international legal obligations would have supported the assertion that Iraq must be regarded as unpredictable. Of course, critics of the United States's position would have undoubtedly pointed to the years of containment as evidence that Iraq did not pose a genuine threat to the United States. However, the new element of a transnational terrorist group with an avowed determination to conduct mass casualty attacks against the United States and other coalition partners, and with a demonstrated ability to do so, could have been cited as a factor that rendered the past evidence relatively insignificant to the imminent threat equation. Furthermore, the United States would have been in the position to proffer the anticipated devastating consequences of "getting it wrong," and opponents would have been forced to call into question the apparent legitimate U.S. interest of protecting its territory and population. The fact that the United States had actually been the victim of "getting it wrong" on 9/11 would have no doubt

enhanced the credibility of such a position.

The second immediate impact would have been that opponents of the United States's assertion of a self-defense justification would have carried a practical burden of building a consensus of opposition. They would likely have initiated this effort by arguing that, absent an actual attack by Iraq, military action by the United States without express Security Council authorization should be presumed illegal, and that the United States bore the burden of establishing otherwise. From a pure international law standpoint, this argument may indeed be perfectly legitimate. However, at a practical informational and diplomatic level, the challenge for opponents to military action would have been more complex. These opponents would have confronted the same reality that disabled the U.S. effort to build consensus around authorizing military action: securing such consensus is no easy task among the community of nations, and it is certainly a significant burden for the Security Council. The United States could have asserted full compliance with Article 51 by reporting the proposed action to the Security Council. Doing so would have then have imposed a burden on its opponents to establish their own consensus at the Security Council to oppose the United States's invocation of its right to defend itself.

It is of course axiomatic that the veto powers of the United States and the United Kingdom would have ensured that no resolution in opposition to the U.S. position could have prevailed. However, the United States and its partners could have allowed the process to run its course. This would have forced opponents at the Security Council to do more than threaten a veto of a use-of-force resolution—it would have forced the opponents to actually table a resolution challenging the validity of the United States's judgment as to the nature of this emerging threat, and to then generate enough support for that resolution to make the United States's use of its veto power appear wholly invalid. Whether Security Council opponents to military action could have mustered the national will necessary to take such an action is highly questionable.

Even assuming such a resolution was proposed, it is highly unlikely that it would have received anything close to unanimous support. Instead, it is probable that the vote would have been extremely divided. Thus, instead of providing

opponents to military action the opportunity to defeat the U.S. policy with one vote, the United States would have been able to assert that a divided vote in opposition to its interpretation of the right of self-defense fell far short of a conclusive rejection of that determination. This process would have had the additional benefit of allowing the United States to legitimately assert that military action was conducted consistently with the use-of-force paradigm reflected in the U.N. Charter, and thereby undermine the credibility of any accusation that the United States was dismissing the value of that paradigm. This process would have also enabled the United States to assert that it had validated the role of the Security Council as a check on the exercise of self-defense, which would have offset any assertion that the United States had set into motion a process whereby states would routinely rely upon Article 51 as a subterfuge for engaging in military aggression.

It seems clear that the United States made a reasoned decision not to rely exclusively upon an assertion of the right of self-defense as a basis for military action against Iraq. Why this was the case is a matter of speculation, but likely reasons included the potential resistance by other members of the "coalition of the willing," or the concern that establishing a self-defense precedent might be abused by other states in the future. It is just as likely, however, that the legal course of action selected was the result of hubris on the part of the Bush Administration, confident that it would prevail with its burden of persuading other members of the Security Council that a new authorization for military action against Iraq was necessary, and that it must accommodate the U.S. military timetable. Of course, "hindsight is 20/20," but it is clear that whatever the motive for selecting the new authorization approach, the United States failed to establish a credible legal basis for the military action. Perhaps even more troubling, accepting the burden of persuasion, and subsequently failing to meet that burden, forced the United States to publicly condemn the efficacy of the U.N. collective security process—a cornerstone of post-Cold War U.S. strategic policy.

Considering the loss of international credibility suffered by the United States as a result of being perceived as dismissive of international law, the damage to the credibility of the U.N. collective security system, and the political consequence

confronted by those states determined to stand beside the United States in its effort to force regime change in Iraq, it is difficult to conclude that a self-defense-based approach to the use-of-force decision *vis-a-vis* Iraq would have been substantially riskier. Might this approach have provided traditional allies struggling to justify the instinct to support the United States a more viable basis to make that leap of faith?

This question appears to be taking on renewed relevance as the United States and other like-minded countries confront the reality of an increasingly belligerent North Korea who is poised to possess nuclear weapons with long-range delivery capability. In light of the fact that President Obama has already announced that North Korea cannot be allowed to possess such a capability, the possibility that the United States will decide to launch a military strike against North Korea is far from speculation. Like President Bush in 2002, if President Obama reaches this decision point, he will be forced to confront a diplomatic reality: the issue of North Korean proliferation has been within the purview of the Security Council for more than a decade, in large measure due to the insistence of the United States. Will this functionally lock the United States into a collective security authorization legal strategy? If it does, what will be the consequence of failing to prevail in persuading other Security Council members of the need for such an authorization? Perhaps more importantly, do the diplomatic and information risks associated with that course of action—risks that were validated by the United States's experience with Operation Iraqi Freedom—create an incentive for the United States to bypass that process altogether and to take its proverbial chances by invoking a right of action pursuant to Article 51? The answer to this question should, and almost inevitably will, depend in large measure on the intelligence preparation of the diplomatic battlefield, and the potential payoff that such an approach would hold for developing a perception of international credibility. It is to this issue that the Article will now turn.

V. The Enhanced "Supportability" of the Self-Defense Theory of Action

While reluctance and resistance to the U.S. effort to generate support for Operation Iraqi Freedom existed in various degrees throughout the globe, Europe clearly dominated the limelight as the primary obstructer of the effort.[123] The relatively strong influence that Europe has on world politics and its tradition of cooperation with the United States in international conflicts explains why it was so influential on the overall perception of legitimacy for ousting Saddam Hussein from power. The apparent ultimate rejection of that process, with the accordant emphasis of the "coalition of the willing," is an example of the consequence of being perceived as operating outside the accepted norms of international law in relation to the use of force. This section considers the impact that a self-defense based theory of legality might have had on the "supportability" of the conflict by other states. This consideration is important not only to suggest that such a theory might have proven more effective from an international political standpoint, but also because it reflects a potential benefit of reliance on this theory in future military actions in support of national security objectives. A discussion on how European states and key institutions may have perceived and responded to this alternative approach does not lend itself to a precise and distinct account, as there are far too many plausible outcomes. Instead, the complexities associated with each nation and organization's unique policies and decision-making processes suggest a broad alternative discussion. Hence, the value of this discourse is to identify arguments that indicate a shift in support of the United States with reference to the course of action it pursued together with its coalition partners.

During a 2005 visit to Europe, President Bush called for unity in support of the emerging democracy in Iraq.[124] This call was a response to the reality that, more than two years

123. *See* Stahn, *supra* note 95, at 806 n.10 (citing numerous legal journals and news reports reflecting European opposition to the United States's policy).

124. *See* Michael A. Fletcher & Keith B. Richburg, *Bush Seeks to Mend Transatlantic Rift*, WASH. POST, Feb. 22, 2005, at A1.

after the initiation of Operation Iraqi Freedom, the rift between the United States and many of its traditional European partners continued to impact transatlantic relations. While European leaders applauded the elections in Iraq and the efforts of the people of that country to establish a democratic state,[125] there remained a general unwillingness on their part to retroactively endorse the legal theory proffered by the United States to justify the conflict. A significant issue related to the development of this rift involved differences over the international legal authority for the initiation of the conflict.[126]

In retrospect it is clear that the United States underestimated the persuasion required to muster sufficient European support. Still, the Bush Administration was cognizant of such challenges and of the need to produce arguments that appealed to the other side of the Atlantic. When confronted by European media during the run-up to the Iraq War, Secretary of Defense Donald Rumsfeld elaborated on the importance of persuasion of European allies based on his experience as Ambassador to NATO:

> [W]hen we would go in and make a proposal, there wouldn't be unanimity. There wouldn't even be understanding. And we'd have to be persuasive. We'd have to show reasons. We'd have to—have to give rationales. We'd have to show facts. And, by golly, I found that Europe on any major issue is given—if there's leadership and if you're right, and if your facts are persuasive, Europe responds. And they always have.[127]

---

125. *See World Leaders Praise Iraq Elections*, USATODAY.COM, Jan. 31, 2005, http://www.usatoday.com/news/world/iraq/2005-01-31-iraq-world-reax_x.htm.

126. *See generally* Philip H. Gordon, *Iraq: The Transatlantic Debate*, 39 EUROPEAN UNION INST. FOR SECURITY STUDIES OCCASIONAL PAPERS 1 (2002), *available at* http://www.iss.europa.eu/nc/actualites/actualite/article/iraq-the-transatlantic-debate/philip%20h.%20gordon/?tx_ttnews[cboAuteurs]=ALL&tx_ttnews[chkArea][0]=allarea&tx_ttnews[chkType][0]=22&tx_ttnews[cboMois]=10&tx_ttnews[cboAn]=1990&cHash=c18c0920d9.

127. Secretary of Defense Donald Rumsfeld, Briefs at the Foreign Press

Later during the address Rumsfeld coined the delineation between the "old" and the "new" Europe, which raised strong reactions on the other side of the Atlantic, and which would become an obstacle in itself toward reaching transatlantic consensus.[128] Notwithstanding this simplistic division of Europe, there was a clear split amongst European states. The United Kingdom, Spain, Italy, Poland and many small countries sided with the United States, while the ardent opposition was spearheaded by France and Germany, and supported by Greece, Belgium and other small countries.[129]

Whenever a state adopts a theory of legality for the use of force, it must consider the consequences that policy will have on the state's relations with other members of the community of nations. For a state committed to emphasizing its commitment to the rule of law in the international community—like the United States—this consideration is an essential component of the national security decision-making process related to the use of force. To this end, the United States, as the only superpower, had a unique ability to leverage its position. When powerful states invite weaker states to join their position, a strategic calculus takes place as to whether the cost of opposing the stronger state is greater than the gain of joining it. Whether the motive for not supporting the U.S.-led endeavor involved a lack of widespread public support, unsubstantiated intelligence, economic interests, domestic politics, or a reliance on U.N. inspectors, governments invariably also considered the self-evident benefits of standing alongside the United States. There was also a potential domestic and international political payoff inherent in participating in the creation of a new era for the Iraqi people—an aspect of Operation Iraqi Freedom consistent with the

---

Center (Jan. 22, 2003), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1330.

128. *See Outrage at "Old Europe" Remarks*, BBCNEWS.COM, Jan. 23, 2003, http://news.bbc.co.uk/2/hi/europe/2687403.stm.

129. *See* Jürgen Schuster & Herbert Maier, *The Rift: Explaining Europe's Divergent Iraq Policies in the Run-Up of the American-Led War on Iraq*, 2 FOREIGN POL'Y ANALYSIS 229, 238 (2006). *See also Greece Plans Iraq Emergency Summit*, BBCNEWS.COM, Feb. 10, 2003, http://news.bbc.co.uk/2/hi/europe/2744375.stm (follow "Clickable Map" link located within the article's text).

traditional European commitment of respect for human rights. The result of these competing interests was an obvious dilemma confronted by most European governments when they deliberated whether to support, oppose, or remain neutral *vis-a-vis* the inevitable conflict. Notably, while joining the stronger state—a phenomenon referred to in political science as "Bandwagoning"[130]—often provides a compelling option, it also necessitates the offering of incentives, something that many Europeans would argue were in short supply during the run-up to the Iraqi intervention.

Research suggests that while traditional power politics ran its course in the East, Western Europe revealed another dynamic that required a different incentive. Their divide ran alongside the political orientations of governments, with liberal ideologies overrepresented in opposition of the United States.[131] For these liberal states, the idea of lending active support to a military endeavor in Iraq became an insurmountable cost to bear under the circumstances. A military campaign would not only have terminated the United Nations's most tangible effort to resolve the situation—its Monitoring, Verification, and Inspection Commission ("UNMOVIC")[132]—it also suggested that all of the other options at the disposal of the international community were exhausted. When the head of UNMOVIC, Hans Blix, and others continued their advocacy for prolonged inspections, new benchmarks, and revised timelines, the domestic burden of proof for those liberal leaders deliberating national costs easily tilted to the benefit of the politically safe option—despite the perceived threat posed by Saddam Hussein. Indeed, it became impossible to erect sufficient support for a military operation based on collective security theory. Moreover, the collective security approach allowed those in opposition to effectively seize the moral high ground at the expense of the United States and its allies. While reliance on a self-defense theory of legality would have certainly

130. The competing option for Bandwagoning is balance of power. For a discussion on the subject, see generally STEPHEN WALT, THE ORIGINS OF ALLIANCES (1987).

131. *See generally* Schuster & Maier, *supra* note 129, at 233.

132. UNMOVIC was created by the U.N. Security Council, *see* S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999) (establishing UNMOVIC as a subsidiary body of the Council and replacing the Special Commission that had been established by S.C. Res. 687). *See also infra* note 164.

generated international opposition, it is interesting to consider whether this "shifted-burden" approach might have offered liberal governments seeking a rational basis to support the United States a more viable basis to do so. Arguably, a U.S. narrative with a legal basis rooted in self-defense would not have changed the European reluctance towards a military invasion, but it may have significantly relaxed the requirements of political commitment, as it would not have required unequivocal support for the United States and its partners. In fact, this option could have allowed European politicians to voice mild concerns about a forthcoming invasion to satisfy their domestic audience, without challenging the United States's inherent right of self-defense. This is not to say that all Europeans would have sided with the United States, but it would have lowered the threshold for those whose political calculus included more than one plausible outcome. A self-defense justification would also have avoided the perception that the United States held a confrontational posture toward the United Nations, an organization cherished by so many Europeans.[133]

To further unpack the European resistance, it is helpful to examine the competing option to Bandwagoning: balance of power. Put simply, the United States wanted the United Nations to relinquish the international community's authority to deal with the situation with few, if any, incentives with regards to power and control. With this view, Rumsfeld's miscalculation of "old Europe" as irrelevant becomes apparent. In 2003, five of the fifteen members of the U.N. Security Council were European. In addition to the permanent members, France, the United Kingdom, Bulgaria, Germany, and Spain each had seats at the table.[134] It is not surprising that the most vocal resistance came from some of the members

133. The Treaty on the European Union ("TEU"), entered into force in 1993, includes a definition of foreign policy objectives that put emphasis on the role of the United Nations and the U.N. Charter: "[T]o safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter . . . to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter . . . ." E.U. Charter art. 11.1.

134. Press Release, Membership of Principal United Nations Organs in 2003, U.N. Doc. ORG/1371 (Oct. 1, 2003), *available at* http://www.un.org/News/Press/docs/2003/org1371.doc.htm.

of this group. Even Tony Blair, an early proponent of taking military action, was adamant on his preference for authorization through the United Nations. Europeans saw little benefit in surrendering control of the situation through their representatives in the Security Council. This perception was manifested in a European Union Council Declaration in the midst of transatlantic consultations, which emphasized that those nations were "committed to the United Nations remaining at the centre of the international order."[135]

By pursuing collective security as its legal basis, the United States forced many European states to choose between two incompatible options: the safe option of continued political relevance and influence over the process through the United Nations, and indirectly through the European Union; or the risky option of taking a stand for a U.S.-led intervention and implicitly sharing the burden of risk while surrendering the ability to influence the process following a Security Council decision supporting collective security. Since many of these states were regarded as "old Europe," any hopes of recognition and relevance in future transatlantic relations were understandably modest. Had a Security Council-endorsed invasion failed in some way—for example, by a failure to find or take possession of Iraqi WMD—the Security Council decision and its supporters would almost certainly be scrutinized and subjected to harsh criticism. Hence, given the circumstances, it can be argued that the United States had asked for a lot, particularly since President Bush had claimed that the international community was risk-adverse on this issue.[136] Advancing inherent self-defense as its legal basis would not have called for a U.N. Security Council ruling. Instead, counter to the propositions related to balance-of-power, this could have given members of the United Nations

135. *See* Extraordinary European Council at Brussels Presidency Conclusions (EC) No. 6466/03 of 17 Feb. 2003, at 1, *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/74554.pdf.

136. Specifically, President Bush said that "[i]t is important to know that the Iraq is an extension of the war on terror. . . . The international community is risk adverse. But I assure you I am going to stay plenty tough." SCOTT MCCLELLAN, WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON'S CULTURE OF DECEPTION 139 (2008) (quoting President George W. Bush, Address to Republican Governors (Sept. 20, 2002)).

and the rest of the international community a comfortable position as "bystanders," who could form and articulate their view at the time of their convenience, without bearing any of the political risks or responsibilities, and, at the same time, without the ability to influence the process. In the case of France, it is unlikely that it would have been attracted by being sidelined. President Jacques Chirac's clear '*non*'[137] to a military intervention, as reflected in French media on March 11, 2003, at the pinnacle of the diplomatic quarrel, came as no surprise. It was consistent with the policy he had articulated six months earlier in an interview with the *New York Times*.[138] Neither was his position unavoidable. Despite the rhetoric, France was considering, and possibly preparing for, military options.[139] The French policy was premised by two key propositions: a rejection of unilateralism and an absence of a clear and present danger. Both propositions enjoyed broad appeal in Europe. A self-defense approach would have taken the edge off of the latter argument, since it narrowed the scope to threats against the United States and avoided competing with European threat perceptions. Hence, drawing upon the provisions of Article 51 of the U.N. Charter and self-defense as a legal basis might have provided a more viable basis for European governments to leverage support in favor of taking action in line with U.S. plans. Consequently, an approach based on Article 51 rests on the assumption that the United States would have been able to gain more support, or at least at a minimum, less resistance, for the action the United States deemed necessary to counter the threat that Iraq posed.

The first French proposition, unilateralism, encapsulated the depth of the Euro-American divide in that the countries did not share a common view of the world or the utility of power. American foreign policy commentator Robert Kagan argues that, while Europe has entered a post-historical paradise of peace and relative prosperity, the United States remains anchored in history, where military power still has an essential

137. *See Quelles Que Soient Les Circonstances, la France Votera Non*, *supra* note 104.

138. *See French Leader Offers America Both Friendship and Criticism*, N.Y. TIMES, Sept. 9, 2002, at A9.

139. *See* David Styan, *Jacques Chirac's 'Non': France, Iraq and the United Nations, 1991-2003*, 12 MOD. & CONTEMP. FR. 371, 380-81 (2004).

role to play.[140] The senior European Union ("E.U.") diplomat Robert Cooper offers another discourse as he postulates that Europe is a "postmodern" continent that has moved beyond the balance-of-power system towards co-existence and cooperation.[141] This system has elevated the application of international law to a level close to that of national law. In this context, the U.N. Charter stands as the chief guardian against unilateral and unlawful actions against international peace and security. Consistent with this view is the European Parliament's nonbinding resolution passed in January 2003, which rejected a unilateral U.S.-led military intervention against Iraq: "[A] pre-emptive strike would not be in accordance with international law and the UN Charter and would lead to a deeper crisis involving other countries in the region . . ."[142]

The selection of legal theory for the conflict becomes critical. Regardless of the official theory ultimately endorsed by the United States, the reversion to reliance on Resolution 678 at a late stage created a powerful perception that the United States had in fact rejected the collective security mechanism of the United Nations. As a result some governments were constrained, not only by policy concerns, but also by national laws prohibiting support for Operation Iraqi Freedom, as the result of this apparent deviation from the accepted legal framework. In fairness, the European states are neither a homogeneous group, nor entrenched in their positions. For example, despite its commitment to international law, Europe allowed itself to bend its principles during the Kosovo campaign against Serbia.[143] Not only was this operation employed by the North Atlantic Treaty Organization ("NATO"), but it was supported by the European

140. *See generally* ROBERT KAGAN, OF PARADISE AND POWER: AMERICA VS. EUROPE IN THE NEW WORLD ORDER (2003).

141. *See generally* ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY (2004).

142. *See* European Parliament Resolution on the Situation in Iraq, EUR. PARL. DOC. P5_TA 0032 (2003), *available at* http://www.europarl.europa.eu/meetdocs/committees/afet/20040405/p5_ta(2003)0032_en.pdf.

143. *See* Dino Kritsiotis, *The Kosovo Crisis and Nato's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330, 340 (2000). *See also supra* note 133.

Union, despite the lack of U.N. Security Council authorization. The European Council Declaration that offered support to the intervention did so from a self-defense, humanitarian and historical perspective.[144] Indeed mindful of its history, the notion of self-defense resonates in Europe.

As the Iraqi crisis emerged, the communicated rationale for taking military action revolved around three areas: Saddam Hussein's oppression of the Iraqi people, Iraq's possession of WMD and its willingness to use them, and the risk of Saddam Hussein rendering aid and protection to transnational terrorist organizations, including members of Al Qaeda. These two latter considerations would have formed the basis for an assertion of self-defense authority individually, and even more so, when combined. As discussed above, they provided the core of the joint resolution passed by Congress in 2002 authorizing the use of military force against Iraq.[145] The underpinnings were not unsupported in Europe, at least on a principal level. In the aftermath of the Iraqi rift, the Europeans crafted their first Security Strategy in an effort to demonstrate unity.[146] Despite the apparent fundamental differences between the

---

144. *See* European Council at Berlin Presidency Conclusions (EC) No. SN 100/99, at 30 (1999), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/ACFB2.html. The Council stated that:

> On the threshold of the 21st century, Europe cannot tolerate a humanitarian catastrophe in its midst. It cannot be permitted that, in the middle of Europe, the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre at Racak in January 1999, are not repeated. We have a duty to ensure the return to their homes of the hundreds of thousands of refugees and displaced persons. Aggression must not be rewarded. An aggressor must know that he will have to pay a high price. That is the lesson to be learnt from the 20th century.

Id.

145. It must be emphasized that the validity of the intelligence underpinning the United States's policy is beyond the scope of this Article, and this alternate theory must be critiqued prospectively.

146. *See generally A Secure Europe in a Better World* (EC), No. 10881/03 of June 25, 2003, *available at* http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf.

United States and Europe on power and world order, as discussed above, the contrast may in part be a case of prejudice in both directions. Research comparing the American and European strategies acknowledges divergence in their mindsets.[147] However, it concludes that the U.S. agenda was guided by idealistic values whereas the European strategy appeared more realistic.[148] The European strategy document reveals common ground that was never seized during diplomatic efforts. Consistent with the United States's assessment, the European strategy singled out terrorism and proliferation of WMD as key threats.[149] The strategy also supported the notion of exercising self-defense outside its own borders, and specifically noted that the first line of defense will often be abroad.[150]

Despite the disagreement on the pre-emptive doctrine employed by the United States, the European view called for early, rapid, and, when necessary, robust interventions, as well as the importance of being ready to act before a crisis occurs (although the latter is not necessarily related to military interventions). While it would be naïve to suggest that these differences could have been completely bridged by applying a self-defense option, it can be argued that there was potential to better leverage the arguments under such a theory.

Another credible rationale for asserting self-defense as the legal basis must take the 9/11 terrorist attacks as a point of departure. Following the attacks, the international community extended wide support to the United States, and through the adoption of U.N. Security Council Resolution 1373,[151] initiated by France, the United States gained legitimacy to take responsive actions. Moreover, on September 12, 2001, the North Atlantic Council ("NAC") of NATO decided to invoke Article 5 of the Washington Treaty[152] for the first time in the Alliance's history. Notably, Article 5 makes specific references

147. *See* Felix Sebastian Berenskoetter, *Mapping the Mind Gap: A Comparison of US and European Security Strategies*, 36 SECURITY DIALOGUE 71, 89 (2005).

148. *See id.*

149. *See A Secure Europe in a Better World*, *supra* note 146.

150. *See id.*

151. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

152. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

to the right of collective self-defense as laid out in Article 51 of the U.N. Charter.[153] The seventeen European allies and Canada had concluded that the Al Qaeda-sponsored terrorist attacks against the United States were considered attacks against all of NATO's member states.[154] However, this willingness to provide support based on collective self-defense was never leveraged by the Bush Administration. Instead, the Bush Administration employed military power against the Taliban regime in Afghanistan in a manner that failed to exploit the benefits of collective self-defense, and accordingly, rejected troop contributions from several traditional NATO allies. Despite the lack of interest in utilizing collective measures in accordance with the NATO Treaty and the U.N. Charter, the Bush Administration asserted self-defense as the legal justification for launching Operation Enduring Freedom. Accordingly, a notification was issued to the Security Council stating that the United States was acting in self-defense. Following the initiation of Operation Enduring Freedom,[155] the European Union gave its "staunchest support for the military operations" and underlined its legitimacy under the U.N. Charter.[156]

Despite a selective approach in engaging traditional European allies and partners, the ad hoc cooperation that eventually came to fruition after major combat operations ended in Afghanistan was the broadest coalition ever formed. However, what the coalition had gained in width, it had lost in depth. The lack of consultation prior to deploying in

153. *Id.*

154. Press Release, North Atlantic Treaty Organization [NATO], Statement by the North Atlantic Council (Sept. 12, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm.

155. On October 7, 2001, President Bush announced the launch of Operation Enduring Freedom. George W. Bush, Address to the Nation (Oct. 7, 2001), http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html. The operation was an integral part of the larger Global War on Terror, with the legal basis provided by a Senate Joint Resolution. *See* S.J. Res. 23, 107th Cong. (2001).

156. Declaration by the Heads of State or Government of the European Union and the President of the Commission, Follow-Up to the September 11 Attacks and the Fight Against Terrorism (EC) No. SN 4296/2/01 of Oct. 19, 2001, at 1, *available at* http://ec.europa.eu/justice_home/news/terrorism/documents/conseil_gand_en.pdf.

Afghanistan and the feeling that they had been marginalized became sources of frustration for traditional European allies and partners. Moreover, the initial hardships and successes became primarily U.S. and U.K. commodities, and did not provide a cohesive bond within the wider community of traditional allies and partners. Instead, a growing rift between the United States and several European allies developed and the two continents drifted apart in their perceptions on how to best address terrorist threats. This was reflected in a statement issued by the European Union in the midst of transatlantic consultations indicating that it did not support a broad theory of self-defense as a legal basis for more widespread military operations related to the Global War on Terror.[157] Instead it emphasized that "the United Nations remain[s] at the centre of the international order."[158]

Indeed, the time period between 9/11 and the initiation of the United States's diplomatic effort to obtain Security Council support for Operation Iraqi Freedom represents a missed opportunity to build a shared notion of collective self-defense as a legal basis for military efforts aimed at defeating terrorism. Had the United States exploited the invocation of Article 5 of the NATO Treaty in support of Operation Enduring Freedom, it would have defined a new formula for collective self-defense against terrorism. Such a *modus operandi* could have paved the way for a similar approach against Saddam Hussein, and setting the legal conditions for Operation Iraqi Freedom would have formed the next step in this theory of collective defense against terrorism.

At this critical juncture, governments inclined to oppose the United States's plans to effect regime change in Iraq would have borne the burden of articulating the illegality of the self-defense theory, and as a result, would have found it more difficult to convey persuasive arguments against the established method of collective self-defense. Certainly, the challenge of convincing additional European states of Saddam Hussein's links to Al Qaeda would have remained. However, because the burden of proof would have shifted, the United States would have been in a stronger political position; once

157. Extraordinary European Council at Brussels Presidency Conclusions, *supra* note 135.

158. *Id.* at 1.

notice of the theory and evidence in support of the conclusion had been published, inaction by other states could have been treated as acquiescence to the theory of legality. In this regard, it is significant to consider that at the time the United States began to articulate its rationale for Operation Iraqi Freedom, no credible evidence that de-linked Saddam Hussein from his alleged terrorist affiliations was offered by any state opposing the looming conflict. Furthermore, Resolution 1441, adopted unanimously in November 2002, condemned Iraq for its continuing ties to terrorism[159]—a fact that seems relevant in support of a self-defense theory of legality.

These facts, and the shifted burden of persuasion, would not have prevented some nations from opposing the United States's plans. However, rather than having pressure accumulate against the United States as the result of the Security Council's inaction, that same inaction would have shifted attention to those nations detracting from the United States's theory of legitimacy. Furthermore, had the United States capitalized on its allies' invocation of Article 5 of the NATO Treaty based on the precedent that might have been established in relation to Operation Enduring Freedom, the focus of debate could very easily have been shifted to the question of whether such invocation was legitimate under the circumstances, as opposed to the focus that actually did develop at the Security Council.

European polls conducted in January 2003, before the commencement of hostilities, indicated overwhelming public opposition throughout Europe—ranging from sixty-eight percent to eighty-eight percent—against going to war without an additional Security Council Resolution.[160] However, the opposition to war in the event that a new U.N. resolution was agreed upon was considerably lower, ranging from twelve to seventy-two percent, with all the E.U. countries at fifty percent or below.[161] Notably, the opposition in France was less than

159. *See generally* S.C. Res. 1441, *supra* note 52.

160. *See* William Horsley, *Polls Find Europeans Oppose Iraq War*, BBCNEWS.COM., Feb. 11, 2003, http://news.bbc.co.uk/2/hi/europe/2747175.stm (follow "Graphical Data" link located within the article's text).

161. *See id.* (follow "Graphical Data") (noting that a January 2003 European Omnibus Survey found that, among European nations, only Austria, Finland, and Greece reported resistance levels to a U.N.-mandated mission well above fifty percent).

thirty percent.[162] Yet several leaders—like Tony Blair (United Kingdom), Jose Maria Aznar (Spain), and Leszek Miller (Poland)—decided to seek their nations' support to contribute to Operation Iraqi Freedom without a credible U.N. Security Council resolution. It is interesting to note that empirical research suggests that public opinion cannot account for the path chosen by these governments.[163]

Had NATO previously achieved the success associated with Operation Enduring Freedom in Afghanistan through the collective defense process—as opposed to the "coalition of the willing" concept actually relied upon by the United States in that conflict—European governments might have been able to leverage that example in support of an effort to galvanize public support for a similar endeavor in Iraq. Arguably, several traditional European allies and partners had as large a problem with the perceived cavalier approach to coalition building practiced by the United States in both Afghanistan and Iraq as they did with the *de facto* legal justifications for going to war. The very clear signals from the Bush Administration that conflicted to effect regime change in Iraq were inevitable, regardless of the opposition from numerous traditional supporters of U.S. foreign policy, engendered even more entrenched opposition in several European capitals, which was exacerbated by the reaction of the media and widespread public opposition to the United States.

Had the United States asserted a self-defense-based rationale in support of Operation Iraqi Freedom—with the stated objective of removing the Hussein regime because of its established record of non-compliance with international legal obligations related to WMD and its alleged sponsorship of terrorism[164]—the diplomatic outcome might have been

162. *Id.* (follow "Graphical Data").

163. *See* Schuster & Maier, *supra* note 129, at 223.

164. After the Gulf War cease fire, Resolution 687 defined the terms of the cease fire and required Iraqi acceptance of those terms. *See* S.C. Res. 687, *supra* note 49. The resolution addressed both terrorism and WMD. *Id.* Moreover, an inspection and destruction regime was established for eliminating the WMD threat. The U.N. Special Commission ("UNSCOM") and the International Atomic Energy Agency ("IAEA") performed their missions until Saddam Hussein refused to grant inspectors access in 1998. At that time, "it could not be excluded . . . that there still existed undeclared missiles, chemical weapons and biological weapons." HANS BLIX, DISARMING IRAQ 29 (2004). The United States and the United Kingdom responded with

different. Certainly, many nations who ultimately opposed military action seemed to support the effort to determine the nature of the Iraqi threat. For example, according to its foreign minister, even France attempted to leverage all available intelligence in its possession.[165] The United States's inability to prove a positive—that Iraq did indeed possess WMD—was easily exploited by opponents to the U.S. policy precisely because the United States had accepted the burden of proving that Iraq constituted a threat to international peace and security. However, it was equally plausible—and perhaps even more rational—to focus on the lack of evidence to prove the negative—that Iraq did not possess WMD. This absence of proof of non-possession, when linked to Iraq's long history of evading U.N. disarmament efforts and violating international obligations, could certainly have been relied upon to assert that Iraq represented a presumptive threat to the United States, requiring opponents of the conflict to rebut that presumption—had the United States not accepted the burden of persuasion.

Ironically, it is fair to say that, at the time the United States initiated the collective security process, most European intelligence agencies concurred in the assessment that Iraq still possessed WMD. Opposition to the United States's assertion of its right to act in self-defense, particularly when such a policy was supported by the United Kingdom and endorsed by the U.S. Congress, would have not only required a masterful articulation of the absence of evidence, but also a direct challenge to the right of two prominent members of the community of nations to make the judgment of when such

---

military force (Operation Desert Fox) to degrade Iraq's ability to produce, store, maintain, and deliver WMD. Although a new inspection regime was set up in late 1999, *see* S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999), it would take another three years until the inspection teams of the U.N. Monitoring, Verification and Inspection Commission ("UNMOVIC") could be deployed. In the final report by UNMOVIC on March 7, 2003, the Executive Chairman, Hans Blix, could not conclude whether or not Iraq had disarmed. This ultimately led Secretary Rumsfeld to make the oft-quoted remark that "the absence of evidence is not evidence of absence," a comment that seems to reflect a pragmatic characterization of the burden shifting theory addressed in this Article. Secretary Donald H. Rumsfeld, Remarks at Department of Defense News Briefing (Feb. 12, 2002), *available at* http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2636. *See also* BLIX, *supra*, at 112.

165. *See* DOMINIQUE DE VILLEPIN, TOWARD A NEW WORLD 42 (2004).

action was required. In short, opponents would have been placed in the difficult position of asserting that the policy of self-defense for a superpower, supported by the world's most capable intelligence community, should be dismissed based on speculation. In this regard, it seems that rejection of such a legal basis could have represented as significant a threat to the viability of the inherent right of self-defense reflected in Article 51 as the abuse of that right represents to the collective security paradigm. Such an outcome would not be advantageous for any state, particularly smaller ones.

The other aspect of utilizing the theory of self-defense that might have accrued to the diplomatic benefit of the United States would have resulted from invocation of the U.N. Charter. This might have resulted in more European support, even if the interpretation of Article 51 was subject to criticism. It seems clear that European governments, as well as their people, generally view the U.N. Charter as the fundamental cornerstone of international peace and security. This is reflected in the results of polls regarding military action against Iraq. When Europeans were asked to express their views regarding unilateral military action by the United States, the results indicated a support level of only eighteen percent, at the same time that sixty-six percent of the interviewees confirmed that Iraq was a threat to world peace.[166] However, when asked to express their views regarding military action in accordance with the U.N. Charter, support increased substantially.[167]

VI. Conclusion

The United States's decision to invoke the collective security process of the U.N. Charter, and thereby to accept the burden of persuasion on the international diplomatic plane, and then to subsequently abandon that process when it became clear that it could not carry this burden, resulted in numerous direct and derivative undesired effects. It propelled the United

166. *See* European Liberal Youth, Europeans Against War on Iraq Without UN Mandate, http://www.lymec.org/index.php?name=News&file=article&sid=161 (last visited Oct. 20, 2009).

167. *See id.*

States to proffer the "coalition of the willing" as a manifestation of international legitimacy for Operation Iraqi Freedom. It also forced the United States to rely on Security Council resolutions dating back to the first Gulf War as a legal basis for military action. This reliance led to a blurring of the line between collective security and self-defense as a rationale for military action, with the United States asserting the role of *de facto* enforcer of the collective security interests of the international community, despite the fact that the collective security mechanism of that community chose not to endorse such enforcement. This ultimately resulted in that mechanism being marginalized altogether. Finally, and perhaps most significantly, it presented traditional security partners with a dilemma resulting from the desire to follow the traditional path of supporting the United States, and the requirement to manifest respect for international law. This rendered it virtually impossible for several European governments inclined to support the United States to do so.

Despite the Bush Administration's dismissal of the efficacy of the United Nations during the lead-up to Operation Iraqi Freedom, continuing support for the "Charter security paradigm" was clearly manifested by the strained interpretation of Gulf War Security Council resolutions that were ultimately relied upon by the United States as legal bases for the conflict. It therefore seems plausible that a theory of legality firmly rooted in Article 51 of the U.N. Charter, with the accordant shift of the burden of persuasion to opponents of the inevitable conflict, might have enhanced the perceived international legitimacy of the military action, and thus accommodated the interest of the United States in avoiding any endorsement of theories involving use-of-force legality that were not nested within the Charter paradigm. Such an approach would have immediately shifted the burden of persuasion to the opponents of military action, who would have been in the difficult position of articulating why, within the broader context of the terrorist threat manifested by the attacks of September 11, the United States was unjustified in effecting regime change to ensure security from a rogue state believed to possess exactly the type of mass casualty capabilities so obviously coveted by terrorist organizations. Such a diplomatic approach to the conflict would have most

effectively exploited the Charter paradigm from an information operations perspective, and potentially resulted in enhanced support from traditional allies and partners—even if these states might have been troubled by the United States's interpretation of that article.

If the United States is yet again faced with a national security dilemma involving threats of imminent attacks by North Korea or other actors, the United States should, from the outset, compare and contrast the two principal avenues of approach related to collective security and inherent self-defense, respectively, as its legal basis for accomplishing its strategic objective.