ROGUE STATES, WEAPONS OF MASS DESTRUCTION, AND TERRORISM: WAS SECURITY COUNCIL APPROVAL NECESSARY FOR THE INVASION OF IRAQ?

Jason Pedigo*

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* J.D. 2004, University of Georgia School of Law; B.A. 2000, University of Virginia. The author notes that, in recent months, many of the factual justifications for the war in Iraq have become subject to serious doubt. See, e.g., Saddam's elusive arsenal, ECONOMIST, Feb. 3, 2004 (quoting weapons inspector David Kay regarding pre-war assumptions about Iraq's weapons of mass destruction: "We were almost all wrong").

This Note applies international law regarding the use of military force to the war in Iraq in light of the information that was available in the months preceding the war, and the author stands by this analysis. This Note argues that the nexus of rogue states, weapons of mass destruction, and terrorism calls for a more flexible interpretation of the UN Charter's restraints on the use of force. Saddam Hussein's Iraq failed to convince the United States that it did not constitute such a nexus, so under the Core Interpretist Theory that this Note espouses, the analysis of the legality of the war remains the same as if Saddam's Iraq did in fact constitute this threat. See, e.g., Anthony Dworkin, The Iraq War in Retrospect, Crimes of War Project, Sept. 14, 2003, at http://crimesofwar.org/onnews/news-iraq3.html (arguing that "the failure to find weapons of mass destruction in Iraq since the end of the conflict does not greatly affect the basic judgement about whether it was launched in breach of, or in accordance with, the U.N. Charter").
I. INTRODUCTION

In 1991, after American forces invaded Iraq during Operation Desert Storm, President George H.W. Bush ceased hostilities, allowing Saddam Hussein to remain in power.1 Twelve years later, with Bush’s son in the Oval Office, America again went to war with Iraq. This time, the goal was not the protection of a small country overrun by Iraqi troops, but a “regime change” whose primary purpose was the removal of Saddam.2 As America now tries to stabilize the defeated country, questions still exist as to the legitimacy of the war. Opposition came from all sides; Middle East leaders staunchly opposed any military action against Iraq (especially with the Palestinian question unanswered), and traditional American allies broke ranks in an effort to prevent the war.3 These countries argued that a U.S.-led force to overthrow Saddam without UN approval was an illegitimate use of force under international law.4 They urged the United States to refrain from launching a unilateral invasion against Iraq, believing that international approval in the form of a Security Council Resolution was necessary before any military attack could be made.5

While most of the world demanded UN consent, the United States, by contrast, was prepared to take unilateral action.6 In the post-September 11 (9/11) world, the United States has concluded that preemptive action is necessary to protect itself from its enemies. Gone are the days when separation by two large oceans was thought sufficient to insulate the United

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2 “Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict commenced at a time of our choosing.” President George W. Bush, Speech to the Nation (Mar. 17, 2003), available at http://www.cnn.com/2003/WORLD/meast/03/17/sprj.irq.bush.transcript/.
5 Id.
States from the troubles of the rest of the world. One of the lessons learned from the World Trade Center attacks is that enemies can strike the United States at any time from anywhere. After 9/11, the world has become a much smaller place, and America has increased its emphasis on confronting threats before they manifest themselves in attacks on Americans.\(^7\) President Bush identified Iraq as one of the primary threats facing the United States, despite the decade-long imposition of sanctions.\(^8\) Bush argued that Saddam was a unique threat to the United States because he developed nuclear weapons, stockpiled chemical and biological weapons of mass destruction, aided al-Qaeda, and was a "murderous tyrant" who may have been plotting attacks against the United States.\(^9\)

Though the military action has been fought and won, a battle still rages over the legitimacy of the United States' actions under international law. As the world hegemon, the actions of the United States receive a great deal of attention. If the United States does not act within the parameters of international law—in this case if it invaded Iraq without proper authority—other countries will have a justification to violate the law themselves. The United States could unwittingly aid those who oppose it by establishing a dangerous precedent. Furthermore, world opinion of the United States, already lowered due to unilateral moves regarding the environment and missile defense, could drop even further.\(^10\) This increased hostility towards the United States could have ramifications in other policy areas.\(^11\)

This Note will address the United States' position under international law regarding the preemptive attack on Iraq. Several issues present themselves: Does the UN Charter allow non-defensive wars? If so, does it require Security


\(^9\) Id. The editors note that the validity of these claims has come under significant questioning in recent months.


Council approval? Did the United States have sufficient cause to go to war without UN approval? In short, was there any scenario under which the U.S. could legally launch a preemptive war with Iraq?

To evaluate the legality of American action against Iraq, this Note will first examine the UN Charter and its various interpretations regarding the use of force. It will look to the language of the Charter and examine several interpretations commonly used. In coming to the conclusion that the war against Iraq was permitted under international law, this Note will argue that perhaps the most common interpretation of the UN Charter—that all non-defensive wars must first be authorized by the UN Security Council—is not the view most suited for the world today. The historical context of 1945, the year the Charter was created, is very different from the present political situation, and that interpretation of the UN Charter is no longer appropriate. A more pragmatic approach is needed for the UN to become a more effective and therefore more relevant vehicle for managing crises of the type seen today in Iraq and North Korea. This approach allows one nation to take action in the interests of self-defense provided sufficient justification exists.

This Note will then look to the circumstances surrounding the invasion of Iraq to determine whether the use of force was authorized. The evidence will suggest that the Charter may have permitted the war against Iraq. This reading, of course, does presume a practical approach to international law, does rely to some extent on precedent, and does take into account Saddam’s history of violence and aggression.

II. BACKGROUND

On August 2, 1990, the Iraqi army invaded Kuwait, captured its oil fields, and forced its government into exile. On November 29, 1990, the United Nations Security Council issued a Resolution that authorized the use of force should Iraq fail to withdraw from Kuwait by January 15, 1991.12 When that deadline passed, U.S. forces, with an international coalition that included both European and Arab nations, commenced hostilities on January 17, 1991.13 After a thirty-nine day bombing campaign and a four day ground war, Iraqi forces were routed; however, Coalition forces did not remove Saddam from

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power. Instead, they allowed him to fend off massive uprisings and to reassert his control over Iraq. In an attempt to contain Saddam, the Security Council passed Resolution 687, which has several relevant parts.

The Resolution first required Iraq to unconditionally accept the destruction of all chemical, biological, and nuclear weapons and their related components, and all ballistic missiles with a range greater than 150 kilometers. Furthermore, it required Iraq to submit a report to the UN detailing the amount, location, and type of all such weapons. Resolution 687 also called for a weapons inspection program and economic sanctions that would be lifted once the Security Council agreed that Iraq had completed all necessary actions. Even though the allied forces declined to remove Saddam from power, the Security Council enacted weapons inspections to keep him in check.

The weapons inspectors found a nuclear weapons development program that was far more advanced than U.S. intelligence expected. But while they were able to dismantle what they could find, the inspectors were fearful of what they were unable to discover. Saddam’s government “admitted to just a fraction of his missile and chemical stores and falsely denied the existence of a biological program.” In fact, though investigators entered Iraq in 1991, they did not even know of the existence of a biological weapons program until 1995, when Saddam’s son-in-law defected to the United States. Iraq subsequently admitted to the program’s existence, but claimed, without offering any proof, that it had been dismantled.

\[14\] Chris Bury, A Tortured Relationship, ABC News (Sept. 18, 2002), at http://abcnews.go.com/sections/nightline/DailyNews/us_iraq_history_1_020917.html (last visited Sept. 21, 2003) ("[T]here was a fear in the Bush administration that Iraq would fragment into ethnic and religious groups.... And the fear was always if that happened, this would be a new opportunity for Iran.").

\[15\] Id. Rebel forces at one point controlled parts of fourteen of eighteen Iraqi provinces. Id.

\[16\] Id.


\[18\] Id.

\[19\] Id.

\[20\] See John F. Dickerson et al., What Does Saddam Have?, CNN (Sept. 9, 2002), at http://www.cnn.com/2002/ALLPOLITICS/09/09/time.saddam.weapons/index.html (last visited Sept. 21, 2003). Reports of Iraq’s nuclear capacity before the war estimated that it was five to ten years away from building a bomb. Id.

\[21\] Id.

\[22\] Id.

\[23\] Id.

\[24\] Id.
Beyond merely not cooperating, Saddam used more devious tactics to avoid discovery of his forbidden weapons caches. "Iraqi obstruction started early. In the summer of 1991, after only two months of inspections, U.N. personnel were stopped dead in their tracks in a face-off lasting four days."\textsuperscript{25} Indeed, the Iraqi noncompliance became a "ritual," with "gaps and inconsistencies," a "policy of concealment," "unaccounted for warheads," "wrong information" and "disturbing incidents."\textsuperscript{26} UN inspectors increasingly found themselves in a frustrating game of cat and mouse with the Iraqis, according to former chief UN inspector David Kay. "By 1993, '94, '95, every time the inspectors got close to new material, [Iraq] closed the inspections down, frustrated them, stopped them, and in addition to that they maintained a very active concealment and deception program designed to hide their program."\textsuperscript{27}

As then President Clinton himself noted, "[T]hroughout this entire process, Iraqi agents have undermined and undercut UNSCOM [United Nations Special Commission]. They've harassed the inspectors, lied to them, disabled monitoring cameras, literally spirited evidence out of the back doors of suspect facilities as inspectors walked through the front door."\textsuperscript{28}

Then, on October 29, 1997, Iraq announced that the U.S. contingent of UNSCOM would be expelled from the country, calling them "agents of hard-line U.S. policy."\textsuperscript{29} After UNSCOM refused to allow Baghdad to determine the inspection team composition, its chairman withdrew the team.\textsuperscript{30} At the time, he noted that Iraq could be conducting illegal activities in the absence of the team:

\begin{itemize}
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} Bury, supra note 14.
\item \textsuperscript{30} \textit{Id}.
\end{itemize}
Already in the last 10 days when (Iraq was) moving toward what happened in the last 24 hours, they started to impede our cameras, move our equipment, prevent our inspections from taking place. We can't see exactly what's happening now the way we could before and so of course we are concerned that with our backs forced to be turned away in that way, activities may be taking place that are dangerous and illegal.\textsuperscript{31}

After the withdrawal of the team, the UN had no real method of evaluating Iraqi compliance. Until the war, the UN only received evidence on Iraqi weapons development from the Iraqis themselves.\textsuperscript{32} Due to its history with Saddam, the United States was understandably reluctant to accept it at face value.\textsuperscript{33}

The United States was very concerned with the lack of information coming out of Iraq. When the inspection teams left, they knew they had not completed their mission.\textsuperscript{34} They believed that Saddam still had stockpiles of chemical and biological weapons, Scud missile delivery systems, and perhaps most importantly, the ability to restart weapons production quickly should he so desire.\textsuperscript{35} This knowledge, coupled with the firm belief that Saddam, during UNSCOM's entire six-year presence in Iraq, continually frustrated the inspections with the sole purpose of protecting his illegal stockpiles that he unconditionally agreed to dismantle at the conclusion of the Gulf War, caused alarm in the Bush Administration.\textsuperscript{36}

It would be beyond the scope of this Note and the ability of its writer to describe the impact that 9/11 had on the United States. Suffice to say that this country was deeply affected and changed its outlook on foreign affairs. The events of 9/11 brought home with brutal force the fact that the world was a

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} Dickerson, \textit{supra} note 20.
\textsuperscript{33} That Saddam lacked credibility is beyond dispute. While inspectors were still in the country, "Iraq revised its nuclear declarations four times within just 14 months and it has submitted six different biological warfare declarations, each of which had been rejected by UNSCOM." \textit{Id.}; Clinton, \textit{supra} note 28. In addition, Iraq admitted the existence of a biological arsenal only after Saddam's son-in-law defected. Saddam persuaded him to return with promises of forgiveness and promptly executed him. Dickerson, \textit{supra} note 20; Clinton, \textit{supra} note 28.
\textsuperscript{34} Clinton, \textit{supra} note 28.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} Cheney: 'Survival of Civilization' at Stake, \textit{supra} note 6.
much smaller place and that people who hold hatred for the United States have the ability to strike her from a world away.

The brevity of the Gulf War reinforced the position as world hegemon, and even though sanctions were created to ensure Saddam divested himself of weapons of mass destruction, there was never any doubt that his armed forces were incapable of harming the United States.\(^3^7\) However, just as U.S. military might continues to distance itself from its nearest challenger, the post-9/11 United States feels an acute sense of vulnerability. As al-Qaeda has brutally illustrated, a non-military fighting force can inflict devastating economic and psychological injuries.

In the immediate aftermath of the 9/11 attacks, "stocks fell, oil prices surged, the dollar tumbled and money flooded into Treasury bonds."\(^3^8\) Not only did American markets "basically collaps[e]," but overseas markets registered double digit losses.\(^3^9\) In addition to severe economic consequences, massive terrorist attacks can give rise to a great deal of national psychological damage. After 9/11, experts warned of widespread post-traumatic stress disorder, including trauma "experienced vicariously by those who are some distance away."\(^4^0\)

With this heightened concern over future terrorist attacks, including a new appreciation of the destruction they can deliver, the United States turned a watchful eye towards Iraq. After weapons inspectors left Iraq for good in 1998, few believed that Saddam had given up his forbidden weapons programs. In fact, it was almost universally accepted in the West that he was intent on their continued development.\(^4^1\)

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\(^{37}\) See Johanna McGeary, *Inside Saddam's World*, CNN (May 6, 2002), at http://www.cnn.com/2002/ALLPOLITICS/05/06/time.saddam/index.html. A former Iraqi tank commander stated, "the army he left behind last year was in sorry shape, demoralized, underpaid and ill equipped. Of the 33 tanks in his sector, he says, 15 were out of commission. In a land of oil wells, there was even a shortage of tank lubricant." Id. These observations were borne out by the brevity of conflict.


\(^{39}\) Id.


\(^{41}\) McGeary, * supra* note 37 ("[Saddam] sacrificed the well-being of the Iraqi people and billions of dollars in oil revenues to keep the unconventional weapons he had before the Gulf War and to engage in an open-ended process of acquiring new ones.").
A Saddam-ruled Iraq with nuclear weapons would have been a grave problem for American interests in the Middle East.\textsuperscript{42} American, and indeed worldwide interests, are best served with a stable Middle East. In fact, al-Qaeda has listed both American support for Israel against the Palestinian people and the presence of American troops in Saudi Arabia as its primary reasons for attacking Western interests.\textsuperscript{43} Stability in the region would mean an end to the Palestinian uprising and a greatly diminished need for the presence of American troops. The United States views one major step towards the desired stability in the Middle East to be a democratic Iraq.\textsuperscript{44}

Saddam is known as an opportunistic aggressor who will invade his neighbors when he perceives weakness.\textsuperscript{45} He has invaded both Iran and Kuwait when he believed he could expand his territorial reach,\textsuperscript{46} and the Bush Administration was convinced that, given the opportunity, he would invade again.\textsuperscript{47} And even though his military was severely weakened after the first Gulf War, had Saddam possessed nuclear weapons, he could have used them to intimidate neighboring nations.\textsuperscript{48}

Since the end of the first Gulf War, the United States has been highly suspicious of Saddam Hussein, as there has been documented evidence of his development of weapons of mass destruction, as well as of his hatred for the United States.\textsuperscript{49} Yet this information was not new. The sudden increase in American resolve—the U.S. transformation from a Security Council member satisfied to uphold sanctions to a country prepared to wage a unilateral war—was a result of both this information and the new understanding of the potential of terrorism.

As stated above, 9/11 brought home to the United States the potential harm that terrorism can inflict on many different levels. Saddam potentially combined the two greatest fears of the United States: a state sponsored

\textsuperscript{42} Id.
\textsuperscript{45} McGeary, \textit{supra} note 37.
\textsuperscript{46} Id.
\textsuperscript{48} McGeary, \textit{supra} at note 37.
\textsuperscript{49} See id. ‘Down With America’ banners, in English, greet visitors to the former Saddam International Airport in Baghdad. \textit{Id.}
weapons program coupled with al-Qaeda’s terrorist organization. Saddam knew that using nuclear weapons directly against the United States would invite immediate nuclear counterattack. Yet, had he allied himself with al-Qaeda, he would have had an indirect means to inflict great harm. President Bush noted this joint threat in rallying support for the war.

Almost immediately after 9/11, government leaders began to beat the war drums regarding Iraq, as Senators such as Joseph Lieberman noted that efforts to contain Saddam had failed and that the United States must “be prepared to act alone.” President Bush stated, “We’re taking him out,” while Vice President Dick Cheney told a Senate Republican policy lunch group that “[t]he question was no longer if the US would attack Iraq.... The only question was when.”

Yet these statements were not couched as mandates to remove a tyrant who oppresses his own people or may again attack his neighbors. They instead contain a defensive tone, with Senator Lieberman advocating removing Saddam as part of the war on terror. President Bush has stated, “Saddam Hussein needs to understand I’m serious about defending our country.” This statement demonstrates that the impetus behind removing Saddam was not just an altruistic motive to make Iraq and the world in general a better place (although that argument has certainly been made), but a real fear that Saddam may harm the United States.

On November 8, 2002, the Security Council addressed this threat by passing Resolution 1441 with a unanimous vote. The Resolution required Iraq to provide by December 8, 2002, “a currently accurate, full and complete declaration of all aspects of its programmes to develop chemical, biological,
or nuclear weapons . . . ." 57  Furthermore, "false statements or omissions in the declarations submitted by Iraq . . . and failure by Iraq at any time to comply with . . . this resolution shall constitute a further material breach of Iraq’s obligations . . . ." 58 Most importantly, Iraq must provide weapons inspectors with "unimpeded, unconditional and unrestricted access to any and all [sites] . . . they wish to inspect." 59 The Resolution ended by reminding Iraq that it would “face serious consequences” if it continued to violate the Resolution. 60

Iraq wrote a nine page letter to the UN decrying the actions of the United States and Britain but saying it would comply with the Resolution. 61 The letter stated that Iraq did not possess any weapons of mass destruction and claimed to welcome the opportunity to expose the “lies and manipulations” of the West. 62

UN inspectors reentered Iraq, but never found a “smoking gun.” 63 They did, however, discover empty chemical warheads omitted from the Iraqi declaration 64 and reiterated that the declaration was incomplete. 65 Though Chief UN Weapons Inspector Hans Blix did indicate that Iraq had improved cooperation, UN inspectors also found Iraqi missiles which exceeded the 150 kilometer range limit imposed by the UN. 66 Finally, the UN pulled out its inspectors when it appeared that war was imminent. 67

The U.S. military campaign, subjected to much early criticism, was one of the shortest wars on record as President Bush proclaimed an end to major fighting only six weeks after hostilities commenced. 68 Almost immediately after hostilities ceased, American forces began the search for weapons of mass

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58 Id.
59 Id.
60 Id.
62 Id.
65 Id.
68 President George Bush, Speech On Board the USS Abraham Lincoln (May 1, 2003).
destruction. To date, only circumstantial evidence of these weapons has been uncovered, though White House officials remain confident they will be found eventually.

III. ANALYSIS

Determining the legality of military attacks against Iraq depends on how one interprets the UN Charter and international law. When the Charter was first adopted in 1945, it anticipated future conflicts and established a mechanism to confront them. Article 2(4) directed all member nations to refrain from the threat or the use of force in international relations. Knowing, however, that states would be unable to uphold this lofty ideal, the Charter created the Security Council, a fifteen member group (with five permanent members) that primarily addresses matters of international security. This group has the power to impose economic or diplomatic sanctions on law-breaking nations, as well as to authorize military action if those measures are inadequate. Giving strength to this power is article 43 of the UN Charter which requires member states to make available to the Security Council military forces that would compose a UN military body. Though sole military discretion rested in the Security Council, the right to self-defense was left intact. In theory, therefore, should one country attack another, the attacked country would immediately take defensive measures while informing the Security Council, who, if other non-military options were deemed inadequate, could send UN troops into battle. In a sense, this UN military

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72 U.N. CHARTER art. 2, para. 4.
73 U.N. CHARTER art. 39.
74 U.N. CHARTER art. 41.
75 U.N. CHARTER art. 42.
76 U.N. CHARTER art. 43.
77 U.N. CHARTER art. 51 (“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. . . .”).
presence would be a worldwide police force, reducing the need for unilateral action.

This system reflects the political setting in 1945, and it failed because of the onset of the Cold War. Cooperation among the allied nations during World War II had been so great that it was believed that same spirit would continue in the United Nations. Furthermore, all of Europe and much of the Soviet Union was still devastated from the war, so the framers feared internation conflict on a massive scale and structured the Charter to address that possibility. Peace (and by extension, sovereignty) was the goal, not justice.

That in part explains why the structure of the Security Council, with its five permanent members holding veto power, enables those members to obstruct any legislation they choose. From its inception until the end of the Cold War, the Charter has been at the mercy of obstructionist agendas empowered by permanent vetos. So long as Saddam had an economic carrot to dangle in front of one permanent member, he had an excellent chance of avoiding Security Council-authorized action. Self-defense must then be the justification used by America for any invasion of Iraq.

A. Iraq's Qualities

Unfortunately, the historical influences that developed the Charter did not anticipate a nation such as Iraq. There are several factors that made Iraq a

78 See Franck, supra note 71.
79 Id. at 52.
80 Pretextual claims of self defense often justified an aggressor's actions and thus, the Charter sought to impose an objective and impartial means to determine the legitimacy of the use of force. Therefore, no force was allowed unless an actual attack had occurred. Michael J. Glennon, Preempting Terrorism: The Case for Anticipatory Self-Defense, WKLY. STANDARD, Jan. 28, 2002, at 24.
82 Id. A classic example of this problem is the Korean War, which began with an attack by North Korea against South Korea in 1950. Seemingly, this attack would be the precise type of action which the Security Council existed to confront. However, because North Korea was communist and therefore supported by the USSR, a Resolution authorizing force could only be passed while the Soviet member was absent. Franck, supra note 71, at 53-54.
83 Arend, supra note 81. The framers did not anticipate the frequent use of the veto, especially in the early days of the United Nations, to block nearly all possible actions by the Security Council against aggression. Id.
84 Any permanent members with veto power could prevent authorization for war by exercising their veto. Id.
unique threat to the world and especially to the United States. Iraq was commonly classified as a “rogue state,” defined as “a state whose identity is to some extent defined by acting outside of the standard rules of international law.”

85 Saddam showed his disregard for international law on numerous occasions throughout his rule. Most famously, his invasion of Kuwait was a clear violation of the UN Charter on the prohibition on the use of force. 86 When the UN imposed sanctions after the Gulf War, it articulated specific steps that Saddam had to take to become certified as compliant with international law. 87 Yet over a decade later, Saddam’s refusal to cooperate to the satisfaction of the Security Council kept those sanctions in place.

In addition to being a rogue state, Iraq evinced a desire to obtain or develop weapons of mass destruction 88 and a disturbing willingness to use them in battle. Saddam used chemical weapons on Iranian troops in the Iraq-Iran war in the 1980s, and again in the 1990s on his own citizens during the Kurdish uprising. 89 Considering his propensity for using these weapons, there was an understandable concern that, given the opportunity, he would use them on his greatest enemy: the United States.

In addition to Saddam’s disregard for international law, his attempts to procure weapons of mass destruction, and his willingness to use them, Saddam is notorious as one of the world’s worst human rights violators. 90 Saddam ruled with a paranoia that perceived any opposition or challenge as a threat to his power, 91 and those who threatened his power were often tortured and executed. 92 This oppressive, systematic violation of his own subjects’ human rights created a powerful moral incentive for a country to intervene. Yet

87 S.C. Res. 687, supra note 17.
88 Though Iraq denied these allegations, it did possess biological weapons and had a nuclear weapons program before the Gulf War. And despite its denials, the Security Council Resolution demanding the return of weapons inspectors was passed unanimously, showing that even traditional allies such as France, Russia, and Syria disbelieved Saddam’s protestations of innocence. U.N. SCOR, 4644th mtg., S/RES/1441 (2002).
89 Though there was no prohibition against the use of chemical weapons until 1997, their use was generally condemned, as evidenced by the 1925 Geneva Gas Protocol. Arend, supra note 85, at 742. The distinction between these types of weapons is slight, so that a willingness to use one creates a legitimate fear concerning a willingness to use the others.
91 Id.
92 Id.
because Iraq did not attack another country, such an intervention would be illegal.

Finally, there were allegations of collaboration between Iraq and al-Qaeda. The prospect of Iraq’s weapons program conspiring with al-Qaeda’s shadowy organization presented the possibility of Iraq using the terrorist group as a proxy in its desire to harm America while avoiding the inevitable retaliation. The UN Charter does not directly address this type of threat, and guidance approving a self-defense rationale depends on the interpretation used.

Because the UN cannot guarantee worldwide security, and because rogue states such as a Saddam-ruled Iraq pose such a serious threat, states have often placed their own national interests ahead of the Charter and have used force numerous times in contravention of the Charter. The legality of using force in light of any UN failures has been a popular topic of debate, and three theories have emerged. Applying these theories—the Core, Rejectionist, and Core Interpretist—to Iraq, especially in the post-9/11 context, highlights the strengths and weaknesses of each. Knowing that each theory has its flaws, it seems that only the third, the Core Interpretist, provides the necessary interpretation of the UN Charter and the applicable rules of force to provide the proper balance of security and military restraint.

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94 If the UN provided adequate security, an aggressor would know the futility of undertaking war. This would reduce the threat of aggression and in turn reduce the need for anticipatory self-defense. Glennon, supra note 80.

95 Since a use of force is legitimate in very limited circumstances—only for self-defense or through Security Council approval—every instance of military action since 1945 has required at least one illegal actor. For both participants to wage war in accordance with the UN Charter requires the UN to approve an attack against an “innocent” country which then fights in self-defense. Even conflicts with one side fighting according to international rules are rare; the majority of military conflicts, such as the Vietnam war, the Soviet invasion of Afghanistan, the Pakistan and Indian conflicts, and any number of African wars are fought without either party obtaining Security Council approval.

96 An additional theory, that the Charter is a legally binding document that controls its signatories’ actions until formally repudiated, exists. However, in view of the numerous military conflicts since 1945, it is evident that few of the signatories consider the Charter binding when it conflicts with their own national interests. It therefore appears that the acts of the members effectively negate any legal obligation just as formally as any written document could. Abraham D. Sofaer, International Law and Kosovo, 36 STAN. J. INT’L L. 1 (2000)

97 Though there is no one name for these theories, I use those selected by Professor Arend in his article, International Law and the Recourse to Force: A Shift in Paradigms, supra note 81.
B. Core Theory

The first theory, the Core Theory,99 is a very strict, literal belief that any use of force must satisfy the requirements of the Charter, meaning it must be in self defense or authorized by the Security Council.99 If a war does not satisfy the formal requirements, it is illegal, no matter how just, even if it advances the purposes of the Charter.100 Humanitarian intervention and preemptive self-defense, among others, are not legal uses of force under this view.101 Not only must the use of force be in response to an attack, but the attack must be continuing; if the attacker has withdrawn, the counterattack must stop.102

This approach does have its advantages. It provides a very clear standard concerning the use of force. The justifications used by previous aggressors would be insufficient smokescreens to cloud the nature of the aggression or prevent the Security Council from acting. In an ideal world, where all nations conform their action to the Charter, war would virtually cease.

Yet, clearly we do not live in such a world. A lofty rule that ignores reality is in danger of itself being ignored. Economics teaches us that a cartel is very difficult to maintain because whenever its members set a price for their goods, there always exists an incentive for each member to undercut the group for its own advantage. The same is true under the Core Theory. If one state knows that it can act to its benefit in any manner, short of armed attack, and avoid military repercussions, it then has an incentive to follow its national interests, to the detriment of its neighbors, so long as it is prepared to pay the economic and diplomatic price.103

98 Id.
99 Sofaer, supra note 96.
100 Id. at 2-3.
102 This is a natural extrapolation of the definition of self-defense. Once the threat is removed, no need for defense exists. Therefore, in theory, if one country launches a massive raid on another, but withdraws before the defender can engage, no military recourse exists for the victimized country.
103 Not only would the Core Theory have prevented NATO from intervening in Kosovo to prevent ethnic cleansing, but Yugoslav President Slobadan Milosevic was "sufficiently confident in the 'push-button' view to invoke international law by filing suit in the International Court of Justice against participating NATO states." Sofaer, supra at note 96, at 3. Clearly, Milosevic
This view, then, would have been most advantageous to Saddam. His propensity to break international law would never be corrected so long as he was willing to suffer through sanctions. Yet provided he did not attack another state, Core Theory rules out military action, leaving only sanctions. After more than a decade, there was little reason to suspect that sanctions would ever render him harmless. Yet in spite of the inadequacy of alternatives, without a Security Council Resolution authorizing force against Iraq, the Core Theory would make any counterattack illegal.

This theory is fatally flawed, however, because the international collaboration envisioned in 1945 never took place. The Cold War divided the world into two competing camps that “cooled the impetus for globalist solutions.” Therefore, no permanent UN forces were made available per Article 43, as Eastern bloc nations and the West began to view each other with suspicion and distrust. The United States could not rely on UN forces to contain Saddam and correct any problems he might cause.

Finally, as laudable a goal as peace may be, it may conflict with national interests, or even the purposes of the Charter. Preserving the peace can, at times, come at the expense of human rights, criminal justice, or any number of factors that can provide a state with incentives to act militarily. The Core Theory does not allow any of these factors to influence or authorize a decision to go to war. Unfortunately, these factors at times compel a state to act in violation of the Charter, and other times, these factors may dictate a moral duty to use force.

A rogue state's drive to obtain nuclear weapons also exposes a critical problem with this theory. Though atomic weapons had been developed before 1945, the convention had no way of foreseeing their destructive power or their

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believed that the Core Theory view would allow him to institute his purely domestic ethnic-cleansing agenda by prohibiting intervention.

104 Indeed, while under sanctions, Saddam still built ornate palaces, amassed great wealth, and retained absolute power. The people of Iraq were the ones adversely affected by the sanctions. McGeary, supra note 37.

105 Franck, supra note 71, at 53.

106 Id.

107 If a dictator ruthlessly suppresses an ethnic minority within his own borders, a neighboring country primarily composed of that minority may feel obligated to intervene, despite the lack of threat to its own territorial integrity.

108 Note that the intervention in Kosovo was never claimed to be self-defense, rather NATO countries used moral and political reasoning (ethnic cleansing, threat of regional destabilization) to justify their actions. Sharp, supra note 101, at 318-20.
destabilizing effect. Their power is such that an attack could cost millions of lives and devastate entire cities. Saddam's history of aggression and ruthlessness suggested that he would use them if it was to his advantage; however, the Core Theory would prevent another country from acting until it had actually fallen victim to their use. Though peace is certainly an important goal, the stakes with weapons such as these are too high to require a nation to wait until attacked to use force. Following this requirement could result in state annihilation, while ignoring it makes the Charter irrelevant. Neither result is desirable, and, therefore, the Core Theory cannot survive as nuclear weapons proliferate.

Finally, this theory would not have allowed the United States to attack Iraq even if concrete evidence had surfaced that it operated in cooperation with al-Qaeda. Because of the Charter's emphasis on stopping interstate warfare, other more devious methods have developed such as surrogate warfare, "waged indirectly by subversion and covert foreign intervention in civil wars. This was not the kind of traditional 'armed attack' against which the 'inherent right of ... self-defense' was designed to provide protection." Because the International Court of Justice has ruled a defending state may not intervene in a country from which the surrogate force originates, the Core Theory would not recognize any attack on the sponsoring nation as self-defense. Therefore, theoretically, Saddam would be free to give weapons of mass destruction to al-Qaeda to use against America without fear of military consequences.

This war illustrates a conflict that arguably advanced the Charter's aims, yet this interpretation of the Charter would not have allowed any action. If the

109 Arend, supra note 85, at 742.
111 The UN may have indirectly endorsed this view when it failed to criticize Israel for its preemptive attacks in 1956 and 1967. Franck, supra note 71, at 59. Even the International Court of Justice "was unable to decide definitively whether an otherwise unlawful act—recourse to nuclear weapons in anticipatory self-defense—would be lawful if the very existence of the state were threatened." Id. at 60 (citing 1996 Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict).
112 Recently, North Korea, itself a "rogue state," has claimed to be a nuclear power. Unfortunately, if North Korea does indeed possess nuclear weapons, U.S. options are much more limited than they would be had this crisis occurred before the weapons were developed. Christopher Dickey, No, Saddam is Worse, NEWSWEEK, Jan. 13, 2003, at 31. The dramatically increased difficulty in addressing the problem is another reason why intervention cannot be predicated on an actual attack.
113 Franck, supra note 71, at 57.
Charter values peace and sovereignty, then it should not be tied to an interpretation that does not advance those goals most effectively. True, the Core Theory does have a clear standard of when war is justified; however, that standard may only encourage violence and vigilantism. If it had been proved that Saddam was aiding al-Qaeda, then application of the Core Theory would have two results.

First, any help that al-Qaeda receives directly increases the violence and potential for war. If the United States, or any similarly situated country, can stop the source of their support, the conflict will end or diminish in intensity. Conversely, additional support to the surrogate will prolong the violence. Proponents may argue that the Core Theory has prevented wider war in past eras such as in Vietnam or during the Soviet invasion of Afghanistan. The Cold War and its policy of Mutually Assured Destruction, however, played the key role in preventing the escalation of conflicts.\textsuperscript{115} The Core Theory cannot claim sole responsibility for containing war then, and its use could actually have the opposite effect now.

The second result upon applying the Core Theory, if Iraq had been proven to be conducting surrogate warfare against the United States through al-Qaeda, is a greater chance of unilateral action. A pressing national interest to act against Iraq, combined with the minimal help that the Charter provides, creates a greater incentive for the United States to ignore the Charter. Just as following this interpretation in the face of nuclear proliferation results in either state destruction or Charter irrelevance, in the age of surrogate warfare, continued reliance results in prolonged conflicts or Charter irrelevance. The Core Theory cannot address either of these problems, and neither of these options are desirable. Therefore, it is obsolete after 9/11.

\textbf{C. Rejectionist Theory}

The second theory is less an interpretation than a belief. The Rejectionist sees the flaws in the Core Theory and has followed the second path discussed

\textsuperscript{115} For example, the North Vietnamese Army was given great support from the Soviet Union, yet the United States limited its fighting to Vietnam. When the roles were reversed in Afghanistan, the Soviets similarly never attacked their greatest enemy, the United States, despite American assistance to the Afghan freedom fighters. International pressure undoubtedly played some role in these decisions; however, the knowledge of the consequences of such an invasion and the potential for nuclear war made any attack out of the question. See generally \textit{John Lewis Gaddis et al., eds., Cold War Statesmen Confront the Bomb: Nuclear Diplomacy Since 1945} (1999).
above. Frustrated by the Charter’s inability to “justify legally what they consider so palpably proper and politically essential. . . . render[ing] the civilized world helpless to deal with such patently lawless and inhumane conduct,” the Rejectionist does not believe that the UN Charter is a “proper guide for the use of force in international affairs.”

In addition to the Charter’s ineffectiveness, the Rejectionist argues that individual state practice is so “far removed from any reasonable interpretation” of the Core Theory that the Charter “does not in any meaningful way constitute existing law.” Because national interests sometimes conflict with the Charter, and because states follow their national interests at the expense of the Charter, the “authority and control of the norm have essentially disappeared.”

If Core Theorists could be called idealists, then Rejectionists would be realists. Fast adherence to the Core Theory interpretation of the Charter would have prevented any international war since 1945. Though the Cold War is often noted for the absence of large scale conflicts, there was no shortage of military confrontations.

If the actions of states do not reflect any inhibition by international law, it may be accurate to say that international anarchy exists. But the simple fact that the use of force has been nearly universally illegal does not warrant an abandonment of the Charter and the ideals it espouses. One does not need to be an expert in international relations to see the danger of accepting this theory. In an anarchical system, there is nothing to curb self-interested actions. Saddam, or any other tyrant, would have total freedom to oppress his people, develop nuclear weapons, and cooperate with al-Qaeda to harm the United States. With no organized opposition, the only resistance would come from his next victim. Divide and conquer has long been the preferred tactic of the aggressor. Before the Gulf War, Saddam had one of the world’s largest armies, with over one million men. If no international law existed to brand

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116 Sofaer, supra note 96, at 4-5.
117 Arend, supra note 81, at 27.
118 Id.
119 The ‘Containment Policy,’ the Soviet revolution against capitalism, African wars, etc., made warfare common in every part of the planet. However, the superpowers never directly fought one another in part because, to do otherwise would have involved NATO and the Warsaw Pact, making world war and nuclear war likely. See generally GADDIS, supra note 115.
120 “[I]t is [the Rejectionist] approach that seems to offer the most accurate description of the contemporary jus ad bellum.” Arend, supra note 81, at 28.
121 See Marc Erikson, Iraq: In All but Name, the War’s On, Asia Times Online (Aug. 17,
his actions illegal, he could have attacked any nation; and were he wise enough to attack one without a powerful ally, there would have been no one to stop him.

Besides greatly empowering the aggressor, the Rejectionist view makes just intervention harder in additional ways. There would be no "legitimate" system to counter a tyrant such as Saddam. Many countries rejected military action without UN consent.\(^2\) The Rejectionist Theory would have closed that avenue, even if the United States desired to act within the UN system. Coalitions such as those used in the Gulf War or in Afghanistan after 9/11 would be much harder to organize without a body such as the UN issuing the call for support. Other Arab nations would view any U.S. involvement with greater suspicion and be less inclined to cooperate without the umbrella of objective authorization. Though this theory may provide short-term benefits to America such as facilitating invasion by removing legal concerns, long term interests, such as American-Arab cooperation and the war on terror, would be greatly harmed.

D. Core Interpretist Theory

If strict adherence to the Charter language is impossible, its rejection may be even worse. This problem has prompted scholars to search for a middle ground, one that would preserve the system, allow for flexibility, yet create a satisfactory precedent for future crises. The resulting theory, the Core Interpretist Theory,\(^3\) most closely strikes this equilibrium. This theory does not hold that the core of Article 2(4) is coextensive with its language, instead encompassing only the ideals of Article 2(4) that aggressive, unjust war should be illegal.\(^4\)

Clear aggression and the content of article 2(4) and 51 would, in turn, be defined by reference to established traditions of normative reasoning, such as prudence and just war doctrine, in an open


\(^3\) Also called the Common-Lawyer theory. Sofaer, *supra* note 96, at 8.

interpretative process similar, in fact, to that already underlying state decision-making...\footnote{125}

This approach requires "an evaluation of all the circumstances relevant to such actions under the Charter and other applicable legal principals."\footnote{126} The flaw of the Core Theory was to attempt to create a standard that covered every situation, but in reality, "it is no more feasible or desirable to attempt to define aggression 'once and for all' than it is so to define any other legal term or concept of international or municipal law."\footnote{127}

Adaptability is one of the Core Interpretist view's key assets. By not tying down the definition of aggression, the system remains free to develop with changing world events. UN approval can be more easily given if a broader spectrum of legitimate uses of force is recognized. Though the spectrum is fairly nebulous, it incorporates other forms of international law, such as human rights, violations of international law, and of course, self-defense.

\[L\]egality is resolved through a process of weighing relevant facts against the standards and purposes of the Charter rather than by examining whether a situation meets the prerequisites of one of a number of particular categories considered necessary to establish legitimate action.\footnote{128}

Of course, this interpretation's biggest asset is also its biggest weakness. Just as the Core Theory's strength is that it provides a clear standard, the Core Interpretist Theory is attacked for its imprecise limits. Charter literalists fear that by allowing other justifications and consideration of all circumstances, aggressors may go unpunished.\footnote{129} With any increase in "malleability" comes an increase in the number of legal wars.\footnote{130}

Yet this fear does not render the theory inoperable. The "use of force carries with it a heavy burden of justification" and the attacking state would

\footnote{126} \textit{Sofaer, supra} note 96.
\footnote{127} \textit{Id.} (quoting MYRES S. MCDougAL & FLORENTINO P. FEUCIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 151-53 (1961) (citation omitted)).
\footnote{128} \textit{Sofaer, supra} note 96.
\footnote{129} \textit{Id.} at 16.
\footnote{130} \textit{Id.}
presumably carry the burden of proof.\textsuperscript{131} And while it is true that such a view may encourage an aggressor to attack first and justify later, such actions are already commonplace.\textsuperscript{132} Furthermore, the standards are largely in place and can be gleaned from existing international law.\textsuperscript{133} The inclusion of customary law into the Charter under the Core Interpretist view allows flexibility and security along with some measure of certainty:

Customary international law, defined as the unwritten body of rules or norms derived from the practice and opinion of states, need not take long to develop, so long as a particular practice of states is uniform.\ldots\ And once customary international law develops, that development can form a reinterpretation of U.N. Charter law consistent with state practice.\textsuperscript{134}

This view, therefore, could allow humanitarian intervention. Without specifically saying so, NATO and the United States justified their actions in Yugoslavia under this theory.\textsuperscript{135} Despite the lack of Security Council approval, NATO and the United States argued that the massive human rights violations perpetrated by Yugoslav President Slobodan Milosevic demanded action.\textsuperscript{136} Sovereignty is still a key component of international law—a war for territorial aggrandizement would be illegal under the Core Interpretist Theory\textsuperscript{137}—and as the human rights justification was controversial even in the extreme case of

\textsuperscript{131} Id. Note also that Iraq's claim that Kuwait was historically part of Iraqi territory did not deter the Security Council from acting, while Israel's preemptive attacks in 1956 and 1967 brought about no U.N. action. Franck, \textit{supra} note 71, at 59.

\textsuperscript{132} Twice Israel has claimed self-defense after preemptive attacks, and all other "illegal" attacks by other nations have been followed by justifications. Miriam Sapiro, \textit{The Shifting Sands of Preemptive Self-Defense}, 97 \textit{Am. J. Int'l L.} 599, at 601 (2003) (describing Israel's justifications of its 1967 attack on Egypt and its 1981 attack on Iraq's Osirak nuclear facility). Therefore, the timing of the justification will not see any change under the Core Interpretist view.

\textsuperscript{133} Sofiaer, \textit{supra} note 96.


\textsuperscript{135} "The Clinton Administration (and NATO)\ldots\ issued a statement of the circumstances that it claimed justified the action [in Yugoslavia]." Sofiaer, \textit{supra} note 96, at 3.

\textsuperscript{136} Id. at 12. NATO and the United States also argued self-defense under Article 51, saying that the conflict was a threat to regional stability. Ryan Hendrickson, \textit{Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter}, 19 \textit{B.U. Int'l L.J.} 207, 217 (2001).

\textsuperscript{137} Arend, \textit{supra} note 81, at 25.
Yugoslavia, the less offensive Iraqi violations would probably not justify an invasion.138

Many argued that the United States’ best rationale for attacking Saddam was his systematic violation of international law.139 Human rights violations aside, Saddam was isolated by Security Council sanctions for twelve years due to his failure to comply with UN Resolution 687.140 His early lack of cooperation with weapons inspectors and his later eviction of the teams despite Security Council demands for readmission141 are compelling evidence of his disregard for international law. Due to the nature of the repeated infractions, Saddam’s actions are very serious and high-profile.

By invading Iraq and deposing Saddam, the United States made a forceful statement for compliance with international law. This statement, in turn, could lend authority and strength to future Security Council Resolutions. Other violators of international law would feel the deterrent effects of an attack on Iraq, similar to the message sent by the UN when evicting Iraq from Kuwait in 1991.

Along similar lines, the United States has asserted that the original Gulf War cease-fire justified military action today.142 “When the Gulf War ended in February 1991, the [Security Council] suspended the authority to wage war and authorized a cease-fire contingent on Saddam Hussein’s agreement to dismantle his weapons of mass destruction under the terms of a UN inspection regime.”143 In this view, his continued failure to abide by his agreement revoked the cease-fire, thereby allowing the United States to re-institute a state of war.

Both of these rationales are probably sufficient grounds for intervention under the Core Interpretist Theory of international law. When “weighing

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138 Sofaer, supra note 96, at 2-4 (noting that criticisms of NATO’s action in Yugoslavia may be “soundly based,” despite compelling humanitarian considerations supporting such action).

139 Bush’s most modest argument for retaliation may be his strongest. Punishing a state that has repeatedly failed to comply with its international obligations is an important way of enforcing international law. Some governments and scholars have argued that states may use armed reprisals in limited circumstances to step in the shoes of the United Nations when it fails to protect the peace.

140 Dickerson, supra note 20.

141 Id.

142 Dafna Linzer, U.S.: Cease-fire justifies action, ASSOCIATED PRESS (Nov. 2, 2002).

143 Id.
relevant facts against the standards and purposes of the Charter," it seems likely that Saddam’s actions are sufficiently egregious and the cause sufficiently aligned with the principles of the Charter to warrant military action.

Such justification would be self-defeating, however. Though the above arguments are premised on the importance of adhering to international law, the underlying transgression is the deviation from Security Council mandates. Iraq has repeatedly violated international law because it has refused to follow Security Council Resolution requirements. If this refusal has dishonored the terms of the cease-fire, it has dishonored a cease-fire created by the Security Council. Yet, by definition, unilateral action by the United States comes without Security Council approval. A paradox emerges: can the United States act without Security Council consent to punish a country that does not obey Security Council demands? These arguments lose much of their moral imperative when viewed in this light.

Of course, neither humanitarian intervention nor securing compliance with international law were the primary motivations behind the U.S. military invasion. Rather, post-9/11 United States has initiated the war on terror to prevent future attacks and to destroy al-Qaeda. Justifying a defensive invasion of Iraq can be (and to some extent was) done two different ways. One possibility is that Saddam was connected with al-Qaeda and thus was a passive participant in the 9/11 attacks. The second possibility is the more conventional argument of preemptive self-defense against some future attack.

President Bush argued numerous times after 9/11 that there was a connection between al-Qaeda and Iraq. He accused Iraq of providing aid and shelter to the terrorist group, and noted a purported meeting between one of the 9/11 hijackers and an Iraqi intelligence agent. Though the United States made no assertion that Iraq helped plan or execute the 9/11 attacks, it attempted to bolster its position based upon the supposed Iraq and al-Qaeda

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144 Sofaer, supra note 96, at 11.
146 Ratnesar, supra note 145.
connection. If this connection was made, the United States would have had its justification for war. Security Council Resolution 1368, passed shortly after 9/11, recognizes the United States' "inherent right of individual or collective self-defence in accordance with the Charter." Yet this Resolution cannot be used to justify a unilateral expansion of the war on terror to nations not participating in the 9/11 attacks. The Resolution was passed to authorize a response to these specific terrorist attacks, not to allow the United States to unilaterally use force to eradicate all terrorism. For the Resolution to support an attack on Iraq, President Bush would have had to produce evidence linking Iraq not just to al-Qaeda, but to the attack on 9/11. The United States never made such a showing. Unless it had done so, self-defense based upon 9/11 could not be used to justify the invasion.

The most powerful argument the United States had for war with Iraq is the necessity of self-defense, which, under the Core Interpretist theory, need not require an actual attack. Saddam has a well known antipathy for the United States, and strong evidence existed that he was developing weapons of mass destruction that could be used against it.

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150 Id.

151 Ratnesar, supra note 145 ("CIA officials, while not ruling anything out, say meaningful ties between Saddam and bin Laden are tenuous at best. Members of Congress who have been well briefed have seen no smoking gun.").


Any state that seeks to invoke the right of self-defense should be required to furnish the international community with credible evidence that... the entity against which the right of self-defense is exercised was the source of the attack... The alleged credibility of conclusory statements by a state's leadership should not be a sufficient basis for actions in self-defense since it would encourage abuse.

The classic definition of the appropriate use of this doctrine was articulated in the mid-nineteenth century by then-Secretary of State Daniel Webster, who "adjudged military preemption permissible if the danger threatened was 'instant, overwhelming, leaving no choice of means and no moment for deliberation.'"\(^{154}\) While this definition certainly states the preferable level of exigency for the use of military force, it comes from a time before weapons of mass destruction. Their introduction into a conflict makes imminent necessity obsolete.\(^{155}\) To wait for an enemy to acquire, much less threaten to use, weapons of mass destruction risks exactly that: mass destruction. In light of the changing nature of self-defense and the threats faced, the Core Interpretivist doctrine allowed a preemptive attack on Iraq.

Saddam’s history suggested that he would not hesitate to use these weapons so long as their use enabled him to retain power.\(^{156}\) He refrained from using them in 1991 due to the American threat to retaliate to any chemical attack with nuclear weapons.\(^{157}\) In theory, therefore, he was unlikely to ever use them openly against the United States. Not only was Saddam’s military capability limited, but past history taught him that their use would bring about his removal. This logic is used by advocates of ‘containment,’ saying that military intervention is unnecessary and unjustified.\(^{158}\)

While this argument may have governed in 1991, it no longer holds true in today’s environment.\(^{159}\) Even if Saddam would never have used weapons of mass destruction against America for fear of his own destruction, he could potentially have passed them to terrorist groups such as al-Qaeda and concealed his role in their use.\(^{160}\) Al-Qaeda has already been linked to other attempts at obtaining weapons of mass destruction,\(^{161}\) and its previous attacks on the United States demonstrate that it would not hesitate to use them if given access.

\(^{154}\) Beres, *supra* note 110, at 128.

\(^{155}\) Arend, *supra* note 85, at 750.


\(^{157}\) *Id.* at 43.

\(^{158}\) *France, Germany Stand Firm on Iraq*, *supra* note 122.

\(^{159}\) Bush, *supra* note 145 ("Before September the 11th, many in the world believed that Saddam Hussein could be contained. But chemical agents, lethal viruses, and shadowy terrorist networks are not easily contained.").

\(^{160}\) *Id.* ("Secretly, and without fingerprints, [Saddam] could provide one of his hidden weapons to terrorists, or help them develop their own.").


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[157] *Id.* at 43.


[159] Bush, *supra* note 145 ("Before September the 11th, many in the world believed that Saddam Hussein could be contained. But chemical agents, lethal viruses, and shadowy terrorist networks are not easily contained.").

[160] *Id.* ("Secretly, and without fingerprints, [Saddam] could provide one of his hidden weapons to terrorists, or help them develop their own.").

Though no evidence existed showing a high level connection between Iraq and al-Qaeda, they do possess "similar interests—hatred of Israel, hostility toward the rulers of Saudi Arabia and, especially, enmity toward their common nemesis, the U.S." The present fragmentation between these two groups with such a shared goal is too uncertain to preclude military action.

Though it may not have been inevitable that Saddam would give covert aid to al-Qaeda, his longstanding determination to acquire weapons of mass destruction and his enmity towards the United States presented too grave a risk to sit and hope otherwise. This potentially deadly combination, given all the relevant information gathered on both Iraq and al-Qaeda, was sufficient justification for a preemptive self-defense invasion under the Core Interpretist Theory of international law.

IV. CONCLUSION

Unfortunately, due to the Cold War and the obstructionist politics that accompanied it, development of international law has been somewhat retarded. As a result, there is not much Security Council precedent dealing with proper uses of force. Therefore, it is difficult to say which of the above interpretations of the UN Charter governs.

Perhaps, in time, the UN will grow into its role as arbiter of world disputes, and the Security Council will govern all uses of force. If the UN remains relevant and deals with future crisis with success, that outcome becomes more likely. Today, however, the Security Council has yet to prove that it is prepared to take all necessary measures to ensure that justice, not only peace, prevails. Should the Security Council impose a limit on the use of force that frustrates a nation's ability to defend itself, its role will be marginalized as the state will place its own survival above adherence to international law.

To some extent, the UN has recognized this problem and adopted a Core Interpretist approach to unauthorized use of force. For example, the 1993 military strike against Iraq in response to its assassination attempt on former

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162 Ratnesar, supra note 145.
163 Id.
164 Bush, supra note 145 ("If [an Iraqi and al-Qaeda union is] permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an option.").
165 Franck, supra note 71.
166 Arend, supra note 81, at 10.
167 Sofaer, supra note 96.
President George Bush received widespread support—despite no actual attack on America.\textsuperscript{168} As in the NATO humanitarian intervention in the Balkans, even in the absence of a threat to America's security, the use of force was tacitly accepted by the UN.\textsuperscript{169} Perhaps the best illustration of the willingness of the Security Council to adopt a Core Interpretist view of the Charter is its "retroactive" authorization of the Economic Community of West Africa States military intervention in the Liberian Civil War.\textsuperscript{170}

These tacit recognitions of legitimate military action, no matter how limited, endorse the validity and necessity of a flexible and interpretive approach to the UN Charter. The Core Interpretist version of international law under the UN Charter is the only reading that correctly balances the actual needs of member nations with the goals of the Charter. Any other approach would result in the marginalization of the UN, either by overly restricting a state's ability to survive, or by rejecting international law altogether.

The application of a Core Interpretist vision of the Charter to the just-completed conflict shows that military intervention in Iraq was justified. Saddam has a history of procuring, developing, and stockpiling weapons of mass destruction. He also used them on several occasions, even against his own people.

Coupled with his apparent determination to possess and willingness to use these weapons was Saddam's continued defiance of the Security Council Resolution calling for him to divest himself of these very weapons.\textsuperscript{171} Indeed, up to his final moment in power, Saddam never was completely open with the UN weapons inspectors, although those same inspectors admitted the Iraqis were becoming more proactive and cooperative.\textsuperscript{172}

While Saddam's alleged desire to possess weapons of mass destruction was not new, the world is a different place since 9/11. The United States and the world have a heightened awareness of terrorism and an increased determination to prevent it. The capabilities of terrorists to enter the United States and commit acts of incredible destruction have become all too apparent. The world

\textsuperscript{168} Hendrickson, \textit{supra} note 136, at 215-16.
\textsuperscript{169} Id. at 218-19.
\textsuperscript{170} Franck, \textit{supra} note 71, at 56-57.
\textsuperscript{171} "Iraq appears not to have come to a genuine acceptance, not even today, of the disarmament which was demanded of it. . . ." CNN, \textit{Excerpts from the Inspectors' Reports to the UN} (Jan. 27, 2003), at http://www.cnn.com/2003/US/01/27/sprj.irq.excerpts/index.html.
now knows of al-Qaeda's desire to obtain weapons of mass destruction so that it may use them against the United States.

Before the war in Iraq, the United States faced two threats. The first, terrorism, involves future attacks against the West. In order to inflict maximum casualties and psychological damage, terrorists are certainly willing to use weapons of mass destruction. The second, Saddam, was known to develop the very weapons the terrorists desire, had no scruples about their use, and shared the same enemy—the United States.

The Core Interpretist theory involves an evaluation of all circumstances and Charter principles. Such an analysis considers the weapons in question, the zealous determination of the enemy, the indiscriminate nature of the attacks, and the potential damage (human, economic, etc.). Prohibiting action because an alliance between Iraq and al-Qaeda did not then exist was unacceptable. Such a posture could have given Saddam the necessary freedom to develop weapons of mass destruction, as well as the opportunity to transfer a weapon to al-Qaeda if he believed he could do so and remain anonymous. This connection was not a prerequisite for action, rather, it was a risk the United States could not take. If such an association developed, it would not be a question of whether, but when such an attack would be directed against the United States.

Critics may argue that such reasoning would give the United States the unbridled discretion to attack any unfriendly country. This assertion is not true. It is the probability of such a link, not the most remote possibility of one, that justifies an invasion as a legal exercise of preemptive self-defense. The United States could not justify an invasion of all unfriendly countries by alleging a connection with al-Qaeda.

Each instance of preemptive self-defense requires an assessment of the situation, the history of the antagonists, and the ramifications of each course of action. Unfortunately, unlike the Core Theory, there is no bright line rule that brings clarity to the analysis. However, based upon the information available at the time and the apparent danger Saddam posed to all, the situation


174 Arend, supra note 81.
that existed gave the United States sufficient justification to use military force against Iraq.