

PREEMPTING PREVENTION: LESSONS LEARNED

MIRIAM SAPIRO*

The invasion of Iraq in March 2003 continues to raise concerns on several fronts. Did the United States have the legal authority to launch the attack? Was it, in any event, a wise move? How did the intelligence community come to produce such flawed analyses? Will the United States be able to defeat the insurgency and stabilize the conflict sufficiently to reduce its forces within the next few years? When will it ultimately be able to withdraw? Has the situation made other states more likely to use force to settle disputes, or has it reinforced existing prohibitions by demonstrating the risks inherent in using military might? Some answers are discernible now and discussed in this essay. Others may not become clear for years.

This Article focuses on legal questions raised by the intervention. It examines in particular whether a “coalition of the willing” was engaged in a “(mostly) unilateral exercise of preventive self-defense.” The answer depends on how persuasive one finds the justifications offered for the war. Unfortunately, arguments that did not appear compelling at the time¹ seem even less convincing now. While it is clear that U.S. policymakers had legitimate concerns about the intentions and capabilities of Saddam Hussein’s Iraq, it is not clear there were sufficient legal or political grounds for choosing the option of war in March 2003. That decision’s impact on the viability of the rules governing the use of force is one of the most critical questions facing us today in light of the invasion.

I. UNILATERALISM

There was no significant mobilization of countries that thought war against Iraq was necessary or important enough to risk the lives of their soldiers. On March 21, 2003, the White

* Miriam Sapiro served as Special Assistant to the President and as a Director at the National Security Council from 1997 to 2000. From 1988 until 1997, she worked for the Department of State. She is president of Summit Strategies International and an Adjunct Professor at NYU School of Law and the School of International and Public Affairs at Columbia University.

1. See Miriam Sapiro, *War to Prevent War*, *Legal Times*, Apr. 7, 2003, at 43.

House announced a list of forty-five other "Coalition Members."² Some of them, however, offered only political support or over-flight rights.³ The list included many of the smallest countries and territories in the world, such as the Marshall Islands, Palau, and the Solomon Islands.⁴ A number of traditional friends and allies, including several NATO partners, chose not to participate.

Since President Bush declared on May 1, 2003, that major combat operations in Iraq had ended, international partners have contributed to stabilization efforts⁵ but not enough to be certain there is enough support for a viable exit strategy. Offering troops to secure Iraq is still a risky proposition because of the insurgency. It is also increasingly difficult for countries where there is strong domestic opposition to the war. While the number of non-U.S. forces is higher than during the war, estimates indicate that the United States is still providing 80 percent of the troops, paying 90 percent of the costs, and bearing 90 percent of the casualties.⁶ To make matters worse, a number of countries have withdrawn the forces they sent earlier, including Nicaragua, Spain, the Dominican Republic, Honduras, the Philippines, Thailand, and New Zealand. Other countries, including Poland, the Netherlands, Bulgaria, Ukraine, and Italy, have indicated plans to draw down their forces during 2005.⁷

2. Press Release, White House Press Office, Coalition Members (Mar. 21, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html>.

3. See, e.g., Sonni Efron, *Administration Insists Coalition Is Large, Diverse and Willing*, L.A. TIMES, Mar. 21, 2003, at A15 (discussing the different contributions coalition countries have made to the war effort).

4. Coalition Members, *supra* note 2.

5. George W. Bush, Remarks from the USS Abraham Lincoln (May 1, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html>; see, e.g., Donna Miles, *Coalition Partners Increase Support in Iraq*, AMERICAN FORCES INFO. SERV. (Nov. 29, 2004), at http://www.defenselink.mil/news/Nov2004/n11292004_2004112904.html (highlighting commitments by Denmark, Japan, and Singapore to extend the stay or increase the numbers of their forces); GlobalSecurity.org, *Non-US Forces in Iraq – 15 March 2005*, at http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm (summarizing which coalition partners sent troops initially, which have pulled out, and which have promised increases in support).

6. Philip Gordon & Jeremy Shapiro, *Learning the Hard Way Not to Fight Alone*, FIN. TIMES, Mar. 18, 2004, at 43.

7. *Non-US Forces in Iraq – 15 March 2005*, *supra* note 5.

R

R

Unilateralism can sometimes be a positive attribute, particularly in a case where a country exercises clear moral leadership in an otherwise desperate situation. Had a single government, for example, been willing to intervene to stop the bloodshed in Rwanda in 1994, it would not have been accused of unilateralism in the pejorative sense of the term. But in the case of Iraq, a majority of countries believed there were options short of war still to exhaust. As a result, there was widespread criticism that the United States acted on its own in deciding to use force, without meaningful consultation with other countries.⁸ While Administration officials have gone to great lengths to dispel this notion, they have had limited success.⁹ Other than the United Kingdom, few countries contributed a significant number of troops to the invasion or subsequent stabilization efforts. So far, Iraq appears to have been a mostly unilateral American effort.

II. LEGAL JUSTIFICATION

Given that Iraq has been a mostly unilateral exercise of “something,” what was it exactly? It does not appear to have been an exercise of the right of self-defense enshrined in the U.N. Charter. The United States based its legal argument—as opposed to its political justification—more on U.N. Security Council resolutions than on the Charter’s right of self-defense.¹⁰ Under Article 51 of the Charter, the “inherent right

8. Even the United Kingdom, which was the next largest troop contributor, was briefed on preparations for war during summer 2002, rather than consulted about whether to employ force, according to a leaked Downing Street memorandum. See *The Secret Downing Street Memo*, TIMES ONLINE (May 1, 2005), at <http://www.timesonline.co.uk/article/0,,2087-1593607,00.html>.

9. During the first 2004 presidential debate, President Bush raised Poland’s contribution of 2,500 troops several times. *Transcript of the Candidates’ First Debate in the Presidential Campaign*, N.Y. TIMES, Oct. 1, 2004, at A20; see also *Non-US Forces in Iraq – 15 March 2005*, *supra* note 5. Polish Defense Minister Jerzy Szmajdzinski has indicated that his country will withdraw its troops when the U.N Security Council mandate expires in 2005. See, e.g., *Poland Confirms Iraq Withdrawal*, BBC NEWS (Apr. 12, 2005), at <http://news.bbc.co.uk/2/hi/europe/4436165.stm>.

10. George W. Bush, Remarks in Address to the United Nations General Assembly (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>; see also William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557, 558 (2003).

of individual or collective self-defence” can be exercised only “if an armed attack occurs against a Member of the United Nations,” and only “until the Security Council has taken measures necessary to maintain international peace and security.”¹¹ The Administration was unable to establish a direct link between the September 11 attacks on the United States orchestrated by Osama Bin Laden and the regime of Saddam Hussein, and so it could not argue that the predicate of an “armed attack” existed.¹² Nonetheless, on occasion officials did allude to traditional notions of self-defense to buttress arguments that existing Security Council resolutions provided sufficient authority.¹³ The President noted on the eve of the war that the United States had “sovereign authority to use force in assuring its own national security.”¹⁴ A few days later, the Department of State’s Legal Adviser mentioned, after citing several Security Council resolutions, that the President “may also, of course, always use force under international law in self-defense.”¹⁵

The United States’ legal argument was based primarily on three U.N. Security Council resolutions: 678 (1990), 687 (1991) and 1441 (2002). Resolution 678 gave Iraq, in 1990, “one final opportunity” to “comply fully with resolution 660 (1990) and all subsequent relevant resolutions” by a deadline

11. U.N. CHARTER art. 51.

12. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 334 (2004) (“The [Clarke] memo found no ‘compelling case’ that Iraq had either planned or perpetrated the attacks.”), available at <http://www.gpoaccess.gov/911/>.

13. See George W. Bush, Remarks at Cincinnati Museum Center (Oct. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html>.

14. George W. Bush, Remarks in Address to the Nation (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>.

15. William H. Taft IV, Remarks to National Association of Attorneys General (Mar. 20, 2003), available at <http://usinfo.state.gov/dhr/Archive/2003/Oct/09-464655.html>. The legal justification published by the British Government did not mention self-defense, but cited only the Security Council Resolutions. See U.K. Foreign & Commonwealth Office, Attorney General Clarifies Legal Basis for Use of Force Against Iraq (Mar. 18, 2003) (Statement by the Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394383&a=KArticle&aid=1047661460790>.

of January 15, 1991.¹⁶ Otherwise, member states cooperating with Kuwait would be authorized to “use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”¹⁷ The phrase “use all necessary means” is synonymous with an authorization by the Security Council to use force.¹⁸ The term “relevant resolution” logically referred to those ten resolutions on Iraq that were enacted between Resolutions 660 and 678, and which were enumerated in the preambular paragraphs.

Resolution 687, enacted at the conclusion of the Gulf War, codified the cease-fire terms to which Iraq had agreed, including its unconditional acceptance of the destruction, removal, or rendering harmless, under international supervision, of certain chemical, biological, and conventional weapons.¹⁹ The Security Council as a whole agreed to “remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region.”²⁰

Resolution 1441, adopted eleven years later in November 2002, found that Iraq had been, and remained, “in material breach of its obligations under relevant resolutions,” including Resolution 687, because of a “failure by Iraq to cooperate with U.N. inspectors and the International Atomic Energy Agency”²¹ Resolution 1441 gave Saddam Hussein “a final opportunity” to comply with Iraq’s disarmament obligations under previous resolutions.²² Rather than specify that member states would “use all necessary means to uphold and implement” Resolution 1441, as it had done earlier to authorize the Persian Gulf War, the Council instead indicated that it would “convene immediately” if it received a report of noncompli-

16. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. ¶¶ 1-2, U.N. Doc. S/RES/678 (1990).

17. *Id.* ¶ 2.

18. See Taft & Buchwald, *supra* note 10, at 558.

19. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶ 8, U.N. Doc. S/RES/687 (1991).

20. *Id.* ¶ 34.

21. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. ¶ 1, U.N. Doc. S/RES/1441 (2002).

22. *Id.* ¶ 2.

ance from the inspectors.²³ It also reiterated its prior warnings that Iraq would “face serious consequences as a result of its continued violations of its obligations.”²⁴ The Council did not decide whether or not those consequences would include the use of force.

The United States argued that Resolution 1441 recognized Iraq was in material breach of Resolution 687, the earlier resolution requiring disarmament after the 1991 war. It asserted that the breach of the earlier resolution was exacerbated by a further breach of Resolution 1441. Together, these breaches were sufficient to suspend the cease-fire Iraq had agreed to in 1991. In the absence of a cease-fire, the member states cooperating with Kuwait that had been authorized by the Security Council to use force to reverse Iraqi aggression in 1990 and, more generally, “to restore international peace and security in the area” could again use force. The earlier authorization to use force to assist Kuwait in repulsing Iraqi aggression could therefore be relied upon again, more than a decade later, to invade Iraq for other reasons.²⁵

The argument that a breach of Resolution 687 revives the authority to use force contained in Resolution 678 raises several fundamental questions. First, if other members of the Security Council accepted the notion that a material breach by Iraq suspended the 1991 cease-fire and revived the authorization to use force provided by Resolution 678 in 1990, why did Resolution 1441 also include a requirement that members “*convene* immediately upon receipt of a report [of non-compliance or from United Nations Monitoring, Verification and Inspection Commission and the International Atomic Energy Agency in order] to *consider* the situation and the need for full compliance”?²⁶ Would it not have been more prudent to spell out the “revival” argument and, as in Resolution 678, en-

23. *Id.* ¶ 12. *Cf.* S.C. Res. 678, *supra* note 16, ¶ 2 (“Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”).

24. *Id.* ¶ 13.

25. *See* Taft & Buchwald, *supra* note 10, at 560-63.

26. S.C. Res. 1441, *supra* note 21, ¶ 12 (emphasis added).

R

R

R

act a deadline for Iraqi compliance? To paraphrase parts of Resolution 678, Resolution 1441 might have stated:

If Iraq fails to comply with this “one final opportunity” to disclose, disarm and destroy its nuclear, chemical and biological weapons by March 17, 2003, the cease-fire enacted in Resolution 687 shall be temporarily suspended and the Member States co-operating with the Government of Kuwait under Resolution 678 may use all necessary means to restore international peace and security in the region.

There was, of course, insufficient support among members of the Security Council for this position.²⁷ All they could agree upon was to disagree about the next step. Thus, at best, Resolution 1441 was ambiguous.

Second, can an authorization as important as one involving the use of force ever be implicit, rather than explicit? The Administration argued that it was relying on the same legal logic that had justified enforcement actions in the “no-fly zones” that the United States enforced over Iraq.²⁸ There would appear to be a significant difference, however, between addressing violations of airspace restrictions and the launch of a full-scale invasion, particularly in light of the Charter’s fundamental prohibition on the use of force, other than in self-defense or as authorized by the Council. Could one really construe a resolution enacted thirteen years previously, which was designed to address an unambiguous violation of one of the most sacrosanct principles in the Charter (Iraq’s brazen encroachment of Kuwait’s territorial integrity), to justify launch of a very different kind of attack in 2003?²⁹ Prime Min-

27. See, e.g., Michael N. Schmitt, *The Legality of Operation Iraqi Freedom Under International Law*, 3 J. MIL. ETHICS 83, 84-85 (2004).

28. See Taft & Buchwald, *supra* note 10, at 557-58, 563; Nicholas Rostow, *Determining the Lawfulness of the 2003 Campaign Against Iraq*, 2004 ISRAEL Y.B. HUM. RTS. 16 (2004).

29. This theory is weakened by U.S. acquiescence to British pleas to return to the Security Council for a more explicit grant of authority for war. See Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 12-14 (2004); Anne Applebaum, Editorial, *Blair in Agony*, WASH. POST, Mar. 18, 2003, at A31. While the British desire to diminish increasing domestic opposition to war was understandable, it made it harder for the U.S. Administration to argue convincingly that it already had all the authority that it needed.

ister Blair succeeded in persuading President Bush to seek a second Council resolution in order to provide explicit authorization that the British leader felt was important, at least on political—if not also legal—grounds.³⁰ Unfortunately, the fact that such a resolution proved impossible to obtain further weakens the revival argument by indicating that the Security Council did not view force as appropriate in 2003.

Third, if a grant of U.N. authority to use force could ever be implicit, which entity should be the judge of whether and when force would again be justified? Should it be the Security Council as a whole (whose exact composition would of course be different in 2003 than in 1990)? All of the states that formed the earlier Coalition? Or just a part of that Coalition? This question of process has important implications for broader issues involving the collective security system envisioned by the U.N. Charter. Few would argue that, as a rule, such decisions should be left to just one country, or to only a few states. Indeed, the United Kingdom view was that “it is for the Council to assess whether any such breach of [the cease-fire] obligations has occurred.”³¹ Even the United States would be unlikely to formally posit such a sweeping rule, as it would be reluctant to trust others to wield that degree of power. After all, what is the Security Council for, if not to at least assist in the interpretation of earlier Council resolutions, the validity of a cease-fire enacted by the Council, and the views of U.N. weapons inspectors working to fulfill their mandate?³²

Fourth, I asked at the time what would happen to the Administration’s legal argument if the finding in Resolution 1441 of a material breach of Iraq’s disarmament obligations turned

30. James P. Rubin, *Stumbling into War*, FOREIGN AFF., Sept.-Oct. 2003, at 46, 53; see also Memorandum from U.K. Attorney General Lord Goldsmith, to Prime Minister Blair (Mar. 7, 2003), ¶ 9, available at <http://www.pm.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf>.

31. Memorandum from U.K. Attorney General Lord Goldsmith, to Prime Minister Blair, *supra* note 30.

32. Jessica Mathews and others have argued that Iraq was actually an example of U.N. inspectors doing their job, and doing it well. With hindsight, this appears to have been the case. See JOSEPH CIRINCIONE ET AL., WMD IN IRAQ: EVIDENCE AND IMPLICATIONS 54-56 (2004), available at <http://www.ceip.org/files/pdf/Iraq3FullText.pdf>.

out to be wrong, or at least questionable.³³ In such a case, Iraq might not be in “material breach,” and the cease-fire would therefore remain in force. The lack of a material breach—based on the absence of actual weapons of mass destruction—undermines the option of arguing that the Council’s 1991 authorization to use force was an available option. At the time of the Symposium, in February 2004, no weapons of mass destruction had been found, but many still thought they might be discovered. Since that date, however, most everyone—including supporters and critics of the war—has concluded that there were no such weapons.³⁴

The Administration’s legal argument therefore appears to have several weaknesses. If there is a silver lining to the U.S. action, perhaps it is that the invasion of Iraq will be less likely to be used as a precedent for dealing with similar challenges in the future.

III. POLITICAL JUSTIFICATION

The political justification advanced to support the war also suffers from problems. The American public would have been as unlikely to support an action designed solely to enforce a Security Council resolution as Administration officials would have been to take the United Nations so seriously at that time. The United States argued instead that force was the only real option for keeping Iraq’s chemical and biological weapons out of the hands of terrorists.³⁵ Its adoption of a theory of preventive war to address this threat raises several important questions: Is a concept of preventive self-defense legal under current international law? If not, should it be after the horror of September 11?

The law governing uses of military force (*jus ad bellum*) is unsettled. As noted above, it is clear that a State may act under Article 51 of the U.N. Charter once it has been attacked

33. See e.g., Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 603 (2003).

34. See, e.g., CENT. INTELLIGENCE AGENCY, 1 COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ’S WMD 54-56 (Sept. 30, 2004), available at http://www.foia.cia.gov/duelfer/Iraqs_WMD_Vol1.pdf.

35. See, e.g., *President’s State of the Union Message to Congress and the Nation*, N.Y. TIMES, Jan. 29, 2003, at A12.

or if the United Nations Security Council authorizes action.³⁶ But in the absence of these circumstances, it is not settled when a State may legally use force. There has been debate for decades about the legitimacy of “anticipatory self-defense”—reacting to an imminent threat in the absence of an actual attack. The notion of acting in a merely preventive context, in the absence of an imminent threat, could significantly raise the proclivity for abuse.

The United States’ National Security Strategy, enacted in September 2002, speaks in terms of preemptive self-defense, but in reality offers a more subjective standard than traditional preemption.³⁷ Anticipatory—or preemptive—self-defense traces its historical origins back to the famous *Caroline* case, in which British forces destroyed a steamer being used by American and Canadian rebels.³⁸ Secretary of State Daniel Webster challenged the British to demonstrate a “necessity that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation” and, further, that such action was limited by that necessity.³⁹ The test has become whether the perceived threat is imminent and whether the use of force is both necessary and proportional to meet it.⁴⁰

There are different views on whether the preemption doctrine survived adoption of the U.N. Charter in 1945 because Article 51 requires an “armed attack” before a state can invoke self-defense. The better line of reasoning argues that the requirement of an “armed attack” is broad enough to accommodate the prospect of an imminent attack, when there is a high level of certainty and the other criteria—necessity and proportionality—are met.⁴¹

But it is a challenge to stretch the doctrine to accommodate the notion of a preventive war that does not meet the

36. See U.N. CHARTER art. 51.

37. See NAT’L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA § V (2002), available at <http://whitehouse.gov/nsc/nss.pdf>.

38. An excellent summary of the dispute is found in Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214-20 (2003).

39. JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906).

40. See Taft & Buchwald, *supra* note 10, at 557.

41. See, e.g., Sapiro, *supra* note 1.

Caroline standard. The Strategy states that the “greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, *even if uncertainty remains as to the time and place of the enemy’s attack.*”⁴² It eliminates the requirement that an impending threat be imminent, instead specifying only that it be “great,” although greater than what is not clear. Indeed, the Administration did not seriously argue that Saddam posed an *imminent* threat, and they even acknowledged that the risk was more attenuated. As the President himself stated in his ultimatum to Saddam Hussein: “In one year, or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over We choose to meet that threat now, where it arises, before it can appear suddenly in our skies and cities.”⁴³

The U.S. decision to invade Iraq was “preventive” in nature, relying upon a concept of questionable legal pedigree and a high degree of subjectivity. As the U.K. Attorney General noted, if the U.S. position “means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry out that connotation) this is not a doctrine which, in my opinion, exists or is recognized in international law.”⁴⁴ The further a decision to use force moves away from the requirement of imminence, the more likely the possibility of a mistake. The Iraq experience may suggest that there is wisdom in preempting further talk of preventive self-defense, at least without a clear international consensus on appropriate constraints.

IV. INTELLIGENCE MATTERS

Whether we focus on the generally accepted doctrine of preemption, or the more radical one of prevention, there are novel questions involving the role of intelligence that require further study. In cases where there is no armed attack, what should constitute an adequate evidentiary basis for formulating a decision to use force to respond to the threat? And what are the implications of being wrong? With respect to Iraq,

42. NAT’L SEC. COUNCIL, *supra* note 37, at 15 (emphasis added).

43. George W. Bush, *supra* note 14.

44. Memorandum from U.K. Attorney General Lord Goldsmith, to Prime Minister Blair, *supra* note 30, ¶ 3.

some have characterized the U.S. action as “probably the least ambiguous case of the misreading of secret intelligence information in American history.”⁴⁵ In the post-September 11 context of new threats posed by shadowy actors, governments may find themselves dealing with potentially catastrophic threats on the basis of highly ambiguous intelligence.

Trying to improve our intelligence-gathering tools and analyses to provide real-time results becomes vitally important. Obviously, a political imperative or a legal justification is only as persuasive as the underlying facts upon which it is based. However, even the combination of sharp analytical minds and the best raw intelligence—gathered from reliable electronic and human sources—often operates in the realm of uncertainty and probability.

What steps can improve the chances that we will get it right next time? We must come to a stronger consensus on the evidentiary threshold for determining imminence. How much evidence needs to be substantiated and to which audience? Which actors should sit in judgment on whether the test is met in a specific case?⁴⁶ Are a state’s calculations with respect to the use of force always self-judging, or can they be shared with a broader audience? Is there, for example, an acceptable trade-off between revealing intelligence sources and methods, and disclosing more details—both supportive and uncorroborated—in an effort to allow for some form of independent evaluation? Could, for example, a regional organization that includes the country considering a use of force be enabled to serve a vetting function, subject to protections against abuse? On all three of these issues—getting the right raw data, determining the appropriate evidentiary standards, and undertaking the requisite analyses—we have an obligation to ask ourselves how to do it better next time.

V. REBUILDING CONSENSUS

U.N. Secretary-General Kofi Annan has described U.S. behavior towards Iraq as “a fundamental challenge to the princi-

45. Thomas Powers, *The Vanishing Case for War*, N.Y. REV. BOOKS, Dec. 4, 2003, at 12.

46. The issue of measuring the sufficiency of intelligence is different than the question of judging the legality of a decision to use force, although there may be a close correlation between the two conclusions.

ples on which, however imperfectly, world peace and stability have rested for the last 58 years.”⁴⁷ At the same time, he has acknowledged that “we [must] also face up squarely to the concerns that make some States feel uniquely vulnerable”⁴⁸ His answer is to “show that those concerns can, and will, be addressed effectively through collective action.”⁴⁹

Notwithstanding the differences that have emerged over the legal and political rationales proffered by Administration officials for Iraq, it is imperative that we work to develop a rough consensus—domestically and internationally—on when force is permissible. Substantial differences have emerged, for example, between those that believe the exercise of unilateral, “preventive” self-defense is justified when collective action is impossible, and those that believe all unilateral uses of force are extralegal. Declaring the U.N. Charter dead is not the answer, for its norms have provided the only international consensus on when military force may be used, and they are actually more advantageous than constraining for the United States.⁵⁰ A world without the Charter would be more lawless and less stable. Likewise, the answer is not to ignore the problem in hopes that Iraq proves to be a unique case, or that the suspected weapons of mass destruction will mysteriously surface one day and vindicate U.S. policy. Rather, we must try to define legitimate uses of force in ways that are both consistent with the U.N. Charter and cognizant of the dangers we face today.

In addition to determining how best to respond to questions regarding use of force in light of new threats, vulnerabilities and actors, we must also strive for consensus on who should be the final arbiter of such decisions. These questions have relevance far beyond the United States’ use of force against Iraq. North Korea, Iran, China, Russia, Turkey, Pakistan, and India are just a few examples of countries that may be tempted to adopt an unduly broad view of self-defense, with potentially devastating consequences.⁵¹

47. *What They Said in New York*, TIMES (London), Sept. 24, 2003, at 17.

48. *Id.*

49. *Id.*

50. *But 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 (2002).

51. *See, e.g.*, Sapiro, *supra* note 1

To begin the process of shaping consensus, Secretary-General Annan asked a “high-level panel of eminent personalities” to examine current challenges to peace and security, and to report back to him on how collective action can better address them.⁵² The panel was chaired by Former Thai Prime Minister Anand Panyarachun and consisted of other distinguished persons who had served in governments around the world, including former U.S. National Security Adviser Brent Scowcroft. The group’s 2004 Report addressed a number of pressing issues involving security broadly⁵³ and touched briefly upon questions surrounding the use of force. Interestingly, the panel concluded that the U.N. Charter does encompass a right of anticipatory self-defense, when a threat is imminent. If that test is not met, however, there is no right of preventive military action. Any concerns should instead be put to the Security Council for consideration and possible action. Any other position, the panel concluded, would pose unacceptable risks to the “global order and the norm of non-intervention.”⁵⁴

In March 2005, Secretary-General Annan issued his own report in preparation for review of the Millennium Declaration later in the year. Entitled “In Larger Freedom: Towards Development, Security and Human Rights for All,” the Secretary-General’s report considered how best to resolve lingering issues concerning appropriate uses of force, not only in terms of preemptive action but also with respect to dire humanitarian emergencies.⁵⁵ Not surprisingly, Annan views the Security Council as the final arbiter on questions beyond traditional and anticipatory forms of self-defense. But he also acknowledges that the Council requires input from Member States on the relevant guiding principles. In his words:

When considering whether to authorize or endorse the use of military force, the Council should come to

52. See *What They Said in New York*, *supra* note 47.

53. See generally *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges, and Change*, U.N. GAOR, 59th Sess., Agenda Item 55, U.N. Doc. A/59/565 (2004), available at <http://www.un.org/secureworld/>.

54. *Id.* ¶ 191.

55. *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, U.N. GAOR, 59th Sess., Agenda Items 45, 55, ¶¶ 122-126, U.N. Doc. A/59/2005 (2005), available at <http://www.un.org/largerfreedom/report-largerfreedom.pdf>.

a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.⁵⁶

VI. CONCLUSION

The situation in Iraq has demonstrated the risks inherent in allowing preventive self-defense to masquerade as preemptive self-defense. The 2003 war was launched on the basis of inaccurate information and legal and political theories rejected by many around the world, including important friends and allies. It now threatens to require substantial numbers of U.S. troops for the foreseeable future, straining military and financial resources. Going forward, it is imperative that we develop a rough consensus on the parameters governing force, taking into account the new threats we are facing without opening up the potential for abuse. Elaborating the appropriate standard for judging when force is justified, consistent with international law, and demanding more rigorous analysis of intelligence, are critical to future decisions involving force. We should not hide behind the argument that the world now has one less ruthless and brutal dictator with the fall of Saddam Hussein. As international lawyers, we should be candid about what the law authorizes, and cautious when efforts are made to move it in a parlous direction. At the same time, we should bring creativity to bear on finding ways to define acceptable—and relevant—parameters for using force.

56. *Id.* ¶ 126 (emphasis in original).

