Less than Bargained for:
The Use of Force and the Declining Relevance of the United Nations
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I. INTRODUCTION

In the wake of its intervention in Iraq, the United States is coming to terms with an international system that may leave it open to serious national security vulnerabilities. International terrorism, rogue nations, and the proliferation of weapons of mass destruction pose the threat of a direct, devastating attack on American civilians. Regardless of one's opinion on the intervention in Iraq, it is clear now that American policymakers must reevaluate their approach to the United Nations as they develop a strategy to defeat these threats. International lawyers must face the question whether the United Nations Charter, which seeks to prohibit the use of force between nations in most instances,1 too strictly constrains the behavior of the United States in responding to terrorism, weapons of mass destruction, and rogue nations. If American policymakers reach a consensus that important national security objectives are suffering because of the United Nations, it will be difficult to justify adherence to the Charter rules on the use of force.

Of course, no one seeks American withdrawal from the United Nations. Even if United Nations membership ceased to accrue any significant security benefits for the United States, a complete departure from the UN would be unnecessary and unwise. The United Nations plays useful roles in encouraging

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1 United Nations Charter, art 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.").
and enhancing international cooperation outside of the security area.\(^2\) US withdrawal from the UN would likely trigger a spiral into collapse for the organization, as occurred with the League of Nations after World War I. Indeed, American absence from the League was one of several important factors that led to its demise.\(^3\) A similar collapse of the United Nations as an international body would not be beneficial for the United States, even compared to the real possibility that for most countries, membership in the UN may become substantially less relevant to their respective security interests.\(^4\)

The fact that complete US withdrawal is unlikely, however, does not mean the United States must maintain its current relationship with the UN. Nor does it mean that the United States cannot direct the UN to play a role more consistent with its real abilities in the current security context. The US approach of leveling heavy criticism at the UN, its operations, and its members can be supplemented by active steps toward its reform. This essay explores the proper US approach to the UN with regard to the use of force.

This essay criticizes the United Nations Charter’s standard for the use of force, and outlines a different but still constructive role for the UN in some critical domains. In Part II, we point to serious flaws inherent in the structure of the United Nations Charter rules, particularly the ex ante requirements that nations must satisfy prior to engaging in the use of force. Parts III and IV suggest more modest types of roles that the United Nations could occupy, and how the organization can help promote international security without endangering the security interests of its respective members.

II. A PRELIMINARY ANALYSIS OF THE UNITED NATIONS’ GOALS AND STRUCTURE

Clearly, the United Nations’ goals are admirable. Its twin aims are to prevent the use of force between nations except in self-defense, and to promote peace and international security by creating a system of collective self-defense in

\(^2\) Even when the UN is itself unable to react swiftly to international humanitarian crises, it does seem to raise awareness of those crises in the international community. For an example of this phenomenon in the continuing fight against HIV and AIDS, see David P. Fidler, *Fighting the Axis of Illness: HIV/AIDS, Human Rights, and U.S. Foreign Policy*, 17 Harv. Hum. Rts J 99, 106–07 (2004).

\(^3\) Walter LaFeber, *The American Age: United States Foreign Policy at Home and Abroad Since 1750*, 350 (Norton 1989) (noting that the refusal of the United States and Great Britain to support the League’s “call to action” against Japanese incursions into China “mortally wounded” the League, and caused it to “stumble... slowly to its death.”).

which UN members—when authorized by the Security Council—resort to the use of force to prevent threats to the international system. The Charter was a response to World War II, which catalyzed the organization's development, and which was characterized by sweeping conflicts between major alliances of nation-states. In the United States, there was widespread sentiment after the war's end that although American interests must always take precedence, America could not afford to shun cooperation with other major global powers. The UN Charter passed overwhelmingly in the Senate by a vote of eighty-nine to two.

In 1945, the UN Charter appeared to make a great deal of sense. In the wake of World War II, the architects of the postwar international structure sought to reduce the independent ability of states to make war. By encouraging states to enter into collective security commitments to which many other states were participants, future wars could theoretically be avoided. Eventually, global problems generally—and not simply those dealing with the use of force between nations—could be solved by an organization supported by intricate treaty arrangements. At the same time, the Security Council created an institutional forum in which the great powers (circa 1945) would continue to play an integral role in collective security decision making. In this manner states could engage in more mutually beneficial cooperation, and hopefully would not break their respective bargains in order to go it alone in a dangerous world.

Today, however, the United Nations' rules on the use of force have become obsolete. Some scholars have written that the Charter began its march toward obsolescence soon after its initial conception. It is no longer the Cold War rivalry, however, that has rendered the Charter's use of force irrelevant. The major threat to international peace and security today does not come from the threat of conflict between great powers. Threats arise from international terrorist

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8 Id at 153.


organizations, proliferation of weapons of mass destruction, and rogue nations.\footnote{See John C. Yoo, \textit{Using Force}, 71 U Chi L Rev 729 (2004).} In the modern era, the shift from conventional to unconventional warfare compels us to question whether the UN's current approach continues to make sense.

Does the emergence of modern terrorism signal the end of the usefulness of the United Nations Charter's rules on the use of force? Certainly the international landscape at the time of the adoption of the UN Charter was very different than the landscape we face today. The UN Charter system was designed to prevent future wars between great powers. World Wars I and II, wherein large nation-states with huge mechanized armies invaded one another, were the Charter's target. The Charter embraced an international system that mirrors the criminal law—a system in which there would be a supranational government that would attempt to hold a monopoly on the use of force. As with domestic government, the UN would provide each nation security against attack in exchange for its monopoly on the use of force. As with an individual under domestic criminal law, a state cannot use force against another state, except in self-defense. Just as one's personal response to an attack in self-defense is justified in many domestic legal systems, a response in the international context would similarly be justified by the system established by the UN Charter.\footnote{For a thorough analysis of the emergence of these analogous doctrines, as well as the inadequacies inherent in drawing such an analogy, see id at 775–94.}

One of the most important reasons for distinguishing between domestic criminal law and international use of force principles is the notion that, at some level, there is an acceptable amount of conflict and harm in international relations. Even where one nation's preemptive strike might add to the overall level of conflict present in a given situation, international law permits nations to act in a manner that could prevent imminent attacks.\footnote{Note that self-defense and preemptive attack are not synonymous. In self defensive actions, an attack is occurring and the defender's actions are a response to that attack; in a preemptive attack, a defender calculates ahead of time the risk involved in refraining from attack, and strikes first in order to preclude the expected attacker from ever making the first move. For an analysis of these concepts, see George P. Fletcher, \textit{Rethinking Criminal Law} 811 (Little, Brown 2000).} Such actions, however, may not always be proportional to the threats would-be attackers present. In contrast with domestic criminal law, it could be argued that states should have flexibility when assessing the ability of others to cause harm, since it would seem unfair to require states to respond with the precise amount of force necessary to maintain the equilibrium of conflict and harm present in the world. Standard criminal law does not always produce the same result. Individuals who defend themselves must often be cognizant of the danger being posed to them. Indeed, an individual may usually not use deadly force unless he reasonably believes such
force is necessary to protect his or her own life. For better or worse, we are much more concerned about individuals who use deadly force than we are about nations that must use an equivalent type of force to defend themselves.

Terrorist groups that wish to attack the United States are quite obviously not restrained by Article 2(4) of the UN Charter. Private individuals and groups are not bound by the terms of the Charter in attacking other states, but states are bound by it when attacking nations they suspect sponsor and aid these groups. A strict reading of the UN Charter—were it to actually have binding legal effect on nations in their use of force—would significantly constrain the United States’ military options without producing any corresponding restraint on the part of nonstate terrorist groups.

Nevertheless, some parts of the international community continue to believe that a legitimate war may only be conducted either in self-defense or with the express permission of the United Nations. UN Secretary-General Kofi Annan, who recently called the conflict in Iraq “illegal,” is one of the more prominent international figures to hold this belief. But his statement ignores the multiple UN Security Council resolutions that authorized the use of force in Iraq—authorizations that were never specifically repealed by the Security Council. It also ignores legitimate self-defense claims by the United States. It furthermore raises questions about the UN leadership's consistency in the application of the use of force. During the Kosovo war, for example, the Secretary-General did not raise loud objections to the legality of the intervention by the United States and its NATO allies. Yet, that conflict was not authorized by the Security Council, nor did the United States make any self-defense claim.

Like all international organizations, the United Nations seeks to facilitate the bargains made between states. But the function of these organizations ceases to be productive when nations feel a compelling need to consistently violate the substantive norms embodied in the agreement. Whether international organizations can successfully constrain member nations depends in part on whether these nations receive a benefit from continuing to adhere to the bargain established in the international agreement. A strict reading of the UN Charter

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14 Colum Lynch, U.S., Allies Dispute Annan on Iraq War, Wash Post A18 (Sept 17, 2004). Annan is officially on record as saying that the intervention in Iraq, “[f]rom our point of view and the U.N. charter point of view, . . . was illegal.”

15 See Michael D. Ramsey, Reinventing the Security Council: The U.N. as a Lockeian System, 79 Notre Dame I. Rev 1529 (2004) (noting that the best argument in favor of those who feel preemptive war against Iraq was consistent with the UN Charter is that Hussein continued to defy several Security Council resolutions); see also Christopher Clarke Posteraro, Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention, 15 Fla J Intl L 151, 187 (2002) (“Resolution 687 certainly was subsequent to Resolution 660, and it would be very difficult to contend that the cease-fire resolution imposing an inspection regime is not also relevant to Resolution 660, which authorized the initial use of force.”).
would prevent the United States from taking action to protect its national security or to take steps to maintain international security. At some point, the cost of the strict reading could outweigh the benefits that the United States receives—or what the world receives from American uses of force that maintain international peace and stability—from complying with the UN Charter. This situation will either cause the United States to ignore the UN Charter rules, replace them with new rules, or simply withdraw from the UN Charter system entirely.

The case presented by Iraq demonstrates the costs of strict adherence to the UN Charter in a world of new security threats. Although debate will continue over whether Saddam Hussein could reasonably have been thought to possess weapons of mass destruction or links to al Qaeda, it does seem clear that the presence of Hussein's regime in the region was creating great instability. Hussein had used the Iraqi army and military capabilities to wage several wars in the region, including aggressive invasions of Iran and Kuwait. Hussein had also caused billions of dollars in damage and killed thousands of civilians both in his own and in neighboring countries.\(^\text{16}\) Only an expensive system of military containment and economic sanctions kept that instability in check.\(^\text{17}\)

Thus, if the UN Charter rules, as interpreted literally by Kofi Annan, prohibited the use of force against Iraq in 2003, it would bar the United States from taking action it believed necessary to prevent a threat to international peace and security in that region. The United States went to war regardless of the Secretary-General's interpretation of the Charter. One of three conclusions can thus be drawn: the United States ignored the rules, it is seeking to change the rules, or we are seeing the beginning of a US withdrawal from the UN Charter system. To be sure, the withdrawal seems to be a gradual one, having begun with the Kosovo war—another conflict waged by the United States and its allies in violation of a strict reading of the UN Charter rules. Nevertheless, there would be no reason for the United States to withdraw from the UN Charter if it could more narrowly ignore or replace the Charter rules on the use of force only. Those rules did not anticipate, and did little to constrain, the actions of the

\(^{16}\) For a more comprehensive description of the massive damage Saddam Hussein did to the region, see Posteraro, 15 Fla J Intl L at 156-69 (cited in note 15).

\(^{17}\) For the key findings of the commission charged with investigating the extent of Saddam Hussein's weapons program, see Charles Duelfer, *Regime Strategic Intent, Key Findings 1*, in *Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD*, 30 September 2004, available online at <http://www.cia.gov/cia/reports/iraq_wmd_2004/> (visited Nov 5, 2004) (finding that "by 2000-2001, Saddam had managed to mitigate many of the effects of sanctions and undermine their international support. Iraq was within striking distance of a de facto end to the sanctions regime, both in terms of oil exports and the trade embargo, by the end of 1999.").
superpowers during the Cold War, and it appears that they will be similarly irrelevant to the new post-September 11 security environment.

III. A REDUCED UN ROLE

Preventing the aggressive use of force between nations has always been the primary purpose of the United Nations. Assessing whether it has achieved its goal is a more difficult question. While its success at keeping peace may be debated, it is certainly the case that the United Nations Charter's formal legal rules are often breached. By strictly confining the use of force to the point where states must ignore legitimate security threats, the leadership of the United Nations is condemning the Charter to obsolescence. States will change international law before it becomes a suicide pact. This is not to say, however, that the United Nations can play no role in helping defuse militarized crises. The UN might be more successful by creating mechanisms that help states resolve international problems before they reach the stage of war. By fetishizing the use of force requirements in the Charter, however, and neglecting to respond aggressively to global threats before they become imminent, the UN has missed an opportunity to maintain relevance in the security area. Recent UN efforts to address proliferation or to operate sanctions regimes indicate that the UN is currently unable to perform these potentially very useful tasks.

In addition to Iraq, another recent example may bear this out. The International Atomic Energy Agency, an arm of the United Nations, adopted a resolution on September 18, 2004, demanding that Iran freeze its uranium enrichment operations. Despite the demands of the UN, Iran has refused to halt its nuclear weapons activities. Iran’s plan to enrich more than forty tons of uranium would, according to the Agency, provide enough material for several nuclear bombs. Moreover, if the matter is sent to the Security Council for review, Iran has stated firmly that it will withdraw entirely from the Non-Proliferation Treaty (“NPT”). Although Iran contends that the uranium enrichment operations are taking place solely for energy reasons, its Parliament has suspiciously declared that it will not support additional NPT protocols that

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18 That this is the case belies the notion that the Charter rules should be kept, even if ineffective, merely to establish the “norm” of peace. See Louis Henkin, The Reports of the Death of Article 2(4) Are Greatly Exaggerated, 65 Am J Int'l L 544 (1971).
21 Id.
call for closer monitoring of weapons programs if the matter goes before the Security Council.\textsuperscript{22}

It appears to be increasingly the case that the UN Security Council will not be able to take the measures needed to head off military conflict, whether in Iran or elsewhere. This seems to be due, in part, to two different factors. First, permanent members of the Security Council are likely to have differing interests in different regions of the world, based on economic or political ties. In the period leading up to the 2003 invasion of Iraq, for example, it became obvious that France and Russia would vote against a new Security Council Resolution authorizing the use of force against Saddam Hussein.\textsuperscript{23} Significant speculation existed that these nations, each holding the ability to single-handedly veto a potential resolution, might want to avoid war with Iraq so as to preserve significant business contacts there or to ensure that the Hussein government would repay its debts. In the case of Kosovo, Russia prevented the Security Council from issuing a resolution authorizing the use of force because of its historic ties to Serbia.

Second, permanent members of the Security Council may be using their veto to frustrate the exercise of power by the United States. Some nations view the United States as a global hyperpower that threatens to establish a worldwide hegemony. They may seek to take measures to counteract the growth of the United States in classic balance of power fashion. One way such countries may seek to counterbalance the United States' enhanced position is by preventing the Security Council from approving American interventions, thereby imposing some political costs on its use of military force.

\textbf{IV. WHAT ROLE IS LEFT FOR THE UNITED NATIONS?}

The UN remains capable of playing a useful role in resolving disputes between states before they escalate into warfare. Its role, however, is far more modest than the ambitious goal of actually preventing interstate wars. Rather, the United Nations can help reduce the chances of war between two nations by playing the role of a neutral institution that can produce information about a dispute. More information may help facilitate a bargain between the nations that heads of war.

We might begin with a simple illustration. One puzzle is why two nations with a dispute go to war at all. If two nations are in a dispute over something,

\textsuperscript{22} Id.

\textsuperscript{23} That France and Russia were the targets of Saddam Hussein's efforts to curry favor within the Security Council to break the sanctions regime has been confirmed by the Duelfer Report. See Duelfer, \textit{Regime Finance and Procurement, Key Findings}, 1, in \textit{Comprehensive Report} (cited in note 17).
such as a piece of territory, then under perfect information they should come to a settlement that divides the territory rather than going to war. War generates costs that can be avoided by a peaceful bargain. In many cases, the sum of the costs to the two nations may outweigh the sum of the benefits; in other words, the destruction and loss of life from a war will far outweigh the benefit to the two nations through a division of the disputed territory. Their division of the territory should reflect their relative power positions. Thus, suppose state A and state B both lay claim to a territory C. Suppose that state A’s power is greater than state B’s, such that if a war erupts, state A will prevail and gain all of C. However, a war would also generate costs on both sides. State A will presumably go to war if the gains of war, namely the value of territory C, are greater than the costs of war, which in part will be a function of the power of state B to resist a military attack. If both states have full information about these costs and benefits, it is likely that state A and state B will be able to reach a negotiated settlement, rather than go to war. The resulting agreement would probably divide territory C between the states such that A’s share is greater than the overall value of C minus the cost of war (which would be the overall cost benefit of going to war). State B, behaving rationally, should make an offer that would head off war, because it will otherwise suffer the costs of war and lose all of territory C. The greater the power disparity between state A and state B, the more that state B would be wise to offer, since even if it agrees to give most or all of territory C, it still avoids the cost of war.

Rational states should reach an agreement rather than go to war. But as James Fearon has observed, this is often not the case because states lack perfect information of the relative capabilities and costs of war on the parts of both states A and B. State A, for example, may not know exactly how much power state B has, and it may not have good information on the costs of war to state B. If it underestimates state B’s power or overestimates the cost of war to state B, state A will go to war in some situations when it should have actually reached a negotiated settlement. State B, in other words, will have private information about its own capabilities and costs that it may be unwilling to share with A. State B, for example, might also want to exploit uncertainty about its


26 Defensive alliances also throw this equation into flux. For an analysis of this problem, see Posner and Sykes, Optimal War, U Chi John M. Olin Law and Econ Working Paper No 211 (cited in note 24).
capabilities and costs in the hopes that state A might do the exact opposite—overestimate state B’s power and underestimate its costs.

The UN could play a useful role in overcoming this problem and averting war—not by forcing states to obey its formal legal rules, but by producing information that causes states to alter their respective calculi of conflict. If the UN can provide more information to states about the relative power of nations and the costs and benefits of conflict, it could help encourage negotiated settlements. This function is consistent with theories about the role of international institutions in facilitating bargains between member nations.

Transparency is one of the major assets produced by bargains between states. Entirely apart from the United Nations, transparency is a bargaining chip in negotiations between states that are party to GATT (and its successor, the World Trade Organization), the World Bank, the International Monetary Fund, and other financial agreements. In certain circumstances, states may be willing to provide transparency in exchange for increased information about the capabilities and intentions of other states. We saw something like this at work in the arms control agreements between the United States and the Soviet Union during the Cold War. What is less clear is whether states would be willing to disclose information that could be given to potential opponents in a military conflict, or to parties known for their inability to maintain confidentiality. Still, it is possible that the United Nations could play a role to encourage all nations, powerful or not, to maintain transparency.

To make this more concrete, the United Nations could produce information by monitoring the development of weapons of mass destruction by countries seeking to raise their international prominence by altering the balance of power. Kenneth Abbott has suggested that nations contract with each other in order to open information channels that can help achieve security interests. When such agreements first began to appear in the Cold War period, nations sought to contract in order to either limit arms races or to disarm. Formal agreements, like the Strategic Arms Reduction Treaty (“START”) and Strategic


28 Fearon, 52 Intl Org at 269–70 (cited in note 25) (noting that institutions devoted to facilitating bargaining are just as important to international cooperation as those focused on enforcement and monitoring).


Arms Limitation Talks ("SALT") agreements, succeeded in achieving this goal. But when the most pressing current danger is the threat of international terrorism and rogue nations, major agreements such as START and SALT are less important—the problem is not arranging reciprocal arms reductions between equally armed superpowers. Information could still be useful, however, by assuring nations that its intentions and capabilities are not hostile. Iraq highlights that nations will be uncertain about the intentions and capabilities of rogue nations that might be developing weapons of mass destruction or might be harboring hostile terrorist organizations. More uncertainty about the rogue nation may have the effect of forcing larger nations to attack in order to prevent the development of a situation in which weapons of mass destruction fall into the hands of terrorists. While this may seem to be counterintuitive, rogue nations may benefit from producing information to a neutral third-party, such as the United Nations. That information may reassure suspicious nations that the rogue nation does not intend to develop weapons of mass destruction and is not harboring terrorists.

Verification arrangements tend to fulfill the interests of multiple contracting parties by ensuring that no party is cheating on international agreements to the detriment of other nations.\(^3\) In some types of verification arrangements, each state party uses its own efforts to monitor the other parties' compliance within an overarching international agreement. Since states that behave rationally can be expected to pursue their own interests stealthily, they cannot always be trusted to unilaterally provide reliable information to other parties. The best arrangements thus allow states to retain their own respective information gathering capabilities,\(^2\) in order to ensure that other states are adhering to the bargain. Of course, some international agreements will be between parties of asymmetrical ability to gather information.\(^3\) In this regard, the UN could play an especially important role as a facilitator of comprehensive transparency arrangements, and could perhaps reduce the asymmetry inherent in most arrangements. Ideally, the UN could simultaneously attempt to maximize information collection while preserving a sphere of autonomy for individual states. Such agreements could enhance security for all parties and might have the concomitant effect of engendering a sense of autonomy that is only as limiting as it is for all the parties involved.

\(^{31}\) Id at 17–20.

\(^{32}\) Indeed, nations would seem to be acting irrationally if they were to join arrangements in which they did not retain inspection power over the other parties to an agreement. See id at 17.

\(^{33}\) Id at 57 (noting that smaller countries have trouble monitoring large countries with vast weapons supplies).
Iraq provides a case in point. The UN inspection teams ("UNMOVIC") sought to provide more information about Iraq's capabilities, particularly whether it had weapons of mass destruction. If the inspectors had not met with obstacles and frustrations, it might have revealed whether Iraq ultimately had Weapons of Mass Destruction ("WMD"). By appearing to delay and impede the inspections, however, Iraq created uncertainty about its true capabilities and the costs of war. Attempting to frustrate the weapons inspectors, for example, may have created the impression that Iraq was near to completion of a viable WMD system. That would have encouraged war, rather than led to a negotiated settlement.

Of course, agreements would not solve all security problems. These agreements would still fail to prevent individual terrorists who are not receiving support of states to operate. But they would allow one country to know whether other countries are or have the capability of supporting terrorists, or whether they are developing weapons of mass destruction that they might pass on to terrorists. Largely for this reason, the blame for US intervention in Iraq must primarily lie with Saddam Hussein. The unwillingness of the Hussein regime to allow an independent monitoring and verification of its activities led directly to US concerns that the regime posed an imminent threat to its security.

Saddam Hussein's refusal to allow surprise inspections, as well as free and unfettered access to various weapons facilities, reinforced growing concern among American policymakers that the Hussein government posed an imminent threat to the United States. Although Hussein may not have developed the capability to launch a nuclear attack against the United States, the possibility that he had WMD raised legitimate fears that he might use them to alter the balance of power in the oil-rich and strategically important Middle East, or that he might transfer them to terrorist organizations. Swift and definitive weapons inspections could have revealed the private information that Iraq did not possess WMD, if indeed that were the case, to the United States and its allies. But active resistance to the inspections had the opposite effect, magnifying the possibility that Iraq possessed a WMD program and stockpile.

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34 See A. Mark Weisburd, *The War in Iraq and the Dilemma of Controlling the International Use of Force*, 39 Tex Intl L J 521, 529 (2004) (noting that even the French Foreign Minister, who was one of the leaders in the antiwar effort at the United Nations, was convinced that Saddam Hussein had significant stockpiles of weapons of mass destruction).

The Bush Doctrine of anticipatory self-defense is a response to the uncertainty concerning the status of WMD held by rogue nations. It is certainly possible that Hussein stonewalled the United States and United Nations out of principle or even mere pleasure. Nonetheless, it appeared Hussein was doing his best to hide a substantial weapons program. It would have approached irrationality to hope that the Hussein weapons program would remain dormant or less than threatening for very long.

In the context of the post-September 11 environment, it was particularly problematic that Hussein, the leader of a state that had destabilized the Middle East several times prior, possessed known financial connections to terrorists, and had served as a constant threat to regional peace, would continue to frustrate UN weapons inspections. Hussein himself must be seen as responsible for sparking a decline in the relevance of the United Nations. Had unfettered access been given to UN weapons inspectors, it is unlikely that the United States would have continued to be so anxious about the possible threat Iraq posed. That Iraq would not reveal its capabilities was particularly problematic after September 11, which demonstrated that an attack on the United States could take unconventional yet devastating forms.

Even if Iraq were less than a temporally imminent threat in March of 2003, the passage of time could easily have altered its status. Within a few years, Hussein’s weapons program could have advanced to the point where preemptive attack would have been unfeasible. Indeed, it appears that Hussein was actively planning on using chemical weapons on American troops. The fact that he did not appear to possess these weapons at the time of the Coalition’s intervention was used by many commentators to suggest that the war was unjustified. But unless the United Nations could have verified that such weapons would not have been developed in the short term, the intervention might have been justified on the grounds that Hussein appeared to possess a growing WMD stockpile that could easily become an imminent danger to the United States.

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36 Bob Drogin, Despite Findings, Bush Sees Iraq Tie to Al Qaeda, LA Times A1 (June 18, 2004) (detailing the Bush Administration’s arguments for linking Hussein with international terrorism).
38 Intelligence, Anything But: CIA Exaggerated Iraqi Strength, Gave Bush the Ammunition He Wanted, Newsday A36 (July 13, 2004) (“[T]he Bush administration used flawed conclusions, based on questionable data, to justify its predetermined rush to war.”); Robert G. Kaiser, A Foreign Policy Falling Apart, Wash Post B1 (May 23, 2004) (“[T]he United States had no evidence tying Saddam Hussein to any recent terrorism apart from the rewards he paid to the families of suicide bombers in Israel and other Palestinian ‘martyrs.’”).
39 See Bradford, 79 Notre Dame L Rev at 1425 (cited in note 4) (describing the Bush doctrine in terms other than anticipatory self-defense, but rather as simply the last best opportunity to engage in a war that is in fact inevitable).
Alterng the current international understanding of the term “imminence” is therefore critical. The standard that we adopt for the term must not be so constraining as to invite its breach—either by the United States, or by other nations that in the near future also find themselves anxious about potential terrorist attacks. This standard could provide benefits in the way we think of terrorism and rogue states. Terrorism undermines the imminence standard because states may have no warning of an imminent attack from a terrorist organization. In the case of international terrorism of the kind we witnessed on September 11, 2001, a nation might have information about locations of terrorist personnel or assets, but at a time that is distant from the time of an actual attack. Terrorists, as we saw with al Qaeda, carry out attacks by surprise with individuals disguised as civilians attacking civilian targets. In such circumstances, the imminence standard simply does not permit a nation to use force within the available window of opportunity when that force could prevent the attack.

Understanding that the imminence standard has changed helps us to understand the war in Iraq. One of the problems with Iraq is that it potentially threatened not just to develop weapons of mass destruction, but also to secretly proliferate them to other nations and groups that might be hostile to the United States. Again, the imminence standard is very difficult to apply because a proliferator might not necessarily pose an imminent threat of attacking the United States, but could be passing on weapons to people or groups who would use them. The window of opportunity in which to attack the proliferators, and not those who would actually use the weapons, might be exceedingly small.

The Hussein regime succeeded, to its detriment, in defeating international efforts to neutrally verify its WMD capabilities, and thereby provide more information that could have given other nations the ability to more accurately estimate the threat that Iraq posed to international peace and security. By raising, in the minds of the United States and its allies, serious concerns about its evasiveness, and the risk of regional and international instability, Hussein left the Coalition with few options. Perhaps after Iraq we will witness more cooperation between countries because it will be in their interest to cooperate with UN verification teams. Cooperation with international efforts to produce information about a nation’s WMD capabilities will actually do more to reassure other countries, such as the United States, that may be willing to use force to prevent their possession by rogue nations or terrorist organizations. If the UN

40 The United States is not alone in fighting a war against a vague enemy that possesses no strict territorial limitations. See James P. Pinkerton, Russia Is a Problematic Anti-Terror Ally, Newsday A47 (Sept 9, 2004) ("[T]he chief of Russia’s general staff announced, ‘As for launching pre-emptive strikes on terrorist bases, we will carry out all measures to liquidate terrorist bases in any region of the world.’ In other words, the Bush Doctrine is now being joined by a similar Putin Doctrine.").
or other international institution can provide a verification framework, it can help provide an international public good: information that a nation is not developing prohibited WMD that could cause a threat to international peace and security.

So long as countries are convinced that sufficient transparency has been achieved, they can make more accurate judgments about threats and capabilities. This could reduce the amount of wars that occur because of mistake or misunderstanding. The exchange of information, entirely apart from the ensuing transparency it allows, would also likely enhance relations between nation-states. If the UN’s role were limited to facilitating these interstate agreements by monitoring weapons programs, it could continue to play a useful role in reducing international conflict. The UN’s problem has been its overly ambitious goal of stopping all interstate conflict through the imposition of a strict, formal prohibition on the use of force.

The last point regarding the UN Charter system and its provision of collective goods involves the potential roles that international institutions can play. International institutions still could play a very important role in the relations between nations because they could provide, as we think the UN verification teams sought to do in Iraq, neutral information about whether a country creates a threat to international stability. Unfortunately, Saddam Hussein’s policies in Iraq—not just resisting verification efforts but also continuing to develop WMD—shows that certain kinds of interventions may continue to be justified.41

But as long as defenders of the United Nations Charter refuse to take into account the magnitude of a potential attack, and continue to rely on a temporal imminence standard, the Charter will continue to decline in relevance. No state will, at least in the long run, jeopardize its national security by limiting its use of force against individual terrorists or rogue nations until they are just about to launch an attack. Full-scale wars between large industrialized nations appear to be on the wane. It is much more likely that small, but highly dangerous weapons in the hands of terrorists or rogue nations will pose a greater threat to legitimate security interests than the Great Wars of the early twentieth century. To remain relevant and useful to its member states, the United Nations must reduce its ambitions and play a more modest role in reducing international conflict.

41 See Patricia Hewitson, Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm, 21 Berkeley J Intl L 405 (2003) (suggesting that the nonproliferation agreements to which the United States are a party to are especially important for US security interests, and that keeping these private agreements facilitates peace).
V. Conclusion

The goals of the United Nations are admirable, and provide the backdrop for a meaningful framework of international cooperation. However, states are not receiving the full benefits of their bargains. Indeed, at this point, they are being unnecessarily constrained from answering genuine threats to their national security. Before the UN Charter’s rules governing the use of force fade into obscurity, we must reevaluate the UN’s role. Modern warfare demands that states enjoy more flexibility in the use of force than that permitted by a strict reading of the UN Charter’s rules. It is time that the United Nations recognizes the reality of the international situation, and that states demand a better bargain.