

Legitimizing the Use of Force in International Politics:

A Communicative Action Perspective

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Abstract

The legal provisions of the United Nations Charter offer imprecise and insufficient criteria for discriminating properly between legitimate vs. illegitimate uses of force. The conflation of the concept of the legitimacy of the use of force with what is lawful, as agreed upon by a small number of major international actors, overlooks those situations in which legal standards are rendered into instruments of political deception and manipulation in the hands of the most powerful actors. The solution proposed to address this problem draws on Jürgen Habermas' theory of communicative action, and it is subsumed by the concept of *deliberative legitimacy*, understood as the non-coerced commitment of an actor to obey a norm adopted on the basis of the criteria and rules reached through a process of communicative action. The analytical value of the concept of deliberative legitimacy is examined empirically in two case studies: the 1999 NATO intervention in Kosovo, and the 2003 US-led war against Iraq.

Key words: use of force, legitimacy, United Nations, Jürgen Habermas, communicative action

I. Introduction:

What are the conditions under which the decision to use force can be reckoned as legitimate in international relations (IR)?ⁱ The relevance of this question has recently grown in importance, and for good reasons, in consequence of the United States' reactions to the September 11, 2001 tragic events. However, the implications of this question for international politics are more profound. Not only does legitimacy represent the moral and legal platform on which political authority is constructed and harnessed in international politics, but it also shapes the very structure of the international system by helping define its ordering principle, that is, its prevalent culture of anarchy.ⁱⁱ Despite its growing political relevance, legitimacy remains, though, a harshly contested concept. In its most crude version, international legitimacy is even equated with simple international consensus, with little regard for the normative value of the principle underpinning it (Kissinger 1964).

The main weakness of the prevailing approaches relates to the conflation of the concept of the legitimacy of the use of force with what is lawful, as agreed upon by a reduced number of major international actors (Arend and Beck 1993; Art and Waltz 1993; Weisburd 1997; Findlay 2002). This is why the adoption of a resolution by the UN Security Council is usually deemed sufficient for granting full legitimacy to certain military interventions, although the manner in which this consensus is reached is rarely questioned. While the legalistic approach offers a good conceptual instrument for addressing the question of political accountability in international affairs, it nevertheless leaves out a number of critical issues concerning the ways in which these legal standards can be rendered into tools of political deception by the most powerful actors. As a result, LUF has increasingly lost its analytical significance, to the extent that competing claims about legitimate uses of force have become very hard to adjudicate.

Drawing on Jürgen Habermas' theory of communicative action, this paper will supplement the *legal* component of LUF with a deliberative *dimension* focused on the appropriateness of the manner in which consensus about the decision to use force is attained. The main question that deliberative legitimacy tries to clarify is the following: do the promoters of military interventions try to reach a reasoned consensus on the need for the use of force, or do they just engage in power games based on credible threats, intimidation, or rhetorical exchanges with no visible intention to achieve argumentative consensus with the other members of the international community on the definition of the situation and on the course of action? The paper will examine empirically the analytical contribution of the concept of deliberative legitimacy in two case studies: the NATO intervention in Kosovo (1999), and the US-led war against Iraq (2003).

The legal ambiguity surrounding the legitimacy of these interventions is the key feature that connects the two cases together. In both cases, but to different degrees, the provisions of the UN Charter were manipulated by powerful actors in order to validate particular political justifications, while the enforcement mechanisms were generally disconnected from the conditions stipulated in the resolutions adopted by the UN Security Council. The paper is structured as follows. The first section will review the main points of debate of the concept of legitimacy within the IR context in general, as well as in relation to the use of force. The second section will examine the current legal standards for legitimating the use of force, assess their efficiency, and discuss some reform proposals. The third part will introduce the key arguments of Jürgen Habermas' theory of communicative action, address the main objections related to its application to LUF, and outline the conditions under which deliberative legitimacy can bridge the current theoretical gap. The last section will assess the analytical value of the concept of deliberative legitimacy by reference to the

two case studies.

II. Legitimacy in IR

1. International legitimacy

The importance of the concept of legitimacy in international politics has been by now relatively well-established,ⁱⁱⁱ but the debate in IR continues to revolve around the question about how can the concept be most appropriately studied? In conceptual terms, international legitimacy is generally regarded as a key variable mediating the relationship between power, political authority, and global governance. While the particular pattern of this relationship remains yet to be determined,^{iv} there seems to be a general consensus about the nature of legitimacy, as a belief held by individuals or organizations that certain norms or rules ought to be obeyed (Franck 1990: 19; Hurd 1999: 381; Clark 2003: 79-80; Steffek 2003: 255). Far from settling the issue, this definition has actually prompted a serious debate in social sciences in general, and in IR in particular.

Should the examination of the issue of the international legitimacy be a mere description, or also a prescription of the social reality? Put differently, should social scientists remain loyal to a Weberian type of reasoning, for which the important aspect of the study of legitimacy is not the truth of the philosopher, but the general belief held by the people concerned (Schabert 1986: 102), or should they support a normative theory of legitimacy that provides grounds for an independent evaluation of the political order? The explanatory version has the merit of providing a framework for understanding legitimacy within a given system of power relations: where legitimacy originates, how the principles and beliefs that comprise it are maintained and reproduced, why consent is continually renewed, and what social forces are responsible for the erosion of legitimacy (Beetham 1991: 101). On the other hand, a strict separation of facts and values reduces legitimacy to a routine submission of authority (Grafstein 1981: 456), and in so doing, it fails to address the problem of legitimation crisis (Habermas 1975), entails moral relativism, may justify tyranny, and it is

theoretically inconsistent (Coicaud and Curtis 2002: 89-94). A combination of the explanatory and normative approaches emerges thus as the logical solution, but the substance of this compromise remains yet to be established.

2. *Legitimacy of the use of force*

How does the concept of legitimacy fare in a more specific area, the use of force? A commonly shared assumption among IR scholars and practitioners is that without legitimacy the unconstrained use of force promises to create even more opportunities for war and violence in the international system. To prevent this, the use of force needs to be legitimized, that is, to be circumscribed by a set of rules acknowledged by the international community, and which states must necessarily observe when deciding (*jus ad bellum*) and exercising the use of force (*jus in bello*). The definition of the “right” criteria, norms, and legal standards states are supposed to follow in order to use force legitimately remains, nevertheless, a matter of serious dispute. International ethics and international law are the two main approaches that aim to address this problem.

International ethics examines the concept of the legitimacy of the use of force not as a matter of legal constraints, but as a problem of moral justification. The prevalent ethical tradition addressing the moral conditions under which the use of force can be legitimated is that of the *Just War theory* (JWT),^v which contends that certain uses of force are *morally* legitimate as long as they follow, as closely as possible, the norms subsumed by the *jus ad bellum*, and *jus in bello* principles. More recent reformulations of JWT emphasize also the notions of *jus ad pacem* (war is acceptable only as a form of peacemaking) (Coates 1997: 273-291), *jus post bellum* (just termination of the war) (Walzer 2004: 162-68), and of the “responsibility to protect” (prevent, react, rebuild) (Evans and

Sahnoun 2001), as ethical principles for the conduct of war and the construction of a durable peace. In short, the more restrained the rush to war, the more limited and cautious the conduct of war, and the more sustained the post-conflict reconstruction process, the more morally legitimate the use of force.

The success rate of JWT remains, though, contentious. For some, the triumph of the theory is self-evident, as presumably illustrated by the way in which its criteria have become, in many Western countries, one of the tests, although not the most important one, which any proposed military strategy or tactic has to meet (Walzer 2004: 11-12). For others, JWT represents an important theoretical tool, but of little practical relevance, primarily as a result of the failure to institutionalize itself in a way that provides sanctions for non-compliance, and that creates incentives for agents to apply its principles impartially, and on the basis of good information (Buchanan and Keohane 2004: 4). Walzer's optimism notwithstanding, the just war theory faces a serious problem: its standards of evaluation of the legitimacy of military interventions are conspicuously disconnected from the political context in which decisions about the use of force are taken. In short, the just war theory provides an ineffective tool for addressing real-world complexities, and this is why the legal not the JWT criteria will constitute the point of departure of this article.

III. Legal legitimacy and the use of force

1. LUF and international law

The equivalence of LUF to a matter of international law is probably the most familiar interpretation of the concept, and it goes back to the writings of the scholastic thinkers, the League of Nations Covenant, or to the 1929 Kellogg-Briand Pact on the Renunciation of War as an Instrument of National Policy. The UN Charter is currently the fundamental legal framework that regulates the use of force in international relations. But what exactly does the notion of *legal legitimacy* mean in this context? From the perspective of international law, the decision to intervene militarily in the affairs of a different country is considered legitimate if it complies as rigorously as possible with the legal provisions laid down in various international treaties and conventions agreed upon by the international community.^{vi} Therefore, the evaluation of the legal legitimacy of an intervention should pose, at least theoretically, no significant problems, since any proof of non-compliance with international law should suffice to validate the point.

The issue is, of course, much more complex, and it is influenced by two factors: first, compliance with international law is rarely complete but rather partial; second, the legal provisions regulating the use of force are often unclear or even contradictory. This is why the *substantive* component of the legal legitimacy that is, the set of legal principles, norms, and rules circumscribing the limits within which the use of force is accepted, is usually supplemented with a *procedural* dimension defining the right authority and the appropriate process by which the substantive component of legitimacy is interpreted and implemented. In order to be effective that is, to generate a strong perception of fairness, justice, and integrity, which are essential ingredients for a norm to command

obedience in absence of coercive measures (Dworkin 1986), the substantive and procedural dimensions require firm legalization.^{vii} The higher the degree of obligation, precision, and delegation of a norm of the use of force, the stronger its capacity to produce legitimacy.

However, states' permanent and vigorous defense of their "sovereign" right to wage war has constantly resulted, with the notable exception of certain areas regarding the exercise of force (*jus in bello*), into weak forms of legalization, and this situation is unlikely to change in the near future.^{viii} Consequently, the overall utility of the legal approach to assess the legitimacy of the use of force is rather limited, since in the absence of strong forms of legalization, the inherent tensions affecting the substantive and the procedural components may often blur some important distinctions between legitimate and illegitimate uses of force. The controversies associated with the international legal framework governing currently the use of force offer a good illustration of these problems.

2. Legal standards for legitimating the use of force

The *substantive* component of the legal framework currently legitimating the use of force in international relations is based on a number of treaties adopted in the past century, starting with the Hague Conventions of 1899 and 1907, continuing with the Geneva Conventions of 1929 and 1949, the 1945 UN Charter, various resolutions of the UN General Assembly, and ending with the 1998 Rome statute of the International Criminal Court (see Table 1). The key aspect of the resort to force is governed, though, only by a few provisions specified in the UN Charter and in several General Assembly resolutions dealing with the issues of self-defense, collective security, and the definition of aggression. The provisions of the 1945 UN Charter regarding the use of force were designed with

the goal of preventing international acts of aggression similar to those committed by Germany, Italy, or Japan during the 1930s.

Table 1: *Formal conventions on the use of force:*

Subject	Hague Conventions	Geneva Conventions	Nuremberg, ex-Yugoslavia, and the International criminal courts	UN Charter	UN General Assembly
Resort to military force				√	√
Use of military force					
Land warfare	√	√			
Sea warfare	√				
Aerial Warfare	√				
Weapons of mass destruction	√	√			√
Treatment of civilians	√	√			
Treatment of prisoners	√	√			
Prosecution of War Crimes		√	√		√
Neutrality	√				
Military occupation	√	√			
Terrorism					√

Source: Compiled and updated based on (Reisman and Antoniou 1994; Roberts and Guelff 2000).

In this respect, the Charter makes reference to two key principles of legitimate uses of force: self-defense (Art 51), and collective security (Chapter VII). Art. 51 acknowledges the right of states to defend themselves against an armed attack,^{ix} but this recognition is not absolute. In fact, the right of self-defense has rather a residual character since all UN member states are supposed to be protected by the shield of collective security. In other words, states are not allowed to abuse this right, but only to use it as a means of last resort, until the UN Security Council is able to intervene and restore peace. The provisions defining the UN collective security system are stipulated in Chapter VII,

which encompasses the political and military steps necessary to be taken by the UN in order to respond properly to threats to peace, breaches of peace, and acts of aggression. The founders of the Charter envisioned two mechanisms of enforcement of the UN resolutions: international military forces created in accordance with Art. 45-47, and collective interventions undertaken by regional security agencies acting under the authorization of the Security Council (Art. 53).^x

The interpretation of these two principles is further qualified by the Art 2(4),^{xi} which stipulates the conditions prohibiting the use of force: a state can make legitimate use of force only against another state, which threatens its territorial integrity or political independence. In 1974, the UN General Assembly (UNGA) supplemented the provisions of the Art 2(4) with a more comprehensive definition of aggression, which was purported to serve as guidance to the Security Council for determining the existence of an act of aggression. Art. 3 of the UNGA's definition of aggression extends thus the prohibition of the use of force to acts of bombardment, blockade, the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, or to the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State (UN General Assembly 1974).

In *procedural* terms, the interpretation and implementation of the articles of the Charter falls primarily within the area of responsibility of the Security Council, the main UN executive organ. The structure of the Council reflects, though, the international distribution of power at the end of World War II. The five winning powers (United States, Britain, France, Soviet Union/Russia, and China) became permanent members of the Security Council, and they also granted themselves the

right to veto the decisions considered by the Council. The rest of ten seats on the Security Council rotate among other members of the UN. The judicial organ of the UN is the International Court of Justice (ICJ), the role of which is to settle legal disputes between the member states, and to give advisory opinions on legal questions referred to it by the UN bodies and specialized agencies. The overall influence of ICJ is, nevertheless, quite limited, especially on issues dealing with the use of force. The number of cases judged by ICJ since its establishment in 1946 is hardly impressive,^{xii} and the main reason for that is the unwillingness of the parties to accept the jurisdiction of the ICJ in the dispute.

3. Evaluation

The problems besetting the UN provisions concerning the legitimate use of force are well-known.^{xiii} In basic terms, they deal with three issues: the ambiguity of some of the Charter's articles, and the structural flaws of the UN decision-making and enforcement mechanisms. The most controversial issues generated by Art 2(4), 51, or Chapter VII relate to the scope of application of the self-defense and collective security principles. Art 2(4) makes, for instance, no reference to whether armed reprisals in times of peace, or interventions for protecting nationals abroad should be considered forbidden, nor does it explicitly include self-determination in the list of legitimate interventions. Furthermore, Art 51 is applicable only to states, leaving out the case of attacks perpetrated by terrorist networks like Al-Qaeda. Pre-emptive actions, especially against terrorists armed with weapons of mass destruction (WMD), represent another important issue the Charter keeps silence about, as it does with respect to the requirements of necessity, proportionality, and immediacy when acting in self-defense. Last but not least, the Charter's provisions regarding collective security make no reference to situations when humanitarian interventions might be required to stop, prevent, and

punish abuses leading to gross violation of human rights and refugee disasters, or to capture war criminals.^{xiv}

On the other hand, the UN mechanisms of decision-making and enforcement suffer structural flaws. The effectiveness of the UN Security Council, the UN executive body responsible for interpreting, deciding, and enforcing the provisions of the Charter, has been undermined from the very beginning by the granting of veto rights to great powers. This allowed the latter to block any resolution perceived as detrimental to their interests, or to their allies, a fact that has contributed to freezing the UN, with some minor exceptions, into a condition of institutional paralysis. Furthermore, neither the Charter, nor the Security Council's rules of procedure make any reference to the manner in which consensus about the decision to use force is attained, a fact that leaves wide open the possibility of abuse of the Charter's provisions. This situation has been aggravated by the Charter's ambiguity with respect to the role of the International Court of Justice (ICJ), the "principal judicial organ" (Art 92) to review whether the decisions of the Security Council are indeed taken in accordance with "UN purposes and principles" as specified by Art 24(2) (Franck 1992).

The only instances when the system did work, albeit with many improvisations, were during the Korean War (1950-1953), and the Gulf War (1991), but even then the military operations were not conducted by the UN, but by a US-led coalition, operating under UN authorization. Since Art. 43 of the UN Charter has never been implemented, the Security Council cannot rely on its own contingents to carry out an enforcement action (Ronzitti 2002: 8). Furthermore, the relations between UN, on one hand, and regional security agencies, such as NATO and the European Union, on the other hand, still lack doctrinal and operational compatibility. With no mechanism of enforcement working properly, the promise of collective security inscribed originally into the

Charter has gone unfulfilled, and as a result, the resort to unilateral actions and illegitimate use of force has only grown in frequency and intensity.^{xv}

4. Reform proposals

The combined effect of the tensions affecting the substantive and procedural dimensions of the legal framework legitimating currently the use of force in international relations is unsettling: *the legal standards have basically become tools of political manipulation in the hands of the most powerful actors*. The ambiguity of the Charter's article and the changing nature of threats to the international order have led to the formation of a growing "gray zone" of issues that fall in-between the provisions set by the Charter for legitimate vs. illegitimate uses of force (see Table 2). On the other hand, the decision-making paralysis, and the absence of a credible enforcement mechanism have deprived the UN of an effective procedural instrument to address the inconsistencies and contradictions of the Charter's provisions. In short, the present legal standards fail to offer a clear basis for discriminating properly between legitimate and illegitimate uses of force.

Two reform agendas seem likely to emerge in response to the current stalemate. On the one hand, better clarification of the Charter's articles combined with an effort to bring as many issues as possible from the "gray" into the "legitimate" zone could increase the precision and scope of application of the provisions of the UN Charter, and in so doing, it could deny legal excuses to dubious uses of force. On the other hand, a thorough reform of the UN decision-making and enforcement mechanisms that would include the limitation of the veto system, the establishment of a permanent military force, the re-configuration of the voting system of the General Assembly based on the population size of each state, as well as the granting of the right of judicial review to the

International Court of Justice for all Security Council resolutions, would provide the appropriate instruments necessary for the UN to better accomplish its original mission of preventing war and aggression around the world.^{xvi}

Table 2: *UN Charter standards for the use of force:*

Legitimate	“Gray Zone”	Illegitimate
Self-defense against invasion, bombardment, blockade, or an armed attack of another state	Armed reprisals in times of peace	Interventions for facilitating self-determination
Protection of a state’s territory, military, and political independence	Protection of nationals abroad	Preventive interventions
Protection against the actions of a State, which has made available its territory for perpetrating an act of aggression	Interventions to combat terrorism and acts of aggression committed by non-state actors	
Protection against acts of aggression committed by groups, irregulars or mercenaries	Capturing war criminals	
Collective interventions by or under the authorization of the Security Council	Pre-emptive actions	
	Humanitarian interventions	

Undoubtedly, both proposals outlined above are fully justified and necessary for the UN to adopt in order to regulate more effectively the legitimate use of force in international politics. However, both of them are vulnerable to a similar problem namely, the unwillingness of the permanent members to accept changes in the Charter that could affect their sovereignty or their voting rights in the Security Council. This situation may change in long term, but until then IR needs a conceptual tool that is able to see through the veil of inconsistencies and political manipulation of the Charter provisions, and in so doing, to provide a clear basis for distinguishing between legitimate vs. illegitimate uses of force. Put differently, IR theory requires a theoretical framework that is able to determine whether

states' compliance with the Security Council's decisions to use force is primarily driven by an internal sense of moral obligation, as opposed, for instance, to fear of retribution or coercion. Jürgen Habermas' theory of communicative action offers the right solution to address this problem.

IV. Deliberative legitimacy

1. Communicative Action theory

Although formulated more than two decades ago,^{xvii} Habermas' theory of communicative action (Habermas 1984) has been introduced to IR only recently (Risse 2000). The central argument of this theory revolves around the concept of "communicative action" developed by Habermas by reference to those circumstances when "action orientations of the participating actors are not coordinated via egocentric calculations of success, but through acts of understanding. Participants are not primarily oriented toward their own success in communicative action; they pursue their individual goals under the condition that they can coordinate their action plans on the basis of shared definitions of the situation" (Risse 2000: 9).

In contrast to instrumental bargaining conducted on the basis of fixed preferences, or "rhetorical action" of pursuing one's self-interest by skillfully manipulating norm-based arguments (Schimmelfenning 2001: 63), communicative action implies a mode of interaction between actors based on the logic of arguing that is, of convincing each other to change their causal or principled beliefs in order to reach a reasoned consensus about three types of validity claims: the first refers to the truth of assertions made, or the conformity with perceived facts in the world; the second focuses on the moral rightness of the norms underlying arguments; the third concerns the truthfulness and authenticity of the speaker (Risse 2000: 9 -10). In other words, the goal of the actors engaged in deliberative behavior is not to maximize fixed interests and preferences (i.e., logic of consequentialism), nor to follow passively norms underwritten by powerful social institutions (i.e., logic of appropriateness), but to seek a communicative consensus about their understanding of the situation and the preferred course of action by challenging the validity claims inherent in the

interests, preferences, and norms driving actors' actions (i.e., logic of arguing).

Thus, deliberation is not epiphenomenal to actors' interactions in the sense of being just a communication channel through which fixed preferences and established norms are expressed. Instead, it plays an active role in defining both preferences and norms by actively challenging the validity claims inherent in the interests and norms driving actors' actions. Two sorts of communicative action can be distinguished in this respect: *weak* and *strong*. The first type refers to those situations when actors are oriented solely towards claims to truth and truthfulness. Strong communicative actions go further than this, as they refer to acts of understanding that go beyond personal preferences, and extend to the normative reasons for the selection of the goals themselves (Habermas and Cooke 1998: 326-9). A successful communicative action is thus one in which the "better argument" wins, but not in any conditions. As argued by Habermas "only the rules and communicative presuppositions that make it possible to distinguish an accord or agreement among free and equals from a contingent or coerced consensus have legitimating force today" (Habermas 1979: 188).

This assertion is vulnerable to three points of criticism. First, actors must be prepared to change their beliefs and to be persuaded by the strongest argument presented in the discussion. This requirement is often very difficult to meet, especially when the political stakes are high, or the actors are divided by deep ideological beliefs. Second, communicative action describes an "ideal-speech" situation where power relationships are basically purged from the context that is, participants enjoy equal deliberative standing regardless of their political, economic, or military capacities. Obviously, this is rarely the case since various power asymmetries between actors control the access to the deliberative process, and they also affect significantly the "weight" of the arguments presented. Third,

communicative action is supposed to take place against a background defined by a “common lifeworld” that is, a system of shared norms, values, and intersubjective understandings to which actors can refer when exchanging arguments. However, unlike domestic politics, the international system generally lacks a dense and stable normative framework (Wight 1966), and hence, argumentative behavior in world politics might be difficult to achieve since the existing stock of “common lifeworld” is rather limited.

2. Deliberation and the legitimacy of the use of force

If the points of criticism raised above are accurate, then what exactly makes communicative action suitable for addressing the problems affecting currently the legal dimension of LUF? Three arguments recommend basically deliberative behavior as the most effective instrument for adjudicating between legitimate vs. illegitimate uses of force. First, the fast-growing “gray zone” of issues that fall in-between the provisions set by the Charter for legitimate vs. illegitimate use of force, as well as the weak mechanisms of decision-making and enforcement of the Charter’s provisions have created a serious collective problem for the use of force. The space of contestation about the definition and scope of application of the existing legal standards of the use of force has expanded and grown more intense. The more these standards are contested, the stronger the demand for information about the situation under debate, the position of other actors, the implications of the intervention, or the procedure followed in previous cases. The pressure for collective coordination grows thus directly proportionally with the intensity of the contestation process. Instrumental behavior cannot adequately confront this problem. In fact, strategic behavior can only intensify this problem by creating further points of disruption and confusion among actors, through the selective

use and manipulation of facts. Communicative action is, thus, the only mechanism that can effectively address this problem by helping actors make a well-informed and non-coerced choice among unclear or conflicting norms.

Second, although power-driven behavior remains prevalent among states, strategic behavior is becoming less and less effective as a political instrument, not least by increasing significantly the various costs associated with the failure of coordinating one's actions with the others', as illustrated, for, instance, by the US growing difficulties to pacify Iraq alone. The incentives for engaging in deliberative behavior are thus becoming stronger since actors' problem-solving capacity rests increasingly on their ability to take the interests of other actors genuinely into account. Nevertheless, the decreasing lack of efficiency of strategic actions does not necessarily mean that states will abandon this form of behavior and embrace communicative action. Power-driven behavior will probably remain the default strategic option for the majority of states in the foreseeable future. The important question then is not whether power relations affect the access to deliberation - they do, anyway -, but to what extent this type of behavior undermines the validity of the consensus reached by actors over the conditions for legitimating the use of force. The theory of communicative action offers the most appropriate conceptual framework to answer this question.

Third, the international system lacks a stable normative framework since moral obligations are predominantly shaped at the domestic not at the international level. Nevertheless, the decisions concerning the conditions for legitimating the use of force are taken in institutional settings, like the UN, EU, OSCE, or NATO, which are characterized by a dense and tested network of collective understandings, rules, and diplomatic norms interlocked into a relatively rich "common lifeworld" of political interaction. This "institutional lifeworld" facilitates communicative action in two

particular ways. First, it limits the scope of rhetorical action since the transparency and visibility of these institutional settings makes easier for actors to scrutinize and criticize each other's arguments in the public eye, in a much effective way than at the domestic level. In other words, communicative action is the best protection against international embarrassment. Second, an "institutional lifeworld" helps create a minimum level of trust that international actors can use for bridging divides, forging compromises, and thus reaching communicative consensus when taking decisions about the use of force, especially when actors are uncertain about their interests, identities, and views of the world (Risse 2000: 21-23). In short, communicative action is a more frequent and influential type of behavior in international politics than is generally acknowledged.

3. Deliberative legitimacy

How does communicative action help us adjudicate between legitimate vs. illegitimate decisions to use force? The answer to this question rests with the *concept of deliberative legitimacy, understood as the non-coerced commitment of an actor to obey a norm adopted on the basis of criteria and rules reached through a process of communicative action.* In other words, deliberative legitimacy represents the platform on the basis of which the points of contention between actors' justifications to use force can be ascertained and validated. Thus, the key issue that deliberative legitimacy tries to clarify is whether the promoters of a military intervention try to reach a reasoned consensus on the need for the use of force, or they just engage in power games based on credible threats, promises, or rhetorical exchanges with no visible intention to achieve argumentative consensus with the other members of the international community on the definition of the situation and on the course of action. A positive answer to the first part of the question will legitimize the position of the party

making systematic efforts to reach a reasoned consensus on the arguments for using force. In other words, the legitimacy of an intervention is not contingent upon the consensus reached by the parties involved, but on the *manner* in which this consensus, or lack of it, is attained.^{xviii}

The conditions under which deliberative legitimacy can be validated are the following:

- The facts on the basis of which decisions about the use of force are taken are truthful and complete as informed by the best evidence available.
- All interested parties must be allowed to participate in the argumentative discourse, and all participants should have equal rights concerning making an argument or challenging a validity claim.
- The participating actors show genuine interest in using argumentative reasoning for reaching consensus on the use of force.

The first condition is required for denying actors opportunities to engage into acts of political manipulation and deception with respect to the legal aspects of the intervention. The second provision serves to reduce, as much as possible, the influence of power relationships, coercion, or intimidation during the deliberative process. The third condition is important for making sure that the decision to use force is taken based on the most compelling (legal) arguments available.

The UN Security Council is particularly amenable to this form of interaction since the number of actors involved in decision-making is small, the general support for UN is robust, deliberations are open to public scrutiny, and the end of the Cold War helped relax many constraints that had previously forced great powers to adopt uncompromising positions.^{xix} In other words, within the UN Security Council context, deliberative legitimacy enjoys a significant degree of tractability. However, communicative action is vulnerable to possible obstructions instrumented by various

actors for which the perceived stakes in the dispute are relatively high. This may determine other actors to engage in strategic behavior as well, regardless of their initial pre-dispositions for communicative action. Two institutional measures can best contain and possibly prevent this possibility: a) the improvement of the transparency of the deliberation process; b) the adoption of procedural rules asking all participants to base their arguments on verifiable evidence. By increasing public accountability and lowering the monitoring costs, these measures can enhance significantly the level of applicability of deliberative legitimacy, especially in the UN context.

Finally, the application of the concept of deliberative legitimacy to concrete situations is likely to generate three types of scenarios. First, if none of the three conditions above is met, then the legitimacy of the intervention is definitely undermined, regardless of whether the majority of the actors involved agree eventually to authorize the use of force. Second, if only the first two conditions are met, then a weak claim of legitimacy can be invoked in support the respective intervention. This is so because the justifications invoked by each side express genuine concerns and the formal framework of debate is inclusive and transparent. Nevertheless, the fact that the actors involved demonstrate a pattern of unwillingness to change their causal or principled beliefs in order to reach a reasoned consensus about the decision to use force represents a major weakness for the legitimacy of the respective intervention. Third, a strong claim of legitimacy can be invoked only when the first two conditions are supplemented by a clear and consistent engagement of the supporters of the intervention in argumentative reasoning, that is, of pursuing their individual goals not by strategic or rhetorical action, but by actively listening to the arguments of the others, and by coordinating their actions plans based on the “best argument” available.

V. Case studies

The analytical value of the concept of deliberative legitimacy will be assessed empirically in two case studies: the 1999 NATO intervention in Kosovo, and the 2003 US war against Iraq. The relevance of the two interventions is illustrated by three factors. First, in both cases the issue of legitimacy had a substantial impact on actors' motivations, the dynamic of the negotiation process, as well as on the timing of the decision to use force. Second, the two interventions are likely to have long-lasting effects on the dynamic of the international system, since they both confronted major post Cold War challenges, and they also compelled all major actors to become heavily involved, either politically or militarily. Third, in both cases, the intense dispute over the substantive and procedural legal components of the legitimacy of the interventions did not allow the rival parties to overcome their differences and reach a compromise, leaving thus the entire issue of legitimacy indeterminate. The remainder of this article will present a brief historical background of the two cases, explain why the current international legal standards make it very difficult to draw a clear distinction about the legitimacy of the two interventions, and then it will discuss how the concept of deliberative legitimacy can bring clarity to this matter.

Historical background

The March-June 1999 NATO operation Allied Force took place in the absence of an explicit UN resolution authorizing the use of force, and was triggered by the specter of a humanitarian disaster in the context of the escalation of the Serbian paramilitary offensive against Kosovar Albanians. The origin of the conflict between the Serbian authorities and the ethnic Kosovars dates back at least to 1989 when the Serbian president Slobodan Milosevic removed the autonomy of the region, and revoked the educational, linguistic, and cultural rights enjoyed previously by the Kosovars. The

tension between the two sides had been simmering for almost a decade before erupting into open conflict in 1998, leading to the death of almost 1500 Kosovars and the forced removal of another 400.000 people from their homes.^{xx} The escalation of violence and the risk of regional spreading of the conflict prompted the international community to intervene, and to seek a peaceful resolution to the conflict.

In a first stage, international involvement encompassed a number of measures of coercive diplomacy including a 1998 NATO Activation Order for air strikes, several diplomatic meetings between NATO officials and the Serb authorities, two UN Security Council Resolutions (1160, 1199) calling for a cease-fire by both parties to the conflict, an OSCE Kosovo Verification Mission and a NATO aerial surveillance mission (both of them endorsed by UN Security Council Resolution 1203), and finally two rounds of international negotiations conducted in Rambouillet and Paris in February-March 1999. Unfortunately, none of these measures convinced Serbian authorities to bring an end to the violence, stop the brutal process of ethnic cleansing, and facilitate the return of Kosovar refugees to their homes. Consequently, on March 23, NATO began its air campaign against Serbian military forces in line with the objectives set by the NATO Council in its meeting on March 12, 1999 (NATO 1999b). The Serbian forces were forced to withdraw from Kosovo on June 9, allowing NATO to take complete control of the region. The process of post-conflict reconstruction started soon thereafter in line with the UN Security Council resolutions 1239 and 1244.

The 2003 US pre-emptive action against Iraq was officially driven by considerations of rooting out the possibility of weapons of mass destruction (WMD) being traded and used against US by potential terrorist networks. The proposal to attack Iraq had been pushed up on the political agenda of the Bush Administration in the week immediately after the September 11, 2001 terrorist attacks

(Clarke 2004: 30-31), but it became official policy only one year later when the Administration announced that confronting Iraq preemptively was an essential part of the global war against terrorism (White House 2002; Kessler 2003). Various intelligence assessments and systematic Iraqi obstructions of the UN inspections led to the conclusion that Iraq might be able to restore soon its WMD program and, in so doing, to once again threaten regional stability and even directly the US through its alleged sponsorship of terrorist networks.

Under the pressure of a new UN resolution (1441) which threatened with “serious consequences” in case of non-compliance, Iraq allowed the UN to resume its inspections in November 2002. Despite the request made in March 2003 by the UN chief weapons inspector for more time to complete the verification of the Iraqi disarmament policies, the US and UK started, on March 19, the military campaign against Iraq. On April 9, 2003 the Iraqi regime collapsed and the US-led coalition forces took control of the country. Soon thereafter, the UN Security Council approved a new resolution (1483), on 22 May 2003, which recognized US and UK as occupying powers and lifted all non-military sanctions against Iraq. Despite the capture or killing of the most important leaders of the former Iraqi regime, a guerrilla-style war has taken roots and grown in intensity, throwing the post-conflict situation into uncertainty.

A. Legal legitimacy

Current standards of international law offer limited guidance for drawing a clear distinction regarding the legitimacy of the two interventions. Two tensions are particularly relevant in this context: the gap between political justifications and legal provisions, and the inconsistencies between the Council’s resolutions and the enforcement mechanisms. In other words, the Charter’s provisions have been stretched out in order to validate certain political justifications, while the

enforcement mechanisms have generally failed to observe the provisions of the Council's resolutions. In short, the legal provisions were politically manipulated in order to serve the interests of the major actors. However, these tensions had an uneven effect on the legitimacy of the two interventions (see Table 3).

Moral and political justifications represent a necessary step for building up the legitimacy of an intervention, but the main challenge is to find the proper way to translate them into legally sound arguments. Neither of the two interventions seemed, though, to have performed very well from this perspective. Since the UN Charter provided no reference to the right of humanitarian intervention, and since the disputed region fell under the territorial jurisdiction of the Federal Republic of Yugoslavia (FRY), the Kosovo intervention was the most difficult to validate in legal terms, despite its robust justification in moral and political terms. The three Security Council resolutions (1160, 1199, and 1203) adopted before the start of the NATO military operations were passed under Chapter VII,^{xxi} with the Security Council determining vaguely that the “unresolved situation in Kosovo [...] constitutes a continuing threat to peace and security in the region” (*Resolution 1203* 1998: 2). However, as a result of the strong opposition expressed by Russia and China, both of them concerned about not setting a precedent that some day could turn against them, none of these resolutions authorized the use of force by an outside entity, nor did they include any reference to the threat of using force against FRY.

Table 3: *Legal standards of the use of force:*

	Kosovo	Iraq
Justification	Humanitarian intervention	Pre-emptive action
Legal provisions	The deterioration of the situation in	Iraq's “material breach” of Council

	Kosovo constitutes a continuing threat to the security and peace of the region (Art. 42)	resolutions poses a threat to international peace and security (Art.42)
UN or other official resolutions	SC 1160, 1199, 1203 , 1239, 1244, NATO M-NAC-1(99)51	SC 678, 687, 1441 , 1483
Enforcement	NATO	US-led coalition
Assessment	Weak legal basis	Disputed legal basis
	Weak resolutions	Ambiguous resolutions
	Un-authorized enforcement	Un-authorized enforcement

It could nevertheless be argued that the rejection of the Security Council resolution introduced by Russia, immediately after the start of the military action, accusing NATO of violating the UN Charter, and the failure of Secretary-General Kofi Annan to condemn NATO actions in an informal statement, were basically equivalent to a post-factum acquiescence of the UN in the intervention.^{xxii} Furthermore, the Security Council's Resolution 1244 adopted at the end of the military campaign authorized member states and relevant international organizations to establish a security presence in Kosovo in order to deter renewed hostilities, as well as to maintain and enforce a cease-fire, but the resolution stopped short from legalizing NATO's actions retroactively. In other words, the lack of clarity of the Charter's articles concerning the issue of humanitarian intervention and the weakness of the Security Council's decision-making mechanism allowed both sides to raise equal claims of validity, thus throwing a thick veil of ambiguity over the legal basis of the legitimacy of the NATO intervention.

The legal basis for the intervention in Iraq was only slightly stronger than that for Kosovo for the simple reason that by 2002 the Iraqi regime had ignored or breached a significant number of UN resolutions adopted in the aftermath of the 1991 Gulf War. Officially, two legal justifications were put forth by the US Administration in support of the intervention. The first legal argument revolved around the notion self-defense against an allegedly imminent danger posed by the Iraqi regime. In

his speech to the United Nations on September 12, 2002, the US President George W. Bush described the Iraqi regime as "a grave and gathering danger," seeking to acquire weapons of mass destruction, and cooperating with terrorist networks like Al-Qaeda (Bush 2002b). Similar declarations were made by all key decision-makers of the US Administration.^{xxiii} The UN Charter does indeed recognize the right of states to defend themselves against an armed attack, but only when an armed attack has occurred against that state, as stated in Chapter 7, Article 51 of the UN Charter (United Nations 1945).

Since Iraq did neither commit an armed attack against US, nor made preparations for carrying out such an attack, the self-defense argument had basically little legal value. Furthermore, questions about evidence regarding the imminence of the Iraqi threat were usually dismissed by the Bush Administration on grounds that in the post 9/11 environment the nature of the evidence required for launching a military attack has significantly changed. According to the US Secretary of Defense, the burden of proof falls now not on the attacking side, but on the side suspected to pursue WMD programs (Rumsfeld 2002).^{xxiv} This type of argument may have indeed strategic value, but it has no legal basis in either the UN Charter, or any other source of international law.

A second legal justification was then put forth, according to which the Iraqi regime posed a threat to international peace and security by failing to live up to the terms of the cease-fire concluded at the end of the 1991 Gulf War (Fleischer 2003). This argument invoked legitimately the provisions of the Chapter 7 of the UN Charter, but only in a selective manner. According to Article 39 of Chapter VII of the UN Charter, it is up to the UN Security Council, not to the member states to determine the existence of a threat to international peace and to decide what appropriate measures need to be taken (United Nations 1945). The Resolution 1441 passed by the UN Security Council in November 2002

provided a solution of compromise. Despite the intense US and UK pressure, the resolution did not authorize the use of force against Iraq, but called, in very strong terms, for new UN inspections with the intention to find and eliminate Iraq's WMD. It also warned that any false statements and omissions in the declarations submitted by Iraq, as well as the failure by Iraq to comply with, and cooperate fully in the implementation of the resolution would constitute "material breach" of Iraq's obligations and would lead to "serious consequences"(*Resolution 1441* 2002).

The question of what exactly constituted a "material breach" by Iraq turned later into an intensely contested issue among the members of the UN Security Council. Supported by UK and Spain, the US did attempt to pass a new resolution confirming Iraq's "material breach" of its obligations (*Draft Resolution* 2003), but the proposal failed to meet the consensus of the UN Security Council and hence, it was pulled by the US on March 17, 2003. Without the backing of a new resolution authorizing explicitly the use of force against Iraq, the supporters of the intervention made then the contentious argument that the UN resolutions 678, 687, and 1441 provided enough legal support for a military action. Similar to the Kosovo case, the resolution 1483 adopted at the end of the military campaign on 22 May 2003 acknowledged the responsibilities of the occupying powers (US and UK) to improve the security and stability of the country, but it refused to legitimize retroactively the attack on Iraq. Again, the ambiguity of the UN framework on this particular aspect allowed some members of the Security Council to take advantage of the situation, and to warp the Council's resolutions around their narrow self-interests.

B. Deliberative legitimacy

The comparative analysis of the legal bases of the legitimacy of the two interventions demonstrates clearly that current legal standards offer imprecise criteria for discriminating properly between legitimate and illegitimate uses of force. The solution for breaking this stalemate rests with the concept of deliberative legitimacy. The latter is not supposed, though, to replace the legal component of LUF, but only to add a second dimension to it, in order to bring analytical clarity to the issue. In other words, legal standards are necessary for legitimating the use of force, but they are not sufficient conditions, for reasons explained above and demonstrated in the previous section. But what exactly is the value-added of deliberative legitimacy?

By clarifying whether and how the UN Charter's provisions are manipulated to serve the interests of the powerful actors, deliberative legitimacy offers a powerful analytical tool for adjudicating between competing claims about the legitimacy of the use of force, especially when the legal component of legitimacy leads to ambiguous or conflicting interpretations. A good illustration of this contribution is offered by a second examination of the two case studies. As pointed out in the previous chapter, three criteria are important for assessing the status of deliberative legitimacy: the accuracy of the justifications invoked (are they expressing genuine concerns, or they are used only as a disguise for some other interests?), the deliberative context (do actors have equal rights in presenting and challenging arguments, or some of them are kept outside the debate?), and actors' interest in argumentative reasoning (are participants open to the arguments of the others, or they are just engaged in rhetorical action?).

1. Accuracy of the justifications

The decade-long policy of ethnic intolerance of the Milosevic regime toward the Kosovar Albanians had prepared the ground for a severe humanitarian crisis, which erupted violently in 1998. Given the regime's strong reputation for aggressive actions, established through its previous military operations in Croatia or Bosnia, the possibility of having Kosovo transformed into a bloodbath, as well as of having other countries from the region, especially Albania, drawn into the conflict was taken very seriously by the international community. These concerns were widely shared by the US and European leaders,^{xxv} as well as by the UN Secretary-General who reported in December 1998 that the situation in Kosovo showed "alarming signs of potential deterioration, [...] growing tensions on the ground", increased number of internally displaced people, spread of violent incidents in heavily populated urban centers, serious shelter and aid distribution problems, Serbian obstructions of the refugee return process, and a ominous spillover potential of the Kosovo conflict in the region, especially in Albania (UN Security Council 1998). In other words, it is clearly implausible that the intervening parties were motivated by anything other than humanitarian and regional security considerations, all the more Kosovo presented no economic or strategic significance.

As alternative explanations, two domestic factors have been generally mentioned as having a certain influence on the decision to use force against FRY. First, the refugee problem was indeed important for Germany, which during the 1990s accepted most of the refugees from ex-Yugoslavia,^{xxvi} but it seemed highly unlikely that Germany, or any other EU member state for that matter, would have started a war just because it could not afford the costs of accommodating another flow of refugees. Furthermore, it was primarily US, and to a certain extent France, not Germany, which pushed for harsher measures against the Milosevic regime. Second, the Lewinski scandal in US involving the US president was also invoked as an alternative reason for the Clinton Administration to use the

Kosovo crisis as a distraction for the US public opinion. However, Clinton was acquitted by the US Senate one month *before* the NATO intervention, and given the US constitutional limits, no military campaign would have helped Clinton get elected for a third term. In addition, the “Lewinski” factor does not explain why most of the European countries supported the US policy of taking military action against the Milosevic regime.

On the other hand, the US justification of its war against Iraq remains definitely very problematic. The intervention was presented by President Bush as “un urgent duty to prevent the worst” since a “failure to act would embolden other tyrants, allow terrorists access to new weapons and new resources, and make blackmail a permanent feature of world events” (Bush 2002b). The main points of accusation referred to the Iraq’s possession and production of WMD, including nuclear weapons, as well as of its support and high-level connections to international terrorist groups, including Al-Qaeda (Bush 2002b). However, the accuracy of these accusations has been strongly contested ever since. The US investigation team has not been able to prove so far any of the allegations concerning the Iraq’s possession and production of WMD (Gellman 2004; Jehl 2004), and even more disturbingly, the US and UK decision-makers seemed to have purposely ignored some contrary information, and to have deliberately twisted some intelligence in order to exaggerate the threat posed by Iraq (CBC 2003; Reynolds 2003).

A clear example in this sense is the allegation made by President Bush in his 2002 State of the Union Address concerning the Iraqi government’s efforts to buy “significant quantities of uranium from Africa” in order to advance its nuclear weapons production (Bush 2003). This statement was later proved to have been made despite the reservations expressed by high-ranking officials in the Administration, senior military officers, as well as by representatives of the US intelligence

community (Woodward 2004: 294-95). Similarly, the strong connection established by the Bush Administration between Iraq and Al-Qaeda,^{xxvii} was also refuted by the National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission), which found evidence of neither a “collaborative operational relationship” between Iraq and Al-Qaeda, nor of Iraq’s cooperation “with Al-Qaeda in developing and carrying out any attacks against the United States” (9/11 Commission 2004: 66). Deliberate ambiguity and misleading statements (Cirincione *et al.* 2004; Select Committee on Intelligence 2004), have been both involved in the US decision to attack Iraq, and hence, the overall accuracy of the US justifications for war is seriously compromised.

2. Deliberative context

The previous examination of the legal dimension of the legitimacy of the two interventions raised some questions about whether the actors involved had shared equal opportunities to participate in the argumentative discourses that preceded the adoption of the UN Security Council resolutions. Deliberative legitimacy can clarify this matter by assessing the structure of opportunities enjoyed by the concerned parties regarding making an argument or challenging a validity claim. Despite the intensity of the differences between the main actors, the deliberative context preceding the intervention in Kosovo was fairly balanced. Each side experienced basically no difficulties in presenting and defending their positions. While the US, UK, and France were determined to stop Milosevic from inflicting further harm on the Kosovar Albanians, the other two permanent members of the Security Council, Russia and China, expressed strong reservations about a military intervention in what they viewed as the “internal affairs” of FRY.^{xxviii} The Yugoslav representatives were able also not only to present and defend their arguments directly in front of the UN Security

Council,^{xxix} but they also benefited from having their position taken up and defended vigorously by the Russian ambassador to the UN.

The representatives of the FRY authorities and Kosovar Albanians were given a final chance to come to an agreement during the peace talks held at the French chateau at Rambouillet and Paris, and convened by the Contact group on Kosovo (Britain, France, Germany, Italy, Russia and the United States) in February-March 1999. Both Serbian and Albanian delegations were reportedly subjected, especially by the US, to a certain amount of diplomatic pressure to make mutual concessions, but both sides refused in the end to accept the terms of accord.^{xxx} The most disputed moment of the deliberation process during the Kosovo crisis took place in the days immediately after the commencement of the NATO campaign, when the Russian ambassador, with the support of two other countries, India and Belarus, tabled a draft resolution accusing NATO of violating the UN Charter, and demanding a cessation of hostilities.^{xxxi} The resolution was eventually defeated by a large margin,^{xxxii} but the debate allowed all parties, including the Yugoslav ambassador, to present freely, their views on the situation and to try, unfortunately unsuccessfully, to come to an agreement. In short, none of the members of the UN Security Council reportedly engaged in acts of intimidation or of exerting undue pressure on the others, but this did not help them reach a common position.

Undoubtedly, the deliberative context surrounding the UN Security Council's refusal to authorize the use of force against Iraq was less balanced. The issue deeply divided the Security Council, with US and UK, on one hand, supporting the intervention, while Russia, France, and to a lesser extent China, opposed it. Despite this, the two sides managed, in a first phase, to reach a compromise under the form of Resolution 1441. France, China, and Russia reportedly supported the resolution after receiving assurances that US would return to UN before launching an attack against Iraq. However,

the support of the other members of the Security Council was seemingly secured by the US through intense diplomatic pressure, particularly on the countries that depended on the US for economic or military aid (Deen 2002). The US policy of arm-twisting became more intense in the months preceding the intervention in Iraq.

In an effort to secure international support for a new UN resolution authorizing fully the use of force against Iraq, the Bush Administration resorted to an entire arsenal of intimidation tactics against the countries opposing the intervention: threats of unspecified “consequences” or of re-allocation of military bases, cancellation of foreign and military aid, reduction of financial investments, denial of access to Iraq oil and reconstruction projects, electronic surveillance of the communications between the UN Security Council members, and even the prospect of suspending its membership from the UN under the pretext that the UN failure to back war against Iraq would allegedly condemn it to “irrelevance”.^{xxxiii} Nor were key US allies spared from such a treatment. On the orders of Defense Secretary Donald Rumsfeld, Pentagon officials discussed, for instance, a plan to punish Germany’s “treachery and ineptitude” over Iraq, by harming its trade and economy (Beaumont *et al.* 2003). The deliberative context surrounding the UN decision not to authorize the use of force against Iraq was thus the least conducive towards reaching a communicative consensus about the understanding of the situation and the preferred course of action.

3. Argumentative reasoning

The last component of deliberative legitimacy deals with the issue of argumentative reasoning, that is, the willingness of the actors to change their causal or principled beliefs in order to reach a

reasoned consensus about the decision to use force. This implies that actors should try to pursue their individual goals not by strategic or rhetorical action, but by actively listening to the arguments of the others, and by coordinating their actions plans based on the “best argument” available. The communicative framework circumscribing the debate preceding the NATO intervention in Kosovo was clearly divisive. Given their own domestic problems in Chechnya and Tibet, Russia and China were strongly motivated to prevent UN from establishing a precedent that some day could turn against them. On the opposite side, US, UK and France were firmly determined to take serious steps, including military, in order to prevent the outbreak of another humanitarian crisis in the Balkans.

Caught in the middle of these two positions were the two belligerent factions: the Milosevic regime, for which the surrendering of Kosovo was tantamount to political ruin, and the Kosovar Albanians, who were basically fighting for their own physical survival. In other words, the political stakes were very high for each side and hence, the field of exchanges and interactions between the parties was overwhelmingly dominated by strategic considerations and rhetorical actions. The Serbian government was pressing covertly ahead with its policy of ethnic cleansing, while some of the radical Kosovars were intentionally challenging the Serbian military with the hope that possible retaliation measures would eventually trigger a NATO intervention. The proponents of the intervention, US, UK, and France, were apparently the only side making genuine efforts to move beyond an instrumental logic of action, and to take into account the interests of the other actors as well, as demonstrated by following three factors.

First, they tried, from the outset, to strike a balance between the claims of the two belligerent parties. While exerting strong pressures on the Milosevic regime to stop its policy of ethnic cleansing, the

supporters of the intervention demanded constantly an end to violence on both sides, including from the Kosovar paramilitary forces, and they reaffirmed consistently the territorial integrity of Yugoslavia, in all resolutions passed by the UN Security Council. Second, they always put diplomacy ahead of the use of force. They negotiated the presence of an OSCE verification mission in Kosovo, in October 1999, to oversee the return of refugees to their homes, and they also insisted in having a last round of multilateral peace talks at Rambouillet and Paris with the direct participation of both parties, before taking any military action. Thirdly, they engaged systematically the Russian and Chinese counterparts in an effort to compare and assess the validity of each side's arguments, on the basis of the reports presented by the OSCE mission about the situation on the ground in Kosovo. In contrast, Russia, and to a lesser extent, China refused firmly to give up to their strategic mode of action, and to reflect more openly about the validity of the arguments presented by the other side. A clear example of that is the refusal of the Russian delegation, on very contrived grounds, to sign the agreement put forth by the Contact Group in Paris, in March 1999 (Wheeler 2000: 265).

As regards the debate preceding the US invasion of Iraq, the key question for the US top decision-makers seemed to have been not why to attack Iraq but when (Suskind 2004: 70-75). Plans for an invasion of Iraq started to be drawn before the September 11 terrorist attacks, but the latter reinforced the "idée fixe, rigid belief, received wisdom" that Iraq must be invaded "and no fact or event could derail" this decision (Clarke 2004: 264-5). However, electoral interests and pressure from its closest ally, United Kingdom, determined the Bush Administration to seek the approval of the UN Security Council for the intervention, even though failure to get it was never considered a serious obstacle capable of stopping US from attacking Iraq unilaterally (Peel *et al.* 2003). The lack of interest of the US Administration in argumentative reasoning is also illustrated by its reaction to the proposal of the opponents of the intervention to extend the mandate and to strengthen the

capabilities of the UN weapons inspection teams. Not only were the latter refused more resources and time to complete their work (Preston and Weisman 2003), but the intelligence tips given by the US were basically of no use (Buncombe 2003; Phillips 2003; Jehl and Sanger 2004), while the pressure put on them for exaggerating the findings against Iraq continued to grow (Smith 2003).

Table 4: *Deliberative standards of the use of force:*

	Kosovo	Iraq
Accuracy of the justifications invoked	High	Low
Deliberative context	Balanced	Coerced
Interest in argumentative reasoning		
Pro-intervention	High	Low
Against-intervention	Low	Moderate
Assessment	Legitimate	Illegitimate

On the other side, France and Germany, joined later by Russia, were the most important powers to oppose the war for a number of reasons, both international and domestic. France was primarily concerned about the negative effects for the stability of the Middle-East triggered by a unilateral US intervention, Germany was overwhelmingly committed to pacifism, while Russia was increasingly resentful at the excessive US unilateralism. However, both France and Russia expressed their willingness to reach a compromise, including on the issue of a multilateral intervention, under the condition that the UN inspectors were given more time to complete their task (Peel *et al.* 2003). The political leadership of Iraq remained defiant in the first stages of the debate, but when the US resolve to go ahead with its military plans became clear, the Iraqi leaders took steps to cooperate and

comply with the demands of the UN inspection team, including the dismantling of its medium-range missiles (Mroue 2003; Price 2003). Unfortunately, both the French-Russian proposal and the Iraqi cooperation with the UN inspectors were met with deep skepticism by the US officials, and hence the conditions for reaching a communicative consensus on the use of force were basically absent.

To conclude, a deliberative approach reveals that only the Kosovo intervention was decided legitimately, since the accuracy of the justifications and the interest in argumentative reasoning of the supporters of the intervention were both strong, while the formal framework of debate was moderately inclusive and transparent (see Table 4). In contrast, the decision to wage war against Iraq met none of the three deliberative standards of legitimacy. The accuracy of the justifications invoked in support of the intervention was rather dubious, the deliberative context was dominated by intimidation and arm-twisting tactics, while the interest of the two parties in listening actively to the arguments of the other side, and in coordinating their actions plans based on the “best argument” available was clearly lacking.

VI. Conclusions

This article has examined the theoretical weaknesses of the current legalistic approach to the concept of legitimacy of the use of force. It has been argued that the conflation of the concept of LUF with what is lawful, as agreed upon by a small number of major international actors, overlooks those situations in which legal standards are rendered into instruments of “organized deception”, or outright political manipulation, in the hands of the most powerful actors. As a direct result of this omission, the analytical value of the concept has been seriously undermined, to the extent that competing claims about legitimate uses of force have become very hard to adjudicate. The solution proposed to address this problem draws on Jürgen Habermas’ theory of communicative action, and revolves around the concept of deliberative legitimacy, understood as the non-coerced commitment of an actor to obey a norm adopted on the basis of the criteria and rules reached through a process of communicative action.

The paper has also argued that the role of deliberative legitimacy is not to replace the legal component of LUF, but only to add a second dimension to it. The value-added of the concept of deliberative legitimacy is to help adjudicate between competing claims about the legitimacy of military interventions, especially when legal standards offer conflicting interpretations on the matter. The paper examined empirically the analytical contribution of the concept of deliberative legitimacy in two case studies: the NATO intervention in Kosovo (1999), and the US-led war against Iraq (2003). The analysis revealed that while the legal basis of the legitimacy of the decision to go to war was problematic in both cases, the deliberative standards of legitimacy, evaluated on the basis of three criteria - the accuracy of the justifications invoked, the nature of the deliberative context, and the actors’ interest in argumentative reasoning -, were satisfied only by the intervention in Kosovo, but not by that in Iraq.

By demonstrating its analytical usefulness in the two cases, the concept of deliberative legitimacy highlights the possibility of developing a broader research agenda for the process of legitimization in international politics. Two research directions are particularly important. The first one relates to the process of institutionalization of deliberative legitimacy, especially in the UN context. What are the procedural mechanisms required by the UN Security Council to operate in a more deliberative manner? What are the institutional obstacles against this objective, and how can they be overcome? The second research direction refers to the possible implications of deliberative legitimacy for the international order. Who is more likely to benefit from this form of international legitimization of the use of force, and how is this process going to re-shape the nature of international conflicts, as well as the “vessel” of anarchy? The overall conclusion of the article is that deliberative legitimacy presents a tremendous theoretical potential for the study of international politics, which unfortunately has been largely ignored so far. The present article represents an effort to compensate for this oversight, and to call for a more systematic discussion of the theoretical and empirical value of this concept.

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Endnotes:

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ⁱ The term "IR" refers to the discipline of international relations, rather than the subject matter of the discipline.

ⁱⁱ Recent studies have used this concept to explain the construction and consolidation of the structure of the international system (Hall 1999; Wendt 1999), as well as to examine the process that may lead to the formation of a global state (Wendt 2003).

ⁱⁱⁱ In basic terms, legitimacy is credited with bearing an important causal effect on the stability, as well as on the structure of the international system. For a good review of the different positions addressing this point, see (Clark 2003: 81-7).

^{iv} For an insightful review of the theoretical approaches to the relationship between legitimacy and global governance, see (Bernstein 2004).

^v For a detailed discussion of the key concepts of the just war doctrine, see (Bull 1966; Ramsey 1968; Johnson 1981; O'Brien 1981; Walzer 1992; Coates 1997; Amstutz 1999).

^{vi} According to the Article 38 of the Statue of the International Court of Justice, the traditional sources of international law include: 1) treaties, that is, written agreements between states; 2) international customs, understood as general practices accepted as law; 3) general principles of law, underlying the first principles or assumptions about the law-making process which states must accept (e.g., sovereignty or *pacta sunt servanda* - agreements must be kept -). For a more detailed presentation of the sources of international law, see (Arend and Beck 1993: 5-9).

^{vii} For more on the issue of legalization, see the contributions to the special issue of *International Organization* 54 (2000) on "Legalization in World Politics".

^{viii} The unbundling of territoriality (Ruggie 1993), whereby states accept to deal with issues that are trans-territorial in scope, could lead to a reorganization of the political space, along the lines of a multi-perspectival polity like the European Union, which in long term could lead to stronger forms of legalization of the use of force.

^{ix} Art 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security" (United Nations 1945).

^x The first enforcement mechanism has never worked, but the role of regional agencies in enforcing UN resolutions has increased significantly in the post Cold War period. NATO non-Article 5 missions in Bosnia (1995) and Kosovo (1999) are particularly relevant in this context, but the EU Petersberg missions under Article 17 of the Treaty of European Union might share the same fate in the near future.

^{xi} Art 2(4) states: "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” (United Nations 1945).

^{xii} Between 1946 and 1 July 1996, the ICJ was called upon to deal with 74 contentious cases in which it delivered 61 Judgments and made 295 Orders. During the same period, it dealt with 22 advisory cases, in which it delivered 23 Advisory Opinions and made 32 Orders. For a summary of these cases, see (International Court of Justice).

^{xiii} The reasons for the UN failure to enforce the provisions of its Charter have been addressed extensively in the literature. For a sample of arguments about the political and legal impediments of the UN enforcement system, see (Reisman 1984; Ruggie 1998; Wedgwood 2000; Sato 2001).

^{xiv} Art 2(7) of the Charter illustrates perfectly this ambiguity: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII*” (United Nations 1945, my emphasis). For a broader and more detailed discussion of the issues presented above, see (Ronzitti 2002).

^{xv} For an overview of the justification of various interventions since World War II, see (Weisburd 1997).

^{xvi} Following the political standoff during the Iraq crisis, the UN Secretary General Kofi Annan appointed, in November 2003, a high-level panel to examine the current challenges to global peace and security, suggest ways to address them through collective action, review the major U.N. organs' functions and relationships, and “recommend ways of strengthening the United Nations, through reform of its institutions and processes”. For further details, see (UN News Centre 2003; Wurst 2003).

^{xvii} Previous attempts to explore the implications of communicative action in international relations were fleshed out by (Kratochwil 1989; Onuf 1989). Their work was based on the speech act theory but, unfortunately, the IR community largely ignored it.

^{xviii} One could easily imagine a situation in which reasonable arguments are put forward by one of the parties, but strategic behavior of other actors, either powerful or weak, prevents the attainment of an agreement on the use of force. The intervention could still be viewed as legitimate as long as its supporters make systematic efforts to engage into communicative action. The argument holds obviously true for the reverse situation when the opponents of an intervention are systematically engaged in communicative action, while the promoters refuse to negotiate their positions. Such an intervention would utterly lack deliberative legitimacy.

^{xix} As illustrated, for instance, by the sharply declining number of vetoes used by the permanent members of the Security Council: an average of 1.5 vetoes a year cast after 1990, comparing to an average of 4.38 vetoes a year thrown during the Cold War Period. For more details, see (Global Policy Forum 2004).

^{xx} The data presented in this section are based on (NATO 1999a).

^{xxi} For details, see (*Resolution 1160* 1998; *Resolution 1199* 1998; *Resolution 1203* 1998).

^{xxii} For a full presentation of this argument, see (Wheeler 2000 275-281).

^{xxiii} Vice-President Cheney claimed also that “the risk of inaction” on Iraq was “far greater than the risk of action” because Saddam Hussein would acquire nuclear weapons “fairly soon” and that, once he had them, he would seek to dominate the Middle East and its oil supplies through nuclear blackmail (Washington Post 2002). Asked about whether the Iraq's regime posed a clear and present danger to the United States, the US National Security Advisor, Condoleezza Rice replied also in very categorical terms that Iraq “is a danger that is gathering momentum, and it simply makes no sense to wait any longer to do something about the threat that is posed here. As the president has said, ‘The one option that we do not have is to do nothing’” (CNN 2002). Similarly, the US Secretary of Defense, Donald Rumsfeld insisted that containment of Iraq had failed to produce compliance, it had only allowed the threat to go, and hence Iraq “is a danger we do not have the option to ignore” (Rumsfeld 2002).

^{xxiv} In an effort to strengthen the case for war, the US Secretary of State Collin Powell laid out the US file of evidence on the Iraqi WMD programs in front of the UN Security Council (Powell 2003), but his presentation raised actually more questions than it answered. For more details on this matter, see (Bennis 2003;

Rangwala 2003).

^{xxv} US President Bill Clinton made repeatedly clear his government commitment “to end the violence in Kosovo which threatens to spill over into neighboring countries and to spark instability in the heart of Europe; to reverse a humanitarian catastrophe in the making as tens of thousands of homeless refugees risk freezing or starving to death in the winter; and to seek a negotiated peace” (Clinton 1998). The British Prime-Minister Tony Blair went even further: “This is a just war, based not on any territorial ambitions but on values. We cannot let the evil of ethnic cleansing stand. We must not rest until it is reversed. We have learned twice before in this century that appeasement does not work. If we let an evil dictator range unchallenged, we will have to spill infinitely more blood and treasure to stop him later”(Blair 1999).

^{xxvi} For details, see report of (US Agency for International Development 1997).

^{xxvii} For a first-hand account of the Bush Administration’s efforts to link Al Qaeda to the Iraqi regime, see (Clarke 2004: 30-33, 227-228, 231-232, 268-270).

^{xxviii} China abstained from voting all resolutions dealing with the situation in Kosovo (1160, 1199, 1203, 1239, 1244), while Russia abstained only from supporting resolutions 1203 and 1239.

^{xxix} The rotation system did not grant Yugoslavia a seat as a non-permanent member of the UN Security Council at that particular time, but the FRY ambassador Vladislav Jovanovic was allowed to address the Council several times: March 31, 1998; March 24, 26, 1999; May 14, 1999, and June 10, 1999.

^{xxx} The contentious points of the proposal related to the issue of granting a certain amount of autonomy to Kosovar Albanians, the disarmament of the Serbian and Kosovar Albanian forces, and the international monitoring of the terms of the agreement by a NATO led implementation force. The last point, in particular, was rejected by the Serbian authorities, and it was also used by the Russian delegation as a technical pretext to refuse to endorse the agreement. For more details, see (Wheeler 2000: 264-5).

^{xxxi} For details, see (*UN Speech* 1999a; *UN Speech* 1999b).

^{xxxii} 12 votes against and 3 votes for the resolution (Russia, China, and Namibia).

^{xxxiii} For a detailed account of these practices see the collection of press reports available at (Global Policy Forum 2003).