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Legality and legitimacy: the quest for principled flexibility and restraint

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Points of departure

What follows is an attempt to acknowledge the complexity and relevance of debates about the relation between legality and legitimacy as it bears on political behaviour. The opening section is intended to orient these international policy debates in wider traditions of political theory, particularly as they bear on the nature of sovereignty and the state. On this basis, the two prominent, recent instances of controversial recourse to war (Kosovo and Iraq) are considered from the perspective of legality and legitimacy, first as a matter of juridical evaluation and then from the perspective of international reputation. The focus throughout reflects a concern with the qualities of American global leadership since September 11th, and how this leadership should or should not be guided by canons of legality.

Throughout the period between the end of World War II and the present there have been periodic challenges directed at the core commitment of the United Nations Charter that prohibits unconditionally recourse to force other than in instances of self-defence strictly construed.[1] These challenges have commanded major attention in the last several years in the settings of two sets of global circumstances: alleged humanitarian emergencies, and expanding claims of defensive necessity. In the first instance, the legal debate tends to be focused on the propriety of 'humanitarian intervention', while in the second instance, the emphasis has been upon American claims and security policy since 9/11 that are associated with recourse to 'preemptive war', or what is better known as anticipatory self-defence.

These developments have important policy and jurisprudential implications, and have been sharply contested in practice and doctrine. One important mode of legal reasoning that has emerged in both settings to defend or critique the contested use of force has rested on a distinction drawn between 'legality' and 'legitimacy'. Much of the serious discussion, at least in the United States, has been so far devoted to the application of these ideas to the Kosovo War of 1999 and the Iraq War of 2003. In the article that follows these two controversial wars are considered from the perspective of legality and legitimacy. The domestic law historical background of this distinction is also superficially considered, as well as the jurisprudential implications of blurring the edges of legality by invoking guidelines of legitimacy. Finally, attention is given to whether the distinction performs a constructive role under

[1] Thomas M. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', *American Journal of International Law*, 64:109 (1970); Louis Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', *American Journal of International Law*, 65:544 (1971).

present conditions of world order, and what might be done to reconstitute the domain of legality so as to minimise pressures to rely for justification on legitimacy, which simultaneously offer a juridical argument in support of a given course of action while violating the law.

In some senses, recourse to legitimacy as a supplement to legality is a discourse that parallels the revival of the Just War doctrine, especially in thinking about the propriety of 'war' as a response to the 9/11 attacks.[2] Indeed, supplying content and criteria for legitimating war resembles the process of validating war by reference to the Just War doctrine. In this regard, invoking legitimacy as the basis for validating international uses of force both acknowledges the authority of law as serving normal needs of global society, and its dysfunctionality when extended to govern *selected* exceptional situations. But which circumstances, and by whom identified? And by whom appraised? Is not, in the end, the danger of relying on legitimacy to overcome the inadequacies of legality a means to assert the primacy of politics and the subordination of law.[3]

But why not, then, merely acknowledge that the law is violated for certain ethical and political reasons, and generalise such a framework? It is possible that *principled* violations of the Charter norm on force would serve an equivalent purpose to that of complementing legality with legitimacy. Yet to engage in behaviour that is admittedly 'illegal' seems to diminish respect for law more than to contend that incompleteness or new circumstances produce *reasonable* exceptions to law that should be constrained by principled considerations and treated as temporary. In this usage of 'legitimacy' it might be better to think of the exception as *quasi-legal* rather than in the seminal usage of Carl Schmitt as *political.*

The distinction between legality and legitimacy originated and developed in the context of state/society relation, highlighting the significance of specific historical and structural circumstances of public order. The prominent assessment of this relationship between legality and legitimacy in late Weimar Germany sparked a complex and remarkably durable jurisprudential controversy about how to conceive of legality in circumstances where a political order is assaulted by an ultra-authoritarian movement such as the Nazis.[4] When dealing with the limits of legality within a state that possesses a functioning government, the issues are fundamentally different. The main issue is whether the forms of legality provide the ultimate answer to the question of legitimacy, providing the citizens with final authority by way of legislative representation, or whether this legality should be tempered by societal norms interpreted by courts or subjected to emergency decrees issued by the source of 'sovereign' authority, the head of state. In the historical context of Germany, the influence of legal positivism is often blamed for facilitating the rise of Nazism, encouraging the passivity and obedience of the German citizenry and the willingness of the bureaucracy to preside over the destruction of democratic constitutionalism. But it seems doubtful that any view of law could have effectively obstructed the Nazi political

[2] Jean Bethke Elstein, *Just War Against Terror* (New York: Basic Books, 2003); Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press); Richard Falk, *The Great Terror War* (Northampton, MA: Interlink Press, 2003).

[3] The locus classicus for such discussions is Carl Schmitt, *Legality and Legitimacy*, trans. John P. McCormick and ed. Jeffrey Seitzer (Durham, NC: Duke University Press).

[4] For a fascinating account see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford, UK: Oxford University Press, 1997).

onslaught associated with the rise of Hitler to absolute power, given the climate of popular opinion in crisis-ridden Germany. The legal arena in Germany, as well as theories about law, was certainly a site of struggle, but it was the inevitable prevalence of 'the political' in periods of crisis rather than the choice of legal theory that determined the fate of Germany. Perhaps Germany was more susceptible to this dynamic of subservience to secular authority, given its political culture, including the deep influence of Lutherism, the late consolidation of state power, and its long experience of autocratic rule.

If we turn from domestic public order to world public order we discern dramatic differences. There are no governmental institutions beyond the state that can claim 'sovereignty', in the sense of autonomous and ultimate authority to pronounce the law. The United Nations is best conceived as 'a club of states', and is organised in such a way as to acknowledge geopolitical realities expressed formally by granting permanent membership in the Security Council and veto power to the five states that dominated world politics in 1945 when the UN was established. The International Court of Justice (ICJ), the judicial arm of the UN, has no general authority to decide disputes among states unless asked to do so, or even to review contested decisions of the Security Council, possessing only a residual authority to issue 'advisory opinions' if so requested by an organ of the organisation. No tradition of deference has emerged within the UN system to overcome the autonomy of leading states in relation to uses of force, although the effort to oppose 'aggression' has activated the UN from time to time.[5] Some legal scholars concluded that the legal prohibition embodied in the Charter had been seriously eroded or compromised by inconsistent patterns of practice, some reasonable, others not.[6] At the same time, the ICJ interpreted legality with respect to uses of force as specified by international law and the UN Charter as fully operative, and did not acknowledge any weakening of Charter norms as a result of the practice of states.[7] Additionally, there is widespread opposition to recent moves by the United States to view war as ultimately a discretionary instrument of foreign policy, as well as to the sort of unilateralism associated with the presidency of George W. Bush. Again, Kosovo and Iraq provide litmus tests for this push and pull.

Legality clarifies the core obligations relating to force, while legitimacy tries to identify *and delimit* a zone of exception that takes account of supposedly special circumstances. It is so far a problematic and controversial means of achieving flexibility because the delimitation proposed lacks endorsement by the United Nations or acceptance by the governments of leading states. The legality/legitimacy discourse is largely an expression of concern in civil society about contested uses of international force, especially involving the United States. There is some international effort to move toward a more authoritative intergovernmental status for the distinction, given its use with approval in the Report of the Independent International Commission on Kosovo, and considering the call by the UN Secretary

[5] Instances where the UNSC has applied Charter norms to oppose aggression in an effective manner include the Korean War (1950–52), The Suez Operation (1956); and the First Gulf War (1991).

[6] Anthony Clark and Robert J. Beck, *International Law and the Use of Force* (London: Routledge, 1993); A. Mark Weisbrud, *Use of Force: The Practice of States Since World War II* (University Park, PA: Pennsylvania State University Press, 1997).

[7] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) 1986 International Court of Justice Reports 14.

General for a resolution by the Security Council clarifying the Charter approach to uses of force under varying conditions. The official UN approach has been to insist that the Charter concept of legality is itself flexible enough to incorporate the *substance* of the Bush Doctrine on pre-emptive war, but not the *process* of unilateral invocation. *In Larger Freedom*, the Secretary General's comprehensive report to the Security Council on UN reform, drawing on recommendations made by an expert panel, insists that while pre-emptive war or anticipatory self-defence might be justifiable to address an emerging threat, that determination must be entrusted *without exception* to the Security Council.[8] Put this way makes it evident that the essential objection to American diplomacy since 9/11 is its unilateralism, but indirectly as well, as evident in the Iraq debate prior to the war, to the application of the doctrine in particular circumstances. Put differently, the United States tried hard to obtain approval for its claim to wage war against Iraq from the Security Council, but it refused, and then the United States acted in concert with its partners.

Force beyond legality: the Kosovo debate

The debate occasioned by the Kosovo War of 1999 now seems overshadowed by the response to the 9/11 attacks, but the issues raised then with respect to the appropriateness of 'humanitarian intervention' have a persisting relevance to the role of international law and the UNSC in setting *and suspending* limits on acceptable behaviour by sovereign states in relation to international uses of force. At bottom the concern is with the method and style of embedding elements of morality, politics, and reasonableness in the interpretation of legal standards, whether this 'loosening' of law is generally better done by stretching the meaning of the standards, that is, *internal* to the domain of 'legality,' or by acknowledging that it better preserves the core constraints of law (here the basic prohibition on non-defensive force) to acknowledge the limits of law by creating an *external* domain of exception, labelled 'legitimacy'.[9] Another way of expressing the inquiry is to consider under what conditions political and moral pressures for adjustment with respect to legal restraints should be dealt with by techniques of flexible interpretation and when these pressures should be handled by explicitly admitting that a gap exists between legality and legitimacy. If interpretative flexibility rejects textual guidance of carefully drafted treaty language, it undermines confidence in law as truly separate from politics and morality. It is this jurisprudential urge to sustain the authority of law as law that provides the inner strength of positivist orientations. However, if interpretative rigidity makes law incapable of adapting legal guidelines to changing circumstances in situations of widely perceived crisis, then law tends to be cast aside as 'irrelevant' by power-wielders and politically minded jurists or is upheld and regarded as 'oppressive'. This tension between the benefits of certainty and the need for flexibility is what inspires the quest for a golden mean of interpretation that necessarily relies,

[8] 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, A/59/2005, 21 March 2005, para. 122–6.

[9] The issue is much discussed recently in political and legal theory in relation to the statist thinking of Carl Schmitt and now Geogio Agamben. See particularly Agamben, *State of Exception* (Chicago, IL: University of Chicago Press, 2005).

however phrased, on the power to create exceptions. The goldenness of the process depends on explaining the exception as reasonable rather than arbitrary, and placing limitations based on principled criteria.[10] It contrasts with the Schmitt view that law should give way to politics whenever there is present a clash, and that any stricter legalism such as is espoused by democratic liberalism, involves a dangerous weakening of the state as a political actor that must protect society against its internal and external 'enemies'.

Drastic responses to this unavoidable dilemma arise whenever the moral and political imperatives of policy appear to exceed the limits of legality. Such responses rose to the surface in the course of the Kosovo debate. An influential response to the implications of the Kosovo War was developed by Michael Glennon who proposed viewing the entire legal framework of constraint embodied in the United Nations Charter as having been sufficiently superseded by the present global setting to lose its restraining force, thereby allowing behaviour to be authoritatively shaped by discretionary initiatives ('coalitions of the willing') until a new legal regime responsive to current realities of power and values can be established by the consent of major states.[11] A different accommodation to these same realities of power was proposed by Thomas Franck who advocated a forthright repudiation of the legal constraint to explain the action taken in the circumstances of Kosovo.[12]

The now infamous John Bolton, in contrast, acted as if the efforts of jurists to find a legal rationale for or against intervening in Kosovo were a waste of time, insisting instead that the United States should refrain from intervening in Kosovo *solely* because it had insufficient national interests at stake to warrant the risks and costs. If the assessment is based on such an extra-legal calculation of interests, international law becomes almost totally irrelevant, except possibly for a dominant state such as the United States, which may or may not be concerned with its profile and reputation as a law-abiding global leader. Such a concern can work in both directions, either conveying a willingness to play the geopolitical game within the rule-governed framework of international law and the UN, or demonstrating its contempt for existing norms and institutions while claiming a freedom of manoeuvre with respect to such a framework for the sake of the greater public good.[13] The extreme version of this kind of politicised approach is to claim an exemption from legal constraint for itself while acting as an enforcer of the very same constraints with respect to those other states seen as challenging the established order of world politics. Such a posture has been adopted by the Bush administration with respect to the accountability of political leaders for crimes under international law, insisting on an exemption for itself, while having the temerity to assist in the Iraqi preparation of the prosecution of Saddam Hussein and close associates as war criminals.

The specific circumstances prompting the Kosovo War have been frequently recounted. The historical context and short-term memory were definitely important.

[10] See *Kosovo Report* (Independent International Commission on Kosovo) (Oxford: Oxford University Press, 2000), esp. pp. 192–5 [hereinafter cited as Kosovo Report].
[11] Michael J. Glennon, *Limits of Law; Prerogatives of Power; Interventionism after Kosovo* (New York: Palgrave, 2001).
[12] Thomas M. Franck, 'Break It, Don't Fake It', *Foreign Affairs*, 78 (1999), pp. 116–22.
[13] Richard Perle, 'Thank God for the Death of the UN: Its Abject Failure Gave Us only Anarchy', *Guardian*, 20 March 2003.

Serb brutality in Bosnia, climaxing in the massacre of some 7,000 Muslim males within the UN 'safe haven' of Srebrenica in 1995 while UN peacekeepers looked on as spectators, was certainly a factor encouraging effective international action in the face of an imminent threat of another phase of ethnic cleansing in Kosovo. Possibly as well, although more conjectural, an interest in confirming the vitality of the NATO alliance as it neared its 50th anniversary, despite the ending of the Cold War and the collapse of the Soviet Union, was also an encouragement for timely and effective intervention under NATO auspices. Beyond this, the growing perception of a developing humanitarian emergency in Kosovo, associated with atrocities allegedly perpetrated by the Serbs against Kosovar civilians combined with a stream of refugees, solidified public opinion in Europe and stiffened the will of European governments to take some protective action before the process of ethnic cleansing was underway in full force, even without a mandate from the Security Council.[14] In effect, a humanitarian emergency highlighted by media attention was present in Kosovo posing a moral challenge. This challenge was reinforced by such political considerations as demonstrating NATO effectiveness, establishing an American military presence in the Balkans, and showing that the United States remained involved in Europe despite the ending of the Cold War.

Such a convergence of moral and political factors was not able to control fully the mechanisms of decision within the UN Security Council. Russia, traditionally aligned with Serbia, and China, uncomfortable about encroaching on sovereign rights, let it be known that any effort to obtain a mandate for military intervention within the Security Council would fail because of their veto. But without the approval of the Security Council even a humanitarian intervention would violate the Charter prohibition on recourse to non-defensive force. The US-led pro-intervention countries were faced with a difficult choice: either abandon the Kosovar people to an oppressive regime imposed by Belgrade and apparently bent on ethnic cleansing to create a demographic balance more favourable to minority Serb domination, or act in violation of the core obligation of the UN Charter to obtain advance approval for any use of international force that cannot be explained as self-defence against a prior armed attack. As we know, NATO chose to act, relying on the regional nature of the initiative, and the support of all neighbours except Greece, and seems to have rescued the Kosovar Albanian population, which comprised 90 per cent of the totality. The intervention was effective, although criticised for its reliance on high-altitude bombing, its failure to do more to protect the Serb minority in the aftermath of the war, and its insufficient reconstructive effort. At the same time, the Security Council rejected a proposed resolution of censure relating to the intervention, and took on the task of working with the NATO occupying forces entrusted with peacekeeping operations, which could be viewed as a retrospective validation of the intervention by the UN, or at the very least, a refusal to censure the violation of the Charter. Of course, the refusal can itself be discounted as an expression of *political* realities associated with the strength of the United States and its European partners in the Security Council, rather than as a belated acknowledgement of either the *legality* or *legitimacy* of the intervention.

[14] The incident in the Kosovo village of Recak on 15 January 1999 was particularly influential, where Yugoslav military forces killed some 45 Kosovars, allegedly civilians, although Serbs claim that the casualties were the result of a skirmish with the KLA, and were paramilitary combat officers. See Kosovo Report, pp. 81, 83.

It was against this background that the Independent Commission on Kosovo believed that the best way to handle the mixture of contradictory legal, political, and moral pressures was to rely on a distinction between legality and legitimacy. In effect, the NATO intervention was viewed as *illegal* because of its irreconcilability with the UN Charter prohibition on non-defensive force, yet *legitimate* because of its effective response to an imminent humanitarian catastrophe. The need to rely on this extra-legal justification was acknowledged in the Report as unfortunate, disclosing a deficiency in the legal regime governing the use of force, which suggested the importance of legal reform. Such reform is difficult within the UN setting because it is cumbersome to amend the Charter, but more fundamentally, because some major states distrust or oppose humanitarian rationales for intervention, and would surely withhold their consent from an expanded notion of permissible force even if under UN authority.[15] For these reasons, the recommendation to overcome the gap between legality and legitimacy seems unlikely to materialise in the near future.

The Kosovo Commission additionally recommended a framework of principles that would, in effect, provide a quasi-legal framework to guide and assess legitimacy claims and undertakings. What was proposed consisted of a set of principles, which themselves depended on considerable interpretative discretion if applied to actual situations. The Kosovo Report puts forward three threshold principles and eight contextual principles that try to provide guidance as to *when* an intervention would be legitimate, and *how* such an intervention should be carried out to maintain its legitimate character.[16] The overall purpose of these principles is to depict conditions of what might be described as 'humanitarian necessity', that is, only by acting promptly and proportionately can an acutely vulnerable people or minority be protected against massive suffering. The principles make clear that the case for necessity must be strong, that diplomatic alternatives have been exhausted in good faith, and recourse to war is a last resort and undertaken in a manner that minimises destructive effects for the civilian population being protected. In the Kosovo setting, these criteria were only partially met, and so the Kosovo War did not rank as high as it might have on the legitimacy scoreboard. There were doubts about whether the diplomatic efforts preceding the war were serious efforts to find a solution, there were some suspicions that the KLA had provoked the Yugoslav military forces in Kosovo so as to generate incidents that could be then reported to the world media as 'atrocities', and there was much criticism of the failure of the international community to extend support to the non-violent resistance efforts led by Ibrahim Rugova during the 1990s.[17]

A somewhat different approach to the Kosovo challenge was proposed by the International Commission on Intervention and State Sovereignty.[18] It tried to

[15] There were also independent sceptics. Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Monroe, ME: Common Courage Press, 1999). For a wider, deeper scepticism about claims of humanitarian intervention, see Anne Orfeld, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003); as well, the domestic jurisdiction provision of the UN Charter, Article 2(7), can be understood as a deliberate legal obstacle to preclude the UN from endorsing humanitarian intervention.

[16] Kosovo Report, pp. 193–5; also Appendix A.

[17] On Rugova see Kosovo Report, pp. 43–65.

[18] 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty, 2001.

circumvent the rough edges of political disagreement by abandoning the anti-sovereignty language of humanitarian intervention, substituting the phrasing 'the responsibility to protect'. The outcome of both frameworks is similarly shaped by the formulation of a framework of principles for military intervention designed to get the job done, but minimise the use of force.[19] The frameworks are complementary in content and intention, with *The Responsibility to Protect* seemingly more directly incorporating the sort of language of guidance that is associated with the Just War doctrine, and also more intent on changing Security Council practice. Its emphasis on what it calls 'Right Authority' is designed to encourage the Security Council to reconsider its role under the Charter in light of the development of international human rights since the founding of the UN. The Security Council is encouraged strongly to discharge its responsibilities, but if it fails to do so, then action may be taken by a descending hierarchy of empowered actors: the General Assembly, regional and sub-regional actors, and finally, 'concerned states'. In the light of the actuality of an impending humanitarian catastrophe, the main point is that external actors have an obligation to act in a timely and effective fashion. To bolster the capability of the Security Council to discharge this function and in direct response to the Kosovo prospect of vetoes, the Report recommends that the five permanent members should agree not use their veto if there exists otherwise majority support for taking protective action. Kofi Annan in his report on UN Reform, titled *In Larger Freedom,* appears to endorse the approach advocated by *The Responsibility to Protect.* The Secretary General asks rhetorically, 'As to genocide, ethnic cleansing, and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?' He adds, 'The task is not to find alternatives to the Security Council as a source of authority but to make it work better'. And then listing some criteria resembling those proposed by the two commissions, Kofi Annan concludes, '*I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorise or mandate the use of force'*.[20]

Both reports, as well as the Secretary General, offer constructive responses to the challenge, but it is unlikely, due to the underlying political differences that pertain to this subject-matter, that anything formal will be agreed upon for some years. The impacts of 9/11 make such a prospect even more remote in one sense, but less important from another angle, given the likely continued decline in the willingness of major states, especially the United States, to use its power directly for the sake of overcoming a humanitarian catastrophe. The more immediate policy issue is whether the report of the Kosovo Commission or that of the Intervention and State Sovereignty Commission is more deserving of support. In my view the Kosovo Commission is to be preferred because it directly confronts the dilemma that arises at the outer limits of law when moral and political factors strongly favour moving beyond those limits. It also does not pretend that 'intervention' is not 'interventionary'. But as earlier argued, both reports are constructive, move in generally the same direction, and should be reflected upon in addressing future contexts of humanitarian

[19] Report, Note 18, pp. xii–xiii, and Appendix B.
[20] Emphasis in the original; all references in this paragraph are to *In Larger Freedom,* cited n. 8, A/59/2005, paras. 122–6.

emergency in which interventionary responses are under consideration. The simmering genocidal circumstance in the Darfur region of Sudan is precisely such a context, but characterised by an absence of a sufficient political will on the part of major states to discharge 'the responsibility to protect'.[21]

Legality, legitimacy and the Iraq War

The main justifications for the Iraq War offered by the US Government prior to its onset were related to the threats posed by Iraq's possession of weapons of mass destruction (WMD), and secondarily, Iraq's failure to comply with a series of UN resolutions. This set of circumstances supposedly, according to official representations on behalf of American policy, validated a use of force despite the absence of explicit authorisation. And this absence was itself contested by Administration supporters who read into Security Resolution 1441 an implicit authorisation to use necessary force to achieve Iraqi compliance with earlier UN directives.[22] Unlike Kosovo where the factual grounds for claims of humanitarian necessity seemed widely accepted, the claims of defensive necessity relating to Iraq could not be convincingly made, and thus the claims of self-defence or implementation of UNSC resolutions were neither formally persuasive in the Security Council, nor accepted by public opinion either in the region of Iraq or in Europe, the locus of America's traditional allies. Opposition to the Iraq War was more intense elsewhere in the world, being most unified in Islamic countries that viewed the conflict through the lens of 'a clash of civilizations', neither more nor less. This scepticism has been generally viewed as vindicated by the failure to discover WMD, the main *pre-invasion* pretext for recourse to a pre-emptive war, the growing evidence that the US Government was resolved to invade and occupy Iraq quite apart from whether or not Baghdad complied with UN authority, the indications that oppressive circumstances in Iraq, while persisting, were not approaching an emergency phase (and had been far worse in prior years), and the absence of any clear evidence that the American occupation has been accepted by the majority of the Iraqi people as a welcomed liberation. In effect, there seemed insufficient grounds to validate the Iraq War because of its legality, and no persuasive reason to affirm its legitimacy.[23] In other words, the recommended approach to the Kosovo War, even if accepted, does not provide a justification for the Iraq War, but on the contrary suggests the conclusion that it was both illegal and illegitimate.

[21] See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General (Pursuant to UNSC Res. 1564, 18 Sept 2004), Geneva, 25 January 2005; Scott Straus, 'Darfur and the Genocide Debate', *Foreign Affairs*, 84:1 (2005), pp. 123–33.

[22] For definitive statements of US Government official arguments along these lines, see William H. Taft IV and Todd F. Buchwald, 'Preemption, Iraq, and International Law'; John Yoo, 'International Law and the War in Iraq'; and Ruth Wedgewood, 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense', in *Future Implications of the Iraq Conflict*, selections from the *American Journal of International Law*, September 2003.

[23] For comprehensive assessments along these lines, see C/G. Weeramantry, *Armageddon or Brave New World? Reflections on the Hostilities in Iraq*, 2nd edn. (Ratmalana, Sri Lanka: Weeramantry International Centre, 2005); Domenic McGoldrick, *From 9–11 to the Iraq War 2003* (Oxford, UK: Hart Publishing, 2004), esp. pp. 24–86; see also R. Falk and David Krieger (eds.), *The Iraq Crisis and International Law* (Santa Barbara, CA: Nuclear Age Peace Foundation, January 2003).

Shortly before the start of the Iraq War, Anne-Marie Slaughter did attempt a variation explicitly modelled on the approach taken by the Kosovo Commission. Pointing out that the states favouring a use of force in Kosovo 'sidestepped the United Nations completely and sought authorisation for the use of force within NATO itself', she noted that '[t]he airwaves and newspaper opinion columns were filled with dire predictions that this move would fatally damage the United Nations as arbitrator of the use of force', but that after the generally successful outcome of the Kosovo War the Kosovo Commission found that 'although formally illegal . . . the intervention was nonetheless legitimate in the eyes of the international community.'[24] Writing days before the invasion, Slaughter saw a similar possibility for the American recourse to the war against Iraq but this could be established, if at all, only after the fact of an invasion. Slaughter somewhat surprisingly argued that '. . . the Bush administration has started on a course that could be called ''illegal but legitimate'', a course that could end up, paradoxically, winning United Nations approval for a military campaign in Iraq – though only after an invasion'. This rather ingenious argument reasoned that the American recourse to the UN in search of approval was itself an implicit, although a conditional, endorsement of UN authority showing that the United States Government would not act 'without any reference to the United Nations at all'. Slaughter sees this twilight zone of 'compliance/violation' as part of 'an unruly process of pushing and shoving toward a redefined role for the United Nations'. In the end, despite the US failure to receive authorisation from the Security Council to initiate a war against Iraq '. . . the lesson that the United Nations and all of us should draw from the crisis' is this: 'Overall, everyone involved is still playing by the rules. But depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal.' If playing by the rules means only that dubious claims to use force will first be vetted at the Security Council, and if not approved, will then be exercised, it limits the role of the UN to that of a debating society, where if the state seeking to engage in controversial behaviour cannot make its case persuasively, it will proceed to act in any event. Slaughter's *approach* is untenable as it so seriously blurs the distinction between compliance and violation, disabling a critique from the perspective of either legality or legitimacy *in advance* of a challenged use of force. Reverting to the Kosovo precedent, it would seem that the case for legitimacy, in the face of illegality, was based on circumstances that *preceded* recourse to war. In my view, a retrospective construction of legitimacy as proposed by Slaughter provides an unacceptable validation of the primacy of geopolitics in relation to global governance.

Writing a year later, Slaughter applied the proposed approach, contending that her earlier analysis was based on the invasion of Iraq being '*potentially* legitimate in the eyes of the international community' if certain conditions were satisfied: finding WMD; a welcoming reception by the Iraqi people; and an acceptance of UN supervision of the occupation and political reconstruction of Iraq by the United States, United Kingdom, and their array of lesser allies. Her entirely convincing conclusion in 2004 was that none of these conditions had been met, and thus the use of force against Iraq was illegal and illegitimate. She suggests that Kosovo shows that '[i]t is sometimes necessary to break the law to change it', and that the international community should respond by adapting the law to these changed circumstances

[24] Slaughter, 'Good Reasons for Going Around the UN', New York Times, 18 March 2003.

associated with discharging the responsibility to protect. But she argues *after* the fact that '[t]he lesson of the invasion of Iraq is quite different', vindicating the opposition within the UN to the use of force by those governments that asked the United States to defer recourse to war until more evidence existed of an WMD presence in Iraq or more time for the UN inspection to produce an assessment of the Iraqi threat. Slaughter shares the view of the Bush administration that pre-emptive uses of force need to be made permissible in specified circumstances in view of the altered security threats posed after 9/11: 'The world faces very different threats than it did in 1945'. Yet for Slaughter this widening of the right of self-defence does not validate the abandonment of the core legal constraints of the Charter. In her words, 'the most important lesson of the invasion of Iraq is that the safeguards built into the requirement of the *multilateral* authorisation of the use of force by UN members are both justified and necessary. If nations seeking to use force cannot mount strong enough evidence of a security threat to convince a majority of the Security Council and to avoid a veto (provided that the veto is not clearly motivated by countervailing political interests), the world should wait and try another way before sending in the troops.'[25] I think Slaughter 'before' and 'after' discloses the difficulties of making a clear analysis of legality in circumstances of pre-emptive claims if the distinction between legality and legitimately is employed too loosely. In my view, the proposed American war against Iraq was definitively illegitimate as well as illegal *before* any use of force against Iraq was undertaken, and could not have been rendered retroactively legitimate regardless of whether WMD were found, the public welcomed the intervention, and the UN took over the post-conflict occupation and reconstruction.[26] For Slaughter, in contrast, it would seem that a *potential* demonstration of legitimacy was a sufficient sign of adherence to the rules of world order even if such a claim should subsequently be shown as lacking a factual foundation. In my view, the claim to use force is only potentially legitimate if there can be made a *prior* demonstration of defensive necessity based on the imminence, plausibility, and severity of a security threat, with these conditions *normally* to be determined by a *multilateral* process, preferably by the Security Council. This is the approach now advocated by Kofi Annan, and the basis of the finding that the Kosovo War was illegal, yet legitimate.[27]

Slaughter seems to endorse a superficially similar approach, but more closely considered, her views contain some significant variations. For Slaughter, if approval by the Security Council is thwarted by an actual or anticipated veto that is politically motivated, then recourse to force would be justified, even without UN approval. But she never clarifies how to identify a political motivation for an exercise of a veto. To this day, the US Government regards the French opposition to its effort to obtain a mandate for the invasion of Iraq as politically motivated. So long as the power of exception is a matter of decision by a hegemonic government, the limitations associated with the constraining guidelines are not likely to inhibit discretionary wars.

Beyond this, the possibility of retrospective legitimation opens wide the door to abuse of the legality/legitimacy approach. Perhaps, a middle ground exists that rests

[25] All quotes in this paragraph are from Slaughter, 'The Use of Force in Iraq: Illegal and Illegitimate', *ASIL Proceedings 2004*, pp. 262–3.
[26] Richard Falk, 'The Iraq War and the Future of International Law', in n. 25, pp. 263–6.
[27] See text at n. 8; also Kofi Annan, Address by the Secretary General. Kofi Annan, UN Doc. SG/SM/8891, 23 September 2003.

on the provisional legitimacy of recourse to war, that is, where there is probable cause to suppose that the threshold criteria of legitimacy will be satisfied. In the instance of Iraq that would have meant untainted evidence of a massive WMD programme, strategic objectives that include support for global terror and future war plans, and an alienated population that would welcome intervention (as the majority of the Kosovar citizenry clearly did). In my view, there was no way for the US Government to uphold the burden of persuasion prior to the invasion, and thus, unlike Slaughter, I would maintain that the position taken by the Bush administration was illegal and illegitimate from the outset, and not susceptible to being legitimated after the fact. At most, the degree of illegitimacy could have been considerably mitigated if large stockpiles of WMD had been discovered together with plans for future wars and if the Iraqi people had overwhelmingly welcomed the foreign forces as liberators. Then, and only then, could one credibly dismiss the resisting elements in Iraq, as was done by Donald Rumsfeld, as 'dead enders'.

A second legitimacy debate in public policy circles

It is important to distinguish 'legitimacy' as used to denote the status of the United States as global hegemon, and legitimacy as a benchmark of judgment with respect to a particular use of force that falls outside the orbit of legality. The two views of legitimacy may or may not be linked, depending upon whether hegemonic legitimacy is associated, or not, with a reputation for generally adhering to international law. In the aftermath of the Iraq War, there has emerged a debate in the mainstream on the nature of hegemonic legitimacy, and whether or not it presupposes law abidingness. This debate can be most usefully framed by presenting the views of a prominent neoconservative commentator on foreign affairs, Robert Kagan, and that of an equally prominent geopolitical realist, Robert W. Tucker (in collaboration with David Hendrickson).

The more intellectual neoconservatives acknowledge that the invasion of Iraq without a mandate from the Security Council cost the United States heavily in terms of perceived legitimacy, especially among European democratic states. This viewpoint has been most clearly expressed by Robert Kagan.[28] What is most interesting about Kagan's argument is that he delinks this loss of legitimacy from legality, and connects it to what he calls 'the unipolar predicament' of having capabilities and vulnerabilities, but not the leadership to command adherence to defining policies. In Kagan's view it was this failure, abetted by clumsy diplomacy, which was exhibited by the split with traditional European allies in relation to the Iraq War. His point here is that the loss of legitimacy by the United States is not a consequence of Washington's refusal to have its policy shaped by reference to international law, a general posture of lawfulness, and deference to the United Nations. Kagan insists that this refusal has long characterised US foreign policy, but that previously it did not produce political difficulties because America's traditional European allies were supportive.

It is Kagan's view that '[c]ontrary to much mythologising on both sides of the Atlantic these days, the foundations of US legitimacy during the Cold War had little

[28] 'Robert Kagan, America's Crisis of Legitimacy', *Foreign Affairs*, 83:2 (2004), pp. 65–87.

to do with the fact that the United States had helped to create the UN or faithfully abided by the precepts of international law laid out in the organization's charter'. In the same vein, '[i]t was not international law and institutions but the circumstances of the Cold War, and Washington's special role in it, that conferred legitimacy on the United States, at least within the West'.[29] What led to this European acceptance of the legitimacy of American leadership were three pillars: the Soviet Union posed a strategic threat to Europe that could only be addressed by means of a European acceptance of American leadership; the Soviet Union was also a common ideological enemy enabling America to be the acknowledged leader of 'the free world'; and thirdly, the structure of bipolarity meant that American power was kept in check by Soviet power, and this reassured Europeans that the United States would not be too reckless in pursuing its foreign policy (unlike the current circumstance of unchecked power in the relations between Europe and the United States).

The changed circumstances and their consequences for American hegemonic legitimacy came to a crisis in the run-up to the Iraq War. Europe perceived no strategic threat arising from Iraq's behaviour, and was deeply put off by the American insistence that such a strategic threat existed. At the same time, according to Kagan, the Europeans were disturbed by their inability to mount an effective opposition, or to induce the United States to act only to the extent of UN authorisation. Europeans perceived that their legimacy was 'an asset they have in abundance . . . they see it as a comparative advantage – the great equaliser in an otherwise lopsided relationship.'[30] Kagan indicts the Europeans for their hypocrisy. He argues that Europe's central contention that the United States was dependent on Security Council approval before it acted against Iraq was inconsistent with European support for evading the Security Council in order to proceed with the humanitarian intervention in Kosovo back in 1999. Kagan's central thesis is as follows: 'There are indeed sound reasons for the United States to seek European approval. But they are unrelated to international law, the authority of the Security Council, and the as-yet fabric of the international order. Europe matters to the United States because it and the United States form the heart of the liberal, democratic world.'[31] From this perspective the prescription is simple: 'The United States, in short, must pursue legitimacy in the manner truest to its nature: by promoting the principles of liberal democracy not only as a means to greater security but as an end in itself.'[32] The question of whether or not the rift between two competing visions of world order can be healed, the one predominant in Europe and the other in the United States, depends in the last analysis in how they perceive the basic threat to world order: is it an exaggerated perception of the threat by the United States or an insufficient appreciation of it by Europe? Kagan regard this divergence as a 'tragedy', and sides in the end with the American view, saying of the Europeans '[i]n their effort to constrain the superpower, they might lose sight of the mounting dangers in the world, which are far greater than those posed by the United States'.[33] There are from this perspective three main conclusions implied by Kagan's analysis: first of all, departures from legality are not of significant relevance to an assessment

[29] Ibid., at p. 67.
[30] Ibid., at p. 72.
[31] Ibid., at p. 84.
[32] Ibid., at p. 85.
[33] Ibid., at p. 87.

of legitimacy; secondly, legitimacy matters far more than legality in evaluating criticisms of foreign policy; and thirdly, the American threat assessment, even if producing certain dysfunctional policies, is generally accurate, and should be regarded by European governments as a legitimate approach to world order in the period since 9/11. At the same time, Kagan acknowledges that it is not so regarded, and that part of the fault lies with the 'maladroit' diplomacy of the Bush administration. In effect, Kagan would presumably like to see the Europeans respect the American view on the common threats posed to the established order of global security arising from the new terrorism and would encourage Washington to be more consultative and collegial in relation to European sensibilities when shaping its future foreign policy.

At issue, is whether the disagreements that surfaced during the pre-war debate on Iraq were primarily matters of diplomatic style or exhibited deep substantive differences. There is no doubt that the abrasive Bush approach, especially considering the earlier record of unilateralism and repudiation of lawmaking treaties, contributed to the image of the United States as a global leader of severely diminished legitimacy. But there were also significant substantive differences on the nature of terrorist threat, and widely divergent interpretations as to whether the regime of Saddam Hussein should be regarded as part of the threat, and these differences could not have been removed by smoother diplomacy. In that sense, the Iraq War challenged the legitimacy of American global leadership in much more serious ways than were associated with objections to the Kosovo War of 1999 or the Afghanistan War.

Returning to the legality/legitimacy connection, Robert W. Tucker and David C. Hendrickson, with firm realist credentials, challenged the Kagan approach, mainly on the level of conceptualisation.[34] It was the Tucker/Henrickson view, expressed in an article published in *Foreign Affairs*, that the American fall from legitimacy was directly linked to its refusal to guide and justify its foreign policy by reference to international law. In their view, '[l]egitimacy arises from the conviction that state action proceeds within the ambit of law, in two senses: first, that action issues from rightful authority, that is, from the political institution authorised to take it; and second, that it does not violate a legal or moral norm'.[35] They acknowledge that legitimacy is elusive as it is at least possible that illegal or unlawful action may on occasion be deemed legitimate, but despite this, their view is that 'illegitimacy [is] a condition devoutly to be avoided'.

The main burden of Tucker/Hendrickson's analysis is take explicit issue with Kagan's view of how the United States sustained its legitimacy in the period of the Cold War. They argue that American legitimacy emerged out of four related features of its foreign policy – 'its commitment to international law, its acceptance of consensual decision-making, its reputation for moderation, and its identification with the preservation of peace'.[36] In contrast, they view each of these 'pillars' of legitimacy to be severely weakened by the style and substance of American foreign policy during the Bush presidency. Tucker and Hendrickson acknowledge that there had been previous American initiatives that had challenged these principles, but that the overall posture of the country was one that maintained the link between legality and

[34] 'The Sources of American Legitimacy', *Foreign Affairs*, 83:6 (2004), pp. 18–32.
[35] Ibid., at p. 18.
[36] Ibid., at p. 24.

legitimacy, and that this was widely understood by our main allies in the world. In their view, American problems can be structurally understood in relation to its inability to handle 'the unipolar moment' that emerged after the collapse of the Soviet Union. They also show the implausibility of initiating the Iraq War by invoking the so-called Bush Doctrine claiming a right to wage pre-emptive wars. The absence of the imminence of any threat, made all too clear by the failure to find WMD in Iraq, deprived the American policy of any plausible basis to argue either legality or legitimacy. But even more damaging from the Tucker/Hendrickson perspective was the evident indifference to legality: 'In truth, the Bush administration did not care a fig for whether the war was lawful'.[37] And further along this line was their conclusion that the US Government was now exhibiting 'a fundamentally contemptuous attitude toward principles that had previously sustained US legitimacy'.[38]

Tucker/Hendrickson do not adopt an unconditional attitude toward legality, acknowledging that considerations of prudence and morality may justify unlawful conduct in exceptional circumstances. But in their view the Iraq War was not such an instance. Such illegal uses of force are 'in fact unnecessary for US security and actually imperil it'. They argue that 'containment and deterrence' had provided 'a perfectly workable method of dealing with Saddam Hussein', while the occupation of Iraq has made 'Americans much more insecure'.[39] They are also critical of the Kosovo War, contending that the factual basis for claiming that an imminent humanitarian catastrophe justified the NATO intervention did not exist, but was fabricated on the basis of exaggerated accounts of Serb atrocities and disregard of KLA provocations.[40] In other words, maintaining legitimacy depends, according to Tucker/Hendrickson, on limiting departures from legality to situations of compelling necessity. The road back to legitimacy for the United States is a difficult one given current perceptions, but it is a vital part of restoring American security, as well as being of intrinsic benefit. Their closing words: '. . . the importance of legitimacy goes beyond its unquestionable utility . . . a good in itself. For its own sake, and for the sake of a peaceful international order, the nation must find its way back to that conviction again.'[41]

Continuing the debate in the pages of *Foreign Affairs*, Kagan argues mainly that Tucker and Henrickson are now arguing a position that is inconsistent with their past acceptance of departures from legality, and are allowing their dissatisfaction with Bush's foreign policy to colour their discussion of principle.[42] I think Kagan scores points here, but he fails to address the most fundamental issue, which is, under conditions of unipolarity, international law assumes a more important role than within global settings where countervailing centres of state power exist: providing the only available source of constraining discipline for the United States. This structural factor has been rendered more important by the sort of blunt approach that the Bush administration brings to diplomacy, virtually inviting other states to withhold

[37] Ibid., at p. 26.
[38] Ibid., at p. 23.
[39] Ibid., at p. 29.
[40] Ibid., at pp. 30–1.
[41] Ibid., at p. 32.
[42] Robert Kagan, 'A Matter of Record: Security, Not Law, Established American Legitimacy', *Foreign Affairs*, 84:1 (2005), pp. 170–3.

support for American leadership on grounds of both legality and legitimacy. Kagan fails to deal with the bearing of extremist ideology in a context of unipolarity as aggravating the legitimacy crisis, and therefore understates the relevance of legality.

Kagan shares with Tucker/Hendrickson a deep concern about the loss of American legitimacy in world affairs, but insists that sustaining, losing, and regaining legitimacy has never been closely tied to a record of compliance with international law. In the end, Kagan thinks that more skilful diplomacy is all that is needed to restore American legitimacy, as Washington is essentially correct about the nature of the post-9/11 world and what to do about it. It is my judgment that elevating style above substance will work to repair some of the damage, but that American legitimacy cannot be recovered until there is a strong sense that US foreign policy is basically, although not invariably, constrained by international law and the United Nations Charter.

The flexibility of lawyers versus the flexibility of law

It is one thing to advocate a general adherence to legal guidelines, but it is quite another to translate this advocacy into agreed lines of behaviour. There are always lawyers available to support the preferred policy options of political leaders either motivated by careerist or nationalist goals. Never has this subordination of lawyers to the political mood been more obvious than during the Bush administration.[43] There were always government lawyers available in Washington to justify casting aside the Geneva Conventions or to validate pre-emptive/preventive uses of force. It is this availability that led the philosopher Immanuel Kant long ago to call international lawyers 'miserable consolers'.[44]

There is little doubt that it is difficult to attain the perspective of a detached and informed observer in the United States, given the traumatising effects of the 9/11 attacks, although with the passage of time that difficulty seems to have diminished. (See McDougal on the evaluative objectivity essential for judgments about legality). The proper assessment of legality needs to be outside the orbit of official rationalisations, but should not subscribe to legalistic understandings of law that are rigidly disconnected from context or changing circumstances. As legal expectations are always subject to interpretation, and are presumed to be consistent with prevailing ethical values and underlying security needs, there is room for considerable interpretative latitude without ever reaching the precarious domain of 'illegal, but legitimate'.[45]

[43] See Mark Danner, *Torture and Truth;* also Lisa Hajjar, 'What's the Matter with Yoo?' and R. Falk, 'Law, Lawyers, Liars and the Limits of Professionalism', papers presented at the 2005 Law & Society Annual Meeting, 2–5 June 2005, Las Vegas, Nevada.

[44] 'Perpetual Peace', in *Kant On History*, ed. Lewis White Beck (Indianapolis, IN: Bobbs-Merrill, 1963), pp. 85–135, 99. See also the Busiris scene in Jean Giradoux, *Tiger at the Gates* (New York: Oxford University Press, 1955), pp. 43–47.

[45] This issue has been decisively elaborated by Harold Lasswell and Myres S. McDougal in their influential article, 'The Identification and Appraisal of Diverse Systems of Public Order', reprinted in McDougal, *Studies in World Public Order* (New Haven, CT: Yale University Press, 1960), pp. 3–41; for the wider issues associated with interpretative discretion see Myres S. McDougal, Harold D. Lasswell, and James C. Miller, *The Interpretation of Agreements and World Public Order* (New Haven, CT: Yale University Press, 1967).

In the setting of the main controversies of recent years, there is no evidence that torture provides the best source of information in the course of interrogating prisoners, and there is massive evidence that revelations of torture as official policy have damaged American security and contributed heavily to the decline in American legitimacy in both senses discussed above, that is, reputation for law abidingness, reputation as hegemonic leader. The pictures of abuse of detainees at Abu Ghraib and elsewhere in similar detention facilities suggest a pattern of sadistic behaviour by guards condoned, if not induced and abetted, at the highest levels of the US Government. The portrayal of detention at Guantanamo contributes further to a portrait of depravity in dealing with the religious and human sensibilities of individuals under the total control of their captors and minders, most of whom lack any possible useful knowledge and many of whom are innocent. A picture of gratuitous abuse emerges, connected to no reasonable public purpose, and the result is damage to American legitimacy in both its wider and narrow senses. In other words, it is not only the Iraq War that provides the most notorious instance of illegal and illegitimate, but the general pattern of practices associated with the conduct of the War Against Global Terror.

Legality and legitimacy: the dilemma reconsidered

The ongoing preoccupation in political theory generated by Carl Schmitt's conceptualisations of legality and legitimacy have seldom explicitly influenced the application of such terminology to the *international* behaviour and status of a sovereign state. The Schmitt perspective, arising in the context of emergent Nazi dictatorial rule, was supportive of the view that 'legitimacy' was essentially an expression of political will that was inherently rooted in sovereignty, and took precedence over deference to 'legality' in the internal and international operations of government. The sovereign should not be constrained by illusions about the primacy of law, which for Schmitt was the fatal flaw of liberal democracy. This way of deploying legality and legitimacy forms the background of discussion, but the foreground is associated with foreign policy debates about controversial uses of international force, or recourse to war.

These debates have been principally concerned about the propriety of the wars in Kosovo in 1999 and in Iraq since 2003. The earlier presentation of these debates was intended to convey the confused, even contradictory, history of legitimacy in both international relations and international law. In these intellectual settings legitimacy functions both as a statist benchmark of reputation and propriety, and as linked to legality. With respect to reputation, there is disagreement as to whether the reputation of a state, particularly a hegemonic actor, is or is not dependent on a record of compliance with international law, whether legitimacy is essentially concerned with diplomatic decorum as to a responsible and effective use of hegemonic power or is rooted, above all, in substantive behaviour that exhibits respect for the core principles of international law.[46] For the Kosovo Commission

[46] See generally Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

invoking legitimacy was a means of endorsing an intervention on moral and political grounds that could not meet tests of legality. At the same time, it was hoped that the constraints of legality would be soon loosened to incorporate the Kosovo precedent, thereby obviating future pressures to depart from these constraints. From these perspectives, reliance on legitimacy is a signal of the need and desirability of law reform.

In contrast, although invoking the approach of the Kosovo Commission, Anne-Marie Slaughter, writing in the tradition of international liberalism, supposes that if a state seeks legality, and is denied, as the United States was when it sought approval from the United Nations of its plan to wage war against Iraq, it could still *subsequently* be regarded as having acted legitimately if certain specified conditions were satisfied in the course of the war. Slaughter's eventual denial of legitimacy was not based on the illegality of recourse to a non-defensive war against Iraq, but on the failure of the Bush administration to demonstrate the accuracy of its own rationale for the war.

The recommended approach taken here is based on approval of the Kosovo Commission approach to the legality/legitimacy divide, but not to Slaughter's effort to allow legitimacy to be demonstrated after the fact. The positive role played by legitimacy is to impart a measure of flexibility with respect to the application of legal constraints on the use of international force in two, and only two, sets of circumstances: conditions of humanitarian necessity (Kosovo; Darfur, Sudan) and circumstances of defensive necessity (1967 War in the Middle East; Afghanistan War of 2002). As pointed out above, it is supportive of these views that the moral and political rationales for war in these two sets of circumstances have been endorsed by the UN Secretary General and expert bodies as *already embodied* in the UN Charter if correctly understood. In other words, the gap between legality and legitimacy is not a matter of substantive standard, but interpretative clarity. Whether this is the proper approach to a concern about the limits of legality itself deserves further debate. By incorporating through interpretation changing circumstances, flexibility is achieved, but the clarity of an inhibiting text is definitely weakened. A motive for inflexibility in formulating constraints on the use of international force is to minimise the ambit of discretion available to governments, and thereby contribute to the basic undertaking of the United Nations 'to save succeeding generations from the scourge of war'.

There are no enduring solutions for these issues of war and peace that will recur in varying settings as history continues to unfold. It does seem that debating legality and legitimacy is one means to encourage deliberative reflection about controversial recourse to war to resolve international conflict. This reflection is needed in these contexts of decision to address the tension between a desired clarity in standards of constraint and a needed relief from such clarity in situations where moral and political imperatives push up against these constraints. The legality/legitimacy debate at its best, as in Kosovo, did perform this function. Since the September 11th attacks there have been renewed, and more radical pressures directed at the framework of constraint understood as legality, but there has also been unprecedented resistance to these pressures by states and civil society actors in relation to the Iraq War, including an international consensus that this particular war was both illegal and illegitimate. Whether this discourse based on legality/legitimacy will help frame future foreign policy debates is itself uncertain at this juncture.