Legitimacy and the use of force: can the circle be squared?

ANDREW HURRELL

It is no great surprise that in the contemporary world the use of deadly force by a political grouping or nation-state or on behalf of international society should raise troubling questions of legitimacy. The problem appears to be massively over-determined and the intellectual challenge is to bring some order to a confused and confusing debate; to distinguish between short-term problems and deep-rooted changes in both understandings of legitimacy and patterns in the use of force; and try and identify where there might be scope for narrowing the very deep disagreements that have come to surround this question. This article argues, first, that the legitimacy problems surrounding the use of force can only be understood by considering the way in which changing understandings of international legitimacy have interacted with developments in both the generation of insecurity and the management of insecurity; and, second, that although the ideology, strategy and policies of the Bush admin-istration have undoubtedly been central to recent debates, many of the most important aspects of the problem reflect broad and deep-seated developments within global politics. The article concentrates on questions of *international* rather than *domestic* legitimacy – although it needs to be recognised that sharply divergent national perspectives regarding the use of force are of course one aspect of the international problem.[1] The article addresses three questions:

1. What do we mean by legitimacy and how have both conceptions of legitimacy and practices of legitimacy politics evolved in ways relevant to the use of force?
2. How have changes in both the nature and management of international security complicated the legitimacy challenges facing international society?
3. Can the circle be squared? What might it mean to square the circle?

What do we mean by legitimacy and how have both conceptions of legitimacy and practices of legitimacy politics evolved in ways relevant to the use of force?

Legitimacy is sometimes understood in a sociological or psychological sense – the tendency of individuals or groups to accept and follow the rules of a political order.

---

[1] Thus the recent US emphasis on the use of military force needs to be seen in the context of a powerful and robust Jacksonian tradition within US foreign policy. See Walter Russell Mead, *Special Providence: American Foreign Policy and How it Changed the World* (New York: Alfred N. Knopf, 2001). See also Tony Judt's brave highlighting of those elements within US society that, in other places, we would not hesitate to label as militarist. See Tony Judt, 'The New World Order', *New York Review of Books*, 14 July 2005, pp. 14–18. It would be wrong, however, to focus too heavily on the US. For example, Putin has had no great difficulty in convincing many Russians that the brutal use of force in Chechnya is a perfectly legitimate means to restore 'order'.

However, the fact of actual acceptance or compliance is not enough and the study of legitimacy has for a long time focused on the beliefs of those who are complying and on the reasons why they come to accept a rule or a political order as appropriate and legitimate. Legitimacy therefore refers to a particular kind of rule-following or obedience, distinguishable from purely self-interested or instrumental behaviour on the one hand, and from straightforward imposed or coercive rule on the other.

It is true that legitimacy is often not easy to divorce from the calculation of interests. An international order that obtains in a given period may well be stable and considered legitimate to the degree that it reflects an agreed mutual satisfaction of interests. It has been common to argue that Great Power dominated systems have been legitimate to the extent that the major powers take account of the views and interests of weaker states and formulate their own policies in such a manner that others see themselves as having a stake in the system. But if acceptance can be understood solely in terms of interests and the instrumental calculation of interests, then it is unhelpful for the analyst to talk in terms of legitimacy, even if the actors themselves do so. Legitimacy implies a willingness to comply with rules or to accept a political order even if this goes against specific interests at specific times.[2] We may also need to invoke notions or principles of legitimacy precisely in order to understand how the idea of mutual satisfaction of interests is understood and interpreted by the parties involved.

Power is also central. It is, after all, the existence of an international order reflecting unequal power and involving the use of coercive force that creates the need for legitimation in the first place. On one side, the cultivation of legitimacy plays a vital role in the stabilisation of an order built around hierarchy, hegemony or empire. All major powers face the imperative of trying to turn a capacity for crude coercion into legitimate authority. As Martin Wight puts it: 'The fundamental problem of politics is the justification of power. . . . Power is not self-justifying; it must be justified by reference to some source outside or beyond itself, and thus be trans- formed into ''authority''.'[3] On the other side, such power as the weak possess is often closely related to exploiting the arguments about legitimacy that have become embedded in international legal and political practice. There is undoubtedly a great deal of instrumentality in appeals to legitimacy, and nowhere more so than when weak states seek to strengthen legal and moral constraints against the use of force by the strong. Legitimacy can therefore be seen as a strategic move in a political game and needs to be understood as much a part of the messy world of politics as of the idealised world of legal or moral debate. The analyst needs to recognise the role of power and interest in the practice of legitimacy politics without falling into the trap of believing that understandings of power and interest can ever be fully grasped outside of the conceptions of legitimacy that predominate in a particular historical period or cultural context.

Legitimacy is not simply what people tend to accept in a sociological sense; it is what people accept because of some normative understanding or process of persuasion. Justification and reason-giving are fundamental. As the etymological origins of the concept suggest, this normative acceptance and the process of

---

justification are often based on law. In many situations legitimacy is often equated with lawfulness – lawfulness within the legal system itself, but also the lawfulness of a legally-structured constitutional order within which day to day politics takes place. But the problem of legitimacy arises precisely because of the unstable and problematic relationship between law and morality on the one side and law and power on the other. The law/morality relationship has been at the very heart of the great debates on legitimacy within both jurisprudence and political theory.[4] Can law and morality be separated, as one central strand of legal positivism has argued? Should a law be obeyed if it manifestly violates moral standards or stands in the way of morally-sanctioned action? As we shall see, these long-familiar arguments have been central to recent debates on the use of force. If we know what should be done – to protect our society against terrorism or to save distant strangers from murder and oppression – why should we allow a legalistic or formalist concern with rules and institutions to get in the way?

The relationship between law and the political order is equally central. Historically, it is often shared political norms and practices that underpin international order. Such norms are often in deep tension with the core principles of international law. The Cold War order, for example, was one in which the balance of power and shared understandings of spheres of influence played a central role and in ways that were very hard to reconcile with legal norms seeking to regulate the use of armed force. For those who stress the fragility of international society and the imperatives of national security, it is the demands of this political order that must be granted priority. This other long-familiar argument has also been central to recent debates surrounding the use of force. Why should we set such store by international institutions such as the United Nations when those institutions are clearly incapable of acting decisively and forcefully against challenges both to the security of individual states and to the broader security interests of international society as a whole?

Legitimacy is an extremely slippery concept. Not all 'legitimacy talk' should be accepted at its face value and the interpretative study of subjective and intersubjective beliefs about legitimacy needs to be set against more distanced accounts and explanations. Some have suggested that its very slipperiness means that the concept is best avoided or that it should be disaggregated into its component parts. However, as with sovereignty, the study of legitimacy takes us quickly into a site of contending claims that are so central to the analysis of political order that they cannot be easily ignored or avoided. Moreover, it is precisely the extent to which legitimacy represents an aggregate social quality (especially one attaching to a political order) that makes it valuable. Legitimacy and understandings of legitimacy are crucial if we are to understand the nature of state interests and how they change; the way in which the game of power politics is structured; and the character of the pervasive conflict over values that so disrupts efforts to capture shared interests and to secure the stable management of unequal power.

This is not the place to provide a detailed analysis of the concept of legitimacy;[5] nor of the role that it has played within international society.[6] My intention is rather

[4] For an excellent analysis of these classical debates, see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford: Oxford University Press, 1999).
[5] See especially David Beetham, *The Legitimation of Power* (Basingstoke: Macmillan, 1991).
[6] See, in particular, Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005); and Gelson Fonseca Jr., *A Legitimidade e Outras Questões Internacionais* (São Paulo: Paz e Terra, 1998).

to emphasise the many-sided character of legitimacy as it applies to the use of force and some of the principal ways in which conceptions of legitimacy have shifted and become more complex. Let me touch briefly on five dimensions of legitimacy.

The first dimension has to do with process and procedure. This is one aspect of what Fritz Scharpf labels 'input legitimacy'.[7] It involves the claim that an action or a rule is legitimate to the extent that it 'has come into being and operates in accordance with generally accepted principles of right process'.[8] Process-based conceptions of legitimacy mesh naturally with pluralist conceptions of international society. For the pluralist, international society aims at the creation of certain minimalist rules, understandings and institutions designed to limit the inevitable conflict that was to be expected within such a fragmented political system. These rules are to be built around the mutual recognition of states as independent and legally equal members of society, the unavoidable reliance on self-preservation and self-help, and the freedom of states to promote their own moral (or immoral) purposes subject to minimal external constraints. It is not difficult therefore to see why analysts of the pre-1914 European state system should so often view legitimacy in terms of shared procedural rules and practices – as with Bull's emphasis on the creation by common consent of rules and institutions by which clashes of interest and conflicting values can be mediated; or Kissinger's much-cited definition of legitimacy: '[I]t means no more than an international agreement about the nature of workable agreements and about the permissible aims and methods of foreign policy'.[9]

Whatever the exact character of legitimacy in the classical European state system, the crucial point here is to note the ways in which understandings of process legitimacy have evolved and expanded. In the first place, there have been fundamental changes in the character of international law – away from a system in which international law was made by the strong for the strong, and in which law was designed to fulfil a narrow set of specific purposes (its 'tool-kit function'); and towards a system in which norm creation becomes an increasingly complex and pluralist process, in which ideas of equality become more powerful and pervasive, and in which specific rules come to be understood and interpreted in the light of general legal principles and shared foundational values and as part of an increasingly integrated normative order. The degree to which the legal order has grown more complex and harder for even powerful states to control is one of the reasons why US frustration with international law has grown sharper, shifting the balance between law's power-cementing and legitimacy-creating advantages and its constraining and ensnaring costs. Of particular importance for the use of force has been the growth of those urging a form of international legal constitutionalism built around the UN Charter. As with all such constitutionalist designs, power, and especially coercive power, is to be thoroughly constrained by the exercise of constitutional authority. Proponents of this view tend naturally to stress the legal limits on the use of force, especially in relation to humanitarian intervention and self-defence, and to reject more open readings that would allow the use of force to promote broad policy goals

---

[7] Fritz Scharpf, *Governing Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).
[8] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), p. 19.
[9] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edn. (Basingstoke: Palgrave, 2002); Henry A. Kissinger, *A World Restored* (London: Weidenfeld and Nicolson, 1957), p. 1.

or allegedly shared moral values.[10] Viewing the UN Charter in constitutionalist or quasi-constitutionalist terms can be seen as part of a broader trend towards the judicialisation of international politics (as, for example, in relation to the EU or WTO) and, for its proponents, undoubtedly represents a powerful normative view of how the use of force should be managed.[11]

This leads to the second change in understandings of process legitimacy, namely the increasingly powerful demands that international institutions be subject to the same standards of legitimacy that are applied within liberal democratic states. The core intuition is indeed a powerful one: that the exercise of all power in political life should be subject to appropriate standards of democratic legitimacy; that the delegation of authority to international bodies has created increasingly serious 'democratic deficits' and 'crises of legitimacy'; and that these should be met by finding ways of implementing the values of participation, transparency, representation and accountability at the international level. How can anyone expect the UNSC to be viewed as legitimate given the dominance of the P5, the often murky back-room diplomacy that characterises the operation of the Security Council, and the non-representation or under-representation of important regions of the world? In a world where democratic values have gained such currency, how can the importance of representativeness not lead to legitimate demands for Security Council reform? [12]

Although there is very little agreement on what principles of democratic legitimacy might be applied within international institutions, the spread of such arguments has had three very important implications for the use of force. The first is to underpin a powerful challenge to the procedural legitimacy of established institutions and, in particular, the United Nations. If democratic legitimacy is to be central, then why should such great weight be placed on the legitimating role of institutions whose own democratic credentials are so plainly flawed. As Henry Nau puts it:

Thus a decision by the United Nations as a whole, no less than one by the Security Council, may not reflect democratic law and certainly cannot be said to be the only legitimate way to decide on the use of force in world affairs. Legitimacy requires more than unanimity among the great powers or universal participation. It ultimately requires the consent of the governed, and many UN members do not operate on the basis of such consent.[13]

Second, and related, the democratic legitimacy of the individual state should outweigh the flawed workings of international institutions. Legitimacy should be based on domestic democratic consent and domestic constitutionalism, not on the

---

[10] For a clear example, see Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edn. (Oxford: Oxford University Press, 2002). The emphasis on the need to 'constitutionalize international law' has also been visible amongst political theorists, again especially in Germany. Habermas, for example, has argued that 'The world organization . . . has a veritable constitution, which sets forth procedures according to which international breaches of rules can be determined and punished. There have been, since, no more just and unjust wars, only legal or illegal ones, justified or unjustified under international law.' 'America and the World: A Conversation with Jürgen Habermas', *Logos*, 3:2 (Summer 2004), p. 14.

[11] See John Ferejohn, 'Judicializing Politics, Politicizing Law', *Law and Contemporary Problems*, 41 (Summer 2002), pp. 41–63. The idea that the use of force should be tightly constrained by legal and constitutional structures is also central to many liberal theorists of global governance such as David Held.

[12] See David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', *American Journal of International Law*, 87:4 (1993), pp. 41–63.

[13] Henry R. Nau, 'The Truth about American Unilateralism', *The American Outlook* (Fall 2003).

agreement of others, nor on international law, nor on universal principles.[14] And third, if democratic legitimacy is so important, then the non-democratic character of many states should negate their own claims to strong and exclusive sovereignty. This is where democracy as a critical procedural value comes together with democracy and human rights as increasingly central constitutive norms of international society. Thus liberals attracted by the notion of the responsibility to protect have argued that sovereignty should be contingent upon the willingness and ability of a state to protect the core rights of its citizens, and that the violation of those rights creates a legitimate right of outside intervention for humanitarian purposes. The same logic appears in recent arguments about security – that 'sovereign status is contingent on the fulfil- ment of certain fundamental obligations, both to its own citizens and to the international community. When a regime fails to live up to these responsibilities or abuses its prerogatives, it risks forfeiting its sovereign privileges – including, in extreme cases, its immunity from armed intervention.'[15] The sovereignty of 'rogue regimes' that support terrorism or pursue weapons of mass destruction should therefore be viewed as conditional, and not absolute.

The deployment of these arguments by the US administration exemplifies the instrumental role of legitimacy in international politics. There are clearly many other ways of thinking about democratic legitimacy in international politics. For example, if one takes seriously the core democratic idea that coercive power should be made legitimate above all in the eyes of those who are directly subject to it, then democratic legitimation at the global level has far more radical and subversive implications than those envisaged by Nau, Bolton or Haas. But the crucial point here is simply to stress that the spread of arguments about democratic legitimation has immeasurably complicated understandings of what process legitimacy does, or should, consist of.

The second dimension of legitimacy has to do with substantive values. In order for an institution or political arrangement to be legitimate, its core principles need to be justifiable on the basis of shared goals and values. Central to this article is, of course, the extent to which increasingly tight constraints on the use of force have been central elements of the move towards a liberal solidarist conception of international law and society. Within the pre-1914 European state system, international law imposed few restrictions on the use of force and resort to war. War was, as Hall expressed it, 'a permitted mode of giving effect to decisions'; and conquest and subjugation were permitted modes of acquiring territory – mechanisms 'by which the successful deployment of armed force might serve not only to wrest the territory from the rightful sovereign but also to invest the conqueror with a superior title'.[16] There was no place for notions of self-determination, and the dominant powers determined the criteria by which non-European political communities could be admitted to

---

[14] See John R. Bolton, ' ''Legitimacy'' in International Affairs: The American Perspective in Theory and Operation', Remarks to the Federalist Society, November 2003, ⟨http://www.state.gov/t/us/ rm26143.htm⟩, accessed 10 August 2005. Bolton's argument is strikingly inconsistent and he is happy to acknowledge the legitimacy-conferring role of international law and society whenever it suits his own understanding of US interests.

[15] Amongst the clearest statements of the conditional sovereignty idea is Richard N. Haas, 'Sovereignty: Existing Rights, Evolving Responsibilities', Speech at Georgetown University, 14 January 2003.

[16] R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), pp. 3–4. See also Sharon Korman, *The Right of Conquest* (Oxford: Clarendon Press, 1996), ch. 4.

membership of international society, including the degree to which the laws of armed conflict were to apply to the non-European world.

The re-entry into the international legal order of rules governing the right to resort to force in the post-1919 and especially post-1945 period is well known. Equally well known are the ambiguities of the apparently clear-cut proscription of the aggressive use of force. These follow not only from the internal open-endedness of the concepts of aggression and self-defence but also from the increasingly complex relationship between *jus in bello* and *jus ad bellum.* But there are other aspects of the expanded normative ambition of international society that have also had very important implications for the use of force. The increasing value placed on the idea of national and political self-determination has played a major role in justifying and legitimising the many occasions in which force and violence have been used in anti-colonial and nationalist struggles – and indeed in many cases of contemporary terrorism, including Chechnya, Sri Lanka, and Palestine. And, as noted above, the increasingly powerful political and legal role of human rights and democracy has been central to the 1990s debates surrounding humanitarian intervention, as well as to the arguments of those who believe that non-democratic states possess only conditional sovereignty and that the use of force to promote regime change can be permissible.

If one of the central features of a liberal solidarist conception of international society is its increased normative ambition (including the ambition of constraining the aggressive use of force, of taming and harnessing the power of the strong), another concerns the justification and evaluation of norms. Alongside the old idea that actors create and uphold law because it provides them with functional benefits, the post-1945 period has seen the emergence of a range of internationally agreed core principles – respect for fundamental human rights, prohibition of aggression, self-determination – which are held to provide the basis for evaluating specific rules. This may be viewed in terms of the surreptitious return of natural law ideas or of a philosophically-anchorless, but nevertheless reasonably solid pragmatic consensus. Partly as a consequence we have also seen the emergence of powerful arguments that international law should escape from the limits (and genuine inadequacies) of a view of international legitimacy based on state consent and, instead, seek to build legitimacy around a shared conception of substantive justice. The most elaborate and persuasive account of this position has been developed by Allen Buchanan, for whom legitimacy is built around a Natural Duty of Justice defined as 'the limited moral obligation to contribute to ensuring that all persons have access to just institutions, where this means primarily institutions that protect human rights'.[17]

The important point to highlight is that, when it comes to the use of force, two of the most important sets of changes in the international legal and normative order point in diametrically opposite directions. For the liberal constitutionalist, legitimacy is dependent on the extent to which the use of coercive power is constrained by constitutionalist procedures, especially as embodied in the UN Charter. For the cosmopolitan moralist, rules relating to the use of force should be interpreted in the light of the substantive moral values on which the legitimacy of international law and of international society must ultimately depend.

---

[17] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (Oxford: Oxford University Press, 2004), p. 86.

A third component of legitimacy concerns specialised and specialist knowledge. Institutions and the norms and rules that they embody are legitimate to the degree that those centrally involved possess specialist knowledge or relevant expertise. Arguments of this kind have often been central to debates surrounding the legitimacy of multilateralism in relation to the global economy or the environment. Such claims are of less direct relevance to the use of force, but emerge in a number of places. Thus claims about the legitimacy of the preventive use of force are held to depend on access to secret knowledge and intelligence that only governments and intelligence agencies possess. Arguments justifying the use of force against rogue regimes have rested heavily on claims to privileged or specialist knowledge – about what their capabilities or potential capabilities might be and about their actual or future intentions. As with claims to legitimacy based on technocratic knowledge (for example in the cases of the IMF or the WTO), such arguments have suffered heavily in the face of both intelligence failures, manifestly insufficient knowledge of the countries under analysis, and the political manipulation of such intelligence. However, particularly in relation to the problem of pre-emptive or preventive use of force, there is a structural problem that cannot be easily evaded: the knowledge needed to legitimise the decision to use force cannot be easily or unproblematically made available to public scrutiny.

The fourth dimension of legitimacy has to do with effectiveness, one crucial aspect of what Scharpf labels 'output legitimacy'. In many areas of global governance, especially to do with the global economy, it is routinely argued that the delegation of authority to international organisations, to regulatory networks, or to private systems of governance is legitimate to the extent to which such delegation provides effective solutions to shared problems. A similar case is made in relation to security organisations. Thus those who reject calls for a reform and expansion of the permanent membership of the Council often rest their arguments on the importance of effectiveness. Yes, reform might promote representation; but at what cost? If a Council of 25 or 26 is even less able to act effectively than the current arrangement, then how has this increased the legitimacy of the organisation? Does not such reform carry with it the risk of repeating the very mistakes of the League that the founding fathers of the UN were so anxious to avoid?

Legitimising hierarchy in the name of effectiveness has a long history. A traditional defence of the role of Great Powers within international society was that: 'The desire for some minimum order is so powerful and universal that there is a certain disposition to accept an order that embodies the values of existing great powers as preferable to a breakdown of order'.[18] Even as international society moved into the age of sovereign equality and as the number of international institutions expanded, the importance of order via hierarchy persisted, as did its justification on grounds of effectiveness. This trend was visible in the permanent membership of the Security Council and the veto, in the voting structure of the World Bank and IMF, and in the informal norms by which negotiations in the WTO are conducted. One of the most important functions of informal groupings within formal institutions is to provide a way of combining effectiveness and legitimacy.[19]

---

[18] Hedley Bull, 'The Great Irresponsibles? The United States, the Soviet Union and World Order', *International Journal*, XXV (1979–80), p. 439.

[19] See Jochen Prantl, 'Informal Groups of States and the UN Security Council', *International Organization*, 59:3 (2005), especially pp. 582–5.

But the issue of effectiveness raises other more fundamental questions. If it is effectiveness that really matters, why bother with institutions that are both ineffective and unrepresentative? It is this line of argument that is central to those who are tempted by the possibilities of empire and hegemony – the idea of an American Empire as the only possible provider of global security and other international public goods; as the only state with the capacity to undertake the interventionist and state-building tasks that the changing character of security have rendered so vital; and as the essential power-political pivot for the expansion of global liberalism.

But even if we continue to think that institutions and international law matter, we need to think about the relationship between the legal and political order. A long tradition of thought has doubted whether coercive power can ever be wholly tied down within a legal constitutional order. Realists, for example, have long argued that some agent has to possess the effective power to safeguard international order when it comes under challenge and when institutions are unable to act. The *locus classicus* of such arguments is, of course, Carl Schmitt: his critique of both domestic and international legal constitutionalism; and his argument that the essence of sovereignty is the capacity to decide on the exceptional situation when effective action is unavoidable.[20] Albeit in more moderate and restrained tones, one strand of international legal thinking has continued to stress the custodial role of major powers in general, and of the United States in particular, in upholding the international legal order and in linking it to a politically prior security order.

As the strongest power in the world community, the US is called upon to play an additional and unique role: that of the ultimate custodian of the fundamental goals of the multilateral institutions that it has helped to establish, when these institutions prove unable to act. And they often prove unable to act because one of the sad facts of international life is that multilateral institutions have certain inherent defects that arise from the very nature of international politics. . . . As currently structured, the institutions often prove unable to act, whether because of a veto right or a requirement of consensus. But a change of procedure will not resolve the problem, for the obstacles to action are reflections of the international political process itself. So the alternatives for a state that is able to act unilaterally are to do nothing, because unilateral action would be 'against the law', to act alone, if necessary, to preserve the system.[21]

It is not difficult to see why such arguments create problems of legitimacy, especially when the self-appointed custodial role involves the use of force.

The fifth component of legitimacy has to do with giving reasons and with persuasion. In many ways this is the most important element because it is here that the first four are brought together into an effective process of legitimation. Even in the case of effectiveness, legitimacy has to rely on more than 'brute facts on the ground' and depends on a reasoned and accepted argument that an order or institution is legitimate because it is able to provide effective security. Martin Shapiro has noted the tremendous significance of the apparently simple idea of giving

---

[20] Carl Schmitt, *The Concept of the Political*, trans. George Schab (New Brunswick: Rutgers University Press, 1976).
[21] W. Michael Reisman, 'The United States and International Institutions', *Survival*, 41:4 (1999–2000), pp. 71–2.

reasons.[22] Political, legal or moral debate necessarily involve providing reasons, and criticising, debating, accepting or discarding them. Legitimacy is about providing persuasive reasons as to why a course of action, a rule, or a political order is right and appropriate. Three issues are of particular and persistent importance: audience, institutions, and language.

The first issue concerns the audience. The politics of legitimacy are played out to an increasing range of audiences, domestic, international and transnational through an increasingly complex set of media. One of the great political challenges of legitimacy politics is to speak to these multiple audiences and to manage their divergent demands. Or take the example of regionalism. It is often argued that, in the global politics of legitimacy, endorsement of the use of force by a regional body is the next best thing to endorsement by the United Nations. And yet, in regions dominated by a hegemonic power (such as the Americas or the CIS), it is far from clear that the regional audience will see such legitimation in the same way. Asking which audience matters and why is therefore central to the analysis of legitimacy. How far, for example, is the Kissingerian insight still valid, namely that it is the acceptability of a policy to other major powers that is politically crucial rather than consensus within some broader, and perhaps illusory, international community?

The second issue concerns the institutionalised setting within which attempts at persuasion and justification take place. In an age of global communication, appeals and arguments can be made outside of any institutional structure. And yet attempts to legitimise policies are difficult to carry through in a sustained fashion if there are no institutions or institutionalised practices in which rules and norms can become embedded. The importance of the UN and, in particular, of the Security Council, is not best understood in strict legal constitutionalist terms as the authoritative body that can rule on the legality or illegality of a particular use of force. It should rather be viewed as a deeply flawed and heavily politicised body in which arguments can be presented and policies defended because other, better, forums simply do not exist. For example, it has become very common to argue that a community of liberal democratic states should be the body that legitimises the use of force in cases of humanitarian intervention or expanded self-defence. But this community has either no institutional embodiment or deeply imperfect ones (as in the claim that NATO as a military alliance should play such a role).

The third issue concerns language. In order to persuade and to justify, there has to be a shared language through which such claims can be articulated, addressed and received. Diplomacy is an important element of procedural legitimacy to the extent that it provides shared conventions for communication (linguistic and procedural) and an institutional framework to allow political negotiation and communication to take place in strained and often very difficult circumstances. One of the reasons why law has played such an important role in legitimacy comes not from the capacity of

---

[22] Martin Shapiro, 'The Giving Reason Requirement', in Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002), pp. 228–57. See also Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach', *European Journal of International Relations*, 9:2 (2003), especially pp. 260–5. As Steffek makes clear, the importance of argument, persuasion and communication explains why the figure of Habermas is so central to the understanding of legitimacy.

a legal system (even a well-functioning domestic legal system) to deliver an unambiguous answer as to what the law is – whether, for example, the war in Iraq was legal or illegal. It comes rather from the existence within law of well-established patterns of argumentation about the use of force, about the rules that have governed and might govern the use of force, about the ways in which political interests can be expressed in a common language of claim and counter-claim. Moral argument, too, takes place within an inherited tradition of ideas that may well have emerged from within the European and indeed Christian world but which have become deeply embedded in the institutions and practices of international society. This is particularly true of war. The continual involvement of individuals and societies in war and conflict, the moral and political necessity of trying to make sense of what war involves, and the limited range of plausible arguments have led over time to the creation of intelligible patterns, traditions and ideologies. These form the core of legal debates over the use of force and also of moral debates, including understandings of what might constitute a just war. As Michael Walzer puts it: 'Reiterated over time, our arguments and judgements shape what I want to call *the moral reality of war* – that is, all those experiences of which moral language is descriptive or within which it is necessarily employed'.[23]

Although we can appeal to diplomacy, to international law, to a shared moral understanding of war, it is the difficulties of communication and of rational persuasion that need to be stressed. The politics of legitimacy is also about asking difficult questions about who is included or excluded from these allegedly shared languages and where the gaps and breakdowns occur. Language cannot be understood as a straightforward or easy facilitator of communication and agreed collective action. Rather it is central to the immensely difficult task of imposing some minimum rationality on the chaos and contingency of political life and to understanding the perverse internal logics of power and the destructive role of rhetoric in political affairs. The problem is that all too often:

Words carry us forward towards ideological confrontations from which there is no retreat. This is the root of the tragedy of politics. Slogans, clichés, rhetorical abstractions, false antitheses come to possess the mind. . . . Political conduct is no longer spontaneous or responsive to reality. It freezes around a core of dead rhetoric. Instead of making politics dubious and provisional in the manner of Montaigne (who knew that principles are endurable only when they are tentative), language encloses politicians in the blindness of certainty or the illusion of justice. The life of the mind is narrowed or arrested by the weight of its eloquence. Instead of becoming masters of language, we become its servants.[24]

It is precisely this enclosure in the blindness of certainty and the illusion of justice that stands in the way of the debate and dialogue on which legitimacy must depend and that, all too often, persuades the true believer that rational persuasion is unnecessary. How can anyone except the irrational fanatic not see that my use of force is perfectly justified?

---

[23] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 15.

[24] George Steiner, *The Death of Tragedy* (London: Faber and Faber, 1961), pp. 56–7.

How have changes in both the nature and management of international security complicated the legitimacy challenges facing international society?

The period since the end of the Cold War has seen an enormous literature on the changing character of security and the changing dynamics of the global security landscape: the fading into the background of the old agenda of major power rivalry and conflict; the emergence of a wide range of new security challenges connected with civil wars, domestic social conflict, ethnic strife, refugee crises, and humanitarian disasters; intensified concern over weapons of mass destruction and over the adequacy of existing multilateral constraints on nuclear proliferation; and, of course, the way in which new weapons technologies and the infrastructure of globalisation have interacted with both new and ongoing forms of non-state terrorism. In many cases the new security threats derive not from state strength, military power, and geopolitical ambition; but rather from state weakness and the absence of political legitimacy; from the failure of states to provide minimal conditions of public order within their borders; from the way in which domestic instability and internal violence can spill into the international arena; and from the incapacity of weak states to form viable building blocks of a stable regional order and to contribute towards the resolution of broader common purposes. The declining capacity of the state to enforce legitimate order has led in many parts of the world to the privatisation of violence as diverse social groups are increasingly able to mobilise armed force; and to the privatisation of security as social groups seek to protect themselves, whether through the growth of vigilantism, the formation of paramilitary groups, or the purchase of security within an expanding commercial marketplace.

There are five implications of these changes that are central to debates about legitimacy and the use of force. First, and most obviously, the management of such insecurity is highly likely to require deep intrusion and often persistent and continuing intervention. In common with many other aspects of contemporary global governance, security is clearly a 'beyond the border' issue. Given the embeddedness of norms relating to non-intervention and to self-determination, it is hardly surprising that the inevitability of deep intrusion has created problems of legitimacy. Second, the character of new security challenges, especially in relation to terrorism and weapons of mass destruction, have led to calls for a rethinking of the categories of pre-emptive and preventive self-defence. The US attempt to enunciate such a doctrine has been the focus of a great deal of criticism, and for good reason. As with unsanctioned humanitarian intervention, the dangers of predation and abuse appear to many states and commentators to be unacceptably high; and the idea that a state can unilaterally decide to use force against a long-term and remote threat represents a fundamental challenge to accepted legal understandings. However, the need to engage in such rethinking has been acknowledged in the security strategies of other states and in the UN High Level Report. The problem is therefore a real one even if the US 'solution' is rejected.

Third, new security challenges have led to a blurring of the legal categories around which the use of force has been legally and morally structured, especially between waging war on the one hand and pursuing criminals on the other. Again, the particular policies adopted by the United States, especially in relation to the treatment of detainees, have been the subject of much well deserved criticism. But it is important to note that the structural characteristics of the struggle against

terrorism make increased tensions amongst different bodies of law inevitable. And these are tensions that the current international legal order is singularly ill-equipped to deal with. Fourth, the broadening in the security agenda has increased the problem of selectivity. Already by the late 1990s the legitimacy of UN involvement in peace and security was threatened by charges that collective security had become selective security and reflected the values and political interests of the dominant Western states.

The fifth factor is the most important and has to do with the essential contestability of security. Whose security is to be protected and promoted? Against what kinds of threats? Through the use of what sorts of instruments? Some seek to answer this question in objective and material terms. Thus liberals have consistently argued that the rich and industrialised world should be concerned with the insecurity of the South because of intensified interdependence. The insecurity of the weak 'matters' to those living both in neighbouring states and in more distant regions because of the direct spillovers and material externalities that war and conflict generate. The new security agenda is important to international security because of the way in which drugs, social upheaval, political violence, refugee crises, and the growth of terrorism directly affects outsiders. Globalisation, mass communications, and the liberalisation of economic exchanges are problematic for this new security agenda because of the way in which they facilitate illicit flows of all sorts. More recently, realists who were once so critical of what they saw as global social policy have become far more concerned with the consequences of state failure, partly because of arguments that the number of 'failed states' has risen, but above all because of the negative material spillover effects.[25]

Others seek to answer these questions in moral terms. For advocates of human security, morality dictates that security is fundamentally about the promotion of human security in the face of all kinds of existential threats. Human security should include safety from hunger and disease as well as from all forms of violence. For nationalists and communitarians, the answer is equally simple. There is in reality no such thing as international security. The only security that matters is the security of our own state or community. Limited costs may be incurred to safeguard the security of other groups or to promote a more benign international environment. But such efforts must be subject to a test of national interest, not merely because of the legitimate political imperatives faced by the leaders of states but also because of a particular view of what morality requires.[26]

A great deal of the divisiveness over when it is legitimate to use force in the interest of security follows naturally from the essentially contested character of the concept of security and from the intensely and unavoidably political character of contemporary processes of securitisation. There is nothing self-evident about the statement that the greatest threat to peace and security comes from international terrorism. Indeed, from a variety of legitimate moral and analytical perspectives such a statement is manifestly wrong.

One side of the problem, then, concerns the nature of the security agenda and the changing character of security challenges. The other side concerns the management

---

[25] See Stephen Krasner, 'Sharing Sovereignty: New Institutions for Collapsed and Failing States', *International Security*, 29:2 (2004), pp. 85–120.
[26] See, for example, Jack Goldsmith, 'Liberal Democracy and Cosmopolitan Duty', *Stanford Law Review*, 55 (2002–2003), pp. 1667–97.

of insecurity and, in particular, the abiding difficulties of increasing the collective element in security management. Particularly for the strong legalist, overcoming the legitimacy problems surrounding the use of force necessarily involves increasing the collective element in security management. This does not necessarily mean a fully functioning system of collective security in which every state accepts that the security of one is the concern of all and agrees to join in a collective response to threats to international peace and security.[27] But it does involve the weaker idea of collective security: the idea of a system that commits states to develop and enforce generally accepted rules, norms and principles in the area of international peace and security and to do so through action that has been authorised by international institutions.

The collective element of security management expanded significantly in the 1990s and it is the very notion of possible progress that has done much to underpin the current belief that self-help and the unilateral use of force are illegitimate and can, at least in principle, be superseded by something better. Equally, for all the failures associated with the UN, its defenders argue powerfully, and correctly, that interest and institutional engagement can coincide even for the strong: partly because of the burden-sharing opportunities created by effective multilateralism; partly because multilateralism has the immensely difficult task of state- and nation-building; but most especially, because of the unique role of the UN as the source of collective legitimation for the use of force and the forum within which the norms surrounding the use of force are maintained, developed and interpreted.[28]

However, the structural obstacles to both collective security and more limited collective action remain severe and it is an illusion of the critics of the US unilateralism that there is an easy multilateral alternative waiting around the corner (especially given the degree to which the legitimacy of the top-down, prescriptive multilateralism of the 1990s was already coming under strain well before the first Bush administration came into office). The three core dilemmas are well known: (1) the dilemma of common interest: the prioritisation of national interests and the problems of free-riding and buck-passing; (2) the dilemma of preponderance: the dependence under any likely system of collective security on the resources of a small group of major powers (and, in the military realm, increasingly on a single power);[29] and (3) the dilemma of constraint versus expansion: the extent to which collective security does have an expansionary logic, not as Schmitt argued in terms of necessarily eroding the laws of war, but in terms of growing demand that individuals be punished and societies remade and democratised. The changing character of

---

[27] It is noteworthy that the UN High Level Panel spoke explicitly of the need for a collective security system, despite all of the problems associated with the concept and despite failing to address those problems. See especially Part IID: Elements of a Credible Collective Security System, in *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High Level Panel on Threats, Challenges and Change (New York: United Nations, December 2004).

[28] The classic statement is Inis Claude, 'Collective Legitimation as a Political Function of the United Nations', *International Organization*, 20:3 (1966), pp. 367–79; see, more recently, Mats Berdal, 'The UN Security Council: Ineffective but Indispensable', *Survival*, 45:2 (2003), pp. 7–30.

[29] The United States and the United Kingdom sought legal justification for the use of force against Iraq in March 2003 on the basis that previous UNSC resolutions provided 'continuing authority'. Whilst there are very good legal reasons to counter such a claim, the political point remains valid. If international society is capable only of such actions in the field of international security built around the authorisation of individual states or groups of states to act on its behalf, what sense does it make to deny those states the autonomy to carry through the agreed goals? See Adam Roberts, 'Legal Controversies in the War on Terror', keynote address, US Pacific Command, International Military Operations and Law Conference, Singapore 21–24 March 2005, pp. 4–5.

security challenges, particularly in terms of their non-state, intrastate and transnational character, therefore raise politically difficult questions of selectivity, of moral contestability, and of unavoidably deep intrusion into the organisation of domestic society. And, however important the role of the UN, there are today, as there were during the Cold War, many aspects of international security in which its role will remain marginal and where the management of security will continue to depend on the harsher power-political mechanisms of the traditional pluralist international society.

Can the circle be squared?

It is common to distinguish between a normative meaning of legitimacy (a political order is legitimate to the extent that it meets certain criteria) and a descriptive meaning (the willingness of individuals to accept and follow the rules of a particular order). In truth, this distinction is problematic. As Steffek notes: 'For both Weber and Habermas, legitimacy is the conceptual place where facts and norms merge, where the de facto validity (*Geltung*) of a social order springs from a shared conviction about the normative validity of values (*Gültigkeit*)'.[30] Moreover, legitimacy is a political concept and like all political concepts it is quite literally meaningless outside of a particular historical context and outside of a particular set of linguistic conventions and justificatory structures. To paraphrase Ronald Dworkin, legitimacy has no DNA.[31]

Nevertheless, one approach to squaring the circle is to come at the problem from the normative side. There are, for example, powerful legal and moral arguments for seeking to reinstate the centrality of procedural legitimacy and for rejecting the view that international legitimacy should be based around the effective implementation of a set of allegedly shared substantive moral values. Although the positivist attempt to separate law and morality has always faced many powerful objections, the core intuition is a powerful one: that, in an international society characterised by deep and fundamental value conflict and by the constant difficulty of managing unequal power, a viable and stable international legal order must be built around shared processes and procedures, accepted understandings of legal sources, and a commitment to diplomatic negotiation and dialogue. The alternative is both normatively unacceptable and politically unviable, namely to open the door to a situation in which it is the strength of a single state or group of states that decides what shall count as law. Equally, a global moral community in which claims about justice can secure both authority and be genuinely accessible to a broad swathe of humanity will be one that is built around some minimal notion of just process, that prioritises institutions that embed procedural fairness, and that cultivates the shared political culture and the habits of argumentation and deliberation on which such institutions necessarily depend. Even if there is consensus on the content of moral rules, politics and, in particular, institutional politics cannot be avoided. As Dallmayr argues:

---

[30] Steffek, 'Legitimation of International Governance', p. 263.
[31] Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy', *Oxford Journal of Legal Studies*, 24:1 (2004), pp. 1–37.

The notion of *praxis*, however, brings to the fore a domain usually shunned or sidelined by universalist morality: the domain of politics. . . . Even assuming widespread acceptance of universal norms, we know at least since Aristotle that rules do not translate directly into *praxis* but require careful interpretation and application. At this point eminently political questions arise: who has the right of interpretation? And, in the case of conflict: who is entitled to rule between different interpretations? This right or competence cannot simply be left to 'universal' theorists or intellectuals – in the absence of an explicitly *political* delegation or empowerment. These considerations indicate that it is insufficient – on moral and practical grounds – to throw a mantle of universal rules over humankind without paying simultaneous attention to public debate and the role of political will formation.[32]

However, if legitimacy is principally about the beliefs and related behaviour of political actors, then it is not clear what status such abstract arguments should have. At a second level, therefore, we might consider proposals within the political world designed to mitigate the legitimacy challenges posed by the use of force. It has, for example, become common to argue that international society requires new rules. Terrorism requires that international society rethink rules relating to self-defence and new understandings of the legal and legitimate definition of prevention and pre-emption. The degree to which international society is affected morally and practically by humanitarian catastrophe means that we need new rules on humanitarian intervention. Clearer rules may serve a useful purpose. But it is a myth that, for example, a new rule on humanitarian intervention would obviate the need for institutions and for institutional debate. Even if the rule is agreed and even if the background criteria for evaluation are agreed, all rules have to be interpreted and applied to the circumstances of a particular case. It is therefore impossible to avoid the fundamental political issue: what is the body that has the authority to interpret and to apply the rule?

In related vein, the Report of the UN High Level Panel on Threats, Challenges and Change, issued in December 2004, identified five 'basic criteria for legitimacy' that the Security Council should consider before authorising the use of force: seriousness of the threat, proper purpose, last resort, proportionate means, and the balance of consequences. In this case the proposed criteria are related to the body authorised to interpret and apply them. The problem, however, concerns the structural obstacles that work against effective collective action noted above. The Security Council already has considerable freedom to interpret the mean of 'threats to international peace and security' and there is nothing that stands in the way of authorising more expansive notions of preventive or pre-emptive self-defence. The Panel therefore evaded the crucial issue: what status are these 'criteria for legitimacy' supposed to have in precisely those difficult cases when the Council is unable to act?[33]

If we move beyond such proposals, understanding how the circle might be squared will involve assessing the underlying political dynamics that explain why legitimacy in relation to the use of force has become so problematic. There are clearly good reasons why so much of the debate since 2001 has focused around the problems engendered by the ideology, strategies and actions of the Bush administration: the centrality of military force in US foreign policy; the enunciation of a doctrine

---

[32] Fred Dallmayr, 'Cosmopolitanism, Moral and Political', *Political Theory*, 31:3 (June 2003), p. 434.
[33] *A More Secure World*, paras. 204–9. See also Roberts, 'Legal Controversies in the War on Terror', pp. 9–10.

involving both expanded pre-emption and prevention that clearly represents a far-reaching change in established legal understandings of the justifiable use of force; the determination to take emerging notions of qualified or conditional sovereignty but to give them a much harder edge, for example, by arguing that certain sorts of states have lost the sovereign right to possess certain sorts of weapons, or that conditional or qualified sovereignty legitimises intervention to change a political regime; and the decision to move away from a predominantly multilateral approach to non-proliferation in which legitimacy depended on mutual obligation and a careful balance of rights and obligations, and to replace it by a doctrine of counter-proliferation in which the unilateral use of force is to play a central role.[34]

Clearly any hegemonic state is likely to lean on the international legal order to secure its purposes and to escape from its constraints whenever it can do so at acceptable cost. This structural problem has been enormously aggravated by the character of the policies adopted by this particular hegemon: an emphasis on its own unalienable right to security even at the cost of the insecurity of others; an emphasis on upholding a traditional rigid conception of its own sovereignty whilst at the same time arguing that the sovereignty of others should be conditional; a strident moralism which has brought back the language of the holy war (or rather reciprocated the arguments of its enemies who want nothing more than conflicts to be interpreted in these terms); and a profoundly revisionist attitude to the structure of international society.

But the politics of legitimacy have not been static. The US has found itself in exactly the dilemma identified many years ago by Raymond Aron. 'Either a great power will not tolerate equals, and then must proceed to the last degree of empire, or else it consents to stand first among sovereign units, and must win acceptance for such pre-eminence.'[35] Thus the early reliance on the potential of shock and awe and on a power-based view of the stability of unipolarity has given way to a greater recognition of the importance of legitimacy. Thus even neoconservative commentators have come to lay far greater emphasis on the need for engaging in the politics of legitimacy: principally in terms of shared values (democracy and freedom); and effectiveness (for example the argument that only US power can tackle common challenges such as terrorism and WMD and its broader position as the 'indispensable nation').[36]

However, even if the US were to move further down the road of cultivating legitimacy, there is no reason why this should necessarily involve a wholehearted embrace of international law and institutions. Two obvious policy alternatives exist, both of which have a long history in both international practice and in US diplomacy. The first is to re-engage with institutions but at the same time to reshape those institutions in ways that more closely reflect current US interests. In John Ikenberry's terms this would involve not a return to the constitutionalist order that the US did so much to shape in the post-1945 period, but rather a recasting of that

---

[34] For an excellent analysis of the impact of this change on international legitimacy, see William Walker, *Weapons of Mass Destruction and International Order*, Adelphi Paper 370 (London: IISS, 2004).

[35] Raymond Aron, *Peace and War: A Theory of International Relations* (London: Weidenfeld and Nicolson, 1966), p. 70.

[36] For a neoconservative view of legitimacy in this context, see Robert Kagan, 'America's Crisis of Legitimacy', *Foreign Affairs*, 83:2 (2004), pp. 65–88.

order with a much harder hegemonic edge.[37] The second would be to return to an older notion of a legitimate order – not based on universal institutions, but on power and hierarchy and involving the themes of decentralisation and devolution and the cultivation of closer relations with second-tier and regional powers.

It is important, then, to think through some of the alternative ways in which a legitimate order might be re-established within which the specific challenges posed by the use of force would be mitigated. The other still more pressing need is to see legitimacy other than from the perspective of the dominant state. In much academic analysis, legitimacy is often reduced to a strategy for the powerful and is seen as a tool or an instrument of US policy. Whether an order is legitimate depends on the beliefs, understandings and calculations of other states and on how far acceptance is the result of internalised belief rather than temporary acquiescence or purchased silence. How far this is the case is something that can only be determined by empirical research.

However, the thrust of this article has been to argue that the problems of legitimacy in relation to the use of force are deeper than those emanating from the character of a particular US administration. In terms of procedural legitimacy, the spread of democratic ideas and the political mobilisation of previously subordinated states, societies and groups make it difficult to believe that narrow, top-down, or exclusive notions of procedural legitimacy are likely to prove viable. There is no obvious sign of agreement on what alternative models of procedural legitimacy should look like – witness the impasse on Security Council reform. But political contestation on this issue is unlikely to disappear. In terms of substantive values, the changing character of global governance, not least in the area of international peace and security, necessitate international norms, rules and institutional practices that go beyond a thin pluralist conception characterised by notions of 'live and let live' and that affect very deeply how societies are to be organised domestically. In terms of effectiveness, however much the United Nations remains an important body, the limits of effective multilateralism mean that questions of effectiveness will continue to shape debates on legitimacy – both as to how institutions can be made more effective and what should happen if they fail to become so. And finally, despite the emergence of ever more sophisticated means of communication, finding a stable language for the negotiation of legitimacy across the proliferation of new audiences remains perhaps the most serious challenge. The problematic character of legitimacy in relation to the use of force does not therefore depend on a belief in the eternal logic of politics and insecurity as preached by classical realists, nor on the structural determinism of the neo-realists. Rather it results from the very difficult combination of recurring political dilemmas and powerful processes of historical change that are unlikely to be quickly, or easily, reversed.

---

[37] G. John Ikenberry, *After Victory: Institutions, Strategic Restraint and the Rebuilding of Order after Major War* (Princeton, NJ: Princeton University Press, 2001).