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Legitimacy as an Assessment of Existing Legal Standards: The Case of the 2003 Iraq War

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24

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Introduction: Legitimacy and legality

Power, legality and legitimacy are all crucial to a rule-based international order. Politics is the mechanism that maintains an appropriate tension and balance between these elements.[1] International institutions provide the structure for pursuing politics and provide the means to transmit the outcomes and decisions. The 2003 war in Iraq caused widespread concern about the future ability of the international order to regulate the use of force because the war appeared to push legality aside with a decision both to exercise power and to bypass the most widely recognized source of authority for such action, the UN Security Council. But why did the war in Iraq cause such concern when neither the exertion of power nor the sidestepping of the UN Security Council is new? The answer can probably be found in today's international power structure.

With the end of the Cold War, the United States became the world's only superpower. This role created both new responsibilities as well as new opportunities. But the US failure to send a clear multilateralist signal to the world created concern that nothing would or could restrain this superpower. This concern was fuelled by the US rejection of major international agreements such as the Mine Ban Treaty, the Kyoto Protocol to the Climate Change Convention, and the Statute of the International Criminal Court. Yet, despite the harsh rhetoric, there is little to indicate that, in fact, the United States wishes to operate without restraint, even the restraint of the existing UN collective security frame-

work. But has the United States embarked on a course of no return with regard to the UN security system following the 2003 Iraq war? Not so far, and one way to measure how far the United States has strayed from the existing system may be to assess the legitimacy of its actions.

On the eve of the US-led war in Iraq, Anne-Marie Slaughter published a controversial opinion piece in the *New York Times* in which she noted: ''By giving up on the Security Council, 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.'' She concluded the piece on a tentative note: ''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 which is legitimate is also legal.''[2] Legitimacy in the case of Iraq depended heavily on what was found.

One year later, she wrote:

> A year ago, when the U.S. and Britain decided to send troops to Iraq without a second UN resolution, I argued that their action was illegal under international law but *potentially* legitimate in the eyes of the international community. I set forth three criteria for determining the ultimate legitimacy of the action: 1) whether the coalition forces did in fact find weapons of mass destruction; 2) whether coalition forces were welcomed by the Iraqi people; and 3) whether the U.S. and Britain turned back to the UN as quickly as possible after the fighting was done. A year later, I conclude that the invasion was both illegal and illegitimate. The coalition's decision to use force without a second Security Council resolution cannot stand as a precedent for future action, but rather as a mistake that should lead us back to genuine multilateralism.[3]

Although UN Security Council Resolution 1511 (2003) authorizing UN involvement in post-conflict reconstruction and nation-building in Iraq brought the United Nations back into the picture, Slaughter's conclusion was that, because of the failure to meet what she outlined as the tests of legitimacy, the action taken in Iraq cannot be regarded as a precedent for future such actions. But had the tests been met, what would legitimacy have provided? It would have provided grounds for *post hoc* UN approval and it might have served as a precedent for future action. Slaughter's initial assertion that the war might be legitimate was controversial enough, but what seemed particularly difficult for many to accept was her view that ''overall, everyone involved is still playing by the rules''. Perhaps the sentence should have read that, ''overall, everyone involved is still trying to play by the rules'', but that ''the rules may have to evolve, so that which is legitimate is also legal''. This conclusion accepts that a gap between legitimacy and legality cannot exist indefinitely and that, if

a case can be made for the legitimacy of an otherwise illegal action, this may indicate that the rule needs to be changed. Considerations of legitimacy therefore are crucial to the functioning of the law even when legality and legitimacy diverge.

Nevertheless, the war in Iraq triggered much concern that basing an action on legitimacy, even though it was illegal, would lead to self-serving unilateral judgements whenever multilateral authorization was not available. Yet, can a nation realistically be expected to wait for a collective decision if it feels under threat? Slaughter addressed this problem in her March 2003 *New York Times* article: ''The United Nations imposes constraints on both the global decision-making process and the outcomes of the process, constraints that all countries recognize to be in their long-term interest and the interest of the world. But it cannot be a straitjacket, preventing nations from defending themselves or pursuing what they perceive to be their vital national security interests.''[4] The larger question is whether alternatives existed that might have been more acceptable to the collective body. The failure to explore such alternatives fully (in the opinion of most voices outside the United States) is perhaps the key problem in arguing the legitimacy of the war. A further problem is the ripple effect that the US action might have on the entire UN security system by tempting others to follow the US example and act without specific UN authorization.

UN Secretary-General Kofi Annan addressed this concern in his charge to the High-level Panel on Threats, Challenges and Change in 2003:

> The past year has shaken the foundations of collective security and undermined confidence in the possibility of collective responses to our common problems and challenges. It has also brought to the fore deep divergences of opinion on the range and nature of the challenges we face, and are likely to face in the future.

Specifically, he asked the Panel to:

> (a) Examine today's global threats and provide an analysis of future challenges to international peace and security. Whilst there may continue to exist a diversity of perception on the relative importance of the various threats facing particular Member States on an individual basis, it is important to find an appropriate balance at a global level. It is also important to understand the connections between different threats.[5]

Whether we individually conclude that the 2003 war in Iraq was legal or illegal, the question is whether the UN Security Council system can respond effectively and retain its ''unique standard of international legal legitimacy''.[6]

The central role of the United Nations Security Council

In 2000, the Panel on United Nations Peace Operations appointed by the UN Secretary-General concluded that "the United Nations does not wage war. Where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council, acting under Chapter VII of the Charter."[7] This is how the United Nations was envisaged to work. "Instead of being a substitute for great powers, [the United Nations] was designed to depend on them."[8] The great powers were to provide the means for the United Nations to carry out its decisions. But this created a reliance on strong military powers and an expectation that these powers would act within the confines of the UN community's interpretation of the scope of an authorization. The effort to institute international control or oversight over the use of national military assets is one of the less developed parts of the UN security system. At the same time, relying on one or two large military powers has caused much of the UN membership concern. The views of UN scholar Ramesh Thakur well express this point of view:

> there has been a perceptible undercurrent of unease since the end of the Cold War that the will of the UNSC has been bent too easily and too often to the wishes of the sole superpower. . . . Developing countries fear that in some sections of the west today, the view has gained ground that anyone *but* the legitimate authorities can use force. If this is then used as an alibi to launch UN-authorized humanitarian interventions against the wishes of the legitimate governments of member states, the international organization would quickly be viewed more as a threat to the security of many countries than as a source of protection against major-power predators.[9]

In the post-1945 world, the UN Security Council plays a central role in determining both the legality and the legitimacy of uses of force. This was recognized by US President George W. Bush in his address to the UN General Assembly on 12 September 2002.

> The conduct of the Iraqi regime is a threat to the authority of the United Nations, and a threat to peace. Iraq has answered a decade of U.N. demands with a decade of defiance. All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?[10]

Although the questions are pertinent, the course ultimately chosen by President Bush to force Iraq's compliance is one that has increasingly been regarded as premature and beyond the scope of the authorization

of any UN Security Council mandate. This difference in view is at the heart of the disagreement about the legality of the 2003 war in Iraq. The United States acted alone when it became clear that no UN Security Council resolution authorizing additional action would be forthcoming, following France's declaration that it would veto any such resolution. US authorities, however, argued that there was adequate authority in existing UN Security Council Resolutions 678, 687 and 1441.

The United States' close ally, the United Kingdom, concurred, as expressed by the UK Attorney General, Lord Goldsmith, who provided the following legal basis for the use of force against Iraq:

> Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security.[11]

The British government's interpretation was that ''Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.''[12]

Australia's Attorney General and the Department of Foreign Affairs and Trade also agreed that ''deployment of Australian forces to Iraq and subsequent action by those forces would be consistent with international law''. The opinion was based on the authority of existing UN Security Council resolutions ''directed towards disarming Iraq of weapons of mass destruction and restoring international peace and security to the area. This existing authority for the use of force would only be negated in current circumstances if the Security Council were to pass a resolution that required Member States to refrain from the use of force against Iraq.''[13]

Iraq in 2002 raised the question of how to deal with threats that have the potential for widespread deadly effects but that have not yet materialized. This led to the debate over whether undertaking ''regime change'' in Iraq without specific international authorization to do so could be legal. In November 2002, the Legal Adviser of the US Department of State, William H. Taft IV, outlined the changing character of self-defence and the possible need to rethink the rules governing self-defence. He noted that the question of when self-defence could be exercised was not new and he cited President John F. Kennedy's observation during the Cuban Missile Crisis in 1962: ''We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to

constitute maximum peril.''[14] But what constitutes ''a sufficient challenge'', and who can be the judge of this in the absence of a determination by the UN Security Council? Who is responsible and accountable for determining the appropriateness of action taken? This is the crux of the problem related to the legality of the war in Iraq. And, in a world threatened by terrorists and in which the proliferation of weapons of mass destruction is virtually inevitable, the question will not go away.

The answers to the question of who can decide to act in the specific case of Iraq vary. The differences turn on the amount of reliance placed on UN Security Council Resolutions 678 (1991) and 1441 (2002), which were to regulate Iraq's disarmament programme. William Howard Taft IV argued that these resolutions provided sufficient authority: ''Resolution 1441 ... gave Iraq a final opportunity to comply, but stated specifically that violations of the obligations ... would constitute a further material breach.... Iraq has clearly committed such violations, and accordingly, the authority to use force to address Iraq's material breaches is clear.''[15]

At the same time, Anne-Marie Slaughter noted that ''a large majority of specialists in international law believe explicit Security Council authorization is required to confer legality on such a military campaign''.[16] A letter to the *Guardian* signed by 16 professors of international law expressed the problem: ''Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed assent. It has not yet done so.''[17] Among official views that the war in Iraq was illegal, the view of the Russian Federation is a good example: ''As the legal basis for the military action against Iraq references are made to Security Council Resolutions 678 (1990), 687 (1991), 1441 (2002). In our view the above-mentioned resolutions considered in their entirety and in combination with other resolutions on Iraq, official statements of States on their interpretation and provisions of the UN Charter which were the basis for their adoption, show that the Security Council did not authorize Member States in this case to use force against Iraq.''[18]

Among those who did not share the majority academic view was Christopher Greenwood, who wrote that ''limited and proportionate action may be taken in self-defense if and when an armed attack is reasonably believed to be imminent''.[19] Ruth Wedgwood also dissented from the academic majority, basing her reasoning on existing UN resolutions on Iraq:

> The founding legal framework for action against Iraq remains intact and available to those who are willing to use it. Resolution 687 is the mother of all resolutions, setting out the requirements for post-Gulf-war Iraq. This 1991 resolution requires, in perpetuity, that Iraq give up its weapons of mass destruction and permit

verification … Resolution 687 designates Iraq's acceptance of this requirement as a continuing condition of the Gulf war ceasefire. Teeth are also supplied by resolution 678, authorizing the allies to expel Iraq from Kuwait and to use force in support of all ''subsequent relevant resolutions'' needed to restore regional peace and security.[20]

The key point of contention is whether these resolutions authorized the use of force in the case of an Iraqi failure to comply with their provisions. Those opposing the war argued, first, that the resolutions did not authorize the use of force, and then that the renewed programme of arms inspections had begun to meet the objective of disarming Iraq. The US and UK position was that, short of immediate and complete compliance with the disarmament provisions of Resolution 687, regime change was needed in order to ensure stability and peace in the region and, indeed, in the world. In remarks to the UN General Assembly on 12 September 2002, President George W. Bush said:

With every step the Iraq regime takes toward gaining and deploying the most terrible weapons, our own options to confront that regime will narrow. And if an emboldened regime were to supply these weapons to terrorist allies, then the attacks of September the 11th would be a prelude to far greater horrors.[21]

Although relying on UN Security Council Resolutions 678, 687 and 1441 as the bases for action, President Bush also based his action on the ''sovereign authority [of the United States] to use force in assuring its own national security''.[22] This latter point, coupled with the present power of the US military, has caused worldwide concern about whether the United States intends to break away from the UN security system that it helped to create after World War II in order to address other ''deviant states'' that it might regard as a threat to its own or the world's security. Joseph Nye wrote that the reason for thinking about preventive war is ''the fear … that certain deviant states, such as Iraq and North Korea, might become enablers of … terrorist groups'' seeking now to privatize war.[23] But where does all this lead us in the long term? Does it lead to more wars of the type we saw waged in Iraq? Does this spell the end of the UN system seeking to restrain the use of force, which has been in place since 1945?

The consensus remains strong in the United States – despite foreign scepticism – that it needs multilateral frameworks. It needs them to address the broad range of issues and areas that it knows have transnational implications. And it needs them perhaps even more urgently in areas where the international standard is not yet clear. One of the harshest critics of US policy, former French Foreign Minister Dominique de Villepin, put it well when he noted:

> Legitimacy ... is the key to the effectiveness of international action. If we want to develop the right answers to the challenges of the modern world and to take appropriate measures – including the use of force – we must do so with the authority of collective decisions.[24]

The present urgent international task is therefore to maintain a multilateral structure within which states can disagree. As with any political contest, winners and losers in a situation must maintain sufficient common purpose and interest to make it possible to work together in the future. Power disparities may present a special problem when the disagreement is with the most powerful member or members of the system. Nevertheless, the United Nations' history during the Cold War demonstrates that this can be done. Sidestepping certain disputes comes at the price of removing some conflicts from the United Nations' field of responsibility. But, as the end of the Cold War showed, having the institution available and capable when political conditions are right for it to play a more active role is also important and should not be overlooked – not by the United States and not by critics of the United States. Although there is a serious disagreement among the most important UN members, all have a stake in maintaining a security role for the United Nations and should be careful not to destroy it.

The war in Iraq and its aftermath pose a serious challenge to the UN system, but the system thus far still remains. Whether that system will be effective in addressing the security concerns of the future will depend on whether UN members are willing to work with each other to make it so.

Establishing legitimacy

In 2001, the International Commission on Intervention and State Sovereignty initiated by the Canadian government noted that, although linked, legality and legitimacy were not synonymous and that legitimacy takes on increased significance when the law is unsettled.[25] But what happens if the chief source of legitimacy happens to be the same body that confers international legality on an action but finds that it can provide neither legality nor legitimacy? This was the case with the 2003 Iraq war, since the UN Security Council declined explicitly to authorize the war in Iraq, making the war illegal in the eyes of many. And are we on the verge of facing more such cases where the United Nations is unwilling to authorize action but some state or group of states nevertheless feels compelled to act? The 2003 Iraq war was not the first time this question arose.

Under very different conditions, but addressing the United Nations'

failure to act in Rwanda in the wake of the 1999 Operation Allied Force in Kosovo, UN Secretary-General Kofi Annan asked:

> To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might say: leave Kosovo aside for a moment, and think about Rwanda. Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defence of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?
>
> To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one might equally ask: Is there not a danger of such interventions undermining the imperfect, yet resilient security system created after the second world war, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?[26]

The dilemma the Secretary-General posed about the adequacy of the UN security system to respond to security concerns unforeseen by the Charter's founders is a crucial one and existed before the questions raised by the 2003 Iraq war. A rigid requirement of Security Council authorization for military forces to be used legally could preclude, and has precluded, their use when morality and international law would otherwise seem to require it, as in humanitarian emergencies. On the other hand, authorization of the use of military force on an ad hoc basis by bodies or groups of states other than the Security Council or action taken by a single state put at risk the decision-making structure of the present international security system. Since NATO's actions in 1999, for example, new claims to be a legitimate source of authorization have already been made, notably in 2000 by the Economic Community of West African States (ECOWAS), which adopted a protocol explicitly stating that the ECOWAS Council could authorize the use of military force even without a Security Council mandate.[27]

Concern over possible unregulated intervention based on the judgement of a small but powerful number of states caused the International Commission on Intervention and State Sovereignty to insist on objective evidence of a conscience-shocking situation and the conception of a ''responsibility to protect'' rather than a ''right to intervene''. The Commission's work was guided by ''a clear indication that the tools, devices and thinking of international relations need now to be comprehensively reassessed, in order to meet the foreseeable needs of the 21st century''.[28] The Commission's report continued that any new approach needed to meet at least four basic objectives:

- to establish clearer rules, procedures and criteria for determining whether, when and how to intervene;
- to establish the legitimacy of military intervention when necessary and after all other approaches have failed;
- to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result; and
- to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.[29]

The Commission further noted that: ''In the face of legal ambiguity, lists of possible thresholds and criteria assume increasing importance. The establishment of a set of criteria has been offered as one way to mitigate the potential for abuse. While not legally binding, they could nevertheless provide a benchmark against which the legitimacy of an intervention could be measured.''[30]

These criteria produce useful general standards by which to judge any claim to legitimate action. They seek to maintain order through rules, procedures and criteria even when such existing standards somehow proved inadequate. They accept the concept of necessity, although only when all alternatives have been exhausted.[31] They apply the just war standard of acting only where there is a likelihood of success in meeting the objectives stated. And, finally, they maintain a focus on supporting durable solutions and institutional structures over pursuing specific national objectives and interests. These criteria well state the tests that can be applied to actions taken outside of the generally accepted frameworks for authorizing action and may provide the conditions necessary to consider legitimate an action that otherwise fails to meet existing legal standards. Given these conditions, it would appear that legitimacy can often be determined only after the action has taken place if the conditions that triggered action are not observable prior to acting. This is, of course, where persuasive and credible intelligence becomes important.

Yet, even though no weapons of mass destruction were found in Iraq, the threat of such weapons finding their way into terrorist networks remains. Are there any standards of legitimacy that might aid in addressing such threats if existing rules and institutions appear unable to respond? One such effort was advanced by Lee Feinstein and Anne-Marie Slaughter in the idea of a ''duty to prevent''. This would apply under the following conditions:

> First, [the duty to prevent] seeks to control not only the proliferation of WMD but also the people who possess them. Second, it emphasizes prevention, calling on the international community to act early in order to be effective and develop a

menu of potential measures aimed at particular governments – especially measures that can be taken well short of any use of force. Third, the duty to prevent should be exercised collectively, through a global or regional organization.[32]

Again, if we put the above criteria to the test, we find that they emphasize alternatives to the use of force and address the problem of proliferation in ways that try to bring the action back into a multilateral setting. Should the international community fail to act through the United Nations or some other widely recognized body, capable states, alone or with allies, may be compelled to act to prevent harm from coming to their citizens and others for whom they are responsible. As suggested by the responsibility to protect, the duty to prevent also begins from the premise that individual states are responsible for the security and well-being of their populations. However, in the case of the responsibility to protect, states from the outside may have to act against a state that is abusing its population, whereas, in the duty to prevent, a state may have to act to protect its population from a potential outside threat.

The duty to prevent is also a reaction to possible threats posed by closed societies developing weapons of mass destruction and lacking any internal political checks on the actions of a despotic regime. The duty to prevent seeks to legitimate early action to prevent mass murder through the use of WMD. It attempts to establish criteria in order to determine the existence of a threat so that the difficulty of mounting evidence to support a response prior to an attack is overcome. If a threat is imminent, international law allows pre-emptive action. However, in a world of weapons of mass destruction and technology, the time available for response once a threat materializes may be very short, rendering the classic approach to pre-emptive action insufficient. As described in the *National Security Strategy of the United States of America* in September 2002: ''We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.''[33]

At the same time, as we have seen from the current war in Iraq, if war is waged on such a pre-emptive basis, then evidence to justify such a war is essential to maintain support for such war efforts on three levels: by citizens in states that wage the war, by the population in the affected state, and by the international community. Whatever the merits of removing Saddam Hussein from power, when the United States waged war in March 2003 on the basis of Iraq's possession of weapons of mass destruction, prior to the completion of the UN weapons inspectors' mis-

sion and without further authorization of the UN Security Council, it imposed a burden to find weapons of mass destruction or evidence of their production. The failure to do so has eroded support of the effort in the United States, overseas and within Iraq and has damaged the credibility of both the Iraqi operation specifically and the general effort to address the threat described above by the *National Security Strategy*.

Legitimacy cannot substitute for legality over the long run. Therefore, if change to the existing system is necessary owing to new conditions and circumstances, relevant international and domestic institutions need to reflect seriously on how to address these new circumstances. Failure to do so will result in the kind of unilateral state response that over time will dissipate the advances made in multilateral international cooperation since 1945. As UN Secretary-General Kofi Annan noted: ''Whilst there may continue to exist a diversity of perception on the relative importance of the various threats facing particular Member States on an individual basis, it is important to find an appropriate balance at a global level.''[34] Implicit in his view is that a balance needs to be found within the UN system itself.

As the International Commission on Intervention and State Sovereignty focused on the responsibility of states and the international community to protect against gross violations of human rights, so is it the responsibility of states and the international community to protect against the potential of mass murder through the use of weapons of mass destruction. The political tensions created among members of the UN Security Council by the war in Iraq demonstrate the complexity of the current security environment. However, both the legitimate and the legal use of force require multilateral cooperation. Yet, militarily capable states can be expected to seek such cooperation only if cooperation will provide effective responses to threats as they emerge.

Conclusion

In an article titled ''Unilateral Action and the Transformations of the World Constitutive Process,'' Michael Reisman wrote:

> Actions inconsistent with the procedures prescribed for them may erode the authority of the law and increase the probability of abuse. Hence the law's ceaseless quest for organization and institutionalization and its discomfort with and inherent resistance to legally unauthorized actions, no matter how urgent the circumstances or morally imperative the impulse.[35]

Reisman continued by reflecting on the correlation between ''the ineffectiveness of a political system and the resort to and toleration of unilateral action: the less effective the system, the more the impulse for and use of unilateral action and vice versa''.[36] These two observations capture well the dilemma faced by the present UN security system.

There is great pressure to avoid changing the existing system lest any effort to improve it result in the destruction of even the modicum of organization and institutionalization that the UN Charter system now provides. At the same time, because the political system does not wholeheartedly embrace this legal framework, the potential for acting outside the framework increases. This explains why any action that challenges the basic tenets of the present system is regarded with such hostility. It triggers a deep worry that each move away from accepted procedure and standards of conduct may prove to be a step towards no organization or order at all. Understanding this, however, leaves open the question of how change can be made in the fragile and fragmented political environment that is the UN community of states.

Arguments of legality should not cloud assessments of the adequacy of multilateral institutions to meet ongoing and emerging needs. Though the tests for legitimacy in Iraq may have proven empty, the questions of security posed throughout the debate about going to war in Iraq may still require attention. These issues included that of closed societies subject to no internal controls developing and brandishing weapons of mass destruction. But if this is the concern, then the need should be clearly spelled out and subjected to legal review. In the case of the 2003 war in Iraq, there was a widespread view that change of the kind sought by the United States and its allies in Iraq was not warranted. For those who will assess these actions in the future, the question will be whether change was not needed or whether the case for change was poorly made.

US actions may have made any change more difficult, but these actions should not overshadow efforts to assess the capacity, effectiveness and accountability of the UN Security Council. This assessment goes beyond Security Council decision-making to its ability to carry out and oversee the decisions it makes. All of this, however, relies on the members of the UN Security Council, and particularly its permanent members, to provide the kind of political system that will decrease the likelihood of behaviour outside the generally accepted framework of conduct.

It would be wise to recognize that, over time, acting on the basis of legitimacy without legality will not contribute to orderly international relations, particularly where the bases for state action may not be easily verifiable. Legitimacy may provide a priori justification where legality is debatable, but it cannot be used on a routine basis and will normally rest

on a *post bellum* consensus on the causes of war, as Slaughter argued. For such justification to have any credibility, it must be applied carefully, resting on broadly accepted standards, on clearly articulated needs and on criteria based as much as possible on objective conditions. The action must further be subject to outside review, including assessing whether the stated goals of an operation have been achieved and whether the conduct of the operation was appropriate and acceptable. Providing a framework for ongoing interaction between the states that opted to act and those that did not is particularly important at a time of change when existing standards may be in flux.

Understanding the differences between legality and legitimacy may provide an immediate answer on whether or not permanent change is required where the existing framework appears inadequate. Whatever the answer, states must work to bring legitimacy and legality back together following any significant episode of acting outside the framework. However, this can happen only if institutions are willing and able to recognize new needs and to respond to them. As the debate over humanitarian intervention demonstrated, the credibility of the UN system rests not just on how effectively it can constrain its members but also, and perhaps more significantly, on how well it can enable states to take appropriate preventive and other measures to forestall threats to peace and security. Under the influence of globalization, the speed with which threats can materialize and the scope of the damage that can be done have increased. The ability of states to stave off such attacks will need to adapt at a comparable pace, and this may include the adaptation of the institutions they rely on to provide security both for prevention and for protection.

Notes

1. See Andreas Paulus, ''The War against Iraq and the Future of International Law: Hegemony or Pluralism?'', *Michigan Journal of International Law*, Vol. 25 (Spring 2004), pp. 732–733.
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3. Anne-Marie Slaughter, ''Reflecting on the War in Iraq One Year Later'', *ASIL Newsletter*, March/April 2004, p. 2.
4. Slaughter, ''Good Reasons for Going around the U.N.''.
5. ''Secretary-General Names High-Level Panel to Study Global Security Threats, and Recommend Necessary Changes'', UN Press Release SG/A/857, 11 April 2003.
6. ''Jim Carter Becomes ASIL's 41st President'', *ASIL Newsletter*, May/July 2004, p. 10.
7. *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305–S/2000/809, 21 August 2000, para. 53, p. 10.
8. Anne-Marie Slaughter, ''The Will That Makes It Work'', *Washington Post*, 2 March 2003, p. B3.

9. Ramesh Thakur and Dipankar Banerjee, ''India: Democratic, Poor, Internationalist'', in Charlotte Ku and Harold K. Jacobson, eds, *Democratic Accountability and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), p. 204.
10. George W. Bush, ''Remarks by the President in Address to United Nations General Assembly'', 12 September 2002, USUN Press Release 131 (02), ⟨http://www.un.int/usa/02_131.htm⟩.
11. Lord Goldsmith, ''Legal Basis for Use of Force against Iraq'', 17 March 2003, ⟨http://www.pmo.gov.uk/output/Page3287.asp⟩.
12. Ibid.
13. ''Memorandum of Advice on the Use of Force against Iraq, provided by the Attorney General's Department and the Department of Foreign Affairs and Trade, March 18, 2003'', available at ⟨http://www.pm.gov.au/iraq⟩ (accessed 5 November 2004).
14. As quoted in William H. Taft IV, ''The Legal Basis for Preemption'', Memorandum to Members of the ASIL-CFR Roundtable on Old Rules, New Threats, 18 November 2002, ⟨http://www.cfr.org/publication/5250/legal_basis_for_preemption.html⟩.
15. As quoted in Peter Slevin, ''U.S. Says War Has Legal Basis'', *Washington Post*, 21 March 2003, p. A14.
16. Ibid.
17. ''War Would Be Illegal'', *Guardian*, 7 March 2003.
18. Legal Department of the Ministry of Foreign Affairs of the Russian Federation, ''Legal Assessment of the Use of Force against Iraq'', reprinted in ''Current Developments: Public International Law'', *International and Comparative Law Quarterly*, Vol. 52 (October 2003), p. 1059.
19. As quoted in ''Why the Sword Is Mightier Than the Law'', *Telegraph*, 19 March 2003.
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