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Iraq: One Year Later

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IRAQ: ONE YEAR LATER

INTRODUCTORY REMARKS BY MARY ELLEN O'CONNELL*

Almost exactly one year ago, during her presidential speech at the 2003 Annual Meeting of the American Society of International Law, Anne-Marie Slaughter spoke of the use of force that began in Iraq shortly before that Annual Meeting. She concluded that the war was unlawful but nevertheless potentially legitimate. That conclusion provoked a great debate from the moment her speech ended. Our purpose today is to take up that debate.

Dean Slaughter will have a chance to return to her remarks today and assess for us whether she has concluded that the use of force in Iraq was legitimate and if not what could have made it so. She will also remark on the idea that some uses of force should be considered legitimate even if they violate international law.

She will be followed by Richard Falk, who helped conceive the notion that major uses of force, while unlawful, could still be considered legitimate. Professor Falk made this contribution in the independent Kosovo Commission's Report in 2000. He told Dean Slaughter last year before her presidential speech that the use of force in Iraq was both unlawful and illegitimate. He still defends assessing uses of force as sometimes legitimate even if unlawful but will clarify for us today why Iraq is not such a case and why he knew one year ago that it was not.

Next is Thomas Franck, who has serious concerns about the whole idea of introducing considerations of legitimacy in the face of illegality. In his most recent book on our subject, *Recourse to Force: State Action Against Threats and Armed Attack* (2002), he shifts focus from the substantive rules prohibiting force, which he wants to preserve, to the consequences of violating the rule. While we cannot adjust the rules during or after a violation, Professor Franck says we can adjust the consequences, depending on the circumstances of the wrong. For him, Kosovo was a case for mitigating consequences; Iraq is not. In his remarks today he focuses on the hubris that led the United States to war in Iraq, a war wholly lacking immediate necessity.

Mary Ellen O'Connell follows next. She will look at whether Professor Franck's mitigation doctrine is likely to accomplish for international law what he hopes: preservation of robust substantive rules but with greater flexibility than the system currently allows. Professor O'Connell argues that what international law needs now is less flexibility, not more. Both Secretary Powell and Secretary Rumsfeld have said that no Security Council resolution was needed for Kosovo and one was not needed for Iraq. Mr. Blair and Mr. Bush speak of humanitarian considerations for the Iraq invasion, drawing comparisons to Kosovo. The flexibility introduced into the law since Kosovo has rendered it far more difficult to convince leaders that international law is real law.

Following Professor O'Connell is James Crawford. Professor Crawford will consider how politicians are using international law and possibly this very debate over legitimacy and legality for their own purposes. He, too, takes up the concept of "unlawful but legitimate," and even more the concept of "unlawful but potentially legitimate," to expose how distant such ideas are from the international community's agreed law, and how potentially destructive to it they are.

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THE USE OF FORCE IN IRAQ: ILLEGAL AND ILLEGITIMATE

by Anne-Marie Slaughter[*]

A year ago, when the United States 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 United States and Britain turned back to the United Nations 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; rather, it was a mistake that should lead us back to genuine multilateralism.

None of the criteria I put forward has been fully met. Above all, no weapons of mass destruction have been found. The best President Bush could do in his State of the Union address was to claim that U.S. inspectors had found "dozens of weapons of mass destruction-related program activities." As dangerous as Saddam Hussein may have been to the world, he did not pose the kind of imminent threat necessary to justify preemptive action.

Second, the vast majority of Iraqis are indeed glad to be rid of Saddam Hussein, but an equal number appear to perceive the coalition presence more as an occupation than a liberation. Third, the U.S. administration is only really "going back to the UN" now, when it has been forced to recognize that it cannot broker a political settlement without UN assistance, and when it is likely looking for someone else to blame if Iraq descends into chaos in the months leading up to the presidential election.

Why distinguish between legality and legitimacy in the first place? After the NATO intervention in Kosovo, a distinguished international commission found that it was illegal but legitimate. It is sometimes necessary to break international law to change it; where the law does not permit what the international community approves, the commission argued, the law must be updated "to close the gap between legality and legitimacy."[1] It thus concluded that UN rules and international law generally needed to be updated to permit armed intervention for purposes of humanitarian protection under carefully specified conditions.

The lesson of the invasion of Iraq is quite different. The nations that insisted on more evidence that Iraq actually possessed weapons of mass destruction, more time for the inspectors to do their work, more time for a fully mobilized international community to exert diplomatic pressure, proved to be right. I believe that the Iraqi people are unquestionably better off without Saddam Hussein, and that the prospects for creating a stable and more democratic Iraqi government are still alive, although they are going to require coordinated international effort and assistance for many years. But the ends cannot justify the means with regard to war, any more than we can authorize police to detain and search ordinary citizens on a false warrant as long as they ultimately find some evidence of criminal activity. The United States offered the world a false warrant.

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[1] Independent International Commission on Kosovo, *The Kosovo Report* 10 (Oxford University Press 2000).

UN rules should be updated to make it easier, in Kofi Annan's words to the General Assembly this past September,[2] to consider "early authorization of coercive measures," which is UN-speak for collective preemption. The world faces very different threats than it did in 1945; international law must adapt. In particular, nations must be prepared to recognize the combined threat of a government that has access to weapons of mass destruction and no internal checks on its power, as evidenced by massive human rights abuses, complete control of the media, and an absence of any political opposition. The UN Security Council must be prepared to enforce its resolutions consistently and unanimously.

But the most important lesson of the invasion of Iraq is that the safeguards built into the requirement of the *multilateral* authorization of the use of force by UN members are both justified and necessary. If nations seeking to use force cannot mount strong enough evidence of a security threat to convince a majority of the Security Council and to avoid a veto (provided that the veto is not clearly motivated by countervailing political interests), the world should wait and try another way before sending in the troops.

THE IRAQ WAR AND THE FUTURE OF INTERNATIONAL LAW

by Richard Falk[*]

A year after the initiation of the Iraq War is not too soon to assess, if tentatively, the impact of this globally controversial war upon international law. My assessment is organized around five questions that deserve responses at this point:

1) Should the Iraq War be treated as *a defining moment* for international law?
2) Should refusal to endorse the Iraq War be regarded as *a triumphant moment* for the United Nations, especially the Security Council?
3) Can the Iraq War be interpreted as an *illegal but legitimate* war of choice?
4) Should the legal norm of nonintervention in the internal affairs of sovereign states be abandoned?
5) Does the Iraq War provide an occasion for incorporating *new norms* of international law governing the use of force?

My response to each of these questions is a resounding "No." The remainder of this brief presentation will give the essential reasoning behind the answer.

1) Should the Iraq War be treated as a defining moment for international law? No.

There is some temptation to contend that the Iraq War was a defining moment for international law and for the authority of the United Nations. It could be argued, of course, that the Iraq War vindicates nondefensive wars of choice, and that UN opposition has made, as President Bush warned in his speech to the General Assembly of September 12, 2002, the organization "irrelevant." Such a temptation is easily resisted.

Recourse to war against Iraq in March 2003 on the facts and allegations that existed at the time is regarded around the world as so flagrantly at odds with international law and the UN Charter as generally understood to have little or no weight as a *legal* precedent. It is better understood as a prominent instance of a violation of the core obligation of the UN Charter, as

[2] Kofi Annan, Address by Secretary-General Kofi Annan, UN Doc. SG/SM/8891, Sept. 23, 2003, *available at* <http://www.un.org/News/Press/docs/2003/sgsn8891.doc.htm>.

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embodied in Article 2(4); as such it qualifies as a potential Crime Against Peace in the Nuremberg sense. It provides an occasion to reaffirm the fundamentally sound idea embodied in international law that force can only legally be used under conditions of palpable *defensive necessity* (or possibly on the basis of an explicit mandate from the Security Council).

Note that defensive necessity is broader than "self-defense"; it does take realistic account of the post-9/11 world that could validate preemptive uses of force under exceptional conditions of demonstrated threat. The Afghanistan War might qualify under such legal reasoning as a valid claim of defensive necessity. Several of the staunchest supporters of the Iraq War as a matter of strategic and moral necessity, such as the British Prime Minister Tony Blair and the influential American neoconservative Richard Perle, have stated that respect for international law was not warranted to the extent that it would have precluded the Iraq War. In effect, the most articulate advocates of the Iraq War concede, implicitly or explicitly, either its "illegality" or that if "regime change" of this sort was precluded, then it was "bad law."

It is notable that the Bush administration made only the most minimal effort to provide a *legal* rationale for the Iraq War. Its public justifications were based on a confusing mixture of security and humanitarian rationales. As for the irrelevance of the UN, the difficulties of the occupation have increasingly led even the Bush administration to seek UN help in bringing stability to Iraq.

Shifting ground, I would argue that if the Iraq War had turned out to be successful as a political project, it might well have been a defining moment for American foreign policy and the character of world order. It could have become a precedent for American unilateralism within the context of recourse to war and for regime-changing interventions. If this pattern were established, it would have produced what might be called a *geopolitical norm*, that is, a use of power in a predictable pattern to achieve specified goals. The main feature of such a norm would be a repudiation of the authority of international law and the UN Charter by state practice that violates a consensus that joins the views of the majority of states and world public opinion.

At present, the U.S. government seems to be claiming the role of the legislative agency for creation of geopolitical norms, reinforced by ad hoc coalitions of the willing, in at least two areas impinging on the legal norms governing the use of force: (1) intervention in sovereign states to achieve regime change; and (2) selective coercive pressure to promote counter-proliferation goals beyond the mandate of the nonproliferation treaty regime. To the extent that these geopolitical norms are acted upon, it represents a fundamental shift from world order based on the principles of territorial sovereignty to world order based on hegemonic edict. Such a world is best denominated an *imperial* world order and would likely be challenged by statist and nonstatist forms of armed resistance.

2) *Should the refusal to endorse the Iraq War by the United Nations, especially the Security Council, be viewed as a triumphant moment? No.*

Many opponents of the Iraq War have praised the UN Security Council for remaining steadfast in the face of formidable U.S. pressure for a formal mandate for initiation of a regime-changing war against Iraq. I agree that the Security Council deserves some credit for this result, but I would argue that it did only about 25 percent of the job entrusted to it by the UN Charter. If the American-led claims against Iraq were evaluated from the perspective of international law or by reference to the war prevention goals of the Charter, the UN performance was still 75 percent or so deficient.

There are several dimensions of this deficiency:

1) The UN imposed on Iraq a punitive peace via SC Resolution 687 (April 3, 1991) comparable in the setting of the Gulf War to the discredited Versailles approach to Germany after World War I.

2) The UN lent its authority to more than twelve years of punitive sanctions against Iraq (1991–2001) despite evidence of indiscriminate, severe harm to the Iraqi civilian population.

3) The UN did not censure the United States or the United Kingdom for repeated threats and uses of force that intruded upon the sovereign rights of Iraq in this same period.

4) SC Res. 1441 (Nov. 8, 2002) adopted the main premises of the American geopolitical norms relating to counter-proliferation and regime change, seemingly suggesting that if Washington had been more patient the endorsement of recourse to war would likely have been forthcoming.

In the background of the UN role with respect to the Iraq War are some important issues, though they are admittedly hypothetical. Suppose that the Security Council had authorized the Iraq War. Would that make it "legal"? Is the UN legally entitled to endorse what would be otherwise considered to be a war of aggression without such an endorsement? Who is authorized to make such a determination if there is no judicial review of Security Council decisions, as seems to be the implication of the World Court judgment in *Lockerbie*? It seems reasonable that only the General Assembly has residual responsibility to assess whether the Security Council has acted beyond the constitutional limits imposed by the UN Charter, but it lacks the power of decision, and its judgment would be only an expression of opinion.

3) Can the Iraq War be interpreted as an illegal but legitimate war of choice? No.

In my view, the illegality of recourse to war against Iraq in 2003 was clear. It was also clear before and after the war that there was no reasonable basis for invoking the "illegal but legitimate" formula used by the Independent International Commission for Kosovo to deal with an exceptional circumstance of humanitarian emergency. With respect to Iraq, the worst humanitarian abuses were associated with the campaign against the Kurds in the late 1980s and against the Kurds and Shi'ia in southern Iraq immediately after the Gulf War in 1991. Perhaps a case for humanitarian intervention could have been credibly made in these earlier settings, but the Kosovo exception was based on the *imminence* of the danger associated with the feared ethnic cleansing of the Albanian population, made credible by Serb behavior in Bosnia just a few years earlier and by the rising tide of atrocities in Kosovo in the months preceding recourse to war, under the NATO umbrella but without a Security Council mandate.

Given the failure to find weapons of mass destruction of any variety in Iraq and considering the intense resistance to the occupation, there is also no way to maintain convincingly that a condition of either defensive necessity or humanitarian emergency existed in Iraq as of 2003. If there was such an emergency it was not attributable to the Baghdad regime, however dictatorial its record, but was a result of UN sanctions and numerous uses of force against Iraq.

4) Should the legal norm of nonintervention in internal affairs of sovereign states be abandoned? No.

The Iraq War, along with other experience with interventionary diplomacy, suggests that respect for the norm of nonintervention, accompanied by respect for territorial sovereignty, continues to represent a prudent guideline for statecraft. If the U.S. government had adhered to such a guideline over the course of the last several decades it would have avoided its two worst foreign policy disasters: The Vietnam War and the Iraq War. If it had refrained from regime-changing covert interventions in Iran (1953) and Guatemala (1954), it might have avoided the Iranian Revolution and the years of atrocity and brutality in Guatemala.

The Iraq War confirms the wisdom of avoiding interventionary diplomacy unless there is a genuine defensive necessity or humanitarian emergency, and even then caution is appropriate. As the Iraqi resistance confirms, interventionary wars are primarily political phenomena, not

military; they are decided by the play of nationalist, ethnic, and religious passions. It is best to await the dynamics of self-determination to achieve transformative changes in dictatorial states. The experience with Eastern Europe, the Soviet Union, and South Africa is both instructive and encouraging.

5) Does the Iraq War suggest the need for adapting international law to the new conditions of international conflict in the aftermath of 9/11? No.

From the argument so far, the simple conclusion is that the Iraq War is an occasion for reaffirming the continuing viability and validity of the legal prohibition against nondefensive uses of force that is contained in the Charter. At the same time, the grave threats posed by the sort of mega-terrorist attacks of 9/11 do justify stretching the right of self-defense to validate uses of force, as necessary, to remove threats associated with nonstate actors when the territorial government is unable or unwilling to address the situation decisively and with due urgency. The Afghanistan War, with qualifications, arguably fits within such an expanded conception of self-defense.

THE ROLE OF INTERNATIONAL LAW AND THE UN AFTER IRAQ

by Thomas M. Franck[*]

THE GREAT DELUSION

"Voila le soleil d'Austerlitz!" Napoleon boasted, recalling his triumph seven years earlier over the Austrians, as his officers formed outside the gates of Moscow in 1812. This bit of over-the-top braggadocio symbolizes a larger truth: Emperors and empires, sooner or later, get things wrong. History is littered with the shards of their grandeur:

> Two vast and trunkless legs of stone
> Stand in the desert. . . .
> My name is Ozymandias, king of kings:
> Look on my works, ye Mighty, and despair. . . .
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare
> The lone and level sands stretch far away.[1]

In a sense, the imperial penchant for failure is a pity, for otherwise humanity might by now have emancipated itself from its narrow tribalism to achieve a form of the global unity so enthusiastically espoused by Alexander the Great, Claudius I, and Napoleon, not to mention prominent contemporary publicists of international law. But bad things always happen, even to relatively benign imperialists as well as (fortunately) to the really awful ones like Adolf Hitler. Invariably, at some point they or their minions make a fatal mistake.

This easily accessible lesson of history is worth another look as the United States, hot on the heels of Macedonia, Rome, et al., enters into what Andy Warhol might have characterized as its fifteen minutes of fame as the world's single superpower. The American president has already made clear that he intends to use those fifteen minutes to get them extended indefinitely. Still, history cautions against putting a bet on that lame cavalry horse.

A far more constructive way to spend the allotted span of imperium might be to plan for the time after it is inevitably over. Those fifteen minutes of disproportionate power afford a unique

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[1] Percy Bysshe Shelley, *Ozymandias*.

opportunity to influence the shape of the international system in ways that accord with the lone superpower's cherished social, political, and legal values.

Instead, Washington seems determined to do what all other empires did: lay down the rules by which everyone else, except it, is expected to play. This may work for a while but in the end it will fail, leaving nothing behind but its clay feet standing sentinel in the desert.

THE UNILATERALIST TEMPTATION

Despite the warnings of history, in Washington the unilateralists are still in triumphalist ascendance, buoyed by the illusion of easy "victories" in Afghanistan and Iraq. The carefully crafted postwar system of multilateral diplomacy that the UN represents is being debased.

After World War II, it was the United States that was singularly responsible for designing the post-war system of institutionalized governance and international law that is embodied in the UN Charter. Chief of its characteristics was the strict limitation on the discretion of individual states to resort to force.

Instead of building on that base, Washington has now boldly asserted a new policy that openly repudiates the restrictions on recourse to force of Charter Article 2(4). When it comes to defending our national security, President Bush again told Congress this year, "America will never seek a permission slip to defend the security of our people."[2]

It is not enough to reiterate that any effort to establish a thousand-year American empire is likely to meet the same fate as all prior essays in global grandiosity. Rather, we must understand that failure represents a supremely wasted opportunity. We will always be left to wonder what might have been, had we not squandered our brief moment at center stage.

It may be no more than human nature for the most powerful to be scofflaws. Our government may be saying no more than did Leona Helmsley when, reputedly, she told a servant that "only little people pay taxes."

Indeed, the United States has issued that sort of *defie* explicitly. The UN had emphatically *not* authorized it to invade Iraq. Security Council Resolution 1441 charged Iraq with violations of the disarmament regime imposed on it in 1991, but it addressed that failure exclusively by deciding "to set up an enhanced inspection regime" and providing that, if compliance was not satisfactory, the Council be convened immediately to consider the situation while warning Iraq of "serious consequences" if there were "continued violations of its obligations." The resolution concluded by emphasizing that the Council "will remain seized of the matter."[3]

How could Lord Goldsmith, the British Attorney General, conclude from this that, while there is an obligation to convene the Council "to consider the matter before any action is taken . . . further [military] action can be taken [by a member] without a new resolution of the Council" and, moreover, that "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 authorize force."[4]

The problem, then, was that the United States and Britain were unwilling to subordinate their judgment to that of a Security Council jury.

It may be natural for a superpower to refuse to subordinate its appraisal of the facts and conditions relevant to its national security, but such hubris may ultimately betray its national interest. Thus, in the run-up to the Iraqi invasion it became clear that the overwhelming majority of states were of the view either that Iraq did not have weapons of mass destruction or that these could be found by augmented UN inspections. Vice President Cheney, to the contrary, said just before the war, "There is no doubt that Saddam Hussein now has weapons of mass

[2] State of the Union Address (Jan. 20, 2004), transcribed *in* N.Y. TIMES, Jan. 21, 2004, at A1.

[3] UN Doc. S/Res 1441 (2002).

[4] *Lord Goldsmith's Statement*, TIMES (LONDON), Mar. 18, 2003, at Home News 2.

destruction" and scoffed that the UN weapons inspectors "provide no assurance whatsoever."[5] He was dead wrong, and we left more than five thousand dead in the wake of that misunderstanding.

The UN system sets up checks and balances that we destroy at our peril. As to Iraq, others were right, we were wrong, and thousands were killed because we would not listen. Listen to whom?

In a recent filmed interview, Robert McNamara, the Vietnam-era Secretary of Defense, discusses the nation's lack of empathy for dissenting views and sees in it a recurrent danger to the formulation of sensible policies. "What makes us so omniscient?" he asks.

> We are the strongest nation in the world today, and I do not believe that we should ever apply that economic, political, or military power unilaterally. If we'd followed that rule in Vietnam, we wouldn't have been there. None of our allies supported us. If we can't persuade nations with comparable values of the merit of our cause, we'd better re-examine our reasoning.[6]

Preening, draped in what Harold Koh calls "American exceptionalism,"[7] we fell on our face in Iraq, and the world sniggered. We have wasted the first seven of our fifteen minutes. But let us not underestimate our capacity to learn from this catastrophic essay and to make our way back to multilateralism.

Real realism, in place of the prevailing unilateralist fantasies, should now force a sober reconsideration of the national advantages to be gleaned, even for the sole superpower, of a return to the norms and institutions of multilateral diplomacy. This requires leadership, not bullying. In the words of Harvard's Joseph Nye, "If I can get you to *want* to do what I want, then I do not have to force you to do what you do *not* want to do."[8] In its remaining eight minutes of imperium, instead of pursuing a policy of boastful domination and heedlessness the United States could be nudging the world towards an effective cooperative approach to the three predominant global problems of the century: terrorism, failed states, and poverty. But, the only viable tactic for promoting its preferred solutions—aside from *having* solutions—would be for the United States to use its influence behind the scenes to make the nations of the world feel that it is *they* who are designing the common approach to these three related problems.

There is ample room for creativity and there are ideas aplenty, many of them originating with global networks of experts and emanating from fifty years of field experience by international organizations. Most of the components of reform are by now self-evident.

The veto needs to be rethought. First, when the Security Council has characterized a situation as a threat or breach of the peace in accordance with Article 39 of the Charter and laid down conditions with which the offending state must comply, that resolution should also stipulate that any decision to use collective measures in the event of noncompliance should be made by a majority of the Council, not subject to the veto.

Second, the world needs a standing, transnationally recruited, volunteer rapid reaction force; its deployment must be by multilateral decision but not subject to one-state veto; it must be under a centralized international command; its components must include police, intelligence experts, and personnel trained in reconstructing civil societies; it must be funded by a flat assessment against the gross national product of every state (or some comparable measure); and it must be configured administratively and authorized to act in close cooperation with the complementary capabilities of the world's major powers, with regional organizations and

[5] *In Cheney's Words: The Administration Case for Removing Saddam Hussein*, N.Y. TIMES, Aug. 27, 2002, at A8.

[6] THE FOG OF WAR: ELEVEN LESSONS OF ROBERT S. MCNAMARA (Sony Pictures Classics 2003).

[7] Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

[8] JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 9 (2002).

groupings as well as with the world's financial, monetary, and economic development institutions.

No small task, you say? Of course not. But what's the sole superpower's exalted status for, if not to tackle the world's really big tasks in a creative but subtle way; so that, when our fifteen minutes are up, we will all be living, appreciatively, in a better, safer, more civilized place?

THE END OF LEGITIMACY

by Mary Ellen O'Connell[*]

Professor Falk tells us this is not a defining moment for international law. He believes that because the use of force in Iraq was so blatantly unlawful nothing has been defined or redefined as a result of it. I suggest , however, that it is a critical moment—a moment to end the erosion in legal rules that has brought us to the point where it was not so clear to many that using force in Iraq was blatantly unlawful.

The decision by four nations to use force in Iraq last year, with the positive support of about two dozen more, has created a crisis for international law on the use of force. It is a crisis out of which, however, I am confident we can forge a renewed international law. We must, as part of the renewal, end the erosion of law caused in part by the assertion that some uses of force are legitimate even if they are unlawful.

Last night during the presidential panel, one of the former legal advisers to the State Department said we really do not have rules on the use of force. It was no great surprise to hear a comment like that, but it should have been. Out of a renewal movement we should have the goal that no one disputes the existence of real, binding international law rules on the use of force. We should have the goal that when such a rule is violated, few remain in doubt.

An important step toward attaining widely accepted, real-law status for these rules is to reject the approach that some uses of force are still legitimate even if they are unlawful. I am in full agreement with Professor Franck about the danger of such thinking. It invites us to decide on personal moral grounds rather than community-based legal grounds the acceptability of a use of force. Instead of community-authorized decision-making bodies assessing uses of force on the basis of existing rules, national leaders can decide on the basis of their own personal moral views.

The abandonment of the legal approach in the Kosovo crisis created a strong precedent for the moral approach in Iraq. The individual moral decisions of coalition leaders were viewed by many as just as important as the views of authorized decision-makers on the Security Council.

We need to return to legal process and legal rules on use of force. Philip Allott described to me a few days ago what the goal should be: We international lawyers need to be able to insist to a leader that a rule really exists, that it cannot be ignored. It may still be violated, but no one will be confused that a real violation has occurred. In the words of James Hathaway: we will no longer provide "camouflage for the exercise of unilateral action in defiance of legal authority."[1]

While I am certain the "unlawful but legitimate" approach will not get us to real law, I also wonder whether Professor Franck's approach will. In his book, *Recourse to Force,* he raises some concerns for the rule of law that are posed by pronouncing actions legitimate even if unlawful. He warns against undermining the clarity of illegality. In a case like Kosovo, he

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[1] James Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT. L.121, 129 (2000).

advocates keeping the focus on the law violation but mitigating the "penalty" if circumstances indicate.

I worry, however, that thinking in mitigation terms can also undermine substantive rules. Mitigating a penalty before courts of law is a long way from what is possible in use-of-force cases. Courts have a range of well-defined penalties from which to choose. A judge can shape the penalty to meet individual circumstances and can consider the long-range impact of mitigating a sentence on all of society.

We have no such penalty system for violations of the international law on the use of force. As a result, thinking about mitigating the penalty for law violation creeps into thinking about the substantive rule. We end up at the same place as the legitimacy approach, doubting that the substantive rule is really binding.

Yet that is what Professor Franck so very much wants to avoid. His remarks today focus on the better approach. He advocates reaffirming real law by working to reform rules and processes within the formal sources and methods of international law. International law is a complete legal system, with means for law-making, application. and enforcement. The law provides defenses when the strict application of the law is not warranted. It has methods for change. We need not (and *may* not, in fidelity to law) rely on commentators to make exceptions for complying with law based on their personal opinion.

Recent cases underscore that the international law on the use of force and the institutional approach to applying it are basically sound. These cases underscore that the legal approach is far more appropriate than the personal moral approach. Both the Kosovo and Iraq cases vindicate Security Council and universal rules regulating the use of force. The Russians were right in the case of Kosovo to urge the continued use of economic sanctions, human rights monitors, and pressure on Milosevic as an alternative to seventy-plus days of high aerial bombardment. Eleven members of the Security Council were right to want more time for UN inspectors as an alternative to an invasion and occupation of Iraq.

The basic approach of the Security Council looks sound today and so do the bright line rules restricting the use of significant force to self-defense in the case of an armed attack. Lesser forms of force are permissible in the face of grave and imminent peril under the doctrine of necessity.[2] States may also resort to forceful countermeasures in the face of injury.[3] This is the range of forceful legal, and therefore legitimate, action, assessed on the basis of universally agreed principle.

The range of lawful action is practical and appropriate in today's circumstances. We need not throw it all over and resort to personal opinion. No international lawyer should feel it is irrational to call on governments to conform to these rules. No international lawyer should treat this law as less than real law. Indeed, it is time for a real law movement within the international legal system. That is what Martti Koskeniemmi's new formalism is about[4] and James Hathaway's critical positivism.[5] They are both calling for a real law movement, a call not heard since Kelsen was prominent but long overdue.

[2] International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), *available at* <http://www.un.org/law/ilc>. The defense or excuse of necessity, however, does not apply to the use of force if the force is more than *de minimis*. That defense did apply to the 1967 British bombing of the *Torrey Canyon* on the high seas. The tanker threatened serious oil damage to the British coast. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES, 181 (2002). Uses of force above the *de minimis* threshold must be in self-defense or have Security Council authorization.

[3] International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 22, 49–54, *supra* note 2.

[4] Martti Koskenniemi, *"The Lady Doth Protest Too Much", Kosovo and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

[5] Hathaway, *supra* note 1, at 128.

THE PROBLEMS OF LEGITIMACY-SPEAK

by James Crawford[*]

This panel is not, strictly speaking, about Iraq. Rather it is about the legal, moral, and political dialogue that the Iraq conflict has provoked among international lawyers and political commentators (two categories of persons who may seem more and more often to intersect).

At issue is the increasing use of "legitimacy" as a guide to assessing the propriety of state action. This did not, of course, begin with Iraq or even Kosovo. The *Shorter Oxford English Dictionary* dates to the mid-nineteenth century the use of "legitimacy" in the sense of "conformity to law, rule, or principle; lawfulness, conformity to sound reasoning, logicality,"[1] and the term has always had legal overtones. But in recent discourse there has been very little attempt to use it in a discriminating way, despite attempts at more rigorous analysis by Franck and others.[2] Instead it has been applied as a loose substitute for "legality," a way of glossing over difficulties presented by international action. It has given cover to the big battalions whose conduct has appeared to be morally driven but has nonetheless not been generally approved. Increasingly the fuzziness and indeterminacy of "legitimacy-speak" has seemed to allow us to break free from disciplinary constraints and to assert and impose our own moral intuitions, shared or unshared, on various target audiences.

It is revealing to ask in what contexts we would allow such uses of legitimacy arguments within a constitutional order, e.g., within a single state governed by the rule of law. A number of possibilities spring to mind. For example, we might praise conduct as not merely lawful but legitimate, as when a government takes strong but nonetheless lawful action to deal with a serious social problem. Conversely, we might accept conduct as lawful—the law allowing a considerable margin for error or appreciation on the part of government—but nonetheless criticize it as excessive or unwise. This is a perfectly proper use of language. But I doubt that we would use the term "illegitimate" simply to indicate conduct with which we disagree. In this sense to say that conduct is illegitimate is to make a systemic point: the law may allow you to do that, but your conduct tends to undermine the foundations of the system as a whole.

A particular example of this use of the term arises in constitutional systems that depend significantly on practice or convention rather than law. The British Queen might refuse her consent to a law banning fox hunting because of a penchant for hounds—but if she did so, we might wonder how long the requirement of royal assent would last. Such a refusal would be lawful (the Queen has that legal power) but illegitimate.

Then there is the context in which the law is not clear, is perhaps evolving, and action is taken that presses up against previously imagined limits. Absent a clear ruling on the point, we might say that a use of power was legitimate, meaning that it was arguably reasonable in the circumstances given the lack of clearer guidance. In this sense, the use of the term implies a sort of provisional assessment. But this is a marginal usage. We would be more likely to refer to a legitimate attempt to address the problem, or, if the action was eventually upheld, to say that its legitimacy was vindicated.

Another possibility, of some sociological interest, could arise with respect to conduct within a subgroup that is accepted by that subgroup even though it contravenes general societal norms or laws. The practice of duelling in eighteenth century England may be an example; strictly, it was homicide, but there were apparently circumstances when gentlemen did it and believed

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[1] 1 SHORTER OXFORD ENGLISH DICTIONARY 1562 (4th ed. 1993).

[2] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

correctly that they would not be punished. In such a context we could speak of a legitimate challenge to a duel—a legitimate challenge to commit murder or manslaughter!

These examples and others do not, however, dispense with law as a basic parameter of permissible conduct. Judgments of legitimacy are in one way or another expressed in relation to law, not autonomously. By contrast if a lawyer were to say, within a constitutional order, "Hereafter I dispense with considerations of law; for me all that matters is that the conduct should seem generally appropriate and fitting, regard being had especially to motives and eventual outcomes," we would be surprised. Would we consult such a lawyer? Would we allow her to become or remain a judge? Fidelity to law is not (except perhaps *in extremis*) the same as fidelity to one's own moral intuitions and preferences. It is in some sense external. It can be assessed by reference to external criteria.

No doubt there may be marginal cases where individual considerations intervene. But imagine a legal system, one that prohibits all forms of deliberate killing of humans, in which the practice of euthanasia is widespread and in which the health professionals effectively exercise the power to dispose of individuals whose life is judged not, or no longer, to be worth living. There would be a rule-of-law problem in a society in which legitimacy and legality were in such fundamental opposition. One would hope for a readjustment of one to the other.

Of course, it may be said that in relation to external affairs—to the province of international law—all this is beside the point. The rule of law does not obtain in the international sphere and attempts to introduce it are quixotic. The major powers—the United States (with steadfast support from the United Kingdom), China, even Russia—are each determined on a form of unilateralism within their spheres of influence, the difference being only the scope of those spheres. So the language of legitimacy is necessarily based on particular values and on unilateral or partial appreciations. There are no external constraints other than those imposed by the situations in which action is to be taken, power employed, or military force used; there are certainly no ultimate rule-governed constraints.

There are responses to such a position, but for present purposes and for the purposes of argument I propose to accept it. On this basis we are part of a "system" (a "set" would be a better term) of states whose ignorant armies clash by night—the clashes perhaps intermittent but in principle continuous, the ignorance extending even to the one army not knowing whether the other has deployable weapons of mass destruction. This is not a happy situation, given the fragility of international institutions and our massive and diverse capacity to do harm, including perhaps ultimate harm, to life and to the planet. But if that is in truth our situation, it is as well to know it.

Even on this hypothesis, I do not believe that lawyers should abandon the tools of their trade and set themselves up as general philosophers or as the custodians of legitimacy. Indeed, it is probably the case that they should be more circumspect, as lawyers, in the brave world that this vision imagines for us. The values of consent and form that have underpinned classical international law do not seem any less useful or necessary in such a world. No doubt as citizens we may be repelled by the spectacle of everyday military action—of targeted assassination, reprisals, extrajudicial custody, etc. But by definition we are only citizens of specific polities; we vote nowhere else.

Lawyering is not the same as voting. As lawyers, we probably have *less* right to impose our own values, that is, values not in some way endorsed by or immanent in the law we profess, than we would have in a more coherent system. I know good lawyering when I see it, including good international lawyering, and I could give an account of why it is good that others (including my opponents) could understand and even accept. I am not at all sure that I know good legitimizing, and I am very doubtful that I could offer any such account. Moreover, so much of legitimacy depends on the long term and comes out only in the wash. Lawyering, to

be useful, must occur at the time of the event, or at least that is the standard form. Contingent advice—advice contingent on outcomes—is not much use.

This is not, of course, to suggest that we turn away to some self-contained world of international law, a world by definition nonexistent. It *is* to suggest that we use the instruments at our disposal, the treaty-making system, the canons of interpretation, the modalities of dispute settlement, the hermeneutics of qualified consent, in all the particular instances that face us in our professional lives. Of legitimacy it is for others to judge.