Legitimacy in the use of force: *Opinio* or *Juris*?

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Abstract:

Debates about the recourse to force in international politics often conflate legality and legitimacy. The legitimate use of force is often associated with legality and illegitimacy is generally associated with illegality. But the relationship between the two concepts is not linear and recent examples such as the proposed Syrian intervention and the NATO air campaign in Kosovo show that legitimacy and legality are not necessarily cognates. This paper separates opinion from international law and argues that many commentators have inflated the role of law in determining the legitimacy of actual or proposed uses of armed force. It argues that the principle purpose of international security law is to codify norms of behaviour which states find acceptable in order to facilitate cooperation and collective action. Because laws exist to reduce risks and transaction costs between international actors, they are representations of standards which already exist and are not in themselves the final arbiter of legitimacy. Rather, legitimacy is determined by a more ethereal and dynamic combination of norms which determine what conditions actors collectively feel constitute ‘the right thing to do.’ This explains widespread advocacy for the use of force for humanitarian purposes without legal authorization under certain circumstances.
Despite increasing contestation, legitimacy in the international use of armed force remains under-examined. In simple applications, international legitimacy is equated with an international consensus on the legality of a course of action. This conflation of legality and legitimacy overlooks the normative value of judgments made by the international political community. These judgments are important, especially when they are widely accepted and adopted as precedent. For example, in 2000, the International Independent Commission on Kosovo (2000, 4) reported that the 1999 North Atlantic Treaty Organization (NATO) air campaign in Kosovo was ‘illegal but legitimate.’ This statement highlights a growing tension between laws and practice in the international use of force. States are willing to make exceptions to the formal rules if the cause is widely perceived to be morally just, or the right thing to do. Although legitimacy is founded on prevalent social, political and legal norms, it does not necessarily represent the legal, or even the moral, basis for the international use of armed force (Bjola 2005, 267). Rather, legitimacy reflects judgments that actors make about circumstances. These issue-specific judgments, it turns out, can be more powerful than the rules and laws which international actors make to govern their behaviour in general.

This paper argues that debates about the recourse to force in international politics often conflate legality and legitimacy. This highlights a need for further exploration of the distinction between the two concepts and the relationship they share. It further argues that the principle purpose of international security law is to codify norms of behaviour which states find acceptable in order to facilitate collective security, multilateral cooperation and collective action. Because laws exist to reduce risks and transaction costs between international actors, they are representations of norms and standards which are already recognized and widely accepted. Conversely, legitimacy is conferred on actors or their actions with reference, not deference, to norms of behaviour and laws. Actors make judgments about the applicability of norms and laws to specific situations and contexts. As such, legitimacy is determined by an ethereal and dynamic combination of norms and
judgments which determine the conditions which actors collectively feel constitute the right thing to do. This explains widespread advocacy for the use of force for humanitarian intervention absent legal authorization under certain circumstances.

This argument proceeds in three parts. The first section examines the concept of legitimacy in law and politics. It argues that the concepts of legality and legitimacy are conceptually distinct and cannot be conflated. Many debates about the use of force use the terminology of legitimacy and illegitimacy to add weight to arguments based primarily in legal validity. However, the ostensibly objective comparison of events to analytical frameworks measures validity according to specific criteria. It does not measure the acceptance or endorsement of certain actions by a political community. Hence, legal validity and legitimacy are measuring different phenomena. The second section examines international opinion and the precedents set by exceptions to the general rules of refraining from the use of force and abiding by United Nations Security Council (UNSC) resolutions, particularly when a veto has been threatened or exercised by one of the permanent five members of the Security Council. The third section examines legality and legitimacy in international practice. It argues that international practice, especially since Kosovo, has endorsed the growing divide between procedural validity and political legitimacy. The implication of this trend is that conceptual distinction between legality and legitimacy is of increasing importance to debates about the use of armed force in the international system.

**Legitimacy in law and politics**

Debate about what constitutes legitimacy is often relegated to the discipline of political philosophy because legitimacy is an inherently social concept. Legitimacy infers authority to act because the action is perceived as desirable, proper and appropriate within a specific system of commonly held norms, values, beliefs and definitions. As such, legitimacy is possessed in an objective sense. It is
measurable and cannot be inflated with self-aggrandising statements. However, legitimacy is conferred subjectively by individuals and groups who actively support or passively acquiesce to actions or actors (Suchman 1995, 574-5). The concept of legitimacy can be used in reference to: a) an institution of norms, rules and principles, b) an actor, or c) actions. These approaches are interrelated because systems of values, actors and actions all influence perceptions. Illegitimate actions erode the legitimacy of actors, illegitimate rules or principles undermine the legitimacy of institutions and illegitimate actors can undermine both rules and actions through their actions. For the purpose of this paper, legitimacy of actions is the most relevant because the legitimacy of the international use of armed force is conceptually distinct from, although important to, the legitimacy of actors and institutions.

Legitimacy is conferred by communal agreement that actions are appropriate within a given context. This agreement is socially conferred and dependent on general recognition within a social unit. Reus-Smit (2007, 159-60) distinguishes legitimacy from other social values. Actions can be described rational, legal, moral or just by appealing to objective standards within a political community. Although those standards are subjective in relation to other political communities, they are generally well-established in a particular political context. Consequently, political actors can justify their actions as rational according to an accepted system of logic, as legal in accordance with the body of law which govern their actions, as moral to the extent that their actions conform to accepted social standards, and as just insofar as their actions can be argued to deliver some form of justice or good to a population, even if that good is contested. The crucial difference between legitimacy and other social values is ‘the necessity of social recognition’ (160).

An important trait of legitimacy is that social recognition is based on opinion and belief. Because of this some International Relations scholars contest the notion of a distinct concept of legitimacy in
international politics. For example, O’Connor (2007) characterizes legitimacy as an ‘empty idea’ (2) and a ‘fundamentally confused concept’ (14) because legitimacy is not conceptually distinct and is, therefore, ‘muddled, tautological and analytically unrewarding’ (15). O’Connor’s criticisms largely stem from his observation that ‘neither empirical nor normative significance can be convincingly attributed to legitimacy’ (14). This assertion conflates the various types of legitimacy, institutional, agent-based and action-based, to argue that the concept is immeasurable and therefore undefinable. This is not consistent with the contrary examples of the 1999 NATO intervention in Kosovo and the 2003 invasion of Iraq, which clearly demonstrate the importance of legitimacy distinct from legality in effect. The empirical record shows that legal, rational, moral and justice-based argument aside, Kosovo was widely perceived as legitimate (Wheeler 2000) and Iraq was not (Murphy 2004).

Similarly, some legal scholars see international legitimacy as an ill-defined concept often used to confer authority outside of the accepted norms and vocabulary of international law. For example, Crawford (2004, 271) characterizes international legitimacy rhetoric as a ‘loose substitute’ for the discourse of international law. This is problematic because international debates over legal legitimacy often resemble debates about legal validity. Thomas (2013, 8-9) notes that legal validity is established by correct legal process, while legal legitimacy is contingent upon social consensus and general recognition of the legal process. A positivist view of legal validity implies that legal process and moral justifiability of a law are separable. While this is contested in the discipline of International Law, it does not feature prominently in international debates over the legitimacy or legality of the use of armed force. For example, the large body of literature examining the legitimacy of the 2003 invasion of Iraq focused on testing ethical standards (Enemark and Michaelsen 2006), legal validity (Bellamy 2003) and moral principles for humanitarian intervention (Teson 2003). There was little debate that the situation called for a deeper investigation of the legitimacy of internal law regarding the resource to force in the international system.
Political debate often uses the terminology of legal validity to frame the issue of political legitimacy. Mainstream debate about specific international uses of armed force rarely grapples with issues of justness of the law in general, instead contesting the validity of its application. This suggests that the focus of political debate is legitimacy, while legal debate emphasizes validity. However, in reality the two are often indistinguishable when used in debate. For example, Morris and Wheeler (2007, 219) argue that ensuring compliance with the ‘rules and procedures of the [UN] Charter that constitutes the most important source of legitimacy’ for the collective security order underpinned by the United Nations Security Council. This takes an institutional concept of legitimacy and maps it onto action-based legitimacy. However, legitimacy of international actions are a reflection of beliefs held by a community of actors at various levels of analysis, other states, organizations, groups and individuals. Actions are legitimated by recognition of their appropriateness. The use of legal discourse to discuss legitimacy conflates the law with the consensus. Yet these are separate concepts. The law and perceptions of legitimacy often align, but this is not necessarily the case. There may be exceptions to the general alignment between law and opinion. The findings of the International Independent Commission on Kosovo (2000) and recent calls for intervention in Syria are clear examples that such exceptions can and do exist.

**International opinion and exception**

International opinion regarding armed conflict is often tempered by measurable standards. Principle examples are just war doctrine and international laws which relate to the use of force in the international system. Just war provides ethical standards for assessing the recourse to force, namely the Jus in Bello principles (Johnson 1981; Walzer 2006, 21). International law provides legal standards for assessing the resources to force. The two types of international law relevant to the use of force are the UN Charter, which is binding treaty law, and customary law, which is founded on the practice of states and *Opinio Juris*, the belief that customs apply to one’s actions (Danilenko
Apart from *Opinio Juris*, which is notoriously difficult to determine, the ethical and legal frameworks used to judge the justness and legality of armed conflict are generally presented as tools which can be objectively applied to particular situations. Although the frameworks are themselves objective, their application often involves some degree of interpretation of events which can lead to different judgments of the same circumstances.

Variability in judgments based on the same laws or norms applied to the same situations starkly differentiate legitimacy from legal validity. Even if the law is clear, as was the case with the NATO intervention in Kosovo, legitimacy reflects a broad political agreement that the action was justifiable for reasons beyond the scope of the law as it is written and practiced. It is not necessarily the validity of the judgment that is important, as legitimacy can be conferred by a community without a complete understanding of the situation it judges. Similarly, deviation from accepted practice can be legitimated by a community’s acceptance of the new practice (Suchman 1995, 574). Such acceptance may be based on emerging normative principles, dissatisfaction with current practice, or disinterest in potential consequences. Legitimation can be further encouraged by appealing to normative principles. However, as Clark (2005, 255) argues, legitimation is not reducible to those principles. For example, proponents of humanitarian intervention often make pragmatic judgements about acting outside UNSC mandates. Schachter (1991, 126) argues that even without UNSC approval, actors using force to halt atrocities ‘when the necessity is evident and the humanitarian intention is clear’ are likely to have their actions condoned. In essence, Schachter implies that if the cause is seen as legitimate, then the law is not likely to be enforced. Ergo, legitimacy trumps legality in certain circumstances.

This point leads to the example of Kosovo, where deviance was legitimated by perceived necessity to ‘do the right thing’ and where the precedent of humanitarian intervention absent UNSC
authorization was set. Operation Allied force, NATO’s 1999 aerial campaign in Kosovo was framed as a humanitarian imperative which transcended the boundaries of UNSC procedure and international law. Any attempt to legally justify the use of force is implausible. In reality, the ends were widely seen to justify the means, even though it required the illegal use of force (Chinkin 1999, 841-2). Kosovo is widely framed as an intervention of last resort when the UNSC had ‘stopped working’ and had failed to perform its vital function of preserving international peace and security. Brown (2000, 286-7) contends that the legitimacy of the Kosovo intervention was not necessarily undermined by the lack of UNSC authorization for the use of force because UN approval does not in itself determine the ‘right’ response to humanitarian crises. Brown suggests that UN approval may contribute to a determination on an appropriate response, but that the majority view of states is also important. States’ views were telling not only at the outset of the intervention, but also after it had begun. A Russian-led draft UNSC resolution condemning the NATO intervention was overwhelmingly defeated. This vote demonstrated that the majority of UNSC members supported the intervention and reflected the broader support of the international community for the normative principles of collective security and humanitarian intervention. It also reinforced widely held perceptions that the voting procedures of the UNSC were preventing it from ‘living up to its responsibilities’ (Morris and Wheeler 2007, 221).

In this instance the legitimacy of the Security Council as an institution was tested against an impossible standard and found lacking. Two key facts, a) that the UN acts as a medium for communication and decision-making by states, and b) that the purpose of the Security Council is to facilitate actions within procedural rules, including the permanent member veto, did little to stem widespread criticism of the UNSC’s perceived failure. Another way of looking at the situation is that the UNSC fulfilled its purpose by holding a vote on extending the UN mandate in Kosovo but failed to prevent NATO states from carrying out the intervention after the UN mission had expired.
That was certainly the way that the US invasion of Iraq was viewed in 2003 in procedurally similar circumstances. One possible explanation for this divergence is the contention that legitimacy claims in relation to Kosovo were articulated within existing normative frameworks. Conversely, legitimacy claims in relation to the invasion of Iraq largely disregarded existing norms and instead presented a rationale for legitimation based on contemporary circumstances (Morris and Wheeler 2007, 221).

Nevertheless, in the aftermath of each case, the UNSC passed resolutions which have been characterized as bestowing retrospective legitimacy on aspects of the use of force. This is particularly demonstrative in the case of Iraq because the international community had been opposed to the invasion from the outset. UNSC Resolution 1546, passed in June 2004, was widely seen as legitimating the ongoing presence of international forces in Iraq (Clark 2005, 255). In particular, the resolution observed the willingness of the multinational force to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq' and determined that 'the situation in Iraq continues to constitute a threat to international peace and security' (UNSC 2004).

It is important to note that the change in the tone of the UNSC’s rhetoric in relation to the occupation of Iraq did not coincide with a significant improvement of the security situation, or with any reduction in popular opposition to the conflict. The key difference was neither the facts of the matter nor the normative principles used to interpret them. Rather, it was the ‘disposition of international society’ which had changed and validity frameworks, such as principles and laws, could not account for the attitudinal shift (Clark 2005, 255).

**Legality vs. legitimacy in international practice**

Hehir (2008, 22) argues that Kosovo is not a good precedent for the use for force for humanitarian purposes outside the authority of the UNSC. Yet, proponents of humanitarian intervention argue
that Kosovo clearly demonstrates the necessity for flexibility when it comes to the letter of the law. Similar arguments have surfaced in recent years in relation to Syria. In response to the looming threat of a Russian veto against any resolution authorizing the use of force against Syria in the UNSC, popular commentators began debating the merits of an illegal, or perhaps extra-legal, intervention. In principle, the legitimacy of the UNSC as a central decision-making body does not seem to be disputed. However, the argument that states or coalitions have a right to bypass the UNSC when it is at an impasse is gaining traction. In an ideological sense, a belief in moral authority of the right thing to do seems to trump some commentators’ commitment to legal conventions. On the fringes of the debate, some scholars argue that there is basis for this in domestic bodies of law. The legal argument for this can be framed in terms of justification or mitigation, which nearly all domestic systems of law recognize. This suggests that breaking the law out of necessity to reduce harm also reduces an actor’s culpability. The lynchpin of this argument is that the illegal conduct sought to prevent or avoid a greater injustice (Franck 2004, 180).

Even if the law is taken to be somewhat flexible on this principle, which is certainly not a mainstream view, any judgment on the appropriateness of actions taken to avert a greater crime are likely to be tempered by perceptions of legitimacy. Thus legitimacy remains an important feature of states’ international use of force. Legitimacy is important because it can constrain certain behaviour and enable other behaviour. For example, backlash against the US invasion of Iraq likely factored into Washington’s decision not to pressure Iran to the extent it had planned at the outset of the war. Similarly, calls for US intervention in Libya and Syria saw significant consideration of the crisis of American legitimacy in the aftermath of Iraq. Clearly, the concept of legitimacy affects behaviour. Moreover, legitimacy identifies behaviour which defines and is defined by commonly shared principles and values which serve to bind states together into an international community (Clark 2005, 246-7).
The importance of legitimacy in the use of force can, therefore, surpass legality. The essence of this claim is that legality is one of several methods for judging actions, but legitimacy is the outcome of many kinds of judgments. International law scholars see serious problems with this approach. Greenwood (2002, 144-5) asserts that any long-standing divergence between legality and legitimacy would constitute a condemnation of international law. From a legal perspective, Greenwood contends that the law ought to reflect what is considered legitimate and that legality should follow legitimacy. If humanitarian intervention is widely acknowledged as legitimate and morally justifiable in the international community, then it follows that it ought to be legally permissible. The alternative is a situation in which the law is accepted as incomplete or flawed and that the practice of acting outside the law is accepted as legitimate. Greenwood (2002, 145) further notes that accepting extra-legal intervention risks allowing the interests and moral calculations of powerful states to trump the collective values designed through international consensus. However, this criticism misses the point that the fundamental concept of legitimacy is hinged upon community approval of actions, not the legitimating discourse or rationale of the actor or actors involved.

In situations where the use of force has been legitimated the importance of legality seems to be diminished in debate and often takes a back seat to discussion of the moral and normative principles used to underpin perceptions of legitimacy. This is a potentially dangerous situation because it pits long-term and short-term notions of legitimacy against one another. The NATO intervention in Kosovo is an instructive example. On one hand, Kosovo sets the precedent that sufficient moral justification can in extremis override procedural deadlock in the UNSC. This is typified by the International Independent Commission on Kosovo’s (2000, 164) remarks that the intervention reflected a ‘gray zone of ambiguity between an extension of international law and a proposal for an international moral consensus.’ Proponents of this view would question the alternative precedent; that morally unacceptable atrocities would be allowed to occur because of deference to a rigid legal
and procedural framework. On the other, the Kosovo precedent also suggests that a UNSC veto can be ignored if conditions are right. If overused, this precedent could destabilize the international collective security order which the UNSC represents. Undermining the legitimacy of the UNSC as the final arbiter of collective security could be a worse situation in the long-term as legitimacy is strongly associated with stability in the international system (Reus-Smit 2007, 170). Thankfully, the international community has not so often been rash with the precedent of ignoring UNSC vetoes.

**Conclusion**

There is a growing tension between international law and state practice in the international use of force. States are increasingly willing to consider and sometimes make exceptions to procedural rules and international law in situations where illegal actions are perceived to be legitimate. This suggests that the relationship between legality and legitimacy needs to be clearly understood in the context of states’ decisions to use force in the international system. Legitimacy and legality are often conflated in popular debates regarding the international use of force. The terminology of legitimacy is used widely, but the concept of legitimacy is rarely examined deeply. Instead, many commentators rely on the conceptual approach of legal validity to justify assertions of legitimacy or illegitimacy. This paper has argued that legality and legitimacy are distinct, although related, concepts which measure different phenomena. The legal approach employs validity tests to empirical evidence against set criteria, in this case a body of law, to make a determination according to a specific process of reasoning. Legitimacy measures the support for a course of action conferred by other actors. It is not bound by the same restrictions of interpretation and can be inconsistent with established practice or normative principles. The contrary examples of the NATO intervention in Kosovo and the US invasion of Iraq, clearly demonstrate that legitimacy can be distinct from legality in effect.
The paper then argued that legal frameworks are representations of norms and standards which are widely recognized, while legitimacy is conferred on actors or their actions by social communities that exist in a particular political context, in this instance the international community. Because communities make collective judgments about the applicability of norms and laws to specific situations, legitimacy is determined by a complex of principles and interpretive frames which are much more subjective than legal interpretation. However, the precedence of subjugating legality to legitimacy is fraught with danger. The potential for actions which are not consistent with humanitarian principles to be legitimated through misinformation or ignorance is significant. A similar case has been made in relation to Australia’s participating in the invasion of Iraq, highlighting the possibility of undesired legitimation, whether deliberate or inadvertent. Finally, the paper argued that international practice, particularly since the NATO intervention in Kosovo, has endorsed the growing divide between procedural validity and political legitimacy. The paper concludes that the conceptual distinction between legality and legitimacy is increasing in significance to debates about the use of armed force in the international system.
References


