Rethinking Legality/Legitimacy After the Iraq War

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Legality and Legitimacy in Global Affairs

Edited by Richard Falk, Mark Juergensmeyer, and Vesselin Popovski
Rethinking Legality/Legitimacy
after the Iraq War

Christine Chinkin

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it
means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many
different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

—LEWIS CARROLL, THROUGH THE LOOKING GLASS, CHAPTER 6

1. Introduction

My topic is legality and legitimacy after the Iraq war. I will start by problematiz­ing the question. First, it is too limited. Why should the question be defined in
terms of “after the Iraq war,” not after some other event such as the war in the
Democratic Republic of the Congo where some four million people have died
and where the health consequences of HIV/AIDS will continue for generations?
Events, even catastrophic events, from which powerful actors have remained
aloof, have little visibility as key incidents1 in the evolution of international law.
They are not deemed the “moments of crisis”2 of which our discipline is so fond
and which shape the debates and mould state practice. Yet the war in the DRC
has at least been subject to international legal adjudication,3 a scrutiny that more
powerful states have resisted with respect to their interventions. Second, why is
Iraq cast as a definitive moment for assessing legality and legitimacy rather than
being seen in conjunction with other events—Darfur, the Middle East, nuclear
proliferation, the “war on terror,” the US-backed use of force by Ethiopia in
Somalia—which along with many others intersect and interact in complex ways
with the Iraqi situation? Third is the import of the word “after”: what constitutes
“after the war” in Iraq? After the end of “major combat operations” declared by
President Bush from the deck of the USS Abraham Lincoln on May 1, 2003; or
after the formal occupation; or after the time when the ongoing violence and
attacks finally come to a halt?

One of the problems of evaluating legality and legitimacy is determining at
what point any such assessment should be made: looking back with hindsight or
contemporaneously as events unfold? An individual’s, 4 a population’s 5 or a gov­
ernment’s assessment can change as it must be contingent on external criteria,
on emergent or revealed facts, on the success or failure of the enterprise, or on
political standpoint. Inherent in these questions is the sense that questions of
legitimacy and legality in the contemporary era cannot be divorced from the
role of the United States as the major player, as a permanent member of the UN
Security Council (SC), and as a hegemonic power 6 that attempts to use and
manipulate international law to sustain its interests. The words of Hannah
Arendt are pertinent:

Power needs no justification, being inherent in the very existence of political
communities; what it does need is legitimacy. The common treatment of these
two words as synonyms is no less misleading and confusing than the current
equation of obedience and support. Power springs up whenever people get
together and act in concert, but it derives its legitimacy from the initial getting
together rather than from any action that then may follow. Legitimacy, when
challenged, bases itself on an appeal to the past, while justification relates to
an end that lies in the future. Violence can be justifiable, but it will never be
legitimate. Its justification loses plausibility the farther its intended end
recedes into the future. No one questions the use of violence in self-defense,
because the danger is not only clear but present, and the end justifying the
means is immediate. 7

2. Legality and Legitimacy

Legality denotes compliance with the binding rules (substantive and procedural) of
the political entity, while legitimacy denotes the normative belief by other members of
the community that a rule or institution ought to be obeyed. This perception “may
come from the substance of the rule or from the procedure or source by which it was
constituted.” 8 There are four options: an activity may be deemed legal and legitimate;
legal and illegitimate; illegal and legitimate; or illegal and illegitimate. 9 In determining
legality, decision makers (and the audience) are likely to start from some common
notion of what constitutes “the law.” Nevertheless, conclusions as to the legality of
certain actions may differ depending on such factors as the weight the decision-maker
accords to different sources of law, diverse meanings given to acts or statements,
which facts he or she deems relevant, and the preferred interpretative techniques.
A perception of legitimacy is subjective and culturally, socially, and historically contingent. The criteria for legitimacy in international affairs have been the subject of much debate, especially in the context of action that has not been explicitly authorized by the appropriate body—in the case of the use of force that charged with the primary responsibility for the maintenance of international peace and security, the UN Security Council. Divergent views on both legality and legitimacy are expressed between and across societies including those that generally share common values, as for example between the US and UK governments and those in Europe that opposed the 2003 invasion of Iraq.

Since the end of the Cold War, the SC has both authorized new “measures” under UN Charter Articles 39, 41, and 42, and given a wider meaning to the triggering concept of threats to international peace and security. This extended activity has raised questions about whether there are limits to the SC’s power, what those limits might be, and who has the competence to determine them. For example, is prolonged detention of an individual “legal” because the SC has decided it is necessary for “the maintenance of security and stability in Iraq,” and is legality to be determined by international law, regional human rights law, or national law? And by whom and with what consequence? The wider ambit of SC-authorized measures has been mirrored by unauthorized responses to perceived threats where SC approval has not been sought, has been sought but not been forthcoming, or the attempt to muster support abandoned as apparently unlikely to succeed. In such instances, claims of legality must be based on rules of international law that exist outside the charter, and arguments may be bolstered by assertions of moral or political legitimacy. Intervening governments have an obvious stake in attempting to legitimize their actions to their electorates, to their military forces, and to other states, generating responses from those with an interest in delegitimizing those same actions—often using the same language and rhetoric.

Legitimacy can be seen as a substitute for legality, thereby exposing a gap between law and international community values. An assessment of “illegal but legitimate” poses questions about the legitimacy of the law itself when it is perceived as being out of touch with the moral demands of international society, and about the role of the five permanent SC members as arbiters of such issues. Of course an apparent gap between legality and legitimacy is likely to be based on the moral and political subjectivities of those who claim an action to be illegal but legitimate (or legal but illegitimate). For those who identify such a gap, it also challenges the legitimacy of the international institutions that have failed to act in accordance with the supposed values and needs of the international community. Thus, in the view of President Bush in mid-March 2003, the United Nations had “not lived up to its responsibilities” by failing to authorize “all necessary measures against Iraq.” In language echoing that of Hannah Arendt, he had told the General Assembly (GA) six months earlier that “a regime that has lost its legitimacy will also lose its power.”
The SC faces other challenges to its legitimacy, such as its lack of transparent decision making and accountability, its unrepresentative composition, and its entrenchment of the privileges of power. While George Bush was (rightly) concerned that the SC would not adopt the resolutions he sought with respect to the 2003 invasion of Iraq, others fear that it has become the instrument of its permanent members, in particular the United States, manipulated by it when it can do so and ignored when it cannot. Ian Hurd has warned that “[l]egitimacy is easily lost if the audience comes to believe that the institution is in the end only a stand-in for one of its members. The myth of collectivity is essential for the legitimacy of the institution.” Thus SC legitimacy is challenged from opposing perspectives: by those who fear its control by the United States, and by the United States when it is unable to secure that control. Proposals for its reform have been made, inter alia by the High-Level Panel on Threats, Challenges, and Change; the former secretary-general; and the UN General Assembly (GA), which in its Millennium Declaration resolved to intensify efforts “to achieve a comprehensive reform of the Security Council.” At the 2005 Outcome Summit, there was insufficient political will to affirm any proposals for UN Charter amendment with respect to SC membership and only a general expression of support for early reform.

Against this backdrop, I consider three exercises of Western power over the past decade that have framed thinking about the legality and legitimacy of military intervention: Kosovo, Afghanistan, and Iraq. In none of these cases was there unambiguous SC authorization. Nor did the GA—a more representative body of world opinion than the SC—offer much assistance in determining the legality or legitimacy of these incidents of coercive action. Various legal arguments have been offered in support of the military action in each case, including intervention on humanitarian grounds, legal responses to terrorist acts, self-defense, and the right to remove an undemocratic regime that commits human rights abuses against its own people (“regime change”). Although different weight has been given to the various legal arguments (and by different protagonists), the justifications have become merged, especially in the context of Iraq.

The three cases have supposedly contributed to a crisis of confidence about the legitimacy of the international legal system as it has moved further away from the long, post-Cold War decade when the West’s clarion call of commitment to democracy, the rule of law, and human rights was reaffirmed as its preferred basis for political and economic (re)ordering of society. In none of the cases has the formula been made fully effective, and its thinness has been exposed by double standards and bias in application. Nathaniel Berman has described that post-Cold War decade as “an era of the more or less steadily growing legitimacy of an activist internationalism”: a golden era—more imagined than real in light of failures of international response in Somalia, Rwanda, and Bosnia—that seems to internationalists as one when international law had status and coherence through upholding the humanitarian instincts of
the so-called international community. The exposure of the fragility of this status and coherence highlights concerns about the threats to collective security in an interdependent world.

3. Military Intervention in Kosovo: Legal? Legitimate?

The first of the three military actions was the NATO campaign against Serbia in 1999. A number of commentators (and SC member states) concluded that in the absence of SC authorization, the military action was in violation of articles 2(4) and 53 of the UN Charter and as such was illegal. Other commentators and governments (notably the United Kingdom) argued that international law had evolved: there was sufficient state practice and opinio juris to sustain a principle of customary international law upholding a right of humanitarian intervention as a further exception to the charter prohibition on the use of force. Although argued on the basis of traditional sources of law, this view is clearly motivated by a concern that the foundational principles of international law should uphold a moral position, that the case for legality is supported by the legitimacy of the coercive response. After all "an interpretation of international law which would forbid intervention to prevent something as terrible as the holocaust... would be contrary to the principles upon which modern international law is based." A corollary of this argument is the need to agree fixed legal criteria to determine when intervention on humanitarian grounds might be undertaken so as to limit the potential of abuse of a precedent based on exceptional circumstances.

It was not only those who argued for the legality of the action who considered it legitimate. Among those who considered the action illegal the view was also expressed that it was in some sense legitimate: military action had been carried out to put an end to violations of human rights committed by the Serbs against the Kosovar Albanians rather than out of any self-interest of the NATO states. The SC's implicit endorsement of the agreement that ended the military campaign and established UNMIK (civil presence) and KFOR (security presence) arguably supported this view, as did the failure of the Russian attempt to have a resolution adopted condemning the action. Only a "thin red line" separated the NATO action from formal legality; if customary international law had not yet evolved a principle of humanitarian intervention, it was at least moving in that direction. An expressed attitude was that an international legal system that stood back while people were being massacred because of a "deference to the UN or... outmoded or overly rigid restrictions on the use of force" that upheld the supremacy of state sovereignty was not morally acceptable.

Nevertheless such assertions of legitimacy have their troubling aspects. Could we be sure of the facts upon which the military action was based? How do we factor into the equation the mass movements of displaced persons that intensified
with the commencement of the bombing? What is the legitimacy of bombing from 15,000 feet after the departure of OSCE verification monitors and without providing ground troops as protection for the population? What is the legitimacy of excluding human rights obligations from the actions of those bombing missions? How are the criteria of reasonableness and proportionality to be applied to the *jus ad bellum* and *jus in bello* where the military objective is not to acquire territory or secure some strategic objective but to protect human rights? How do we assess the willingness to intervene in Kosovo against unwillingness in the Congo or Sudan, and the insistence on an Indonesian “request” to military intervention in East Timor some six months later? Moving forward to 2011, the limited number of States that have recognized the Republic of Kosovo as an independent state and the International Court of Justice’s narrow focus on the “legality” of Kosovo’s unilateral declaration of independence in 2008 suggest that the tension between legitimacy and legality has not abated.

Two merging lines of development can be discerned following the Kosovo moment that bear upon similar debates after the Iraq war. The first is relatively well evidenced, that is the growing interest in the concept of human security. Unlike national security, which focuses upon the state and the sanctity of state borders, human security puts the security of people at the center of international policymaking: “their physical safety, their economic and social well being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms.” The so-called “responsibility to protect” is vested primarily in states with respect to their own citizens but ultimately in the international community if states are unwilling or unable to give it effect. This language was used by the secretary-general in his report, *In Larger Freedom*, spelled out as a commitment by the GA in its Outcome Document, 2005, and generally endorsed by the SC in its Resolution 1674. In express terms, on 17 March 17, 2011, the SC reiterated in Resolution 1973 the “responsibility of the Libyan authorities to protect the Libyan population” and authorized the “use of all necessary measures” to protect civilians.

The second is more nebulous. Kosovo represented a significant use of force without SC authorization, albeit under the auspices of a regional defense organization that had previously been called upon by the council to act on its behalf. That its intervention was regarded as legitimate in at least some influential quarters may have been a factor in encouraging further unauthorized action, including that in Iraq in 2003. Although the circumstances were different, some features were similar, including the presence of a repressive regime with a history of human rights abuses. It is impossible to know the weight to be given to the different influences that motivated the US and UK leaders in Iraq. However while the neoconservative agenda appears to have been a considerable factor for President Bush, Tony Blair has expressed himself forcefully in terms of the need to uphold international community values. He has said that Kosovo cannot be seen in isolation because: “[I]t is a just war, based not on any
territorial ambitions but on values. We cannot let the evil of ethnic cleansing stand. We must not rest until it is reversed. We have learned twice before in this century that appeasement does not work. If we let an evil dictator range unchallenged, we will have to spill infinitely more blood and treasure to stop him later.\textsuperscript{52} The strength of this opinion—and his own sense of "rightness" in having championed a "legitimate" conflict—may have strengthened his resolve four years later.\textsuperscript{53}

4. Military Intervention in Afghanistan: Legal? Legitimate?

If there was at least some support for a verdict of "illegal but legitimate" in Kosovo, exercise of military power by the United States and its allies against Afghanistan in October 2001 was widely perceived as "legal and legitimate." The coalition of the willing had resounding support in the aftermath of the atrocities of September 11, 2001,\textsuperscript{54} and the legitimacy of the US response was widely assumed,\textsuperscript{55} except by those who were not "with us" in the "war on terror." The claim that the United States was acting in self-defense\textsuperscript{56} rather than in illegal reprisal\textsuperscript{57} was not seriously challenged.

Yet the legal argument might perhaps not be as strong as is often supposed. Security Council Resolution 1373, September 28, 2003, acknowledged the right to self-defense within its preamble but not in the body of its text. Nor did the SC explicitly state the right to apply following the September 11 attacks, as it did for instance with respect to Kuwait's right to self-defense after Iraq's 1990 invasion.\textsuperscript{58} Resolution 1373 refers to "terrorist acts" not "armed attack," which is the trigger for UN Charter Article 51. The resolution provides numerous steps that states must undertake to undermine the financing of terrorism but does not use the now well-established formula of authorizing "all necessary means" to achieve its objectives. An explicit authorization of force is unnecessary for the inherent right of self-defense to arise, but this requires identifying the September 11 attacks as an armed attack, or as an act of aggression, of which an armed attack is a subcategory.

While flying civilian planes into the World Trade Center and Pentagon indisputably constituted attacks, they were carried out by non-state actors. Does this have legal import? The UN Charter regulates relations between sovereign states and is predicated upon that basis. This starting point is explicit in the GA definition of aggression which states that "aggression is the use of armed force by a State . . . ."\textsuperscript{59} International law on the use of force was not developed for application to contemporary forms of violence operating outside the inter-state paradigm,\textsuperscript{60} although this did not inhibit the NATO states from invoking Article 5 of the North Atlantic Treaty on September 12, 2001.\textsuperscript{61} The ICJ has been more cautious. Its decision in \textit{Armed Activities on the Territory of the Congo}, reiterates a generally narrow understanding of self-defense. The Court did not determine "whether and under what conditions
contemporary international law provides for a right of self-defense against attacks by irregular forces. Judges Simma and Kooijmans directly addressed the issue: Judge Simma considered that SC resolutions 1368 and 1373 “cannot but be read as affirmations . . . that large scale attacks can qualify as ‘armed attacks’” within the terms of Article 51, and both he and Judge Kooijmans considered that armed attacks by non-state actors should be subject to the same tests as those committed by states.

State practice is also unhelpful in elucidating whether there is a right to self-defense against terrorist acts. The only states with consistent practice on this are the United States and Israel, states that have suffered repeated terrorist attacks from outside their territory, and which have the military and intelligence capabilities to respond. The helpfulness of responses by other states in gauging the lawfulness of US and Israeli actions is limited because they are typically fashioned by political alliances rather than through legal evaluation.

Some tests have been proposed for resolving this interpretative dilemma. One is that a military response to terrorist attacks is lawful when the acts are on a scale equivalent to what would be an armed attack if conducted by government forces—a test recognizing that in the twenty-first century, states do not have a monopoly on the ability to use force or commit horrendous acts—but which equates the scale of destruction to that associated with the exercise of state powers. A second is that self-defense is more likely to be accepted as legal when it is in response to terrorist acts on a state’s own territory rather than those committed against its nationals abroad. A third is a twofold test requiring “a very serious attack on the territory of the injured state or on its agents or citizens while at home or abroad” and that these acts form part of a consistent pattern of violent terrorist actions rather than isolated or sporadic attacks.

The issue of whether an armed attack emanating from non-state actors gives rise to the right to self-defense is connected to the questions of legal targets for defensive action, the objectives of that action and proportionality. Given that terrorist cells operate transnationally and constitute ill-defined targets, the crucial question is whether a state that provides a safe haven for alleged terrorists is an appropriate target. Was Afghanistan, at the time under an unrecognized and undemocratic regime with a record of human rights violations, responsible under international law for harboring those who planned and instigated terrorist attacks, and did such harboring constitute an armed attack giving rise to the right of self-defense? The US response equated the Taliban and the al Qaeda network by seeking (unsuccessfully) to destroy the latter through overthrowing the former. Such actions, which amount to assisting one party in a civil war, go well beyond the accepted use of force in self-defense, which must be exclusively directed to repel the armed attack of the aggressor.

Despite the levels of destruction of civilian life and what might be characterized as legal niceties about whether the UN Charter is applicable to armed attacks committed by non-state actors, the international institutions upheld the
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The legality of the 2001 military campaign against Afghanistan. The GA condemned the use of Afghan territory for terrorist activities and the export of terrorism from Afghanistan. In an outstanding feat of misrepresentation it welcomed “the successful efforts of the Afghan people to remove the Taliban regime and the terrorist organizations it hosted” and urged a political settlement for a broad-based, gender-sensitive, multi-ethnic, and fully representative government—factors that would also retrospectively enhance the legitimacy of regime change.

The assumption that domestic legitimacy is assured through conformity with democracy, the rule of law, and human rights bolsters that of international legitimacy. These factors—the need to deter further terrorist attacks, a repressive regime, and gross human rights violations—became merged and developed the context in which arguments for the legality and legitimacy of the war in Iraq would subsequently be put forward.

The United States and its allies sought other ways to bolster the legitimacy of its bombing of Afghanistan (at least to its domestic audience), for example through assertion of women's human rights. Before commencing military action against Afghanistan (but not until after September 11) there were concerted efforts to emphasize the nature of the Taliban's violations of women's human rights, a strategy directed at depicting the Taliban as barbaric and deserving of destruction for reasons additional to their sheltering of terrorists. Afghan women were presented as the passive victims of an uncivilized regime to justify punitive action by the civilized, who would bring human rights and democracy in their wake. In ways reminiscent of colonial “civilizing” missions, this also serves to legitimize the violence that was committed against the persons and property of civilians in Afghanistan: “Once the depiction of the ‘savage other’ as an unruly horde is completed, the civilized self justifies its brutalization of the former as a heaven-ordained task of pacification and civilization. This mission, often backed with tremendous violence, is uniquely construed as an unavoidable task of creating order from the chaotic environment of the savage.” However, these attempts at constructing legitimacy have been undermined by the inconsistent approach to women's human rights in the reconstruction efforts in Afghanistan.

Some formal advances have been made, for example Afghanistan's accession to the Convention on the Elimination of All Forms of Discrimination against Women on 5 March 2003 and a constitutional guarantee of equality. However, violations of women's human rights have been ignored or discounted by the United States when other imperatives have prevailed, including forming alliances with the Northern Alliance, Pakistan, and Saudi Arabia and in 2011 open discussion of negotiation with the Taliban. Military intervention has failed to deliver equality and security for many of Afghanistan's women. The blatant appeal to women's human rights in the case of Afghanistan contrasts with the silence in this respect in both Kosovo and Iraq and highlights the instrumentality of any reference to gender relations in assessing the legitimacy of military action. The likely positive effect of focus on advancement of women's human rights on domestic
audiences in intervening states is typically subordinated to other political imperatives. Meanwhile, a legitimacy audit of foreign military intervention should take into account its possible consequences for women, such as the popular appeal of extremist movements, reduced physical security in public and private spaces, lessened ability freely to access employment, education, health, and other facilities, the feminization of poverty, and women's vulnerability to begging, prostitution, and being trafficked, and thus to gender-based violence. The general acceptance of the legality and legitimacy of the military intervention in 2001 has not continued. By 2011, it has become commonplace to talk of a "legitimacy crisis" in Afghanistan fostered by the high financial and human costs (primarily to Afghan civilians but also to military forces), political instability, insecurity, and the resurgence of the Taliban. Nevertheless, the withdrawal of most foreign troops is envisaged by 2014. The long military action without achievement of its goals has contributed to this shift in perception and indicates the contingency of evaluations of legitimacy.

5. The Occupation of Iraq: Legal? Legitimate?

Kosovo and Afghanistan provide legal and political backdrops to the US- and UK-led invasion of Iraq in March 2003, following the various coercive actions that had continued since the 1991 ceasefire. Strong opinions that the action against Iraq was illegal, including from other SC permanent members and numerous academic commentators, have been aired. Many of the contextual factors deemed relevant in Kosovo or Afghanistan have been reiterated, either singly or in conjunction with each other, in attempts to cloak dubious legality with some legitimacy. The arguments for both legality and legitimacy have shifted and been given different emphasis at different times in response to factual and political changes, in particular the failure to find weapons of mass destruction in Iraq. Depending upon one's perspective, this either allows for a cumulative strength to develop or undermines the weight of all such arguments: one of the justifications must be valid, or at least taken together they must constitute a sound basis for the military action, or alternatively, none of the arguments can stand up alone and a multiplicity of arguments provides no greater credence.

The international institutions have given little assistance as they have remained largely silent. Unlike SC Resolution 1244, which "welcomed" the political solution to the Kosovo crisis, SC Resolution 1483, May 22, 2003, merely noted the letters recording the establishment of the Coalition Provisional Authority (CPA) in Iraq. The GA abdicated responsibility for bestowing either international approval or condemnation of the invasion and its aftermath. The former secretary-general did at last assert the illegality of the war in September 2004. The ICJ has not been seised of the war in Iraq. However in the Armed Activities on the Territory of the Congo case it reaffirmed its earlier jurisprudence that UN Charter
Article 51 creates "strict confines" to the application of force in self-defense and that a state cannot use its "perceived security interests" to use force beyond those parameters. In contrast to its silence about the invasion, the SC "called upon" the CPA to promote the welfare of Iraqis "through the effective administration of the territory" thereby rendering the occupation (until June 28, 2004) ostensibly legal. However it "goes without saying that the outcome of an unlawful act is tainted with illegality:" Moreover, the SC's endorsement of the CPA does not necessarily uphold either the legality or legitimacy of specific actions undertaken (or omitted) by it. The following sections examine some of the factors contributing to, or detracting from, the legality and legitimacy of US and UK actions as occupying powers in Iraq.

5.1 SYMBOLIC LEGITIMACY

After the contested invasion, the coalition powers needed the help of other members of the international community in Iraq's reconstruction, which would not be forthcoming if that period was widely perceived as an illegal and illegitimate occupation rather than as the "liberation" proclaimed by the United States. They therefore sought the symbolic legitimacy that would be accorded by SC endorsement, thus espousing behavior different from that they would otherwise have adopted because "they believe[d] the institution require[d] them to." The United States and United Kingdom realized the inevitability of hard negotiation. Although they were willing to return to the SC to seek an acceptable resolution, their problem was twofold: they had to convince SC members to allow them to go beyond the restraints imposed by occupation law while not ceding primary authority to the United Nations through a post-conflict international administration, as in Kosovo. Other SC members would not endorse the military action (as had arguably been achieved in Resolution 1244 on Kosovo) but did seek some status in Iraq. From their perspective there was the possibility of regaining some of the authority that had been eroded by the coalition's unauthorized recourse to force. As Ian Hurd has described it: "there is power in being seen as the legitimate author of . . . changes." The post-conflict SC resolutions on Iraq were therefore hard-fought compromises with ambiguous and imprecise language.

As they wanted to be thought of as "liberators" of Iraq, the joint letter of May 8, 2003, from the US and UK permanent representatives to the president of the SC did not use the word "occupation" and asserted only that the two states were exercising "powers of government temporarily." In contrast, Resolution 1483 described the United States and United Kingdom by the less legitimate (but more factually accurate) designation of "occupying powers" acting through the CPA. This had implications for the relevant legal regime and the resolution spelled out the applicability of occupation law, "including" the Fourth Geneva Convention and the
Hague Regulations. The implication that other, unspecified principles of international law were also applicable allowed both for wider powers through SC authorization and further constraints through, for example, the applicability of human rights law. Paragraph 8 provided for the appointment of a Special Representative of the Secretary-General (SRSG) in Iraq and listed his "independent responsibilities," although the mandate was ill-defined and essentially limited to reporting to the council and coordinating various activities. The SRSG was required to work intensively with the Authority, which in contrast was not obliged to report to the SC. The "vital role" of the United Nations in reconstruction was in fact little more than a face-saver for the organization and a weak legitimizing device for the United States and United Kingdom. The SC thus did not bestow either the sought-after legitimacy on the coalition, nor any clearly defined authority on the United Nations.

Security Council Resolution 1483 did provide the needed façade of legality after the divisiveness within the council caused by the invasion. But the symbolic power of the United Nations had been severely dented both by the United States' and United Kingdom's unauthorized recourse to force and by the United Nations' failure to make them accountable for it. Within Iraq, the United Nations' previous history, including the long sanctions regime with its resultant hardships, and the manipulation by Saddam Hussein of the oil-for-food program with the connivance of the SC, undermined the institution's legitimacy. The unwillingness of other states "that are not occupying powers" to work with or under the CPA, or to contribute to the multinational force, suggests that they did not consider the United Nations to have legitimated the enterprise. The deadly attack on UN headquarters on August 19, 2003, shows the extent to which the institution's legitimacy had been damaged within Iraq.

Particular points of contestation between the occupying powers, Iraqis, and the United Nations were the process for the transfer of power, the mode of selection of appropriate Iraqi representatives, and the powers they could exercise. In order to give credence to their self-designation as "liberators," the United States and United Kingdom emphasized from the outset their facilitation of "the efforts of the Iraqi people to take the first steps towards forming a representative government based on the rule of law." The SC maintained the fiction of the continued "sovereignty and territorial integrity" of Iraq and expressed encouragement for the Iraqi people to restore and establish emblematic institutions for representative governance. The first step was the establishment of the Iraqi Governing Council (IGC) in July 2003. Although its members were appointed by the CPA, the SC welcomed the broadly representative IGC "as an important step towards the formation by the people of Iraq of an internationally recognized, representative government" and subsequently upheld it as "embodying the sovereignty of the State of Iraq."

As attacks on the occupiers mounted after the summer of 2003, the United States increasingly needed the symbolic legitimacy the United Nations could bestow with respect to the modality and timing of the transfer of power and the
constitutional basis for an Iraqi government. Paul Bremer, the CPA administrator, had favored the Iraqis drafting a constitution and elections being held during the occupation, but this became increasingly unlikely in face of opposition from within the IGC and the rising insurgency. In November 2003, the Bush administration changed its direction and agreed to a timetable for drafting a Transitional Administrative Law (TAL) and for local caucuses within the Iraqi governorates to elect delegates to a Transitional National Assembly, which in turn would elect an interim Iraqi government to assume power on June 30, 2004, when the CPA would terminate. Direct elections would take place in 2005. These plans proved divisive among Iraqis, and the United States was unable to move forward, in part at least because Shi'a Grand Ayatollah Ali al-Sistani (who was demanding immediate direct elections) refused to meet with Paul Bremer. Bremer went "hat in hand" to ask the United Nations to act as "an impartial third-party broker" in assessing the feasibility of elections. The UN team, headed by Lakhdar Brahimi, met with all the key players and made influential recommendations. By "engaging with Iraqi society," Brahimi sought to "cultivate legitimacy for a step-by-step political process." The non-elected interim government replaced the IGC on June 1, 2004, and remained until the implementation of the January 2005 elections. The interim government however was subject to SC Resolution 1546, and the TAL, which was adopted by the IGC after a process involving the CPA, the United Nations, and other groups. Security Council Resolution 1546 endorsed the interim government but did not refer to the TAL and imposed its own restrictions, notably that it was to refrain from any actions affecting Iraq's destiny beyond the interim period. This was at odds both with the reaffirmation of Iraqi sovereignty and the sweeping reordering of Iraqi society undertaken by the CPA. The United Nations thus secured some legitimacy for the transition of power without assuming responsibility for security in Iraq (and thus also avoiding blame for its failure). Security remained the task of the coalition forces, transformed after Resolution 1511 into a SC-authorized multinational force (MNF) and formally sustained after June 28, 2004, by "the request of the incoming Interim Government of Iraq."

Symbolism suggests representations and imagery in place of reality. In many ways, this was the situation in "post-conflict" Iraq. The CPA was constructed by the United States and United Kingdom as a front behind which they could shelter, denying responsibility for their actions by claiming the CPA to be the responsible actor. Similarly, the United States and United Kingdom maintained the fiction of the proactive role of the IGC, despite the CPA's "ability to ignore Governing Council objections to its decisions or to by-pass consultation in the first place." This reality highlighted the symbolism of Iraqi defeat invoked by the language and indicators of empire, for example, the establishment of the heavily fortified, self-sufficient and Americanized Green Zone in Saddam Hussein's main palaces and the tagging of Paul Bremer by Brahimi as the "dictator of Iraq," or "viceroy." These characterizations are supported by
the starting point of CPA Regulations and Orders—that they are promulgated pursuant to Bremer's authority "as administrator of the Coalition Provisional Authority." In Iraq, the administration became the preferred legal order of the invader and occupier.

5.2 "LEGITIMACY OF COHERENCE" 104

Operating within the context of a coherent legal system that provides for consistency and certainty is another hallmark of legitimacy. Mark Suchman defined legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions." 105 This is especially apt as a yardstick against which to assess the CPA. Belligerent occupation is just such a socially constructed system: military power regulated and constrained by law. The United States and United Kingdom went beyond the restrictions imposed upon occupying powers by the Hague Regulations and Fourth Geneva Convention that require the occupier to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." 106 In its Regulation No. 1, the CPA vested in itself all legislative, executive, and judicial authority necessary to achieve its (not the SC's) objectives, six days before the adoption of SC Resolution 1483, thereby exposing the fiction of SC decision making. This authority was to be exercised by the CPA administrator. The Coalition Provisional Authority's Order 1 endorsed the disestablishment of the Baathist party and Order 2 dissolved many Iraqi entities, including the armed forces. These "transformative" actions could only be legally justified if authorized by the SC.

The extent to which SC Resolution 1483 (and subsequent resolutions), in conjunction with other principles of international law, for example human rights law, authorized the extensive reordering of Iraqi political and economic structures is arguable. 107 What is unarguable is the impact of such changes in undermining the legitimacy of the occupation in the eyes of Iraqis who did not perceive them as "desirable, proper or appropriate." 108 What is unarguable is the impact of such changes in undermining the legitimacy of the occupation in the eyes of Iraqis who did not perceive them as "desirable, proper or appropriate." The disbanding of the army created large-scale unemployment, 110 while the de-Baathification process tainted all former party members with the illegitimacy of the Saddam Hussein regime, regardless of the individual's own history and record. In addition to these legislative acts, numerous other factual aspects of the occupation militate against a conclusion of legitimacy with respect to Iraqis (and external actors) including inadequate preparations for the aftermath of military intervention, 111 failure to prevent looting, widespread detentions, coercive interrogatory techniques, and apparent disregard for civilian deaths as evidenced by the lack of records of their numbers or investigations of fatal incidents. Many failings stemmed from political factors such as the relationship between the United
Nations and the occupying powers, the reliance on Iraqi exiles, the Pentagon's post-conflict role, and the initial unwillingness of the CPA to allow states that had not supported the coalition to bid for contracts. Other factors were rooted in the conduct of the civilian and military authorities in occupation Iraq that undermined the rule of law. The following are illustrative of many other examples that could have been discussed.

First, the CPA by Order 17 accorded extensive immunities from the Iraqi legal process to the occupiers and their civilian contractors. Order 17 was renewed on June 27, 2004 (the day before the "handover" to the interim Iraqi government) to provide for continued immunity after the demise of the CPA. The legality of the occupiers' actions was not to be tested in Iraq. Second, these extensive powers and privileges might have been less damaging to the legitimacy of the occupation if the occupiers had themselves complied with human rights standards. This was conspicuously not the case as in the use of torture at Abu Ghraib and the death in British custody in Iraq of Baha Mousa, whose "dead body . . . was covered in blood and bruises." Human rights abuses committed by the Saddam Hussein regime do not excuse those committed by the occupiers. Both the United States and United Kingdom have denied the applicability of their international human rights obligations to the actions of their forces in Iraq, insisting on the territorial application of the relevant instruments and preferring any assessments of legality to be made against the less demanding standards of the laws of war. This stance has been rejected by the UN human rights treaty bodies and (in the case of the United Kingdom) the European Court of Human Rights. No independent human rights monitor was mandated in Iraq such as the ombudsperson in Kosovo. This culture of impunity is furthered by the failure of the prosecutor of the International Criminal Court to investigate allegations of war crimes and violations of the Geneva Conventions in Iraq.

Failure to act within the principles asserted as the basis for regime change plays into the hands of radical opponents who can proclaim the justness of their cause while highlighting the dissonance between the occupiers' asserted values and those revealed by their behavior. In Hurd's words: "Sociologists and anthropologists report that resistance works best when presented in terms borrowed from the language of the authority and where the point is not to challenge the existing authority head-on but to argue that the existing authority is not being true to its own professed values."

Third, the occupiers sought to enhance the legality and legitimacy of their actions through extensive use of SC powers under UN Charter Chapter VII while changing established laws (for example occupation law) in conjunction with a formalist legal regime promulgated by the CPA. That body was a hyperactive legislative body, creating a detailed legal regime that obscured the reality of rule by imperial decree (and the impossibility of delivery). In just over thirteen months, it adopted twelve Regulations (defining the CPA's institutions and authorities), one hundred Orders (binding instructions to Iraqis, including changes to Iraqi law),
seventeen Memoranda (documents adjusting procedures applicable to a Regulation or Order) and twelve Public Notices (conveying the administrator's intentions to the public). The CPA's Regulation 1 asserted that "Regulations and Orders issued by the [CPA] administrator shall take precedence over all other laws."

Where explicit SC authorization was lacking for specific actions it was implied, for example through letters annexed to the relevant resolution and interpretative techniques that had been crafted to fit the argument. John Bellinger III, legal adviser to the US State Department, has explained that this was a deliberately adopted strategy. He has told how lawyers for the coalition partners analyzed the law of occupation and found that they "faced some difficult tasks in reconciling the legal rules." Security Council resolutions were negotiated to "set forth specific rules to govern particular aspects of the occupation" irrespective of existing treaty obligations. Bellinger referred to the Al Jedda litigation in the UK courts to illustrate the effectiveness of this legal manipulation. Mr. Al Jedda is an Iraqi/UK dual national who was detained between 10 October 2004 and 30 December 2007 without charge in a UK facility in Iraq. The secretary of state claimed that his detention was authorized by SC Resolution 1546, which decided inter alia that the MNF "shall have all the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution." The letters referred to were from the prime minister of the interim Iraqi government and then US secretary of state, Colin Powell. The latter stated that "[u]nder the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure forces protection. . . . This will include . . . internment where this is necessary for imperative reasons of security in Iraq. . . . " This language echoes that of the Fourth Geneva Convention, Article 78, applicable to occupation, but has no counterpart in human rights law. The UK courts determined that the resolution displaces the human rights guarantees accorded by the European Convention on Human Rights. Bellinger described this as "a good illustration of the Security Council's increasing willingness to address threats to international peace and security by invoking its Chapter VII authorities to create mechanisms to ensure accountability for specialized bodies of law, and to tailor those bodies of law when specialized legal frameworks are needed to effectively address the problem." An alternative view is that it undermines the commitment of the international legal system to the rule of law by allowing the institutional hierarchy to trump other values and legal obligations. In July 2011, the Grand Chamber of the European Court of Human Rights preferred this second view and held the UK to be in violation of Article 5 of the European Convention on Human Rights, determining that the language of the SC Resolution did not unambiguously indicate that the Security Council intended to place Member States within the Multinational Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention.
The extension of the powers of Iraq's occupiers beyond those set out in the Hague Regulations and the Fourth Geneva Convention was a blatant illustration of what David Malone has called the geostrategic use of the SC by its permanent members, in particular the United States and United Kingdom, as a resource for their own purposes. They ensure appropriate language within a resolution when it supports their interests while bypassing the council when it does not do so. Such "defiance legitimacy" challenges the international community by flouting stable legal requirements and requiring acceptance that these are irrelevant and not suited to contemporary demands. Further, focus on the flouting of occupation law obscured the normalization, and thus legitimization, of the occupation in accordance with US (imperial) ideologies and objectives. What was dimmed was that the "biggest mistake of the occupation . . . was the occupation itself."

Language too was distorted, or came to mean the opposite of its normal meaning. The SC "reaffirm[ed] the sovereignty and territorial integrity of Iraq" (resolutions 1483 and 1511) in disregard of the empirical reality that sovereignty was made permeable and territorial integrity violated. Security Council Resolution 1546 (setting out the terms of the transfer of power from the CPA) imposed limitations on the "fully sovereign and independent" interim Iraqi government that supposedly "assumed full responsibility and authority." In Al Jedda, the UK courts upheld that the "maintenance of security and stability in Iraq" justified detention without charge or trial for many years: "incommunicado detention in Iraq [became] a measure to protect human rights." Expressions such as "implied Security Council authorization," "creeping unilateralism," "unreasonable veto," and "pre-emptive self-defense" entered the international law lexicon as euphemisms for illegal action under existing law. The term "war on terror" legitimized the violence of the United States and its coalition partners: "[c]alling it a war legitimizes what is often a very one-sided violence—like calling bull-fighting a sport." Language was used to shame those who resisted, as in "our boys" or the "Patriot Act." Thucydides put it rather more eruditely than Humpty Dumpty in his History of the Peloponnesian Wars: "Words had to change their ordinary meanings and to take that which was now given to them."

6. Legitimacy: The View of Civil Society

Military intervention in Iraq was challenged by civil society within the West prior to March 2003 when huge public demonstrations against the war took place throughout the world. The legality and legitimacy of the invasion and occupation were examined by a Peoples' Tribunal, the World Tribunal on Iraq (WTI). The WTI was a response to the frustration caused by the failure of state institutions to address these issues. It held over twenty sessions in different parts of the world to hear testimony and to evaluate the actions of especially (but not exclusively) the United States and United Kingdom against legal and moral criteria.
The WTI culminated in a final session in Istanbul in June 2005, where the findings of the preceding sessions on the legal, political, social, and ethical wrongs committed against the people of Iraq were summarized, analysis of specific crimes and violations was carried out, and statements made. The prestigious Jury of Conscience heard extensive victim and witness testimony, expert statements, and legal advocacy. It asserted its legitimacy to be “located in the collective conscience of humanity” and speaking in this name made a series of findings, named those who should be subject to investigation, and made recommendations. In the words of Justice Kirby of the High Court of Australia: “The growth of the activities of Peoples Tribunals is, in one sense, a response to the inadequacy of the institutions of the International Community. In another sense, it is an assertion of the rights of peoples themselves which are different from the rights of states and of international organizations.” The organizers of the tribunal sought to preempt accusations of its own illegitimacy by invoking symbols of legitimacy, such as ensuring worldwide participation, including especially the global South, evoking the formal rituals of advocacy and the symbolism of a Jury of Conscience. Civil society resistance has been discounted by the coalition partners and in the state-centered international legal system does not constitute protest militating against acceptance of state practice.

A Peoples’ Tribunal is one mechanism through which the voices of civil society may be heard, albeit in an unofficial (or non-state) setting. Others have been suggested. For example, the 1995 Commission on Global Governance proposed an International Assembly of People and a Forum of Civil Society with direct access to the UN system. In 2000, the UN secretary-general proposed a NGO Millennium Forum, to be held in conjunction with the Millennium Assembly. Richard Falk and Andrew Strauss have argued for a standing Global Peoples Assembly, organized and represented by civil society. Their vision is for a “globally democratic institutional structure that would enable the peoples of the world to have a meaningful and effective voice.” A less radical suggestion might be allowing participation of civil society representatives at meetings of the SC.

7. Conclusions

In their use of military interventions in recent years, Western powers, notably the United States and United Kingdom, have attempted to shift the boundaries of legitimate behavior by claiming exceptions to the UN Charter based on a broad mix of values, human rights, democracy, and national security. Where possible, they have also sought legality within the terms of the charter, seeking the support of the Security Council to authorize “all necessary measures” in response to ever-widening understandings of what constitutes a threat to international peace and security, especially under the guise of the “war on terror.” Where there is procedural legality it may be hoped that legitimacy will be assumed. However, while the cases of Kosovo
and Afghanistan showed some readiness to admit the legitimacy of actions undertaken to further human rights and democracy or in pursuit of terrorists, this may have changed, and the legitimacy of the façade of legality through SC authorization may be also questioned. Events following the military interventions in Afghanistan and Iraq have demonstrated the ineffectiveness of force that lacks, or fails to sustain, international or national legitimacy, and SC authorization for the deployment of KFOR in Kosovo did not prevent the eruption of violence in March 2004. Examples of post-Iraq intervention illustrate how the SC continues to be used in the furtherance of the hegemonic mission of international law and how language, national laws, and supposed international values continue to be made contingent.

First, SC Resolution 1725, December 6, 2006, authorized an African Union (AU) protection mission to Somalia with an endorsement that border states should not deploy troops there. Later in December, in blatant disregard of this endorsement, Ethiopia deployed troops in Somalia, not as part of the AU mission but instead to fight against the Union of Islamic Courts in support of the Transitional Federal Government. It is also worth noting that “every independent account”145 deemed the Union of Islamic Courts to have brought the first peace and stability to Somalia since 1991. Abuses were committed against civilians by all sides in this round of violence in Somalia, but it was “the Ethiopians with their superior weapons who are doing much of the harm in Mogadishu.” Ethiopia also engaged “in a regional program of arbitrary detentions and unlawful renditions of individuals of interest to Addis Ababa and their allies in Washington.”146 Far from any recourse to the “responsibility to protect,” the destruction of civilian life and property accompanying this military intervention caused little international outrage or condemnation. Ethiopia’s contempt for Resolution 1725 was not condemned by the SC, which did not demand withdrawal of Ethiopian troops or impose sanctions against Ethiopia; it only “welcomed” Ethiopia’s decision to withdraw its troops but without setting down any timetable or monitoring mechanism of progress toward this objective. Illegality was effectively legitimated because, as was said at the time, “Ethiopia and its Somali proxies, including a large number of warlords with notorious records of abuse from earlier conflicts, are perceived by the EU and US government as key allies in the ‘war on terror’ and are doing the west’s dirty work against Somalia’s Islamists. Behind the scenes the United States has been helping the Ethiopian military effort and interrogating suspects in Ethiopian detention.”147 The European Union apparently warned that “war crimes might have been committed,” and that if this was the case it “would be complicit.”148

Second, John Bellinger III has cited the US support for a Special Tribunal for Lebanon as evidence of that country’s commitment to international law.149 The tribunal “of an international character” was negotiated between the UN secretary-general and the Lebanese government pursuant to SC Resolution 1664, March 29, 2006. The council approved the statute and it was signed by the United Nations. However, under the Lebanese constitution, a treaty must be ratified by parliament, which was not done because of internal political disagreement. Security Council
Resolution 1757, May 30, 2007, overrode this requirement and brought the treaty into force. Some states spoke against “forceful interference” in the national constitutional process. Such interference is of course not new. In 1992, Libya asserted that it was acting in compliance with the Montreal Convention, Article 8, by taking steps to submit the persons accused of bombing Pan Am flight 103 to its competent prosecution authorities because Libyan law prevents extradition of its own nationals. The ICJ would not review the SC resolution imposing sanctions for Libya’s failure to comply with the US and UK demands, although the council was superseding national law. The Special Tribunal for Lebanon can be viewed as an innovative and legitimate use of UN Charter, Chapter VII that will protect the Lebanese people and enhance their political freedom, or alternatively as an illegitimate and unwarranted intervention that constitutes misuse of SC powers.

The third example does not involve new SC resolutions but the continued flouting of old ones. Hamas, the government of Palestine elected in January 2006, was shunned by the international community and subjected to a political and economic embargo by the European Union and United States. Israel froze VAT monies belonging to the Palestinian Authority amounting to US $50–60 million per month, effectively imposing a collective punishment on Palestinian voters and creating—not responding to—a humanitarian crisis. In the words of the UN special rapporteur, John Dugard: “This is difficult to understand.” Israel, which is in breach of SC and GA resolutions, escapes economic sanctions while the people living under occupation were made subject to “possibly the most rigorous form of international sanctions” of modern times. After Hamas gained control in Gaza in June 2007, the Palestinian president installed the unelected Salam Fayyad as prime minister, and the embargo was terminated. This too undermined any commitment to a “responsibility to protect” or democracy.

These three examples perhaps answer the question posed at the outset as to why the focus is on legality and legitimacy “after the Iraq War.” They show that the Iraq war was not a single “one-off” experience of disrespect for the international rule of law in the contemporary world order. Rather it is part of a sequence of events commencing well before the 2003 invasion and continuing apparently unabated. Language and legal concepts have been hijacked and international legality claimed regardless of their compliance with formal legal requirements. When adopted, some SC resolutions are discounted with impunity while others are imposed with disregard for other national, regional, or international legal orders. Bias and double standards permeate the mantra of democracy, human rights, and the rule of law, making assessments of legitimacy ever more conditional. At times it appears that we are sleepwalking our way to an international regime where legality has been displaced by the assertions of legitimacy by the powerful. However, there are also strenuous efforts made to resist this through the media, through civil society action, through activist lawyering, and through scholarship and analysis of what is occurring and its consequences. Although such efforts may be denied the force of state action, they offer a vital counterbalance to determinations of legality and legitimacy.
Endnotes

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4. E.g., in 2003 Anne-Marie Slaughter concluded the war in Iraq was illegal but potentially legitimate, whereas in 2004 she found it illegal and illegitimate, primarily because of the failure to find weapons of mass destruction in Iraq; Slaughter, "The Use of Force in Iraq: Illegal and Illegitimate," American Society of International Law Proceedings (2004): 262.
5. In the United Kingdom, the legitimacy of the Iraq war was severely undermined by the failure to make public the Attorney General’s memorandum on the legality of the war and subsequent revelations as to changes in the opinion. P. Sands, Lawless World: America and the Making and Breaking of Global Rules (London: Allen Lane, 2005), 194–200.
10. T. Franck, The Power of Legitimacy among Nations (Oxford: Oxford University Press, 1990), was a significant contribution to this debate in international law; see also J. Brunnée and S. Toope, Legitimacy and Legality in International Law (Cambridge: Cambridge University Press, 2010).
11. Issues of legitimacy have arisen in other international law contexts such as lawmaking, and actions of non-state actors; A. Boyle and C. Chinkin, The Making of International Law (Oxford: Oxford University Press, 2007), 24–35; 99–103; 300–310.
12. E.g., the imposition of targeted sanctions regimes and listing individuals subject to such sanctions; establishing ad hoc international criminal tribunals in former Yugoslavia and Rwanda and a hybrid tribunal in Sierra Leone; actions against the financing of terrorism and the non-proliferation of nuclear weapons.
14. R (On the Application of Hilaľ Abdul-Razzaq Ali Al Jeddá) v Secretary of State for Defence [EWCA]; [2008] 3 WLR 954; [2008] 1 AC 332 (HL). Lord Bingham considered that while "imperative reasons of security" may allow the UK to lawfully exercise the power to detain under UNSCR 1546, it "must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention;" ibid. § 39.
Baroness Hale considered the European Convention on Human Rights to be "qualified" but not displaced; ibid. §§125–126.


16. Security Council legitimacy is undermined by its actions in other contexts, for example its focus on Iran's nuclear program despite its traditionally low profile in nonproliferation and disarmament issues and the fact that the five permanent members are the original nuclear states; J. Simpson in UNA-UK, New World (January–March 2007): 14.


20. The UN Commission on Human Rights was abolished in 2006 because it was perceived to have lost legitimacy and was replaced by the Human Rights Council; UNGAR 60/251, April 3, 2006.


23. UNGAR 55/2, September 8, 2000, § 30.


26. In so doing, I recognize my own selectivity and accept that there are a number of other examples that could have been chosen.

27. E.g., in his September 12, 2002, speech to the GA, President George W. Bush brought together Iraq's 1990 aggression in Kuwait, Saddam Hussein's human rights abuses, terrorism (including that al Qaeda terrorists "are known" to be in Iraq), Iraq's possession of diverse weapons of mass destruction, violation of SC resolutions, and lack of cooperation with UN inspectors.


30. Ibid.


32. This instance of an institutional regional intervention without SC authorization has attracted much greater academic attention than the actions of ECOWAS through its military arm ECOMOG in Liberia and Sierra Leone and to which no SC member objected. For SC endorsement and commendation of these actions see UNSCR 788, November 19, 1992 (Liberia); UNSCR 1181, July 13, 1998; and UNSCR 1270, October 22, 1999 (Sierra Leone); T. Franck, Recourse to Force (Cambridge: Cambridge University Press, 2002), 155–162.

34. Notably Russia and China; Franck, Recourse to Force (above n. 32) 168.

35. UK Ministers of the Crown stated that where there was “overwhelming humanitarian necessity, . . . in light of all the circumstances, a limited use of force is justifiable as the only way to avert a humanitarian catastrophe.” House of Commons, Foreign Affairs Committee, Fourth Report, Kosovo (Session 1999–2000), Vol. 1, § 124.

36. C. Greenwood, ibid., § 129.

37. UNSCR 1244, June 10, 1999, “decides” that the political solution will be based on the general principles adopted by the G8 foreign ministers, but nowhere explicitly endorsed the NATO action.

38. The GA affirmed the mission costs as expenses of the organization but did not otherwise indicate any opinion as to the legality or legitimacy of the military action; UNGAR 54/245 B, July 21, 2000.


40. B. Simma, “NATO, the UN and the Use of Force: Legal Aspects,” EJIL 10 (1999): 1, 22.


42. Independent Commission on Kosovo, The Kosovo Report (Oxford: Oxford University Press, 2000), 170; Fourth Report, Kosovo (above n. 35), § 138: “NATO’s military action, if of dubious legality in the current state of international law, was justified on moral grounds.”


44. Bankovic v Belgium and Others, 11 Butterworths Human Rights Cases 435 (E Ct HR, GC December 12, 2001).

45. In September 1999, the SC was “appalled” at the humanitarian situation in East Timor but still sought an Indonesian “request” before authorizing intervention; UNSCR 1264, September 15, 1999.

46. Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Adv. Op.) 2010 ICJ Reports (Opinion of 22 July, 2010). Considering the question put to it the ICJ saw no reason to consider the validity (legitimacy) of recognition; ibid § 51. In July 2011 78 states have recognized Kosovo.


49. World Summit Outcome, §§ 138–139.


54. The GA "strongly condemned" the September 11 "heinous" attacks; UNGAR 56/1, September 12, 2001.


56. Before commencing its bombing campaign, the United States asserted in a letter to the SC that its action was an exercise of its inherent right to self-defense. It provided little legal analysis of this position; ibid., 186.

57. The Declaration on the Principles of Friendly Relations, UNGAR 2625 (XXV), October 24, 1970, proclaimed that "states have a duty to refrain from acts of reprisal involving the use of force."

58. UNSCR 661, August 6, 1990.

59. UNGAR 3314 (XXIX), December 14, 1974.

60. However, the exchange of notes after the Caroline incident, which is accepted as specifying the criteria under customary international law for self-defense, concerned the acts of non-state actors.


63. 2005 ICJ Reports, sep op Judge Simma, § 11-14; sep op Judge Kooijmans § 28-32.

64. This is not always the case. France and Spain refused permission for use of their airspace to the United States for its 1986 attack on Libya in response to terrorist attacks in West Berlin; M. Byers, War Law (London: Atlantic Books, 2005), 62. This instance of state practice militates against the development of a rule of customary international law allowing for military response to terrorist attacks outside a state's own territory.


68. E.g., by Laura Bush and Cherie Blair. Previously attacks on the Taliban's treatment of women had emanated primarily from women's NGOs; H. Charlesworth and C. Chinkin, "Sex, Gender and September 11," AJIL 96 (2002): 600, 602.


70. The point applies more broadly to neglect and under-funding of reconstruction in Afghanistan; Keen, Endless War (above n. 53), 107-109.


74. Iraq had been regularly subjected to military action since the 1991 ceasefire, notably Operation Desert Fox, December 1998, when some 650 air strikes were launched. This violence had become sufficiently normalized for it to become widely asserted that the use of force commenced in March 2003.
78. UNSCR 1546, June 8, 2004. The envisaged date for these changes was June 30, 2004, but they took place on June 28, 2004.
79. 2005 ICJ Reports, sep op Judge Kooijmans, § 60.
81. In Afghanistan, the Northern Alliance forces had been part of the victorious coalition. The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement), 2001, provided for the Afghan Interim Authority with a mandate for six months, followed by a two-year Transitional Authority (TA) and elections.
82. The SC has “discursive power,” that is the ability to ‘promote and impose concepts as the basis of preferred policies.’ I. Hurd, “Legitimacy, Power” (above n. 19), 35, 37 (citing P. Chilton, *Security Metaphors: Cold War Discourse from Containment to Common House* [New York: Peter Lang, 1996], 6.)
83. Jack Straw, UK foreign secretary, told the House of Commons that “Of course, the resolution was indeed a compromise . . . Resolution 1483 was passed unanimously, after much negotiation”; Hansard, HC Debates, vol. 4, June 2003, column 189–190.
84. E.g., “The liberation of Iraq has cleared the path for today’s action” [the adoption of UNSCR 1483]; Mr. Negroponte, Permanent Representative, USA, 4761 Meeting of the SC, May 22, 2003, UN Doc. S/PV.4761.
86. Any attempt by the SC to condemn the invasion would have been vetoed by the United States and United Kingdom, but the GA could have been active in this regard; D. Krieger, “The War in Iraq as Illegal and Illegitimate,” in *The Iraq Crisis and World Order*, ed. R. Thakur and W. Pal Singh Sidhu (Tokyo: UN University Press, 2006), 381, 389.
87. UNSCR 1483, Preamble.
88. Hurd notes that “whether other centers of power come to the aid of an institution under threat” is an indicator of legitimacy; Hurd, “Legitimacy and Authority” (above n. 8), 391.
89. Malone comments that UN officials were chastened by the realization that the organization’s “legitimacy had been repeatedly tarnished in Iraq.” D. Malone, *The International Struggle over Iraq* (Oxford: Oxford University Press, 2006), 227.
90. Joint letter, May 8, 2003 from the US and UK permanent representatives to the president of the SC, annexed to UNSCR, 1483.
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92. UNSCR 1500, August 14, 2003.

93. UNSCR 1511, § 4.


97. Ibid., 225.


99. The UK secretary of state for defense stated: "Governing authority in Iraq during occupation was, in accordance with UNSCR 1483 (2003) exercised by the CPA . . . the CPA was not a subordinate authority of the UK . . . Iraq remained a sovereign state"; respondents printed case, House of Lords in *R (Al Skeini) v Secretary of State for Defence* [2007] UKHL 26, June 13, 2007. The European Court of Human Rights rejected this analysis concluding that "the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq." *Al Skeini and Others v United Kingdom* (Appl. No. 55721/07) (GC), July 7, 2011, § 149.


101. The title of a journalist's account of occupied Iraq symbolizes both the elements of empire and the failure to take account of reality during the period of the CPA: R. Chandrasekaran, *Imperial Life in the Emerald City* (London: Bloomsbury Publishing, 2007). Iraq was of course administered by the British Empire after World War I until 1932.

102. Malone, *International Struggle over Iraq* (above n. 89), 226; N. Berman, "Intervention in a Divided World" (above n. 39), 761 describes the adverse impact on third world states of colonial labels like "proconsul" in Kosovo.

103. The term favored by Chandrasekaran, *Imperial Life* (above note 101). Chandrasekaran notes that "[p]ublic questioning of his edicts was verboten" and that he micromanaged the CPA; ibid., 72.

104. Berman, "Intervention in a Divided World" (above n. 29), 757.

105. Cited in Hurd, "Legitimacy and Authority" (above n. 8) at 387.

106. Convention (IV) respecting the Laws and Customs of War on Land and Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, October 18, 1907, article 43. See also Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, article 64.

107. E.g., CPA Order 39 (amended by Order 46) on Foreign Investment gave foreign investors unrestricted rights to buy Iraqi companies.

109. Of course, Iraqis are not homogenous as is clear from the different histories of the Kurds, Shiites, and Sunnis. Other distinctions are based on sex, class, wealth, urban, and rural inhabitants, and so on.


111. Amnesty International pointed out that although "[m]uch planning and resources seem to have been devoted to securing Iraqi oil fields . . . there is scarce evidence of similar levels of planning and allocation of resources for securing public and other institutions essential for the survival and well-being of the population. The response to disorder has been shockingly inadequate." Cited in UK Select Committee on Foreign Affairs, Tenth Report 2002–3, July 15, 2003, § 118.

112. Malone, International Struggle over Iraq (above n. 89), 206.

113. This section does not consider the many other actions of dubious legality that have undermined the legitimacy of the US claim to be upholding human rights and democracy, for example detentions in Guantánamo Bay, Bagram, and elsewhere, denial of prisoner of war status to detainees, and extraordinary renditions.

114. R (Al Skeini) v Secretary of State for Defence [EWCA]; [2006] 3 WLR 508, § 28-29 per Brooke LJ.

115. In its Third Periodic Report to the Human Rights Committee, the United States rejected the applicability of the International Covenant on Civil and Political Rights to its forces in Iraq; UN Doc. CCPR/C/USA/3, November 28, 2005, Annex. The Committee noted "with concern" the restrictive interpretation of the "position that the Covenant does not apply with respect to individuals under [US] jurisdiction but outside its territory," UN Doc. CCPR/C/USA/CO/3/Rev. 1, December 18, 2006.


118. Although the United States is not a party to the Rome Statute of the International Criminal Court, 1998 the United Kingdom ratified the Statute on October 4, 2001.

119. Hurd, "Legitimacy, Power" (above n. 19), 46-47.


123. The hierarchy is established by UN Charter, Article 103 which states that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." See C. Chinkin, "Jus Cogens, Article 103 of


125. Malone, International Struggle over Iraq (above n. 89), 103.

126. N. Berman, “Intervention in a Divided World” (above n. 29), 743.


128. Adel Abdel-Mahdi, member IGC, cited in Chandrasekaran, Imperial Life (above note 101), 323.

129. UNSCR 1546.


132. This concept was used by both the White House and then British prime minister Tony Blair in referring to the possible French veto of a resolution authorizing the use of force in Iraq.

133. The argument for a doctrine of preemptive self defense as explained in the US National Security Doctrine, 2002 was not pursued and has received a “chilly” reception; H. Duffy, "War on Terror" (above n. 55), 211.

134. Keen, Endless War (above n. 53), 214. F. Mégret, "War? Legal Semantics and the Move to Violence," EJIL 13 (2002): 361 also describes how the use of the word "war" contributed to the escape from the constraints of international law.


138. Ibid.


144. The Aria formula allows for informal meetings between non-governmental organizations and members of the Security Council, and mandate holders such as special rapporteurs of the UN Human Rights Council also occasionally appear.
147. Ibid.
150. E.g., South Africa thought it inappropriate for the SC to impose the tribunal on Lebanon; China believed the action would create a precedent for interference in a state's domestic affairs that could undermine the council's authority; Russia did not believe the establishment of the tribunal under chapter VII to be warranted; UN Doc. S/PV/5685, May 30, 2007.
153. Ibid., § 54.