



# Policy Brief

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## Overview

In extreme circumstances, legitimacy can introduce constructive flexibility in international law, as illustrated by the 1999 Kosovo intervention. In contrast, the 2003 Iraq war demonstrates the dangers of abusing such flexibility. In the past the absence of a legitimacy discourse brought the immediate condemnation of legally uncertain acts. Today flexibility exists and claims for legitimacy are made more often—either reinforcing or challenging legality.

Legitimacy can strengthen legality, enhancing the authoritative power of treaty-based or customary rules. However, the legitimacy of law can be undermined by its structural inability to respond to urgent problems. When laws are seen as limited, obsolete, or harmful to people, legitimacy can be a corrective force, invoked for global justice, human dignity, emergency protection, or environmental security. Legitimacy needs law as much as law needs legitimacy—law cannot be respected if seen as illegitimate, while appeals to legitimacy must be based in law to prevent opportunism.

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## *Legality and Legitimacy in International Order*

**T**HE 1999 NATO ARMED INTERVENTION OVER Kosovo was illegal under international law, but widely regarded as legitimate. The 2003 US invasion of Iraq was both illegal and illegitimate, though unilateral attempts were made to legitimize it, using the Kosovo precedent. The sanctions against Iraq, preceding the 2003 invasion, were legal, but seen by many as illegitimate. These examples are symptomatic of a wider disconnect between legality and legitimacy which affects many areas of international life. Legality is not the only criteria for determining acceptable state behaviour. Other criteria—humanitarian, ethical and political—play a significant role in modern international relations. Ignorance of international law has serious negative consequences, but so has the blind reliance on international law, detached from human aspirations and actual circumstances.

When laws serve only themselves, there is a lack of legitimacy. Legitimacy watches over laws, ensuring that they serve their fundamental purpose—to improve the lives of those they govern. Existing international law may fail to respond effectively to pressing global needs, particularly those arising from humanitarian emergencies. This failure triggers the need for a corrective, or even for an alternative act. Legitimacy serves to support and, when necessary, to correct legality. When international law would prevent the international community from intervening to help large groups of people at serious risk, the gap between law and legitimacy is clearly manifested. In other situations legally impeccable decisions—such as UN-authorized trade embargoes—have indirectly produced serious civilian suffering and their legitimacy has been rightly questioned.

Human history shows that law can be challenged—the Nuremberg Tribunal is a prime example—when emergencies demand action which the existing law at the time is unable to explicitly permit. Such actions can be seen as legitimate, even if unauthorized by law. Laws can soon develop—as the Geneva Conventions and the Genocide Convention did after Nuremberg—to ‘catch up’ with transformative challenges. In the early 1960s the UN Security Council (UNSC) condemned Israel’s violation of Argentinean territory to arrest a war criminal, Adolf Eichmann, and bring him to justice. Thirty years later the same Council established international tribunals for Yugoslavia and Rwanda, demanding that states arrest war criminals and bring them to justice.

### International Law on the Use of Force

Article 2.4 of the UN Charter demands states refrain from the threat or use of force against territorial integrity or political independence of other states.

Article 2.7 prohibits interference in the domestic jurisdiction of states, except for UNSC actions in response to threats to the peace under Chapter VII.

Article 42 allows the UNSC to authorize military measures to maintain or restore international peace and security.

Article 51 guarantees states the inherent right to self-defence against armed attacks.

### Legality and Legitimacy of the Use of Force

The recourse to the use of force has an exceptional and controversial character and is the most critical domain of international relations in need of robust legality and legitimacy. Only two provisions in the UN Charter allow the use of force in international relations: in self-defence (Art. 51) and by UNSC authorization (Art. 42). The first option is limited to an armed attack against a state or an imminent threat, leaving no choice of means or moment of deliberation. For the second legal option the threat can be non-imminent, and may arise from various situations, but the use of force can only be made by a collective decision of the UNSC members. Still there is a gap—what should be done when people’s lives are in imminent and grave danger, but the UNSC members refuse to act or rely on the veto to prevent action?

There have been armed interventions for ostensibly humanitarian reasons without the consent of the UNSC—India intervened in Eastern Pakistan in 1971, Tanzania in Uganda in 1979, and Vietnam in Cambodia in 1979. In all three situations legally dubious self-defence arguments were presented in order to avoid challenging the strict prohibitions of the UN Charter. In the 1990s the UNSC authorized interventions in Iraq, Somalia, Liberia, Haiti, Yugoslavia, Rwanda, Burundi, Sierra Leone, and Timor Leste, among others. The norm of intervention on behalf of civilians at risk continued to develop, but remained tied to explicit UNSC authorization.

In early 1999 the world faced a difficult dilemma—either to ignore imminent ethnic cleansing in Kosovo, abiding by the law of the use of force in the UN Charter, or to ignore the law and intervene. A UNSC resolution

could have given authorization, but the certainty of Russian and Chinese vetoes closed this path to legality. A self-defence justification could not be invoked—citizens of NATO countries do not live in Kosovo. The law prohibited what morality strongly demanded. The gap between legality and legitimacy widened and crystallized. NATO chose to intervene over Kosovo. Later the independent experts’ International Commission on Kosovo found that although international law had been violated, the overall net outcome had been positive; its conclusion that the intervention was ‘illegal but legitimate’ remains the best expression of the legality-legitimacy gap.

When the US referred to the Kosovo precedent in connection with its 2003 invasion of Iraq, it abused the legitimacy discourse for geopolitical purposes. Widespread international opposition to the US invasion, coupled with—and largely a result of—the lack of UNSC authorization, led to the labelling of the intervention as ‘illegal and illegitimate’ by prominent legal scholars. Even if the Security Council had been induced to authorize the invasion of Iraq, this would have been seen as illegitimate. Iraq ironically brought legality and legitimacy together by clearly demonstrating how illegitimate the illegal action was.

The 1999 Kosovo intervention illustrates the ability of legitimacy to introduce constructive flexibility in international law in extreme circumstances, whereas the 2003 Iraq war demonstrates the dangers of abuse of such flexibility. Appeals for legitimacy to challenge legality are sometimes necessary, and international law needs some degree of flexibility to remain relevant. But there is also the risk of abuse of the legitimacy discourse for actions against international law, being

opportunistically used by states as self-assigned labels to vindicate selfish goals. The problem with the legitimacy argument is that it can be employed by the ‘good cops’, but can also be employed by the ‘bad cops’. The judgment of who are the ‘good’ and who are the ‘bad’ cops is to be made by the people at risk in need of protection—they will finally judge whether legitimacy actions against existing legality have improved their situations, or not.

### Constituting Legitimacy

The legality of an action or policy is assessed by reference to legal texts,

ability of the rules governing the act, and upon the actor itself. Nuremburg can illustrate this—the law was problematic both in substance and in procedure, and all prosecutors were from victors’ states. Nevertheless, the two alternatives—amnesty or extra-judicial execution—would have been even less legitimate.

Legitimacy does not necessarily replace or transcend legality; it also has a vital role in reinforcing and supporting the law. Indeed, laws, legal institutions, or processes which lack legitimacy will be treated with disdain. Legitimacy therefore plays a double

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case law, and precedents. Challenges and appeals may be raised as part of the adjudicative process, but there is a clear and final view either in favour or against. An action is always either legal or illegal; it cannot be partly legal. In contrast, legitimacy is fluid and changing—it depends on perceptions and outcomes. As a subjective interpretation of what is desirable and appropriate, legitimacy can be maintained by a constant effort to ensure conformity with the normative expectations of the affected constituents. Legitimate decisions are based in democratic participation whereby affected persons have the opportunity to raise their voices. When legitimacy is separated from democratic participation, it risks being exposed to ideological and self-concerned manipulation.

Legitimacy is a relative measure—it depends upon the perceived accept-

role. It can strengthen legality and add more authoritative power to treaty-based or customary rules. However, when laws are seen as limited, obsolete, or harmful to people, legitimacy can be a corrective force, invoked in the name of global justice, human dignity, emergency protection, or environmental security. Legitimacy can reinforce legality, but also it can challenge legality. Ideally, what is legal should be legitimate and what is legitimate should be legal. However the mere prescription ‘should’ suggests that such unity is not always present.

States can ignore international law, and disregard even their own previously signed treaties. President Kim Jong Il (North Korea) withdrew from the Nuclear Non-Proliferation Treaty (NPT) in order to develop a nuclear capacity. President George W. Bush (US) un-signed the Rome Statute of

the International Criminal Court and imposed bilateral sanctions on states which were signatories to this Statute. The lack of a global parliament (legislature), a global government (executive) and a global police force allows states to manipulate and violate the laws. But the law does not become irrelevant because it is violated by individual, self-interested states. The law can be challenged by the legitimacy of a higher rationale—saving human life, for example.

There are two visions of international law—a positivist school, regarding law as a firm set of rules to be followed without exception (con-

and involving humanitarian and moral discourse to justify controversial policy. No doubt, legitimacy enters into consideration in particular when the issues at stake are highest and international law is most rigid, such as the global distribution of power, the norms of recourse to force, the interplay between states and within states in times of violence, post-war arrangements, the nature of power leadership, and geopolitics, among others.

Legitimacy is a flexible category; it can be gained and it can be lost. It evolves over time and its maintenance requires constant effort. Legality is a

## “Legitimacy can reinforce legality, but it can also challenge legality”

ceptually driving from domestic law); and a functionalist school, seeing international law as a gradual process of decisions, shaping itself authoritatively through the organs of the United Nations and international treaties. International law is therefore ‘uncertain’ law, or at least less certain than domestic law. This uncertainty necessitates the introduction of legitimacy—a softer category between the extremes of firm law and firm state power. The introduction of legitimacy also brings into the picture non-state actors, global voices and civil society as bearers of public morality.

The legitimacy narrative has developed as a way to encourage more attention to questions of appropriate authority to act coercively in contested situations, when the basis for assessment does not belong to the primacy or relevance of international law. This narrative breaks free from the straight-jacket of legalism and evaluates states’ behaviour with sensitive reflection on ethical and political considerations, loosening the constraints of legality,

distinct, immediate, black-and-white decision—in a court of law the verdict is either guilty or not guilty. Legality is a judgement from the beginning of the process; legitimacy is a judgement from the end of the process.

### **Legality-Legitimacy Gaps in UN and International Regimes**

The United Nations was originally created to represent a global voice, to act as ultimate legitimacy-provider. UN legitimacy is rooted in its representative and universal nature, its political impartiality, its transparent procedures, and its dedication to global justice.

In reality, the lack of effective UN action in cases of mass atrocities increased the legitimacy deficit of the UNSC, of its processes and composition. The unrepresentative nature of the UNSC has widened the legality-legitimacy gap—the UN is ‘torn’ between its original image of a comprehensive global institution, comprising all 192 states of the world; and its reality with a UNSC that is accused

of being unrepresentative and ineffective. The UN's ideas and its standing as a solid global institution are desperately needed to prevent violence, ignorance, and unilateralism, but at the same time one of its cornerstones—the UNSC—suffers from a legitimacy crisis, driven by its lack of accountability to the General Assembly (GA), the World Court, and the peoples of the world. The concentration of legislative, executive and judicial power in the hands of five permanent members is clearly inequitable and undemocratic. The lack of transparency in the processes and procedures of decision-making adds to a lack of performance legitimacy.

The UN General Assembly is expected to speak as a representative, normative voice of all humanity, but its resolutions often suffer from procedural technicalities, political power-games and point-scoring, prompting suggestions that the creeping powers of the UNSC are at least partly due to these deficiencies of the GA. Similarly problematic is the legitimacy of other organs of the UN, although some of the allegations are politically motivated and must be carefully evaluated.

The tension between legality and legitimacy is not limited to the UN—it is evident in a wide range of international regimes and issues. Global environmental governance is afflicted by the failure of political institutions to respond to climate change, and the sense that those who are most affected are the most alienated. There is a democracy deficit—civil society, directly affected by the environmental rules, has only limited participation in the process by which the rules are made. This makes the global regime at least inadequate, if not illegitimate. The legitimacy of global 'green' governance is also called into question by its failure

to discourage forms of behaviour which are legal, yet responsible for pollution and harm. The preference for market-based mechanisms over regulatory regimes often allows corporate actors and industrialized countries to buy their way out of commitments, which are in any event insufficient to protect the global environment.

A new challenge to the legitimacy and the legality of the NPT was spurred by the US shift away from multilateralism towards unilateral policies, which reshaped the incentives for smaller states. The NPT is one of the most significant achievements of international law, built on a bargain whereby non-nuclear states gain access to civilian nuclear technology, and are provided by the nuclear states with both negative security assurances (non-use of weapons against them) and positive security assurances (nuclear disarmament). The failures of the five nuclear powers to carry out their commitments to seek disarmament and at the same time their attempts to restrict access to nuclear technologies, have exacerbated the asymmetries in the non-proliferation regime. In this manner, the legality of the NPT is damaged due to non-reciprocity in the implementation of the non-proliferation and disarmament obligations, while the legitimacy of the treaty—designed to reduce demand for nuclear weapons—is at risk because the core bargain has been undermined.

Even the most fundamental international norms, such as the prohibition of torture, have been undermined by arguments which use law itself. The 'torture warrants', that will forever stain the Bush Administration, or the reference to the status of 'illegal enemy combatant' to facilitate detention of terrorist suspects, appallingly aim to reconstitute the law through unilateral

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manipulation of its main premises and consistent practices. This may be more dangerous even than violating the law as it draws into question the status and operational meanings in this instance of the numerous and entirely sufficient existing treaty provisions for protecting civilians and prisoners of war. It is vital to maintain concerted opposition

can enhance legitimacy. Although the reinterpretation of the norms of non-intervention and sovereignty has consequences for peace and security, it is also clearly necessary to reconcile these norms with the need for intervention in situations of humanitarian emergency. The promotion of the ‘responsibility to protect’ norm represents one attempt

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to such attempts, protecting legitimate legality from the tainted legality of sovereign decisions that are not impartially assessed.

#### **Future Dynamics of Law and Legitimacy**

As norms evolve and develop, international law must adapt. Laws are codified rules—fixed representations of how society believes the world should be ordered, in a snapshot of norms and expectations at the time. But as society changes and new problems emerge, so norms adaptively respond, while fixed rules may no longer be relevant. The legitimacy of law can be undermined by its structural inability to face urgent problems and respond to pressing issues. Failures to agree on definitions of terrorism or aggression, to extend the NPT, or to reform the UNSC demonstrate this problem.

The gap between legality and legitimacy is rooted in the disconnect between the needs of real-world situations and the codified international rules that aim to govern these situations. Efforts to close this gap through reform of international organizations

to build a bridge between legality and legitimacy, closing the gap opened by the Kosovo intervention.

Legitimacy is a vital prerequisite for any decision taken by political actors. In an ideal world, law would always be legitimate—that is, laws would embody the normative beliefs of those living under them. However, the institutions, processes and outcomes of international legal debates often suffer from a lack of legitimacy, reflecting the impact of political pressures.

International law may still endure, even when appeals to legitimacy have been made as an alternative to legality. The problem is not a desire for a higher degree of legitimacy; rather, the problem is the way in which an alternative is sought. Appeals to legitimacy outside the law are vulnerable to opportunism by powerful states, with dangerous consequences for international order. Rejecting legality in favour of legitimacy has led to human suffering; the failings of legality may not always be replaced by legitimacy. Legitimacy needs law as much as law needs legitimacy—just as law cannot be respected, if seen as illegitimate, so appeals to

legitimacy must be based in the spirit, if not the letter of the law to prevent opportunism.

We must clarify and reinforce the law, so that it can regain its legitimacy and remove the need for appeals to other concepts of legitimacy. These changes must be made on the basis of cosmopolitan normative agreements, to avoid unilateral attempts to alter the law. But also we must acknowledge that laws are not perfect, and where appeals to legitimacy gain support, it is clear that legal reform is necessary to close the gap between legality and legitimacy, and rescue the relevance of law.

Because of the Iraq invasion and US refusal to abide by international law, there has been a jurisprudential backlash, insistent on the strict authority of legal texts and distrustful of claims of interpretative discretion in extreme circumstances. Three times ‘crying wolf’—the prolonged military presence in Afghanistan, the allegations of weapons of mass destruction in Iraq, and an unrelenting anti-Iranian campaign—has given rise to widespread doubts as to the wisdom and viability of US national security strategy. There are pressures for flexibility in the dynamic conditions of modern international relations, and combined with the slow capacity of law to adapt, they refresh the legality-legitimacy discourse and consider its application elsewhere than to the international use of force. The challenge of climate change, for example, may discourage behaviour that could be legal but illegitimately harming the environment. The current debates over immigration in many countries also highlight the need to introduce legitimacy correctives to legality.

In the past the absence of a legitimacy discourse brought the immediate condemnation of legally questionable

acts. Today flexibility exists and claims for legitimacy are put forward more frequently—either to reinforce, or to challenge legality. The question that future research could address is whether, under what circumstances, and for how long the flexibility of the legality-legitimacy gap needs to be sustained and whether it is feasible to introduce safeguards to discourage abuse of the gap.

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## INSIDE: Policy Brief

### *Legality and Legitimacy in International Order*

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