

Legality and legitimacy in the use of force

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Since the United States and The United Kingdom embarked on their war on terror, pressurising the United Nations to lend them credibility, the balance between what is legal and what is legitimate has been affected. This article analyses the juridical line of argument which has led to the erosion of International Law since the terrorist attacks of 9/11.

Within the framework of International Law, the use of force ought to be applied only as a last resort when a conflict threatens peace and international security. This point is reinforced by the provisions of the Charter of the United Nations, and by the criteria of legitimacy which increasingly govern, at least in theory, international interventions.

Since the United States and the United Kingdom embarked on their war on terror, dragging along various allies with them and pressing the United Nations to grant their actions credibility, the balance between what is legal and what is legitimate has been affected. If during the nineteen eighties and up to the mid nineties the legitimacy of the use of force was reliant on standards of legality, since the intervention in Kosovo in 1999, and especially since 2001, the relation has been reversed: what is presented as legitimate or justifiable in relation to the use of force becomes tolerated or implicitly legalised by International Law, in spite of doubts about legality, as the case of Kosovo demonstrates and, to a lesser extent, (because it faced greater scrutiny) that of Iraq. The upshot of this appears to be that legitimacy is currently more important than legality in the international arena when it comes to applying force; but what are the reasons for this change and what are its consequences?

There are at least three reasons which explain this new situation:

First of all, the use of force in International Law is contemplated within a set of ground rules in which states intervene when there is a threat to international peace and security, which is to say, whenever a state alters the geo-political order which emerged after the Second World War and which the United Nations was created by general consensus to uphold. Any such intervention requires an offending state and an international regime which acts as a guardian of legality capable of restoring the order which has broken down. In practice, the restoration of order is carried out by one or more states which answer a call made by the United Nations through its Security Council Resolutions. In this context, arguments and counter arguments which lay out options are intimately bound up with the debate on the legitimacy of the use of force and dependant on humanitarian or security questions.

In second place, the effects of globalisation have seen a weakening of the definition of the state as an entity based on territory, government, population and a monopoly of the use of force. States do not hold a pre-eminent position in International Law on account of these factors, but instead their place in the security pecking order is determined to a great extent by their capacity to position themselves as guardians or offenders in the international system. This positioning in either of these fields is crucial, because it will determine the legitimacy (but not the legality) of the use of force which these states have recourse to and can apply if needs be.

¹ I am grateful to Mariano Aguirre for his comments and contribution to crucial areas of this text. His suggestions have notably enriched the text and allowed me to associate ideas in a way which were not initially envisaged in this article.

This division between states in the international system has been accentuated by the distinction which has been made since the end of the Cold War between established and fragile states, and equally between postmodern states (which do not resolve their conflicts pacifically), modern states (which steadily incorporate International Law into their foreign policy) and pre-modern states (which continue to use force to resolve conflicts).² The fragility or pre-modern nature of these states turns some of them into the setting for economic, political or military intervention, and the legitimacy of such acts emanates from the characteristics of the state in question itself.

In third place, states must compete with other actors in the international arena, and for this reasons their capacity to influence International Law through the creation of treaties or international agreements is more limited today than it was fifty years ago.³ States which seek to maintain a pre-eminent position in International Law have to resort to other strategies if they want to continue to decisively influence international affairs. The state is no longer the only actor with a discourse of international dimensions, and so states need to find spaces where they can influence International Law without the interference of other actors. The use of force is just such a space. Seen in this way, it is worth highlighting that the so-called war on terror regulates and affects human rights, security, economic or international cooperation and trade issues, amongst others.

Globalisation blurs the defining lines of the traditional elements which constitute the state. At the same time, the international community appears to aspire to become a global forum formed by democracies respectful of human rights, at least in their formal discourse, and tolerant of the different, non-state actors which make them up, whilst the latter adjust to their rules. All of this leads to a situation in which the use of force is not just a way of sanctioning states which contravene the international order, but also something which contributes, paradoxically, to emphasising the pre-eminent figure of the state, restricting International Law to the discourse of (certain) states. In this model, some states are strong and legitimate, others are weak and have little or no legitimacy, and non-state actors can be classified as legitimate (some NGO's) or illegitimate (groups such as Hamas or Hezbollah), depending on circumstances.

These arguments, put forward as legitimate, are subsequently endorsed as truths, allowing the same legal order which the use of force claims to safeguard to be dynamited or simply sidestepped. The objective of this strategy is not to alter the framework for the use of force, as some argue, nor to make international law more humanitarian⁴, but instead to allow the state to continue to dominate the international arena through arguments presented as legitimate, if not legal, and which in the last resort try to prove the point that international consensus lies in the hands of nation states, and will continue to do so.⁵

The debate on the legality or legitimacy of the use of force is in reality one on the role of the state in International Law, an ever wider playing field where non-state actors can increasingly participate. The attempt by certain states to dominate the debate on International Law and to cross the legal boundaries without apparently violating them, amounts to an attempt to contravene international legality and also to make citizens believe that what is illegal can sometimes be valid and necessary depending on the needs of certain states. This, in short, is an extremely dangerous weapon to play around with, even more so when it is wielded by those

² See Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century*, Atlantic Books, London, 2003.

³ This is a complex line of argument which deserves more space. However, two key phenomena stand out in the development of International Law in recent years. Firstly, the fact that states increasingly resort to instruments of soft law in order to regulate different areas; and secondly, the circumstance which sees non-state actors playing an increasingly important role in the negotiation of treaties.

⁴ See the affirmation by the German philosopher Hans Magnus Enzensberger in this respect: "It is a fact that the sanctions imposed by the United Nations have had far more devastating consequences than war for the Iraqi population; victims can be counted in the hundreds of thousands. Pacifists have always denounced them for that reason. If they had had their way, the regime would still be in power and the UN sanctions would have continued", in "Blind Peace. A postscript to the Iraq war", *El País*, 17th of April 2003.

⁵ Recent versions of this idea hold that a league of democratic states would be authorised and legitimised to intervene militarily whenever the Security Council was in stalemate. See Robert Kagan, "The Case for a League of Democracies", *Financial Times*, 13th of May 2008.

who declare such things as “No matter how long it takes, no matter how difficult the task, we will fight the enemy, and lift the shadow of fear, and lead free nations to victory.”⁶

The origin of the legality versus legitimacy debate

In recent years, an intense battle has broken out in International Law on whether we are witnessing the birth of a new set of ground rules for the use of force which modifies the provisions of the Charter of the United Nations. The publication in 2004 of a report entitled “A more secure world: our shared responsibility” under the auspices of the then General Secretary Kofi Annan laid bare the deep divergence of opinion which have divided state representatives, international organisations and experts regarding the use of force.⁷

A large part of the divergences which can be inferred from the report arise from the conviction that international terrorism demands new measures. In that regard, the provisions of the Charter of the United Nations are said to be obsolete given that a new conflict is underway with a new modus operandi. The argument is varied and ranges from the need to abandon international conventions on International Humanitarian Law, to an imminent clash of civilizations. On security related matters, the discourse elaborated by the United States and various intellectuals proclaims that the new terrorism has no state base, is nihilistic in its essence and, in consequence, has no value system. In order to tackle it, traditional national and international legal frameworks will be of little use, prohibiting as they do the use of torture or pre-emptive war. On the contrary, torture can be justified as a measure to thwart terrorist attacks and, as for pre-emptive strikes, they are deemed a necessity if the development of hostile nuclear programmes is to be nipped in the bud.

At the same time, another line of analysis has been developing since the end of the Cold War which calls on the international community to commit itself to preventing genocide and mass violations of human rights in crisis states. The debate on humanitarian intervention has unfolded in a complicated fashion since 1989 up to the present day, especially in the period which started with the break-up of the Balkans and Darfur. These humanitarian crises were classified as “new wars” by authors such as Mary Kaldor and other “humanitarian interventionists” have insisted that International Law be used in a more flexible way in order to enable interventions to be carried out under a UN mandate.⁸

Two different arguments with an effect on legitimacy have coincided in this way in recent years. On the one hand, the humanitarian interventionist discourse espoused by some analysts who propose that interventions be carried out in the name of International Law; and simultaneously on the other, actors such as the United States who prefer a user-friendly International Law (and Humanitarian Law and a revised convention of human rights) which can be tailored to their own political ends.

Some states have modified their position on essential aspects of the right to wage war in response to the war on terror, especially in relation to the application of the provisions of the Geneva Convention, generating an intense debate on the legality of this new practice, its relation to the established ground rules which govern the use of force, or its compatibility with international human rights obligations. The leaders of the war on terror frame a question in the language of humanitarian interventionism which boils down to the following: faced with a new kind of war, why not change the rules?

The rationale for this argument is based, amongst other things, on the existence of an imminent danger and the need to protect citizens from further acts of terrorism. This imminent danger has already justified “special and exceptional” measures being adopted with substantial changes having taken place since 9/11 in three areas:

⁶Speech by President Bush on the war on terror, delivered on March 8th 2005 in the National Defence University. <http://www.whitehouse.gov/news/releases/2005/03/20050308-3.html>

⁷A more secure world: our shared responsibility, Report of the Secretary General’s High-Level Panel on Threats, Challenges & Change, United Nations, December 12th 2004. <http://www.un.org/secureworld/>

⁸Mary Kaldor, *New and Old Wars*, Stanford University Press, California, 1999; and, to a lesser extent, Herfried Münkler, *New Wars*, Polity Press, Oxford, 2004.

- a-The creation of new right(less) subjects (the category applied to enemy combatants);
- b-A harshening of anti-terrorist measures with important restrictions on human rights;
- c-A looser interpretation of the provisions of the Charter relating to the question of the use of force.

Changes in the international rules are not, however, easy to bring about. The rules which govern human rights and the waging of war are the outcome of a consensus which has emerged over years of negotiations and international practice. This explains why those states which supported the proposed new adjustments had to resort to other measures if they wanted to act in a framework of international legality. In this scenario, the invasion of Afghanistan (from 2001 onwards) was presented as an exercise in legitimate self defense under article 51 of the Charter, and the invasion of Iraq (from 2003 onwards) as the result of Iraq's refusal to comply with repeated Security Council resolutions. Both positions were problematic; there wasn't just a problem of supposed illegality at stake here, but also a credibility issue for a system unable to muster consensus on such a delicate subject.

Supporters of the wars in Iraq and Afghanistan have indicated that, in both cases, the problem was less one of legitimacy than legality. In this sense, it has been frequently argued that although the invasion of Iraq could be seen to be illegal, in any case it was certainly legitimate, to the extent that it was just in essence. Even when the alleged arsenal of weapons of mass destruction failed to appear, some politicians continued to argue support for the war in any case, because it had put paid to a dictator, an argument which leaders at the time such as former President Jose María Aznar, former Prime Minister Tony Blair and President Bush have put forward time and again.

This legitimacy argument was hardly a new development. Kosovo was a clear example of this doctrine being elaborated. When NATO bombed Serbia and Kosovo in 1999 without UN Security Council authority, some states and a large number of experts in the field argued that whilst the air strikes might not be justified under the UN Charter, they were necessary anyhow to avoid a massacre like the ones which had taken place in Bosnia or Ruanda. The Independent International Commission for Kosovo confirmed this argument for the first time back in the year 2000, when it affirmed that the NATO intervention was illegal because it lacked UN Security Council backing, but justifiable none the less, because peaceful options had been exhausted and the people of Kosovo had to be freed from Serb oppression.⁹

In the context of the war in Iraq, the debate on the legitimacy of the use of force has been tied to the crisis of moral authority which the United Nations has suffered, its origins principally lying in the fact that the UN had lost its capacity to influence international decisions which states adopt in areas related to the use of force. International Law has been described as a nebula of rules which states comply with when it was in their interest and where the strongest impose their criteria. This approach was a reflection of realist and neorealist doctrines dominant in many Anglo-Saxon circles, and also in the formulation of a common criticism in certain coteries which maintain that International Law and the United Nations are quite useless for the tasks for which they were created.¹⁰

Perhaps part of the problem is that International Law is not designed for the purposes most of us might think, but instead has other objectives in mind. In a general sense, it is not of much use when it comes to eliminating wars, nor in designing peace, and it often fails to limit violence or make conflicts more humane; nor does it broker peace effectively. War and peace are neither created nor are they managed according to International Law, but rather the Law only aids the way they are conducted, setting out limits and a framework which help to manage an environment which is by definition ungovernable.

The actions of European powers during colonialism allows us to see how environments

⁹ This supposed legitimacy is now being followed by the supposed legality of the recognition of an independent Kosovo. .

¹⁰ See for example Adam Lebor, "Complicity With Evil" The United Nations in the Age of Modern Genocide, Yale University Press, Virginia, 2006, James Traub, The Best Intentions. Kofi Annan and the UN in the Era of American World Power, Farrar Straus Giroux, New York, 2006.

perceived as “ungovernable” are actually managed. Ramón Campderrich, in his introduction to a text by Carl Schmitt, notes: “For Schmitt, the limitation or the modern “humanisation” of war was not generalisable, it could not be extended to all four corners of the earth. It necessarily requires spaces and territories where exactly such a limitation or “humanisation” was conspicuous by its absence. And those territories were none other than those subjected to European colonisation, America and Africa above all.”¹¹ Campderrich explains that according to Schmitt, Europe developed a European identity throughout the centuries as a result of contact with Americans and Africans, the concept of a common cultural belonging which allowed the excesses of war against those considered akin to be moderated, and in opposition to those considered “different”.¹²

In that sense, many of the advances we recognize as “humanisation” efforts in International Law are limited by two parameters; culture and the subject. Culture (whether it be legal, political or economic) refers to a meeting place where agreed upon principles are managed or applied, and the subject is refers to the legitimate and legal actor who designs, imposes and implements those principles. Schmitt addressed the importance of cultural belonging in a geographic space whilst Foucault explained how the subject is constructed.¹³ Seen in this way, any exception to the application of what we understand as universal principles was based on the defense of civilization as culture, or as protection against barbarians or savages as subjects (or non-subjects of rights) The echoes of this text in the definition of “unlawful combatants” which the United States has applied in Guantánamo are very much evident.

The reasons why International Law is applied in some cases but not others is not purely a matter of power or hypocrisy. This “inconsistency” is not the upshot of the mere absence of a sanctioning structure, nor a simple reflection of the different positions different states hold in the international pecking order, but instead comes down to the definition of International Law as a cultural and “subjective” project (understanding the law to be subjective in the sense that it is developed and belongs to the subject which created it, which is to say, fundamentally to states and in the context of power relations between them). Seen from this angle, International Law is part of a modern and enlightened culture which proclaims the equality of subjects, their freedom of action and their need to cooperate.

If International Law is understood as a cultural instrument at the service of a subject or several subjects, then when the latter requires others instruments to impose programmes of colonization, or civilization or unleash the war on terror, those provisions of the Law which limits states can easily be dispensed with or distorted to fit requirements. What we are left with in these cases is a law based on the arguments which justify and legitimise behavior which International Law can hardly tolerate within a rule-based framework, but which is presented as absolutely necessary in the context of legitimacy. This subtle violation of legality is possible thanks to the construction of the subject in International Law.

Reasons for the ongoing leading role of states as subjects of International Law.

The subjectivity of International Law is articulated around the category of the international juridical personality. This juridical personality is the concept which bestows international actors with the legal capacity to act (in the field of rights and obligations) under International Law. Consequently, it is related to the full force of law, or the recognition of legal acts of certain bodies being granted. However, in International Law not all actors are subjects. The first definition of a juridical personality was provided by Leibniz in the XVII century when he

¹¹ Ramón Campderrich, “Tierra y mar: Historia, técnica y legitimidad”, in Carl Schmitt, *Tierra y mar*, Trotta, Madrid, 2007, p. 11.

¹² *Ibid.*, p. 11. Mark Duffield has recently explored the dichotomy between “their wars” which are internal, illegitimate, based on identity and with privatised violence, and “our wars”, waged between legitimate states for rational reasons. M. Duffield, “Reprising durable disorder: network war and the securitisation of aid”, in Bjørn Ente y Bertin Odén (Ed.), *Global Governance in the 21st Century: Alternative Perspectives on World Order*, Expert Group of Development Issues, Stockholm, 2002:2, p.79.

¹³ See Michel Foucault, *La hermenéutica del sujeto*, Akal, Madrid, 2005.

referred to this category as the capacity to exert influence on the international stage “with weapons or treaties”. However, the definition of juridical personality based on the capacity to act came later and was formulated by the International Court of Justice (ICJ) in its *Advisory Opinion in Reparation for Injuries Suffered in the service of the United Nations*.¹⁴ In this case, the Court made reference to the international juridical personality in terms of the capacity to hold rights and obligations.

Despite the fact that the above mentioned advisory opinion acknowledged a certain juridical capacity in international organisations, the truth of the matter is that the principle subject in International Law continues to be the state and states define themselves according to a territory, a government and a population (Montevideo convention, 1933, article 1). However, in recent decades, states have seen how that international subjectivity has been shared with other actors who compete with their presence, strength and discourse on the international stage. Individuals, international organisations, NGO’s and indigenous peoples have slowly but surely obtained recognition of their juridical personality through access to areas of influence which in the past were attributed exclusively to states (rule making capacity and the presentation of international demands, mainly). In this sense, these new subjects have managed to influence international discourse through the international recognition of their actions.

The positioning of these new subjects has coincided with a certain decline in the elements which constitute the state in International Law. The pre-eminent position of states in the international context is not sustainable any longer only on the basis of territory, government or population. For example, the international community continues to recognize entities as states even when their governments do not enjoy effective control of their territory or population (as in the case of failed states). This reality implies that what constitutes a state in International Law derives in part from other variables. However, the fact remains that despite the constitutive definition of a state becoming blurred, states continue to be the main actors and subject of International Law. But if this pre-eminence is not based on territorial control, population or government, what is it about the state which allows it occupy this place?

If we go back to Leibniz’s definition and his historical context, we can find an answer. The author’s intention was to argue a case which would allow German princes to be recognised as internationally legal and legitimate actors in a world in which the medieval authority of the Pope and the Emperor was beginning to dissolve and reform around kings and queens of sovereign states.¹⁵ In this context of rupture and legitimacy, the first definition of a juridical personality which refers precisely to the capacity to influence international affairs appears: “*Those who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties, might be considered under the category of persona iure gentium*”.¹⁶

Leibniz provides an excellent example of how the juridical personality was initially tied to questions of legitimacy and the capacity to influence different actors present in the international sphere. The objective, in consequence, of the subject in International Law is none other than to “influence” events in the international arena “by force or with treaties”. This capacity to influence by means of force or treaties works in tandem with International Law, so that when one is active, the other takes on a passive role, allowing perfect coordination between the two.¹⁷

To take the example of peace operations, in recent decades a number of peace building and also peace enforcement operations - in contrast to the traditional peace-keeping operations - have been put into place in which states intervene militarily to impose peace.¹⁸ These

¹⁴ Advisory Opinion of the International Court of Justice, April 11th 1949.

¹⁵ As Schmitt points out, at the end of the XVI century, princes who were unable to turn themselves into states had to simply abandon the international stage. Carl Schmitt, *El nomos de la tierra*, Centro de Estudios Internacionales, Madrid, 1979, p. 139.

¹⁶ Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, Asser Press, La Haya, 2004, p. 31.

¹⁷ This is one of the keys to Foucault’s work, how peace wages a dull war, how peace conceals and nurtures new battles. See, Michel Foucault, *Hay que defender la sociedad*, Akal, Madrid, 2003.

¹⁸ We can find examples of these kind of operations in the Congo, Somalia, Bosnia and Kosovo. For a wider debate on the responsibility of protecting in these situations, see Juan Garrigues, “La responsabilidad de proteger: De un principio ético a una política eficaz”, in *Intermón Oxfam, La Realidad de la Ayuda 2007-2008*, Capítulo 3, pp. 153-182. Available at www.fride.org

operations have been evolving since the beginning of the nineteen eighties towards more complex operations. Whilst to begin with such operations oversaw cease fire agreements and kept belligerent parties separated, the new generation of peacebuilding operations which has emerged in recent years is orientated towards state-building: the international community becomes involved in the reconstruction of the state following intervention. Examples can be found in Afghanistan, Kosovo, East Timor and Haiti.

The general characteristic of these kinds of operation is that the security aspect begins to play a more prominent role than peace itself. These missions entail restrictions on the freedom of action of others actors such as international organisations or even NGO's by the security context which states and armies impose. The state can thus design not only a new concept of peace with its discourse and actions, but also one which is subordinated to what it defines as security priorities.

This examples highlights the fact that any definition of the subject in International Law implies the capacity to act, the capacity to exert influence and the capacity to define the discourse and arguments valid in International Law (such as what peace is, what human rights are and how they relate to security) at the same time as it limits other subjects in the way they apply, create or modify these discourses (NGOs, minorities or other actors). Seen from this perspective, states are the best example of the capacity to influence the political discourses which are articulated in international circles and which are subsequently presented as juridical truths, which is to say, in line with reality, and which consequently can't be rationally refuted.

This characteristic of subject has been vested in the state since the Enlightenment and is one of the building blocks of political life and also of the juridical life of nation states. Whilst governments have the capacity to lie, states are blessed with the gift of discerning the "truth", and how to transmit it. Foucault was one of thinkers who especially emphasised the importance of the triangle law – force - truth, a triangle which sees the Law impose itself in a way associated with force but bound to truth, a truth which is imposed by force, which wages war even in times of peace, but also which omits other truths, other narratives. In short, a truth which can only be true to the extent that it imposes itself on the other.

This capacity has been the state's main resources right up to the present day and it continues to be its main resource in times of crisis in which other proposals and other axes of influence emerge which do not necessarily have to work through it. It is in this context that states act as "producers of truth", emitting discourses which will influence events in the international arena and which will prevail "by force or by treaties". In this sense, it is not enough for the state to simply produce these narratives or discourses, it must also put them into practice by means of force, in such a way that truth "conquers", which is to say, in a way that prevents truth becoming a mere narrative relegated to posterity. Truth has to spell victory, it has to impose itself on the world and order it in its likeness. This is a truth which is born on the battlefield, and is constructed in the offices and the corridors of civil servants and it holds that "our societies must be defended."¹⁹ It is exactly the same discourse as the war on terror.

This war of the subject to occupy and maintain a preeminent position in International Law takes place at a time in which the strength of a state does not lie in its territory, its government, or its population, or for that matter in its exclusive capacity to influence International Law by means of drafting treaties or the formulation of international demands. A state concerned with producing juridical truths need a territory to argue them out, a space where legitimacy can be debated in a way which will allow truth and force to enjoy full association.

The events of 9/11 provided this opportunity, although the tendency can be traced back to Kosovo. The state found the perfect space, within the field of International Law, a space where it has no other challenger: the use of force. The international ground rules governing the use

¹⁹Michel Foucault, *Hay que defender la sociedad*, op. cit

of force apply only to the state and it is the state which has the option of resorting to its use, in the event of certain, strictly conceptualized scenarios as laid out in the United Nations Charter. However, the definition of when a state can resort to the use of force, in what conditions and with exactly what measures is an open debate which pivots on the dualism of the concepts of violence (illegitimate and illegal) and force (legal and legitimate).

An excellent example of how these discourses work in International Law can be found in the accusations made by the United States and the United Kingdom which asserted that Iraq possessed weapons of mass destruction. Neither the findings of the International Atomic Energy Agency (IAEA), nor reports by organs of the United Nations prevented this argument imposing itself on events in an unassailable way, and served subsequently as the basis for the invasion of Iraq. The rationale for the military actions which were carried out in that country cannot be comprehended in the context of legality, but rather in that of legitimacy. At present, the decisive factor when it comes to applying the use of force is not the legality of certain actions, but their legitimacy, precisely because what is at stake is not the construction of a new juridical order, but instead the survival of the state as the main actor in opposition to other forms of organizations whose loyalty is not dependant on the state, but instead look to the clan, tribe or social group. The war on terror is not a war against terror, because both sides use it for their own ends, but instead a war between two conceptions of subjectivity; a war which seems to be playing itself out in the context of legitimacy and not that of legality.

Consequently, what is new in this situation lies less in the fact that states use arguments at hand to justify the use of force, but instead the circumstances in which these arguments are expounded - a world which aspires to be both global and tribal at the same time, in which the mass media are undergoing an unprecedented expansion and in which international legality regarding the use of force is presented as a set of flexible norms which can be manipulated by arguments which are sufficiently legitimate to avoid violating the international regulations which they claim to champion. In cases such as this, humanitarian arguments or other legitimising reasons undermine the Law rather than add to it.²⁰

Why is legitimacy important?

In a context in which legitimacy is becoming more important than legality, we need to understand the key to the former. Legitimacy is related in general terms with the reasons which lead to rules being obeyed. There are procedural reasons (consensus, amongst others) but also substantive reasons, which is to say, the ideas which support the notion that rules must be respected. For example, what is the process by which violence becomes a legal and legitimate force in International Law? What are the ideas which frame a space in which violent acts are presented as legitimate and necessary, although not necessarily legal?

International Law in matters related to the use of force is not only a state construct, but also one subjects indulge in, and it is held together by apparently invisible truths which it clings to in a system which is by definition violent. Which is to say: International Law endorses the existence of states which create rules, impose them, and acknowledge other actors as subjects, and which can legitimise and legalise violence. This system is held up by a discourse which states present as the truth; discourses such as the one that called for an intervention in Iraq because it was a threat to peace and international security. The ultimate objective is precisely to make public opinion believe that so-called rogue states are violent offenders, not those states which start illegal wars.²¹ If we assume that International Law is violent or allows violence in the terms we have seen in Iraq and Afghanistan, we can then go on to argue that the counterpoint to the current situation cannot emanate from human rights (which are formulated in most cases in a legal framework), but instead must lie in challenging the arguments which will subsequently sustain the political ideas and juridical arguments which operate in the international context.

The fact that violence is only represented in relation to non-state actors is one of the truths

²⁰ See Jürgen Habermas, "¿Qué significa el derribo de un monumento?", El País, May 20th, 2003.

²¹ See, Jaques Derrida, *Canallas: Dos ensayos sobre la razón*, Trotta, Madrid, 2005.

which states produce and reproduce, nurturing and legitimising determined responses which are presented as legal in International Law. The reason the World Trade Centre massacre horrifies us so much more than the same slaughter seen on a normal day in Iraq is not that it is encoded in the media packaging of entertainment, nor does it lie in its cultural proximity, but instead because it taps into some of our society's most deep seated codes and values.

One of the most important challenges we face in the next few decades of the war on "terror" is to decipher this assembly line of truths which is run from the corridors of international agencies, the desks of bureaucrats, and the offices of certain politicians, at the same time as we need to ascertain how those truths interfere with or shape the juridical discourse of the day. These are times in which certain versions of legitimacy (those which equate legitimacy with justice) allow extra-judicial factors around which no consensus exists to be introduced as if they had been unanimously agreed upon. For that reason, when polemical interpretations of the rules are touched upon we must demand at one and the same time both coherence and consensus. If the international community decides to intervene in a region for humanitarian reasons, any action whatsoever carried out there must be guided by that criteria. That implies in equal measure that any consensus worth the name must include other actors (society, international organizations, NGO's). If the framework for allowing the use of force is to be changed, then good reasons for that must exist, and these cannot be exclusively reasons of state.

Legitimacy should be a way of constructing arguments by those who believe that a set of ground rules governing the use of force is necessary, not a place where states decide to impose their truths in order to create spheres of international influence through the use of force. In this sense, the war on terror ought to imply an understanding that certain arguments and ways of forcing the truth down people's throats only fan the flames of barbarity and confusion.

How can a legitimate discourse be articulated in line with the truth? The first answer is that it simply can't. Truth and legitimacy cannot be paired together so neatly, nor can legitimacy and justice, because in any conflict different versions of these concepts co-exist. But what we can do is demand that states and their governments respect the ground rules which limit the use of force, as well as resist deceitful arguments which hold that waging war can pave the way for justice and democracy,²² at the same time as pioneering initiatives which aim to encourage and regulate the peaceful resolution of conflicts.

For example, the United Nations Charter stipulates that before resorting to force states must ensure that all peaceful means of solving a crisis have been exhausted. However, International Law does not establish any mechanism or procedure which might guide this process. Was Rambouillet, in the case of Kosovo, an example of peaceful means being exhausted? Were all the diplomatic options exhausted before the invasion of Iraq? An alternative would see conflict resolution and the use of force rooted in the same area, because ultimately the use of force is nothing if not the last stage in the evolution of peaceful attempts at conflict solving and in consequence forms part of that.

However if the use of force becomes detached from that context, we run the risk of being exposed to dangerous arguments which are presented as effective and legitimate in resolving international crises or serious violations of human rights. It is no easy task, but perhaps the moment has come to pioneer the establishment of certain international criteria in order to manage the negotiations and procedures which states need to apply before coming to the conclusion that all diplomatic avenues have been explored and that only the use of force remains on the table as a possible and legitimate option.

²² See Danilo Zolo, *La justicia de los vencedores: De Nuremberg a Bagdad*, Trotta, Madrid, 2007.

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