Legitimacy of Legislative and Executive Actions of International Institutions

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I have been kindly asked by the organizers of this Symposium to deal with a vast, difficult and, possibly, impossible topic. This is why I will first explain why I will not deal with my assigned topic. Then I will try to deal with it. And finally, if time and your patience allow, I will try to draw some conclusions – here again wider than my assigned topic.

I. Some Introductory Points

Paradoxical as it may seem, I have had more difficulties in identifying the meaning of the word "actions" in my topic than that of the word "legitimacy". "Legitimacy" has for long not been a common word in the language of law in general, and certainly not of international law. It was of concern only for a very few international lawyers, of various "ideological" origins it is true to say, since, by way of example, Tom Frank[1] was neighbouring Myres McDougal,[2] which is clearly "counter

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[1] "Why a Quest for Legitimacy?", *UC Davis Law Review* 21 (1987), 535 or "Legitimacy in the International System", *AJIL* 82 (1988), 705-759; for a more recent presentation: "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium", *AJIL* 100 (2006), 88-106.

[2] See e.g.: Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", *AJIL* 53 (1959), 1 et seq.; Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society,*

nature". However it seems now to be well established that legitimacy is part of the legal debate in the international sphere even though there are some uncertainties, to say the least, about the precise meaning of the word – which I interpret in less of an idealistic way than the previous speakers even if, like them, I accept that legitimacy is subject-oriented; but I will return to this in a few minutes.

Now, the word "actions" raises different issues and I have wondered what precise meaning the organizers of our seminar, whom I take this opportunity to thank heartily both for their initiative and for their invitation, had in mind when formulating the topic. "Actions" could be an equivalent for "measures" as referred to in Chapter VII of the UN Charter; but Chapter VII seems to differentiate between "measures" on the one hand – the word is used both in Article 40 ("Provisional Measures") and Article 41 ("Measures not involving the use of armed force") – and "actions", since Article 42 reserves the word "action" for military measures. For its part, Article 14 authorises the General Assembly of the United Nations to "recommend measures [not actions] for the peaceful adjustment of any situation".

A further difficulty is that I am supposed to speak not just of "executive actions" but of "legislative actions" as well. "Action" as used in Art. 42 of the Charter could be assimilated to "executive action", but surely not, at least from an orthodox and traditional point of view, to "legislative action". But, to tell the truth, I must admit that I see no real basis for the use of such terminology, which reflects, if I may say so with the utmost respect for the organizers of our seminar, an excessively state-oriented view of what international law is. As aptly explained by Weiler, "[a]nalogies to domestic law are impermissible, though most of us are habitual sinners in this respect"[3] – including the best among us; I am thinking in particular of Georges Abi-Saab's remarkable course at the Hague Academy, which rests on this, unfortunate for me, distinction between executive, legislative and judicial functions in international society.[4] I strongly suggest that there is no such thing in international society as the *séparation des pouvoirs*, the separation of powers. And this certainly has to do with our topic today.

1992; see also: Inis L. Claude, "Collective Legitimization as a Political Function of the United Nations", *International Organization* 20 (1966), 367-379.

3 J.H.H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", *ZaöRV* 64 (2004), 550.

4 "Cours général de droit international public", *Recueil des cours*, vol. 207 1987-VII, 11-463.

Within the State, the separation of powers is seen as one of the fundamental elements of democracy, as is very forcefully expressed in Article 16 of the French 1789 Declaration: "*Toute société dans laquelle la garantie des droits de l'homme n'est pas assurée ni la séparation des pouvoirs déterminés n'a pas de constitution,*"[5] which clearly meant, in the minds of the French revolutionaries, that such a society is not democratic. And democracy certainly has something in common with legitimacy, at least at the domestic level. But here again, I have strong doubts that it is so at the international level, and for two different reasons.

First, there is definitely no such thing as the separation of powers in the international sphere. It may be the case that some organs of some institutions have something which looks like executive or legislative functions. But these functions would hardly be separated from each other. Just take the Security Council of the United Nations. It has a "command power". But I would certainly hesitate to define the Council as an executive or legislative organ. It can decide – and even though it has for long hesitated to make decisions of a general and, in a way, abstract nature, it has now taken the plunge, at least in two particular matters: terrorism and the proliferation of weapons of mass destruction. This will be dealt with tomorrow morning by Georges Abi-Saab and Erika de Wet;[6] but even in these two fields, the resolutions adopted by the Counsel are certainly not a manifestation of a purely legislative power, in that it is turned into action. But nor can the Security Council be seen as a pure executive body since, on the one hand, it implements its own decision and, on the other hand, it is entirely dependent on "the forces of Members of the United Nations" to implement the actions it decides upon under Article 42, and it can only "call upon the Members of the United Nations to apply" the measures it decides under Article 41. I suggest that this is neither "executive" nor "legislative"; it is something which is very peculiar to the international sphere.

5 "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution".

6 See below in this book E. de Wet, "The Legitimacy of United Nations Security Council Decisions in the Fight against Terrorism and the Proliferation of Weapons of Mass Destruction: Some Critical Remarks", p. 131 et seq.; G. Abi-Saab, "The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy", p. 109 et seq.

The second reason I am definitely uncomfortable with my topic – and, on this, I certainly do not concur with Professor Keohane[7] – is that I think that the very notion of democracy is simply meaningless at the international level or, perhaps more accurately, that trying to transport democracy at the international level makes the very concept of democracy itself meaningless.

Even though this may seem very general and not purely focused on my topic, I wish to pause for a short while on this, especially because Professor Wolfrum clearly raised the question when he wrote in his introductory paper to this seminar: "Is it now necessary for international law to meet the test of legitimacy modelled on democratic principles."[8] But I think that he himself gives the right answer when he writes just two pages later: "It is doubtful whether it is necessary, possible or even advisable to attempt to invoke the democratisation of international law in general."[9] I entirely concur with this view and would probably go even further: democracy has little to do with international society; indeed, virtually nothing. And I feel that it is extremely confusing to speak of democracy or democratisation of international society as well as of the United Nations, which now give a quite reliable image of the international (restrictively defined as interstate) society.

Weiler, in his interesting article in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2004, on international law governance, democracy and legitimacy goes as far as evoking "the tragedy of democracy in the international legal order."[10] This may be too dramatic an expression. But it is certainly true that international law is based on the sovereignty of the State and not on democracy.[11] And it is true, for

7 A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions", in this volume, at p. 36.

8 See above in this book p. 20.

9 See above in this book p. 22.

10 *Op. cit.*, note 3, at 561.

11 See *ibid.*, at 548. See also, for various views: Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2nd ed., 1928; "Sovereignty and International Law", *Georgetown Law Journal* 48 (1960), 627; Charles Chaumont, "Recherche sur le contenu irréductible du concept de souveraineté internationale de l'État", *Hommage d'une génération de juristes au Président Basdevant*, 1960, 114-151; P. Guggenheim, "La souveraineté dans l'histoire du droit des gens", *Mélanges offerts à H. Rolin. Problèmes de droit des gens*, 1964, 134-146; M. Virally, "Une pierre d'angle qui résiste au temps: avatars et pérennité de l'idée de souveraineté" in: I.U.H.E.I., *Les relations internationales dans un monde en mutation*, 1979, 179-195; J. Verhoeven, "L'État et l'ordre juridique international", *RGDIP* 82 (1978), 749-774; A. Truyol-Serra, "Souveraineté", *Archives de philosophie du droit* 35 (1990), 313-326; J. Combacau, "Pas une puissance, une liberté: la souveraineté internationale de l'État", *Pouvoirs* 67 (1993), n° 7, 47-58.

example, that "one state, one vote" is entirely different from "one human being, one vote". If, as I strongly contend, democracy is the "government for the people by the people" it has indeed nothing in common with the sovereignty principle, at least as it stands in the international sphere.

If we were to transpose democracy at the international level this would mean that China would have to be allocated 1 billion and some hundred million votes. India more than 1 billion, and Nauru 8,000 votes. And even this would not be enough: China would itself have to become a truly democratic state; this may happen in a more or less remote future, but it is clearly not the case for the moment. Therefore, I would suggest that, subject to some qualifications to which I will come later,[12] we had better leave democracy aside at the global level for the time being.

With all this in mind, let me try to come closer to my topic by stating three general propositions:

- first, while legitimacy is not a common word in the language of law, it is not without relation to legality; I would suggest that this relationship goes both ways:
- on the one hand (and this is my second proposition), law being the result of a "successful political process"[13] which defines how policy goals are converted into binding standards, rules of law will only (or, at least, more easily) appear, and be seen, as lawful when they are legitimate; and
- third, on the other hand and reciprocally, legality is part of the legitimisation process in that, in the usual circumstances, behaviours which are in conformity with legal rules are seen as legitimate, while those which are unlawful will appear to be illegitimate; unless the law is widely seen as manifestly unjust, a behaviour's legality almost certainly guarantees its acceptance as legitimate.

This also shows – and this is why I do not entirely concur with the general approach of legitimacy which has been introduced by the two pre-

12 See below, p. 80 et seq.

13 "Une politique qui a réussi" (Émile Giraud, "Le droit positif – ses rapports avec la philosophie et la politique", *Méls. Basdevant*, note 11, 234).

vious speakers[14] – that legitimacy cannot be assimilated with fairness or with justice, as was very brilliantly shown by Thomas Frank in his Hague Academy Course in 1993.[15]

This approach can be illustrated by two different sets of examples regarding, first, the economic international institutions and, second, the use of force.[16]

II. International Economic Institutions

As regards economic institutions, whether the IMF, the World Bank or the WTO, we have probably very striking examples of the discrepancy between legitimacy in the strict sense on the one hand and fairness on the other hand.

All three institutions are vested by their respective Statutes with the power to take action in the bold sense I have accepted:

- the Bank lends money to Member States,
- the IMF can authorise its Members to purchase the currencies of other Members through the policies it defines,[17]
- while the WTO has very little decision-making power, it can nevertheless enforce its rules through the famous mechanism of the Dispute Settlement Body (DSB).

In all three cases, legal techniques (and indeed very different legal techniques) ensure the legitimacy of the decisions of those three international institutions.

The World Bank – that is the IBRD and its affiliate bodies, the IDA and the IFC – ensures the legitimacy of its actions by means of most classical legal tools, i.e. loans agreements. These agreements are seen as legitimate for the very simple reason that the consent of the beneficiary of the loan is given in conformity with the traditional law of treaties which, at least in a volontarist approach, fully preserves the State's sovereignty and, in particular, permits the national Parliament to give formal approval if this is required by the national Constitution.

The IMF Agreement ensures the legitimacy of its "conditionality" – that is the special conditions it imposes on its Member States using its resources – in a more subtle way. It does so through quite peculiar legal instruments, the "stand-by arrangements" which, from my point of view, are not agreements, nor treaties, but unilateral decisions of the Organisation, which are compulsory for the Fund itself, but *not* for the beneficiary (the State which "buys" the currencies).[18] Legally speaking, the latter remains free to comply or not with the conditions – if not, it loses the ability to use the Fund's resources but it does not entail its international responsibility. Here again, the legitimacy of the Fund's action is ensured by its formal respect for the States' sovereignty.

Regarding the WTO, things are different again. As I have said, it is doubtful whether the organization can make decisions binding on its Members, but it can nevertheless take action in order to impose on its Member States the obligation to respect its Statute and the correlative agreements, including the 1947 and 1994 GATTs. But the WTO does so, not through executive or legislative actions, but through the quasi judicial – and more judicial than quasi ... – action of the DSB, which, by the way, does confirm that, at the international level, there is no separation of power: in the case of the WTO, the judiciary is the means by which action is taken.

Here again, the legitimacy of such action is ensured by legal technicalities, which lie on State sovereignty, of which the organizations want to appear as the servants. First, the implementation mechanism is activated by the State or by an Economic Union, not by the organization itself; and, second, the DSB does not decide on the sanctions to be applied in case of non-compliance: it simply authorizes the State victim to take action – that is, in fact, to adopt counter measures in the most classical sense. And we are just referred back to one of the most classical features

14 R. Wolfrum, "Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations", 1 et seq.; A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions", at 25, both in this volume.

15 "Fairness in the International Legal and Institutional System – General Course on Public International Law", *Recueil des cours,* vol. 240, 1993-III, 41-44.

16 In both fields, I will deal only with the global level, leaving aside European law and its institutions.

17 See Article IV, Section 3, of the IMF Articles of Agreement.

18 See Joseph Gold, *The Stand-by Arrangements of the IMF*, 1970 or Patrick Daillier et Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed., 2002, at 1080. *Contra*: Dominique Carreau et Patrick Juillard, *Droit international économique*, 2nd ed., 2005, at 594.

of the most classical international law, the right of each state to take the law into its own hands.

Of course, there are differences; these measures are authorized and framed by the Organisation. However, I suggest that all three cases (World Bank, IMF and WTO) call for common conclusions: the acceptability of the actions taken by the three organisations is guaranteed through mechanisms which formally safeguard the sovereignty of the States, and which are then part of the legitimacy process. At least if we assimilate legitimacy with social acceptability,[19] there can be little doubt that those actions are seen as legitimate by the international actors concerned.

In all three cases, this result is, no doubt, reached. And, in all three cases, it can probably be accepted that the legitimacy of the process stems from a complex combination of factors:

- the initial consent given by the interested States when they became members of the organization,
- fear of the negative consequences of non-compliance,
- the need to obtain aid from the organizations and to be held to be full members of the "community", and
- the additional lip-service paid to State sovereignty by the organizations (at least in the case of the Bank and the Fund) or, in the case of the WTO, the contradictory judicial process which is also a powerful means of enhancing the legitimacy of the action taken.

Another conclusion can also be derived from these three examples. They confirm that legitimacy and fairness are two very different things, since also in all three cases, it is quite apparent that States are not exactly happy to comply with the institutions' demands. There is no need to elaborate: economic need and fear of retaliation are not precisely signs of wilful acceptance. States, whether the addressees of the Organisation's decisions or the beneficiaries of the action, consent; but will and

[19] As very aptly explained by professor Ian Hurd in an illuminating article, "legitimacy ... refers to the normative belief by an actor that a rule of law or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor's *perception* of the institution" ("Legitimacy and Authority in International Politics", *International Organization* 53 (1999), at 381 – italics in the original text).

consent are quite different notions.[20] And, indeed, if underdeveloped countries are less vocal today in their criticisms of the international economic order that they used to be in the 1970s or the 1980s, they certainly cannot be described as willing partners. They accept actions by international economic institutions as a fact of life, not as an expression of fairness. However, I would think that they do not challenge the legitimacy of those decisions.

Nor do they question the procedures followed, unfair as they may appear in several respects. This is quite obvious in respect to the twin Washington Organisations where the decision making power lies in a handful of industrialized countries – the United States, the European Union and some others – as a consequence of the shares system, which results in an unequal distribution of the votes inside both the IMF and the World Bank, a system which is seen as unfair by the Third World. Unfair but legitimate since it is expressly provided for in the Statutes of both organisations and, more deeply, because it is an exact reflexion of the unequal distribution of power among States.

These conclusions *mutatis mutandis* also apply to the actions of international institutions in the field of the use of force (and by force I now mean only military force in international relations).

III. The Use of Force by International Institutions[21]

A preliminary remark can be made however: scholars may be puzzled by the lack of legitimacy of the UN system for peace; the States do not really share these concerns. It is striking that the 2000 Millennium Declaration[22] does not include the words "legitimacy" or "legitimate". This

[20] See Alain Pellet, "The Normative Dilemma: Will and Consent in International Law-Making", *Australian Yearbook of International Law* 12 (1992), 22-53.

[21] This second part of my presentation is directly inspired by a paper I prepared for the United Nations Foundation during the elaboration of the Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (A/59/565, 2 December 2004): "Legitimacy, Legality and the Use of Force" (reproduced on the website of the United Nations and Global Security Initiative – http://www.un-globalsecurity.org/pdf/Pellet_legit_use_of_force.pdf).

[22] A/RES/55/2 of 8 September 2000.

is in strong contrast with the Report adopted by the High-Level Panel of "Eminent Persons", *A More Secure World*, which uses the word a number of times (16 my computer told me ...) and devotes to the question a full sub-section suggesting five guidelines supposed to reinforce the legitimacy of the actions to be decided by the Council: seriousness of threat, proper purpose, last resort, proportional means and balance of consequences.[23] However, significantly, the record falls to two mentions in the Secretary-General's Report, *In Larger Freedom*[24] – and these mentions are not related to the actions of the Security Council; and to one in the 2005 World Summit Declaration which contents itself with supporting an "early reform of the Security Council – an essential element of our overall effort to reform the United Nations – in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the *legitimacy* and implementation of its decisions"[25]; in other words, only the composition of the Council seems to be a matter of concern in relation to legitimacy.

Although I certainly do not share this precise concern and maintain that the actual composition of the Council makes it a reasonably legitimate body, I agree that the UN system for the maintenance and re-establishment of peace does not raise real issues of legitimacy – again compared with fairness. But the request for more fairness is not strong enough to undermine its legitimacy whatever the "eminent persons" may believe. In any case, I think that experts cannot be the real judges of legitimacy and, in this respect, I am not sure I agree with either Rüdiger Wolfrum or Professor Keohane.[26]

There is but little doubt that an armed action in conformity with either an authorization or a measure taken by the Security Council under Article 42 of the Charter or within the framework of Article 51 will be seen as lawful and, consequently, legitimate, while an armed attack falling outside these two hypothesis will qualify, by nature, as both illegal and illegitimate aggression. The sharp contrast between the two Iraqi wars in 1990-1991 on the one hand and 2003 on the other hand is telling in this respect. And this certainly explains why the United States, even reluctantly, sought the Security Council's blessing before attacking Iraq

[23] A/59/565, note 21, para. 204-209.

[24] A/59/2005, para. 70 and 116.

[25] A/RES/60/1, para. 153.

[26] See above, Wolfrum, note 14, at p. 24 and Buchanan and Keohane, note 14, at p. 47 respectively.

in March 2003. Similarly, the high degree of probability that the Security Council would not have authorized the contemplated uses of force by the U.S. in this case, or by NATO in Kosovo, also explains why, eventually, a vote in this organ was not requested: the rejection of a resolution authorizing the use of force would have made its illegality too apparent and, by way of consequence, would have jeopardized its legitimacy (that is its acceptability as a lawful act) even more. Pointing to the same direction, it is striking to note that, in making its case for the Iraq war to international audiences, even the Bush administration tacitly accepted this framework, citing Security Council resolutions dating back a dozen years as legal justification for military action; only to domestic audiences did it offer a "preventive" rationale without reference to the Charter.

By contrast, Security Council Resolution 1368 (2001) has certainly enhanced the legitimacy of the U.S. response in Afghanistan to the "horrifying terrorist attacks" of September 11, by making it indisputable that the situation was one of self-defence even though an authorization by the Security Council is clearly not required for the use of military force in the event of an armed attack. In a way, it is exactly the opposite since Article 51 implies that the inherent right of individual self-defence (*légitime défense* in French) comes to an end when "the Security Council has taken measures necessary to maintain international peace and security" – an achievement which is not defined in the Charter and which, to my knowledge, has never been clearly presented as such in any formal resolution of the Council. I note in passing that, while Resolution 1368 is probably the most clearly identified example of a legally superfluous Security Council resolution enhancing the legitimacy of self-defence – that is the unilateral use of force by a State or a collection of States victim of an armed attack, this is clearly not an isolated example. Just think, for example, of the whole of the first Gulf war[27] when resolution 661 (1990) of the Security Council, which initiated the whole process affirmed "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter".

These examples clearly show that a blessing by the international organ on the use of force by a State – or by States – reinforces the legitimacy of its or their unilateral use of force – this absent any action by the international institution itself.

[27] Or second Gulf war if you include the Iran-Iraq war.

Now, when the Security Council decides to act or to authorize actions under Chapter VII of the Charter, there is no doubt, leaving aside legal quibbles made by scholars that States generally speaking clearly see such actions as legitimate. A striking example is the behaviour of the Milosević regime during the war in Bosnia-Herzegovina. As clearly appeared from the recent pleading in the *Genocide* case before the ICJ involving Bosnia and Herzegovina and the then Serbia and Montenegro, Yugoslavia was, at the time, conscious that it had to seem to comply with the Security Council's resolutions condemning its involvement in Bosnia and Herzegovina. And as Brdjanin, one of the leaders of the government of the Republica Srpska, the Bosnian Serb secessionist entity, put it: Belgrade wished "to appease the requests of the international community to cease all involvement in the country" while maintaining its hidden aid to the entity.[28]

So, even the Milosević regime saw the resolutions of the Security Council as both lawful and legitimate. This – and many other examples could be given – clearly shows that even the "wrongdoers" have no doubt that they must comply with the decisions of the Security Council. In this respect at least the legitimacy of its actions is not challenged. But it does not mean that, at the global level, Security Council action is seen as "fair" and, here again, we meet this opposition, or, at least, the absence of full coincidence, between legitimacy and fairness.

However, legitimacy through the rule of law may be jeopardized if the fairness of the legal process itself is put into question. In the present situation, this is probably the case as far as actions decided by the Security Council are concerned. I see two main reasons for this discrepancy (corresponding to the only two cases in which the use of military force is lawful in the current state of international law):

(1) the voting rules applicable within the Security Council are seen as unfair since they give a handful of permanent Members a power of veto, which, rightly or not, seems unfair to a great majority of States and

[28] See ICJ, CR 2006/10, 6 March 2006 (Condorelli), at 26, para. 34; see also, e.g.: CR 2006/2, 27 February 2006 (Van den Biesen), at 46-47, para. 62-64 or at 51, para. 75; CR 2006/8, 3 March 2006 (Van den Biesen), at 57, para. 72-73 or at 59-60, para. 82-83; CR 2006/34, 20 April 2006 (Van den Biesen), at 28, para. 1 and at 29-30, para. 6-7 and *ibid.*, (Ollivier), at 70, para. 20; see also the pleadings by Serbia and Montenegro trying to prove that assistance by the FRY to RS "was perfectly compatible with the (...) provisions of the United Nations Charter" (CR 2006/17, 13 March 2006 (Brownlie), p. 23, para. 222); see also CR 2006/16, 13 March 2006 (Brownlie), at 44-45, para. 129.

public opinions all over the world – which weakens the moral authority of the decisions of this organ, including those authorizing the use of force; and

(2) the conditions for the use of the "inherent right of individual or collective self-defence" under Article 51 of the Charter are uncertain and open to question, Resolution 3314 (XXIX) of the General Assembly (1974) defining aggression being both debatable and optional for the Security Council.

On the other hand, the legal conditions for the lawfulness of the use of force are seen in some limited but highly influential circles – mostly the Bush Administration and the US conservatives – as abusively (and therefore illegitimately) restrictive, mainly because they do not offer a proper legal framework for the defence and reinforcement of the State's interests and do not authorize (the United) States to use force in assuring their (its) national security interests. The U.S. and some others are therefore induced to define unilaterally both their own legitimate interests (usually presented under a veneer of "values") and the means by which they are most properly safeguarded – at the expense not only of the UN collective security system and commonly accepted international law, but also of legitimacy as perceived by the rest of the World.

An interesting phenomenon is however that the putting into question of the fairness of the system as such has not – or has not yet – from my point of view, jeopardized the legitimacy of the specific actions decided or implemented under such a system.

However, it clearly stems from what I have just said that the current established process for legitimization of the use of military force through the United Nations is under strong criticism from various circles and different parts of the World – even if for very different and sometimes quite opposite reasons. In the current political climate it would seem unrealistic and hopeless just to defend the system as it stands – although from my personal point of view it is highly defensible. On the other hand, it seems rather futile and useless to suggest changes in the law written into the Charter which would clearly be unacceptable for either, or both, of the two opposed "camps" – if only because any change which calls for a revision of the Charter implies a vote and ratification by a two-thirds majority "of the Members of the United Nations, including all the permanent members of the Security Council."[29]

[29] Articles 108 and 109.

At the "normative" level, two directions could be explored, relating respectively to each of the two conditions for the lawfulness of the use of force under positive international law. *First*, something could probably be done with respect to Article 2, paragraph 4, of the Charter combined with Chapter VII. *Second*, the conditions of use of the inherent right of individual or collective self defence could be more clearly defined.

It is commonplace to recall that Article 2, paragraph 4, is not satisfactorily drafted, and the "codification" by Resolution 2625 (XXV) (1970) of the principle it lays down improves its understanding in only a limited way and, in any case, does not seem to fit the current state of international relations. It would be advisable to adapt and clarify the scope of this principle in a formal and consensual Declaration on the Legitimate Use of Force in International Relations, the main aspects of which could be inserted into a newly drafted Article 2, paragraph 4. The main themes of such a Declaration could be summarized as follows:

(i) the use of force in international relations or its threat is forbidden under all circumstances except when the conditions set out in the UN Charter are fulfilled (the current drafting of Article 2.4 does not say this straightforwardly);

(ii) the prohibition of the use of force in international relations includes any acts of reprisal, military intervention, and the organization of or aid to civil wars in other states and any acts of terrorism (this is already included in Declaration 2625 (XXV), but could be made clearer and more categorical);

(iii) whether lawful or unlawful, any use of force in international relations does not exempt the Parties, including military forces under UN command, from fully respecting the laws of war, including those pertaining to military occupation of a foreign territory (this is made necessary by the uncertainties in severalsituations where the differentiation between *jus ad bellum* and *jus in bello* is not clearly perceived).

It cannot be seriously maintained, leaving aside Article 107 – which has clearly become obsolete – that there is any legal ground for the use of force in international relations other than (i) self-defence (or, at least, reaction to another use of force[30]) and (ii) measures taken by the Security Council pursuant to Article 42, and there is no need or any realistic possibility to change this state of the law: "legitimate self-defence" is and must remain the only exception to the prohibition of the use of force in international relations. However, given the uncertainties in the

[30] See below, p. 79.

current drafting of the relevant provisions of the Charter, there is room for varied interpretation. I suggest in particular that:

(i) the French (and Spanish) text of Article 51 should be brought into line with the English text (*attaque armée* replacing *agression armée*) in order to avoid misunderstandings such as the ones which happened after September 11; more widely, the use of the word "aggression" (for which no generally accepted and "operational" definition has ever been found) should be deleted from Chapter VII of the Charter and replaced by the less sensitive expression "armed attack";

(ii) it could be accepted that measures that do not amount to an armed attack but do involve a use of force justify a proportional use of force by the victim or victims (the question was left open by the International Court of Justice in *Nicaragua*[31] – more recently, the Court seems to have accepted the lawfulness of such a further step[32] that I nevertheless hesitate to encourage);

(iii) it should be understood that any pre-emptive use of force is subordinated to a decision by the Security Council, but Article 42 should be redrafted so that (or formally interpreted in such a way that) the current practice (debatable from a strictly legal point of view) of authorizing the use of force by a State or a group of States be clearly lawful.

Whatever the clarifications and cautious widening of the cases in which the use of force is lawful, the main question remains: who may decide? The answer to be found in the Charter is unambiguous: failing an armed attack the decision-making power belongs to the Security Council alone,[33] and this is also true in case of an armed attack since, as I have already said,[34] pursuant to Article 51 the inherent right of self-defence ends when the Council "has taken the measures necessary to maintain international peace and security". There should be no question that a State, whichever it is, cannot be a judge in its own case (*nemo judex in re sua*); otherwise the very idea of a collective security would vanish. However, it must be recognized that in the present state of the law the monopolistic situation of the Security Council may give rise to an incapacity to act, claims for efficiency substituting the law in the quest for legitimacy.

[31] Judgment of 27 June 1986, *ICJ Rep.* 1996, p. 110, para. 210.

[32] See the Court's Judgment of 6 November 2003 in the *Oil Platforms* case, *ICJ Rep.* 2003, p 187, para. 51, or pp. 191-192, para. 64.

[33] Article 39.

[34] See above, p. 72 et seq.

Leaving aside the numerous and unconvincing attempts to modify the composition or voting rules in the Security Council, three tracks probably deserve to be explored.

First, one could think of an "organized self-restraint" in the use of the veto. By this I mean that the five permanent Members should agree that, when not directly concerned by a given threat to the peace, breach of the peace or armed attack, they would abstain from using their veto right. This should be done through a formal and duly publicized memorandum of understanding.

Second, the celebrated Resolution 377 (V), "Uniting for Peace", should be revived. In reality, it has never been repudiated and all categories of States have used it at one time or another, which confirms its legitimacy even if the debate on its legality is still open. But the "Dean Acheson Resolution" has fallen asleep since the end of the Cold War. It should be seen as a practical means to overcome the paralysis of the Security Council and a powerful tool for enhancing the legitimacy of the use of force in such a case: the General Assembly is seen by most States as more "democratic" than the Council (as debatable as the very idea of "international democracy" is[35]) and the end of the confrontation between blocs should lessen fears of "automatic majorities."[36]

Third, but probably not least, deep thought should be given to the possibility of using the regional arrangements provided for in Chapter VIII not only as a means to achieve peaceful settlement of local disputes or to enforce measures decided on by the Security Council, but also "upstream", as forces of proposals and as an aid to decision-making by the Council. At a time when the legitimacy of both the Security Council and the United Nations as a whole is put into question, such a shift towards regional organizations (when they exist – but this could be an incentive to create new ones, in particular in Asia) could be a way to safeguard a sense of collective security in relation to the UN but within less discredited institutions. Moreover, those arrangements, being more proximate to the (potential) enemies, could, at the same time, be more efficient and more easily accepted than the UN seen as a remote "World Government".

In this respect, one could contemplate encouraging (or directing?) those regional arrangements to act as "peace watchmen" and to bring to the

[35] See above, pp. 64-66.

[36] See Alain Pellet, "Inutile Assemblée générale?", *Pouvoirs* 109 (2003), 43-60, esp. at 52-53.

attention of the Security Council potential threats to peace in the region. It should also be accepted that, in a case of unlawful use of force against one or several Member States of those regional organizations, they could have the first word (subject to confirmation by the Security Council) in determining whether there is a case for the use of force in self-defence and proposing specific measures to the Council; they could even provisionally enforce them until the Security Council has taken the necessary measures already envisaged within the framework of the African Union.[37]

The suggestions made above are intentionally limited to fields that are not yet totally explored or are in the works (such as the reform of the composition of the Security Council). I am strongly in favour of revisiting some important proposals for the reform of the UN which are far from having been completely implemented so far, such as the *Agenda for Peace* of former Secretary General Boutros-Ghali of 1992[38] and 1995[39] or the Brahimi Report of 2000;[40] their implementation would improve the efficiency of the UN and enhance the legitimacy of its action. However, I am firmly convinced that the current crisis is much less the result of the weaknesses of the legal framework than of the lack of political will of the various actors – and I have less in mind that of the U.S. than that of its partners which do not, or dare not, properly use the irreplaceable tool of regulation of the use of force provided for by the UN Charter.

However, once again, these proposals may enhance the efficiency of the Charter *system* for the maintenance or re-establishment of international peace and security, or reinforce its legitimacy, or make it look fairer, they must not hide the fact that, in the present state of international law and relations, the *actions* of the Security Council under this disparaged system are not seen by their main addressees – the States – as being illegitimate. Nor is it the case for public opinions. I would suggest that, on the contrary, the idea is well anchored that *only* actions based on the

[37] See in particular the Protocol relating to the Establishment of the Peace and Security Council of the African Union, Durban, 9 July 2002.

[38] *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc. A/47/277 and S/24111, 31 January 1992.

[39] *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1, 3 January 1995.

[40] Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305-S/2000/809, 21 August 2000.

Charter are seen as legitimate. In other words, we face the paradox of a system the fairness of which is put in doubt while the actions taken in conformity with it not only are seen as legitimate but, even more, have a legitimizing effect.

IV. Some Concluding Remarks

Globally – and this holds true both for the use of force and the economic global system, I would think that the challenge to the fairness of the system is not important enough to undermine its legitimacy. The addressees, the beneficiaries of the "actions" decided on or undertaken by international institutions, feel that the decisions made are legitimate. But this also calls for some more specific conclusions.

First, generally speaking the actions of international institutions at the global level at least are seen as being legitimate – and this, in itself, is very telling. It shows that at the end of the 20th and the beginning of the 21st centuries, multilateralism is not seen as incompatible with sovereignty and is certainly accepted as more legitimate than unilateralism. The balance between sovereignty (or, more precisely, the formal respect for State sovereignty) and multilateralism seems even to be the reason why the system itself is felt to be legitimate.

This is certainly true for the use of force – if only because self-defence is better accepted when backed by a resolution of the Security Council. But this is also true in the economic field.

No doubt, the IMF or the WTO is unpopular and the decision-making processes in both institutions as well as in the World Bank are criticized and, often, felt as being unfair and inequitable. Nevertheless, multilateral institutions are seen as more secure and reliable channels for international aid than purely bilateral relations, and the reinforcement of the rules of the game in the field of trade through the WTO since 1994 has been accepted by the States as progress. There are two main reasons for this: (i) all Member States participate in the discussions for the adoption of new rules or the reinforcement of existing principles and the generalized practice of consensus gives all groups of States – if not all individual States – a chance to object to the adoption of illegitimate rules, while (ii) the implementation mechanism based on contradictory proceedings is widely accepted as legitimate and decently efficient.

Second, this acceptance of the actions decided by international institutions does not mean that the global system from which these actions

emanate is itself seen as being fair. Neither the quota system in the Bretton Woods Agencies nor the right of veto in the Security Council is accepted as such. It remains nevertheless that, globally, States do comply with the outcomes of those processes and that the claims based on the unfairness of the system, whether made from inside the system, at the interstate relations level or coming from outside the system, from the so-called civil society, the NGOs, are not strong enough to delegitimate lawful action taken by an institution of the system. No State or group of States has voluntarily decided to step out or to stay apart from the system, and the concessions made by States in order to join the WTO are most revealing of their global acceptance of the rules of the game – whatever their reasons.

Not only is the international global system seen as legitimate, but admission to the system itself clearly appears as part of the legitimization of the States themselves.

Third, claims of illegitimacy of both the system and the actions taken in accordance with its rules and principles do not usually come from inside; they come from outside: they emanate from "public opinion" (an undefined notion, but an indisputable reality), and in particular the NGOs, which style themselves as the guardians of international morality.

This self-defined function is not to be underestimated: it offers a constant incentive for reforms and improvements and their claims are, in the long term, echoed by the system as a whole and the particular institutions which compose it, which probably makes it more legitimate and, consequently, more acceptable and sustainable.

Now, I think that my conclusions would certainly be more popular if I were of the view that the system and the actions taken in accordance with the system are illegitimate. But this view is neither reasonable nor tenable.

Before ending this rather general paper on a vast and fascinating topic, I offer some even more general conclusions on the very nature of legitimacy:

(i) first, fairness and legitimacy are two different concepts; of course, they are connected to each other, in that fairness of the procedure or its outcomes – that is the rules to be followed by the actors and the actions of the actors themselves – is probably part of the legitimacy of such rules and actions; nevertheless,

(ii) it is both intellectually acceptable and observable in practice that claims for the unfairness of these systems and actions are not strong

enough to undermine their legitimacy – even though, in the long term, they could have this result; and

(iii) legitimacy in the international legal sphere is no doubt a fashionable concept, but I wonder whether, after all, it is that new.

It reminds me of a most classical discussion, well known to all of us, on the two elements of custom, which is said, and rightly so, to be based on general practice accepted as law. And I suggest that, after all, the very idea of legitimacy of the rules of law is nothing more than the good old *opinio iuris* of the addressee that the rules which are addressed to it are acceptable and must be obeyed. And this joins my deeply rooted conviction: the very test of law in general and of international law in particular is not the will of the States, nor is it pure relations of power, it is a subtle alchemy of a great variety of elements which at the end of the day result in a generalized *opinio iuris*, which founds both the efficiency and the legitimacy of the rule of law. This *opinio iuris* also explains why, in spite of so many criticisms, the global system and its actions are seen as being legitimate.

Now, and to put it bluntly, with respect, I am not sure that I agree with Rüdiger Wolfrum[41] that there is a deficit of legitimacy at the global level. This does not, however, mean that the system is fair. It just shows that it is not unacceptably unfair, which, I think, is different. This may be the wrong kind of legitimacy, to paraphrase Professor Keohane;[42] it is nevertheless *a* kind of legitimacy.

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[41] See Wolfrum, note 14, at p. 19 et seq.

[42] See Buchanan and Keohane, note 14, at p. 42 et seq.

Sonderdruck aus

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Legitimacy in International Law

Herausgegeben von R. Wolfrum · V. Röben

Springer