

A Response to “‘Legitimacy’ in International Affairs: The American Perspective in Theory and Operation,” Speech Given by Undersecretary of State for Arms Control and International Security, John Bolton, November 13, 2003

(Another American Perspective on Legitimacy in International Affairs)

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Last November, John Bolton, the Undersecretary of State for Arms Control and International Security, gave a speech entitled “‘Legitimacy’ In International Affairs: The American Perspective in Theory and Operation.”¹ The speech addresses the legitimacy of three aspects of U.S. foreign policy – the authority for the war in Iraq, a new U.S.-led nonproliferation effort called the Proliferation Security Initiative, and opposition to the International Criminal Court. Some points Bolton makes on these subjects are wrong, and this piece corrects those points. More fundamentally, however, Bolton’s speech attacks the very idea of international norms. This paper is then also a brief defense of multilateralism.

The title of Bolton’s speech is notable for two reasons. First, although he serves in American government, the American perspective is not John Bolton’s to pronounce. An ally of Jesse Helms, Bolton is on the hard right of a hard right administration. His voice is an American perspective, but hardly the American perspective.

Second, in his title and throughout his speech, Bolton uses the word legitimacy oddly. At times he seems to equate legitimacy and legality – a word he avoids. Legitimacy is not legality. Legality is conformity to established rules. Legitimacy is more vague. Scholars generally use the word legitimacy to refer to the perception among those affected by a law that the law is valid; that it is just.² Legitimacy is a measure of a rule’s morality and commitment to the rule. A law may be legal but perceived as illegitimate. But Bolton is not discussing the legitimacy of laws; he is talking about the legitimacy of U.S. foreign policy.

Bolton’s use of legitimacy is confusing because actions generally need to be legal to be legitimate. One function of legality is to deliver legitimacy. It is true, however, that international opinion generally sees some arguably illegal actions, like NATO’s air campaign against Serbia, as legitimate. So there is something to be said for a standard of legitimacy that is not strictly married to legality.³ But Bolton goes further than that. He argues that only Americans determine the legitimacy of American foreign policy.⁴

That argument is dangerous. It is dangerous because it rejects the existence of soft power – the idea that our reputation for moral action and conformity to international standards make us more powerful.

¹ John R. Bolton, “Legitimacy” in International Affairs: The American Perspective in Theory and Operation, Remarks to the Federalist Society, Washington, DC, November 13, 2003

² Thomas Franck, “Legitimacy in the International System,” *American Journal of International Law*, 1998 (82 AM. J. INT’L L. 705).

³ It should be noted here that legitimacy requires that states who take action that violates international law gain an added burden to justify those acts in moral terms acceptable other countries.

⁴ Bolton does not make this point clearly – he mingles legal and moral arguments, mangling his logic. But once you cut through the confused logic, the point seems to be that American democratic institutions alone legitimate American foreign policy.

The Proliferation Security Initiative

One topic the speech discusses is the Proliferation Security Initiative (PSI). The initiative is a U.S.-led effort to organize states to cooperate to interdict shipments of technologies used to build biological, chemical, or nuclear weapons or the missiles to deliver those weapons. With ten other nations, the United States plans to share intelligence and use existing legal authority to stop ships in port, territorial waters, and the high seas. The plans call for conformity with the Law of the Sea Convention, the multilateral treaty that governs the seas. Bolton's discussion of the initiative is basically descriptive. On this subject, he avoids controversial claims.

Bolton does say, however, "What we do not believe is that only the Security Council can grant us the authority we need." What this statement means depends, of course, on what authority is needed. States have limited authority to stop shipments today. Writing a new treaty or amending the Law of Sea Convention would probably not aid interdiction. Proliferating states would never sign the treaty, leaving them outside its legal grip. If the United States wants additional authority to lawfully stop shipments, it will need the Security Council's permission.

All states can search ships in their own ports under national law. In territorial waters, which extend 12 miles off a coastal states' shore, the coastal state has a limited right to regulate shipments. But ships passing through territorial waters have the right of innocent passage, meaning that they cannot be stopped unless they pose some threat or safety risk to the coastal state. The Convention does not provide any clear basis for denying innocent passage to shipments transporting missiles or even nuclear, chemical or biological weapons materials. On the high seas, which are all waters beyond territorial waters, ships enjoy freedom of the seas – an ancient right to noninterference tied to commerce. Only ships engaged in piracy, the slave trade, unauthorized broadcasting or drug trafficking lose their right to freedom of seas. On the high seas, states can stop ships flying their state flag and can grant that right to other states. Any state can stop ships that fly no flag.

Between the strong rights states have to interdict shipments in port and the limited rights states have to stop shipments in territorial waters and on the high seas, the PSI states can stitch together the authority to stop most suspect shipments – but legal gaps, wide enough to sail a missile shipment through, will remain. A North Korean ship, for instance, flying its nation's flag and carrying missiles and even centrifuge equipment to Iran, could likely claim a right to deliver its goods unmolested, so long as it stayed out of ports of cooperating nations.

The only way for PSI states to get legal authority to stop that shipment is to get a Security Council Resolution. Stopping the shipment by force would amount to an act of war. Under international law, acts of war require either self defense or Security Council authorization.⁵ Self-defense is a limited right. It justifies interdiction of a shipment bound for terrorists or a state at war with interdicting state. But if U.S. forces interdicted a shipment of missiles from North Korea to Iran based on the right to self-defense, we would undermine the idea of self-defense. We would make it a rhetorical flourish that can justify aggression.

The approach taken thus far by the Proliferation Security Initiative – working with allies under international law – is the right one. The legitimacy allies and legality bring will be crucial in extending international cooperation against weapons proliferation. In nonproliferation, unilateralism is worse than useless. The United States must rely on other states to police the globe and help protect our borders from terrorists with unconventional weapons. Intimations that the United States is not bound by international law only damage the legitimacy that our nonproliferation efforts require.

⁵ It might be possible to assert an emerging norm of customary international law against proliferating nuclear weapons shipments, allowing interdiction. For more information on possible legal basis for interdicting weapons shipments see Benjamin Friedman, "The Proliferation Security Initiative: The Legal Challenge," Bipartisan Security Group Policy Brief, September 2003, http://www.gsinsitute.org/docs/09_03_PSI_brief.pdf

Article 98 Agreements and the International Criminal Court

Bolton also discusses the International Criminal Court (ICC). He expresses general U.S. concerns about the ICC and defends U.S. efforts to exempt its citizens from ICC prosecution.

The concerns Bolton voices about the ICC are mostly well founded. Clinton administration officials who negotiated the Rome Treaty, which created the ICC, shared many of these concerns. First, the ICC claims jurisdiction over nationals of states who are not party to the treaty. That claim of jurisdiction violates the idea that in international law power should flow up from the people, not down from bodies claiming authority.⁶ Second, the Court is not checked by any other body, creating fears that overzealous prosecutors could run amok.⁷ Third, the ICC is empowered to define aggression, a task that may infringe on Security Council duties.⁸ Finally, opponents of the ICC note that it does not include due process guarantees commensurate with U.S. standards. This claim has some merit, but the Court will have strong procedural safeguards – stronger perhaps than U.S. military tribunals, where there is no right to a jury trial.

The problem with the approach to the ICC taken by Bolton and the Bush administration is not the complaints voiced about the treaty; it's the reaction to those complaints. By expressing its unwillingness to ratify the treaty (what some call unsigned the treaty) in the spring of 2002, the United States surrendered its official role in addressing the ICC's rules.⁹ By unsigned the treaty, we sacrificed our ability to fix it.

Worse, legislation passed in 2002, the hyperbolically named American Service Members Protection Act (APSA), strips any nation who signed the Rome Statute of U.S. military aid. The legislation directly contradicted administration statements that the United States would not undermine the ICC.¹⁰ The bill exempted NATO allies and several other states allies. The APSA also contains national security waivers, allowing the President to waive the sanctions for nations who cooperate with the United States. Thus the legislation seeks to strong-arm (blackmail is another word) nations into resisting the ICC. When support for the ICC remained in the face of these tactics, the administration decided to use the legislation for a different but related purpose: to pressure nations to sign what are known as Article 98 agreements.

Article 98 of the Rome Treaty theoretically allows nations to negotiate bilateral immunity agreements – assurances that neither state will deliver the other's nationals to the ICC. Thus far the United States has signed Article 98 agreements with 70 nations. Bolton argues that these agreements cover all U.S. citizens. Most European diplomats disagree. They argue that the agreements can only apply to military personnel and government employees.

The Europeans have the better of the argument. The language in Article 98 comes from Status of Forces Agreements – treaties meant to protect troops serving abroad from prosecution in their host state. That is why Article 98 refers to persons from a “sending state.” Only government employees and military personnel are “sent.” Civilians arrive by their own accord. The meaning Bolton gives to Article 98 – and thus the immunity from ICC prosecution that U.S. agreements purportedly give to U.S. civilians – seems to contradict the wording of Article 98.

But this linguistic argument has limited bearing on the subject of this paper and Bolton's speech – the legitimacy of U.S. action. The tactics the United States uses to undermine the ICC do far more damage to our legitimacy than our legalistic argument about the meaning of Article 98. Whatever misgivings the

⁶ The states who sought to extend jurisdiction over nonsignatories claimed that failure to extend jurisdiction would leave rogue states outside the treaty. That is a real concern, but a better approach would have been to use the moral authority of the international community to pressure states to sign up for the court, and to use Security Resolutions to authorize prosecution of nationals of recalcitrant nations.

⁷ Jennifer Elsea, “U.S. Policy Regarding the International Criminal Court,” Congressional Research Service Report, September 3, 2002, <http://www.usembassy.it/pdf/other/RL31495.pdf>, p.6

⁸ Ibid, p.6

⁹ Ibid, p.1

¹⁰ Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002, <http://www.state.gov/p/9949.htm>

United States has about the ICC, immunity from prosecution for war crimes – prosecution that is unlikely to occur – is not worth the resentment our policy has created.

Bolton's narrow view of legitimacy avoids the question of how our actions look – the real measure of legitimacy. The President has waived sanctions against European states that support the ICC but used the law to deny military aid several small states for their refusal to sign Article 98 agreements. That smacks of double standard. In the eyes of other states, we have embarked on a policy of blackmailing large portions of world, especially weaker states, in order to avoid the prosecution for war crimes. Once the United States led the fight to enact international justice, now we appear to assault it. Like it or not, the ICC exists. It claims the mantle of international justice. Given that we cannot alter this reality, the United States should work to improve the institution, rather than petulantly assailing it.

By attacking the ICC and punishing those states that support it, the Bush Administration has damaged the U.S. reputation for commitment to the rule of law. It is not lost on the rest of the world that American opposition to the ICC is part of pattern – a pattern illustrated by the rejection of the Kyoto Accords, the Biological Weapons Convention Protocol, and other treaties. Together these actions demonstrate contempt for international law. Such contempt, or the mere perception of it, shrouds U.S. policy in illegitimacy.

Iraq

Bolton's speech also discusses the legitimacy of the war in Iraq. He argues that the United States had authority under international law to attack Iraq in the spring of 2003. He then argues that the United States did not need authority under international law to attack Iraq. One is left to wonder why someone making the second argument bothers to make the first. These implicitly contradictory arguments are examined in turn.

A point about international law is needed here. The United States is a party to the United Nations Charter, the treaty that governs the use of force by states. The UN did not impose itself on the United States; we agreed to it, obligating ourselves to obey certain rules. Because the U.S. Constitution makes treaties the "law of the land," the UN Charter is part of U.S. law. Under the UN Charter, states can legally go to war only if they are acting in self-defense or with authorization of the UN Security Council.¹¹ Although U.S. officials, including President Bush and Vice President Cheney, warned that Iraq posed an imminent threat to the United States, Bolton does not make a self-defense argument. He argues only that Security Council resolutions authorized the war in Iraq.

Bolton overstates the case. The authority the United States had under the resolutions is ambiguous at best. Ambiguity does not make for fun reading or good politics, but arguments about the authority for this war that do not at least acknowledge the existence of ambiguity are closer to bumper sticker slogans than serious considerations of the issue. Bolton argues that three Security Council Resolutions authorize the war – Resolutions 678 and 687, passed before and after the first Gulf war, and Resolution 1441, passed in November 2002.¹²

With resolution 678, the Security Council demanded that Iraq comply with a prior resolution, 660, which demanded Iraq's withdrawal from Kuwait. Resolution 678 authorized states cooperating with Kuwait to use of force to enforce 660 and "all subsequent relevant resolutions" and to restore international peace and security in the area.

Resolution 687 required that Iraq declare its stockpiles of nuclear, chemical, and biological and ballistic missiles with ranges greater than 150 kilometers. The resolution demanded that Iraq allow weapons inspections in Iraq and allow them to destroy these weapons. The resolution also demanded that Iraq pay

¹¹ Some legal scholars argue that recent experience has created a norm of humanitarian intervention that justifies war without self-defense or Security Council authorization. See for instance, Jane E. Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change," in *Humanitarian Intervention: Ethical, Legal, And Political Dilemmas*, (J. L. Holzgrefe & Robert O. Keohane eds. 2003). But neither the Bush Administration nor the British used this legal argument to justify war in Iraq. Therefore the right to humanitarian intervention is not discussed here.

¹² In the speech Bolton also argues that legitimacy for the next government of Iraq comes from the Iraqi people, rather than any international body. There he's right. Sovereignty must flow up before it can flow down.

reparations to Kuwait and cease support for terrorism. Iraq's acceptance of these terms began the official cease-fire, which took effect in April 1991.

Resolution 1441 declared Iraq to be in breach of its obligation under Resolution 687 to disarm but offered Iraq "a final opportunity" to cooperate with inspectors and declare its stockpiles of banned weapons. The resolution set up a new inspections regime and stated that Iraq's failure to truthfully declare the existence of weapons programs would constitute "further material breach." Additionally, the resolution instructed the inspectors to report any interference with inspections to the Security Council and stated that the Council would convene to consider violations of Iraq's obligations. Finally, the resolution reminded Iraq that failure to comply with its obligations would trigger "serious consequences."

One argument for the war's legality says that because Resolution 678 authorized the use of force for "all relevant subsequent" resolutions, Iraq's violation of resolutions 687 and 1441 allowed the United States and any of the other states who fought Iraq in the first Gulf War to attack Iraq. This argument uses treaty law to note that because the United States was a party to a ceasefire agreement embodied in Resolution 687, Iraq's violation of that agreement dissolves the ceasefire and recreates the legal situation where Resolution 678 authorized force. It follows that the United States could attack Iraq. The other argument for the war's legality is that Resolution 1441's reference "serious consequences," allows the United States to attack Iraq for its failure to comply with the resolution.¹³ The fact that 1441 speaks of Iraq's "material breach" use the same treaty logic, indicating that Iraq's lack of compliance might allow the United States to restart the first Gulf War under 678's authorization of force.¹⁴

As a preliminary matter, one might ask whether Iraq was even in violation of its obligations under 687 and 1441, given the failure of U.S. forces to find banned weapons in occupied Iraq. It appears that Iraq did violate its obligations, although not as flagrantly as pre-war estimates guessed. Although Iraq seems to have retained no chemical, biological or nuclear weapons, the report issued by Chief U.S. weapons inspector David Kay indicates that Iraq did keep related subsystems and research facilities.¹⁵ If that statement is true, Iraq violated Resolution 687 (section C8a). Iraq's financial support for suicide bombing in Israel also violated Resolution 687 (section H).¹⁶ Iraq also likely violated the terms of Resolution 1441 by failing to fully disclose the threadbare weapons programs it retained, and because it was not fully cooperative with inspectors (see paragraphs 3 and 5, respectively).

Even so, both Bolton's arguments for the war's legality are shaky. The argument that 678 authorized the war has several holes. 678's authorization of force to uphold Resolution 660 (demanding Iraq's pullout from Kuwait) and "all relevant subsequent resolutions," can be read to mean only all the relevant resolutions from 660 to 678. In other words, the Council might be speaking retrospectively about the resolutions it had passed regarding the invasion rather than speaking prospectively and issuing a blank check to enforce resolution it had not yet passed. 678 would not then authorize force in response to Iraq's violation of 687 and 1441.

Even if 678 was not the last "relevant subsequent resolution," the ceasefire in 1991 may have changed the situation so much that resolutions could no longer be considered relevant and subsequent. It follows that violations of Resolutions 687 and especially 1441 could not reach back to 678 to trigger the use of force.

Moreover, Resolution 678 authorized only states "cooperating with Kuwait" to use force. That language implies that the authorization of force is tied to the ejection of Iraqi forces from Kuwait and contingent on Kuwaiti cooperation. If only states cooperating with Kuwait can use force, how can the U.S. use force without Kuwaiti help for an invasion of Iraq twelve years later? Indeed, both legal arguments Bolton

¹³ Bolton does not lay these arguments out in detail. He provides only a cursory overview of the legal case for war.

¹⁴ Frederic Kirgis, "Security Council Resolution 1441 on Iraq's Final Opportunity to Comply With Disarmament Obligations," American Society of International Law, ASIL Insights, November 2002, www.asil.org/insights/insigh92.htm

¹⁵ Kenneth Pollack, "Spies, Lies, and Weapons: What Went Wrong," *The Atlantic Monthly*, January/ February 2004.

¹⁶ Iraq is widely reported to have paid families of Palestinian suicide bombers. That violates 687's command that Iraq "not...support any act of international terrorism." See "Palestinians Get Saddam Funds," www.bbc.com, March 13, 2003, http://news.bbc.co.uk/2/hi/middle_east/2846365.stm.

makes for the war struggle to answer questions of agency. Iraq may be in breach, but why should it be the United States that punishes their breach with force? Could any state have attacked Iraq?

Fourth, 687 includes a remedy for violations of its terms short of force. In paragraphs 21 and 22, the resolution says that the sanctions on Iraq might be lifted should Iraq comply. Resolution 687 can then be read to indicate that its breach should be met with sanctions, not force.

Finally, the argument that Iraq's violation of 687 is a "material breach" that authorizes war under 678 relies on the faulty idea that resolution 687 can be analogized to a treaty. The Vienna Convention on the Law of Treaties allows a state damaged by another state's unjustified repudiation of an essential part of their treaty to suspend its own obligations under the treaty. Here the "treaty" in question is a cease-fire embodied in a resolution, so Iraq's failure to comply could relieve the United States of its obligation not to attack. But resolutions are not treaties.¹⁷ Without a treaty breach, it is not clear the U.S. has rights under the Vienna Convention to end the ceasefire. Moreover claiming a right to attack from a broken cease-fire agreement might violate the UN Charter.

Another problem with the breach of treaty concept is timing. If Iraq was in breach, how could the United States argue as late as March 19, 2003 that 687 still imposed obligations on Iraq? The fact that the international community sought to enforce 687 makes it hard to argue that a breach by Iraq justifies war¹⁸

The second argument for authorization fares no better. The failure of treaty analogy has already been discussed. Additionally, Resolution 1441's reference to serious consequences is intentionally vague. There are many serious things other than war.

The resolution yields no clear authority for war because it emerged from conflicting goals. The United States and the British wanted a resolution that would allow them to argue that further noncompliance by Iraq would allow a U.S. attack without further Security Council action. The French, Russians, and Chinese wanted a resolution that would force the United States and the British to come back to the Security Council to get authorization for the war. The result was a compromise where both sides could claim a victory. The argument was solved by semantics ("serious consequences"), which postponed the argument for a later day – a day the sides hoped to avoid through Iraqi compliance. The resolution is then intentionally unclear about whether it authorized war. It says that the Security Council will consider how to proceed if Iraq fails to comply but does not say what will happen if the Security Council considers reports of noncompliance but does not act, which is what happened. By design, Resolution 1441 yields no easy answer on the authority for war.

In sum, the legal argument for war is weak. That said, the question will remain unanswered; the legality uncertain. No authority can say if the U.S. and British arguments succeeded. The arguments contend only in court of public opinion. And in an important sense, legality is beside the point, or only part of the point. More important than the war's black letter legality is whether the world perceives it as legitimate. The war in Kosovo was illegal but widely seen as just. But the world largely sees the war in Iraq as illegitimate. That perception is a bigger problem than illegality.

That brings us to Bolton's second argument about the war in Iraq. Bolton's argues that the United States, through its domestic political institutions, can legitimate a war. He states,

Importantly, there is no doubt in light of the October 17, 2002 Congressional resolution supporting the use of American force that the President had full authority, and therefore full legitimacy, to disarm the Iraqi regime under the Constitution. We should not shrink from the debate on legitimacy through concern that following our own Constitutional procedures on the use of force is somehow not "enough" to justify our actions. Indeed, there is a fundamental problem of democratic theory for those who contend, implicitly or otherwise, that the proper operations of America's institutions of representative government are not able to confer legitimacy for the use of force. And make no mistake,

¹⁷ Mary Ellen O'Connell, "Addendum to Armed Force in Iraq: Issues of Legality," American Society of International Law, ASIL Insights, April 2003, www.asil.org/insights/insigh99a1.htm

¹⁸ Ibid

not asserting that our Constitutional procedures themselves confer legitimacy will result, over time, in the atrophy of our ability to act independently.

Bolton is not saying that the international community should view the war as legitimate. He is saying that Americans view the war as legitimate, and therefore, it is. That stance is wrong for several reasons.

First, Bolton is confused about democracy. He follows the canard that all international law is somehow undemocratic. But, as discussed above, the United States, through its democratic representatives, joined and ratified the UN Charter. The UN Charter is a treaty, which under the U.S. Constitution is part of U.S. law, enforceable in our courts. The UN did not claim dominion over the United States; the United States, largely through the hand of Franklin Roosevelt, formed the UN. There are problems with the UN charter, to be sure. But those who ignore it bear the burden of explaining their way around the U.S. Constitution.

There is a fundamental problem of democratic theory for those, like Bolton, who contend that some acts of democracies are more democratic than others. The United States' ratification of the UN Charter was an act of democracy, not a repudiation of it. Because the Charter is U.S. law, many Americans view acts that contradict that law as inherently illegitimate and even undemocratic.

Second, Bolton's view of legitimacy is dangerously myopic. The question of whether Americans view acts that contradict the UN Charter as legitimate is interesting, but insufficient. It is the wrong question. Bolton should be asking what purpose legitimacy serves. Legitimacy is a tool of statecraft. It is means to assert power and to create and defend moral ends. In international affairs, only the international community can confer meaningful legitimacy – not because multilateralism is end in itself, but because the judgment of the others affects U.S. persuasive power.

Power comes in many forms. Military might is hard power. Legitimacy is soft power. Legitimacy is subjective. It is not a fixed value; it is how people perceive laws, or in this case actions. Where we act in the world, our audience is other states. We ignore our audience at our peril. Military might perceived as just is more powerful than military might alone. The assertion that American democracy alone legitimates American acts ignores the soft power conferred by legitimacy; the justice that legitimacy puts on actions.

Acting in accordance with international ideas of legitimacy aids our reputation. Reputations for principled acts grease the wheels of diplomacy. Reputation makes charges of exploitation less believable. A good reputation encourages allies to contribute to our causes and our enemies to avoid resort to arms. Reputation is one way international legitimacy aids U.S. power.

The United States benefits in other ways from the international norms of behavior Bolton dismisses. We benefit from the check those norms put on aggression. True, the United States has acted without Security Council authorization in the past, for instance in Kosovo and during the Cuban Missile Crisis. But there is a crucial difference between occasionally acting with dubious legality and denigrating the idea that international standards of legitimacy affect our use of force. Just because we occasionally speed does not mean we do not benefit from speed limits. Where we acted with dubious legality in Kosovo and in the Missile Crisis, we still sought the legitimacy of alliances and broad international support.

If, as Bolton says, a state's legal structures alone legitimate its foreign policy choices that state's actions are ipso facto legitimate – legitimacy is nothing more than an exclamation point that process puts on policy. All states believe that their governmental process affords their actions legitimacy, even where they are not democracies. If Americans denigrate the existence of an international standard of legitimacy, these states' flimsy arguments will gain weight, making it easier to justify aggression.

One reason the international community rallied against Iraq's invasion of Kuwait in 1990 was because Iraq clearly violated both international law and more amorphous ideas of legitimacy. If we lived in world without international standards, where legitimacy is a function of domestic politics alone, it would have been harder to organize states to denounce the invasion, institute sanctions, and support the United States in repelling Iraq from Kuwait.

International standards of legitimacy have helped the United States vilify those who commit acts of aggression, from the North Koreans in 1950 to Soviets in Afghanistan to the Iraqis in Kuwait. And

international norms helped deter other aggressors by making it clear that states that act to stop aggression will get broad support. Undermining norms hurts U.S. interests by harming our reputation, helping others to upset the peace, and making it harder to stop them.

Conclusion

Even Bolton seems to have doubts about the purely domestic form of legitimacy he espouses. By arguing that international law authorized the U.S. invasion of Iraq, Article 98 agreements, and the Proliferation Security Initiative, Bolton contradicts his own argument that international law is not a component of legitimacy. If international law does not matter, why in the world is Bolton arguing its fine points? He implicitly acknowledges that international law matters before asserting that it does not.

Bolton's points about the international law governing the Proliferation Security Initiative, Article 98 of the Rome Treaty, and the second Gulf War are often wrong. But these points about international law are secondary. They come with a wink, a wink exposed by the real argument: the contention that international law and opinion does not matter to the United States.

Bolton's speech concludes with the idea that arguments about legitimacy are usually made to block American action and undermine the American constitutional system. He hints that those who offer an international version of legitimacy hinder America's ability to defend itself. But it is Bolton's argument that misunderstands democracy; Bolton's idea of legitimacy that weakens and endangers the United States. There is nothing undemocratic about the assertion that the way states perceive us affects our power. There is a difference between surrendering our discretion and having the common sense to realize that our reputation matters.

The war on terror heightens the need for international legitimacy. Our efforts to defeat terrorists, face down insurgency in Iraq, and motivate the international community to stop proliferation all require help from other nations. These tasks will benefit from the perception that what we seek is just. Where we reject the idea that our foreign policy is subject to foreign judgment, we surrender the moral arguments that support our power and security. Those who embrace the rejectionist view of legitimacy tragically misunderstand American power. They have already badly damaged the nation they aim to defend.



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"Legitimacy" in International Affairs: The American Perspective in Theory and Operation

John R. Bolton, Under Secretary for Arms Control and International Security

Remarks to the Federalist Society

Washington, DC

November 13, 2003

I thank the Federalist Society for the opportunity to address this year's annual lawyer's convention. With so many challenges to American actions around the world, and so many criticisms of our foreign policy, I think it important that we establish for ourselves, and, perhaps more importantly, for our critics, how and why we consider our actions around the world as legitimate. While this may sound like a perilously abstract issue, in fact it daily affects our ability to secure American national interests in a wide range of circumstances. Since many voices question the legitimacy of our policies, it is essential that we both understand and articulate the often unspoken premises on which America typically rests its foreign and national security actions.

Let me take three current examples of important American policies where our legitimacy has been questioned: first, key elements of our Iraq policy; second, President Bush's new Proliferation Security Initiative; and third, our efforts to protect American persons against the assertion of jurisdiction over them by the International Criminal Court. Of course, the wisdom of these policies has also been criticized, but I hope to treat here not the substantive merits of these issues -- although I would be more than happy to do so at the drop of a hat -- but more fundamentally, and ultimately more damaging, the assertion that we are basically doing something illegitimate.

Iraq

There are two recent case studies involving Iraq where the legitimacy question has emerged most sharply. First is the question of the authority for -- and hence the legitimacy of -- the U.S.-led Coalition's recent military action in Iraq. Let me say immediately, for those who wonder, that we had ample Security Council authority under Resolution 678, which authorized the "use of all necessary means" to uphold the relevant Security Council resolutions and to restore international peace and security in the region. Resolution 687 provided for a formal cease-fire but imposed conditions on Iraq, material breaches of which left member states with the responsibility to enforce those conditions operating consistently with the underlying authorization contained in 678. Resolution 1441 contains the Council's specific decision that Iraq was and remained in material breach, and provided a final opportunity, which Iraq clearly failed to avail itself of.

Significantly, UN Secretary General Kofi Annan has specifically said, "Unless the Security Council is restored to its preeminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy." But these sorts of statements, which the Secretary General and others have made repeatedly over the past several years, are unsupported by over fifty years of experience with the UN Charter's operation. The case of Kosovo in the previous Administration alone proves this point. Since the decision to use military force is the most important decisions that any nation-state faces, limiting its decisions or transferring them to another source of authority is ultimately central to a diminution of sovereignty.

Importantly, there is no doubt in light of the October 17, 2002 Congressional resolution supporting the use of American force that the President had full authority, and therefore full legitimacy, to disarm the Iraqi

regime under the Constitution. We should not shrink from the debate on legitimacy through concern that following our own Constitutional procedures on the use of force is somehow not “enough” to justify our actions. Indeed, there is a fundamental problem of democratic theory for those who contend, implicitly or otherwise, that the proper operations of America’s institutions of representative government are not able to confer legitimacy for the use of force. And make no mistake, not asserting that our Constitutional procedures themselves confer legitimacy will result, over time, in the atrophying of our ability to act independently.

Second is the fundamental issue, still in dispute, of where the legitimacy of the next government of Iraq will come from. (I distinguish here “legitimacy” from actual political power or political impact. They are two separate things, and one can certainly have legitimacy without power, and vice versa.) For Americans, the basis of legitimacy for governments is spelled out in the Declaration of Independence: the just powers of government are derived from the consent of the governed. It is, therefore, unequivocally the U.S. view that the legitimacy of Iraq’s next government must ultimately derive from the Iraqi populace, and not from other individuals, institutions or governments, not from theologians, not from academics, not from the United States, and not from the United Nations. This is a fundamental precondition for understanding the legitimacy of the use of any governmental power, and yet it has been fundamentally misunderstood in the UN system.

Many in the UN Secretariat, and many UN member governments, in recent Security Council debates, have argued directly to the contrary. Increasingly, they place the authority of international law, which does not derive directly from the consent of the governed, above the authority of national law and constitutions.

Proliferation Security Initiative

The question of legitimacy also arises as the United States seeks to defend its national interests using novel methods and loose coalitions. For instance, one major new policy, the Proliferation Security Initiative (“PSI”), announced by President Bush in Krakow, Poland on May 31st, has been developed with ten other countries, each using its national-level efforts and capabilities. Without question, the PSI is legitimate and will, I predict, be extremely efficient in its efforts against weapons of mass destruction (“WMD”).

PSI is an interdiction program. Where we cannot convince a state to stop proliferant behavior, or where items are shipped despite our best efforts to control them, we need the option of interdicting shipments to ensure this technology does not fall into the wrong hands. Properly planned and executed, interdicting critical weapons and technologies can help prevent hostile states and terrorists from acquiring these dangerous capabilities. At a minimum, interdiction will lengthen the time that proliferators need to acquire new weapons capabilities, increase their cost, and demonstrate our resolve to combat proliferation.

Accordingly, the United States and ten other close allies and friends have created a more dynamic, creative, and robust approach to preventing WMD, missiles, and related technologies flowing to and from states and non-state actors of proliferation concern. PSI has been a fast-moving effort, reflecting the urgency attached to establishing a more coordinated and active basis to prevent proliferation. On September 4, just three months after the President’s announcement, we agreed on and published the PSI “Statement of Interdiction Principles.” The response to the PSI and the Principles has been very positive, with more than 50 countries already indicating their support and readiness to participate in interdiction efforts. President Bush has made clear that the PSI will be broadened to all countries that have a stake in nonproliferation and that have the will and the ability to take necessary action to address this growing threat. Our long-term objective is to create a web of counterproliferation partnerships through which proliferators will have difficulty carrying out their trade in WMD and missile-related technology.

As PSI has been created, some critics have questioned its legitimacy, some actually likening it to piracy. As PSI participant countries have repeatedly stressed, however, our interdiction efforts are grounded in existing domestic and international authorities. Participating countries have exchanged extensive information about what we believe our respective national authorities are, and the Statement of

Interdiction Principles makes clear that the steps it calls for will be taken consistent with those authorities. The governments of participating countries have conducted thorough reviews of this initiative, and we are very confident that we have substantial legal authority to conduct interdiction operations.

In the maritime interdiction area, for example, we can find a variety of ways to interdict illegal shipments when the vessels carrying them come to port, given that sovereign power is at its greatest in national waters. Other vessels on the high seas may, under well-accepted principles of customary international usage, be boarded by any navy if they do not fly colors or show proper identification. That is not, of course, to say that we have the authority to make any seizure that we want. The question of what is permissible for seizure and what is not must be determined on a case-by-case basis. As a nation that has consistently upheld the importance of free trade around the world, we will not act capriciously. Where there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstances dictate. What we do not believe, however, is that only the Security Council can grant the authority we need, and that may be the real source of the criticism we face.

Article 98 Agreements

My third example of challenges to U.S. legitimacy concerns our efforts to seek agreements with other countries to protect U.S. persons from the jurisdiction of the International Criminal Court (“ICC”). These efforts have been disparaged as contrary to the letter and spirit of the Rome Statute that created the ICC. As President Bush has argued starting in the 2000 campaign, and as I detailed here last year, numerous problems inherent in the ICC directly affect our national interests and security, and therefore also affect the security of our friends and allies worldwide. The ICC is an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence.

Accordingly, we are engaged in a worldwide effort to conclude legally binding, bilateral agreements that would prohibit the surrender of U.S. persons to the Court. These “Article 98 agreements,” so named because they are specifically contemplated under Article 98 of the Rome Statute, provide U.S. persons with essential protection against the Court’s purported jurisdictional claims, and allow us to remain engaged internationally with our friends and allies.

Thus far, the United States has concluded and signed Article 98 agreements with 70 countries all around the globe, representing over 40 percent of the world’s population. Each Article 98 agreement meets our key objective -- ensuring that *all* U.S. persons are covered by the terms of the agreement. This broad scope of coverage is essential to ensuring that the ICC will not become an impediment to U.S. activities worldwide. Article 98 agreements serve to ensure that U.S. persons will have appropriate protection from politically motivated criminal accusations, investigations, and prosecutions. These straightforward agreements commit partners, either reciprocally or non-reciprocally, not to surrender U.S. persons to the International Criminal Court, not to retransfer persons extradited to a country for prosecution, and not to assist other parties in their efforts to send U.S. persons to the ICC.

Indeed, our current tally attests to the growing consensus worldwide that Article 98 agreements with coverage of all U.S. persons are legitimate mechanisms as provided in the Rome Statute itself. Of the 70 countries that have signed Article 98 agreements with us, 50 are signatories or States Parties to the Rome Statute. Based on our extrapolations from negotiations currently underway, not only do we anticipate a rising number of total Article 98 agreements, but even more agreements from States Parties and signatories to the Rome Statute. Our ultimate goal is to conclude Article 98 agreements with every country, regardless of whether they are a signatory or party to the ICC, or regardless of whether they intend to be in the future.

The main opposition to our Article 98 efforts comes from some EU officials and from the presumptuously named “civil society,” which argue that the wording of Article 98 limits the categories of persons that can be covered by bilateral non-surrender agreements. On the contrary, Article 98 clearly allows non-surrender agreements that cover all persons, and those who insist upon a narrower interpretation must, in effect, read language into Article 98 that is not contained within the text of that provision.

Here is a real irony in the legitimacy debate. From our perspective, it is difficult to see how following provisions of the Rome Statute to protect U.S. persons would do unacceptable damage to the spirit of the treaty, when the treaty itself provides for such agreements. Indeed, parties to the Rome Statute have used Article 124 to exempt their nationals for a period of seven years from the Court's war crimes jurisdiction, yet there has been no suggestion that triggering these treaty provisions will undermine the Court. One EU member, France, has already invoked that exemption in order to protect its citizens from accusations with respect to war crimes.

Our detractors claim that the United States wants to use these agreements to undermine the ICC, or that these agreements as crafted lack legitimacy under the terms of the treaty. To the contrary, we are determined to be proper in our relations with the Court, proceeding in a manner specifically contemplated by the Rome Statute itself. Moreover, in each agreement, the United States makes clear its intention to bring to justice those who commit genocide, crimes against humanity and war crimes where appropriate. This is the stated goal of ICC supporters, and a goal that the United States has and will maintain.

The real legitimacy issue here is the Rome Statute's purported claim that the ICC can exercise jurisdiction over U.S. persons even though the United States is not a party to the treaty, and is no longer even a signatory to the treaty. It is, to say the least, most ironic of all that a "human rights" treaty is advanced on a theory that fundamentally rejects and seeks to override the exercise of popular sovereignty in the United States by purporting to bind us without our consent. One can only imagine the criticism we would receive if we tried something similar on other nations. Our efforts to secure Article 98 agreements are not only legitimate under the Rome Statute itself, but reflect the basic right of any representative government to protect its citizens from the exercise of arbitrary power.

Conclusion

The question of legitimacy is frequently raised as a veiled attempt to restrain American discretion in undertaking unilateral action, or multilateral action taken outside the confines of an international organization, even when our actions are legitimated by the operation of that Constitutional system. The fact, however, is that this criticism would delegitimize the operation of our own Constitutional system, while doing nothing to confront the threats we are facing. Our actions, taken consistently with Constitutional principles, require no separate, external validation to make them legitimate. Whether it is removing a rogue Iraqi regime and replacing it, preventing WMD proliferation, or protecting Americans against an unaccountable Court, the United States will utilize its institutions of representative government, adhere to its Constitutional strictures, and follow its values when measuring the legitimacy of its actions. This is as it should be, in the continuing international struggle to protect our national interests and preserve our liberties.

[End]

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