



# Breaking and Making Norms: American Revisionism and Crises of Legitimacy

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International norms are influential when they are seen as legitimate, and recent American behaviour may undermine the legitimacy of norms on the use of force. I examine three kinds of legitimacy crisis that might arise from American revisionism. First, the US threatens to delegitimize the norms that it challenges, particularly on military preemption. Second, it threatens to undermine its own influence by disassociating American power from one source of legitimation. Finally, it may negate the basic idea of American hegemony as that term is understood in constructivist scholarship and so transform the structure of the international system. Any of these might lead to a crisis, though of different kinds. The American challenge to the customary law on preemption threatens to delegitimize both the existing norms and the social basis of US power, while also attempting to legitimize American interests and new understandings of the norms. It therefore shows the productive and destructive aspects of the power of legitimation in world politics. Legitimation is the link between states and the normative structures of international society.

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## Introduction

There is a striking consensus in IR theory that American power is enhanced when it is seen by other states as legitimate. Many therefore expect that unilateral behaviour by the US might delegitimize its power and so undermine American influence. I examine this possibility by looking at American behaviour toward norms of preemption in light of the relationships between legitimation and delegitimation and between states and norms. I find that US norm breaking is inescapably connected to efforts to legitimate new norms, and that the process is a continuation of the political struggle over legitimation in international relations. Three kinds of legitimacy crisis may ensue, and each has a distinct scope and consequences.

The connection between legitimacy and US power is accepted by scholars from a broad range of perspectives, from structural realists to soft-power



liberals to anti-hegemony critics. The breadth of this consensus is interesting for both disciplinary and substantive reasons. Stephen Krasner (1999) argues that the institution of sovereignty has been an important legitimating device for leaders in their struggles against rivals. Stephen Walt (2002) suggests that the United Nations is a useful institution for legitimating American power. Joseph Nye (2002) counsels the use of 'soft power' on the grounds that it takes advantage of legitimated norms of multilateralism and therefore produces less resistance. Mark Rupert (2003) shows much the same thing from the perspective of the subordinate in the power relation. He suggests that overturning hegemony requires challenging its bases of legitimation. These writers disagree on whether the goal should be to enhance or undermine US legitimacy and on how to accomplish legitimation or delegitimation, but they agree on the basic claim that legitimation is a form of, or contributes to American power. They agree that American actions, when seen by others as legitimate, are more likely to gain international support, are less costly to the US, and are less likely to provoke backlash and resistance. Within the IR discipline, this unites scholars who agree on little else around a central constructivist tenet, that shared ideas constitute international power.

If legitimation supports American power then delegitimation should destabilize it. My focus in this article is on delegitimation and its possible consequences at three levels: for international norms, for US power, and for the social structures that make up the international system. To examine the effects of delegitimation, I use as an illustration the recent American effort to change the long-standing interpretation of preemptive attacks in customary international law. I examine the implications of this case for legitimacy regarding the specific norms on preemption, the social bases of American power, and the ordering principles of the international system most broadly. The American attempt to make new rules in the area of preemption involves both breaking and making international norms, and reconstructs the relationship between the US and other states. This is a crisis for the norms themselves and may enable great violence and injustice, but whether it produces a crisis in US power or in the international system depends on the productive process of re-legitimation. I contrast the preemption case with recent American behaviour regarding the human rights of foreigners, in which the US has used secrecy rather than legitimation as its rule-breaking strategy. Secrecy implies the absence of a credible legitimation strategy and is a temporary retreat from the politics of legitimation.

### **Legitimacy, Power, and Three Paths to Crisis**

Competing views on how to interpret American power have been developed by Christian Reus-Smit and Stephen Brooks & William Wohlforth. Both are



concerned with the reciprocal effects of international norms on American power and of American power on international norms. Brooks and Wohlforth (2005, 2007) attempt to assess the degree to which the constraining power of international norms limits US power and conclude that the American capacity to shape norms implies that its constraining effects are low. Reus-Smit (2004, esp. Chapter 2) argues that hegemonic power can only exist when it is institutionally embedded and thus unilateral norm-breaking by the United States undermines the 'social' bases on which US power is founded. For Reus-Smit, power is constituted 'by social institutions, broadly construed as complexes of norms, rules, principles, and decision-making procedures' and strong actors are constituted by these intersubjective resources. They therefore have an internal and inherent incentive to comply with the existing structure of international norms (Reus-Smit, 2004, 43). They are constituted to comply. By contrast, Brooks and Wohlforth believe that the US can choose to ignore these incentives and either absorb the costs or rewrite the norms. Reus-Smit emphasizes that state power is constituted by intersubjective structures and therefore shows the limits of that power; Brooks and Wohlforth emphasize the agency that comes from material resources and show the apparent autonomy that power brings.

My approach borrows elements from both of these positions but sees them as aspects of a single dynamic process rather than as competing alternatives. From Reus-Smit I adopt the view that states are unavoidably embedded in social relationships and norms. I assume that states are constituted in such a way that they seek normative justification for their actions. States are not actors independent of their relationship to norms and they cannot choose to make themselves disembedded from them.<sup>1</sup> Instead, states attempt to legitimize new norms and thus change their social relationships. From Brooks and Wohlforth I borrow the emphasis on the American capacity to remake norms. Contrary to their analysis, though, I do not find that this means that the norms are relatively unimportant or that American material resources allow it to stand outside the international community. Instead, I find that the US has influence over the development of international norms but remains unavoidably situated within them.

Taking these two elements together, I suggest that the process of delegitimation by the US is necessarily also a project of relegitimation of new understandings of the norms. My method emphasizes the mutually constitutive relationship between state practice and international norms, and maintains that legitimation can be understood as the process that links them. This combines the agent-structure insights of Alexander Wendt (1987) with the approach to legitimacy proposed by Reus-Smit (this volume).<sup>2</sup> Interests and behaviour are shaped by norms, and norms are shaped by the interests and behaviours of states.



The definition of legitimation presented by Reus-Smit (this volume) centres on this mutually implicating relationship between legitimating norms and state behaviour: state behaviour that follows legitimating norms is seen by states as legitimate, and it in turn reproduces the legitimacy of the norms. In order to study delegitimation and crisis, Reus-Smit breaks into this loop by focusing on the audience to which legitimacy claims are directed.<sup>3</sup> He says that legitimacy 'is a quality that actors ascribe to another actor's identity, interests, or practices, or to an institution's norms, rules, and principles. This process of ascription is always norm-referential' (Reus-Smit, this volume). While actors may make all manner of legitimating claims, ultimately the audience is the judge of the legitimacy of a rule or an actor. In his model, the audience compares the actor's identity, interests, and actions to a pre-existing schedule of legitimating norms; because the audience has been socialized to believe in these norms, it responds approvingly to actors that support them and penalizes those that do not.

This suggests three possible paths to a crisis of international legitimacy. One is centred on the rules and another on the actor, and a third arises at the systemic level out of the first two. On rules, repeated violations of the norms by states might be seen as either a force contributing to the delegitimation of the rules or an indicator that the rules are not seen as legitimate. Without state behaviour reinforcing the legitimacy of the norms, the norms lose their social relevance and their power. A norm that is publicly challenged ceases to be 'taken for granted' and it is destabilized. It then fails to operate as either a focal point for mutual expectations or as a naturalized guide for behaviour. In the gap that opens up between behaviour and normative justification, the possibility exists for dramatic change in the rule, in state behaviour, and in the system as a whole (for historical examples of systemic change, see Reus-Smit, 1999; Philpott, 2001; Bukovansky, 2002; Finnemore, 2004).

The second path to a crisis of legitimacy centres on strong states. When a state fails to convince its audience that it is committed to the legitimating norms in the society, it operates in the realm that Reus-Smit (this volume) describes as 'rule without right'. This may be a crisis for the actor because it increases the obstacles to its domination. A state that has become accustomed to the deference that comes from hegemony may find itself facing unexpected resistance from its client states and perhaps even an end to any pretension to hegemony. For contemporary American power, Brooks and Wohlforth (2005) attempt to assess the costs to the US of 'rule without right' in order to evaluate the degree to which American unilateralism risks undermining its own power.<sup>4</sup>

These paths lead to distinct questions regarding the American case. The state-centred path leads to the question of whether the US is now, or will be soon, suffering a crisis of legitimacy in its international power. Is it in a condition of 'rule without right'? The rules-centred path raises the question of



whether the US is causing a crisis of legitimacy for the existing international rules. Has US behaviour revealed basic institutions of international society to be without legitimacy in the eyes of important players? The two paths converge on a third question: how do the changes affect the nature of the international system? Changes in norms and in state power have consequences for the underlying structures of international society, and so American behaviour is part of the broader process of changing and remaking the social foundations of the international system.

The following section examines these three questions using as an illustrative case the American move to redefine the norms of preemption in the use of force. The case is a vehicle for examining how American behaviour has presented a new interpretation of a norm, and how this may change American power, the norm itself, and ultimately the international system. The American challenge to the customary law may delegitimize both the existing norms and the social basis of US power, but is also intended to legitimize American interests and new understandings of the norms. It therefore shows the productive and destructive aspects of the power of legitimation in world politics.

### **American Revisionism**

The US interpretation of the rules on military preemption is a useful location to examine the relation between American power and legitimating norms. The case provides an instance of a direct challenge to an existing set of norms by which the US was met with a great deal of international opposition. While it is common to claim that the US has recently taken an antagonistic attitude toward many international norms, finding a direct and open challenge by the US to a specific international obligation is difficult. For each claim that the US has abandoned a valued norm or institution, such as multilateralism (Martin, 2003), the laws on war (Sands, 2005), or the United Nations (Skidelsky, 2003), there is a reactionary counterclaim that the US remains committed to the norm but with its own interpretation of how it applies to specific cases. For instance, the US has defended its actions as consistent with UN rules, the laws of war, and the idea of multilateralism (see, for instance, Rice, 2005; on multilateralism specifically, see Kagan, 2002). These justifications are more than cheap talk since they involve a careful matching by the US of behaviour to normative interpretation. In this sense, they are a 'genuine' attempt to legitimize US actions using the norms, though they may lack credibility to most observers.

The attack on preemption is different. The new American position on preemption, as stated in the 2002 *National Security Strategy* (NSS), included an explicit challenge to how the concept was traditionally understood in



international law. The new US interpretation was incompatible with how many other countries understood the existing norms governing international intervention for self-defence, and so it set up a conflict over the content of important international rules. The US made it clear that it would not operate within the existing understanding of the rules of international society and it used its material and normative power to rewrite the rules defining appropriate state behaviour. Steven Hook and John Spanier (2004, 350) say that ‘the Bush Doctrine challenged a central tenet of international law that required nation-states to identify an imminent danger before they could legitimately resort to military force’. They suggest that ‘the scope of the new grand strategy [the ‘Bush Doctrine’] was unprecedented in world history’ (Hook and Spanier, 2004, 351; Reus-Smit, 2004, 100–101). Anthony Arend (2003, 89) says that the NSS took the ‘contentious doctrine’ of preemption ‘to an even more controversial level’, and François Heisbourg (2003, 79) suggests that as a result ‘the legitimization of the use of force may be revolutionized’. The US has ‘departed from its allies’ strategies — whether expressed collectively ... or individually’ (Heisbourg, 2003, 82) and thereby contributed to ‘the European perception of US unilateralism’ (Heisbourg, 2003, 81). The American move was profoundly revisionist; it was expressly designed to delegitimize the existing practices around preemption and institutionalize a new norm based on a different understanding of imminence.

The traditional interpretation of the norms on preemption was centred on the ‘imminence’ of an attack as the necessary condition to justify legitimate and legal preemption by force. These rules both regulated state behaviour by limiting the acceptable use of force and helped to constitute state sovereignty by defining the terms of intervention and statehood. The content of the rules on preemption had been largely customary, based on general principles taken from the first half of the 19th century (Byers, 2005, presents a good history). The basic concept of a right to preemption is uncontroversial, having been present from the very beginning of the laws on war. Grotius outlined self-defence of the state as a justification for force in international relations in 1625 (see Schachter, 1989). He did nothing to limit this to action *ex post* and indeed said ‘it be lawful to kill him who is preparing to kill’ (Ackerman, 2002). The classic definition of legal self-defence, including the concept of anticipation of an attack, comes from the aftermath of the *Caroline* incident, after British troops sank an American-owned ship in 1837 in American waters. The ship may have been assisting anti-British rebels in Canada and its sinking provoked dialogue between the US and Britain which clarified the legal context of the dispute. Secretary of State Daniel Webster challenged the British to ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.<sup>5</sup> These tests have come to be used generally as the criteria for assessing the legality of anticipatory self-defence.<sup>6</sup>



American revisionism in 2002 centred on the time-horizon for understanding imminence. The US argued that the twin advances of technology and anti-US terrorist networks meant that the meaning of imminence in the *Caroline* rule must be interpreted differently than it was in the past. The combination of conservatism and revisionism on display in American justifications for preemption is typical of the legitimization strategies used by norm entrepreneurs to ground their new claims in what they believe to be the legitimated discourse of the society (see for instance Risse and Sikking, 1999). The NSS, for instance, says that the US 'has long maintained the option of preemptive actions to counter a sufficient threat to our national security' and that 'international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack' (NSS, cited in Sofaer, 2003, 211). This is a restatement of the prior norms. However, it goes on to argue 'we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means.' These statements suggest a more distant relationship between the threat and the act of preemption than was accepted under prior international norms.<sup>7</sup> The American innovation, which ignited the controversy, was to attempt to unilaterally redefine the criteria for assessing what is an 'imminent' threat and so to rewrite the customary-law understanding of the terms of imminence.

The public construction of an alternative legitimating justification on preemption stands in sharp contrast with the shape of American policy with respect to other novel aspects of its 'war on terror'. For instance, on human rights, including on kidnapping, secret detention, and detention without trial, the US has since 2001 sharply diverged from the existing rules but it has attempted to keep its policies secret rather than justify them with norms (Sands, 2005; Byers, 2005). The relationship of US behaviour to the norms and to legitimization is therefore different than in the case on preemption norms. In violating international norms on human rights, the US has sought to operate in secret and has not provided a public legitimization narrative grounded in existing norms. It has further sought to silence those who have learned about its policies and to punish those who have publicized them. The justifications supplied by the US have been at the most general level, as when a CIA spokesperson said that the US always acts 'in accordance with its laws and treaty obligations' (Paul Gimigliano, cited in Smith and Mekhennet, 2006). In this area, the US has not acted as a norm entrepreneur or sought to use power productively. It has instead operated in the 'denial' stage of the 'spiral model' from Thomas Risse and Kathryn Sikking (1999, 23), 'refus[ing] to accept the validity of international human rights norms themselves and ... oppos[ing] the suggestion that its national practices in this area are subject to international jurisdiction'. By operating in secret and by attempting to avoid the entire



process of legitimation politics around human rights norms, the US has placed itself in the position of being a rule-breaker without a compensating normative justification. The effect on human rights norms is therefore different than are the effects of US behaviour on preemption norms. On human rights, the most immediate crisis arises in the legitimacy of American power rather than in the legitimacy of the norms themselves; the gap between US behaviour and the international norms is wide and unbridged. On preemption norms, the US has sought to reinterpret the norms so as to eliminate any gap between the norms and its behaviour. As a result, on preemption the crisis is first in the norms themselves, and its broader effects in world politics depend on how the others respond to its relegitimation exercise around new rules.

The next section examines these three types of legitimation crisis.

### **Revisionism and Legitimacy Crises**

A revisionist Great Power is not unusual in the international system.<sup>8</sup> This section examines three consequences of US revisionism toward the preemption norms and considers the contribution each might make to legitimacy crises as defined by Reus-Smit. First, the US threatens to disempower the particular norms that it violates. Second, it threatens to undermine its own influence by disassociating American power from one source of legitimation. Finally, it may negate the basic idea of American hegemony as that term is understood in constructivist scholarship and so transform the structure of the international system. Any of these might lead to a crisis, though of different kinds. I argue that while each of the three will certainly lead to international *change*, the mutually constitutive relations between norms and state practice mean that 'crisis', strictly defined, is unlikely. The revisionist aims of American leaders are constructed out of, and justified in terms of, the intersubjective resources in international political culture, and they are therefore limited by and contribute to those resources. Even radical attacks on international norms, backed by the full destructive potential of American power, search for legitimating justifications from international society. American influence operates within legitimating principles that shape and constrain it. The capacity to be both within the normative structure and simultaneously redefining it is inherent in the co-constitution of norms and states.

#### *Legitimation and Delegitimation of Preemption Norms*

The US effort to delegitimize the prevailing understanding of the preemption norms is a direct challenge to the rules on the use of force. Such a direct attack on a norm by a powerful player is a potential crisis for the norm itself. The



content of the rules exists as an intersubjective understanding among international players and the express repudiation of the prior common understanding affects how all others see it. It does not necessarily delegitimize the rule in the eyes of others, but by revealing the possibility of competing interpretations it shows the limits of the 'shared' space. The content can no longer be taken for granted as part of the social framework of international society.

A useful analogy is to the development of customary law in international relations, which includes a long-standing debate over how to interpret defections from the customary regime by strong states. Two schools of thought compete to explain the effects on dissent on customary law. One suggests that since custom is a collective product, one defection cannot invalidate a piece of customary law. This was expressed by the US Supreme Court in a classic case from the 19th century on maritime rights: 'no single nation can change the law of the sea, which rests on the common consent of civilized communities. It has force because it has been generally accepted as a rule of conduct'.<sup>9</sup>

The alternative view is that when a powerful state explicitly rejects a rule of custom, the very definition of customary law requires that the law must give way. Customary law only exists when states generally behave according to the rule and that behaviour arises from a belief in the legal obligation behind the rule (*opinion juris*).<sup>10</sup> Legality is different from legitimacy (Clark, 2005), but the tension between these two approaches is also evident around norm legitimation.

A single powerful state can, by its unilateral behaviour, undermine a legitimated rule. It cannot replace it with no-rule (or 'anarchy') but it can provide a competing interpretation of the rule and then attempt to institutionalize it through legitimation. The US attack on the rules followed this pattern. It reflected not only a destructive effort to delegitimize the norms but also a reconstructive process by which US power was deployed to reconstitute them. The productive facet of the process comprised two elements, both inseparable from the delegitimation described above. First, it showed by its military commitments in Iraq that it was willing to put its material capacity behind the new norms in ways that directly contradicted the old norms. This was an effort to institutionalize the new norms by showing that they, and not the old were the governing regime for American behaviour. Second, it justified its behaviour in the broader context of the constitutional norms of the international system. These included the basic right of self-defence, the desire for international stability, and the enforcement of UN Security Council resolutions. In this way, it made the case that its revisionism with respect to preemption was in fact conservative when seen from the perspective of the wider shared values of the community. These two forms of American



commitment fit well with the model for how states change customary international law:

In order to effect that change, states interested in a new rule of customary law must take action that violates existing law and they must encourage others to do the same ... If the proponents of the new rule are successful, a new consensus of state practice and *opinio juris* will develop and those nations which had the audacity to violate customary law will be found to be behaving consistently with the law (Charney, 1986, 914–915).

For preemption, the American reinterpretation changed the social context in which the norm existed in two ways, both of which show the destructive and productive aspects of delegitimation. On the one hand, the US generated a debate about the appropriate understandings of the rule and provoked others to consider whether they should adopt the new American definition. This allows for the possibility that the norm might indeed be redefined, perhaps in the terms favoured by the US but perhaps in other terms. On the other hand, it generated solidarity among the norms' defenders and placed the US outside the community. This redefines the community while retaining the old definition of the norm.

The reconstruction of the rule is inherent in the process of delegitimation. Political actions require justifications, and new rules must be supported by normative resources accepted by the audience. States (and people) appear to find it irresistible to provide a justification for their behaviour, and this generally takes the form of showing how the behaviour is covered by existing social norms. Rule-breakers find it useful to portray their actions as consistent with the basic rules of society. John Kane goes further and argues that the search for justification is inherent to *all* political action, and he characterizes justification as the fundamental moral act: 'the ends of politics must always present themselves as morally justified according to some set of standards or other. Even where politics becomes pathological or corrupt, those seeking power face an urgent political need to justify themselves in general terms' (Kane 2001, 15).<sup>11</sup> 'Political action', he says 'always presumes such justification' (Kane, 2001, 15). This may be why, in the human-rights area, the US resorted to secrecy when it apparently failed to devise a credible justification for its rule-breaking. Even while undermining the legitimacy of some international rules, the US remains embedded in the process of justifying itself with the intersubjective structures of international society (Hurd, 2005).

Deep implications for American power exist in this effort to be revisionist toward preemption but to cast itself as *status quo* toward other norms. The next section considers how delegitimizing one norm may open the way for a more general crisis of legitimacy in American power.



*Legitimation and Delegitimation of American Power*

'Hegemony', says Reus-Smit (2004, 44), is a 'status' rather than an attribute. It is a social relation that produces a hierarchy among actors in which the defining feature is the legitimation of power inequalities. Brooks and Wohlforth say 'That a hegemon needs legitimacy is undeniable. All of history's powerful states have sought it, and there is no reason to believe that the US is somehow exempt from this rule' (Brooks and Wohlforth, 2005, 517). 'Hegemons', says Bruce Cronin, 'cannot remain hegemons if they do so at the expense of the system they are trying to lead' (Cronin, 2001, 122). A standard textbook on US foreign policy summarizes the situation this creates for the US:

the flaunting of American power is likely to produce defiance rather than compliance with the nation's objectives. This pattern will continue despite the best intentions expressed in Washington. Power plays by any state, no matter how benevolent, inevitably produce backlash even from states and societies that claim to share the hegemon's values. Such is the logic of the international system ... (Hook and Spanier, 2004, 376).

The potential for a crisis is inherent in the social foundations of that power: losing legitimacy means losing some power, and losing enough legitimacy may produce a situation in which American claims to power are unsustainable in practice. This would necessitate the forced adaptation in behaviour that Reus-Smit (this volume) defines as a crisis. Two possible crises might emerge: in this section I consider the possible consequences for the power of the US and in the next the consequences for the international system.

The brute material condition of having one state holding a preponderance of military resources may produce great influence and strength for that state but without a successful strategy of legitimation the social relation of hegemony or 'Great Power' status is not created. Kane (2001, 28) says 'Leadership may involve the use of power but cannot be reduced to an exercise of power, for it relies crucially on persuasion'. All states work at justifying their behaviour, but for states seeking to be seen as legitimate leaders or Great Powers, the success of those justifications is essential for their 'ontological security' — their existence as a Great Power, and the advantages they gain as a result, depends on the progress of its legitimation (the term 'ontological security' is examined in Mitzen, 2006). The US gains influence to the extent that others internalize its claims to special status as a 'Great Power' and weaknesses in those claims are therefore threats to its influence. American revisionism on preemption may contribute to a general delegitimation of US claims to 'leadership'.

It is possible that beliefs about American legitimacy are already so low that it has little to lose, but I think there is enough evidence of international deference



to US claims of ‘leadership’ that this condition has not yet been reached. For example, the US routinely claims that it has interests in events around the world and expects other states to accept those interests as legitimate. American interests, it says, are global — for instance, it claims that the military programmes of Libya, Iraq, Iran, and North Korea are of legitimate concern to it. Other states are accustomed to accepting these claims, even while perhaps objecting to the particular interests the US pursues behind them. States appear to accept as natural or unavoidable that the US should express interest in others’ regional conflicts and that it merits a seat in international conferences of limited membership. Indeed, it is perceived to be noteworthy and politically problematic when the US is *not* included in international bodies, as when it was not elected to a seat at the UN Human Rights Commission in 2001 or when it rejected membership in the International Criminal Court or UNESCO (from 1984 to 2003). These special privileges are the products of the belief that US power entitles it to unequal rights. They are the expression in practice of the Great Power relation. Ian Clark summarizes these privileges as the ‘recognition of the requirements of leadership on the part of the predominant state .... It ... make[s] realistic allowance for the leading role that the hegemon plays in the maintenance of international order as a whole’ (Clark, 2005, 241). To the extent that states believe, and act upon the belief, that deference to the US is a ‘realistic’ requirement of international life, then the social relation of hierarchy between the US and other states is reproduced and this relation is a piece of the deep structure to the international system. These advantages for the US are threatened if the practices that sustain the Great Power relation are not enacted. Both the ‘Great’ and the rest must act in ways that reaffirm the identity-relation for it to be perpetuated.

It is not the case that legitimation requires always following the rules. To assume that legitimacy is maintained *only* by acting in accordance within existing norms is to misunderstand the relationship between states and norms. Reus-Smit (2004, 102) says ‘The hegemon must pursue its interests in a manner consistent with these norms, or the legitimacy of its leadership will fast erode’. This is true as far as it goes but it cannot be the end of the story. It overstates the constraining effects of international norms while understating their dynamic nature. Such a structure-driven view must be opened up to reflect the fact that actors, especially Great Powers, strive to remake the system in their interests. The ‘agency’ that comes with power often leads to disproportionate influence over the development of rules and norms. Great Powers can pursue norm-innovation without negating their power but they need to do it through the practice of legitimation itself, which both limits and enables their power.

Here, Brooks and Wohlforth (2005, 2007) provide a useful reminder that norms are malleable and that the distribution of power in the international



system is relevant for understanding how state practice can change them. They conclude from this that the strongest states are not particularly constrained by the norms. My approach leads to a different conclusion. Because states seem incapable of acting without a normative justification for their behaviour, even highly revisionist states remain embedded in a society of international norms, ideas, and resources. They construct their legitimating justifications from these communal resources and are limited in their actions by the availability of plausible justifications. This allows for more agency on the part of states than does the view that they must comply with existing norms to remain legitimate but it reveals the 'social' limits to that agency. Norms, therefore, are not only constraints. Norms and other rhetorical resources are the materials with which states construct productive strategies of relegitimation.

The limits to justification make possible a crisis in state power. How this works in practice is unclear and there are at least three relevant hypotheses. Reus-Smit's emphasis on the role of the audience suggests that a legitimating justification fails when the audience rejects it as an inappropriate use of the social resources. The precipitating event that causes the crisis is therefore the act of rejection committed by the audience. Others maintain that even in such a case the fact that the *attempt* was made to legitimate action according to existing norms provides a residual effect of legitimation. Gregory Raymond, for instance, describes the 'feeling of obligation' that is present in some approaches to norms and which can persist even when an actor chooses to violate the rule for instrumental reasons (Raymond, 1997, 217). Only if the 'feeling' is gone does the norm cease to matter. Here, the potential for crisis of a Great Power comes when it fails to recognize the need to legitimate its actions — it thereby nullifies the Great Power relation itself. Finally, if we see state subjectivity as constituted by the social relations in which states participate, then we might conclude that states are constitutionally incapable of conceiving of action that does not find justification within the terms of those social relations. This would deny the very possibility of action outside of the norms, though where many and conflicting norms exist it might not provide a practical limit on behaviour.

When Great Powers fail in their legitimation, or fail to try, the consequence is a change in the basic constitution of the international system, from a hegemonic order to something else. The next section considers the possible systemic crisis of legitimacy from American revisionism.

### *Legitimation and Delegitimation of the International System*

The privileged position of hegemonic states is not just a quality of individual states, it is a systemic feature of international relations. This follows naturally from the relational nature of the Great Power identity and it creates an



international system that is hierarchical in its basic constitution. Therefore, threats to the social recognition that supports the status of the US as a Great Power contain the potential to change the basic structure of the international system, as well as changing the nature of American influence. The third possibility for legitimacy crisis exists at the level of the international system.

The existence of Great Powers with unequal rights and obligations is embedded in the structures of the international system. The hierarchy that this creates is part of the organizing structure of the international system. Great Powers are, by definition, in a privileged position of governance over other states and over the system, legitimated by beliefs about their 'right to rule' (Coicaud, 2002, 10). Gerry Simpson's survey of Great Powers in modern European history supports this view. He finds that since 1815 every European international system has enshrined a legal distinction between Great Powers and other states. He says 'Sometimes these regimes are constructed around loose affiliations of interested Great Powers (the Vienna Congress), at other times the role of the Great Powers is laid out in detailed provisions of an originating document (The United Nations Charter)' (Simpson, 2004, 5). Across all his cases, international law has institutionalized the idea that Great Powers have special legal authority in the system, usually 'a right to intervene in the affairs of other states in order to promote some proclaimed community goal' (Simpson, 2004, 5). The boundaries of the right to intervene, as Martha Finnemore (2004) notes, define the content of the institution of sovereignty.

The structural features of a Great Power system are historically contingent. How might the system change if the processes discussed in the previous section did indeed result in the inability of the US to legitimize its power? A system without Great Powers would lack the institutionalized hierarchy, familiar since 1815, and might provide more space for the egalitarian principles in international relations, although it would not necessarily be more peaceful or just.

The most commonly identified alternative to legitimized hegemony is a system of direct coercion in which brute force is used to accomplish what previously was achieved by legitimacy through 'soft power'. This popular view suggests that the alternative to legitimated American power is a more Hobbesian anarchy where *ad hoc* coercion replaces the rule of law. This prediction is unsatisfying because it detaches the politics of legitimacy from the normal operation of international relations. Brute force appears as the alternative to legitimated power only if we adopt a simple materialist conception of power. If we assume 'that power resources and political influence exist in a relationship of simple causality, with material preponderance unproblematically spawning political influence' (Reus-Smit, 2004, 5), then the collapse of legitimacy can indeed be seen as uncovering the underlying and pre-existing system of material coercion. Reus-Smit rightly criticizes this view



for presuming that material power is fundamental and autonomous of legitimation (Reus-Smit, 2004, Chapter 2). The image of a Hobbesian alternative to legitimation is misleading because it ignores the productive aspects of delegitimation.

A more realistic understanding of the 'post-hegemonic' alternative must reflect the mutual constitution of state practice and international norms, and the linked nature of legitimation and delegitimation. The collapse of the hierarchical structure of legitimated Great Powers would not mean that the system was suddenly organized according to brute material resources isolated from social meaning and rules; it would rather be organized by different rules, and find a different 'political equilibrium' through the continued practice of legitimation (Clark, 2005, 255). For instance, a backlash against American behaviour might result in a narrowing of the social understanding of the privileges of Great Powers, and other norms such as sovereign equality may become more influential than before. Nico Krisch defines the principle of sovereign equality as 'a promise to abolish all unjustified privileges based on power, religion, wealth, or historical accident' (Krisch 2003, 135). The term 'unjustified' is crucial. If contemporary US behaviour delegitimizes some of the privileges of Great Powers it might produce a system in which the balance between hierarchy and equality is shifted toward the latter. The US could no longer operate as a hegemon because other states were not participating in the practice of deference that reproduces the legitimated hierarchy of Great Powerhood. The result may be something like that suggested by Stephen Toope (2003, 316), in which American 'participation in the evolution of custom is not unique among the major powers'.

Seeing the world in this way suggests that there may be no useful distinction between the normal politics of legitimation and the moment of crisis in legitimacy. The imagery of 'crisis' proposed by Reus-Smit in the introduction implies a sharp disjuncture between the normal process of 'change' in a regime of legitimation and the specific discontinuity of a 'crisis'. My approach emphasizes a process of continual change and reinterpretation of both norms and actors, in which (to use Reus-Smit's definition of a crisis) 'the imperative ... of remedial action' is *always* present and motivated 'by the immanent possibility of death, collapse, [or] demise ...' (Reus-Smit, this volume).

It is insufficient to model international norms solely as constraints on the agency of states. This view leads to either the overly structural conclusion that states must abide by norms or risk delegitimation, or the overly agentic conclusion that since strong states can absorb the costs of delegitimation they are not particularly affected by norms. The structural view appears in Frank Schimmelfennig's argument that 'We can explain Eastern enlargement [of NATO and the EU] as the admission of former communist countries that successfully... adopted the constitutive rules of the Western organizations'



(Schimmelfennig, 2003, 4).<sup>12</sup> The rules are treated as outside of the states and as governing their conduct and (perhaps) identities. The agentic view appears in the treatments of the United Nations provided by both Brooks and Wohlforth, and Erik Voeten (Brooks and Wohlforth, 2005; Voeten, 2005). These authors suggest that the measure of the power of legitimacy is to be found in its capacity to restrain the Great Powers. If the UN cannot restrain the strong states then, for Voeten, it will not be seen by others as legitimate and, for Brooks and Wohlforth, it will be of minimal importance in world politics. Both the agentic and the structural views on norms are useful up to a point, but it is by combining them in a model that accepts the possibilities of both 'constraint' and 'refashioning' that the concept of international legitimacy becomes analytically useful.

### **Conclusion: The Breaking and Making of Norms**

The meaning of norms is fundamentally ambiguous. It depends on how they are invoked by actors and how the audience responds. Struggles among actors to set the terms of legitimate authority are often violent and traumatic, as shown by Mlada Bukovansky (2002) in her study of change and revolution within and of what she calls 'international political culture'. I have argued that the politics of legitimation and delegitimation link states with the normative structures of international society. Legitimation is a practice through which states and norms interact. Both are changed as a result. This approach makes it possible to make sense of the dual dynamic in the use of norms by states, where states are constituted to seek legitimacy for their actions by associating them with existing norms while also behaving strategically to reconstruct the norms in ways that they believe will serve their interests. Norms are both constraining and enabling for states, and states are both socialized to norms and strategic calculators that manipulate them. The choice faced by the US is not between following the rules or not following them, or between being inside the society or outside of it. It is not enough to treat American 'agency' as distinct from the 'structure' of international norms. Rather, American behaviour necessarily takes place within the existing international normative context and simultaneously contributes to refashioning it.

Constructivists often show how strong states are enmeshed in constraining international norms, while realists often counter that strong states can rewrite the rules (see for instance Cronin, 2001; Brooks and Wohlforth, 2005). This article moves beyond that dichotomy by showing the contributions that come from taking seriously the mutual constitution of state practice and international norms. I see states inescapably situated in a social context and as a result in a relationship with international norms that is both productive and



limiting. These relations limit states' options and yet are malleable and contingent. Methodologically, this suggests that the delegitimation strategies of states toward norms cannot be studied without also attending to states' productive contribution to remaking new norms (on productive power in IR, see Barnett and Duvall, 2005). Substantively, it supports the view that US power is both enabled and constrained by international norms, and that the US cannot avoid providing a normative justification for its actions. Secrecy is a temporary and unstable alternative to legitimation. Constructing legitimating narratives is a fundamental part of political behaviour, inherent even in the process of delegitimation.

The US attack on the preemption norm shows these dynamics in practice. American unilateralism undermined the apparent consensus behind the conventional understanding of preemption but it was unavoidably also engaged in a productive practice of legitimizing a new understanding of the rule. The inescapable connection between delegitimation and legitimation tempers the possibility for the three forms of legitimacy crisis discussed above.

For the rules on preemption, the American move forces a fundamental change in the context of the norms, which leaves other states no choice but to respond to a changed normative environment. By unilaterally forcing a shift in the society from an apparent consensus on the norm to active contestation, American power succeeded in altering the status of the norm on behalf of the entire society. This is indeed a crisis as defined by Reus-Smit. This may not result in the outcome sought by the US since gaining 'collective legitimation' (Claude Jr, 1967) of new rules depends on the productive elements of American behaviour and rhetoric, which in turn depend on its interaction with the audience. To the extent that the US fails to situate its behaviour in a communally recognized, though new, interpretation of the norms of the society, its capacity to exert influence will be reduced. The danger for the US, which is also the opening for anti-hegemonic forces, is that the audience may reject the US claims and so fail to provide the collective authorization with which the US seeks to re-found American power on new grounds.

If this should happen, a major change in the international system as a whole is possible. The system is currently constituted to include a special position for Great Powers. The US claims an interest in the goings-on around the world, and a right or obligation to provide 'security', 'stability', or 'leadership' to actors outside its borders. These claims are backed by US material resources but also crucially by the acceptance, grudging or willing, by other actors. The privileges that the US enjoys are undermined to the extent that the US fails to behave within the norms or reconstitute new norms. The potential for systemic crisis and transformation as a result of US unilateralism depends as much on the outcome of US re-legitimation efforts as it does on its delegitimation of the *status quo*. By adopting a methodology that explicitly



addresses both together, as I have done here, we can understand the practice of delegitimation and relegitimation as a productive process in the mutual constitution of states as agents and norms as structures.

## Notes

- 1 For a critique of ‘choice’ and norms, see Toope (2003, 303–304). On the social needs of states, see Wendt (1999).
- 2 On legitimation, norms and interests, see also Finnemore (2004), Hurd (2007).
- 3 The audience might of course be multiple and conflicted rather than singular and coherent.
- 4 To do so, they assume that the US has, until recently, been ruling ‘with right’.
- 5 Letter from Mr. Webster to Mr. Fox, April 24, 1841, excerpt in Harris (1991, 848).
- 6 For instance, Harris (1991), Arend (2003), Sofaer (2003), and Schachter (1989).
- 7 This is sometimes called ‘prevention’ rather than ‘preemption’ (see for instance Hastedt, 2006, 361–362) but the two are conceptually identical; they differ only in the time between the act and its provocation. Also, Freedman (2003).
- 8 On Great Powers, compare Schweller (1996) with Mearsheimer (2001). Also Simpson (2004).
- 9 *The Scotia* case, US, Supreme Court, 1872, 14 *Wall. (81 US)* 170. Cited in Von Glahn (1996, 15).
- 10 On customary law, see Brownlie (2003).
- 11 Cf. Cortell and Davis Jr (2000, 69) who see justification as a byproduct of ‘regret’ about ‘deviation or violation’ of norms. To them, justification is important for rule-breakers and not for rule-followers.
- 12 Thomas (1999) takes a similarly structural approach to human rights norms in Eastern Europe.

## References

- Ackerman, D. (2002) ‘International Law and the Preemptive use of Force against Iraq’, [www.house.gov/radanovich/documents/CRSReportIraqInternationalLaw.html](http://www.house.gov/radanovich/documents/CRSReportIraqInternationalLaw.html) (accessed June 6, 2006).
- Arend, A.C. (2003) ‘International Law and the Preemptive Use of Military Force’, *Washington Quarterly* 26(2): 89–103.
- Barnett, M. and Duvall, R. (2005) ‘Power and International Politics’, *International Organization* 59(1): 39–75.
- Brooks, S.G. and Wohlforth, W.C. (2005) ‘International Relations Theory and the Case Against Unilateralism’, *Perspectives on Politics* 3(3): 509–524.
- Brooks, S.G. and Wohlforth, W.C. (2007) *The Challenge of American Primacy*, Princeton: Princeton University Press.
- Brownlie, I. (2003) *Principles of Public International Law*, 6th edn., Oxford: Oxford University Press.
- Bukovansky, M. (2002) *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture*, Princeton: Princeton University Press.
- Byers, M. (2005) *War Law: Understanding International Law and Armed Conflict*, New York: Grove Press.
- Charney, J.I. (1986) ‘The Power of the Executive Branch of the United States Government to Violate Customary International Law’, *American Journal of International Law* 80(4): 913–922.
- Clark, I. (2005) *Legitimacy in International Society*, Oxford: Oxford University Press.
- Claude Jr, I.L. (1967) ‘Collective Legitimation as a Political Function of the United Nations’, in I.J. Claude Jr (ed.) *The Changing United Nations*, New York: Random House.
- Coicaud, J.-M. (2002) *Legitimacy and Politics*, Cambridge: Cambridge University Press.



- Cortell, A.P. and Davis Jr, J.W. (2000) 'Understanding the Domestic Impact of International Norms: A Research Agenda', *International Studies Review* 2(1): 65–90.
- Cronin, B. (2001) 'The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations', *European Journal of International Relations* 7(1): 103–130.
- Finnemore, M. (2004) *The Purpose of Intervention*, Ithaca: Cornell University Press.
- Freedman, L. (2003) 'Prevention, not Preemption', *Washington Quarterly* 26(2): 105–114.
- Harris, D.J. (1991) *Cases and Materials on International Law*, 4th edn., London: Sweet and Maxwell.
- Hastedt, G.P. (2006) *American Foreign Policy: Past, Present, Future*, 6th edn., Upper Saddle River, NJ: Pearson/Prentice-Hall.
- Heisbourg, F. (2003) 'A Work in Progress: The Bush Doctrine and its Consequences', *Washington Quarterly* 26(2): 75–88.
- Hook, S.W. and Spanier, J. (2004) *American Foreign Policy Since World War II*, 16th edn., Washington, DC: CQ Press.
- Hurd, I. (2005) 'The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003', *International Organization* 59(3): 495–526.
- Hurd, I. (2007) *After Anarchy: Legitimacy and Power at the United Nations*, Princeton: Princeton University Press.
- Kagan, R. (2002) 'Multilateralism, American Style', *Washington Post*, September 13.
- Kane, J. (2001) *The Politics of Moral Capital*, Cambridge: Cambridge University Press.
- Krasner, S. (1999) *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press.
- Krisch, N. (2003) 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law', in M. Byers and G. Nolte (eds.) *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press.
- Martin, L.L. (2003) 'Multilateral Organizations After the US-Iraq War of 2003', in I. Abrams and W. Gungwu (eds.) *The Iraq War and its Consequences: Thoughts of Nobel Prize Laureates and Eminent Scholars*, Singapore: World Scientific Publishing.
- Mearsheimer, J.J. (2001) *The Tragedy of Great Power Politics*, New York: Norton.
- Mitzen, J. (2006) 'Ontological Security in World Politics: State Identity and the Security Dilemma', *European Journal of International Relations* 12(3): 341–370.
- Nye, J. (2002) *The Paradox of American Power: Why the World's Only Superpower Can't Go it Alone*, New York: Oxford University Press.
- Philpott, D. (2001) *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, Princeton: Princeton University Press.
- Raymond, G.A. (1997) 'Problems and Prospects in the Study of International Norms', *Mershon International Studies Review* 41(2): 205–245.
- Reus-Smit, C. (1999) *The Moral Purpose of the State*, Princeton: Princeton University Press.
- Reus-Smit, C. (2004) *American Power and World Order*, Cambridge: Polity Press.
- Rice, C. (2005) *Remarks at the American Bar Association's International Rule of Law Symposium*, Washington, DC: US State Department, November 9.
- Risse, T. and Sikkink, K. (1999) 'The Socialization of International Human Rights Norms Into Domestic Practices: Introduction', in T. Risse, S.C. Ropp and K. Sikkink (eds.) *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press.
- Rupert, M. (2003) 'Globalizing Common Sense: A Marxist Gramscian (re-)Vision of the Politics of Governance/Resistance', *Review of International Studies* 29(Special Issue): 181–198.
- Sands, P. (2005) *Lawless World: America and the Making and Breaking of Global Rules — From FDR's Atlantic Charter to George W. Bush's Illegal War*, New York: Viking.
- Schachter, O. (1989) 'Self-Defense and the Rule of Law', *American Journal of International Law* 83(2): 259–277.



- Schimmelfennig, F. (2003) *The EU, NATO, and the Integration of Europe: Rules and Rhetoric*, Cambridge: Cambridge University Press.
- Schweller, R.L. (1996) 'Neorealism's Status Quo Bias: What Security with Dilemma?', *Security Studies* 5(3): 90–121.
- Simpson, G. (2004) *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge: Cambridge University Press.
- Skidelsky, R. (2003) 'The American Contract', *Prospect*, June 19.
- Smith, C. and Mekhennet, S. (2006) 'Algerian Tells of Dark Odyssey in US Hands', *New York Times*, July 7.
- Sofaer, A.D. (2003) 'On the Necessity of Pre-Emption', *European Journal of International Law* 14(2): 209–226.
- Thomas, D.C. (1999) 'The Helsinki Accords and Political Change in Eastern Europe', in T. Risse, S.C. Ropp and K. Sikkink (eds.) *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press.
- Toope, S. (2003) 'Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law', in M. Byers and G. Nolte (eds.) *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, pp. 287–361.
- Von Glahn, G. (1996) *Law Among Nations: An Introduction to Public International Law*, 7th edn., Boston: Allyn and Bacon.
- Voeten, E. (2005) 'The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force', *International Organization* 59(3): 527–558.
- Walt, S. (2002) 'Keeping the World "Off Balance": Self-Restraint in American Foreign Policy', in G.J. Ikenberry (ed.) *America Unrivaled: The Future of the Balance of Power*, Ithaca: Cornell University Press, pp. 121–154.
- Wendt, A. (1987) 'The Agent-Structure Problem in International Relations Theory', *International Organization* 41(3): 335–370.
- Wendt, A. (1999) *Social Theory of International Politics*, Cambridge: Cambridge University Press.