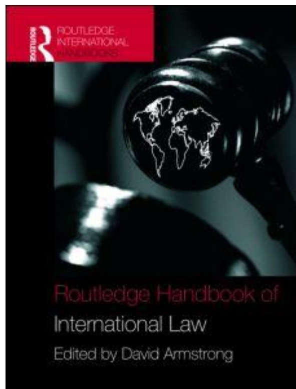
This article was downloaded by: *10.2.97.136*
On: 22 Mar 2023
Access details: *subscription number*
Publisher: *Routledge*
Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: 5 Howick Place, London SW1P 1WG, UK



Routledge Handbook of International Law

David Armstrong, Jutta Brunée, Michael Byers, John H. Jackson, David Kennedy

The Nature of US Engagement with International Law

Publication details
https://test.routledgehandbooks.com/doi/10.4324/9780203884621.ch14
Shirley V. Scott
Published online on: 22 Dec 2008

How to cite :- Shirley V. Scott. 22 Dec 2008, *The Nature of US Engagement with International Law from:* Routledge Handbook of International Law Routledge
Accessed on: 22 Mar 2023
https://test.routledgehandbooks.com/doi/10.4324/9780203884621.ch14

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: https://test.routledgehandbooks.com/legal-notices/terms

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 210

14

The nature of US engagement with international law: making sense of apparent inconsistencies

Shirley V. Scott

The attitude of the US towards international law often appears full of contradictions, which critics tend to characterize as hypocrisy. This chapter seeks to move beyond criticism or defense of the nature of US engagement with international law in order to make better sense of the apparent inconsistencies. Three features of the US engagement are identified and explored: the US uses international law to disseminate its policy preferences; the US seeks to protect its own policy choices and legal system from external influence via international law; and, with some provisos, the US takes legal obligations seriously. Individually and in combination, these three factors can help account for many seemingly anomalous actions or inactions of the US as well as provide a basis on which to identify elements of change and continuity in the nature of the US engagement with international law.

The United States has in recent years come under considerable criticism for its seemingly undesirable attitude towards international law. Given that the US is known as a legalistic country whose rhetoric has made much of the ideals of democracy and the rule of law, displays of apparent US disregard for international law have been disappointing and virtually incomprehensible to many observers, particularly in countries closely allied with the US. The US treatment of detainees during the war on terror, the failure of the Bush administration to join the new International Criminal Court, its rejection of the Kyoto Protocol, and the fact that the US has yet to become a party to a number of the key global human rights treaties, are typically interpreted as a sharp divergence from strong US support for international law in the early post-Second World War years. Beyond recognizing that some practices of which the US is accused, such as torture – are not open to justification – this chapter does not aim to excuse or condemn the US. Rather, the chapter seeks to provide the context within which to make sense of apparent anomalies and to highlight elements of both continuity and change in the US approach towards international law. Three features of the US engagement are identified and explored: the US uses international law to disseminate its policy preferences; the US seeks to protect its own law and policy from external influence via international law; and, with some provisos, the US takes legal obligations seriously.

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 211

Is there an identifiable US approach to international law?

There are numerous seeming contradictions and anomalies in the US approach to international law. The US has long been regarded as the leading protector of human rights, but the US has ratified few of the major human rights instruments; the US has supported most moves towards international courts and tribunals but is rarely prepared to itself be subject to a third party adjudication; the US constitution appears to accord high status to international law but the US legal system is in practice relatively closed to the influence of international law; and the US refers often to the importance of the international rule of law in its foreign policy rhetoric but does not always seem to want to support the further development of that system. One of the most common criticisms of the US in relation to international law is that the US is hypocritical – it does not want to behave in relation to international law as it tells others they should. The US justified its invasion of Iraq in part on Iraqi non-compliance with international law and yet the US invasion was itself in blatant breach of the international law on the use of force.

Attempts to explain recent undesirable actions of the US in simple dichotomous terms as a shift from multilateralism to unilateralism, or from embracing to rejecting, are inadequate, for there are always exceptions. While much recent US action has been of a unilateral nature, there is considerable multilateral law with which the US still engages and, while unilateralism is often referred to in negative tones, unilateralism may on occasion be a positive and effective mode of action. It is difficult to claim that the US has "rejected" international law when in 2006 alone it entered into 429 new international agreements and treaties (Bellinger 2007). The question thus arises as to whether it is possible to identify any patterns in the nature of the US engagement with international law or whether it is simply a mix of contradictions, excuses, and anomalies. If there appears to have been a shift in the US attitude towards international law during the Bush administration or since the end of the cold war, is it simply a case of the US going from being an ardent supporter of international law and its further development to an avoider and spoiler, or is it possible to at least in part reconcile recent behavior with traditional US rhetoric and actions highly supportive of international law? The objective of this chapter is to try to articulate some of the patterns in the nature of the US engagement with international law so as to make better sense of the apparent inconsistencies and changes.

Some scholars of IR might object to the task of defining a set of characteristics of the US engagement with international law. Talk of the US as a single unit might be considered problematic because such an approach appears to be treating the state as a monolithic entity, overlooking the fact that the US includes several branches of government as well as numerous interest groups and individuals with strikingly divergent understandings of what international law is all about. While the fullest explanation at the lowest level of analysis of any specific US action or inaction in relation to international law would undoubtedly be made at the sub-state level, it is indeed worthwhile to seek to identify patterns in US behavior, if only because the US participates in the system of international law as a single unit; the United States is a single "subject" of international law. Providing a picture of what the US "usually does" in relation to international law will not only facilitate reconciling apparent contemporary inconsistencies in US actions but will provide a basis on which to discern elements of continuity and change over time. Three such characteristics will be defined and explored.

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 212

The US uses international law to disseminate its policy preferences

The use of international law to disseminate US policy preferences was a very strong feature of the international order established in the wake of the Second World War. In his writing on "liberal hegemony", John Ikenberry (2000) has emphasized that the success of post-1945 US foreign policy owed much to the spread of international law and institutions. In the case of some treaties, such as the UN Charter and the Antarctic Treaty, the US provided the draft text. In some instances the draft was based on recent US legislation and so reflected a shift in US policy. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction followed the unilateral 1969 US announcement that the US would renounce the possession and use of lethal and incapacitating biological weapons and destroy its entire stockpile (Tucker 2002: 107). The US took unilateral action in the 1970s to control aerosol emissions of CFCs ahead of the negotiation of the 1985 Vienna Convention for the Protection of the Ozone Layer (Scott 2004a: 268). In a number of cases, international law can thus be understood to have in effect extended US policy foci to other countries. Negotiations have still taken place, but the initiative, the issue and approach adopted in the resultant treaty came from the US.

The 1972 Marine Mammal Protection Act provided for a moratorium on the taking of all marine mammals and products in the United States and prohibited their importation. The Act required United States officials *inter alia* to endeavor to negotiate a binding international convention that would ensure comprehensive protection for marine mammals. The US took its new anti-whaling policy to the United Nations Conference on the Human Environment in Stockholm, and from there to the International Whaling Commission (Scott 2004b: 130–43). The Commission finally agreed to a moratorium on commercial whaling, which took effect in 1986. In 1977 the US Congress passed the Foreign Corrupt Practices Act (FCPA), which was aimed at curbing overseas bribery of public officials by US corporations. Out of concern that US corporations had been put at a competitive disadvantage by the FCPA, Congress in 1988 urged the executive branch to negotiate prohibitions on bribery within the OECD (Glynn, Kobrin and Naím 1997: 19). This generated the momentum that in 2003 gave rise to the UN Convention against Corruption.

This first identified feature of the US relationship with international law is one regarding which there appears to have been some shift in recent years. Many people hoped that the end of the cold war would usher in an era of enhanced international co-operation and reliance on international law. But in the US there was in some quarters a sense that the US, as the sole superpower, could now achieve its objectives without incurring formal legal obligations (Taft 2006: 504). A number of academic commentators in the US have promoted the idea that international law is a strategy used by the weak against the strong, the implication being that the most powerful only stand to lose through participation in the international legal system (Rivkin and Casey 2000/2001: 35). This contrasts strikingly with the notion of international law as an effective means for the powerful to disseminate their policy preferences. Paul Kahn wrote in 2000, for example, that "appeals to international law have been one of the tools available to weaker States in their battles with more powerful states" (Kahn 2000: 1). Such ideas have permeated official thinking. According to the 2005 National Defense Strategy (at 5): "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 213

US use of international law to disseminate its policy preferences has during the Bush administration been overshadowed by a prominent use of non-treaty forms of policy dissemination. The Introduction to the 2002 US National Security Strategy referred to coalitions of the willing which can "augment" longstanding alliances such as the UN, the WTO, the OAS and NATO. Critics charge that in the case of Iraq, the "coalition of the willing" was not used so much to augment the United Nations but to replace UN authorization. One significant area of policy in which the US has drawn on non-treaty forms of cooperation, developing a loose coalition within which it negotiates a series of bilateral rather than multilateral agreements, is climate change. On July 28, 2005 the US, Australia, China, India, Japan, and the Republic of Korea presented a "Vision Statement for an Asia-Pacific Partnership for Clean Development and Climate". Although the US denied that what came to be known as the AP6 and more recently the APP was intended as a replacement for Kyoto, the fact that the Bush administration had categorically rejected Kyoto and favored such a coalition meant that in practice the US was proposing the AP6 as a substitute means of tackling the issue on a multilateral level.

The US use of non-law approaches to issues requiring a collective or widespread response has in practice not been an outright rejection of law in favor of non-law because non-legal methods may serve as an impetus to legal developments and legal and non-legal processes have often been used in conjunction with each other. The US reaction to the threat of maritime terrorism post-9/11 offers a useful example. The US responded to the heightened awareness of the threat of a maritime terrorist attack on a major US city by reviewing its domestic laws and policies and used both treaty and non-treaty methods to disseminate these policy preferences at a global level. Non-treaty initiatives included the Container Security Initiative, aimed at identifying potentially dangerous containers well before they entered the US, and the Proliferation Security Initiative, designed to interdict ships suspected of carrying WMD and missile-related technologies. The US also initiated and led a drive to improve international law on the subject. In January 2002 the US submitted a proposal to the International Maritime Organization on measures to strengthen maritime security on ships and in ports. By the end of that year the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea had adopted a new International Ship and Port Facility Security Code, which was incorporated as a new Chapter of the 1974 International Convention for the Safety of Life at Sea (SOLAS) (Beckman 2005: 250 fn 1).

In acknowledging that the Bush administration has made strong use of non-legal mechanisms to disseminate its policy preferences it must be recognized that multilateral treaties have rarely solved the problems they were negotiated to solve. It is true that the use of ad hoc coalitions and agreements with no legal status does nothing to further the development of the system of international law, but it does avoid institutional blockages. The US can limit membership to a small group of like-minded states and then expand the group once momentum has been achieved (Byers 2004: 544). Constructing coalitions on an ad hoc basis may be more effective than large-scale multilateral treaty approaches, the documented deficiencies of which include the slow speed of negotiations, the lowest common denominator impact of large negotiating groups, and creative ambiguity in the treaty text (Kellow 2006: 290).

In some situations in which observers might have anticipated that the US would promote a multilateral treaty approach, the United States has in recent years sought resolutions of the UN Security Council. Security Council Resolution 1373 (2001), based on a US draft, required all states to take certain actions against the financing of terrorist activities and established a committee of

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 214

the Council to monitor implementation of the resolution. Unlike previous Council decisions commanding states to take specific actions, there was no explicit or implicit time limit to the actions required of states; hence the resolution could be said to establish new binding rules of international law (Szasz 2002: 902). Resolution 1540 (2004), requiring states to take certain specified actions to prevent non-state actors acquiring weapons of mass destruction, prompted some lawyers to argue that such legislative resolutions are beyond the powers of the Council (Elberling 2007).

There are obvious practical advantages to the US of using Security Council resolutions in this way, including the relative speed of the negotiating process and the fact that by article 25 of the UN Charter, members have agreed to accept and carry out the decisions of the Security Council. The introduction of "legislative" resolutions has sparked concern at the potential scope for this autocratic mode of imposing new law on the international community in contrast to the relatively more democratic method of multilateral treaty negotiations. To be perceived as legitimate, such law making requires trust on the part of the less powerful states that the permanent members of the Security Council will not abuse their powers but trust in US foreign policy, methods, and motives has in recent years been in short supply.

The US seeks to protect its own policy choices and legal system from external influence via international law

A second feature of the US engagement with international law is that the US guards keenly against other actors using the international legal system as a means of influencing US law and policy, both foreign and domestic. The net effect of a lot of US-led multilateral treaty law has been that the US has influenced the laws and policies of others in a way that is not true vice versa (Scott 2004c). The US has been strongly resistant to anyone else attempting to use international law as a way of changing US law or policies. The US did not support the Landmines Convention that, if ratified, would have impacted on US policy on the Korean Peninsula; neither has the US accepted the need for a new arms control treaty for outer space as has been promoted by China. According to the 2006 US national space policy, the US will "oppose the development of new legal regimes or other restrictions that seek to prohibit or limit US access to or use of space" (US National Space Policy 2006: 2). Within the US there have in recent years been strong voices warning US policy makers to guard against the "threat" of international law (Spiro 2000b); Rivkin and Casey have, for example, claimed that "international law may prove to be one of the most potent weapons ever deployed against the United States" (Rivkin and Casey 2000/2001: 36).

US resistance to the imposition on US society of external law can be said to have a long history:

> For the American Revolution was a rebellion against the imposition of transnational law, the precise issue being whether the British Parliament possessed the rightful authority to make laws for the internal affairs of the colonies. The colonists insisted that, as they had never been represented in the British Parliament, they could not accept such authority. The British disagreed, and so brought on a revolutionary conflict.
>
> (Rabkin 1999: 31)

There has long been a view that leaving US law unsullied could strengthen US cohesion and identity and guard against foreign meddling in US affairs. While liberal internationalists might point out that engagement in the international legal system inevitably involves some loss of national sovereignty or policy control, it is worth bearing in mind that the fact that the US took the lead in drafting so many of the significant post-Second

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 215

World War treaties together with its careful monitoring of the international law commitments it assumed subsequently, has meant that US participation in the system of international law has not involved nearly such a loss of independent decision-making capacity as it has for the average participant.

This longstanding US care to protect its law and policy choices from external encroachment can help us understand recent reluctance on the part of the US to participate in some significant new developments in international law. In the case of US hostility to the ICC, for example, it is true that there were specific aspects of the Statute that the US did not like, foremost among which was that it left open the possibility of a US national being brought before the Court despite the fact that the US had never ratified the Statute (Elsea 2006). The underlying grounds for US hostility towards the Court can, however, be understood to be that international judicial bodies and interested states would be able to use the Court to shape American policy. "An American president would be far less likely to use force if there were a genuine possibility that US soldiers or officials, including himself, would face future prosecution in a foreign court" (Rivkin and Casey 2000/2001: 40).

The US has with few exceptions always guarded against the possibility of the US and its citizens being brought against their will before an international court or tribunal. Despite the fact that the Permanent Court of International Justice, established in 1922, "owed something to the example of the US Supreme Court and much to the inspiration and leadership of American legalists" (Bailey 1974: 629), the US never ratified its Statute. The US did ratify the Statute of the International Court of Justice, but did so with the Connolly reservation by which the US declared exempt from the Court's compulsory jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America". The United States has not only "unsigned" the Rome Statute of the ICC but has through its negotiation of bilateral "impunity agreements" actively sought to ensure that no US citizen ever appears before the Court. A notable exception to the pattern of the US shielding itself from being brought against its will before an international court is the US preparedness to be subject to the compulsory and highly legalized dispute settlement system of the World Trade Organization, in whose establishment the US was a leader.

Article VI of the US Constitution of 1789 declares that not only the Constitution and the Laws of the United States, but all treaties, "shall be the Supreme Law of the Land"; "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding". The fact that the Constitution declares treaties to be the supreme law of the land might appear to suggest a much greater domestic acceptance of international law than, say, the UK system in which treaties have no domestic force unless explicitly incorporated into the national legal system via an act of parliament (Denza 2006: 434). Indeed, the Supremacy Clause is generally understood as having been intended to reverse the British rule, which the US would have otherwise inherited (Vazquez 2008). In practice, the apparent openness of the US legal system to international treaties has led to considerable focus being placed on ways of resisting what might potentially have been an overwhelming impact of international law on the domestic legal system.

One means by which this has taken place has been through the judicially developed doctrine of non-self-executing treaties. As early as 1829, Justice Marshall attached a proviso to his statement affirming that in declaring treaties to be the law of the land, the US constitution was providing that in courts of justice, a treaty is to be regarded as equivalent to an act of the legislature. A treaty was to be regarded as equivalent to an act of the legislative "whenever [the treaty] operates of itself

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 216

without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act . . . the legislature must execute the contract before it can become a rule for the Court" (*Foster vs. Neilson* (27 US 253 (1829)). A self-executing treaty is thus one to which the executive and courts are to give effect without awaiting an act of Congress. Non-self-executing treaties are treaties by which the US government has promised to take a specific course of action such as to enact a law and these require congressional implementing legislation. An example of a non-self-executing treaty is the Genocide Convention by which the US undertook to make genocide a crime in the US. Although it need not necessarily have done so, the doctrine of non-self-executing treaties has, in practice, functioned as a mechanism by which the impact of international law on US law and policy has been considerably constrained (Henkin 1996: 291–92).

The fact that any treaty into which the US was going to enter was going to be "supreme" within the US legal system meant that particular care was to be taken before committing to any treaty obligations. Treaties were to be entered into by the president only if two-thirds of the Senate were to concur.[1] Because a political party rarely commanded a two-thirds majority, this constitutional provision required that a treaty have received broad political support before the US became party to it. Failure to achieve a two-thirds Senate consent to ratification of a treaty has constituted another means by which the impact of international law on US law and policy has been minimized. It is not that the Senate has rejected a large number of treaties; in many cases a treaty has stalled before even being voted on in the Senate when the extent of opposition to the treaty has become apparent.[2]

One whole category of treaties that the US has ratified at a very low rate is that of human rights treaties. The United States has signed but not ratified the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of the Child. It has neither signed nor ratified the two Optional Protocols to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The reluctance of the Senate to lend its consent to ratification of human rights treaties is exacerbated by the fact that these treaties typically address subjects that are primarily a matter of state law in the United States (Murphy 2004: 101).

When it *does* ratify human rights treaties, the United States generally does so with a number of reservations, understandings and declarations (RUDs) that have the effect of severely limiting any independent influence of international law on US law or policy. Kenneth Roth has described how a treaty is subjected to systematic analysis by Justice Department lawyers, who:

> [C]omb through it looking for any requirement that in their view might be more protective of US citizens' rights than pre-existing US law. In each case, a reservation, declaration, or understanding is drafted to negate the additional rights protection. These qualifications are then submitted to the Senate as part of the ratification package.
>
> (Roth 2000: 348)

Hence, for example, although the United States ratified the International Covenant on Civil and Political Rights (ICCPR), its accession was accompanied by five reservations, four interpretative declarations and five understandings. The US has entered the highest number of reservations by states parties to the Torture Convention, the Convention on the Elimination of Racial Discrimination and the ICCPR (Redgwell 2003: 394). In the case of the ICCPR, three out of four states have ratified the treaty without a single reservation, whereas the US has

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 217

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

entered 11. While article 7 of the ICCPR states, *inter alia*, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the US has entered a reservation that: "[T]he United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and-or Fourteenth Amendments to the Constitution of the United States." The practice of seeking to limit acceptance of a treaty to only those provisions already provided for in US law serves to narrow the difference, in practical terms, between those human rights treaties the US has or has not ratified. The US has difficulties in relation to any treaty, such as the Rome Statute of the ICC, which do not permit reservations; John Bolton, who served as the Assistant Secretary of State for International Organization Affairs at the Department of State from 1989 to 1993, has asserted that the US should never agree to such a clause (Bolton 2000: 190).

In the 1950s Senator Bricker mounted an unsuccessful campaign to amend the Constitution to ensure that all treaties would be non-self-executing and to deny Congress the power to implement certain treaties in domestic law, apparently so as to guard against racial discrimination and segregation being ended by international treaty (Henkin 1995b: 348). Contemporary would-be protectors of the US legal system from international human rights law intrusions on US domestic policy include Jack Goldsmith, author of such titles as "Should international human rights law trump US domestic law?" (Goldsmith 2000a). Human rights treaties come in for particular criticism because this group of treaties imposes limits on the basic powers of a state to establish what constitutes permissible conduct in that society and what consequences should flow from a breach of those rules; human rights circumscribe a government's power to define its relations with its own citizens (Schou 2000).

It is in relation to customary international law that fear of the potential impact on US law of international law has been most strongly expressed. Speaking in 2006, Secretary of Homeland Security, Michael Chertoff, emphasized the fairness of the US living up to the letter of a treaty ratified by the Senate, yet cautioned against "an increasing tendency to look to rather generally described and often ambiguous 'universal norms' to trump domestic prerogatives that are very much at the core of what it means to live up to your responsibility as a sovereign state". He explained the value of the Senate adopting a cautious approach through the use of reservations:

> And yet again, the experts and sometimes the foreign adjudicators simply view those limitations as minor impediments to insistence that we accept the full measure of the treaty as ratified by others, or perhaps as not ratified by anybody, but as having its source in that vague and fertile turf of customary international law.
>
> (Chertoff 2006)

The fact that the Supreme Court has in some cases relied on international and foreign law in its interpretation of the Constitution has fueled considerable scholarly output concerning the legal status of customary international law and the validity of using foreign and international law in constitutional interpretation (e.g. Goldsmith and Posner 2005; McGinnis 2006; Neuman 2006).

The US takes legal obligations seriously

It may make for a pithy press release on the part of an NGO to claim that the US simply does not care about international law – indeed, there are undoubtedly many individuals in the US who do not, but if the breadth of US state behavior is held up to analytical scrutiny, such an assertion does

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 218

not hold up. With the twin provisos that US national security must come above all other considerations and that the US seeks to guard against external influencing of US policy via international law, the US can be said to take legal obligations seriously. This is true whether the obligations are US obligations or those of others. US respect for international law can be said to be an extension of US respect for its own legal system. President Abraham Lincoln declared in 1838:

> As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor; – let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children's liberty . . . let [a reverence for the laws] become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.
>
> (Lincoln 1838)

It has often been noted that the United States is a country built on law. "We are a nation bound together not by ties of blood or religion, but by paper and ink. The Declaration of Independence itself was, at its heart, an appeal to law" (Rivkin and Casey 2000/2001: 35). "American law is not merely one social system among many. It is the central instrument of the self-constituting of American society" (Allott 2003: 131). Respect for the rule of law has traditionally been perceived as a core ingredient of US strength. President Lincoln declared in 1838 that: "[W]hile ever a state of feeling, such as this [a reverence for the laws] shall universally, or even, very generally prevail throughout the nation, vain will be every effort, and fruitless every attempt, to subvert our national freedom" (Lincoln 1838).

There are several, perhaps unexpected, implications of the US taking legal commitments seriously. One is that the US shies away from committing to treaties that other states may readily ratify but then not implement. John Bellinger III, US Legal Adviser, commented in 2007 that: "[U]nlike certain countries, we do not join treaties lightly, as a good will gesture, or as a substitute for taking meaningful steps to comply" (Bellinger 2007). It may be the state that has the least intention of complying with a treaty that is most ready to ratify it. China, for example, has a much worse record in terms of torture than the United States, and the Convention against Torture a relatively low participation rate, yet China was an early ratifier of the Torture Convention (Kent 2007: 202–204). While the US may be the only country other than Somalia not to have ratified the UN Convention on the Rights of the Child, this is presumably not indicative of the typical childhood experience in the US and Somalia relative to that in the rest of the world.

The US is ready to hold other states fully accountable in terms of their legal obligations and is particularly unhappy when members of an international committee or organization use that participation to provide cover for actions that may not be compatible with the legal obligations they have assumed. In rejecting the proposed Verification Protocol for the Biological Weapons Convention, the US argued that the Protocol was inadequate to the task and would enable states to gain credibility from ratifying the Protocol even if in breach of their obligations under the Convention (Murphy 2001: 899–901). This is not to say that the United States is never itself in breach of international law; indeed critics accuse the US of grave breaches, including on such high-profile issues as use of force, torture, provisional measures of the International Court of Justice, and the Treaty on the Non-Proliferation of Nuclear Weapons.

How can such apparent lapses in the legal credentials of the US be reconciled with an assertion that the US takes legal obligations seriously or is this identified characteristic no

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 219

more than an apology for US behavior? One perhaps rather simplistic answer would be that the US takes its legal obligations seriously but, from a lawyer's perspective, perhaps not seriously enough. Or, to express it differently, the US is prepared to put its policy choices, particularly those involving the "national interest", ahead of an obligation in international law. A lawyer might believe that a state should comply with international law no matter what, but from a political or even ethical perspective, many questions other than that of legality need to be taken into account in evaluating policy choices.

While it is extremely rare for a state to openly admit that it intends to breach international law, it would be fair to state that the US has gone to extraordinary lengths to try to reconcile its policy choices with contemporary international legal standards. This has on occasion produced contrived legal justifications that lose sight of the spirit if not the letter of the relevant law. The use of force against Iraq offers one example, but the strain in other legal justifications proffered by the US in recent years has been as great if not greater. Particularly given that the prohibition against torture exists in customary international law as well as in treaty law, the US explanation to the Committee against Torture as to how the infamous "torture memos" were compatible with an abiding US commitment to the prohibition on torture would appear to most readers as an exercise in semantics (List of issues). The US has entered into the same definitional acrobatics in terms of who can be regarded as a prisoner of war under the Convention Relative to the Treatment of Prisoners of War (see Aldrich 2002). Such acrobatics may or may not have been performed cynically – the point here is not that US officials necessarily believed in the legal arguments they were putting forward – but that they at least recognized the importance of having a legal rationale and hence the seriousness of legal obligations.

Although the US engages on occasion in contorted legal justification for a policy or action that is not compatible with existing US obligations in international law, it would be fair to say that this is not the preferred position. Where practical, US officials would probably prefer to withdraw from the relevant legal obligation. On December 13, 2001 the US submitted formal notification to Russia of its intention to withdraw from the Anti-Ballistic Missile Treaty of 1972. The treaty had been premised on the cold war doctrine of mutually assured destruction and US defense policy had moved on. While Russia's President Putin recognized that the US was within its rights to withdraw from the Treaty, there was widespread concern that the withdrawal could spark a fresh arms race, particularly with China ("US quits ABM Treaty" 2001).

Following the Avena Case in which the International Court of Justice found that the US had violated article 36, paragraph 1(b) of the Vienna Convention on Consular Relations in its treatment of Mexican nationals on death row in the United States, the US Secretary of State on 5 March 2005 announced the US withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Death Penalty Information 2005). Mexico had invoked the Optional Protocol as the basis of the Court's jurisdiction in this case, as had Paraguay and Germany in two previous cases brought against the United States on the question of consular access for foreign nationals arrested in the United States and sentenced to death.[3] Although withdrawal from a legal obligation with which the US is not complying may be an expedient means of ending US non-compliance, the US cannot simply withdraw from all legal obligations that become inconvenient because the system is premised largely on the principle of reciprocity and the US still wants and needs the international legal system both to promote stability and to provide a means for the dissemination of US policy preferences.

Most US observers would believe that this third feature of the US engagement with

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 220

international law is one that has changed significantly in recent years. Whether the US does in fact take its legal obligations less seriously now than it did 30 or 40 years ago would be difficult to measure. It is not new for the US to engage in acts of non-compliance, even with the international law on the use of force and it is true that higher standards are expected of the US than of other countries. This underscores the importance of perception. The US under the Bush administration appears on occasion to have deliberately fostered a perception of a reduced US commitment to its international law obligations through its rhetoric. This may be one of the ultimate anomalies in the contemporary US engagement with international law, for it would most readily be assumed that a state would want to "talk up" rather than "talk down" its commitment to international law. Joseph Nye has led an effort to warn Washington of the consequences of disregarding the importance of "soft power". Global opinion polling now suggests that majorities around the world assume that China will one day be as powerful as the US and that the US is not concerned by that fact (WorldPublicOpinion.org 2007).

Conclusions

Our starting point in this chapter was the many anomalies and apparent inconsistencies that pervade the US engagement – and disengagement – with international law. In an attempt to reconcile some of those anomalies, this chapter has identified three features of the US relationship with international law. In combination, these features help make sense of many actions and inactions of the US. The US may like to use international law to disseminate its policy preferences, but what then appears as support for the system of international law is weakened by the fact that the US also wants to prevent others from using international law to impose their policy preferences on the US. The US may support the development of international human rights law as a means of disseminating its policy preferences but the fact that it has such faith in its own legal system and respect for the legal obligations its citizens incur thereunder gives rise to a belief that the US has no need for external standards of human rights.

The three identified features of the US engagement also provide a basis on which to tease out aspects of change and continuity in US practice in relation to international law. The US failure to ratify the Rome Statute of the ICC might, for example, appear to reflect a recent downturn in US concern for international law, but it can at the same time be viewed as reflecting continuity with the US reluctance to submit itself or its citizens to the compulsory jurisdiction of an international court. That reluctance remains. While the fact that the US did not veto a 2005 Security Council resolution referring the situation in Darfur to the ICC is interpreted by some observers as another shift on the part of the US, this time toward greater acceptance by the US of the Court, the US has never opposed criminal accountability before an international court or tribunal – at least so far as others are concerned.

Although it would be difficult to sustain an argument that acts of US non-compliance are a new feature of the US relationship with international law, the claim that the US takes legal obligations seriously has in recent years been challenged by a number of high-profile cases of non-compliance, including, most prominently, the 2003 invasion of Iraq. The use of international law to disseminate preferred policy options has been overshadowed by the use by the Bush administration of non-legal means of policy dissemination. This suggests that of the three identified features of the US engagement it is the US determination to protect its own legal system from external influences via international law that has remained most constant. This feature gives rise

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14

9780415418768_4_014.qxd 26/11/2008 02:38PM Page 221

to many of the inconsistencies in the US attitude towards international law, for it tempers both the use of international law to disseminate policy preferences and the seriousness with which the US accepts its international law obligations.

It is interesting to note in conclusion that attaching great importance to respect for sovereignty is also a hallmark of the Chinese attitude towards international law (Xue 2007: 84). As a rising power, China has worked hard to make effective use of soft power (Kurlantzick 2007). The argument that the US should show greater deference towards international law now so that China will do the same if and when its power equates with that of the US may not be entirely convincing (Posner and Yoo 2006). It is nevertheless difficult to see how the US stands to benefit from fostering a perception that it no longer cares about international law.

Notes

1 US Constitution, article II, section 2. This differs from normal legislation, which requires approval by simple majorities in both the Senate and the House of Representatives.

2 Not all treaties are put through this process. Because of the difficulty of acquiring 2/3 Senate approval, a practice arose early on of referring to some of what would in international law be treaties, by other names such as presidential agreements and Congressional–Executive agreements and gaining approval for their ratification via different processes.

3 The first of these cases did not reach the merits stage, after the US executed Angel Francisco Breard in defiance of the provisional order issued by the ICJ. In its decisions in both the LaGrand and Avena Cases, the ICJ found that the US had violated the Consular Convention. Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. United States*), 1998 ICJ Rep. 248; LaGrand Case (*Germany vs. United States*), 2001 ICJ Rep. 466.

Downloaded By: 10.2.97.136 At: 18:37 22 Mar 2023; For: 9780203884621, chapter14, 10.4324/9780203884621.ch14