



Sanctioning versus instrumentalisation: United States, worldwide law and world legislative issues

Aallotar Helen

Jyväskylä University, Finland

Abstract

International law institutionalises norms, behaviour expectations and obligations for state and non-state international actors, regulates their behaviour, and offers some justice to victims of state and non-state actions and processes. It creates a semblance of international realm of law-abiding actors. This law, however, is affected by the United States' (US) dominant position: the US uses informal channels to manipulate international law and subject other states to this law without the US itself being equally subjected to the law; dominates international institutions as embodiments of international law; and internationalises its domestic law. This article argues that much as law regulates state behaviour in international affairs, it remains an instrument of world politics serving state interests of those capable of manipulating and/or eluding it, simultaneously sustaining a semblance of universal legality, a reason why the US's retreat from international law is justified by disguised reference to US constitution, independence and sovereignty.

Keywords: International law institutionalises norms, United State, international law, state sovereignty.

INTRODUCTION

This brief paper outlines the role of international law in world politics, and shows how the United States (US)'s legal-political and institutional dominance affects international law. It shows that international law institutionalises norms, value expectations, and regulates behaviour of both state and non-state international actors, and ideally restrains international political excesses. The law creates an "international society" which is "said to exist when states mutually recognise each other's rights to sovereign authority, when sovereignty comes to be based less on states' material capabilities to defend their independence than on institutionalised rules, such as non-intervention, non-aggression, and self-determination" (Reus-Smitt, 2004).

Abbreviations: IMF, International Monetary Fund; UN, United Nations; WTO, World Trade Organisation; UDHR, Universal Declaration on Human Rights; OECD, Organisation for Economic Co-operation and Development; AGOA, African Growth and Opportunity Act; ICJ, International Court of Justice; ICC, International Criminal Court; EAC, East African Community.

International law also offers some level of justice-at least so far as is possible-to victims of both state and non-state actors. In performing this triple role, international law, however, is affected by the dominance of the US.

The US dominance weakens the universality and equitability of international law: the US affects international law by using informal channels through which it manipulates and subjects other states to a law to which it is itself less, if subjected at all; dominance over international institutions that are generally seen by both state and non-state actors as embodiments of international law; and internationalisation of its domestic law while isolating itself from aspects of international law that appear to contradict its interests and domestic law. Yet those who support this US stance argue that the US retreats from international law in order to protect its constitution, national independence and sovereignty from pressures of global governance (Bolton, 2000a, b; Rabkin, 2007). This paper highlights the meaning and indications of international law; its role in world politics; how and why the US appears to retreat from world politics. It is argued that while the US seeks not to subject itself to a globalist program advocating global governance and the erosion of state sovereignty, the country does

Manipulate and instrumentalise international law for its national interests. Thus the role of law need not be limited to realist, legalist-globalist, institutionalist, or constructivist explanations. Instead, it straddles analytical categories and theoretical confines.

MEANING, ORIGIN AND INDICATIONS OF INTERNATIONAL LAW

International law is constitutive of legalisation of world politics (Abbot et al., 2000). It originates from state interactions, and leads to the establishment of international institutions and tribunals (Keohane et al., 2000), the embodiment of which are international organisations. This law is manifested in states' commitment to agreements and joint decisions reached during interstate interactions. Such interactions need not result into written commitments, hence states' interactions over the years result into customary international law (Barnett and Finnemore, 2004). However, legalisation of world politics implies the establishment of legal frameworks within which states play their political games. For instance, sovereign equality among states is one of the legal principles that dominate world politics (Krisch, 2003), thereby guiding states in their interactions, the violation of which is considered violation of state sovereignty. Concurrent with sovereignty are the norms of respect for the territorial integrity of states, which engenders the inviolability of territorial sovereignty. Sovereignty has the triple components of territoriality, domestic sovereignty (the idea that states have sovereign control over their domestic spaces without foreign interference), and external sovereignty (which embodies the idea that states treat one another as sovereign equals (Krasner, 2002; Zacher, 2001). John Gerard Ruggie notes that sovereign equality and respect are reciprocal. States' existence in relation to other states depends on this reciprocity: "it would be impossible to have a society of sovereign states unless each state, while claiming sovereignty for itself, recognised that every other state had the right to claim and enjoy its own sovereignty" (Ruggie, 1993). Thus "reciprocal sovereignty" has become "the basis of the new international order". Though there may be violations of these sovereignty claims (Krasner, 1993) they remain central to interstate interactions. Norms like non-interference in domestic affairs, punishments for international crimes (such as war crimes and crimes against humanity), protection and respect for fundamental human rights and freedoms embedded in the United Nations Universal Declarations on Human Rights (UN, 1948), cooperation in the management of shared resources, arms control (such as the 1997 Anti-Land Mines Convention), and respect for treaties reached among different states on different issue-areas, have made international interactions legalised. These interactions constitute interstate politics.

International law is rooted in international politics, and ensures the legalisation of that politics. This implies the

coexistence and co-constitution of the legal and the political in international affairs. Coexistence implies that both the political and the legal are inseparable in international politics - they are concurrent. Co-constitution here implies that both international law and international politics are bedfellows; politics gives rise to law and law regulates politics. Thus legalisation of world politics is a political process while politics needs to be played within legal confines; else it is seen as violation of the law.

Legalisation is done by establishing institutional features characterised by obligation (where states and other international actors are bound by a commitment or a set of commitments); precision [the clear definition of required conduct, and authorisation of such conduct]; and delegation (the granting of authority to third parties "to implement, interpret and apply the rules; to resolve disputes; and (possibly) to make further rules" (Abbot et al., 2000). This legalisation prescribes as well as limits conduct: as states interact they set up rules and behavioural yardsticks from which to judge one another's behaviour. In the heretofore state, actions are judged as either compliant with or deviant from international law, and relevant sanctions are imposed where applicable. States commit themselves through treaties, conventions and declarations. They set up international institutions, embodied in international organisations which are mandated to implement their decisions (Karns and Mingst, 2010). Institutions administer justice and resolve disputes; implement joint decisions regarding international cooperation; and monitor states' compliance with the law. The establishment of "third-party tribunals" to apply general legal principles, resolve transnational disputes and mediate between conflicting parties (Keohane et al., 2000) is central to the institutionalisation process. From the foregoing, international law may be understood to imply not only "legal bureaucratisation" or the establishment of institutions for interpreting and administering the law, resolving disputes and enforcing compliance; it also implies the much-upheld legitimacy-building by purposively constructing the law "within inherited traditions" from which obligation, precision and delegation derive their relevance (Finnemore and Toope, 2001).

From the total sum of these indications one can define international law as the deliberate political commitment by states to regulate their behaviour and conduct as they interact in the international realm, through agreed-upon rules and the formation of institutional mechanisms by which these rules can be applied. This law among nation states¹, through which governmental and non-governmental actions and processes in the international realm are regulated and regularised, has three indicative

¹ My concept: "Law among Nation States" simply implies that it is respected and upheld by several nation states bound by such law, not to ignore the fact that some international legal provisions do not hold to all states, especially those which are not signatory to the agreements, conventions and treaties establishing such laws.

instances: international codes of behaviour and principles of existence agreed upon among states and developed over the years by the institutions themselves (such as the principle of sovereignty); non-formal traditions, rules, norms and values, such as customary international law, that regulate state behaviour even when there is no formal agreement developed by, or imposed upon, states to behave as such (namely, diplomatic respect for representatives from other states in international fora, developed over the years); and formal and informal processes of legalisation and political engagement that bring legitimacy. "Much of what legitimates law and distinguishes it from other norms of normativity are the processes by which it is created and applied - adherence to legal process value, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning" and speech (Finnemore and Toope, 2001). While some of these features may be applicable to domestic law, international law is characterised by: absence of an authoritative machinery for its enforcement; it is decentralised and multidimensional, and only binding on states which accept to be subjected to it, so it is not universal; and actors may not equally subject themselves to it regardless of sovereign equality (Krisch, 2003). International law is less binding than domestic law but most-times states obey it. Therefore, it plays an important role in world politics - else states would not respect law if it were valueless and useless (Krisch, 2003; Goldstein et al., 2000).

THE ROLE OF INTERNATIONAL LAW IN WORLD POLITICS

International law institutionalises particular solutions to particular political problems in the international realm; restrains state behaviour (and behaviour of international non-state actors) toward one another; and provides a degree of justice to victims of state and non-state actions in the international realm. It is a middle-ground to the would-be possible political excesses in the international realm that would make international power struggles chaotic.

Institutionalisation of norms, values and behaviour expectations is a key here. International institutions can be seen in this light: they embody an array of authoritative adjudicators in which states' expectations regarding conduct and behaviour, obligation in international affairs, as well as the roles and limits of transnational actors, are expressed. International tribunals, for instance, are "charged with applying the general legal principles" in international politics (Keohane et al., 2000). Institutions like World Bank, International Monetary Fund (IMF), World Trade Organisation (WTO) aid some states, while United Nations (UN) and regional institutions reduce disagreements and resolve disputes amongst international actors, "through institutionalised interstate bargaining". Institutions "maintain the tight national control on dispute resolution through selection

and tenure rules", while ensuring that a set of "decision-making rules and procedures and a forum for interstate bargaining" in which disputes are resolved, is in place (Keohane et al., 2000). The general principle of sovereign equality, which Krisch calls "one of the greatest utopias of international law" (Krisch, 2003) implies that states acknowledge others' sovereignty². This legal recognition makes international politics a game of 'equal' players at least in theory, which explains the survival of both small and big states (in terms of economies, populations and material capabilities), strong and weak states (in terms of military prowess and technological advancements), as well as neutral states (which are not subject to military attack from other states unless they violate their neutrality). This institutionalised preservation of sovereigns is possibly one of the most important achievements of international law.

Institutionalisation, in turn, leads to predictability of behaviour, reciprocity, development and continuity of institutional avenues for interstate bargaining, and the emergence of authoritative supranational actors born of interstate cooperation. These institutions and legal obligations coexistent with and developed by states, sometimes constrain state behaviour in world politics.

States are aware of the existence of other states. They accept to secure their cooperation regardless of the anarchic structure of the international system. International law, thus, constrains state behaviour as reflected in foreign policy. International institutions, embodiments of international law, influence states' behaviour in ways that even encroach on states' security interests. The UN Security Council "imposed programs of inspection, weapons destruction, and compensation on Iraq for violations of international law; it also created the International Criminal Tribunals for Rwanda and former Yugoslavia that have convicted national officials of genocide, crimes against humanity and other international crimes" (Abbot et al., 2000). By imposing obligations on states, law defines acceptable and unacceptable behaviour, and ensures that politics is played within certain limits. The imposition of such limits makes it possible to define acceptable and unacceptable behaviour, leading to predictability of conduct and thereby forcing actors to behave according to international legal provisions. Christian Reus-Smit (2004) admits that "international politics takes place within a framework of rules and norms, and states and other actors define and redefine these understandings through their discursive practices". Thus, though realists might argue that international law is either weak or simply serves the interest of powerful actors - dominant states or groups of states which create and use it for their interests (Carr, 1964; Waltz, 1979) - or that international law and the international institutions embodying it do not hold significant restraint to states bent on maximising power

² This is especially since the Treaty of Westphalia, 1648, when modern international law is believed to have begun.

(Mearsheimer, 1995), there is a high degree of restraint by the law upon both states and non-state actors.

Realists contend that international politics is a realm of sovereign states. There being no higher authority to come to the rescue of states that may suffer injustices from other states, all states must work hard to protect themselves using material, technological and military capabilities most-times backed by robust economies. In the process, as long as states are pursuing their interests - including material, military and strategic interests - international law is unable to restrain states since interstate cooperation is part of the process of self-preservation. Consequently, the international institutions put in place are unable to restrain state behaviour (Carr, 1964; Waltz, 1979; Mearsheimer, 1995). International institutions, accordingly, are seen as a means to an end by powerful states or groups of states controlling them. Yet, contrary to realist arguments, states seem to benefit from cooperation and respect for international law. For instance states may be suspended from memberships to international institutions for improper behaviour yet they otherwise benefit from such membership. In other instances inclusion of the provisions of international law in national constitutions signifies states' willingness to be restrained by international law: many countries, for instance, reflect the 1948 United Nations Universal Declaration on Human Rights (UDHR) in their national constitutions, at the same time respecting international agreements in their policies, which implies their respect for and recognition of international legal provisions.

International agreements, such as the Kyoto Protocol, Montreal Protocol, Geneva Convention and other treaties, constitute some of the means to state constraints. It is interesting how most war actors respect the Red Cross, an unarmed international institutional establishment resulting from the 1856 Geneva Convention. Thus legalisation "represents the decision in different issue-areas to impose international legal constraints on governments" (Goldstein et al., 2000: 387), thereby establishing international institutions which affect political processes: "the relationship between law and politics is reciprocal, mediated by institutions". As Goldstein et al. (2001: 396-399) still indicate, greater institutionalisation "implies that institutional rules govern more of the behaviour of important actors"; actors subject themselves to scrutiny, general rules and procedures. Any state, however powerful will suffer international accusation whenever it violates important aspects of international law. Though there are variations in the extent of legalisation, legalised institutions have a functional value which impacts on compliance with demands of international cooperation. This leads to some behaviour change and the "evolution of international norms". Legalisation does not stop at restraining the behaviour of international actors; it also aids the dispensation of international justice to victims of states and non-state actions and processes.

Perpetrators of international crimes - war crimes, terrorism, crimes against humanity, grave human rights violations, transnational drug and human trafficking, money laundering and other forms of transnational criminality have been subjected to international law, and some brought to book. The transnationalisation of crime, especially due to techno-scientific facilities concurrent with permeable borders in the era of globalisation, would have led to increased impunity if law and administration of justice and punishment of criminals were limited to the domestic realm, but due to international law, perpetrators of heinous crimes, such as in Rwanda and the former Yugoslavia are apprehended and subjected to trial and international adjudication through established legal institutions, such as the International Criminal Tribunal for Rwanda and Yugoslavia (Goldstein et al., 2000; Reus-Smit, 2004). It is arguable that "a transnational tribunal can present itself as a protector of individual rights and benefits against the state, where the state itself has consented to these rights and benefits, and the tribunal is simply holding it (the state) to its word" (Keohane et al., 2000). The willingness of states to subject themselves to international law implies that they see the value of law. Subjection to tribunals in turn may be a double-edged sword: the state may be caught in the wrong and forced to compensate the victims or revert its actions; but the state also benefits when criminals that elude its domestic capacity are apprehended and brought to book from other states. Terrorism, transnational crime and piracy are instances where international law helps states to effectively punish such criminals: with meaningful treaty-based state cooperation and related similar international legal establishments the fight against such crimes is possible.

The meaningfulness of treaty-based interstate cooperation here has two notions: the notion of reciprocity; and the notion of action. Reciprocity arises from the expectation that state actions as agreed upon in the said treaty, such as a treaty to cooperate in the fight against transnational crime and terrorism, are appreciated by all parties which do the same in return: arrest and charge my citizens when found trafficking drugs, laundering money, or involving in terrorist activities, and I will arrest yours when found doing the same. This is possibly the spirit within which Tanzania arrests and deports to Uganda persons suspected to have involved in terrorist attacks in Kampala on 11 July, 2009 (Daily Monitor, Saturday, 17 July, 2010; VOA, 16 July, 2010; Daily Nation, Tuesday, 1 March, 2011); Sempogo in The New Vision, Friday, 1 July, 2011) (RFI, 2010; Ali, 2010; All Africa, 2011). Tanzania's actions are in line with Article 124 and 125 of the Treaty for the establishment of EAC: "enhance joint operations such as hot pursuit of criminals ..." (Article 124(4) (b) (EAC 1999). Tanzania expects the same from Uganda, in case it faces a similar problem, if reciprocity is to be attained. This leads to second notion-actions. International legal

obligations are not paper-work only, though many can be due to the politico-strategic and economic complications of their implementation. Actions speak louder than writings and verbal commitments. It is important that international law is implemented, such as indeed Tanzania acts in the spirit of EAC. Though Tanzania may have done so aware that it is itself not safe from these terrorists being in its territory, it is possible to argue that its actions are within the obligation imposed by the EAC Treaty. Thus combining reciprocity and action instantiates and gives meaning to treaty-based interstate cooperation in international law - whether this cooperation is bilateral or multilateral: absent reciprocity and action cooperation on paper remains claptrap.

What may be controversial is equality before international law, by states and their citizens, in an age of politico-economic hegemony. Niko Krisch (2003) finds that international law "imposes few restraints on situations of predominance and hegemony; it provides only limited protection against the exercise of unequal power, and disappoints those who had hoped for a more transformative power on the part of sovereign equality". This charge, in the post-Cold War order, implies that the US is somehow above the law, at best besides and not under it, like weaker states. The implied inequality before international law brings afore the questionability of equal legal obligation and the possibility that all states can benefit from, or be equally constrained by, the same law³. Whether the US, being a powerful state, is uniquely above international law would require us to understand whether it is itself bound by the law and does respect the law, or if it does not then to explain when and why it retreats from international law. Other states do violate international law - just as domestic law itself is never wholly respected and upheld both by citizens and the states enforcing it, so is international law. The US may be the largest violator because of its dominant position in post-Cold War world politics and economics. Thus US dominance affects international law through isolationist, informal and political channels and processes.

HOW US DOMINANCE AFFECTS INTERNATIONAL LAW

The US hegemonic position affects international law in three ways: exclusive rule-making and informal networks and channels through which extra-legal interests are pursued; dominance of international institutions that remain embodiments of international law; and internationalisation of its domestic law, imposing it on other states.

With the wherewithal to isolate itself from international legal commitments, such as the Rome Statute

³ Of course equality is merely an ideal: in domestic law some office-holders may be exempted from certain legal obligations, such as providing that a sitting President may not be subjected to Court proceedings and she or he takes precedence over all other persons in the country

establishing the International Criminal Court, or the Kyoto Protocol, the US uses its informal channels and compulsions upon other states to benefit from the same law. This is where international politics prevails over international law. Arguably the US could change the foundations of international legal system if they do not serve its interests. Krisch maintains that US dominance erodes principles of sovereign equality by using its power to legalise inequality. The US has refused to ratify several treaties "which are regarded as cornerstones of the development of international law": Comprehensive Test Ban Treaty; the Kyoto Protocol; the International Criminal Court (ICC) Statute; the Landmines Convention; the Convention on the Law of the Sea (Krisch, 2003). The US, instead, opts out and makes itself unbound by international instruments, removing itself from the demands of international legal equality and obligations. It then controls the law "without becoming subject to it", by establishing hierarchy through international legal instruments (Krisch, 2003). More importantly, the US uses third states to monitor states' observance of rules by which it remains (sometimes) less bound: for instance, under the Organisation for Economic Co-operation and Development (OECD)⁴ Task Force on Money Laundering, the US uses third countries, such as Caribbean, East and South African states, to contain money laundering by making these countries bound by OECD demands if they are to access OECD markets and other privileges. These countries are neither members of nor signatories to OECD, but are compelled to abide by OECD rules because of their politico-economic subservient relationship with the US and OECD member states. These informal networks and processes privilege "the expertise and superior resources of United States government institutions in many ways" (Simmons, 2000; Krisch 2003), thereby making the US a policeman of the world, yet states are, in theory, equal sovereigns. The OECD itself notes that its "partner", not necessarily "member" states adhere to its imposed agreements:

The OECD is an intergovernmental organisation that has forged global standards, international conventions, agreements and recommendations, to promote rules of the game in such areas as governance and the fight against bribery and corruption, corporate responsibility, development assistance, global investment, international

⁴ OECD came into force in 1961 but is rooted in World War II European reconstruction. Its aim is to "promote policies that will improve the economic and social well-being of people around the world." and is made up of Australian, European, North American (US, Canada) and some Asian countries, with no membership from Africa and the Caribbean region. Born of Post-World War II ravages in Europe, and with support from US and Canada, European states sought to cooperate to achieve development. The Organisation for European Economic Cooperation (OEEC) was established in 1947 "to run the US-financed Marshall Plan for reconstruction of a continent ravaged by war", and "Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960" (OECD 2011: http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1,00.html, 5 July 2011).

taxation and the environment. Many partner countries adhere to these agreements (OECD 2011: 4, emphasis mine)⁵.

Adherence to these agreements is, as OECD does indicate, not a universal obligation: “many”, not “all” partner states adhere. But being partner, not member, states implies that OECD’s own legal impositions are respected and upheld, not least to say that most of these partners are less developed countries. Thus while some states respect and uphold international law some do not. This is where the US’s ‘disrespect’ or violation of international law becomes part of the general international political game. The US also conditions states, such as African Growth and Opportunity Act (AGOA) beneficiaries, to establish market economies, political pluralism and other conditions. This political and economic liberalism is imposed irrespective of domestic exigencies, sometimes leading to domestic instability and socioeconomic disturbances. These exigencies the US ignores, but instead monitors the rest of the world but itself remains “unbound and unmonitored”, providing a convenient substitute for treaties and their monitoring bodies, as can be observed in the area of human rights where the United States has been termed a ‘trendsetter in unilateralism’” (Krisch, 2003). Of course to justify its monitoring of the rest of the world the US binds itself to some - if not most - of the laws, thereby creating legitimate grounds for domination of other laws: there are benefits accruing to abiding by some of the laws (Byers and Nolte, 2003). The US monitoring of human rights “serves as the basis for financial aid, trade privileges, and the imposition of sanctions” - unilateral sanctions - against other states. The US also uses its courts where individuals can bring cases against violations of international law abroad; as well as indirect means of norm-creation and governance, especially in the operation of markets: “due to the dominant position of the US economy in world market, the US rules often exceed their formal confines and begin to function as global rules” (Byers and Nolte, 2003: 163). This dominant position allows the US to by-pass international law but at the same time impose it upon other states, thereby benefiting from other states’ respect for the law that the US does not respect itself, hence sovereign inequality.

The US dominates international institutions, such as the UN Security Council, World Bank and IMF; and institutionalised norms and values regarding human rights, markets and governance. The US pushes for “broad exceptions to the prohibition on the use of force”; uses its position in UN Security Council to prohibit other states from using force (Byers and Nolte, 2003: 149); and uses these powers to dictate to other states.

The Bretton Woods Institutions have developed powerful rules and make stringent demands against

states wishing to get aid from these institutions, and these rules and demands must reflect, and are modelled along, US ideological and foreign policy interests. This is an indirect violation of the principle of non-intervention: “the United States did not formally accept the principle of non-intervention until 1933” (Krasner 20002; Thomas and Thomas, 1956).

It appears as though the US uses its global influence to indirectly violate such a principle as non-intervention, further violating international law. Of course the US is not alone in violating international law, eluding legal provisions and avoiding some. After all international law is only binding to states which accept to be held accountable to it, though in many instances weak states are compelled to abide by the law where it serves US interests, such as has been indicated in the issue of money laundering or the current issue of transnational crime and terrorism. Thus the US may be the biggest violator of international law, though it is not alone: the impact of those other violations (such as Singapore and China’s non-membership to International Criminal Court together with the US) is that some would-be universal legal institutions end up being partial in their impact on world politics. Though Byers and Nolte (2003) reason that the “foundational aspects of the international legal system magnify the power and influence of those actors who operate within the rules, who seek change with rather than against the grain of legal development” (Byers and Nolte, 2003), responding to the legalised demands of the dominant international institutions appears, to some, synonymous with dancing to the tunes of the US. This has aided the US to internationalise its domestic law, further affecting international law.

Internationalisation of US domestic law has been achieved in three ways: use of domestic courts to judge cases of violation of international law abroad, instead of resorting to international courts and tribunals; using its domestic law to govern relations at the international level and thus “developing into an early form of international government” (Byers and Nolte, 2003); and the supremacy of its constitution. Krisch indicates that the US has established hierarchical structures in many areas of law that subject other states to US regulation. For instance: the “recent OECD and inter-American conventions against corruption... are modelled on the US Foreign Corrupt Practices Act”. The US supported these conventions in order to spread its own law globally. Thus international law is “subject to US governmental powers, and specifically, to the US constitution” (Krisch, 2003). The current regime on drug control is in many respects shaped by the US. This further inequality before the law erodes the principle of sovereign equality: “while the United States subjects international law to its constitution, other states are not allowed to subject it to theirs” (Krisch, 2003: 166). This global dominance gives the US a privileged position as a world government whose power, institutions, exercise of governmental functions, and the whole notion of global governance (Karns and Mingst,

⁵ OECD, 2011, General-Secretary’s Report to Ministers 2011, Paris: OECD: <http://www.oecd.org/dataoecd/56/6/48066007.pdf>, 05 July 2011

2010), override many aspects of international law, or at best subject them to US yardsticks. Avoiding, violating and disrespecting international law has both political and moral justifications derived from the conduct of the US foreign policy over the years.

WHY THE US VIOLATES AND AVOIDS INTERNATIONAL LAW

The United States sometimes avoids international law by refusing to be a signatory to important international legal provisions - agreements, treaties and conventions - and sometimes by using its strong influence in international institutions to benefit from states abiding to the very law to which it is not subjected. For instance by using underhand methods the US may prevent a state from getting a loan from World Bank or IMF if the state's leadership is accused of ICC -related crimes. But why does the US violate and sometimes avoid international law? To answer this question one has to look at the intertwined claims of constitution-guaranteed independence, as well as national sovereignty advanced by those defending the US's retreat from international law and all other obligations therewith going. These claims are important, if high-sounding, guises for promoting the self-interest of the US in international affairs.

United State constitution versus international law

John R Bolton, once US Assistant Secretary of State for International Organisation Affairs (1989-1993), actually wonders whether international law is really law. Scepticism about the legality of international law arises not only from its enforcement but whether it resonates with US legal and political interests. Rabkin (2007) sees this as a dangerous project seeking to impose a global governance structure upon the US: "The United States... is... among the most unlikely to embrace the post-modern vision of global governance without compulsion ... the whole project necessarily undermines the notion of constitutional government at home", erodes authority that would guarantee constitutional rights, and yet "for rights to be secure, there must be a power somewhere which is sufficient to protect rights - and it needs to be an adequate power". This throws a heave of scepticism about international law. Bolton (2000a) writes that: "scepticism about international law does not depend at all on whether one's foreign-policy views are internationalist, isolationist or lie at any point in between, but rather on properly understanding why nations behave as they do among themselves and whether concepts of law used domestically can be exported wholesale into international affairs". This is reductionist in a sense that Bolton (2000a) assumes law is law only when it is domestic, and seems to point out that once domestic legal concepts are not exportable to international affairs then it ceases to be law.

By defining domestic law as a "system of commands, obligations, and rules that regulate relations among individuals and associations, and the sources of legitimate coercive authority in society", he assumes that, there are limited commands, obligations and coercive authority in the international realm. For him the law is based on a "coherent structural framework - a constitution - that defines government's authority" and limits arbitrary authority. Given the absence of a constitution, and a coercive authority in the international realm, then international law remains difficult to be so understood, let alone enforce for there is no power to enforce it. Instead it threatens national independence as guaranteed by the constitution. This constitution-acclaimed approach to international affairs is echoed thus: "The Constitution of the united states requires that individuals find their way to heaven on their own... What keeps the United States government within proper limits is the constitution. What preserves the constitution is American Independence. They cannot be reconciled with boundless schemes of global governance" (Rabkin, 2007).

Rabkin (2007) defends the constitutional basis of American polity and society and the authoritative embodiments constitutive of them. He argues that constitutional government, which guarantees personal liberty, not only serves its people and promotes their welfare through economic-related domestic and foreign policy, but also sustains stable democracy and defines a nation: "the United States is a vast collection of consumers and producers, preference-holders who might better off under global governance. That is not the grounding assumption of the US constitution, however. And it is ultimately the constitution that makes the United States a nation". Since the constitution provides that the American state must promote and protect its independence, any threats to such independence are a violation of the US constitution and must be countered, resisted and crushed: global governance and the postmodernist calls for a world order dominated by international institutions and legalities - such as "an international criminal court, to which individual nations will be subordinate" - threaten the independence of nation-states and violate their constitutions. The US is neither willing, nor ready to subject itself to such institutions, let alone support them: "if other states want an effective global authority to exist, they will have to supply the financing and forces to make it a reality. But they must then expect that this authority may often be in conflict with the United States and with other states that still value their independence... the would-be global authority might have to acknowledge the full sovereignty of independent entities elsewhere" (Rabkin, 2007: 233, 235). Rabkin (2007), thus, contends that, international law tends toward lawlessness, thereby reinforcing Bolton's (2000a) question of whether it is actually law or something else.

The US constitution gives the country and its state structures the legal basis for authoritative control over the American polity and society. Bolton (2000b) seems to disagree with what he calls “statist-globalists” who seek to establish a world government: “Their agenda is unambiguously statist, but typically on a worldwide rather than a national level”. Rabkin also avers that coupled with American ‘dissenting sects’ of Christian Protestantism that is pervasive in the US and does not take well to official direction, there is a lot to learn from states’ interests in protecting their independence. He shows that Latin American states, regardless of their socio-cultural similarities, remain jealousy of their individual national independence, leading to the failures of the Inter-American human Rights Convention to be effective. Where national constitutions guarantee national independence it is difficult, if not improper and unacceptable, to subject a state to international law that appears as violation of such independence. The implicit assumption leaves one wonder whether actually those countries subjecting themselves to international law have neither constitutions nor the constitutional-legal wherewithal to govern their polities and societies in accordance with their domestic constitutional provisions without compromising international legal obligations. It leaves one wonder whether obedience to international law is akin to forfeiture of national independence. The violation, avoidance and evasion of international law remains a persistent phenomenon as the US claims it is doing so to protect its national sovereignty, at least according to Rabkin’s (2007) and Bolton’s (2000a) arguments.

United State national sovereignty versus international law

National sovereignty is guaranteed by the US constitution, just as the constitution of any other state. For Rabkin (2007), “sovereignty has strong moral claims as the practical prerequisite of decent political arrangements. And close those claims are likely to have enduring appeal”. He goes on to justify outside intervention in failed states: such states are not only a challenge to functioning states, but “expose their own people to murderous assaults by warlords and marauders” and also “provide havens for terrorist networks and forces seeking to evade controls on weapons of mass destruction” (Rabkin, 2007: 256). Intervention in such states need not be constrained by impositions or provisions of international law, for intervention is needed to restore some form of order in such states’ societies. While the US is jealousy of its sovereignty, it appears selfish to argue that it is legitimate for it to violate sovereignty of other states described as failed or havens of marauding groups. The US’s intervention in Afghanistan and Iraq post-9/11 is seen in

this light, were international law an effective constraint the US would have incurred costs of not intervening in Afghanistan, Rabkin (2007) seems to indicate. Thus states with limited internal sovereign control over their domestic spaces, or which are ‘monstrous’ to their peoples, should allow to be subjected to international ‘discipline’: “a government which is monstrous enough to contemplate mass murder is monstrous enough to contemplate breaking international law ... A world which is not organized enough to deploy force against a monster is not organized enough to enforce a subpoena”. Hence lawyers cannot substitute for soldiers.

Bolton (2000b) argues that “the harm and costs to the United States of belittling our popular sovereignty and constitutionalism, and restricting both our domestic and our international policy flexibility and power are finally receiving attention”, and adds that the US needs to be allowed wide-ranging decisions, including the use of military force: “since decisions to use military force are the most important that any nation-state faces, limiting their decisions or transferring them to another source of authority is ultimately central to the diminution of sovereignty and the advance of global governance” (Bolton, 2000b: 208, emphasis deliberate). Thus the US should not subject itself to UN Security Council decisions before deciding and implementing war, for this would be diminution of the US’s sovereignty. He argues that this Americanist position is opposed to the globalist position on international law which argues for a global governance agenda that establishes authoritative structures above states. Such authorities erode national sovereignty. The Americanist position seeks to protect US sovereignty, and is reflected by elected representatives from both the Republican and Democratic divide (Bolton, 2000b: 209). Justifying US’s opposition to the International Court of Justice (ICJ), he avers that the ICJ aims “to control the behaviour of states”, and to impair severely the ‘concept of the sovereign equality of states’ favoured by third world governments seeking equal voting rights on the UN security Council, but adds that it is now in disarray. He outlines several other treaties and conventions that have been relegated by the US, arguing that this would “constrain and embarrass the independent exercise of both judicial and political authority by nation-states” (Bolton, 2000b: 212) - two critical indicators of internal sovereignty (lawmaking, and law enforcement by exercising authority and control) being threatened.

Such erosion of sovereignty would be achieved through two ways advanced by globalists: first, establishing networks of international agreements and customary international law that “effectively take critical political and legal decisions out of the hands of nation-states by operationally overriding their own internal decision-making processes” (Bolton, 2000b); and second, by targeting the US, bend the American system into “something more compatible with human rights and other standards more generally acceptable elsewhere”.

The first would “judicialize key decisions, thus removing them from common political processes, and, in effect to supersede national constitutional standards with international ones” (Bolton, 2000b: 212); while the second would limit ‘American exceptionalism’ and “constrain national autonomy because the United States as the whole is the most important skeptic of these efforts”. These would be achieved through international organisations that embody international institutions and international law, as well as “the extranational clout of nongovernmental organisations (NGOs)”. Bolton seems to think that there is a conspiracy against the United States, and that the US must guard against erosion of its sovereignty: “for virtually every area of public policy, there is a Globalist proposal, consistent with the overall objective of reducing individual nation-states autonomy, particularly that of the United States”. While these globalists, he argues, are mainly in Europe where the “international power of their states is too insignificant, their currencies too weak, and their social-democratic welfare systems too expensive to withstand”, he does admit that there are American globalists as well in the highest echelons of the elites. For him, total subjection to international law is costly: “The costs to the United States - reduced constitutional autonomy, impaired popular sovereignty, reduction of our international power, and limitations on our domestic and foreign policy options and solutions - are far too great, and the current understanding of these costs far too limited to be acceptable” (Bolton, 2000b: 213, 216, 220, 221, emphasis mine). Bolton intends to convince his readers that states that have subjected themselves to international law are no longer sovereign - they have lost domestic policy independence, constitutional autonomy and popular sovereignty. This, the United States cannot withstand. Thus there is no reason to constitute overarching international institutions and the law embodied in them: “there remain strong reasons to welcome the division of the world into separate nations and to endorse the principal safeguard of this division - the sovereignty of independent states” (Rabkin, 2007). These sovereigns always have competing interests.

In preserving this sovereignty, States must pursue the interests as sovereigns; thereby continue to exist in anarchy. This seems to counter Simmons (2000) findings that “reputational concerns explain patterns of compliance” with international law, and that “governments commit to and comply with legal obligations if other countries in their region do so”. While his findings may apply to commitment and compliance with international monetary affairs, the arguments advanced by Rabkin’s (2007) and Bolton’s (2000a) indicate that while the US’s European allies are keen to pursue international law and to promote more such obligations the US is sceptical and resistant to such developments. Thus enquiring into the “conditions under which law can influence the behaviour of governments in their choice of international monetary

policies” leads us to Mitchell (2009) averment that institutional designs and problem structures influence states’ willingness to join international institutions and thereby respect the law they embody, in essence they are important factors that affect institutional formation.

Mitchell (2009) contends that states act within institutions to further their goals, and thereby design international institutions accordingly. Further, the outcomes of institutional design lead to states’ vested interests in institutional design: “membership endogeneity” - the view that members that join differ from those that do not join; and “design endogeneity” - the claim that variations in institutional design reflect systematic differences in the underlying structure of the problem being addressed, are two critical issues in the institutional establishments. This brings afore the centrality of states’ interests in international institutions. Mitchell (2009) argument resonates with the realist averment that international institutions are channels through which states pursue their interests, and cannot significantly alter states’ interests (Mearsheimer, 1995). This implies that states’ pursuit of self-interests leads to either violation or respect of international legal provisions as embodied in international institutions. The state being unable and unwilling to forgo its interests in the interest of international law, the law is only as good as it can aid the pursuit of such interest.

Pursuit of United State selfish interests

What seems to be undisputable in Rabkin’s (2007) and Bolton’s (2000a) arguments is that the US seeks to promote its self-interests, the attainment of some of which might necessitate violation of international law. Wade Mansell and Haslam (2005) have argued that John R Bolton’s argument indicates international law “cannot ever be accepted as superior to US domestic law”, adding that the world needs to take seriously the implications, for international relations and practise of diplomacy, of US’s disdain for international law: “the claimed supremacy of the United States Constitution and the United States Presidency over international law greatly diminishes the weight of US participation in treaty and convention negotiations”, and may lead to counter-measures by countries with foreign policy objectives different from the US’s (Mansell and Haslam, 2005: 481). Were the US bound by the law in question it would be considerably constrained in attaining its objectives. That is where Mearsheimer (1995) argues that international institutions matter only on the margins.

Rabkin (2007) states that “International bodies like the UN ... are more often paralysed by conflicting interests among their member states”. It is these interests, more than the claimed defence of national constitution, independence and sovereignty, which explain US’s (and other states’) avoidance and violations of international

law. Ruggie (1982) notes that “we know deviations from regimes not simply by acts that are undertaken, but by the intentionality and acceptability attributed to those acts in the context of an intersubjective framework of meaning”. Highlighting the risks and weaknesses of the ICC from US’s perspective, Bolton (2002) states that, “the real objectives of the ICC’s supporters are to assert the primacy of its authority over nation states, and to promote prosecution over alternative methods for dealing with the worst criminal offences, whether occurring in war or through arbitrary domestic power. This is but one of the many reasons why the Statute of Rome is harmful to national interests of the United States; unsound policy; and a pernicious and debilitating precedent, one that undermines the independence and flexibility that American military force need to defend U.S. national interests around the world. In fact the Court and the Prosecutor are illegitimate”. He would not have been any clearer: the ICC/Rome Statute threatens American interests, threatens US forces committing war crimes, and would subject them to international prosecution for war crimes committed in Vietnam, former Yugoslavia, the Gulf, Afghanistan and Iraq. The prevailing global war against terror has witnessed concurrent violations of other states’ sovereignty, such as was witnessed when the US Special Forces entered Pakistan and killed Osama bin Laden without Pakistani knowledge as is reported, or hold clandestine operations in countries’ territories.

This would have led to evocation of international law and constrain US. With the ‘death’ of the territorial integrity norm (Zacher, 2001; Krasner, 1993) due to the US’s war on terror, international law seems to be in danger. Whether faced with customary international law - that develops out of practices of nation-states over long years of development - or international criminal law, the US must defend its interests without being restricted and constrained by the law. Thus Bolton (2002), in fact, recommends a three-pronged US rejection of the ICC: “America’s posture toward the ICC should be ‘Three No’s’: no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to ‘improve’ the ICC. Such a policy cannot entirely eliminate the risks posed by the ICC, but it can go a long way in that direction”. This utter rejection of an important international institution that seeks to promote responsible and humane individual, group and state behaviour, according to those that support the ICC, is evidence of the self-interestedness of the US in its violation, avoidance and rejection of international law. It may not be because the ICC, for instance, threatens the constitution, independence and sovereignty of the US - for other states that subject themselves to the ICC have not necessarily lost their sovereign independence or given up the pursuit of their interests - but the fact that the ICC and related international legal provisions threaten the modus operandi by which US pursues its interests.

Rabkin (2007) has a similar defensive view, arguing for US’s self-defence in counter-terrorist operations, he argues that the international system is neither a policeman nor capable of enforcing good behaviour to states and non-state actors against one another: states must defend themselves. For him America summoned its resources in the immediate aftermath of 11 September 2001 when terrorists inflicted horror on the US: “United States mounted a counter-attack on the Taliban regime in Afghanistan, a principle host for the terror network that perpetrated the September 11 attacks ... the nation must depend, in the end, on its own exertions for its own security... when attacked, a nation must be able to take the law in its own hands because self-defence is the most basic right”. He does not indicate that Iraq had not attacked America in 2003, or regret that the claimed weapons of mass destruction were not found in Iraq: he only claims that “Saddam’s government has developed friendly relations with international terror networks” (Rabkin, 2007: 2). Therefore, to constrain the US and prevent its pursuit of national interests under the guise of international law is to assume that its interests, which may in many respects contradict those of other states and violate the law, should be sanctioned, which may further limit their pursuit. International law becomes a limiting institution and thereby finds resistance from the US.

CONCLUSION

The triple role of international law - institutionalisation of international political behaviour; restraining the behaviour of international actors under anarchy; and dispensation of justice in the international realm - allows for a predictable, monitorable and regularised international political environment. The interplay between law and politics implies that each accounts for the other, leading to a high level of interdependence between the legal and the political. Thus the role of law need not be limited to realist, institutionalist, or constructivist explanations. Instead, it shapes our experiences and analytical categories that straddle theoretical confines. Indeed while it is arguable that international law institutionalises international affairs (akin to institutionalism), US dominance is seen as overriding legalisation of inequality in world politics for selfish interests (akin to realism). Although by subjecting itself to some aspects of international law, the US does respect the law, it avoids those aspects of international law that would plunge its interests in jeopardy, or threaten its own citizens who violate the law in pursuing US interests, such as during war. The US dominates institutions, internationalises its domestic legal provisions and practices, and avoids other international legal obligations meanwhile using other informal mechanisms to still benefit from legal obligations it tries to avoid. But all these are also couched within a

legal framework, or justified in some sense, making one wonder whether it is a legal or political game. What seems to erode sovereign equality - US dominance - eludes our judgement as other weak states can also violate the law to the same degree and what the implications of such violations would be for international relations theory and practice. Consequently, the US does not erode nor erase international law. In fact it maintains, exploits and instrumentalises international law. Impliedly the United States' dominance does not threaten, but sustains, international law by which its dominant position is maintained. This is a clear indication that international law is an instrument of world politics. It is created and used to serve state interests, avoided under the guise of sovereignty, and instrumentalised under the same guises. Some states may be capable of and prepared to manipulate and/or elude international law, and this the US does under the guise of protecting their constitution, national independence and popular sovereignty. But states sustain the semblance of universal legality in such a manner that legality remains to serve future purposes of international politics.

REFERENCES

- Abbot K, Keohane R, Moravcsik A, Slaughter A, Snidal D (2000). "The Concept of Legalisation." *Int. Organ.*, 54(3): 401-419.
- Ali AB (2010). "Kampala bombings suspects extradited from Kenya", *Newstime Africa*, 9 August 2010: <http://www.newstimeafrica.com/archives/13621> (accessed 30 July, 2011).
- All Africa (2011). "Tanzania Allows Kenyan Kampala Bomb Suspect Extradition." *All Africa*, 2 July, 2011: <http://allafrica.com/stories/201107040261.html> (accessed 30 July, 2011).
- Barnett M, Finnemore M (2004). *Rules for the World: International Organizations in Global Politics*. Ithaca, NY: Cornell University Press.
- Bolton JR (2000a). "Is there Really Law in International Affairs?" *Transnatl. Law Contemp. Problems*, 10: 1-48.
- Bolton JR (2000b). "Should We take Global governance Seriously?" *Chicago J. Int. Law*, 1(2): 206-221.
- Bolton JR (2001). 'The Risks and the Weaknesses of the International Criminal court from America's Perspective.' *Virginia J. Int. Law*, 41: 186-203.
- Bull H (1995). *The Anarchical Society: A Study of Order in World Politics*. 2nd Edition (with new Foreword by Stanley Hoffmann), New York: Columbia University Press.
- Byers M, Nolte G (2003). *United States Hegemony and the Foundations of International Law*. Cambridge: Cambridge University Press.
- Carr EH (2001). *The Thirty Years Crisis, 1919-1939: An Introduction to the Study of International Relations* (with new Introduction by Michael Cox), Hampshire and New York: Palgrave.
- East African Community (EAC) (1999). *Treaty for the Establishment of the East African Community*, Arusha: EAC (As amended on 14th December, 2006; and 20th August, 2007) (available: <http://www.eac.int/treaty/>, 30 July, 2011).
- Finnemore M, Toope S (2001). "Alternatives to Legalization: Richer Goldstein J, Kahler M, Keohane RO, Slaughter A (2000). "Introduction: Goldstein J, Kahler M, Keohane RO, Slaughter A (2001). "Response to Finnemore and Toope." *Int. Organ.*, 55(3): 759-760.
- Karns MP, Mingst KA (2010). *International Institutions: The Politics and Processes of Global Governance*. London: Lynne Rienner Inc., 2nd Edition.
- Keohane RO, Moravcsik A, Slaughter A (2000). "Legalised dispute Resolution: Interstate and Transnational." *Int. Organ.*, 54(3): 457-488.
- Krasner SD (2002). "Troubled Societies, Outlaw States, and Gradations of Sovereignty", Paper presented in the Seminar on Economics and National Security at the John M. Olin Institute for Strategic Studies at Harvard and in the Pacific Northwest Colloquium on International Security at the University of Washington. [Dept of Political Science, Stanford University, 20 July: available at https://bc.sas.upenn.edu/system/files/Krasner_02.05.04.pdf, accessed 16 July, 2011].
- Krasner SD (1993). "Westphalia and All That", in Judith Goldstein and Robert Keohane (Eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Chang*, Cornell: Cornell University Press, pp. 235-264.
- Krisch N (2003). "More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law." In Byers, Michael and Georg Nolte, *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press: 135-175.
- Mansell W, Haslam E (2005) "John Bolton and the United States' Retreat from International Law." *Soc. Legal Stud.*, 14(4): 459-485.
- Mearsheimer JJ (1995). "The False Promise of International Institutions." *Int. Secur.*, 19(3): 5-49.
- Mitchell RB (2009). "The Influence of International Institutions: Institutional Design, Compliance, Effectiveness, and Endogeneity." In Hellen Milner and Andrew Moravcsik, Eds., *Power, Interdependence and Nonstate Actors in World Politics*, Princeton and Oxford: Princeton University Press, Ch. 4, pp. 66-86 (available: <http://pages.uoregon.edu/rmitchel/resume/pubs/chapters/2009-KeohaneEndogeneity.pdf>, accessed 5 July, 2011).
- Organisation for Economic Co-operation and Development (OECD) (2011). *Secretary-General's Report to Ministers*, Paris: OECD (<http://www.oecd.org/dataoecd/56/6/48066007.pdf>, accessed 30 July, 2011).
- Rabkin JA (2007). *Law Without Nations? Why Constitutional Government Requires Sovereign States*, Princeton New Jersey and Oxfordshire: Princeton University Press.
- Rabkin JA (2007). *Law Without Nations? Why Constitutional Government Requires Sovereign States*, Princeton New Jersey and Oxfordshire: Princeton University Press.
- RFI (2010). "Three Kenyans charged for Kampala bombings", *RFI English*, Saturday, 31 July, 2010: <http://www.english.rfi.fr/africa/20101130-18-kampala-bomb-suspects-released-three-re-arrested> (accessed 30 July, 2011).
- Ruggie JG (1982). "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order." *Int. Org.*, 35(2): 379-415.
- Ruggie JG (1993). "Territoriality and Beyond: Problematising Modernity in International Relations." *Int. Org.*, 47(1): 139-174.
- Sempogo H (2011). "Tanzania flies in bomb suspect", *The New Vision*, Friday, 1 July, 2011 (<http://www.newvision.co.ug/D/8/13/759085>), and *Wavuti*, Saturday, 2 July, 2011 (<http://www.wavuti.com/4/post/2011/7/tanzania-flies-bomb-suspect-to-uganda.html#axzz1TV30Z82O>) (accessed 30 July, 2011).
- Simmons BA (2000). "International Law and State Behaviour: Commitment and Compliance in International Monetary Affairs." *Am. Polit. Sci. Rev.*, 94(4): 818-835.
- Thomas AVW, Thomas AJ (1956). *Non Intervention; The Law and Its Import in the Americas*, Dallas: Southern Methodist University Press, in Stephen Krasner, 2002, *Troubled Societies, Outlaw States, and Gradations of Sovereignty*, (20 July), Op Cit: 46.
- Toope S, Finnemore M (2001). "Alternatives to Legalization: Richer United Nations (UN) (1948). *The Universal Declaration of Human*

Rights, New York: UN (<http://www.un.org/en/documents/udhr/>, accessed 30 July, 2011).

Waltz K (1979). *Theory of International Politics*, New York: McGraw-Hill (Re-issued 2010, by Waveland Press, Inc.).

Zacher MW (2001). "The Territorial integrity Norm: International Boundaries and the Use of Force." *Int. Org.*, 55(2): 215-250.