US Constitutionalism and International Law: What the Multilateralist Move Leaves Out

Paul Stephan*

Attacks on US unilateralism draw on two accounts of US behaviour. One, of which Daryl Mundis' contribution to this issue is representative, sees 2001 as a dividing line. According to this version (let's call it the bad leadership story), the Bush Administration broke sharply with past US multilateralist practice by rejecting the Rome Statute, repudiating the ABM Treaty, refusing to ratify the Kyoto Protocol, failing to support the Comprehensive Test Ban Treaty and International Land Mine Convention, proposing to use military tribunals to deal with adversaries in the terror war, arguing against judicial extension of the so-called Alien Tort Claims Act, and not seeking a second Security Council resolution before leading a coalition into Iraq. By identifying unilateralism with one party and one administration, this account implies that the present course rests largely on the capricious whims of the American electorate and therefore can be reversed without too much difficulty.

An alternative account, however, sees unilateralism as an irreducible aspect of American character. American exceptionalism, according to this account, explains why the United States fails to conform to the standards of the rest of the world. Let's call this the bad character story. Various explanations for this exceptionalism exist: the United States is a hyperpower, constrained neither by opposing forces nor historical memory; the United States is the most advanced epiphenomenon of an insidious global corporate culture based on greed and mass production that overwhelms local integrity and human decency; the United States is something like an oversized child that never has had to learn how to get along with others. What holds these disparate observations together is a conviction that the United States is fundamentally different from other nations in the modern world, and thus should be expected not to fit in to the international community.

A review of the evidence suggests that the bad leadership story does not stand up. The Clinton Administration knew full well that the Rome Statute was unacceptable to

* Lewis P. Powell Jr. Professor of Law, University of Virginia.
the Senate, which would have to endorse the instrument by a two-thirds majority for the United States to regard itself as bound, and itself fiercely resisted the institutional structure that emerged out of the final negotiations. Clinton did sign the Statute at the end of his term, but acknowledged that the instrument had serious flaws and argued that a signature would allow the United States to participate in a process that corrected its deficiencies. Some also interpreted Clinton’s signature as a cynical political act that assigned to his successor the uncomfortable burden of informing the world that the United States could not accept the Statute as written. Similarly, the Clinton Administration: (1) put in place the weapons research and development programmes that led inevitably to the demise of the ABM Treaty; (2) never sought to place the Kyoto Protocol before the Senate, knowing that a bipartisan consensus there adamantly opposed that treaty; (3) oversaw a Senate vote rejecting the Comprehensive Test Ban Treaty; (4) never sought ratification of the Land Mine Convention, knowing of the overwhelming opposition in the Senate; and (5) led a military invasion onto foreign soil without Security Council approval (albeit against Serbia, not Iraq). If one is willing the accept the constitutional system of the United States (that is, an independent Senate’s veto power) as an essential characteristic of the nation’s involvement in international lawmaking, then one must concede that the problem of US unilateralism is not limited to a single presidential administration. The US failure to go along with the rest of the world reflects a lot more than the outcome of the 2000 election.

This leaves us with the bad character story. I concede the existence of American exceptionalism but identify one widespread misunderstanding about some of its features. I will not defend every aspect of US foreign policy or the state of international law in America. Historical amnesia and a tendency towards robust high spirits explain much about the United States, and it is understandable that many people find these qualities obnoxious. I do want to point out, however, that one of the explanations of US resistance to the International Criminal Court hints at a valuable, if exceptional, contribution to international law.

At the heart of my argument is a claim that the United States, the current Administration included, believes that international law really matters. For the United States, international law is more than a form of discourse — a means of expression that shapes attitudes and expectations without any direct intervention in human affairs. To the contrary, the United States regards breaches of international obligations as serious, leading to imprisonment, payment of damages, the forfeiture of property and, in extreme cases, the loss of national sovereignty. This understanding of international law regards its pronouncements as powerful and terrible — not as gently pressed aspirations. And the logical consequence of this understanding is to shy away from claims about international law that a reasonable person cannot expect to be honoured.

If one accepts that international law is direct and consequential — that the consequence of violation is punishment — then one must pay some attention to the process of making and applying international law. Here, the distinct US commitment to divided government and, fundamentally, to a system of checks and balances comes
into play. The US Constitution, both in its original intent and in contemporary understanding, rests on a belief that state power exists in tension with individual liberty. Without an organized state, liberty is extinguished (per Hobbes), but, without restraints on the state, liberty will erode (per Locke). The scheme devised to wrestle with this paradox enlists what are believed to be the natural passions of people — selfish and short-sighted — to counterpose groups and interests so as to prevent any one from attaining excessive power.

Working within this constitutionally framed perspective, an American will look at any exercises of substantial authority and ask where the institutional checks are. An American can accept unwritten understandings based on history and common premises as an effective institutional check — we take inspiration from the British Constitution, for example. By the same token, empty formalism does not wash — few of us accepted the validity of Soviet elections during the era when opposition to the Communist Party constituted a criminal offense. The basic point remains: if one cannot find genuine and regularized checks on the exercise of state power, an American is constitutionally inclined to suspect that despotism looms.

One might take issue with American insistence on checks and balances. The assumption that public actors behave opportunistically strikes some as degrading and false, and the erection of barriers to the exercise of power necessarily means that some good and useful actions will not take place. I will not try to defend here the American attitude towards divided rule, but only offer it as an irreducible characteristic of the country.

What does this have to do with US unilateralism? An American will believe that if a permanent International Criminal Court is to have meaningful powers, then one must consider how to impose substantial checks on its authority. The potential problems that an unrestrained judiciary can pose — problems all too familiar to those who live with the US courts — include hubris, self-enlargement of jurisdiction and the substitution of social policymaking for the considered decision of specific cases. The design of the institution must take these concerns into account.

From this perspective, the Rome Statute has two serious flaws. First, only admonitions restrain the discretion of the Prosecutor and the Court. If conscientious people occupy these posts, then the mandate not to proceed in cases where a state, in good faith, prosecutes misconduct by its agents will work. But good faith is a very flexible concept. Self-aggrandizing prosecutors and judges are not unheard of, even in human rights cases. Success as a prosecutor or judge is a great foundation for a future political career, and success in our world is measured more by popularity than by reaching the just result. The question is not whether the current personnel of the ICC pose this risk, but whether it is right to insist upon some reservation of control over the Court’s prosecutorial discretion.

Because the ICC is a creature of the UN, the only duly constituted lawmaker capable of supervising the Court is the Security Council, which can act only when the five veto-wielding Permanent Members are unanimous. The present Statute allows the Security Council to override the ICC’s prosecutorial discretion only when the five permanent members agree to do so. All prior international criminal tribunals have
had their jurisdiction established by positive acts of the Security Council (in the case of Nuremberg, by agreement of the states that became the Permanent Members). The United States desired to retain this jurisdictional structure for the ICC.

The objection to basing jurisdiction on case-by-case Security Council determinations is that this procedure enables each of the Permanent Members to immunize itself and its allies. This argument, however, is deeply inconsistent with the premise that underlies the Security Council structure. Under what circumstances would the ICC proceed against a Permanent Member? The Permanent Members' veto right reflects an assumption about their great power status, backed up in each case by the possession of an overt nuclear capacity. What kind of tribunal will seek to haul a great power into the dock? The United States is asked to take it on faith that the ICC would develop a culture of appropriate self-restraint and modest ambition. But the constitutional skepticism of unchecked power, characteristic of American attitudes, will not admit such a leap into the unknown.

Let us suppose, alternatively, that no one expects the ICC to proceed against a great power, including the United States. Then why give it this authority? The Court’s failure to consider misconduct by the Permanent Members can only undermine its credibility and diminish the strength of its deterrent. This, I think, is a particularly American point of view — to believe that unrealistic idealism is corrosive, not admirable.

The second flaw in the Rome Statute is the open-ended quality of its substantive mandate. Even putting aside the question of future crime definition, implicated in the imbroglio over criminalizing aggression, one must concede that the substantive provisions of the Rome Statute bristle with unanswered questions about the scope of prohibited conduct, the availability of defenses and excuses, and the openness of the terminology to expansive and innovative interpretation. Endowing the ICC with such significant lawmaking power, again subject only to after-the-fact Security Council repudiation, requires enormous trust in the persons who will serve in that institution. The United States is not crazy to seek better constraints on the substantive limits of the ICC’s jurisdiction.

I will deal only briefly with two other counts in the indictment of US unilaterism — the use of military tribunals to deal with suspected international terrorists and resistance to judicial creation of a federal common law of international human rights — made by contributors to this issue. First, what interests me about attacks on the tribunals is how often they rely on assumptions of bad faith in future choices by the US Executive. Exactly the trust in wise exercise of prosecutorial discretion that proponents of the ICC seem to take for granted regarding that institution disappears when it comes to the military tribunals. I will not deny for a second that these tribunals can be abused. I worry especially about cases where the Justice Department initiates a criminal prosecution in the regular courts and then seeks to transfer the

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case to military jurisdiction. These are exactly the instances where our courts have the capacity, constitutional authority and, it appears, inclination to intervene.\(^3\)

Secondly, resistance to the expansion of the power of domestic courts to decide what constitutes a violation of customary international law does not necessarily amount to a rejection of international obligations. The United States has a unique civil liability system, with its mélange of contingency fees for plaintiffs' attorneys, generous class action procedures, far-reaching pre-trial discovery and open-ended conceptions of compensable damages. These features give plaintiffs an advantage that no other legal system in the world matches, and have provoked incomprehension and criticism on the part of many foreign jurists.\(^4\) It is exactly because civil litigation is such a powerful tool that people in the United States seek to impose some limits on the process. The conventional move is to ask the federal courts, which lack the common-law powers of the state courts, to respect legislative mandates in cases that do not involve the interpretation of the Constitution.

Congress, in 1991, enacted the Torture Victims Protection Act, to provide a right to civil relief for victims of state-sanctioned torture and murder.\(^5\) The claim that Section Nine of the 1789 Judiciary Act already does this and much more besides has been deeply controversial since 1980 — the first time that any US court suggested this interpretation.\(^6\) Now that creative lawyers have invoked Section Nine to bring class action suits against large corporations, rather than individual claims against the stray dictator or thug, many in the US legal community are asking whether that obscure statute possibly can mean what these lawyers and a few lower courts say it means.\(^7\) The ultimate answer will come from the Supreme Court, which already has hinted at doubts about allowing Section Nine to serve as a basis for civil suits based on

\(^3\) See Padilla v. Rumsfeld, — F.3d — (2d Cir. 2003) (President lacks authority to detain American citizen on American soil as an enemy alien); Gherembi v. Bush, — F.3d — 9th Cir. 2003) (U.S. courts have jurisdiction to hear claims of Guantamano detainees); cf. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (subjecting to judicial review decision of military to treat a US citizen captured abroad as an enemy combatant), petition for rehearing denied, 337 F.3d 335 (4th Cir. 2003), certiorari granted, 9 January 2004.

\(^4\) As examples of foreign resistance to US litigation practices, consider the many blocking and clawback statutes targeted at US pretrial discovery and damages rules, the refusal of foreign courts to assist US litigation in instances nominally covered by the Hague Convention on the Taking of Evidence Abroad (see Rio Tinto Zinc Corp. v. Westinghouse Elect. Corp. [1978] AC 547 (HL) (applying public policy exception to Convention based on government's intervention in opposition to US antitrust lawsuit brought by British plaintiff)), and the issuance of anti-suit injunctions to stop US litigation (see Midland Bank v. Laker Airways Ltd. [1986] 1 QB 689 (CA) (ordering British plaintiff not to bring US antitrust claim against British defendant)).


international law. I fail to see how the Justice Department’s argument that the federal courts should not invent causes of action without proper legislative authority constitutes lawless unilateralism. If the Supreme Court eventually agrees, the United States will have brought its practice into conformity with the rest of the world, which does not address questions of human rights violations through a plaintiff-empowering civil litigation process.

To return to my general theme, none of these instances represents a repudiation of the struggle to strengthen human rights, but rather an appreciation that good process and concern for institutional design are essential parts of that struggle. Some of the most savage regimes of the twentieth century cloaked their crimes with justifications that invoked higher-order goals of human fulfillment. What the United States is telling the international community, I believe, is that, as the enterprise of international law becomes greater and more meaningful, we need to devote attention to means, not just ends.