

What's Law Got to Do with It?

by Michael J. Glennon

The Bush administration has come under heavy fire for turning its back on the Kyoto Protocol, the International Criminal Court, and other highly publicized multilateral initiatives. America is abandoning its traditional commitment to the rule of law in international relations, charge critics at home and abroad, and is recklessly bent on “going it alone.” *Unilateralist, hegemonic, imperialist*—barely a day goes by without such indictments being leveled at some new American policy. “We shall pursue our efforts toward a humane and controlled globalization,” French foreign minister Hubert Védrine recently declared, “even if the new high-handed American unilateralism doesn’t help matters.” Some worry that the United States is compromising the majesty of international law and its shining promise of a more peaceful world in the century ahead, while others mutter that the United States is taking on the aspect of an empire—and a few in America gleefully embrace the idea. “We are an attractive empire, the one everyone wants to join,” declares *The Wall Street Journal’s* Max Boot.

As a matter of historical accuracy, the talk of empire is ill-founded. The United States is not an empire, nor could it conceivably become one. The term *empire* implies more than simple cultural dominance or preeminent military power. It applies to states that *use force to occupy and control a group of other states or regions*. The conquered states, robbed of autonomy and political independence, become colonies, provinces, or territories of the imperial power. Taxes are levied, laws are imposed, soldiers are conscripted, governors are installed—all without the consent of the subjugated state. Foreign policy, including all military alliances, trade agreements, and diplomatic relations, is dictated by the imperial capital. Rome was an empire. Napoleonic France, 19th-century Britain, and the Soviet Union were empires. But *empire* simply does not accurately describe America’s relationship with France or Germany or Japan, or even with more dependent states such as Canada, Israel, or Guatemala.

Nor is the United States a hardcore unilateralist. It is a party to more than 10,000 treaties—probably more than any other nation in the world. About a third are multilateral agreements. True, the United States does not pursue its interests by multilateral means alone. But neither do other states. Last year, France rejected the declaration of the Community of



Many Europeans join this German weekly in sniffing at the “lawless” U.S. response to terrorism: “The Bush Warriors: America’s Crusade against Evil,” says the headline.

Democracies in which 106 other countries pledged their cooperative support of democratic institutions in emerging democracies. New Zealand in the mid-1980s unilaterally banned visits from nuclear-powered and nuclear-armed ships. Sweden, Denmark, and Britain, declining thus far to adopt the euro, are prominent—but hardly the only—examples of European nations that unilaterally resist full integration. Norway refuses to join the European Union. Until recently, Switzerland took a pass on membership in the United Nations.

It is true that the United States has been ham-handed in backing out of negotiations without presenting alternatives. But in rhetoric as well as substance, the critics are off the mark. Their vocabulary is overblown, and their logic is distorted. The United States often has been doing what any other nation would do in its circumstances—placing its own national interest before a putative “collective” interest when the two

conflict; it just does it with less hypocrisy and greater success. And if as a result of this new tone in foreign policy some of the weaker, less workable elements of international law are revealed for what they are and discarded, the institution of international law as a whole will likely be strengthened.

Broad labels such as *unilateralist* or *imperialist* have little application to the way the United States and other modern nations actually behave. The contrasting notion that nations act—or should act—to advance interests of other nations is no more useful. In the real world, nations act to advance *their own* interests. They accrue power—sometimes power so great as to qualify as hegemonic (*hegemon* is a Greek word meaning “leader”)—and their power, like their interests, varies according to the realm in which they are acting. No state is unilateralist or multilateralist in every realm.

Henry Kissinger makes a similar point about the importance of different realms in *Does America Need a Foreign Policy?* (2001). There is no “international system” to which a single formula can be applied, Kissinger insists, but rather four systems, existing side by side. In the North Atlantic system, democracy and free markets prevail and war is largely unthinkable. In Asia, the United States, China, and other regional powers treat one another as strategic rivals; war is not inconceivable and is kept in check, in part, through a balance of power of the sort that prevailed in 19th-century Europe. In the Middle East, Kissinger’s third system, conflicts are most like those in 17th-century Europe, with roots that are ideological and religious, and are therefore less easily reconcilable. Africa is marked by ethnic conflict, dire health crises, and poverty exacerbated by artificially drawn borders and global isolation. In each of these systems or realms, Kissinger says, the United States, and other countries, must act differently.

Joseph S. Nye conceives of the several realms of the international order in somewhat different terms. He begins *The Paradox of American Power* (2002) with an analogy to three-dimensional chess. In Nye’s view, power is distributed among countries in a complex, three-tiered pattern. On the top chessboard is military power, and there a largely unipolar system prevails, dominated by the United States. The middle board is an international economic system, in which the United States competes with Europe as an approximate equal, while Japan and, increasingly, China exert significant power. The bottom chessboard consists of cross-border transactions—everything from electronic financial transfers to weapons traffic by terrorists—that no government controls. Nye argues that a nation will lose the game if it focuses on only one of the three boards and fails to notice the connections among them. For Nye, as for Kissinger, one label cannot fit all.

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The international legal system is best conceived in much the same way as Kissinger and Nye view the political, economic, and military world—not as a single system but as a web of interrelated subsystems. The treaties and international organizations of the contemporary world occupy different realms, and the United States and other countries have different interests and powers in each. A nation that proceeds unilaterally in one realm may well act multilaterally in another. The use of force, human rights, law enforcement, environmental protection, arms control, trade and finance, intellectual property, migration control, and so forth all present different sets of interests—sometimes unique, sometimes overlapping, but all resistant to an overarching policy that flows from a single, comprehensive algorithm.

Thus, the key question in deciding whether to sign any particular treaty is always the same: Do the proposed restraints serve the state's interests? Do the benefits, in other words, exceed the costs? That is the simple test that every rational state applies when it decides whether to embrace a treaty.

Sometimes what is in a state's national interest is also in some larger common interest, as the NATO Treaty illustrates. And sometimes long-term national interest might argue for acting in the common interest even if a shorter-term view suggests otherwise (which explains why the United States has long supported European

integration even though Europe is an economic competitor). In fields where unilateral action is less likely to be successful, such as law enforcement and environmental protection, treaty agreements may make sense. Some things simply cannot be done without the full cooperation of others.

But acting for a perceived common interest—be it the Western alliance or the brotherhood of man—over a greater and conflicting national interest is irrational. No sensible state does so, and there is no reason why the United States should. Still, contrary to what some of the more “hardheaded” foreign-policy “realists” argue, this does not rule out carefully targeted altruism—such as sending U.S. troops into harm's way in Somalia, an action that saved thousands of people from starvation. Self-image is an important part of a nation's make-up; it derives in part from fidelity to historical ideals, from a willingness to sacrifice occasionally to be true to the national character. A nation whose ideals include humanitarian goals is perfectly justified in pursuing them. But in an international system where life is still nasty, brutish, and short, regularly placing a supposed collective interest over a concrete, competing national interest would only encourage unilateral “free riders” —

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states that are able to reap the benefits without footing the costs—and discourage multilateral solutions that demand fair contributions from all.

For this reason, it is sometimes irrational for the powerful to subject themselves to legalistic constraints created by a community to advance common interests, a point long recognized by political thinkers, including the framers of the U.S. Constitution. In trying to overcome this obstacle to union, James Madison argued that an assessment of *future* power would induce the currently powerful to submit to law. “The uncertainty of their condition,” he wrote in *The Federalist*, prompts the strong to submit to government. The strong “wish for a government which will protect all parties, the weaker as well as the more powerful,” he wrote, because the strong fear that they may some day be weak. But if the strong are not prompted by that fear—if they believe their power will last indefinitely—then they have no reason to accept legalistic restraints. The United States finds itself in much the same position today in a number of realms. John Ikenberry, a leading academic advocate of multilateralism, reflects this insight in his book *After Victory* (2000): “In general, a leading state will want to bind weaker and secondary states to a set of rules and institutions of post-war order—locking in states to acceptable patterns of behavior—but remain unbound itself, free of institutional restraints and obligations.”

In deciding how to act in each of the subsystems of international law, the United States must weigh at least five factors: (1) Is it able to work its will alone, and for how long will it be able to do so? (2) Does an authentic rule of law actually exist in the subsystem, or is its development possible? (3) Is the United States able and willing to bear the long-term burden of being the hegemonic power in that subsystem? (4) Are the benefits of hegemony likely to outweigh the costs if legal constraints within that subsystem are weakened? (5) Is “contagion” likely? That is, would weakening unwanted legalistic constraints in one area undermine constraints in another where they may be more desirable?

Hegemony, as these tests suggest, is in tension with the international rule of law—unless law is seen only as a club for keeping the rest of the world in line. The United States thus needs to determine what measure of discretion it will want to retain in each realm in the distant future and then work backward to devise a strategy to achieve that goal. So it makes perfect sense for American policymakers to think twice before committing the United States to long-term legalistic restraints. Proposed treaties are not holy writ; signing on is not some sort of moral imperative. The United States, like any other state, should approach any treaty offer with strict scrutiny, as if it were being presented by a crowd of carnival pitchmen. Reasonable people may disagree about the merits of a particular treaty, but merit must always be weighed in a tough-minded assessment of national interest.

American decision makers need to be farsighted in recognizing how international norms originate. Rarely do such norms appear suddenly in a treaty cut from whole cloth. More often,

they gestate over a period of years and evolve from informal practices into formal norms, from “soft” law into hard. An example is the UN Security Council. The Council did not emerge spontaneously from San Francisco in 1945. It descended from the Concert of Europe, the informal coalition of great powers that came together at the Congress of Vienna in 1814 to restore order to Continental affairs after the Napoleonic wars. Seemingly ad hoc coalitions such as the Concert can evolve into formally integrated institutions when states’ expectations evolve along with those coalitions, as they did in 1919 with the formation of the League of Nations. So the United States must be circumspect in improvising “coalitions of the willing,” and join only if it can accept the possibility that the “temporary” coalition might eventually take on the status of a more formal multilateral institution, capable of further circumscribing the discretion of members. Coalitions formed to fight wars—as in the Persian Gulf, Kosovo, and Afghanistan—all run the risk of setting precedents that, for better or worse, could congeal into future international institutions.

At the same time, American leaders must be wary of the seductive notion that the United States, with its vast military superiority, economic might, and cultural preeminence, has discovered a Fountain of Perpetual National Power. No doubt it was easy for the leaders of 19th-century Britain or imperial Rome to convince themselves that their dominion would last forever; the Romans did have a run measured in centuries. The United States so far has seemed immune to the perils of “overstretch,” and it has not provoked other states to form the kind of adversarial alliances that have doomed many past superpowers. There is little reason today to fear that American power will wane significantly in the decades immediately ahead. But no one can know. Superpowers come and go, as Mikhail Gorbachev can testify.

The United States should manage its military, political, and economic power as an investor manages assets. Today it is sitting on a stash of power unparalleled in human history. Tomorrow that stash may begin to shrink—or perhaps grow larger. The United States always has the option to “cash out” and lock in its power by accepting legalistic constraints at a time when it can exert maximum leverage. That would be a shrewd move if the geopolitical future looked bleak—if the United States appeared less likely to be able to protect its interests unilaterally. But there is less justification for shackling the nation with multilateral chains in an area where the United States will be able in the future to advance its interests by acting alone. The use of force may be such an area.

During the armistice negotiations at the end of World War I, a hawkish U.S. senator pressed President Woodrow Wilson to justify his support for granting Germany a generous peace. “I am now playing for 100 years hence,” Wilson replied. America’s leaders today must think in the same terms. In some realms, America’s future interests will be better advanced by law; in others, by power. The test of American statesmanship in the 21st century will lie in its ability to discern which is which. □