

Comments

Does the U.S. Government Think That International Law Is Important?

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State Department and other U.S. officials involved in consular activities, technical negotiations, and economic programs represent the majority of the American civilian, non-intelligence foreign policy establishment. Many would be puzzled by the question posed in this essay. International agreements, understandings, and conventions represent the daily grist and foundation of their work. These agreements, such as those on the rights of American citizens abroad, international trade, criminal extradition, and scientific cooperation, embody the corpus of customary law and mutually agreed-upon arrangements through which affairs among nations are ordinarily conducted. The behavior regulated by these arrangements actually represents the heart of day-to-day international activity below the “high politics” that attracts media attention.

Particularly since the latter part of the nineteenth century, the efforts of diplomats and states to establish clear norms for the conduct of international relations in these “ordinary affairs” have been remarkably successful. Although most officials involved in such programs may not ordinarily think of their work as related to international law, to paraphrase Molière, they have been “speaking international law” all of their professional lives. Through their daily work they elaborate and expand the role of international law in these areas even though their activity rarely makes headlines and, until the last few years, has often been given slight attention by senior governmental officials.

Yet there is another dimension to U.S. foreign policy where international law rarely receives more than peripheral consideration. Crisis management, high-stakes political and economic conflict, and national security policy attracts constant and visible attention from senior decisionmakers who weigh domestic politics and foreign policy in the face of

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heavy public scrutiny. Their political calculations rarely invoke international law as a principal guide to action.

There have been administrations where the Secretary of State and his closest advisors have been deeply concerned about the role of international law in foreign policy. Most recently, for example, Cyrus Vance made continuing efforts to ensure that Carter Administration policy options were consistent with concepts of international law. Far more common, however, is for policy-makers to look on international law primarily as an instrument for public diplomacy and official rationalization, or as a source of "problems" to overcome. The U.S. does have to take account of the international political environment in which it acts. Over the last five years, intellectual spokespersons for the Reagan Administration have dealt with such "problems" by offering new definitions of international norms that increase the flexibility of U.S. policy in dealing with a dangerous international environment.¹ In assessing the relevance of international law for the U.S. foreign policy community, this essay first examines the manner in which decisionmakers treat international law in consulting with internal governmental actors, particularly Congress. Second, it discusses the concept of public diplomacy and the need for official rationalization of the policies chosen. Finally, it reviews the specific uses of international law in American foreign policy and offers an assessment of trends for the future.

Internal Governmental Constraints

When questions of international law arise in meetings within government on critical political and security issues, decisionmakers generally refer either to domestic law, including treaties and formal agreements between the U.S. and foreign governments, or to options for dealing with the congressional reactions to policy. Unless a senior official personally focuses on broad questions of legal principle, American policy is conducted with an eye towards pragmatic policy concerns. For example, when Presidents Eisenhower and Kennedy first designated their Ambassadors to the United Nations as members of the Cabinet, this appeared to highlight on-going attention to the principles embodied in the U.N. Charter. Overall, however, these issues are usually dealt with tactically.

1. Offering these new definitions has been done in part to counter cynical references to international law by the Soviet Union in past years in justifying its support for insurrection, revolution, aggression, and even terrorism. Why should the U.S. not have its own interpretation of international law which achieves the same degree of fluidity for American policy (although not for the same ends)? In this sense, policy attention to issues in international law may actually have grown in recent years but in ways that make many international lawyers and diplomats uncomfortable.

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If another country raises an issue of international law as important to its concerns, that question will be addressed. But aside from attempts by the Carter Administration to pay attention to international law and international institutions, international law has received scant attention over the last two decades.

Small wonder that internal policy papers deal with international law essentially as a tool to be used or adapted as politics require. Unless foreign policy professionals know that senior officials genuinely want to hear about international law, they give little consideration to these issues. For example, Cyrus Vance and Deputy Secretary of State Warren Christopher often asked State Department lawyers to work closely with each bureau and included them in discussions on virtually all major foreign policy issues. In contrast to this style of management, neither Henry Kissinger nor Alexander Haig regularly included lawyers in either policy discussions or crisis task forces. George Shultz initially preferred this approach but has softened his stance somewhat with the arrival of a Legal Adviser, Judge Abraham Sofaer, who has an adaptable view of international law.

In addition to concern for the personal inclinations of senior officials, congressional concerns affect decisionmaking. Congress plays a powerful role in determining how international law is considered. Most fundamental is Congress' authority to approve international treaties and commitments and thus determine what formal international law is binding on the U.S. But there are a number of other ways in which Congress affects the executive branch's conduct of international affairs. Congressional efforts to constrain the President's freedom to use military force, most notably through the War Powers Act, are intended to establish standards by which officials understand the limits on how relations may be conducted with other states. Congress established a system through special committees of both Houses to monitor CIA activities abroad, thereby furthering U.S. observance of principles of international law such as non-interference in the internal affairs of other states. When Congress limits available resources (as in cutting appropriations for U.S. contributions to the United Nations) or conditions the use to which such funds may be put (such as for U.S. obligations to the World Bank), it directly affects global perceptions of U.S. commitment to organizations that claim to promote international legal norms.

Policy memoranda on critical foreign policy issues almost always include key sections that discuss how specific actions may be affected by congressional legislation or by policy preferences or by the views of key legislators. Usually such policy issues are discussed with the Legal Ad-

viser to the State Department. But some questions are so urgent, so sensitive or so bureaucratically delicate that responsible officers will often first seek policy decisions from the Secretary of State or from the White House on matters of substance, turning to the Legal Adviser's office for rationalization only after a decision has been made. It is also true that some regional Assistant Secretaries of State have disliked being second-guessed and offered advice by lawyers on policy matters. Legal Advisers do not like this post hoc approach, and those who can exert some personal influence on the Secretary of State or even on White House staff members have actively challenged the process with varying degrees of success.

Operational Significance

A desk officer faced with a serious political problem will rarely discuss international law in memoranda to department heads or Assistant Secretaries unless it has immediate operational significance. For example, he might refer to particular treaty provisions if U.S. use of airspace or base facilities for specific missions is challenged.² Similarly, he would invoke such provisions when a country with close relations to the United States seeks sympathy and support in the face of a military challenge.³ In some situations that may have ambiguous or less than immediate operational significance, analysts also may consider international law. Perhaps a bilateral agreement is being violated by a close ally whom the U.S. may not want to challenge.⁴ Perhaps the U.S. wants to challenge the Soviet Union for a particularly egregious violation of international public order.⁵ On such occasions, officials do indeed look carefully with Department of State or Department of Defense lawyers at the texts of international agreements and commitments before leaping boldly into a diplomatic crisis.

Public Opinion

Aside from its use in an operational context, international law plays an important role in the critical arenas of national and international public opinion. Challenges to U.S. policy made in international fora, in Con-

2. For example, Portugal, Spain, Turkey, and Greece rarely allow U.S. aircraft to overfly their territories in connection with a Middle East conflict involving Israel.

3. *See, e.g.*, Thailand's behavior was explained under the Manila Pact in connection with Vietnam's threat from Kampuchea.

4. *See, e.g.*, Israeli use of U.S. weapons against Syria and Lebanon led to one such incident.

5. *See, e.g.*, Soviet behavior in attacking the government of Czechoslovakia in 1968 or in overthrowing the Afghan government in 1979 represented such a challenge to international law.

gress, or by the press and domestic critics are often stated in terms of international law. Domestic critics may be particularly conscious of international legal norms because of the respect accorded law in American political practice, a phenomenon recognized by all historical commentators since de Toqueville. Whether or not international law plays a direct and immediate role in decisionmaking by any particular U.S. administration, it is often of such importance to other governments that U.S. officials are compelled to take it into account in explaining and justifying their actions. Failure to do so risks confrontations with allies abroad and endangers public support at home. Therefore, a key question for policymakers who may not be otherwise overly concerned about international law is whether what they would *like* to do can be made to *look* good, and thus limit damage to our policy interests.

Although in the last analysis Americans may subscribe to the doctrine of “my country, right or wrong,” there is a strong public preference for “my country, may she always be right.” The role of international law can easily become one of illustrating that the U.S. *is* right and that the other side should be seen as the disturber of the peace or the provocateur. Such use of international law can easily lead to cynicism in viewing international law as little more than an infinitely bendable situational ethic. Alternatively, it may induce a self-righteous belief in national probity that, when disputed and demonstrated to be mistaken, risks serious damage to the credibility of a U.S. administration—or to the U.S. as a nation.

Precedents

Precedents are also important in policy discussion even if they are not determinants of policy. Much of American political argument takes place through historical analogy. “Munich,” “The Vietnam Syndrome,” and “Grenada” are symbols of success or failure in policy that have played and continue to play an important part in policy debates—even if mainly for their powerful emotive effect.⁶ Thus, it is often asked whether a specific U.S. action will enable other countries to claim the right to act in a similar way, perhaps to the detriment of the U.S. If the United States intervenes or imposes sanctions, then may the Soviets or some other adversary claim the same rights in the future? Senior administration officials in recent years have publicly raised the reverse issue as well: Should the United States be constrained from actions (including those contrary to standards we have accepted in the past) that the Soviet Union

6. R. Neustadt & E. May, *THINKING IN TIME* (1986) provides an excellent discussion of this emotive effect.

or other adversaries feel free to undertake? Such precedential concerns are real issues even if they are often publically belittled on the grounds that discussion of the future is speculative. Still, foreign policy professionals do worry about the "next time," even if discussion of these questions is likely to be in the context of national interest analysis rather than international law.

The "tit-for-tat" standard of international conduct represents a fundamental reversal of trends in international standards over the last century, even though it has long had a powerful political appeal within the U.S. This standard shifts the policy debate from "do unto others what you would have them do unto you" to "do unto others what they do unto you" or even "do it first." It has long been recognized that personal moral standards cannot always apply to governments and that there is scarcely a country in the world that has not at times taken the second course rather than the first in defense of its vital national interests. But if retributive or preemptive justice and "least common denominator" rules of international conduct become the primary standards for American policy, the world will be an even more dangerous and unstable place than it has been. There is strong private concern about these issues on the part of many professional diplomats and military officers as well as within State Department legal circles. Occasions for raising these conceptual issues of international conduct on a policy level, however, are limited since references to international law are, as was noted earlier, usually framed in very concrete, pragmatic, and short-term ways.

Nevertheless, it is important to observe that, while senior officials are loath to make decisions on the basis of broad principles of international law, experience suggests that when the U.S. acts unilaterally or in ways that other states see as violating critical standards of international behavior, American policies often fail or succeed only partially. Foreign policy professionals who have dealt with such issues as sanctions against states harboring terrorists, the Soviet gas pipeline into Western Europe, the conflict in Central America, or policies towards South Africa all testify that it is important to take the views and interests of other countries into careful account if U.S. policy objectives are to be achieved. These policy objectives include both concern for the international legal norm of non-interference in the domestic affairs of other countries as well as for universal standards of human rights. Awareness of the importance of these norms, and of working with other states to clarify their applicability in specific circumstances, seems to grow in each administration as time passes and the variety of contacts between foreign leaders and American officials become more intricate. Thus, although the issues themselves are

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usually not discussed in policy circles in terms of international law, the effectiveness of the norms are nevertheless clearly apparent in practice.

Quasi-Legal Norms

Less easy to define is the extent to which decisionmakers incorporate values rooted in the American character, values that are also reflected in accepted standards of international conduct. These quasi-legal "norms" act as guides for policy in ways analogous to those intended by proponents of international law. Although not law in any technical sense, they are values reflected in the Preamble to the U.S. Constitution as well as in the preface to the U.N. Charter, a document heavily influenced by its American drafters. They reflect not only the values many government officials hold personally but those that they genuinely believe are essential to assuring domestic support and gaining the support of our allies.

These norms include, for example, a deep aversion to the use of force that may affect civilians, a distaste for acts of "violence in the night" such as assassinations and coups, and a real concern for the rights of individuals to be free from terror, hunger, and religious and political persecution. Some officials argue that such considerations have no bearing on policy or international law since they are not formally incorporated into domestic legislation or international agreements. This view misses the point, however. National values and standards of conduct affect the way policy-makers view their options in dealing with other states.

The importance attached to these national values varies from administration to administration. But they are far more critical in determining policy choices than many would think or than some policy advisors would like to admit. These values have no explicit sanction in international law, and sometimes a specific linkage with international law may weaken their domestic appeal, as may now happen when the U.N. is appealed to. But these values are inextricably linked to the American character, and administrations that ignore them often come to regret it.

Specific Cases

When the U.S. and China began discussions in 1969 about normalizing Sino-American relations, negotiations were conducted by senior officials with the utmost secrecy. The decision to establish "Liaison Offices" in each other's capitals, the formulation of the Shanghai Communiqué, and other aspects of the normalization process were conceived and implemented with little involvement by the State Department's lawyers. Henry Kissinger viewed the process as one of high policy in which the advice of lawyers was not needed. In the Carter Administration, on the

other hand, as officials approached the formalization of diplomatic relations, the need to deal with a broad range of specific legal and institutional arrangements became pressing, and legal issues became more central. Although only the Legal Adviser and a few top aides were for a long time permitted to be involved, Cyrus Vance was insistent that legal problems, both domestic and international, had to be thoroughly investigated despite the occasional uneasiness of the National Security Council staff.

A pattern of tension between the office of the Legal Adviser and other policymaking staff is occasionally seen in U.S. relations with the Soviet Union. U.S.-Soviet relations are often conducted with only casual reference to the Legal Adviser's office and to issues of international law. There are, of course, numerous bilateral U.S.-Soviet agreements and multilateral understandings. When issues arise during negotiations on arms control, lawyers are deeply involved even if formal issues of international law are rarely raised. But given that international law is not usually enforceable and the power of international public opinion, while important, is not sufficient to assure U.S. security, policy emphasis is focused on bilateral arrangements that are self-enforcing or enforced by national power.

When the Soviets invaded Afghanistan in 1979, policy papers were sent to the Secretary of State and to the President describing possible U.S. responses. These included some pertaining to international law such as appealing to the United Nations Security Council. The analysis also took account of domestic and international legal implications of specific acts, such as severing contracts for the sale of grain or interfering with Soviet shipping or airline rights. Thus, when taken, the decision to halt grain sales was carefully crafted so as not to interfere with existing formal commitments, although there was considerable pressure within the government to do otherwise. Vance and some other Cabinet officers argued persuasively to President Carter that, as a major trading nation, the U.S. had much to lose from violating international contracts and commitments (an argument often used by European and other states that resist U.S. calls for trade or financial sanctions against other states).

Another example of the interplay between international legal and purely political concerns was the Iranian hostage crisis of 1979-80. Debate in the Carter Administration over whether, when, and how to use force in connection with the hostage crisis was especially heated during the first four months of the crisis. While the Joint Chiefs of Staff and the State Department addressed practical questions about the probable risks, costs, and effectiveness of a military mission, Vance and many of his ad-

visers argued strongly both on principle and in substance against using force. As perhaps the administration most interested in using international institutions and the concept of international law since World War II, Carter Administration officials went to the World Court and to the U.N. Security Council for recourse. They also sought mediation by the U.N. Secretary-General, by third country officials, and by ordinary citizens. The Administration even sought the good offices of Islamic states and the Palestine Liberation Organization. President Carter threatened to use force to punish Iran if the hostages were harmed, but despite rising domestic political pressure to teach Iran a lesson, he refrained from employing U.S. forces other than in the unsuccessful rescue mission in April 1980.

Senior officials of the Carter State Department remain convinced that this was the right course and that it was the combination of external political and economic pressures (including the "moral pressure" felt personally by the senior Iranian official at the U.N. General Assembly in 1980) as well as the evolution of the internal revolution in Iran that were the key forces ultimately leading Teheran to free the hostages.

The State Department and the National Security Council under President Reagan have reversed the Carter pattern sharply, displaying skepticism about international organizations in pursuing policy goals and leaning towards the use of military pressure as a policy option. The U.S. intervention in Grenada, the sending of marines to Lebanon, and the naval challenge and subsequent "pre-emptive self-defense" strike against Libya for its support of terrorist actions against Americans represent instances where the military options have won out with President Reagan. Little credence has been given either to the U.N. or to other international institutions such as the World Court and other mediating agencies, although the Administration has gone along with efforts by the Contadora Group in Central America to find a resolution to the challenge perceived from Nicaragua.

The display of American military strength through maneuvers and deployments has been adopted as a policy tool by most U.S. administrations since the beginning of the century, including by the Carter Administration. However, in comparison to previous administrations, the Reagan Administration has followed a bolder strategy seeking opportunities to *use* these forces actively against adversaries. The argument behind the new policy appears to be that force can and should be used selectively when the risks are low in order to bolster four broad U.S. strategic objectives: (1) demonstrating American will to act with decisiveness and reinforcing deterrence against the Soviet Union in the Third

World; (2) displaying the ability of U.S. armed forces to defend American and allied interests; (3) inducing countries that challenge the U.S. to cease and desist; and (4) enhancing in the broadest terms an international perception of the U.S. as the great world power. It is premature to assess either the success of this policy or its implications for international law. Yet there is almost certainly a greater international awareness of U.S. willingness to use its power. Also such awareness has facilitated a drawing together of Western and Japanese agreements in strengthening their official condemnation of Libyan support for terrorism in 1986. It is also possible that this awareness constrains some Soviet policy initiatives, discourages state-sponsored terrorism, and makes for a more effective U.S. foreign policy. Whether it also will encourage other states to act with greater audacity and boldness in pursuing their policy objectives by military force—if they can do so with relative impunity—is a potentially disturbing concern for the future.

Perhaps the most debated aspect of the Reagan Administration's foreign policy has been its covert use of force in Central America. Ultimately a variety of factors such as popular opposition to committing U.S. troops in Central America, congressional constraints built upon this opposition, the probability of major casualties and high military costs, and the reluctance of Latin American allies to support more overt Administration policies have led President Reagan to limit support for the insurgents to non-military and military supplies, as he has also done in Afghanistan, Angola, and Kampuchea. There has never been, however, the slightest hint that international law has figured seriously in any internal policy discussions on Nicaragua or in any of these other areas, although resistance to aggression has been used as a justification for U.S. actions in all four.

This pattern of decisionmaking with respect to Nicaragua contrasts starkly with that of the Carter Administration in the case of Iran. Though the prospects for the U.S. in looking specifically to international law and in going to the World Court in the two cases were different, it is still important to notice that President Carter decided, on the urging of Secretary of State Vance, to go to the Court immediately. The U.S. case against Iran was clear in the light of universally accepted international conventions and was overwhelmingly supported by most states. Nevertheless, Vance would probably have pressed Carter to go to the Court under any circumstances because of his view that such an act had value for American policy objectives.

Reagan's State Department and White House advisors, on the other hand, were opposed to going to the World Court in the Nicaragua case

under any circumstances. When the Nicaraguan case was brought against the U.S. in April 1985, the substantive U.S. case was fragile and the composition of the Court was clearly inclined to the interests of Nicaragua. But the basic U.S. position seemed to be that the issue involved was one of national security in the Western hemisphere, and the U.S. government did not under any circumstances want the World Court meddling in these affairs. When the Court rejected the U.S. argument on jurisdiction and Nicaragua's status in bringing charges, the U.S. opted out of the proceedings completely. A political argument subsequently made for the action was that the Soviets consistently refused to submit to World Court proceedings and thus there was no reason for the U.S. to do so. This argument was politically attractive domestically, but it eroded the stature of the World Court that American values had once tried to build up. Aside from lawyers in the Legal Adviser's office, however, there was little opposition to the U.S. decision in this case from anyone in the State Department.

Collective Security

Deterrence, alliance politics, and the sale of weapons to enable friendly countries to assure their own security and cooperate in collective defense politics have for the last three decades been the focal points of American foreign policy in the arena of national security. The issues are too complex to summarize briefly. The alliance system and the preservation of the interests of its members, however, do constitute one central core around which national security interests, broad political objectives, national ideals, and international law are woven together in the conduct of American foreign policy. The specific endorsement of collective defense efforts included in the U.N. Charter⁷ has provided a link between international law and these other vital areas of policy since World War II. The U.S. has almost always sought to use collective security to justify its international security policy over the years. This can be seen in the way the U.S. justified its efforts in the Korean and Vietnam Wars, the sending of troops to the Dominican Republic, Lebanon, and Grenada, and the provision of military assistance to friendly countries in Asia, Latin America, the Middle East, and Europe. For the U.S., however, its network of alliances offers formal underpinning for international cooperation that most officials have seen as far more dependable and fundamental than the specific articles of the U.N. Charter or the U.N.'s institutions.

7. See U.N. CHARTER arts. 51-54.

The linkage between alliance issues and international law is indirect in nature. What American policy-makers, with occasional exceptions, have increasingly identified as the real rules of international conduct to which the U.S. needs to be attentive are those rules on which the U.S. and allied governments agree, not resolutions that emerge from the U.N. and other international fora. It is also true, however, that our friends and allies are often significantly influenced by these resolutions and by the views of smaller states and that these influences thus feed back, through alliance consultations, to influence U.S. policy.

The Reagan Administration has consistently pressured U.S. allies to adjust their views so as to focus exclusively on the defense of Western, democratic, anti-totalitarian, and anti-communist interests. The counterpressures from Europe, Japan, or smaller Third World "semi-allies" such as Costa Rica, Venezuela, Egypt, and Thailand have had a significant effect on American policies, even during this Administration. Thus pressures within the U.S. government to retreat from international arms control agreements have met with fierce opposition from allies (and from domestic opponents) and thus far have been successfully resisted. But overall, since 1980, there seems to have emerged a more narrow American interpretation of the constraints of international law; it is unclear whether this trend will be reversed by another U.S. administration.

Conclusion

It is probably not fair to ask that officials apply international law explicitly in areas of national policy for which, at this time, it may be ill-designed. But the prospects for the future may not be all that discouraging. Policy areas where international legal arrangements are constantly in use are, as briefly described early in this essay, extensive and growing rapidly. International Western summit meetings each year focus on economic policy and related questions because there is wide acceptance of the usefulness of rules for or at least understandings about the conduct of monetary, macroeconomic, trade, and technological issues. Even in a number of important areas of military and security policy, there are now widely accepted standards on what governments may or may not do in terms of defending their security. Such areas include: (a) weapons that cannot be used, such as chemical or bacteriological weapons, or places where weapons cannot be stationed (in space, on the moon, or on the ocean floor); (b) regions that are demilitarized (Antarctica); (c) the treatment of prisoners of war; (d) the prevention of genocide; and (e) the destruction of or injury to civilian aircraft. Accepted standards of international behavior in such areas represent major achievements for the

international community at large and have generally represented public reaction to the horrors of war or other conflict. It is true that on many political and national security issues that affect the conduct of states in "peacetime," international law has made painfully slow progress. Indeed, there are even signs that standards of behavior may be decaying in some areas, specifically: in the pursuit of terrorism and counter-terrorism; in the reported use of gas and chemical weapons in Iran, Iraq, Kampuchea, and Afghanistan; in the tolerance by some states of drug trafficking; and in the declining effectiveness of the United Nations and many of its constituent elements.

Perhaps, however, progress in the economic, scientific, and technological spheres may gradually begin to have a more powerful influence on these areas of "high politics." The technological revolution includes fabulous advances in telecommunications, computers, biotechnology, and energy. Efforts are underway to establish rules and understandings through which all nations can benefit from such technological and economic change, since the implication of the advances for the global financial, manufacturing, and trading systems has become increasingly obvious. Success is far from assured, but the search for principles and a framework to achieve these goals is welcomed by almost everyone because the benefits and financial stakes for all are so high. There are signs that states may even be willing to brace themselves to accept political losses in order to ensure economic gains.

Perhaps the vital interests of nations in reaching amicable understandings on the conduct of their relationships on the economic and technical side may increasingly compel greater accommodation on political and security issues. Those who have argued that economic interdependence will gradually force states into paying more attention to ensuring that there are clear and workable rules for dealing with non-economic conflicts may turn out to be right. The industrialized states have been reaching toward this goal in their relations with one another, although national domestic political issues still present obstacles. In the next decade, there will be abundant opportunities for officials and for political leaders in the United States to grasp the linkages between the national interest in the smooth development and operation of international norms on non-political issues, and the national interest in assuring that political and security conflicts are resolved peacefully and through parallel norms of international conduct.