



**Opt Back In To the International System Part II:
International Law and Treaties
Sarah E. Mendelson**

Analytic Overview

Legal and security analysts interviewed in the U.S., Europe, and Russia all noted the “catastrophic” decline of the role played by United States today on multilateral fronts and especially concerning international law. Some experts fear that as U.S. smart power declines, China and possibly Russia will increasingly be able to “set the table” in terms of the rule of law around the world, advancing a conception of hyper-sovereignty that challenges decades of international law. As one senior British official remarked, “If North America and Europe don’t find a way to work more effectively together, they’ll separately slip down... what with the rise of Asia... The two together are at risk of being a lot less significant unless they pool heritage and common attitudes.”

A driving force of this decline has been Bush administration counterterrorism policies. The United States government has appeared increasingly prepared to pay lip-service to or ignore entirely its obligations under international human rights and humanitarian law. Particularly damaging has been the way in which the current administration has given great latitude on interrogation methods that most allies classify as torture. The new ambivalence towards the torture prohibition is part of a proliferation of policies and practices that threaten human rights and the image of the U.S. abroad. The speed with which ostensibly long-standing, indeed institutionalized, approaches were abandoned has caused great concern and lessened the U.S. role in generating positive legal practice. In the words of one British legal expert “fixed content norms have been renegotiated.”

There are other areas of international jurisprudence that the United States has backed away from as well, including important treaties that help opponents of the United States portray this country as one that is hypocritical, speaking of law and democracy but not applying rules to Americans. These issues are particularly acute in connection to the International Criminal Court which State Department lawyers in the 1990s played such an important role in helping to construct. They also include the Convention on the Rights of the Child (CRC) and the Convention on All Forms of Elimination of Discrimination Against Women (CEDAW). The lack of ratification of these two particular conventions means, as one British diplomat noted, that the United States keeps very poor legal company with countries such as Sudan and Iran.

U.S. non-cooperation with international legal frameworks stems from a larger problem than simply replacing this administration. The United States has increasingly become home to policy makers and a public that embrace what some have called a “legal isolationism” characterized by a general lack of understanding of international law and little demand for compliance. One expert argued that our legal culture is particularly parochial and outdated given the role we hope to play in the world and the intensely networked world in which we live. Our law schools tend not to give international law pride of place. References to international law are rare and even



“controversial” when used in arguments even before the Supreme Court. American policy makers are loathe to accept international legal treaties. These trends are all viewed poorly by even our closest allies and serve us inadequately; the “knock on effect” makes it easier for others to ignore laws too. It enables a permissive environment internationally for authoritarian, rule of man governments.

Recommendations

The next administration needs to adopt a dramatically different tone, policy and position in regard to international law if it hopes to repair the damage done to smart power. Instead of “opting out” of the world, the next administration needs to “opt back in” and be seen to be opting back in. To demonstrate this commitment, the next president should, early in his or her term, abandon policies that derogate from conventions and work with the Senate toward ratification of several important treaties. The next administration should consider areas where the United States could play a positive role in ending impunity and advancing accountability. The next administration might take on the larger ambitious effort of trying to affect American popular notions of international law in partnership with key nongovernmental stakeholders.

Make the Existing Legal Framework More Robust

Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment: The next president should publicly state his or her intention to fully comply with this treaty that the United States has signed and ratified. Through new counterterrorism policies and particularly working with Congress to bring intelligence agencies under the same regulations that apply to the military, the next administration should make this a centerpiece effort.

Convention on the Rights of the Child (CRC): The next administration should work with the Senate to approve this treaty. Today, the United States is alone along with Somalia in having not signed. The administration will need to work with local state authorities to make clear that the use of the death penalty against minors is not in keeping with the practices of a great power and moral leader. With U.S. ratification, the next administration should make a particular commitment to ending the use of child soldiers and other forms of trafficking in children.

Convention for the Protection of All Persons from Enforced Disappearance: The next administration should work with the Senate to approve this treaty and the next president should state his or her intention to fully comply with this treaty as part of new counterterrorism policies.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): The next administration should work with the Senate to approve this treaty so that the United States is no longer in the legal company of Iran, Sudan and Somalia. In approaches to countering the trafficking of women and girls and in the implementation of the Trafficking Victims Protection Act, more resources in the next administration should be devoted to assessing and affecting how “push factors,” such as discrimination in educational institutions or in the work place, puts women and girls at risk for labor trafficking and forced prostitution.



International Criminal Court: The next administration should work with the Court on cases where the United States can help bring justice through the use of electronic surveillance, such as in Darfur. The next administration should also make more robust the complementarity regime with the ICC. The next administration should engage in consultation with senior military and civilian leaders in the Pentagon as to the functioning of the Court.

Military Extraterritorial Jurisdiction Act: The next president should request that the Department of Justice investigate, and where necessary, prosecute criminal activity conducted by private military contractors working with the Department of Defense overseas. A particular emphasis should be placed on the investigation of crimes associated with human trafficking for which credible evidence has surfaced. Those investigations should cover contractors working for any U.S. government agency for crimes committed within five years.

New Treaty or Legal Regimes

The next administration should explore the possibility of creating a standing order that the United States will share intelligence with reputable courts investigating grave human rights abuses when the United States is the necessary partner for providing justice, such as in the current case before the ICC of Darfur. The next administration should also explore the possibility of creating a comprehensive and viable witness protection regime for international victims bringing cases before U.S. courts, and work with European allies on such a regime for cases occurring in the European Court of Human Rights and the ICC. To this end, the next administration should work toward a visa regime for witnesses who testify in the United States. For cases related to the crime of human trafficking, witnesses should be eligible to receive T-visas. Finally, the next administration should make clear that it will not encourage the sheltering of U.S. businesses that engage in criminal activity abroad. The administration should take a public position condemning cultures of impunity and reminding the business community that the Alien Torts Claim Act can and should be used for serious violations of international law by U.S. citizens.

Message & Marketing

The next administration must make a concerted effort to “opt in” rather than “opt out” of the international legal system. The administration will need to engage in a public education campaign concerning the need for new attitudes concerning international law. Within the first one hundred days, and possibly as a major theme for the inaugural speech, the next president should make a speech on the commitment to recover the standards of historically great American leaders such as Franklin Roosevelt. The speech should make clear the president’s commitment to restore international cooperation and consultation. The speech should aim to restore the narrative in the United States that reflects the idealism and commitment to the universality of human rights.

The next president should make clear that there is a role for the public in this recommitment, and he or she should encourage concerned citizens to engage in a cooperative effort of shifting elite and public opinion on the role that good compliance with international law plays in U.S. national

The opinions expressed in this essay are those of the author, and while they were used to inform the Commission’s deliberations, they do not reflect the opinions and recommendations of the Commission.



interests. Such an effort should be bipartisan and be led by a blue-ribbon commission of legal experts, heads of nongovernmental organizations as well as local community leaders. This commission might be used to lead public dialogues in communities around the country on the issue of international law and human rights and national interest. These roundtables or town meetings might be put together with local civic, business and religious leaders and editorial boards. These roundtables would become especially critical if and when another terrorist attack occurs on U.S. soil. They might plausibly serve as a forum to stem the desire for overreaction and the pernicious support of policies that both depart sharply from international law and erode U.S. smart power.