

Presentation by

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Does International Law Matter Anymore?

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Does International Law Matter Anymore?

Introduction

Thesis

International Law matters and is going to matter increasingly as the world integrates further economically, and as geo-politics and geo-economics adapt to the realities of new power centres, notably China and India. Tonight, I am going to focus on international law as it relates to state and human security. In support of my thesis, I am going to discuss 5 points:

- 1) why we drafted the UN Charter and created the United Nations in the first place;
- 2) how successful, and unsuccessful, the UN has been;
- 3) the harm that has been done, and is still being done, by US foreign policy to international law;
- 4) why the US attitude is dangerous for Americans and for the rest of us and short-sighted strategically; and
- 5) what Canada can and should do about it all.

Why We Created the Charter

To understand why the world needs to maintain a system of collective security based on the rule of law, we need to go back to the basics. We need to remind ourselves of what the world looked like before the reform process led by Woodrow Wilson and Franklin Roosevelt, and the progress of the last 60 years.

A hundred years ago, the only protection against aggression was power. The only question that mattered to a potential aggressor was whether he – it was almost always a “he” – would prevail. The issue was not law; it was power. Stability was maintained by alliances to counterbalance the powerful. And that stability eventually broke down.

In World War I, as slaughter became industrialized and democratized, approximately 8 million people perished. In World War II, as killing technology became more proficient and egalitarian, over 50 million people perished. In World War III, with the advent of modern weapons of mass destruction, especially nuclear weapons, what would the cost be?

No wonder those who fought and won World War II, the people the American “news anchor” Tom Brokaw anointed “the Greatest Generation”, tried to find a better way. That was realism, not romanticism. At the heart of the new system was collective security. President Truman told the assembled UN delegates in San Francisco that “[we] all have to recognize that no matter how great our strength, we must deny ourselves the license to do always as we please”. In the UN Charter, these realists established a system of laws that proscribed the threat or use of force by one state against another. They, also, proscribed interference in the internal affairs of states. Their objective in both cases was to prevent World War III and as much lesser aggression as possible.

II How successful, and Unsuccessful, the UN has been

And by and large, they succeeded. I am not asserting that the UN alone prevented major wars – the emergence of strategies of nuclear deterrence played a central role, as did the NATO alliance. Nor am I arguing that the Charter was everywhere and always respected – it often was not. But there is equally no doubt that without the UN, the world would have been a much bloodier place.

In the last half of the 20th Century, there were fewer interstate wars than in the first half. And this, despite the nearly four-fold increase in the number of states in the UN – from 51 in 1954 to 191 today. The UN Charter established a strong norm against aggressive war. The international Court of Justice was created to resolve disputes peacefully and has had some success in doing so. Successive Secretaries General have practised preventive diplomacy. Peacekeeping was invented to give peace a chance. A vast number of treaties were negotiated to govern behaviour internationally and domestically. The progressive development of international trade law, its biases and uneven benefits notwithstanding, opened the world to commerce, creating widespread stakes in peace.

So, before we think about giving up on the UN and on multilateralism, we need to remember why we created them in the first place and how far we have come. While the U.N. is often the butt of criticism and, in some cases justifiably so, as anyone who has spent an afternoon in the General Assembly can attest, a distressingly small amount of that criticism is well-informed on the particulars of a given issue, and a depressingly large amount of it is just plain ideology and ignorance of the facts. For example, although some have reflexively deprecated the UN's counter-terrorism activity, the UN has passed a dozen counter-terrorism treaties. As those treaties have been progressively absorbed into domestic legislation, they have facilitated the establishment of norms and established standards of international behaviour.

What is true for terrorism is similarly true for human rights, where the U.N. has passed six core treaties including on the protection of women's rights; for arms control and disarmament, where the U.N. is at the heart of the nuclear non-proliferation regime, including its weapons inspection capability; for health, on which the World Health Organization is integral to the effort to control and eradicate infectious and other diseases such as HIV-AIDS, malaria, and SARS, (the WHO would play a crucial role in coping with bio-terrorism); and for the environment where the U.N. has fostered 76 treaties. Beyond rules, norms and laws, there is an alphabet of U.N. acronyms, e.g., ICAO, IPU, ITU, WMO, WIPO, among many others, that stand for organizations that help the world to manage one aspect or another of international interchange.

Critics of the UN have often used the "I" word – irrelevant – but the real "I" word is indispensable. The U.N. is indispensable, also, to international humanitarian objectives. For example, UNICEF has inoculated 575 million children against childhood diseases. The World Food Program has fed 104 million people (in 2003) The UNHCR has over 50 years housed 50 million and is currently helping 17 million refugees; last year it housed 22 million refugees and internally displaced people. The UN Mine Action Service has facilitated 37.5 million stockpiled landmines and saving countless limbs and lives in the process.

Still, no one believes all is well with the UN. The U.N. is suffering from an acute case of inertia at a time when it is facing decidedly new challenges. The most pressing and fundamental challenge the UN faces is to come to a common understanding of when and under what circumstances the international community is justified in intervening in the internal affairs of member states. The possible grounds for intervention include humanitarian crises, the illegal development or acquisition of weapons of mass destruction, the provision of safe haven or financing for terrorists, the inability of states to control international crime and the overthrow of democratic governments. Equally urgent is the issue of ameliorating endemic poverty. The link between economic development and security is becoming increasingly clear.

These are extremely difficult issues and there are understandable reasons why the world's approach to them has been cautious to a fault. The UN Charter was written in and for a different age and treats national sovereignty as absolute and immutable. As a consequence, over time a contradiction has arisen between the most basic purpose of the UN, "to save future generations from the scourge of war", and one of its cardinal tenets, the preservation of state sovereignty.

Most wars, the Iraq war being a major exception, currently arise within the borders of existing states. The inhabitants often cannot legally be protected from the scourge of these wars without intervention from the outside. On no issue is new practice more needed, consider Darfur, than on the determinants of military intervention for humanitarian purposes, that is, to prevent or stop genocide.

It was with these new challenges and urgent crises in mind that UN Secretary General Kofi Annan, appointed two Blue Ribbon panels. The first, the Millennium Development Project, proposed action to implement the Millennium Development goals (MDGs) adopted by world leaders at the UN in 2000. The second, the High Level Panel, made 101 recommendations for UN renewal. The Secretary General will boil these two reports down and make his own recommendations for consideration by heads of government meeting again in New York in September. It is a Canadian national interest that as many as possible of these reforms be made.

III The Damage Being Done to International Law by US Foreign Policy

The US National Security Strategy of 2002 is a remarkable statement of US policy. It begins with a statement of American values and lays out American policies and principles. A good deal of it could have been written for Canada, as well. Where it differs from a Canadian perspective, it does so dramatically. It posits effectively the perpetual preservation of American military predominance, by war if necessary. Further, it speaks of pre-empting enemies but in terms that amount to prevention. Pre-emption, with its inherent sense of the imminence of danger and urgency of self-defence is permitted under international law. Prevention, with its sense of possible danger and eventual risk of being attacked, is not. The Israelis pre-emption of the massed Arab forces on their borders in 1967 was legal. The US attack against a possibly eventually dangerous Iraq is precluded under international law. One is consistent with international law, the other is inconsistent with the law and undermines it.

I represented Canada in the Security Council debate when resolution 1422 on the International Criminal Court (ICC) was first passed in July, 2002, and when it was renewed in June, 2003. The Government of Canada believed deeply then and, I understand, believes deeply now that the creation of the International Criminal Court (ICC) was an important step forward in the development of international law and of international relations. Ending impunity for the world's monsters, ending immunity from prosecution for the most heinous violations of international humanitarian law was, and is, both manifestly positive in themselves and important as deterrents of future crimes. It is therefore, a potentially important instrument for preserving stability and security, no small consideration at a time of heightened fears of the dangers posed by failed states and terrorism.

The Government of Canada opposed U.S. attempts to exempt Americans, and anyone else, from the Court's jurisdiction. Although we respected the right of the Government of the United States to disassociate itself from the Rome Statute of the ICC, we thought U.S. objections were essentially ideological, a reflection of an exaggerated "exceptionalist" mindset. American exceptionalism is currently in fashion in some circles but it is not something new under the sun. It dates from the Independence War and has been remarked on differentially by observers as diverse as De Tocqueville, Margaret MacMillan, author of *Paris 1919*, Michael Ignatieff of Harvard and Harold Koh of Yale.

American exceptionalism has been in some cases exceptionally beneficial. American leadership, idealism, power and activism have contributed enormously in the last century to the growth of international law, democracy and human rights. But when American exceptionalism comes to mean that the U.S. expects one law for the goose and another for the gander, "when the United States actually uses its exceptional power and wealth to promote a double standard" to quote Harold Koh of Yale, it is not benign.

American exceptionalism became American exemptionalism from the jurisdiction of the court. Most fundamentally, we disagreed with the U.S. position because we thought it meant that all people were not equal and accountable before the law, a principle we could not accept. Initially, there was widespread opposition in the Council to acquiescing in the U.S. objectives but, gradually, heavy U.S. pressure, combined with a somewhat less objectionable resolution, persuaded the Council to hold its nose and pass Resolution 1422. Doing so undermined the legitimacy of the Security Council. The U.S. asked the Council, Lewis-Carroll-like, to stand Article 16 of the Rome Statute on its head, to create a general exception to the jurisdiction of the Court. It was clear in the negotiating history of the statute that recourse to Article 16 was to be on a case-by-case basis only, where a particular situation – for example, the dynamic of a peace negotiation – would warrant a temporary, not perpetual deferral of action. Moreover, the Statute foresees that the Council would request the court to defer action only in cases of threats to international peace and security. In the absence of a threat to international peace and security, the Council's passing a Chapter VII resolution was *ultra vires*

Acting beyond its mandate under the Charter undermined the standing and credibility of the Council in the eyes of the membership and the world. Ominously, the Council's passage of resolution 1422 set a negative precedent under which the Security Council could purport to change the negotiated terms of any treaty it wished, e.g. the nuclear Non-Proliferation Treaty, through a

Security Council Resolution. The United States, as did all countries, had several options to protect its interests without vetoing United Nations peacekeeping missions, which were so vital to millions of people around the world.

In the months and years since then, the US has sought separate agreements with virtually the entire world, the effect of which would be to exempt Americans and other nationals, including Canadian, working for them from the jurisdiction of the Court. Again, enormous pressure has been brought to bear, particularly on smaller states who have been threatened— and in some cases the threats have been implemented – with curtailment of military and other assistance programs. The U.S. is prepared to go an extraordinary distance to exempt itself from this aspect of international law. Currently, Washington the US is trying to prevent the Security Council from referring the issue of Sudanese crimes against humanity and war crimes from the ICC in The Hague.

The Iraq War

Mainstream legal opinion is that the Iraq war was illegal. According to this view, the decision to authorize military force belongs to the Security Council acting collectively and specifically on the matter at hand. Individual countries cannot interpret existing Council resolutions as authorizing them to use force. In the fall of 2002, the Council passed resolution 1441 on Iraq unanimously. On the use of force, that resolution was ambiguous, forecasting “serious consequences” in the absence of Iraqi compliance. But forecasting serious consequences and authorizing the use of all necessary means, the usual UN language regarding the use of force, are not the same, literally or legally. Nor did resolution 1441 set any deadline for compliance. In the absence of explicit authorization, the US used a connect-the-dots legal argument. It held that because Iraq was in material breach of 678, which did authorize all necessary means, that resolution was still in effect, and they were entitled to act on it, but with respect to the central issue, the existence of weapons of mass destruction, Iraq was in compliance with 687, which had proscribed Iraqi WMD and imposed weapons inspections. Further, the very seeking of a second explicit authorizing resolution is evidence that the US argument was weak. Indeed, even at the time, although UN weapons inspectors could not preclude that Iraq had hidden weapons of mass destruction because a negative cannot be proven and some accounting discrepancies of weapons precursors material, especially biological materials remained to be convincingly explained by the Iraqis, they did not assume that Iraq had such weapons. Indeed, they asserted that Iraq had no nuclear weapons. When in February 2003 the US and UK sought the second resolution authorizing war, they were unable to persuade even a simple majority of Council members to agree, let alone to satisfy the statutory and more difficult test of 9 of 15 council members, including the other veto-holding states, voting affirmatively. Moreover, the US Administration made it very clear that war was not a last resort but rather, in contradiction of the UN Charter, a foreign policy instrument to be used as they saw fit. Both the essence of the National Security Strategy of 2002, and its application to Iraq, are a long way from Article 51 of the UN Charter which recognizes “the inherent right of self-defence if an armed attack occurs against a member of the United Nations”.

Nor is that the totality of damaged done to international law by this US administration. In prosecuting its “war on terror”, which it considers not to be a mere metaphor but an actual war, it has dismissed the relevance of the Geneva Conventions to the President as Commander in Chief in wartime, denied the salience of the Torture Convention to its own Gulag Archipelago of prisons,

and authorized the “exceptional rendering” of suspects to countries where they are all but certain to be tortured. At home, they have even suspended habeas corpus for “unlawful enemy combatants”, a category for which the administration itself is judge, jury and prison keeper. It is not anti-American to worry that US foreign policy is becoming literally lawless.

IV Why US Policy is Dangerous in the Short Term and Short Sighted in the Long Term

A little discussion of American foreign policy would help situate our discussion, especially the growing gulf between Washington’s self-perception and the perception by others of Washington.

The End of Checks and Balances

In the US, the exercise of power domestically is governed by a system of checks and balances. Internationally, American foreign policy elites progressively came to realize after the demise of the Soviet Union that internationally its power no longer faced check or balance. American will and capacity for international leadership grew at a time, while others, particularly industrialized countries, were content to see Washington lead if it wanted to, in part because of the US’s sheer capacity to do so, in part because they saw (and still see) no international threat to themselves or, less nobly, obligation to others requiring heaving investments in military capability. As a consequence of the leadership role that others readily conceded to the US, and because of the considerable costs and risks of its self-appointed mission to propagate democracy, many in Washington on both sides of the political aisle came increasingly to see the US as bearing a disproportionate burden and meriting exceptional dispensation from international law and norms

It was not always thus. At the end of the Second World War, when the US bestrode the world even more colossally than it does today, President Truman told the assembled UN delegates in San Francisco that “[w]e all have to recognize that no matter how great our strength, we must deny ourselves the license to do always as we please.” Now, many in the US seem to expect to lead, not by example, but by exception.

Unilateralism

The Gulf between Americans’ perceptions of themselves and the way the world perceives them is becoming dangerously wide. At the Democratic convention, Senator Kerry said: “The USA never goes to war because it wants to. We only go to war because we have to.” President Bush said not long before that at a Memorial Day commemoration: “It is not in our nature to seek out wars and conflicts. We only get involved when adversaries have left us no alternative.”

History cannot carry the weight of these arguments. There were the Barbary Wars, the Mexican War, Nicaragua (several times), the Spanish American War, the Philippine War, Cuba (several times), Panama (several times), Haiti, the Dominican Republic, Grenada and China. In the more contemporary history, there was Iran in the ‘50s, and the overthrow of Mossadeq, the democratically elected leader, an act still being paid for today; the Congo in the 60s and the overthrow of Patrice Lumumba, its democratically elected leader; Chile in the 70’s and the

overthrow of Allende, its democratically elected leader; Viet Nam and Cambodia; support in the 80s for the poison gas-using Saddam Hussein in the Iran-Iraq war and for the Mujahiddeen in Afghanistan against Russia.

At the Republican Party convention, Senator Libby Dole proclaimed that America was great because its people are good. For the rest of us, though, the issue is not whether Americans are innately good people, believing in values of tolerance and respect for others and guided by religious faith, so much as that they are human and capable of the same mistakes as everyone else is.

China and the Emerging World

There is every reason to believe that the precedents and exceptions we might grant to the United States now will be claimed as well by others in due time. The economy of China, a communist country, will equal that of the US in 20 years' time. Within the lifespan of many people in this room, Chinese military power might well surpass American power. Does it make sense to dispense with the constraints of international law in these circumstances?

V – What Canada can do About It

Canada needs a two-pronged foreign policy. In North America, we need to ensure that we are not an inadvertent danger to American security. That means we should do everything reasonably possible to safeguard our ports and to prevent unauthorized access to the United States over land, across lakes, or along our coasts. We should co-operate with the United States – and Mexico – on forward defense against terrorists, notably by intercepting undocumented travelers before they get into Canada.

At the same time, we should maintain an independent foreign policy. Our first priority should be to work for reform of the United Nations, and to safeguard the UN Charter, the heart of international law. At the same time, we need to sustain the UN's norm-building vocation. And we need to consolidate and, where possible, to enhance the complex network of treaties that govern international relations. The more the US is tempted to go it alone, the more it is in Canada's interest to uphold the law. Because, in the end, international law does matter, and it matters to Canada most of all.

Thank you.