Alain Pellet

Being a commentator is a fortunate position, since the authors of the chapters have worked hard and you are simply supposed to distribute good or bad marks without yourself having done much work. But it can be also uncomfortable, at least when you give high marks, since as a matter of definition you have nothing, or very little, to add to what has been written. This is the situation in which I find myself, since, overall, I have found virtually no grounds for disagreement.

Both authors have, I think, expressed balanced views. They try hard to find excuses for the United States' behavior with regard to treaty law – a rather difficult task, I'm afraid. Their general tone is, it must be said, rather critical, but it would be hard to disagree. The United States is, indeed, a law-abiding country, but it abides by its own law and not, or as little as possible, by general international law.

In this respect I do have a regret concerning Pierre Klein's paper, in that he does not discuss the general feature of the treaty network into which the United States has agreed to enter. Klein tells us that the United States insists that it is bound only by its own consent. But, with respect, this is stating the obvious: treaty law is consensual law as a matter of definition. *Pacta sunt servanda* applies to the United States just as it applies to San Marino or Monaco. It would probably have been more interesting to find out how many treaties the United States has entered. And I would bet that, compared with other Western powers, its record is rather poor. This is confirmed in Nico Krisch's remarkable chapter, at least as far as multilateral conventions are concerned: compared with its main Western allies, the United States ratifies a very limited number of conventions. In this respect, the United States is perhaps more comparable with Third World countries, and maybe Japan, rather than with Western and probably eastern European countries (with the possible exception of Russia).

I am not suggesting that the United States violates treaty law more than any other State. But it commits itself less and is more reluctant to become bound than many States. Its lack of support for treaty law is also shown by the multiplicity of reservations, understandings, declarations, and other unilateral statements that it formulates when it accepts to be bound. And I must say that, as the International Law Commission's Special Rapporteur on Reservations to Treaties, I have been struck by a very special US policy which exists nowhere else in the world: the United States is the only State

which imposes so called "reservations" on *bilateral* treaties. Although there are a few examples of "reservations" to bilateral treaties outside the United States, they are isolated accidents, not policies. My view (as accepted by the ILC) is that such statements are not reservations: they are offers to renegotiate the treaty. But when such offers come from the United States they are demands or orders – and I know of only a very few cases where they have been rejected. One such rejection came from France, but this is highly unusual; in most instances, the United States' partners have agreed to the modifications imposed by it.

This approach can be compared to the successful US endeavors to change the United Nations Convention on the Law of the Sea or its ongoing efforts to change the Rome Statute of the International Criminal Court, not to speak of the Kyoto Protocol. This is very well presented in Klein's paper. But one could also think of other techniques, for example the conditional ratification of the WTO agreements. I have said "conditional," but I might more properly have spoken of a "threatening" ratification. The United States says: we accept the treaty, but if we are condemned too many times by the WTO mechanisms, we will denounce it.

And indeed, it seems to me that the United States has a very particular idea of the *pacta sunt servanda* principle. Its conventional relations with the former Soviet Union, and then Russia, concerning bilateral disarmament treaties provides another illustration of this, let us say arrogant, reinterpretation of *pacta sunt servanda*, which conveys the impression, viewed from this side of the Atlantic, that it is seen in Washington DC as *pacta sunt utilisanda.*

In a way, this probably is a natural inclination for superpowers. After all, when Britain and France were in this (albeit shared) position, they too had a most debatable and cynical policy in this respect and did not hesitate to consider some of their treaties as pure scraps of papers when they deemed it advantageous to do so, at least and most especially when the treaties were concluded with what they cynically referred to as "uncivilized countries." But the irony of the present situation is that the United States was, in a now rather remote past, very active in trying to moralize the practice and the law of treaties. Just think of the supposed ban on secret diplomacy after World War I and the actions of President Woodrow Wilson.

But there is something else that is missing in part from both chapters.

Both Catherine Redgwell and Pierre Klein ably show how the United States takes great care in refusing any provision in a treaty that contradicts

its own law – not only its Constitution and statutes, but also, more often than not, all its regulations, whatever their place in the legal hierarchy. Senator Bricker's ghost is still very present in US policy regarding treaty law.

A good example of this is the US attitude towards the ILC's rather good Draft Articles on State immunity. Since the United States has an international immunity act of its own, it tries to block, up to now very successfully, the very convocation of a diplomatic conference which could negotiate a treaty on the basis of the ILC's draft. This is unfair: if the United States wishes to stick to the Foreign Sovereign Immunities Act (which is neither better nor worse than the ILC's draft), very well. But why does it prevent others from adopting a useful agreement which would constitute significant progress in resolving the existing legal disorder in this area? To be fair, I must say that the other Anglo-Saxon countries, which also have their own immunities acts, behave in the same way. But the attitude of these countries is also to be regretted, and is certainly no excuse.

Two years ago, during a very fruitful conference organized at New York University by Thomas Franck, we had a very stimulating and rather tough debate on an interesting point. I explained that I was shocked – and indeed I still am – by the rigidity of the United States when its laws and regulations are at stake; as I have noted before, one of the major aims of the United States when negotiating and then ratifying a treaty is to leave its own law untouched and unchanged. After I had developed this idea, I was quite vigorously attacked by my US colleagues who in return mocked the French mania for constitutional instability. And it is true that we have no difficulty in changing our constitution in order to bring it into line with our international treaty commitments.

In this context, I was told a nice joke which was said to be a true story and which I cannot resist repeating here. One day in Paris, Senator Jesse Helms' chief aide went to a specialist legal book store and asked for a copy of the French Constitution. "Sorry sir, we don't have it," he was told. Senator Helms' aide asked why not. The answer: "We are a bookstore, not a newsagent." And it is true that France has changed its constitution several times in the last few years in order to accept new treaty commitments. This is categorically unheard of, impossible for Americans.

As appears in the titles of many of the chapters of this book, the United States is "more equal than the rest" (Krisch); it is largely "powerful but unpersuasive" (Stephen Toope); it is, indeed, "predominant." But if Americans lock themselves in a legal ivory tower, it is not, or not only, because their

country is powerful; it is also, and for that matter perhaps principally, because they are absolutely persuaded that their law is the best and/or that the intrusion of international law would be a threat to the satisfactory balance their domestic law achieves.

This leads me to a second small lacuna that I have detected in both chapters.

I regret that they have been silent on the implementation of treaty law inside the United States and particularly by US courts. I do not know enough about this matter to venture a hypothesis, but it would have been interesting to ascertain the solutions implemented by United States courts in respect of the place of treaties in the hierarchy of norms they apply. The self-executing or non-self-executing character they accord treaty provisions would seem to be of some relevance here.

I suppose that I shall be accused of elementary anti-Americanism, if I venture – I cannot help it! – that such a study would probably confirm that the famous doctrine "international law is part of the law of the land" should largely be reversed and that we would probably come to the conclusion that "The law of the land is part – and a predominant part – of international law," or even that "US law *is* international law." This certainly is the impression given by the two excellent chapters on which I am commenting.

I should like to end with a more general note.

Many of the chapters in this book take a rather critical view of the US record in matters of international law. I am afraid that such a pessimistic appraisal is all too well-founded. However, there is something strange and paradoxical in such a conclusion. Yes indeed, the United States is predominant, but this averred fact should lead to an opposite finding: powerful States should – and, generally speaking, do – adapt themselves rather well to the demands of positive international law.

Being neither a positivist, nor a moralist – even less a "moralistic positivist," an expression which, for me, means nothing even with respect to my good friend Bruno Simma – I maintain that law is the result of power. Therefore, it would seem natural that big powers are more law-abiding than less powerful States: they have the means to elaborate and impose on the rest of the world the legal rules which best serve their interests. But curiously enough the United States has succeeded neither in forging the international law that it wants nor in convincing world public opinion – including international lawyers – that it is a model law-abiding country. Why? Probably for two main reasons among others.

First, because, whatever its defects, its imperfections, its arrogance, the United States is a democracy. It flows from this indisputable fact that it is rather transparent and open to scrutiny. Therefore, and very logically, all that it does (or does not do), including its breaches of international law, is known, discussed and criticized – the very title of this book is revealing in this respect.

Second, in spite of Stanley Hofmann and many others, the United States is not an empire; it is a State. The difference is that an empire lives in isolation without recognizing any other entity as equal, while state sovereignty cannot be dissociated from equality with that of all other States, as is very well demonstrated in Krisch's chapter. Although the United States may well be "more equal" than the rest, it nevertheless recognizes that it is but a State, among other equally sovereign entities. This deserves our respect, both for the very notion of state sovereignty – which must not be envisaged as an absolute power, but as a doctrine of limitation on absolute power – and for the United States which, more often than not, though not very tactfully, behaves as a State and not as an empire.

It has often been remarked that it is better to be healthy and wealthy than poor and ill. And the United States is just healthy and wealthy, globally speaking. There is nothing wrong with this, providing that it does not turn health into imperialistic domination and wealth into arrogance.

Bruno Simma

Since this project has been funded in part by the Volkswagen Foundation, I should like to begin with a metaphor close to Volkswagen. I think that the provisions on the law of treaties, especially those provisions that relate to treaty-making, are a very robust vehicle equipped with airbags and a crunch-zone. This allows for some quite reckless driving, and without a doubt this is what the United States is engaged in. And relating to something that Pierre Klein has said with regard to the trumping of the law of treaties by Chapter VII action, like any driver you can use public transportation instead of getting stuck in a traffic jam of cars, that is, resort to the Security Council instead of waiting for the green light of a treaty to enter into force. Of course, the United States is not a country famous for its public transportation. What Pierre Klein's chapter shows is that the United States engages in a number of practices that I would call exorbitant and less than constructive – while remaining within international law.

UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW

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