



*Universidad de Guanajuato
Campus Guanajuato*

División de
Derecho, Política y Gobierno

Estudios Políticos

*Documento
de trabajo*

Contradictions and double standards in the American
"Democratic Mission": the case of the United Nations
Convention on the Law of the Sea

No. 5 Daniel Añorve Añorve
Octubre de 2012





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PRESENTACIÓN

El proceso de crecimiento que vive la División de Derecho, Política y Gobierno (DDPG) de la Universidad de Guanajuato abre una oportunidad para la generación de conocimiento especializado en las distintas disciplinas que conforman su esfera académica.

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Contradictions and double standards in the American 'Democratic Mission': the case of the United Nations Convention on the Law of the Sea

Daniel Añorve Añorve¹

Abstract

The present paper studies the frequent contradictions and double standards present in the US democratic mission. An important legal instrument, UNCLOS, serves as the case study. The paper starts with the theoretical considerations that deal with the supposed conditions, those of the democratic peace theory that arguably could turn the States of the world into democratic and peace-prone actors. During a second moment it analyses the dual, often contradictory role that the US plays as a promoter of democratic values, while acting in parallel as an 'exceptional' force or actor that seems to escape to the demands and standards it seeks to impose to the rest of the world. On a third moment, we study the US approach to international law by tracing a record of US stance before several international treaties and other legal instruments. Finally, we confront those views supporting with those opposing the ratification of UNCLOS while analysing the implications for the US of not ratifying UNCLOS and other international instruments.

Introduction

The mission to spread democracy has been present throughout U.S. history. Indeed, one of the central pillars of the United States' foreign policy by word and by action has been the promotion of democracy and free trade. At the same time, the United States portrays itself as an exceptional country, stemming from the fact that it was the first modern nation in History: it did not have to 'become' modern, because it was born modern. A series of historical conditions, its geographical location, the ability to borrow the European ideas of enlightenment, the founding fathers' political engineering of the political system among others, gave the United States its unique characteristics that made it truly exceptional. Paradoxically, the notion that the United States is an 'exceptional' nation has posed some contradictions in its historical endeavor. Although the United States has been very effective in making democracy work at home and has shown a great capacity for dealing with and settling its domestic conflicts that has often not been the case in the international arena.

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The present paper, on a first moment, briefly analyzes the arguments of the democratic peace theory that both implicitly and explicitly has been present throughout the U.S. long-lived democratic mission march. On a second section, we reflect on the origins and rationality of the U.S. exceptional character that has justified the country's leading role as the natural bearer of democratic values and institutions. The third section consists of a confrontation of the liberal and realist approaches and understandings of international law. Finally, the last section deals with our case study- UNCLOS (the United Nations Convention on the Law of the Sea). This section analyzes the arguments for and against the ratification of the Convention by the U.S.

This paper has two purposes: the first one is to explain how the concatenation of both the democratic peace rhetoric and its theoretical arguments, along with the shared mentality of exceptionalism among U.S. citizens, domestic politicians, and those actors involved in U.S. foreign policy making, has turned the mission to spread democracy across the globe a permanent feature of U.S. foreign policy, rather than an interim plan of a particular administration. The second purpose is to analyze the impact that the United States' decision to ignore or minimize international institutions may have on its goal to promote democracy around the globe.

This paper, aimed at a public that approaches for the first time to U.S. foreign policy and/or International Relations, tries to explain why the U.S is perceived with suspicion abroad. It argues that this suspicion derives precisely from the fact that its democratic stance seems to be troubled by double standards: domestic policies tend to conflict with its relations with the rest of the world. It must be noted however, that the objective of the present paper is not to discredit U.S. democracy as a whole, but rather to question its duality-- domestic democracy vs. international behavior.

Democratic peace as a guarantor of progress

With the collapse of the Soviet Union, the old idealistic dream was brought back to the international community: all that was needed to create a globalized-integrated world and an enduring peace was the acceptance everywhere that authoritarian or military dictatorships

had to give way to liberal democracies. On the other side of the same coin, the old central planned economies would turn into free market economies. The superiority of this combination of democracy and free market was apparently clear (Fukuyama, 1992). Therefore, embracing this new duo of political and economic institutions would finally make possible the prevalence of the democratic peace. According to Bruce Russett (1994), it is well known that, in theory, democratic nations hardly, if ever, make war on each other. He tries to demonstrate this statement thru empirical and testable records. The argument goes as follows:

To the degree that countries once ruled by autocratic systems become more democratic, a striking fact about the world comes to bear in any discussion of the future of international relations: in the modern international system, democracies have almost never fought each other (Russett, 1994: 4).

The assumptions behind this logic, Russett holds, are: (a) democracies rarely fight each other (an empirical statement) because (b) they have other means of resolving conflicts between them and therefore do not need to fight each other (a prudential statement), and (c) they perceive that democracies should not fight each other (a normative statement about principles of right behaviour), which reinforces the empirical statement. By this reasoning, the more democracies there are in the world, the fewer potential adversaries we and other democracies in the world will have and the wider the zone of peace (Russett, 1994: 4).

With the end of the Cold War, the democratic crusade or democratic mission strengthened and more than ever was (up to 9/11) a constant element in the formulation of U.S. foreign policy. Former dictatorial regions, such as Latin America, were then as Noam Chomsky notes, "testing ground" for both free trade, represented by the Washington Consensus and Washington's crusade for democracy (Russett, 1994: 4).

Jef Huysmans considers that after 1989 the multilateral security order vis-à-vis the normative security order dilemma typical of the Cold War, seemed to reach the stage at which the multilateral security order could properly function. However, on September 11, 2001, the illusion was crushed. After the tragic events of 9/11 decision makers everywhere, abandoned the ideal that democracy and free markets suffice to integrate the world and to guarantee prosperity and peace. Because international politics neither function nor can be understood and treated as domestic politics, the argument goes, international politics are "exceptional." Therefore a different logic applies to International politics. The neo-idealism was defeated once again under the conviction that the international system is an

'order' without a politically relevant normative content (Huysmans, 2006: 14). Huysmans alludes to the argument of Martin Wight to explain the justification for the defeat of the idealistic hope that was short lived after the end of the Cold War:

Political theory and law are maps of experience or systems of action within the realm of normal relationships and calculable results. They are the theory of the good life. International theory is the theory of survival. What for political theory is the extreme case (as revolution, or civil wars) is for international theory the regular case (Huysmans, 2006: 14-15).

So, the bottom line for Huysmans is that "the criterion of legality as a restraint on political power is severely limited in international relations." (Huysmans, 2006: 15).

While the defeat of democratic peace theory is for Huysmans a result of the differentiation of the domestic and international realms, for Daniele Archibugi the reason for that failure lies in the fact that democracy has prevailed at the national level rather than in the international domain. Archibugi notes that in spite of the countless contradictions in nascent democracies both in the eastern countries and in the South², self-government has slowly expanded and consolidated; however he notes, an equally important development has not been victorious, that is the expansion of democracy not only within states but as a mode of global governance (Archibugi, 2004: 437). For Archibugi it is clear that global democracy is not just the achievement of democracy within each state. He notes that for so long it has been accepted that the presence of democratic institutions hinders the ability of governments to engage in wars (democratic peace theory). The liberal idea is that autocrats are more prone to conflicts, whereas democratic regimes are inclined to contain conflicts. The idea, then, is that states adopting a republican constitution, which are considered democracies, can be trusted not to fight each other. However, for Archibugi, the problem is that democratic states do not necessarily apply to their foreign policy those same principles upon which their internal system is built (Archibugi, 2004: 441). Consequently, for him global democracy is not equal to the achievement of democracy within each state. He implies, then, that the emergence of cosmopolitan democracy, that is the democratization of the international system, is as important as the democratization of the individual member states. For Archibugi, global democracy, in contrast to the reasoning of democratic peace, cannot be understood solely in terms of an "absence of war". (Archibugi, 2004: 442).

² The South is understood here in its traditional conception within the literature of International Relations, that is as those countries that are considered developing countries as well as former colonies with a low development level.

As for me, I will argue that the failure of democratic peace is not rooted in the differentiation of the domestic and international realms, nor is it simply a result of weak international institutions. I will argue that if international institutions have not lived up to the achievements of democratic development within states it is to a great extent the result of the historic messianic 'exceptionalism' that has shaped American foreign policy, and that "exceptionalism" materializes into a constant defiance to live within the framework of an international normative order that values relations built on cooperation over relations built on conflict.

American 'exceptionalism'

As we mentioned at the beginning of this paper, the unique conditions in which the United States was born created a self-portrait of exceptionalism among its population. It must be noted that I do not understand U.S. exceptionalism as an ideology, but rather as an all-encompassing mentality, that however, as we will illustrate later with some figures, seems to be on the wane.

This exceptionalism is not only a rhetorical resource, but it has clear day-to-day manifestations. There are abundant examples of this exceptional mentality; however, we will mention just two that may sound familiar to the reader. The United States, for example, remains practically alone in the use of a different system to weigh and measure things. Practically the rest of the world uses the decimal metric system. One may wonder why the United States is not part of this international near-consensus. Sports offer vast examples of this exceptional mentality.³

However, as social realities are never fixed, we must take a look at whether there is sufficient evidence that our assumptions on US exceptionalism holds against the reality, allowing us to consider that it is embedded in the American psyche. The following facts, taken from serious studies, show these results:

³ It is well-known that practically the rest of the world calls football what Americans call soccer. Also, in baseball, basketball, and football (American) the champion team is always referred as the "world champion". The reality is that in MLB only one team is foreign (the Toronto Blue Jays); therefore, to call the championship series the World Series is an exaggeration. In the case of basketball, the same situation repeats, with the Toronto Raptors as the only non-American team. Finally, in American football, there is no foreign team in the NFL. Despite the fact that all domestic champions are portrayed as world champions, the reality is quite different. In the baseball equivalent of Soccer's World Cup, the twice-played, World Baseball Classic, the world champion has been Japan. Meanwhile, recent winners of the FIBA World Championship (basketball) include Yugoslavia, Spain, and the United States. While this may seem irrelevant or at least not very important, academically speaking, it is nevertheless a proof that the sense of being exceptional, or perhaps parochialism, is continuously present in the life of U.S. citizens

- In 2010, 80% Americans, based on the country's history and its Constitution thought that the US has a unique character that makes it the greatest country in the world.⁴
- In 2011, although the results of a survey show that the public's belief in American exceptionalism is on the wane (49%), it is still higher than in many other countries.⁵
- The 2010 USA Today/Gallup poll shows some contradictions with previous surveys and polls (2006-2008). According to this poll, 66% of all Americans consider that their country has a special responsibility to be the leading nation in world affairs.⁶
- 62% of Americans found convincing (23% very convincing) the argument that the United States "uses its power in the world to do the right thing", and therefore international courts should not be allowed to "tie America's hands." (World Public Opinion, 2006) The messianic consciousness that both Niebuhr and Bacevich mention is very much present in this indicator.

Now, we will address the meaning of 'exceptionalism' within the political domain. The first thing it must be noted is that this sense of being 'exceptional' has become common sense in Americans' lives, regardless of the political, economic, or social preferences of citizens. David Rieff, for example, argues that in reality both Democrats and Republicans share a monolithic worldview which is clear "if one looks at the current American foreign policy debate without the expectation that Democrats and Republicans will agree on just

⁴ According to a USA Today/Gallup poll conducted December 10-12, 2010, when facing the statement, "Because the United States history and its constitution, do you think the U.S. has a unique character that makes it the greatest country in the world, or don't you think so?", 80% of all Americans do think so; only 18% do not agree with the statement. It is interesting that regardless of the Party loyalty in all cases there is a strong agreement on the statement. It is true that Republicans (91%) have a stronger belief in the unique character of the country than Democrats do (73%). At the same time, it is worth noting that despite this majoritarian agreement with the uniqueness of the country, when asked whether they thought that their Presidents believed in American uniqueness, there is a steady decline in the last three decades. As a result, while 86% thought that Reagan acknowledged America's uniqueness, 77% thought the same about Clinton, 74% in the case of George W. Bush, and only 58% thought that Obama believes the United States is a unique country. See Gallup, "Americans see U.S. as exceptional; 37% doubt Obama does." <http://www.gallup.com/poll/145358/americans-exceptional-doubt-obama.aspx> [January 20, 2012].

⁵ The Pew Research Center released on November 17, 2011 the results of its Global Attitudes Project, which was conducted from March 21 to April 14 2011. 49% of Americans compared to 47% of Germans, 44% of Spaniards, 32% of British, and 27% of French agreed with the statement: "Our people are not perfect, but our culture is superior to others." This perception of exceptionalism has consistently dropped, from 60% in 2002, to 55% in 2007 to finally 49% in 2011. Interestingly, among people age 18-29 only 37% agreed, while people age 30-49, 44% believed that, and in the case of people age over 50, 60% agreed with the statement. Now, if we break it down by educational level, only 43% of people with a college degree agreed with the statement compared to 52% without a college degree.

⁶ See Gallup, "Americans see U.S. as exceptional; 37% doubt Obama does." <http://www.gallup.com/poll/145358/americans-exceptional-doubt-obama.aspx> [January 20, 2012]. In the present paper's section on International Law, we can see a strong contradiction with the role the U.S. is to play in world affairs.

about everything, what seems remarkable is the extent to which they do, in fact, agree on just about everything.” (Rieff, 2008: 102)

Rieff asserts that with the exception of a few ardent defenders of empire, such as Max Boot and Robert Kaplan on the right, and some critics on the far left, the American consensus has always been and remains that the United States is not an empire, but rather the last best hope of humanity. He adds that “liberals, no less than conservatives, accept the premise of the virtuousness of U.S. power.” (Rieff, 2008: 102)

Taking as a referential point the April, 2007 speech of, the then serving Senator Barack Obama at the Chicago Council of Global Affairs, Rieff explains that in reality Obama presents an interesting case study in the tyranny of small differences. Rieff also considers that the speech denotes that “while Obama may differ with them [Bush’s administration] on rhetoric and particulars, he remains every bit as committed to cementing U.S. hegemony in the world as President Bush or Vice President Cheney.” (Rieff, 2008: 103) However, Rieff does not consider that Obama or the other Democrats act with hypocrisy, but rather that, a consensus about the theology of American exceptionalism and the U.S. role in the world unites most of the right and most of the liberal-left in the United States. Whether the idea of “The City on the Hill”, or Benjamin Franklin’s idea that “the cause of the United States is the cause of humanity”, the common denominator according to Rieff is the faith in America’s special mission. That mission in the words of Rieff inspires a “messianic belief that [the] nation has a duty to right the world’s wrongs.” (Rieff, 2008: 104)

Rieff claims that the only differences among American leaders are debates on whether the mission should be done unilaterally or multilaterally, and how much the opinion of the rest of the world should count; however, he thinks that beyond the means to achieve the mission, the goal enjoys an absolute consensus. He thinks that ‘the mission’ is so embedded that it may be compared to some old jokes about communism: “If the facts don’t fit the theory, so much worse for the facts.” (Rieff, 2008: 107)

For his part, another prominent and influential intellectual, Reinhold Niebuhr considers that “perhaps the most significant moral characteristic of a nation is its hypocrisy,” (Niebuhr, 1932: 93) and that in the case of the United States, the hypocrisy lies in the conviction that the country was founded as a result of a providential act, and that the country was God’s chosen instrument with the intention to create a new humanity. To put it

in simpler terms Niebuhr considers that Americans have a Messianic consciousness (Bacevich, 2008: 28). According to Andrew J. Bacevich, Niebuhr was very concerned that Americans' veneration of liberty could degenerate into a form of idolatry. Furthermore, Niebuhr cautions that "no society, not even a democratic one, is great enough or good enough to make itself the final end of human existence." (Niebuhr, 1944: 133)

Having noted the wide-spread assumption of the 'messianic mission' among Americans, it then makes sense that Paul Wolfowitz contends that unipolarism and globalization were really the same phenomenon (Quoted in Gaan, 2006: 313). If we follow this entrenched, centuries-old, logic or if we take for granted a series of syllogisms that equalize Americanization and globalization, there is very little hope that a global world can exist outside America's shaping views, even less that Americans may consider taking a critical approach to the limitations offered by this messianic view.

Bacevich considers that the American credo is best illustrated by Henry R. Luce who called for "The New American Century" in a 1941 article in *Life* magazine. Luce then exhorted Americans to "accept wholeheartedly our duty to exert upon the world the full impact of our influence for such purposes as we see fit and by such means as we see fit." (Luce, 1941) Bacevich believes that, just as the American political credo which he defines as "the credo (that) summons the united States-- and the United States alone-- to lead, save, liberate, and ultimately transform the world" (Bacevich, 2010: 12) has a political arm, it also counts on a military arm, or what we can call its security-military counterpart. This trinity is based on the triangle of global presence, power projection, and interventionism.

This 'mission' did not relax as the Soviet Union, collapsed. Indeed, Irving Kristol and Robert Kagan concluded that with the end of the Cold War the neo-conservatives thought that the United States should not squander the unipolar moment and that a neo-Reaganite foreign policy should proudly proclaim its exceptionalism (Kristol and Kagan, 1996). The idea was to extend the unipolar moment into the "New American Century". As Narottam Gaan (2006: 312) puts it, "the end of the Cold War amplified the opportunity to globalize its domestic imperatives." Gaan also sees the climax of unilateralism when the United States in the case of Iraq launched pre-emptive strikes, flouting UN norms and defying world public opinion.

Neoconservative platforms, such as the Foreign Policy Initiative (FPI), according to Jean-Francois Drolet are very much alive, even while the ‘post-imperial’ diplomacy of Obama occupies the Oval Office. US exceptionalism is as strong as ever in the FPI statement, issued shortly after the death of Kristol in 2009:

The challenges we face require 21st century strategies and tactics based on a renewed commitment to American leadership. The United States remains the world’s indispensable nation—indispensable to international peace, security, and stability, and indispensable to safe-guarding and advancing the ideals and principles we hold dear (Quoted in Drolet, 2010: 90-91).

Bacevich illustrates very well how since the end of the Cold War, the management of history has emerged as the explicit purpose of American statecraft. To prove this he recalls the words of George W. Bush, who according to Bacevich has advanced this proposition better than anyone else, when referring to Iraq during his second inaugural in January 2005:

Because we have acted in the great liberating tradition of this nation, tens of millions have achieved their freedom. And as hope kindles hope, millions more will find it. By our efforts, we have lit a fire as well-- a fire in the minds of men. It warms those who feel its power, it burns those who fight its progress, and one day this untamed fire of freedom will reach the darkest corners of our world (Bacevich, 2010: 26).

What is worse for Bacevich is that those words from Bush, are so authentically American that they could “just as well have come from the lips of Thomas Jefferson or Abraham Lincoln, Woodrow Wilson or Franklin Roosevelt, John Kennedy or Ronald Reagan” (Bacevich, 2010: 26). Even more, in the opinion of Bacevich this narrative is not exclusive of leaders but a reflection of the majority of his fellow citizens. So, he thinks it is very American to advocate the idea that the United States is *the Agent of Liberty*.⁷ Bacevich deems the following as Niebuhr’s most memorable phrase, what he believes captures the American self-image: “as tutors of mankind in its pilgrimage to perfection.” He considers that during George W. Bush’s era, Americans engaged in one such tutorial (Bacevich, 2010: 31).

So far we have talked about the manifestations of American ‘exceptionalism’ in routine, non-political life. We also have touched on ‘exceptionalism’ as a ‘messianic mission’. The final part of this section will refer to the practical consequences of the materialization of this ‘exceptionalism’ in respect to international law, multilateral norms, and adherence to an international normative order.

⁷ The italics are mine.

Jef Huysmans fears that the notion of divine law that asserts and imposes universal values by divine representatives that claim a moral or civilized high ground may end up becoming inward and anti-diplomatic. Huysmans clearly sees the integration of the quasi-religious justification of 'exceptionalism' and its political and mundane effects:

Claims of exceptionality help to undermine the legitimacy of law and multilateral norms, or at least emphasize their limits. In doing so, they weaken the existing common ground for symbolic international politics, of which international law and multilateral norms are a central part (Huysmans, 2006: 24).

As Huysmans argues, the claims of exceptionality on international law and multilateral norms either contest the relevance of international norms or they contest when and how political power can legitimately transgress the existing normative order (Huysmans, 2006: 16). The unsettling part is that it does not question the normative order based on rational grounds.

One may only wonder how long the United State can enjoy a blank check, or if a profound domestic sense and faith in the 'mission' and/or in the 'exceptionalism' of the country, is sufficient to justify unilateralism, disdain of international law and standards, and even worse, a perpetual overriding of civil liberties within the United States.

Bacevich considers that the American credo and the trinity are thought by Washington to oblige others to accommodate themselves to America's needs or desire (Bacevich, 2010: 17). Such an idea only implies that concessions and adaptations flow unilaterally, from the non-'exceptional' rest of the world, to the 'exceptional' Big One.⁸

Daniele Archibugi makes an interesting reflection on the practical consequences of American 'exceptionalism' when it comes to democracy:

The belief that a political or institutional body should be exempted from justifying its actions is incompatible with the essence of democracy. Each political player... must come to terms with other actors when competencies overlap (Archibugi, 2004: 452).

Precisely that 'exceptionalism' is what has paved the way for concrete actions that are in open violation of international norms and best practices. In this light we can understand a letter sent to President Bill Clinton in 1997 by the Project for the New American Century arguing for unilateral action to overthrow Saddam Hussein's regime in Iraq, regardless of a lack of unanimity among the veto powers in the United Nations Security Council (Mansell and Haslam, 2005: 464). Also in this light, Wade Mansell and Emily Haslam note, that the

⁸ The Big One is a name that Michael Moore proposes to describe the United States, as well as the title of one of his movies.

National Security Strategy of the United States of September 2002 asserted that the United States now claimed the right of pre-emptive action, leaving the limitations on the international use of force in the UN Charter in utter disarray. Of course the common sense would deny that it is 'exceptionalism' that justifies this defiance of international law and that everything is to be blamed on 9/11. Of course 9/11 has changed the world, and the tragic events of that day deserve the toughest response of Americans. However, 9/11 has also served as the permanent excuse to invoke American 'exceptionalism'

It is worth ending up the present section by recapturing the words of Narottam Gaan, who notes, that contrary to John Quincy Adams' recommendation "not to go abroad in search of monsters to destroy", George W. Bush's grand design was to foster an imperial world order with America as a leviathan nation ever in search of "monsters to destroy" (Gaan, 2006: 315-316).

However, it is precisely, that permanent pursuit of 'monsters to destroy' that has clashed with the possibility of adhering to an international normative order. So, exceptionalism, the idea of being under permanent danger, and disdain of international law and institutions go hand in hand to legitimize the perennial security-military trinity that Bacevich talks about.

International Law

As it was already mentioned in relation to the prospect of democratic peace, with the end of the bipolar world and with the shift of emphasis from conflict to cooperation and interdependence, observers also tended to see the coming of a promising age in which as Thomas Paine in *Common Sense* said: "... the law ought to be the king".

Daniele Archibugi (2004: 438) notes that once the nuclear threat had been removed, many thinkers urged Western states to progressively apply principles such as the rule of law and shared participation within the field of international affairs. However, these high expectations lacked an empirical basis and/or record. The end of the Cold War did not translate at any moment to the end of power politics. As Archibugi questions, western governments have respected the rule of law at home, but can the same be maintained regarding their behaviour on foreign matters?

For the non-specialized reader, we must note that one of the chief differences between domestic and international law is the 'coercive' character of the former. Domestic law has

two main principles: 1) it is mandatory for all subjects within the territorial boundaries subject to that national jurisdiction (whether we talk about national or foreign persons), and 2) it offers clear procedures for its enforcement. At the state level, law is hierarchical. Established structures exist for both making and enforcing law. There is widespread compliance with the law, based on a general consensus. If law is violated, the state authorities can compel violators and punish wrongdoers (Mingst, 2004: 186).

Meanwhile, at the international level the authoritative structures are absent; therefore, international law operates in what is often known in International Relations as an anarchic environment. More precisely, international law in the majority of cases is only mandatory once the states, through their sovereign will decide to ratify and render its obedience to an international body; also, outside the domain of the United Nations Security Council, the enforcing institutions or capabilities of the international society are weak at best, if not non-existent. Consequently, when a state has ratified a treaty or the jurisdiction of a certain court, it may manage, especially if it is a powerful state, to act against international law or international consensus without being seriously sanctioned or punished.⁹

Archibugi (2004: 438) notes that the rule of law above the state is only respected when states themselves are keen to abide by it, and that often the democratic states are no keener to do so than the autocratic states. He also shows concern about the “dangerous double standards” that take place. He notes that even “the most tenacious defenders of democracy within states often become skeptics, even cynics, when confronted with the hypothesis of a global democracy.” He cites two examples: Ralph Dahrendorf (2001: 9), who declares that to propose a global democracy is equal to “barking at the moon”. The other example is Robert Dahl (1999: 21) who concluded that “the international system will lie below any reasonable threshold of democracy.”

Another factor to be taken under consideration by the non-specialized reader is that there are two chief approaches to international law: the liberal and the realist. The liberal approach¹⁰, according to Karen Mingst (2004: 190), suggests that “states obey international

⁹ As Karen Mingst notes, realists tend to understand international institutions, including international law, as reflecting state power, and hence have no independent identity or role in international relations.

¹⁰ It is important to observe, as Jean-Francois Drolet does, that “Liberalism of course, is a broad church constituted by many contending variants—classical liberalism, New Deal liberalism, pragmatic liberalism, neoliberalism, Rawlsian liberalism, etc. Therefore, he considers necessary to cluster of Enlightenment values predicated on a distinctively modern conception of man and society. For that purpose he synthesize liberalism using John Gray’s explanation: “Liberalism is individualist, in that it asserts the moral primacy of the person against the claims of any other social collectivity;

law because it is right to do so. States want to do what is right and moral, and international law reflects what is right.” This trust in the inherent goodness of law (both domestic and international) start from the premise of the universalist moral unity of the human species, as well as the understanding of its proneness towards amelioration, correctibleness, and improvement. Notwithstanding the morality that surrounds the liberal approach, it is recognized that there are rational, self-interest considerations behind it: provided the majority of states join forces to enforce mechanisms for legal regulations to be effective, states find protection and solace in collective action and in collective security (Mingst, 2004: 190-191). On the other hand, non-complying states face a number of pressures (diplomatic protests, reprisals, economic boycotts, and in extreme cases military force) that may outweigh the costs of complying with values, norms, and laws. Liberals also claim, though they admit differences from domestic law, international law not only exists, but has an effect in daily life (Mingst, 2004: 186).

As for the realist approach, its starts from the premise that the essence of the living thing (in this case humans and the states they form) is the will to power. Under this vision, thoroughly developed by Hans Morgenthau during the 20th century, the lust for power is a ‘constitutive element of all human associations, from the family through fraternal and professional associations and local political organizations to the state’ (Quoted in Drolet, 2010: 102). Based on that competition and mistrust inherent to humans, Mingst (2004: 191) notes, “realists are skeptical about international law, intergovernmental organizations, and nongovernmental organizations, though they do not completely discount their place.” Following this logic, she also asserts that “realists contend that compliance occurs not because the norms are good and just in themselves but because it is in the state’s self-interest to comply.” (Mingst, 2004: 191) So, while both liberals and realists recognize the value of living in an ordered world, the realist adherence to the rationale of international law is instrumental. In short, for Mingst, realists “acknowledge that international law creates some order, but stress that states comply only when it is in their self-interest; states prefer self-help.” (Mingst, 2004: 193).

egalitarian inasmuch as it confers on all humans the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; universalist, affirming the moral unity of the human species and according secondary importance to specific historical associations and cultural forms; and meliorist in its affirmation of the corrigibility and improvability of all social institutions and political arrangements.

So, despite finding some common ground between liberal and realist approaches to international law, we can conclude that the former are much more prone to developing and evolving international institutions than realists are. For realists, vital interests and power considerations are the final arbiter of state decisions, even when international legality is at stake.

It is our hope that this brief analysis of the key differences between the liberal and the realist approaches to international law, will allow the reader to grasp the philosophical reasoning behind the stance of key American political actors on issues regarding international politics.

If we really want to judge the U.S. perception and attitude towards international law and international institutions, the best thing we can do is to reflect upon the opinions and stances of key decision makers. According to Wade Mansell and Emily Haslam (2005: 459), John R. Bolton, a former U.S. Ambassador to the United Nations (2005-2006) is skeptical of the entire category of international law and argues that it cannot ever be accepted as superior to US domestic law.

To many Europeans, Wade Mansell and Emily Haslam (2005: 461) explain, American isolationism, especially the notion that a state can afford to remain outside of the international community and its rules, is unthinkable. For Mansell and Haslam, it is dangerous that for many Boltonian Americans, "international law must on occasions apply to every state but the U.S., which should, in the eyes of such Americans, be unconstrained."

Mansell and Haslam (2005: 463) express their main concern on what they deem as the current position of neo-conservatives in the United States: "If one state is in a position, or believes itself to be in a position to act unilaterally without fear of the consequences, the force of law seems to have disappeared."

Bolton, upon which Mansell and Haslam make their reflections, on the price of adhering to the globalists' agenda concludes:

The costs to the United States-- reduced constitutional autonomy, impaired popular sovereignty, reduction of our international power, and limitations on our domestic and foreign policy options and solutions-- are far too great, and the current understanding of these costs far too limited to be acceptable (Bolton, 2000: 221).

International law, as an attempt to produce global governance, is intolerable in Bolton's views because the concept itself attempts to constrain the United States (Mansell and Haslam, 2005: 464). Mansell and Haslam consider that Bolton fears that much of the action

of the globalists in human rights promotion is aimed directly at the USA, which targets 'American exceptionalism'. Even more, Mansell and Haslam think that Bolton's main concern is that the global governance agenda is aimed at directly or indirectly curbing the power of the US by transferring some U.S. sovereignty to worldwide institutions and norms.

Mansell and Haslam (2005: 467-469) see American exceptionalism as leading to two possible scenarios: 1) if the USA is above and beyond international law, the entire system falls and international law, failing to constrain the mightiest, similarly fails to constrain any state with the power to reject constraints with impunity in any particular case; or 2) international law retains its distinctive character for all states but the United States, and lesser states continue to be bound by *pacta sunt servanda*¹¹, and only the USA has impunity and immunity. They warn that the United States' assumption that it may continue to act contrary to standards accepted by international law by arguing its constitutional validation issues leaves open similar arguments to every pariah state in the world. Furthermore, they consider that the United States' claim that other states do not have similar democratic validation of international law is not necessarily true. As a proof, I need only to look at my country, Mexico.¹²

State Department legal adviser, Abraham Sofaer on the issue of the Court's jurisdiction claims that when the United States accepted World Court jurisdiction in the 1940s, most members of the United Nations "were aligned with the United States and shared its views regarding world order." But now "a great many of the countries cannot be counted on to share our view of the original constitutional conception of the UN Charter," and "this same majority often opposes the United States on important international questions." (Sofaer, 1985 quoted in Chomsky, 1998: 75) Sofaer continues by explaining that having drawn the conclusion from the unreliability of the world, we (the United States) must now "reserve to ourselves the power to determine whether the Court has jurisdiction over us in a particular

¹¹ *Pacta sunt servanda* refers to a basic principle of both civil and international law. It refers to contracts both public and private, stressing that contained clauses are law between the signing parties. It implies that parties act in good faith and that, in the case of international public law, the states (parties to the treaty) cannot invoke provisions of its domestic law as justification for a failure to perform.

¹² The Mexican Constitution, according to Article 76, obliges the Senate to decide on the approval of international treaties and diplomatic conventions signed by the executive branch. Since the transition to democracy, Mexico has a pluripartidist system, which complicates the reaching of a consensus among parties. Currently, there are seven political parties with at least one seat in the Senate. None of them holds an absolute majority in the Senate; therefore, all political forces and interests are obliged to negotiate. Frequently, as in the case of the United States, the Mexican Senate faces a legislative *impasse*.

case.” He goes further to explain that “The United States does not accept compulsory jurisdiction over any dispute involving matters essentially within the domestic jurisdiction of the United States, as determined by the United States.” (Sofaer, 1985 quoted in Chomsky, 1998: 75)

As Narottam Gaan notes, for neo-conservatives, when liberal multilateralism challenges U.S. supremacy, then the U.S. should abandon ideals and instead embark on an alternative path. Gaan (2006: 314) considers the U.S. withdrawal from the Kyoto Protocol as the best example of this.

Unfortunately, the Kyoto Protocol is not the sole individual case in which the United States defies the international normative order. Indeed, the whole concept of international law has been questioned in principle. As Jeffrey L. Roberg (2007: 183) states, the influential senator and chairman of the Senate Foreign Relations Committee (1995-2001), Jesse Helms, always stood against any treaty that refuses to grant the United States veto power or that holds the United States accountable to world justice.

There are several domains within international law in which the United States refuses to participate or acts arbitrarily. For example, Noam Chomsky notes, that the United States rejected the International Court of Justice (ICJ) when Nicaragua filed charges against Washington for supporting international terrorism, violation of treaties, and illegal economic warfare. Chomsky (1998: 73) mentions that when the court condemned the U.S. for the “unlawful use of force,” the Court was denounced in the United States “as a ‘hostile forum’ that had discredited itself by rendering a decision against the United States”.

Although, it is not my intention to undertake an exhaustive empirical study regarding the ratification/non-ratification of international instruments, I consider appropriate, to further illustrate my arguments, to draw a chart on the status of some representative international instruments. The idea is to compare the ratification status of some instruments in the case of arguably present or future powers (United States, China, Japan, Russia, France, United Kingdom, Germany, India, and Brazil). The reason to compare the ratification status of these countries regarding certain instruments, is to understand to what extent the realist argument that any great power or any potential hegemon would behave in the same way, that is with complete disregard for international law. The results will allow us to understand whether non-compliance is a structural consequence that applies to all great powers and/or

likely hegemons, or whether it is a decision made by individual countries regardless of the power.

| Ratification Status of International Instruments ¹³ | | | | | | | | | | |
|---|------------|------------|------------|------------|------------|----------------|------------|------------|--------|---|
| | U.S | China | Japan | Russia | France | United Kingdom | Germany | India | Brazil | Others (signed but not ratified) |
| Vienna Convention on the Representation of States in their relation with international organizations of a Universal Character | Not signed | Not signed | Not signed | X | Not signed | Not signed | Not signed | Not signed | | Brazil, Holy See, Nigeria, Peru, Turkey, Tanzania, Yemen |
| Vienna Convention on Consular Relations | X | X | X | X | X | X | X | X | X | Central African Republic, Congo Cote d'Ivoire, Israel |
| International Convention for the Protection of All Persons from Enforced Disappearance | Not signed | Not signed | X | Not signed | X | Not signed | X | | X | Several countries, among them India have signed but not ratified the Convention |
| WHO Framework Convention on Tobacco Control | | X | X | X | X | X | X | X | X | Argentina, Cuba, Czech Republic, El Salvador, |

¹³ These charts are of my own creation. I must note that all information was taken from the United Nations Treaty Collection. I must also note that the United Nations Treaty Collection consists of 29 chapters on the most diverse topics. I tried to integrate as many topics as possible so as to have a better representation of topics. When possible I tried to draw the examples from instruments that have taken place after the Cold War, so that the selection includes Cold War and post Cold War instruments.

| | | | | | | | | | | |
|--|--|---------------|---|--|---|---|---|---------------|---|--|
| | | | | | | | | | | Ethiopia, Haiti, Morocco Mozambique, Switzerland, USA |
| Rome Statute on the International Criminal Court | | Not signed | X | | X | X | X | Not signed | X | Several others among them Russia and USA |

Ratification Status of International Instruments

| | U.S | China | Japan | Russia | France | United Kingdom | Germany | India | Brazil | Others (signed but not ratified) |
|--|---------------|-------|-------|---------------|--------|-------------------|---------|-------|--------|--|
| International Convention for the Suppression of Acts of Nuclear Terrorism | | X | X | X | | X | X | X | X | Several others among them France and USA |
| International Tropical Timber Agreement | X | X | X | Not signed | X | X | X | X | | Belgium, Brazil, Central African Republic, Colombia, European Union, Hungary, Madagascar, Nigeria, Paraguay |
| United Nations Convention on the Law of the Sea | Not signed | X | X | X | X | X | X | X | X | Several among them Afghanistan, North Korea, Iran, Libya, Rwanda |

| | | | | | | | | | | |
|---|------------|------------|------------|------------|------------|---|---|------------|---|--|
| Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 | | X | X | X | X | X | X | X | X | Several among them Afghanistan, Libya, Iran, Iraq, USA |
| Protocol on the Privileges and Immunities of the International Seabed Authority | Not signed | Not signed | Not signed | Not signed | X | X | X | X | X | Several states have signed but not ratified |
| Vienna Convention on the Law of Treaties | | X | X | X | Not signed | X | X | Not signed | X | Several among them Afghanistan, Bolivia, Iran, Pakistan, USA |
| Comprehensive Nuclear-Test-Ban Treaty | | | X | X | X | X | X | Not signed | X | Several among them China, Egypt, Iran, Iraq, Israel, USA |
| Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction | Not signed | Not signed | X | Not signed | X | X | X | Not signed | X | Marshall Islands and Poland. |
| Kyoto Protocol to the United Nations Framework Convention on Climate Change | | X | X | X | X | X | X | X | X | USA |

| International Legal Instruments' Record¹⁴ | | | | | | | | | |
|---|-----|-------|-------|--------|--------|----------------|---------|-------|--------|
| | U.S | China | Japan | Russia | France | United Kingdom | Germany | India | Brazil |
| Number of ratified international instruments | 2 | 6 | 12 | 9 | 11 | 12 | 13 | 8 | 12 |
| Number of non-signed international instruments | 5 | 5 | 2 | 4 | 2 | 2 | 1 | 5 | 0 |
| Number of signed but not ratified international instruments | 7 | 1 | 0 | 1 | 1 | 0 | 0 | 1 | 2 |

It is clear that the United States has challenged a significant number of international treaties to an extent that it is safe to say that the United States is not comfortable with the notion itself of international law.

Roberg shows uneasiness about the United States' tactic of signing but not ratifying treaties. Roberg concludes that if we invoke Article 18 of the Vienna Convention on the Law of Treaties, a state that has signed a treaty should not take any action hindering its ability to fulfill its obligations under the terms of the treaty. As a result, he asserts that if the United States does not want to be a part of a given treaty it should make its intentions clear, so that it would no longer be legally obligated to it. The irony according to Roberg (2007: 182) is that the United States has signed, but not ratified, the Vienna Convention.

President George W. Bush took steps towards a more open defiance of international law. As a result of the Bush administration's insistence from its first months in power that it would not be constrained by international law and would not accept the legitimacy of international pacts, on May 6 2002, the U.S. withdrew from the Rome Statute, managing to achieve immunity from the jurisdiction of the ICC. Not only did the U.S. withdraw from the International Criminal Court, but then Bush demanded that states sign bilateral

¹⁴ Based on the instruments listed in the previous chart.

agreements making American citizens immune from prosecution. According to Mingst (2004: 190), the U.S. has objected the International Criminal Court, "believing that the United States has 'exceptional' international responsibilities as a hegemon that should make its military and leaders immune from the ICC's jurisdiction." For James Traub (2009: 78), this not only goes contrary to the notion of sovereignty eroding elsewhere, but is a sign of "sovereign absolutism hitched to superpower status". So for Traub this American manifestation of unlimited sovereignty paralleled a deep indifference toward the sovereignty of others.

Mansell and Haslam (2005: 481) see with great concern the current policy of the U.S. of questioning the whole international law regime. They believe that this decision will have substantial and profound effects on international relations and on the methods of diplomacy. For his part, Roberg (2007: 183) notes, "not joining [and even more with U.S. withdrawal] the ICC could affect its credibility in future efforts to promote human rights."

There are still other occasions in which the U.S. may not be violating an existing international legislation; rather, it establishes unilaterally pieces of jurisdiction that aim at imposing its foreign policy on others, as it is the case of the Helms-Burton Act, which "compels the United States to impose sanctions against foreign companies that do business in Cuba." (Chomsky, 1998: 72) Chomsky notes that in November, 1996, the United States, with the compliance of Israel and Uzbekistan voted against a General Assembly resolution, backed by the entire European Union, urging the U.S. to drop the embargo against Cuba. He also notes, that the Organizations of American States, of which the United States is a member, by then had already voted unanimously to reject the Helms-Burton Act. Also within the organizational structure of the American interstate system, the Inter-American Juridical Committee ruled unanimously in August, 1996, that the act violated international law.

Another opinion that must be taken seriously is that of Boutros Boutros Ghali, former UN secretary-general:

Multilateralism and unilateralism are just methods for the United States: They use them à la carte, as it suits them. The United Nations is just an instrument at the service of the American policy. They will use it when they need to, through a multilateral approach, and if they don't need it, they will act outside the framework of the United Nations. (Interviewed by De Chatel, 2003)

Archibugi, reflecting on cosmopolitan democracy, stresses a paradox:

For the first time in history, states with democratic regimes are concentrating an amount of economic, technological, military, ideological, and political resources sufficient to ensure control over the entire world. Despite this, military force once again rules international politics. Cosmopolitan democracy will be nothing more than a miserable consolation if it proves incapable of restraining the consolidation of this increasingly hegemonic power. (Archibugi, 2004: 466)

The idea as Archibugi (2004: 453) notes is that a cosmopolitan democracy may have a valid ambition, “that of turning international politics from the realm of antagonism into the realm of agonism.” He sees this as a possibility provided that this process has gradually affirmed itself within democratic states, allowing it to be a common practice for different institutions (or interest groups) to engage in disputes over their competencies. Therefore, he considers that this could be possible on a global level. Archibugi is also alarmed by the scarcity of U.S. authors who talk about cosmopolitan democracy in contrast to the abundance of Nordic, Canadian, and Australian authors who reflect on the topic.

Once we have explored the contesting understandings of different schools of thought regarding International Law, we should contrast the decision maker’s positions, statements, and most of all, actions with the prevailing public opinion in the United States regarding U.S. foreign policy and International Law. Of course, it is possible to argue that U.S. leaders may hold a different understanding of what democracy means at a domestic level and what democracy’s meaning is in world affairs. Even under this extreme and possible (if not plausible) stance, through which one may argue that U.S. leaders are to be held accountable to its citizens and not to the world opinion and/or any international institution, if democratic values are to be upheld to minimum domestic standards, we may infer that U.S. foreign policy, including its position on International Law issues, must be consistent and reflect the beliefs of the majority of its population. It is then necessary to show the readers what surveys and polls have to say regarding U.S. participation and attitudes in International Law miscellaneous issues:

- 69% of Americans support an international order based on International Law.¹⁵

¹⁵ Council on Foreign Relations, *Public Opinion on Global Issues*, Chapter 9, “U.S. Opinion on General Principles of World Order”, November, 2009, p. 1. According to the report, a majority of Americans rejects the view that nations should not feel obliged to abide by international law when doing so is at odds with their national interest. The 69% corresponds to the following statement: “Our nation should consistently follow international laws, It is wrong to violate international laws, just as it is wrong to violate laws within a country.” Only 29% chose the following option: “If our government think it is not in our nation’s interest, it should not feel obliged to abide by international laws.”

- Americans show strong support (85%) for U.S. participation in a variety of international treaties.¹⁶
- 78% of Americans concurred that it is “better for the United States to resolve its disputes with other countries than to allow some disputes to escalate to destructive levels.”¹⁷
- Though not as strong as with the previous situations, a slight majority of Americans (51%) do not think it is correct to ignore the jurisdiction of international courts.¹⁸
- Large majorities of Americans reject a hegemonic role for the United States.¹⁹
- A majority of Americans (63%) reject unilateral behaviour.²⁰
- Only Chinese (74%) and German (70%) respondents show a larger percentage than Americans (69%) who would like their countries to adhere to international law.²¹

U.S. refusal to ratify UNCLOS

Having reflected on the failed expectations of democratic peace, the doubtful prospect of implementing the rule of law at the international level, the negative implications of the deeply embedded ‘exceptional’ mentality among Americans, we note that the possibility of creating and implementing international law and strengthening international institutions is dashed at best.

¹⁶ Council on Foreign Relations, *Public Opinion on Global Issues*, Chapter 9, “U.S. Opinion on General Principles of World Order”, November, 2009, pp. 2-3. 85% of Americans found the following argument convincing (41% found it very convincing): “It is much easier for the United States to pursue its interests if the world is a place where countries are resolving disputes peacefully in accordance with international law.”

¹⁷ Council on Foreign Relations, *Public Opinion on Global Issues*, Chapter 9, “U.S. Opinion on General Principles of World Order”, November, 2009, p. 3. This was the response to the following statement: “Even when presented with the fact that the United States may “lose a case from time to time”, it is “better for the United States to resolve its disputes with other countries than to allow some disputes to escalate to destructive levels.”¹⁷

¹⁸ World Public Opinion.org, April 2006. This is the result of the following statement: “Because the United States is the most powerful country in the world, it has the means to get its way in international disputes” and therefore, “it has nothing to gain from submitting to the jurisdiction of international courts.” 48% of Americans found this statement convincing.

¹⁹ World Public Opinion.org/Chicago Council on Global Affairs, April 2006-2007. Only 10% of Americans chose the option “As the sole remaining superpower, the United States should continue to be the preeminent world leader in solving international problems.”

²⁰ Pew News Interest Index Poll, October 2005. The response corresponds to the position that “The United States is the most powerful nation in the world, we should go our own way in international matters, not worrying too much about whether other countries agree with us or not.” Only 32% endorsed this position.

²¹ Council on Foreign Relations, *Public Opinion on Global Issues*, Chapter 1, “World Opinion on General Principles of World Order”, December 16, 2011. 86% of Americans support the Comprehensive Test Ban Treaty; 89% support the Biological Weapons Convention; 71% favor the U.S. becoming party to the International Criminal Court; finally, 70% of Americans would like their country to join the Kyoto Protocol.

The present international situation, along with the U.S. political class stance regarding the United Nations Convention in the Law of the Sea (UNCLOS) is a perfect way to exemplify what he have discussed throughout the present paper.

We have chosen UNCLOS as the case study as a result of the crucial role that the sea plays in the current international order.²² A number of relevant issues converge at the sea, therefore, making its regulation a key component of a safe and peaceful world. The following facts illustrate its importance:

- * Some 90% of the world trade is transported by sea (UNCTAD, 2011: 40).²³
- * A world fleet of 50,054 ships generate an estimated annual income of about 630 billion dollars in freight rates.²⁴
- * 45% of crude oil production was loaded on tankers and carried through fixed maritime routes (UNCTAD, 2011: 13).
- * In 2010, world LNG, an alternative to piped natural gas, increased by over 16% (UNCTAD, 2011: 16).
- * The area north of the Arctic Circle has an estimated 90 billion barrels of undiscovered, technically recoverable oil, 1,670 trillion cubic feet of technically recoverable natural gas, and 44 billion barrels of technically recoverable natural gas liquids in 25 geologically defined areas thought to have potential for petroleum. These resources account for about 22 percent of the undiscovered, technically recoverable resources in the world. The Arctic accounts for about 13 percent of the undiscovered oil, 30 percent of the undiscovered natural gas, and 20 percent of the undiscovered natural gas liquids in the world. About 84 percent of the estimated resources are expected to occur offshore (USGS, 2008).
- * The low cost of transporting goods by sea allow for the economic viability of commodities and consumer products. Today's levels of consumption, and though, of economic activity would be impossible without seaborne trade.²⁵

²² Indeed, Woodrow Wilson's famous fourteen points of 1918 included two specific points dealing with the sea. Specifically, points 2 and 13 made explicit references to it. The second point called for free navigation of all seas; meanwhile, the thirteenth point demanded an independent Poland with access to the sea.

²³ The world container fleet, measured in thousands of TEU (twenty-foot equivalent unit) has increased from 8560 in 2001 to 16412 in 2010. Another figure that illustrates the relevance of seaborne trade is its 49% increase from 1996 to 2006.

²⁴ International Shipping Federation, "Shipping and world trade", <http://www.marisec.org/shippingfacts/worldtrade/number-of-ships.php> [November 24, 2011].

²⁵ As reported by the International Shipping Federation, freight costs for consumer goods have historically represented only a small fraction of the shelf price. Some examples provided include the following: a) the cost of transported gasoline at the pump is half a cent per liter; b) the typical cost of transporting a 20 feet container from Asia to Europe, carrying over 20 tons of cargo is about the same as the economy airfare for a single passenger on the same journey; c) the shipping

The Reagan administration, although having found most of the provisions under UNCLOS acceptable and consistent with U.S. interests, questioned major sections of the deep-seabed mining provisions (Leitner, 1998). Later, the Clinton administration participated in the deep-seabed portions of the convention. That time, on July, 1994, Part XI of UNCLOS amended various seabed-related parts of the convention. On November 16, 1994, UNCLOS became policy but without accession by the United States, despite the fact that months earlier the U.S. voted in favor after many U.S proposed amendments had been added to the proposal (Leitner, 1998: 135). With the latest ratification, those of Malawi on September 28, 2010, 161 States have ratified UNCLOS. The U.S. appears side to side with so called 'rogue States' such as Iran, Afghanistan, Libya, and North Korea as States that have not ratified UNCLOS.

As a democratic country, there is an open, heated debate in the U.S. on whether it is convenient to ratify UNCLOS, signalling with this action its willingness to play the multilateral-legitimizing card or holding to its 16 year, unilateral stance, of not ratifying the treaty. On the conservative side, Baker Spring, a research fellow at the Heritage Foundation, considers that all conservatives "...should be absolutely unified in the general conclusion that this particular Convention (UNCLOS) does not serve United States' interests." (Spring, 2008: 453) He judges that UNCLOS works against the sacred principle of sovereignty by favoring instead a system of international compulsory order, something that he fears may compromise the behavior of sovereign states. Spring (2008: 457) wraps up his "arguments" by observing that the United States should limit UNCLOS to those things that he considers to be "truly important" to the United States. He reduces these important issues to security interests, explicitly "...making sure that the Navy can project power across the globe." So, the idea for Spring is that the U.S. should have a selective approach to UNCLOS, discarding any provision that is not favorable to the U.S.

Frank J. Gaffney Jr., founder and president of the Center for Security Policy, also anticipates several constraints if UNCLOS is ratified. He argues that Article 88 obligates

cost of a TV set with a shelf price of 700 dollars represents only 10 dollars; d) the shipping cost of a DVD/CD player with a shelf price of 200 dollars represents only 1.5 dollars; e) the shipping cost of a bottle of scotch whisky with a shelf price of 50 dollars represents only 15 cents; and, f) the shipping cost of a can of beer with a shelf price of 1 dollar represents only 1 cent. See, International Shipping Federation, "Shipping and world trade", <http://www.marisec.org/shippingfacts/worldtrade/the-low-cost-of-transporting-goods-by-sea.php> [November 24, 2011].

the parties of the treaty to exercise the peaceful uses of the seas. He also refers to articles 19 and 20 which touch on certain practices like intelligence collection and operations undersea that are restricted in territorial waters. Later, he makes reference to Article 144 which talks about the transfer of strategically sensitive technology. He shows increasing concern regarding Article 110 which he 'thinks' will complicate the Proliferation Security Initiative, since it prohibits the boarding and searching of ships except where the ship is suspected to be engaged in piracy, the slave trade, or unauthorized broadcasting, the ship is without nationality, or the ship is of the same nationality as the boarding warship. Finally, he is concerned about Article 301 which prohibits the threat of the use of force against territorial integrity or the political independence of any state (Gaffney Jr., 2008: 470).

On a more 'muscle-display' position we have Captain Raul Pedrozo, who argues that the United States, based on customary international law²⁶ can, and indeed has exercised and enjoyed the rights that guarantee its navigational freedom worldwide without the necessity to become a party of UNCLOS. Pedrozo argues that more than membership in another treaty what the U.S. needs is a coherent policy that supports freedom of navigation and a strong Navy that can challenge excessive coastal claims that curtail U.S. freedom of movement and access in world oceans (Pedrozo, 2010: 156). Pedrozo asserts that the Exclusive Economic Zone claimed by the United States in 1983 is the largest in the world and that whether the United States is a party to UNCLOS or not, the United States will continue to exercise exclusive resource rights in the U.S. Exclusive Economic Zone. He further claims that "No nation is going to contest those rights". (Pedrozo, 2010: 161) Finally, Pedrozo thinks that if the United States has lived outside UNCLOS for the past 30 years without any serious repercussions it may well live without it for another 30 years. As we can see, Pedrozo's stance ignores and does not contemplate the chances of making international laws work better; rather he favors a commitment to an ever-increasing reliance on force and naval strength. Time after time, U.S. conservatives repeat the idea that as long as freedom of navigation and freedom to access natural resources are guaranteed, everything else does not really matter.

²⁶ The following is a useful definition of customary international law: "It consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way." (Shabtai, 1984: 55) The elements of customary international law include: 1. widespread repetition by States of similar international acts over time (State practice); 2. Acts must occur out of sense of obligation (*opinio juris*); and, 3. Acts must be taken by a significant number of States and not be rejected by a significant number of States. See, Law Library of the University of California-Berkeley (online), <http://www.law.berkeley.edu/library/classes/iflr/customary.html#customary> [November 24, 2011].

“No one sings odes to liberty as the final end of life with greater fervor than Americans”, Reinhold Niebuhr observed according to Andrew Bacevich. At the same time, Bacevich (2008: 36) considers that “no one shows less interest in discerning the true meaning of liberty than do Americans.” To me, the idea that the capacity of the United States’ navy to project power around the globe and the obsession with the freedom of navigation and the unrestricted access to resources, which translate into the freedom for the deployment of power, represent the erroneous conception of liberty that Niebuhr and Bacevich talk about.

Another characteristic of UNCLOS, generally invoked by conservatives, is that it is often portrayed as promoting practices contrary to American values. For example, Baker Spring considers UNCLOS as an anti-free market institution, one that fosters distribution policies. He is joined by Doug Bandow of the Cato Institute who considers that UNCLOS “embodies the most odious features of centralized planning” and that UNCLOS “remains captive to its collectivist and redistributionist origins” (Bandow, 1994 quoted in Spring, 2008: 455).

It is clear to me that in the United States, just as in any other country, there are some scarecrow words. In this case, just the mentioning of centralized planning and redistribution are enough to evoke images of communism among the American public. The reality is that neither the United States nor UNCLOS are communist-oriented institutions or regimes. What should preoccupy the American reader is the lack of a coherent discourse or evidence behind the rhetoric of these conservative forces. Peter Leitner explains in detail the key objections that lead to the rejection of the treaty by the United States. In my opinion, the most prominent scarecrows that lack empirical evidence can be summarized the following way:

- 1) The acceptance without definition of the principle that the mineral resources of the seabed, in areas beyond national jurisdiction are “the common heritage of mankind.” For Leitner (1998: 137), it is troublesome that it calls for the creation of a supernational regulatory agency that will control most activities occurring within the deep seabed.

2) According to Leitner (1998: 137) UNCLOS is fundamentally “an illegitimate anti-free enterprise text”.

3) UNCLOS, in the opinion of Leitner (1998: 137), provides “ammunition” to third world countries to use against U.S. free market proposals. Leitner considers that developing nations lean toward a more collectivist interpretation of the term “common heritage of mankind” to mean that individual states are barred from exploiting the seabed unless it is conducted under the auspices of an accepted international regime. Leitner (1998: 139) does not hesitate to consider this approach as “redistributive demands of the Group of 77”.

Leitner also shows concern that UNCLOS may establish a far-reaching precedent regarding control over traditionally “nonterritorial areas” that may dictate future oceanic and outer space arrangements. He is also puzzled by the possibility that UNCLOS gives developing countries effective control over corporate activities beyond their national borders, allowing them later to place stricter international controls over the activities of multinational corporations in general. Furthermore, Leitner (1998: 146) finds unacceptable that voting arrangements carry the potential for an “aggressive enforcement capability developing within UNCLOS.” Additionally, he shows great fear that the “United States may find itself facing an unanticipated set of future international political and financial obligations as a result.” Finally, there is a huge concern about the “compulsory dispute settlement features of the treaty”. As we can see, most of these objections denote a great fear of the rule of law and demand unrestricted unilateral *laissez-faire, laissez-passer* for the United States.

UNCLOS is not only suspicious of promoting international practices contrary to American values but also is seen as giving too much heed to the United Nations. As a citizen of a highly globalized and interdependent world, I see no reason why we should fear the United Nations, the most trustworthy international organization that humanity has created.

It is intriguing the amount of hatred that the conservatives show towards the United Nations. For example, Baker Spring (2008: 454) tries to disqualify UNCLOS by labelling it “...a part of the broader United Nations system.” He goes further, with no evidence to consider it part of an anti-American agenda: “I have no doubts that the U.N.’s systematic anti-Americanism will be pursued in the Law of the Sea institutions.” (Spring, 2008: 455)

Overall, Leitner (1998: 148) considers that “if there is one overarching characterization that can describe U.S. participation in UNCLOS, it is taking a giant step forward in the continuing delegation of U.S. foreign policy to the United Nations”. This type of accusation once again denotes an alarming, senseless and evidence-less rhetoric.

Gaffney Jr. (2008: 474-474), for his part does not seem comfortable with the U.N. managing “international commons”. It must be noted, however that although the whole idea of ‘commons’ is quite normal in most societies, it has always seemed suspicious in the United States. What others consider as commons typically is perceived in the U.S. as impinging upon U.S. interests. Gaffney Jr. admits that his reasoning may sound conspiratorial:

I think if you are a conservative, the old adage ‘just because you’re paranoid doesn’t mean they’re not out to get you’ applies. We need to be suspicious, especially when dealing with the U.N. or agencies like the U.N., to say nothing of an organization that was crafted by a majority that was determined to create supranational organizations to run two-thirds of the world; that is to say, the two-thirds of the planet that is covered by international waters. (Gaffney Jr., 2008: 471)

Leitner when reflecting on UNCLOS ends up wondering about something totally out of topic. He wonders if the United States will “eventually find itself in the position of “world policeman”, being assigned roles and missions dictated by others”

As for me, I would like to say, that one core principle of democracy, whether at the domestic or international level is accountability. Let’s suppose that the United States was given the role of world policeman. Even in that case, there is nothing wrong with holding the world policeman accountable.

To be fair with one of the undisputable U.S. virtues--diversity and ever contesting views and positions--the best way to end up the present section is with a more positive and promising tone. After all, in my opinion the main political virtue, and perhaps the one that has allowed the United States to prosper for over two centuries, is its ‘exceptional’ and plausible ability to engage in self-criticism, to allow contesting (domestic) views to rival the establishment, and the freedom of speech and thought that ultimately has always allowed the country to overcome any difficulty.

Just as there are many detractors of UNCLOS, there are some key decision makers that support the U.S. ratification of it. Among them, we have John Norton Moore²⁷ who assures:

The United States prevailed on all of the security provisions of the Convention--security provisions which were very much at stake in the negotiations. We fully preserved navigational freedom, including transit passage through, over, and under international straits. We extended the United States' resource jurisdiction into the oceans in an area larger than the entire land mass of the United States, and we insisted on assured access to seabed minerals for United States' firms. (Moore, 2008: 460)

Moore considers the treaty works to be "the greatest expansion of resource jurisdiction in United States' history." Lawrence S. Eagleburger and John N. Moore (2007: A15) consider that the treaty gives the United States "far greater jurisdiction than we got in the Louisiana purchase and the acquisition of Alaska combined".

Moore (2008: 461) highlights the fears of American oil companies when he writes that they are reluctant to develop beyond the 200-mile economic zone without going forward under the treaty. The reality according to Maywa Montenegro (2007 quoted in Moore, 2008: 461-462) is that there may be "...a potential 600-mile area off Alaska and the Continental Shelf for oil and gas, and there may be billions of dollars in access that will not be developed if we do not go forward." Moore (2008: 463) considers that nonadherence only reduces the voice of the United States, which means risking, if combining the value of the minerals in the mine sites, about one trillion dollars.

Moore (2008: 465) claims that the treaty will enhance American sovereignty. He insists that the reality is that by ratifying the treaty, the United States would succeed in the "...the greatest expansion of national resource jurisdiction in the history of the world." Moore warns us of the impossibility of resolving disputes with NATO and non-NATO partners by simply shooting at them in the oceans.

Towards the last semester of 2011, Colonel Reginald R. Smith, professor of national security affairs at the Naval War College wrote an interesting paper, contrasting opposing and supportive arguments for ratifying UNCLOS. He mentions the supporting domestic forces behind UNCLOS:

The National Security Presidential Directive (NSPD) 66, "Arctic Region Policy," released in 2009; the Department of Defense, as articulated in its 2010 Quadrennial Defense Review, strongly advocates accession to UNCLOS in order "to support cooperative engagement."; the U.S. Navy, whose leadership stresses that UNCLOS *will protect* patrol rights in the

²⁷ He is an authority on the law of the sea, and ambassador and deputy special representative of the president to the law of the sea conference. He later served as the head of the negotiations at the Seabed's Committee. Moore considers that the United States was overwhelmingly the leader in the negotiation of UNCLOS.

Arctic; a number of environmental groups who want to advocate on behalf of Arctic fauna and flora; and, the oil industry lobby representing Chevron, ExxonMobil, and ConocoPhillips asserts that oil and gas exploration cannot reasonably occur without the legal stability afforded in UNCLOS. (Smith, 2011: 118-119)

Also, favoring the relevance and necessity of counting on solid international instruments we have Eva Ingenfeld (2010: 257) who notes that, unlike the Antarctic, the Arctic is not protected by a contract, and, therefore, territorial claims are not illegal. This lack of legislation, or better said, the lack of consensus regarding the existing treaties and institutions obviously is a propitious scenario for chaos and escalating conflicts. As Ingenfeld (2010: 257) notes in the case of a hotly-dispute arena, i.e. the Arctic: “The future of the Arctic depends on the ability of all stakeholders to use the Arctic sustainably and to create governance structures that will protect the environment and the populations living there.”

As we can see, no international treaty, instrument, or institution is perfect. However, to be able to reach an enduring global consensus is not only the best, but I will argue, the only feasible way to promote global democratic institutions and ultimately, the global governance that an interdependent world urgently needs. If we add to the normative considerations, which by themselves possess some intrinsic normative and political value, the arguments by experts such as Colonel Smith, we have that the benefits of ratifying UNCLOS appear to outweigh the costs for the United States.

So far, the rhetoric has outgained the practice. During his final days in office, George W. Bush urged Congress to ratify UNCLOS. Meanwhile, Obama during the first year in office, according to Stewart Patrick, the director of the International Institutions and Global Governance Program at the Council on Foreign Relations signaled his intent to seek ratification of long-languishing treaties including the Comprehensive Test Ban Treaty (CTBT) and UNCLOS. These shifts, he noted in 2009 “have energized those who hope Obama will spearhead fundamental global institutional reform.” (Patrick, 2009: 78) Today, exactly three years after Obama swore as the President of the United States, the prospect of ratification seems very distant.

Conclusions

The present paper has concatenated an analysis of the democratic peace assumptions with U.S. exceptionalism to try to understand the contradictions between U.S. mission to spread democracy across the globe and its widespread disregard for international law.

It is evident that exceptionalism has a double meaning that complicates even more U.S. adherence to cosmopolitan democracy: on the one hand, exceptionalism based on undeniable historical, political, cultural, and geographic conditions has turned the U.S. into a truly unique country. This unique character is deeply embedded among its population. As a result of its exceptional development, Americans, at all levels feel the obligation of acting in a quasi-messianic way. On the other hand, exceptionalism seems to have a second meaning—a notion that due to its mission as the bearer of democracy and progress, the U.S. is entitled to a sort of ‘immunity’ from the rules and expectations that other ‘ordinary’ countries must comply with. This dual, but complementary understanding of exceptionalism, has ironically turned the U.S. into an enforcer of its democratic mission as well as a disobedient state when it comes to international legal instruments.

Taking under consideration our analysis of the ratification status of international instruments the democratic peace theory’s assumptions on the behaviour of democratic and authoritarian regimes no longer seems that convincing. Whereas Germany and France show a greater commitment to adhere to international consensus, by ratifying a good deal of international instruments, another stable democracy-- India’s—record is not as good as that of Japan. If we take for granted that democratic peace theory’s assumptions are correct, it is hard to explain then why powerful authoritarian states such as China and Russia hold a better ratification record than the U.S.

Even if we admit that the U.S. is not obliged to live adhering to international consensus, as the primary responsibility of the state is with its citizens, if we recognize that any democracy must represent its people’s ‘voice’, U.S. foreign policy is clearly not representing the country’s public opinion. The polls and surveys contained in this paper show a strong desire of the U.S. population to respect and adhere to international law.

Whether we take surveys and polls or the ratification record as assessments of the liberal understanding of international law, it is clear that U.S. approach to international law is far from meeting the expectations of the liberal approach. Therefore, we are forced to consider that the realist approach is the steering wheel driving U.S. approach to international law.

If this is the case, as it seems to be, then the U.S. could avoid adhering to international consensus as long as it remains the lone superpower. However, under the present scenario, one of a rising China, a strengthened Russia, a modernizing Brazil, a stronger India, and an economic behemoth—the European Union—one may only wonder if establishing the precedent that international law is irrelevant and that great powers may not follow suit after all regarding international law, is the best decision in the long run.

UNCLOS represents one of those ‘special’ international legal instruments that may create conflict-prone scenarios. The stakes at the seas, the vast mineral and energetic resources, the huge food potential it contains, the water ways, and the sea as an important military theatre are all factors of great relevance for the peace perspectives of the world.

As I have noted in other paper, while the U.S. is the only hegemon at the time of writing, there are certain areas, for example, the Arctic, in which the U.S. does not show a superiority *vis-à-vis* other regional powers. Therefore, accomodating thru a strategic adherence to international instruments, in this case to UNCLOS, seems a prudent behaviour rather than confrontation. If the U.S. does not show its willingness to lead the world as an example of how democratic nations can and should behave, other powers will have a free check when deciding to ignore international law, dooming any possibility of consolidating a cosmopolitan democracy.

It has been my intention to provide the reader with a critical and balanced view of U.S. approach to international law. I am also inviting readers to stop advocating Manichaeism, a simplistic world vision where issues are often reduced to the dicotomy of good or evil, i.e. either you are with us or you are against us. The whole idea that appeared during Bush’s campaign and then after September 11, “They hate us because we elect our leaders” does not seem to give a very good rationale of international conflicts. Ending the Bush mindset would create a less conspiratorial philosophy, and indeed portrays a more balanced and less persecutory vision of the world. The world does not hate America, neither does the world wish it ill. It suffices to understand that due to historical arrogance, derived from the ‘messianic mission’, discussed at length in this paper, the world mistrusts the U.S. as much as the U.S. suspects individual countries, multilateral norms and organizations, and international treaties.

The U.S. must understand that it will never obtain genuine good will outside its borders unless it decides to stop having double standards for democratic practices--those at home and those abroad. The moment that the U.S accepts that just as it is a role model for solving domestic conflicts and interests, the same must be the model for the survival of an international democratic governance.

Finally, we must note that despite the fact that democracy is a contested concept, with historical and geographic variations, there are certain core values and principles that must prevail, regardless of what type of democracy we are talking about: 1) accountability, and 2) negotiation. The bottom line is that democracy necessitates giving up some points and, in turn, obtaining concessions. After all, it is contrary to democracy to pretend that every situation is a must win for the same actor.

Ratifying UNCLOS, without the expectation that every single piece of this treaty must conform to American interests is a good way to start practicing international democracy. However, if on judgment day, the neo-conservatives insist on not giving up a single inch, based on the conviction that the U.S. Navy is powerful enough, and that no nation will defy it, then it is very unlikely that the world will be legally, morally, or politically obliged to recognize U.S. demands, speeches, or claims in other issues that are crucial to U.S. interest.

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