Introduction: beyond the myth of the golden age

Whether it be the brazen invasion of Iraq without explicit and indubitable UN Security Council authorization or something less dramatic such as a US team turning up for the first time at the 2009 review conference for the Ottawa Landmines Convention, the actions of the United States in relation to international law rarely go unnoticed. Opinions as to the significance of particular actions generally diverge. Did the fact that the United States sent observers to the review conference of the Ottawa Convention represent a softening of its opposition as a first step towards the United States becoming an enthusiastic supporter of the convention, for example, or was the United States merely ensuring that it keep up to date with regime developments, or did the appearance represent a symbolic move towards engagement, yet one unsupported by any fundamental shift in policy?

US behaviour in relation to the International Criminal Court (ICC) offers perhaps the classic example of an interpretive challenge to observers of international law. There have been so many twists and turns along the path. The United States supported the initial idea, it participated in the treaty negotiations, signed the resultant Rome Statute, 'unsigned' the Statute, negotiated bilateral treaties apparently intended to undermine the effective functioning of the Court, abstained but did not veto the 2005 vote in the Security Council on referring the situation in Sudan to the Court, turned up at the 2010 review conference considering the definition of the crime of aggression, and in 2011 voted for Security Council referral of the situation in Libya to the Court. The significance of each of these steps has been the subject of speculation, the underlying question always being that as to whether there has been a fundamental alteration in the US attitude, or something far less definitive.

This raises the question as to the most appropriate criterion against which to assess the nature of US engagement with international law. Is compliance the key, or perhaps supporting the negotiation of new multilateral treaties, ratifying treaties, enforcing international law, or

something more elusive? If it is performance against expectations, then just what is it that we can reasonably expect of the United States? Should it be judged by the same standards as any other state, or does its pre-eminent power impose additional obligations?

Perceived dualisms in the nature of US engagement with international law

Discussion of US engagement with international law is replete with apparent contradictions: between stated intentions and real-world outcomes, between what the United States says about an international rule of law and what it does in specific scenarios; between what the United States seems to think others should do and what it does itself; between US acceptance of international economic law as compared with its seemingly lower regard for certain other fields; between its promotion of the principle of sovereign equality and US exceptionalism; and between US engagement at different points in time. Common has been to point to US support for international law and institutions in the immediate post-Second World War years and to contrast that with the more recent seeming reluctance to support the ongoing development of the international legal system. The pervasive theme of discontinuities or disjunctures begs the question of how best we can make sense of the nature of US engagement with international law. Is it possible to discern elements of continuity, or can US actions be understood only in terms of ongoing dichotomies?

The administration of George W. Bush (2001–9) met with particular criticism for its attitude to international law. US actions for which it was widely rebuked include its 2002 withdrawal from the 1972 Anti-Ballistic Missile (ABM) Treaty and its treatment of prisoners captured during the 'war on terror'; its lack of compliance with the Vienna Convention on Consular Relations in respect of prisoners on death row not receiving the consular assistance to which they were entitled and its apparent disregard for the International Court of Justice when it addressed the subject. The 2003 invasion of Iraq was the single most dramatic instance of US disrespect for the laws it had helped establish, but the issue was much broader than that of whether the United States had or had not in specific situations complied with international law; it concerned US support for the ongoing development of the system of international law, and included 'non-actions' such as its failure to ratify the 1997 Landmines Convention or the Kyoto Protocol of the same year.

Rather ironically, perhaps, the degree of criticism levelled at the administration of George W. Bush when on occasion it chose to address contemporary issues through non-law or non-treaty approaches threw into stark relief the extent to which the United States had hitherto generally supported the legalization of world politics. The Proliferation Security Initiative and the Security Council resolutions regarding terrorist financing and access to weapons of mass destruction were examples of non-treaty approaches to international co-operation on issues of global security. Military action undertaken during the 'war on terror' was co-ordinated among 'coalitions of the willing' rather than through treaty-based groupings of states.

It was thus the perceived change in the nature of the overall US attitude towards international law that was under attack during the administration of George W. Bush. Philippe Sands described the Bush administration as being 'outspoken in its determination to challenge global rules', referring to a 'full-scale assault, a war on law'.[1] Much writing on the United States and international law at that time had a definite tone of disillusionment because of the fact that the United States referred often to the importance of the rule of law and yet no longer seemed to want its own actions to be in any way constrained by that law.

The myth of the golden age

One favoured rhetorical device by which to critique contemporary US actions in relation to international law has been to express shock at an alleged shift in the nature of US engagement and contrast the present with a supposed previous golden age in which the United States promoted the continued development of international law and institutions and complied with its obligations under international law. Common has been to lament that '[i]t has not always been this way'.[2] The issue with the Bush Doctrine, as brought to fruition with the illegal war against Iraq, was said to be not just that it was an example of lawlessness, or an evasion of legality, or even just another intervention. Rather, it 'represent[ed] a fundamental departure from, and a series of attempts

[1] Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (Camberwell, Vic.: Penguin, 2005), p. xii.

[2] Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Waltham: Brandeis University Press, 2007) , p. 165.

to reconstitute, the norms that were accepted, at least formally, during the reign of law's empire'.[3]

The golden age is often assumed to have been the immediate post-Second World War years, when the United States led the rapid expansion of international law and institutions.[4] President Barack Obama harked back to the 'golden age' of the early post-Second World War years in his speech accepting the Nobel Peace Prize, referring to a time when 'America led the world in constructing an architecture to keep the peace . . . We are the heirs of the fortitude and foresight of generations past, and it is a legacy for [*sic*] which my own country is rightfully proud.'[5] US behaviour towards the ICC is contrasted with its role in establishing the Nuremberg and Tokyo tribunals.[6] And in respect of human rights Kenneth Roth commented, 'Fifty years ago the United States took the lead in building modern international human rights law. But lately, Washington has been in the public eye for the obstacles it has raised to its further development.'[7]

Before Bush, discussion of undesirable US behaviour was usually couched in terms of its being a phenomenon of the post-Cold War years, during which a tendency of the United States towards unilateralism had been exacerbated by the 'unipolar moment'.[8] But rhetorical references to a previous golden age have a longer tradition. The Reagan years were ones of particular concern at what was widely perceived to be 'a pattern of unprecedented lawlessness and unilateralism in the conduct of American foreign policy', which was sometimes attributed to a Republican dismissal of international law.[9] Highet wrote of a 'radical and dangerous re-ordering of the attitude of the United States

[3] Amy Bartholomew, 'Introduction', in Amy Bartholomew (ed.), *Empire's Law: The American Imperial Project and the 'War to Remake the World'* (London: Pluto, 2006), pp. 1–17 at p. 6.

[4] See remarks by Michael Byers on 'The Single Superpower and the Future of International Law', (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 64–5.

[5] 'Obama's Nobel Remarks', transcript of President Obama's speech at the Nobel Peace Prize ceremony Oslo, *New York Times*, 10 December 2009, www.nytimes.com/2009/12/11/world/europe/11prexy.text.html (accessed 16 July 2011).

[6] Terris, Romano, and Swigart, *International Judge*, p. 165.

[7] Kenneth Roth, 'Sidelined on Human Rights: America Bows Out', (March/April 1998) *Foreign Affairs* 2–6 at 2.

[8] For discussion of US unilateralism in relation to international law, see (2000) 11:1 and 2 *European Journal of International Law* (special issues).

[9] Burns H. Weston, 'The Reagan Administration versus International Law', (1987) 19 *Case Western Reserve Journal of International Law* 295–302 at 295.

toward the [World] Court specifically and international law in general'.[10] Arthur Schlesinger commented in 1986 that American commitment to a world of law had in recent years 'been in decline'.[11] Writing with reference to the Reagan administration's repudiation of the 1982 UN Convention on the Law of the Sea and its 'steady attack on international institutions', Richard Falk claimed that the US government had altered 'by 180 degrees its attitude toward the relevance of international law to foreign policy'.[12]

Burns Weston pointed out in 1987, however, that US foreign policy had been 'disrespectful' of international law and co-operation at other periods and 'irrespective of party politics', as exemplified by the 1961 Bay of Pigs invasion, the Dominican Republic intervention of 1965, and, of course, Vietnam.[13] Moynihan commented in 1984 that he did not believe that either the Carter or the Reagan administration had displayed a 'sense of the past American commitment to the role, if not the *rule* – of law in world affairs'.[14] Roger Fisher, writing during the Carter administration, usually regarded as having been quite favourably disposed towards international law, lamented what he perceived to be a decline in the attention paid to international law by all countries, including the United States.

> Right after World War II and the founding of the United Nations, we talked about having a world under international law and about achieving peace through law. Fewer and fewer statesmen talk like that today. The states and statesmen appear to ignore international law. The United States responds to a Mayaguez incident without even mentioning its United Nations obligation to exhaust peaceful approaches before resorting to force.[15]

Mary-Ellen O'Connell has expressed the view that the change in the attitude of the United States towards international law came in the 1960s. According to O'Connell, until that decade US leaders had been 'well

[10] Keith Highet, '"You Can Run but You Can't Hide" – Reflections on the US Position in the *Nicaragua* Case', (1986–7) 27 *Virginia Journal of International Law* 551–72 at 554.
[11] Arthur M. Schlesinger Jr, *The Cycles of American History* (Boston, MA: Houghton Mifflin, 1986), p. 83.
[12] Richard Falk, 'The Decline of Normative Restraint in International Relations' (1984–1985) 10 *Yale Journal of International Law* 263–70 at 264.
[13] Weston, 'Reagan Administration', 295.
[14] Daniel P. Moynihan, *Loyalties* (New York: Harcourt Brace Jovanovich, 1984), p. 67.
[15] Roger Fisher, 'International Law: A Toolbox for the Statesman', (1979) 9 *Californian Western Journal of International Law* 472–84 at 472.

versed in international law and demonstrated great respect for it, if not perfect compliance'; it has been from the 1960s on that this knowledge and respect have been 'demonstrably slipping away'.[16] The observation, or assumption, that the US attitude was better at some previous point in time can nevertheless be traced to the era before the Second World War. Lack of US support for the Permanent Court of International Justice after the First World War was contrasted with strong US leadership for the idea of a world court in the period up to 1914. And, going back even further, the fact that the United States had been such a strong advocate of arbitration in the late nineteenth century meant that the US determination to opt for war rather than to arbitrate with Spain in 1898 was greeted with considerable surprise.[17]

This book seeks to move beyond the myth of the golden age and the assumption of disjuncture in the attitude of the United States towards international law so as to articulate elements of continuity. Although there have undoubtedly been differences of style and of substance, including between administrations, there have also been strong elements of continuity that have been far less readily identified or explained.

From Bush to Obama: continuity versus change

When I first began work on articulating what I perceived to be continuities in the nature of US engagement with international law, George W. Bush was still in office and several people kindly suggested that it would be a very difficult thesis to establish. My task may have become easier as at the time of writing we approach the final year of Barack Obama's first term in office.

With the election in 2008 of President Barack Obama, hopes were raised of a dramatic shift in the US attitude towards international law, but subsequent appraisals of that shift have been cautious in their optimism. There was, no doubt, a radical change in rhetoric. On the occasion of receiving the Nobel Peace Prize, Obama acknowledged that 'America cannot insist that others follow the rules of the road if we refuse to follow them ourselves' and spoke of being 'convinced that adhering to

[16] Mary Ellen O'Connell, 'President Obama: New Hope for International Law?', *The Jurist*, 26 January 2009, http://jurist.law.pitt.edu/forumy/2009/01/president-obama-new-hope-for.php (accessed 17 July 2011).

[17] Whitelaw Reid, 'Some Consequences of the Last Treaty of Paris: Advances in International Law and Changes in National Policy' (1899) 1 *Anglo Saxon Review* 66–83.

standards strengthens those who do, and isolates and weakens those who don't'.[18] Susan Rice was appointed US ambassador to the UN and pledged to 'refresh and renew' US leadership in the UN.[19] Secretary of State Hillary Clinton declared in January 2009 that ratification of the UN Convention on the Law of the Sea was long overdue and would be a priority for her.[20] Obama expressed support for ratification of the 1996 Comprehensive Nuclear-Test-Ban Treaty and the eventual elimination of nuclear weapons.[21] Executive orders issued by Obama – to close the detention facility at Guantánamo Bay, to suspend the interrogation programme of the Central Intelligence Agency (CIA), and to order the review of all US government detention policies and legal positions[22] – met with wide acclaim in Europe and were heralded as the return of the US commitment to international law.

The degree of substantive change between the Bush and Obama administrations evident in the first two years of the new administration was, on the other hand, less than had been expected, given the expressed intentions. Obama arguably inherited a particularly challenging situation and his administration came up against institutionalized practices and entrenched interests as well as the practicalities of closing the Guantánamo detention facilities. Obama was similarly unable to meet his deadline of May 2010 for ratifying the Comprehensive Nuclear-Test-Ban Treaty, and there were no early results in terms of the US becoming party to the Law of the Sea Convention, raising the question of just how far-reaching change in respect of international law during his presidency was likely to be.

The transition from Bush to Obama so far as US engagement with international law is concerned is in some ways reminiscent of that from Clinton to Bush, insofar as the shift was to a considerable extent about how foreign policy goals were pursued, and what was said about

[18] 'Obama's Nobel Remarks'.
[19] Colum Lynch, 'At United Nations, U.S. Faces Hurdles for Its Agenda', *Washington Post*, 22 February 2009, www.washingtonpost.com/wp-dyn/content/article/2009/02/21/AR2009022101750.html (accessed 15 July 2011).
[20] 'Nomination of Hillary R. Clinton to be Secretary of State', Hearing before the Committee on Foreign Relations, United States Senate, 13 January 2009, S. hrg 111–249, www.gpo.gov/fdsys/pkg/CHRG-111shrg54615/pdf/CHRG-111shrg54615.pdf (accessed 15 July 2011).
[21] 'Remarks of President Barack Obama', speech, Prague, 5 April 2009, http://prague.usembassy.gov/obama.html (accessed 15 July 2011).
[22] Executive Orders 13491 (22 January 2009), 13492 (22 January 2009), and 13493 (22 January 2009), issued by President Barack Obama.

international law during the process, rather than about radically different outcomes. Writing in 2003, Daalder and Lindsay referred to a 'Bush revolution' in US foreign policy, but qualified this by saying that the revolution was one of methods.[23] Even more broadly, Richard Betts commented of the difference between the foreign policy of Republican and Democrats:

> Democrats push primacy with a human face, dressed up in the rhetoric of multilateralism, and they use military power with much hesitancy and hand-wringing. Republicans push primacy 'in your face', with unapologetic unilateralism, and they swagger brazenly. To a surprising degree, however, the two sides come out in the same place.[24]

It is a hypothesis of this book that, despite many apparent shifts in the nature of US interactions with international law, there has in fact been a far greater degree of continuity in the nature of that engagement than is generally recognized – if only in terms of the ongoing apparent contradictions! The underlying continuities that we have witnessed between the administrations of George W. Bush and Barack H. Obama have in fact been mirrored many times before.

[23] Ivo H. Daalder and James M. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Washington, DC: Brookings Institution, 2003).
[24] Richard K. Betts, 'The Political Support System for American Primacy', (2005) 81 *International Affairs* 1–14 at 2.

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The US quest for legal security

> The more I study the history of American foreign policy, the more deeply convinced I become that our national foreign policy tradition has much to teach us. We don't just draw lucky cards; we also play the game well. Over two hundred years we have developed our own unique style, which suits us. Certainly it has enabled us to become the richest and most powerful nation in the history of the world.
>
> Walter Russell Mead, 2001[1]

It has often been observed that the United States is a country built on law. Justice Anthony Kennedy has noted that Americans were given 'a self image, a self identification, a self understanding about who they are' from the Declaration of Independence and the Constitution.[2] Rivkin and Casey referred to the United States as 'a nation bound together not by ties of blood or religion, but by paper and ink'.[3] Paul Kahn has described the importance of law to the national sense of identity; according to Kahn it is participation in the legal system that unites the United States into a single community. 'The rule of law, for us, is not simply a matter of getting the content of rights correct. It is first of all an expression of our sense of ourselves as a single, historical community engaging in self-government through law.'[4] According to Allott, 'American law is not merely one social system among many. It is the central instrument of the self-constituting of American society.'[5]

[1] Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Alfred A. Knopf, 2001), p. 28.
[2] Interview with Associate Justice Anthony Kennedy, C-SPAN, National Cable Satellite Corporation, 25 June 2009, http://supremecourt.c-span.org/Video/JusticeOwnWords/SC_Jus_Kennedy.aspx (accessed 1 July 2011).
[3] David B. Rivkin Jr and Lee A. Casey, 'The Rocky Shoals of International Law', (2000–1) 62 *The National Interest* 35–45 at 35.
[4] Paul W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', (2000) 1 *Chicago Journal of International Law* 1–18 at 4.
[5] Philip Allott, 'International Law and the American Mind', (2003) 97 *Proceedings of the Annual Meeting (American Society of International Law)* 129–31 at 131.

Some observers of the predominant place of law in US culture believe that law provides a kind of 'cultural glue', binding together a diverse nation and 'serving as a focus of values and aspirations that define the American people'.[6]

> It is not just that the legal dimension of affairs is particularly prominent in the United States, not just that people turn to the courts more often, on more matters, than elsewhere. Americans turn to the courts with a particular kind of faith, and hope, which survives at a deep level despite all the disappointments and frustrations of the legal process.[7]

The central place of law in US society has extended to US foreign relations. US diplomats typically adopt a legalistic approach to international negotiations, arriving well prepared with facts and figures, proceeding with analytical rigour, and drafting any resulting agreement in precise, binding, and enforceable language.[8] Lawyers have dominated key foreign policy positions in the US government. Even in comparison with the United Kingdom, from which the United States derived much of its legal heritage, the difference in professional backgrounds of members of the foreign policy executive is striking. More than half of US presidents have been lawyers, as compared with one fifth of UK prime ministers.[9] Some three quarters of US secretaries of state have been lawyers, in comparison with fewer than one quarter of their counterparts in the United Kingdom.[10] Forty-five of the fifty-three men who have served as chair of the Senate Committee on Foreign Relations have practised law.[11] The importance placed on law in US foreign relations necessitates the State Department having plenty of legal expertise at its disposal. The Office of Legal Affairs within the State Department currently has some 175 permanent attorneys and 100 support staff,[12] whose expertise is often supplemented by that in the profession more broadly, including – in the case of trade for example – experts from private firms and trade associations.[13]

[6] Helle Porsdam, *Legally Speaking: Contemporary American Culture and the Law* (Amherst: University of Massachusetts Press, 1999), p. 4.
[7] Ibid., p. 4.
[8] Richard H. Solomon and Nigel Quinney, *American Negotiating Behavior: Wheeler-Dealers, Legal Eagles, Bullies, and Preachers* (Washington, DC: United States Institute of Peace, 2010), pp. 29–31.
[9] Appendix, Tables 1 and 2. [10] Ibid. [11] Appendix, Table 3.
[12] 'Practicing Law in the Office of the Legal Advisor', Office of the Legal Advisor, 30 July 2010, www.state.gov/s/l/3190.htm (accessed 1 July 2011).
[13] Gregory Shaffer, Victor Mosoti and Asif Qureshi, 'Towards a Development-Supportive Dispute Settlement System in the WTO', International Centre for Trade and Sustainable Development, Resource Paper No. 5 (March 2003), pp. 21, 27.