PART III

Global Challenges
From an international perspective, the first year of Barack Obama’s presidency has been one in which rebranding America has been a top priority. At the conclusion of the George W. Bush presidency, it appeared that one element of the administration’s legacy would be long-lasting harm to the international legal order and to America’s reputation within it. From the outset, President Obama has made it clear that he is aware of the costs of disengaging from the legal and institutional structures of international order. In his first speech to the United Nations General Assembly, on 23 September 2009, he stated that ‘the world had come to view America with skepticism and distrust’, as a result of specific policies undertaken by the previous administration and a widespread belief internationally that America had acted unilaterally on certain critical issues. In response, he promised a ‘new era of engagement’. If the recent high-level US commitments to dialogue and diplomacy are anything to go by, the United States has demonstrated a reinvigorated willingness to abide by international law and the rules and norms of international institutions. The award of the Nobel Peace Prize to President Obama in his ‘freshman’ year for ‘extraordinary efforts to strengthen international diplomacy and co-operation between peoples’ is emblematic of much of the world’s faith in his capacity to reengage with the international community. However, along with the lofty rhetoric comes the risk of dashed expectations if words cannot be converted into deeds. It has prompted some to hark back to Mr Obama’s speech at Washington’s Gridiron dinner as a recently elected senator in 2006, at which he remarked, ‘this appearance is really the capstone of an incredible 18 months. I’ve been very blessed. Keynote speaker at the Democratic Convention. The cover of Newsweek. My book made the best-seller list. I just won a Grammy for reading it on tape … Really what else is there to do? Well, I guess … I could pass a law or something’.

This chapter seeks to analyse the extent to which the first year of the Obama presidency has marked a concrete shift in the United States’ approach to international law and the United Nations. The chapter begins with an assessment of the shortcomings of the Bush administration’s approach to the international legal order. The assessment is not a complete picture, but describes some of the lowest points of the Bush administration’s relationship with the international rule of
law while pointing out that these occurred principally within its first term and also masked a series of positive steps towards international legal engagement in a number of specific areas. It then moves to examine the extent to which the Obama administration can truly be said to have acted as a force for positive change in the relationship between the United States, international law and the United Nations during its first year in office. As the chapter explains, despite President Obama’s initial steps, much remains to be done for the United States to regain its position as a leader in the design and implementation of norms and rules of international law.

THE BUSH ADMINISTRATION, INTERNATIONAL LAW AND THE UNITED NATIONS

The overarching international criticism of the Bush administration can be crudely summarized as a tendency to seek what it wanted from the international legal system without agreeing to be subjected to it itself. This reputation for double standards or ‘exceptionalism’ was earned by a series of instances during the Bush presidency when the United States (1) withdrew from standing treaties and declined to participate in important new international legal initiatives, (2) failed to comply with existing international law, and (3) put obstacles in the way of the effective working of international law and institutions. However, these criticisms of the Bush administration need to be set alongside a long tradition of US exceptionalism from international legal commitments and the fact that, in a number of areas, the administration did commit the United States to further binding obligations in the international legal system.

(i) Non-participant: treaty law and multilateral institutions

The first couple of years of the Bush administration were marked by its rejection of a number of multilateral treaties, for example its withdrawal from the Anti-Ballistic Missile Treaty and ‘unsigning’ of the Statute to the International Criminal Court. It also failed to become a party to the Comprehensive Nuclear Test Ban Treaty, the Ottawa Landmines Convention and the Kyoto Protocol. It opposed efforts to negotiate a verification protocol to the Biological Weapons Convention and a treaty to limit the trade in small arms. It is, of course, the right of every sovereign state to decline to enter into treaties or to refuse to participate in international institutions. President Bush’s Legal Advisor to the Secretary of State, John Bellinger, argued that, rather than evidencing indifference or obstructionism, America’s non-participation in certain international legal initiatives represented the seriousness with which the United States approaches international law. ‘Unlike certain countries, we do not join treaties lightly, as a goodwill gesture, or as a substitute for taking meaningful steps to comply,’ he said.

However, in its first term, the Bush administration pitted itself as an ‘outsider’ against most international institutions, even those to which it is formally a party.
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In the lead-up to the Iraq intervention in 2003, for example, President Bush famously threatened that the UN would ‘fade into history as an irrelevant and ineffective debating society’ if it failed to authorize force,¹ making clear that it was UN compliance with US policy, rather than the converse, that was the key to a successful relationship. The nomination of John Bolton, a career-long detractor of the institution, as US ambassador to the United Nations merely emphasized the administration’s approach. The United States was one of only three states that voted against the establishment of the new Human Rights Council. President Bush explained the US decision not to seek a seat on the newly formed Council on the basis that the United States would be a more effective defender of human rights from the outside.³ His decision reflected scepticism in many US circles that the new Council would be as flawed as its predecessor.⁶

(2) Non-compliance: the Bush Doctrine, human rights and international humanitarian law

The 2003 military intervention in Iraq gained the United States (and the United Kingdom) a worldwide reputation as international lawbreakers. Admittedly, it is particularly difficult for governments to accept legal constraints on the resort to armed force and the Bush administration was no exception. However, following the dramatic terrorist attacks of 9/11 launched by enemies not susceptible to traditional forms of deterrence, the so-called ‘Bush doctrine’ introduced a concept of pre-emptive self-defence that stretched the concept beyond conventionally respected limits. President Bush warned that, ‘if we wait for threats to fully materialize, we will have waited too long’.⁷ The US National Security Strategy of 2002 stated that the United States had a right to use force in self-defence before a threat had crystallized ‘even if uncertainty remains as to the time and place of the enemy’s attack’.⁸ The Bush doctrine was widely criticized, and the UN Secretary-General’s 2004 High Level Panel on Threats, Challenges and Change expressly refuted it, stating that ‘in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively-endorsed action, to be accepted’.⁹

Perhaps the chief casualty of the Bush administration was the US reputation as an upholder and enforcer of human rights throughout the world. The detention of prisoners at Guantánamo Bay and Abu Ghraib has been taken as the principal symbol of US non-compliance with long-standing rules of international human rights and humanitarian law. The interrogation techniques in both camps, indefinite detention in Guantánamo Bay of ‘enemy combatants’, deprivation of fair trial rights, resort to measures constituting torture or inhuman, cruel or degrading treatment and ‘extraordinary rendition’ to secret detention facilities were the subject of particular scrutiny and criticism, even by allies of the United States. The British Court of Appeal described Guantánamo Bay as a ‘legal black hole’,¹⁰ with Lord Steyn calling it a ‘monstrous failure of justice’.¹¹ German Chancellor Angela Merkel insisted that ‘[a]n institution like
Guantánamo Bay in its present form cannot and must not exist in the long-term.12 In a confidential report issued in July 2004 and leaked to the New York Times, Red Cross inspectors concluded that ‘the construction of such a system … cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture’.9 Two separate UN reports called upon the United States to shut the facility down without further delay, citing violations of international law.14 In August 2008, the Inter-American Commission on Human Rights issued precautionary measures requesting the United States to desist from cruel, inhuman or degrading treatment of an individual detained at Guantánamo Bay.5

UN bodies also criticized the way in which the United States implemented its obligations under the Torture Convention.16 The Council of Europe’s Parliamentary Assembly adopted a resolution declaring that the US ‘disregard’ for certain key human rights and humanitarian legal norms following the 9/11 attacks had ‘done a disservice to the cause of justice and rule of law and has tarnished its own hard-won reputation as a beacon in defending human rights and in upholding well-established rules of international law’.17 Former UN Human Rights Commissioner Louise Arbour explained just prior to her retirement how perceptions of human rights abuses committed under the Bush administration had affected her capacity to do her job: ‘If I try to call to account any government privately or publicly for their human rights records, the first response is: first go and talk to the Americans.’18

(j) Obstacle: International Criminal Court

The Bush administration’s reaction to the International Criminal Court (ICC) was illustrative of the way in which it sought to create obstacles to the expansion of international law and institutions. In the 1990s, by promoting the establishment of the UN tribunals for the former Yugoslavia and for Rwanda, the United States had been seen as leading efforts to end impunity for the perpetrators of atrocities. The Bush administration’s attitude towards the newly created ICC was, therefore, all the more frustrating. Following its withdrawal of the US signature to the Rome Statute, the administration embarked on an aggressive campaign against any possible impact by the Court on US nationals. The US Congress adopted an enactment nicknamed the ‘Hague invasion clause’ authorizing the President to take all means necessary, including the use of military force, to bring about the release of any US national detained by the ICC.19 The administration worked to persuade countries to enter bilateral non-surrender agreements under which states promised not to transfer US nationals to the ICC. In threatening to withdraw aid from any country that refused to sign an agreement, the United States did immense damage to its relationships with the countries concerned, to the extent that many questioned whether the small perceived gain was worth the harm done to US interests in prosecuting the war against terror.20

The initial hostility of the United States to the Court was lessened in the later years of the administration. A big step was taken in 2005, when the United
States accepted that the situation in Darfur should be referred to the ICC by the UN Security Council, while the US contented itself with an abstention when resolution 1593(2005) was adopted. The United States subsequently gave support to the Court’s investigations in Darfur. By 2007, American representatives were stating that the government ‘shares [the ICC’s] common goals and respects the decision of other States to become parties to the Statute’. The administration also made it clear that it would not support a Security Council request for the postponement of an arrest warrant for President Omar al-Bashir of Sudan. This put the United States in the position of supporting the ICC against those who proposed that its proceedings be suspended.

(4) A fuller picture

It is also worth noting that the exceptionalist approach of the Bush administration’s first term was in itself unexceptional. The United States has been in financial arrears to the United Nations for much of the time since 1979. The Ronald Reagan years were described by Burns H. Weston as ‘a pattern of unprecedented lawlessness and unilateralism in the conduct of American foreign policy’. Though President Bill Clinton presented an open face to the international community, his administration ultimately declined to support major international initiatives – disagreement with allies over the International Criminal Court, the Kyoto Protocol, the Comprehensive Nuclear Test Ban Treaty and the Ottawa Land Mines Convention arose during that administration. Military interventions of dubious legality including in Grenada (1983), Libya (1986), Panama (1989) and Sudan (1998); wide reservations to human rights treaties; and perceived non-compliance with international law in areas such as the extraterritorial reach of US trade and economic law were all seen outside the United States as reflecting an expectation of a superpower’s dispensation from obligations binding on others.

In addition, any portrayal of the Bush administration as entirely averse to multilateral rules and institutions would be inaccurate. In 2003, the United States rejoined UNESCO, having withdrawn in 1984 in protest at the organization’s excessive politicization, long-term lack of budgetary restraint and poor management. The United States remained fully engaged with institutions and multilateral rules governing the global economy and international trade, whether in the World Trade Organization or the newer North American Free Trade Agreement. The administration also supported efforts to conclude new counterterrorism treaties. In developing the Proliferation Security Initiative to restrict the trafficking of weapons of mass destruction, the United States moved from what began as a unilateral initiative to a coalition of the willing, thence to the promotion of a Security Council resolution and finally to seeking global support by negotiating a new multilateral protocol to the Maritime Navigation Convention. Treaties that the administration put to the Senate for advice and consent, allowing ratification or accession – and which were approved – numbered a ‘record ninety’ in the last Congress of the administration and included the 1954
Hague Convention for the protection of cultural property in armed conflict, and four other agreements on humanitarian law including protocols on explosive remnants of war and blinding laser weapons.

The administration continued to support the UN ad hoc tribunals, the Sierra Leone Special Court and the Cambodian war crimes trials. Its response to the decision of the International Court of Justice (ICJ) in the *Avena* case indicated that the administration did not adopt a negative approach in principle to international courts. The *Avena* case concerned the rights of Mexican nationals convicted and sentenced to death by US courts to be notified of their right under the Vienna Convention to communicate with their consulate. The Bush administration exhibited due deference in accepting the Court’s decision that the rights of 51 imprisoned Mexican nationals be reviewed and, in February 2005, sent a Presidential Directive to the state of Texas to give effect to the Court’s decision. Regrettably, the US Supreme Court declared the directive to be invalid. Equally regrettably, the spirit in which the President greeted the ICJ decision was undermined when, the following month, the United States withdrew from the Vienna Convention’s Optional Protocol, which had formed the basis of US consent to the ICJ’s jurisdiction in the case.

In the later years of the Bush administration, there were changes in the way it approached the principles of human rights and international humanitarian law in the context of the ‘war on terror’. Admittedly, it was the US Supreme Court that had the greatest influence in rolling back previous measures, through a series of decisions overruling the administration’s interpretation of its domestic and international obligations.

Other steps were taken by Congress. A 2005 statute extended the US application of the Torture Convention so that cruel, inhuman and degrading treatment is prohibited in all facilities within US jurisdiction outside the United States; and the crime of genocide can now be prosecuted even when it occurs outside the United States. Lawyers within the Judge Advocate General’s corps upheld the provisions of the Geneva Conventions throughout and argued courageously for the rights of suspects before military commissions. Voices within the administration sought specifically to address international criticisms and to convince the international community of US commitment to international law. Ultimately, however, the international legal diplomacy actively conducted by State Department Legal Advisor John Bellinger during the final period of the Bush administration did not serve to repair the harm to the reputation of the United States, which was inflicted by the measures taken during the early years of the ‘war on terror’.

International activity during the Bush years exposed not only the indispensability of the United States in the international legal order, but also its vulnerability. The absence of the United States from mainstream international efforts to tackle problems of global concern not only weakened world capacity to solve problems that *can* only be dealt with internationally; it served also to undermine US leadership and damage its international credibility. Although the United States is a key enabler of the concept of an ‘international community’, it is also...
the case that the Bush administration’s initial attitude towards that community carried real costs for its international reputation and capacity for leadership later on.

THE OBAMA ADMINISTRATION: A FORCE FOR POSITIVE CHANGE IN THE INTERNATIONAL LEGAL ORDER?

The first year of the Obama presidency was heralded as a sea-change in the US approach to international law and the United Nations. His presidency is already being compared to that of President Franklin D. Roosevelt, who ushered in an era of far-reaching change. Indeed, in justifying America’s invigorated multilateralism under his administration, President Obama has relied upon President Roosevelt’s recognition that the ‘structure of world peace cannot be the work of one man, or one party, or one nation … It cannot be a peace of large nations – or of small nations. It must be a peace which rests on the cooperative effort of the whole world.’ Certainly, the first year of the Obama presidency has included many initiatives demonstrating this philosophy. However, perhaps owing to the degree to which exceptionalism not only was the norm animating the Bush administration’s governance but is actually ingrained in the US body politic, the Obama administration has yet fully to live up to its stated ambition to enhance global cooperation under the rule of law.

(i) International legal order

The Obama administration’s record will ultimately be measured by its conduct rather than its rhetoric, but already the marked change in tone and attitude, as well as high-level statements about the importance of international law, have in themselves been of immense value in strengthening the international legal order. The President has widely acknowledged past mistakes, that America ‘went off course’, and ‘made decisions based upon fear rather than foresight and all too often trimmed facts and evidence to fit ideological predispositions’. In his speech to the UN General Assembly, President Obama affirmed that the world ‘must stand together to demonstrate that international law is not an empty promise, and that treaties will be enforced’.33

A number of highly important specific Executive Orders and statements have signalled a departure from the extraordinary analyses of the law on torture and treatment of detainees put forward by the Bush administration. In his first few days in office, President Obama prohibited the use of torture by the United States, and expressly rejected future reliance upon interpretations of the Torture Convention adopted by advisers under the previous administration. In the administration’s second month in office, the Department of Justice expressed its intention no longer to employ the term ‘enemy combatant’, but instead to draw on the international laws of war to inform its authority, and only detain individuals who supported al-Qaeda or the Taliban if that support was ‘substantial’.
The Obama administration’s reaffirmation of US commitment to international law has provided reassurance to its allies and is depriving violators of international law of the powerful argument of hypocrisy when the United States and other global actors seek to expose and challenge such violations.

(a) Treaties
Since taking office, the Obama administration has taken concrete positive steps in relation to a number of multilateral treaty initiatives. It signed the first new human rights convention of the twenty-first century, the UN Convention on the Rights of Persons with Disabilities. It has vowed to impose mandatory limits on the emission of climate-warming greenhouse gases, and is involved in efforts to produce a new international agreement on global warming. President Obama has vowed to pursue ratification of the Comprehensive Test Ban Treaty ‘immediately and aggressively’, and has launched efforts to rewrite crucial provisions of the 1968 Nuclear Proliferation Treaty to strengthen inspection provisions and close the loophole that makes it easy for countries to drop out, as North Korea did in 2003.

A further treaty now before Congress that merits swift attention is the Law of the Sea Convention. There is wide support for this treaty among a variety of sectors in the United States, including the military, the shipping, oil and gas industries, and environmental groups – and there has been long-standing support for the Law by previous administrations. One reason for continuing US opposition to accession is that the Convention subjects states to dispute-resolution mechanisms in the event of disagreement under the treaty. This central objection to any type of further supranational enforcement upon US sovereign rights echoes once again the arguments surrounding the ICC.

(b) The war against terror, human rights and international humanitarian law
Perhaps the area in which the transition between the Bush and Obama administrations’ approaches to the international rule of law is best reflected is in relation to the so-called war against terror. To begin with, the new administration has dropped the use of the term ‘global war on terror’ or ‘long war’ in favour of the term ‘overseas contingency operation’. The classification of the different engagements with al-Qaeda and other terrorists in terms of a ‘war’ was one of the factors that divided the United States and Europe during the Bush era. Although John Bellinger, the then US State Department Legal Advisor, stated that the ‘war on terror’ was not a legal term, it had legal consequences. In particular, it gave the Bush administration its own justification for applying its version of the laws of armed conflict to what it considered to be a unitary conflict, holding detainees indefinitely, and largely discarding criminal law measures in favour of ius ad bellum claims for using military force in the territory of other states. This approach affected international humanitarian law, leading to results that might make fighting real wars more difficult. The change in language is...
therefore a significant shift, although President Obama’s continued use of references to the nation being ‘at war against violent extremism’ still leaves room for legal ambiguity.38

A series of highly important substantive steps has also been taken to sever the Obama administration’s approach from the costly legacy of the Bush administration. On his first day in office, President Obama made a commitment to close Guantánamo Bay within a year. Though the Military Commission system will not be disbanded completely, President Obama has committed himself to reforming the system so that it is in line with the rule of law. In another highly symbolic indication of the sea-change in American policy, President Obama signed an executive order banning the use of torture or ‘enhanced interrogation techniques’ by the United States, and ordered the closure of CIA secret prisons and ‘black sites’ associated with rendition.

Despite these steps, there are four important respects in which the Obama administration has arguably not gone far enough in dismantling the Bush administration’s architecture for the war on terror. The most difficult task is what to do with the 240 detainees who remain in legal limbo at Guantánamo Bay. Though for the most part President Obama has adopted a ‘try or release’ policy, he has also indicated that certain detainees who cannot be prosecuted but who pose a danger to the American people will continue to be subject to administrative detention. This policy of continued indefinite detention has raised serious concerns outside the United States. Preventive detention is only legally permissible in very narrow circumstances and for a short period of time. President Obama has included an assurance that such detainees will be subject to a ‘thorough process of periodic review’ so that any prolonged detention is carefully evaluated and justified. Nevertheless, previous experience of preventive detention in Northern Ireland and elsewhere shows that it led to further radicalization and recruitment. As far as possible, alternative measures should be pursued, including other means of surveillance such as control orders.

Another area of concern is the new administration’s intention to preserve the CIA’s authority to carry out the policy of ‘extraordinary rendition’. While torture has been banned, and secret CIA prisons have been shuttered, the administration has indicated that it will continue its predecessor’s practice of sending terrorism suspects to third countries for detention and interrogation, although it has pledged to monitor their treatment closely to ensure they are not tortured. The practice of relying on diplomatic assurances that an individual will not be tortured has shown itself not always to be effective in preventing torture. The non-refoulement obligation of Article 3 of the Convention against Torture, making it unlawful to return an individual to a country in which he or she is likely to be tortured, also applies to transfers between third countries. Moreover, even terrorist detainees have minimum due process guarantees such as access to a court to challenge arrest, detention and transfer – rights that are often denied in the case of rendition.

Third, although the United States has taken the important step of affirming that its definition of torture complies with international practice, it is currently
struggling with domestic demands that past allegations of torture be investigated and perpetrators brought to justice. Responsibility for authorizing the unlawful interrogation techniques was the subject of hearings of Senate and House Committees in 2008, which found among other things that

[t]he abuse of detainees in US custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the US government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.

President Obama has said he wants to focus on the future rather than the past, and has resisted calls for the establishment of an Independent Commission or criminal inquiry. However, as Richard Holbrooke has noted, ‘Because the Bush administration limited itself to punishing only those at the very bottom of the chain of command at Abu Ghraib, the damage to the United States’ image has been immense and continuing – the gift that keeps on giving to the United States’ enemies’.39

Failure to launch a domestic investigation or prosecutions is giving the green light to other states to launch their own criminal investigations against past US actions, a more damaging and less satisfactory resolution for the United States. Spanish magistrate Baltasar Garzón, best known for the prosecution of General Augusto Pinochet of Chile leading to his arrest in Britain in 1998, has already launched a formal investigation into six Bush administration lawyers for their roles in advising on interrogation techniques.

In order to ensure that those damaging aspects of the Bush legacy are hermetically sealed and confined to the past, there is a need to establish internationally agreed guidelines for the treatment of detainees in the future. Not only does this minimize the precedent value that allows other countries to point to US practice as cover for their own unacceptable practices, but it also remains a continuing necessity in relation to Iraq and Afghanistan. Already, a US court has concluded that detainees in the detention facility at the US Bagram base in Afghanistan are in a very similar situation to those held at Guantánamo.40

Discussions are continuing on the treatment of detainees in armed conflict, in particular with the International Committee of the Red Cross (ICRC).41 The United States should recognize, as it once did, that Article 75 of Protocol 1 to the Geneva Conventions (setting out the fundamental guarantees owed to individuals captured during armed conflict) reflects customary law and is therefore applicable even if the United States continues not to be a party to the Protocol.

A further question relates to the application of human rights law. The United States continues to insist that it is bound by international human rights obligations only in respect of actions taken within its own territory. It has also failed to acknowledge that human rights are generally applicable in armed conflict, despite the fact that both the International Court of Justice and the Human Rights Committee have stated that international humanitarian law and human rights are complementary. This allows US agents not to apply human rights
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standards to detention facilities outside US territory, bringing the United States into conflict with the decisions of intergovernmental human rights bodies to the effect that, with regard to persons under their effective control, troops and other state agents must apply human rights obligations overseas. Especially in non-international armed conflicts, which are regulated in less detail, human rights law may offer additional protection with respect to, inter alia, the detention, treatment and trial of persons hors de combat. If it is a step too far for the Obama administration to accept that human rights obligations apply to their treatment of detainees overseas as a matter of law, the United States’ reputation as a defender of human rights would be greatly enhanced if it were able to announce that it would apply these standards in practice.

(4) Relationship with the United Nations

The Obama administration has already dramatically changed the United States’ approach to the United Nations. President Obama’s appointment of one of his closest advisers, Susan Rice, to the position of ambassador to the United Nations, and the reinstatement of this position to cabinet-level rank, was indicative of a broader desire to strengthen the US relationship with the United Nations. Furthermore, in May 2009, the United States assumed a seat on the Human Rights Council. It has also cleared its debt to the UN’s regular and peacekeeping budget, which had accumulated arrears between 2005 and 2008, and the administration expressed the intention of working with Congress to ensure dues are paid in full and on time in future, thereby ending the practice that started in the 1980s of paying US dues nearly a year late.

The United Nations is a flawed institution. Yet, as President Obama has recognized, its imperfections are ‘not a reason to walk away from this institution – they are a call for redoubling our efforts’. By reinvigorating its relationship with the UN, the United States is well placed to be a central actor in pushing for essential reform of the organization, instead of being part of the problem that was eroding its credibility. Under Ambassador Rice’s leadership, the new administration has embraced the guiding principle to ‘work for change from within rather than criticizing from the sidelines’. There are three practical ways in which the United States could now contribute to the UN’s enhancement over the term of the next administration:

(a) Human Rights Council: The absence of the United States from the Human Rights Council at its inauguration has had an impact on the formation of a strong bloc of countries that defend human rights. As the Global Advocacy Director of Human Rights Watch stated, ‘While the United States has played a relatively active role as an observer at the Council, the absence of the United States from the Council’s membership has created a leadership imbalance that the EU has been unable to remedy’. In her final report to the Council before leaving office, former UN Human Rights Commissioner Louise Arbour warned that ‘scepticism has not been fully dispelled’ and that the ‘pursuit of consensus’
or use of regional or ‘communal’ positions often ‘eroded the clarity’ with which members and the Council as a whole ‘could and should speak on critical human rights protection’.46

The major review of the Human Rights Council will take place in 2011, and the United States could now commence work in advance to obtain widespread support for workable reform measures. For example, the Universal Periodic Review mechanism, a key mechanism in the Council’s artillery, could be strengthened by the contributions of independent experts and the creation of follow-up mechanisms.

(b) Security Council: The United States should review its policy towards Security Council reform. One of the central and perennial questions that the United States and other permanent members of the Security Council need to address is the legitimacy of the Council some 60 years after it was created. Can the victors of the Second World War legitimately continue to be the privileged guardians of international peace and security well into the twenty-first century? The United States under both the Bush and Obama administrations has been ambivalent about Security Council enlargement rather than explicitly opposed, though arguably it can take this approach because other permanent members such as China are fixed in their opposition.

However, the present exclusion from permanent membership of major economic and regional giants such as Brazil or India is indefensible and ultimately counter-productive. For President Obama to gain the confidence and respect of many of the world’s rising powers as well as many of its weakest, the United States must once again be a lead protagonist in rethinking the governance structure of the UN and actively promote reform of the Security Council.

The Obama administration could also promote more transparent and consultative working methods for the Security Council. American policy initiatives in the Council would benefit from following procedures that avoid antagonizing from the start the wider UN membership. For example, ‘legislative’ Council resolutions that bypass the General Assembly and negotiations that involve only the five permanent members should be avoided unless they are genuinely necessary in an emergency. A more committed approach to securing due process rights for individuals and entities placed on the sanctions blacklists would be another valuable initiative.47

(c) Secretary-General and the better functioning of the institution: The United States can also be a protagonist in reforming the UN for the twenty-first century by taking a more collaborative approach to promoting structural institutional change. One idea would be for the United States to promote making the ‘job search’ for the UN Secretary-General more transparent. The UN’s future success will depend a great deal upon its capacity to employ the most talented individuals, not least at the pinnacle of the institution.
(5) Implementation of international obligations by American states

As evidenced by the difficulty in implementing the ICJ’s *Avena* decision, the federal structure of the United States and the complex system of Congressional oversight for agencies making up the executive branch of a presidential administration can prove an obstacle to effective US participation in treaty-making initiatives and the broader implementation of international law. In the recent request for interpretation of the *Avena* case, the Bush administration declared to the ICJ that it had made all possible efforts within constitutional limits to ensure compliance with the earlier decision of the Court. The US Supreme Court, however, decided that the President’s directive to the State of Texas to implement the ICJ’s decision was not binding.48

This issue is ripe to be addressed by the new administration. As things stand, any administration has a limited ability to ensure US compliance with binding international obligations by the individual American states. The logical, but absurd, consequence could be that countries entering into a bilateral agreement with the United States might need to secure the separate agreement of the 50 American states. Following the Supreme Court’s *Medellín* decision, affirming that ICJ decisions are not binding under domestic law in the absence of an act of Congress, a general review of the means of implementing international obligations, including ICJ decisions, would seem to be advisable, and might lead to the introduction of legislation in Congress.

(6) The International Criminal Court

Domestic opposition in the United States to ratification of the Rome Statute to the International Criminal Court preceded even the Bush administration. Though one of President Bill Clinton’s final actions was to sign the Rome Statute, he also stated that he would not recommend that the next president submit the treaty to the Senate for its consent ‘until our fundamental concerns are satisfied’. Although domestic political opposition to the ICC Statute remains strong, thus making US accession unlikely in the foreseeable future,49 it should be possible for the United States to take some further positive steps to engage with the Court. It does after all agree with the underlying goal of the Statute, which is to end impunity for the perpetrators of atrocities.

Under the Obama administration, the campaign against the ICC appears to have ceased, following the marked thawing of the US relationship with the Court during the second term of the Bush administration. The United States could now take some further positive steps to cooperate with the ICC. The Ten Year Review Conference of the Rome Statute in Kampala, Uganda, which is scheduled to take place in May 2010 provides the opportunity for President Obama to recalibrate the US relationship with the International Criminal Court. For example, it could increase its assistance to the Court by sharing intelligence and other evidence with the Court’s investigators, as it does in relation to the Yugoslav and Rwanda Tribunals. The administration could also agree that
the mandates of future peacekeeping missions would include cooperation with the ICC.50

In more general terms, the United States should take advantage of the fact that the ICC is only a court of last resort, by ensuring that all US nationals can be tried in US courts for crimes within the ICC Statute, rather than leaving them within the jurisdiction of the ICC. This may require a review of US criminal law, including the Uniform Code of Military Justice, to ensure that the law on crimes against humanity and war crimes is updated. Extra-territorial jurisdiction should be applied (as has been the case with the recent US legislation on genocide51) to allow US courts to try these crimes wherever they are committed. If the United States wishes to ensure that US nationals are always tried in US courts, the administration can widen its extradition arrangements.

CONCLUSION

It would be misleading to present the eight years of the George W. Bush administration as an entirely anomalous chapter in the US relationship to international law. The United States has long exhibited exceptionalist tendencies, which it has justified on the basis of its special status as the world’s superpower and the burdens that come with this status, including protecting its allies around the world from communist intervention or domination during the Cold War. However, the Bush administration demonstrated that, when exceptionalism turns to unilateralism, and unilateralism is presented as a justifiable rule for the United States, then America’s long-term interests and international influence suffer. The election of Barack Obama, a man whose personal and career history reflects a deep appreciation of internationalism, civil liberties and the rule of law, opens the opportunity for the United States to play a central role in the reform of the international legal order that it led in establishing 60 years earlier. Taking on such a role will pose significant domestic challenges. However, as Ambassador Rice has noted, a renewed commitment to multilateralist policies by the Obama administration is neither charity nor a quest for international popularity – ‘in an interconnected world, what’s good for others is often good for the United States as well … the UN is essential to our efforts to galvanize concerted actions that make Americans safer and more secure’.52

The Obama administration’s early approach to international law and the UN is consistent with the self-interested internationalism of past US administrations, both Republican and Democrat. Respect for the international rule of law by a state as powerful as the United States actually enhances America’s capacity to exert global leadership. Moreover, the legitimacy and predictability that broad adherence to international law can provide helps sustain a more secure world for the pursuit of US international political and economic interests. And as power is spread more evenly across the world over the course of this century, the existence of strong structures and habits of international law will usually offer a more affordable, enduring and productive means to resolve disputes and prevent potential threats from escalating than can reliance
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on military supremacy and the constant exercise of national power alone. In this respect, the new administration appears to recognize that compliance with international law and commitment to adjudication are merely the ‘cost of doing business’ with the wider world.

NOTES
1 Barack Obama, ‘Remarks by the President to the UN General Assembly’, UN Headquarters, New York, 23 September 2009.
10 R on application of Abbasi v Secretary of State [2002] EWCA Civ 1598 (UK Court of Appeal).
16 A summary of the chief criticisms is contained in a report for the Canadian parliament: Laura Barnett, ‘Extraordinary Rendition: International Law and the Prohibition of Torture’, Library of Parliament, Canada, 17 July 2008: ‘A number of UN bodies have expressed concern over the United States’ implementation of the various international law prohibitions on torture. The UN Committee Against Torture has expressed concern over the absence of clear legal provisions in United States law ensuring that the prohibition against torture is non-derogable. The Committee has
also criticized the fact that the United States government does not consider that the non-refoulement obligation in section 3 of CAT applies to those detained outside the United States. Finally, the Committee Against Torture has expressed concern over the United States’ use of diplomatic assurances. It has stated that a government should rely on diplomatic assurances only with respect to states that do not systematically violate CAT’s provisions, after a thorough examination of the merits of each case. The Committee emphasized that the United States government should establish clear procedures for obtaining such assurances, accompanied by adequate judicial mechanisms for review, and effective post-monitoring arrangements. The UN Human Rights Committee has reiterated many of the Committee Against Torture’s concerns, and has also criticized the United States’ use of the “more likely than not” standard for refoulement.

18 Interview with Louise Arbour, UN Human Rights Commissioner, Democracy Now, 7 September 2007.
19 The American Servicemembers Protection Act 2002. It has been amended twice – in 2006 (waiving restrictions on funding International Military Education Training) and in 2008 (repealing limitations on military assistance).
20 The Coalition for the International Criminal Court has compiled a 24-page table of quotes from high officials opposing the US campaign for bilateral surrender agreements: http://www.iccnow.org/documents/HighOfficialQuotes_Current.pdf.
24 Figure given in speech of John Bellinger at International Law Weekend, American Branch of the International Law Association, New York City, 17 October 2008.
26 George W. Bush, ‘Memorandum for the Attorney General’ (28 February 2005), Appendix 2 to Brief for United States as Amicus Curiae 9a.
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Hegemony and the Foundations of International Law, p. 371.


33 Barack Obama, Remarks by the President to the UN General Assembly, UN Headquarters, New York, 23 September 2009.


For an account of the Bush administration’s support for the Convention, see the speech of the then State Department Legal Advisor at University of California, Berkeley School of Law’s Law of the Sea Institute on 3 November 2008.


43 Obama, Remarks by the President to the UN General Assembly.


46 Address by Ms Louise Arbour, the UN High Commissioner of Human Rights, on the Occasion of the 8th Session of the Human Rights Council, Geneva, 2 June 2008.

47 See, for example, Bardo Fassbender, Targeted Sanctions and Due Process (Berlin: Humboldt University, 2006); T.J. Biersteker and S.E. Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures (Providence, RI: Watson Institute for International Studies, Brown University, 2006). An incentive for further due process rights in this area is provided by the Kadi decision in the European Court of Justice.


49 This was frequently stated by John Bellinger in his speech of 25 April 2008 to DePaul University College of Law. See also John Murphy, The United States and the Rule of Law in International Affairs (Cambridge University Press, 2004) – the United States is unlikely to support any international tribunal that it cannot control in large measure’ (p. 278).

50 Most of the proposals in this paragraph are similar to those put forward by the Atlantic Council of the United States, ‘Law & the Lone Superpower: Rebuilding a Transatlantic Consensus on International Law’, William H. Taft IV and Frances G. Burwell, Policy Paper, April 2007.
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52 Rice, ‘A New Course in the World, a New Approach at the UN’.