

Is there room for international law in *realpolitik*?: accounting for the US ‘attitude’ towards international law

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Abstract. The United States has in recent years come under considerable criticism for its apparently cynical attitude towards international law. While the US administration refers often to the importance of the international rule of law it appears unwilling to itself be bound by that law. While the US took the lead in the post World War II years in establishing international law and institutions it has in recent years appeared unwilling to give those same institutions its full support. This article begins by examining a range of explanations for the seemingly undesirable US attitude towards international law. Dismissing each as inadequate on its own, the article demonstrates how what often appear to be contradictory aspects of the United States’ relationship with international law can in fact be reconciled through the application to United States’ behaviour of the basic tenets of classic modern realism as it pertains to the conduct of foreign policy. This is surprising since international law and *realpolitik* are more often contrasted. The United States’ ‘attitude’ towards international law is better explained not as a post-Cold War anomaly but as having been an integral aspect of the rise of the United States to sole superpower status.

The United States, the world’s sole superpower, should be the champion of international law, not a two-faced, half-hearted friend.¹

According to critics, the attitude of the United States (US) towards international law is two-faced: on the one hand, the US extols the virtues of the international rule of law as a way of moving the world towards greater peace, democracy and a ‘new world order’;² on the other, a number of actions (and inactions) on the part of the US in recent years do not seem to evidence the same support for the system of international law and institutions as was apparent at the time the United Nations

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¹ ‘World law and world power’, *The Economist* (US) 349:8097 (5 December 1998), p. 16.

² Secretary of State Madeleine K. Albright, Condon-Falknor Distinguished Lecture, University of Washington School of Law, Seattle, Washington, 29 October 1998. As released by the Office of the Spokesman US Department of State. For a speech on the importance of the rule of law to the ‘new world order’, see that by George Bush Snr on ‘Iraqi Aggression in the Persian Gulf’. <<http://scom.tamu.edu/pres/speeches/gbaggress.html>>

was being established. It has not always been a case of the action or inaction on the part of the United States having been illegal but rather a case of the United States not setting a good example and not putting into practice what it so often preaches about respect for human rights and the rule of law in international affairs. The highly questionable justification for the use of force against Iraq is only the latest issue of many that would appear to expose as cynical US rhetoric about the importance of compliance with, and support for, international law. Observers have also been faced with the dubious legality of the US use of force in Kosovo; the US vote against, subsequent apparently cynical signing of, and more recent 'unsigned' of, the Rome Statute of the International Criminal Court; the unwillingness of the US to sign the Ottawa Land Mines Convention and decision to abandon the Kyoto Protocol; US non-payment of its assessed contributions to the UN, US failure to inform more than 60 foreign nationals facing execution in the US of their right to seek consular assistance following their arrest;³ defiance of ICJ orders of interim measures not to proceed with executions pending the outcome of relevant ICJ cases;⁴ and the extra-territorial application of laws to function as unilateral sanctions.⁵ The US preparedness to use force pre-emptively appears to represent the confirmation of an arch-*realpolitik* outlook on the part of the Bush Administration, the demands of the 'war on terrorism' seemingly leaving little room for the 'niceties' of international law.

This article does not seek to criticise or to defend the behaviour of the United States. Nor is it arguing for or against the legality of specific actions on the part of the United States. Rather, it takes as a phenomenon the identified US 'attitude' towards international law and examines the reasons that have been offered for that

³ This is provided for in Article 36(1)(b) of the Vienna Convention on Consular Relations. 'United States of America: Violation of the Rights of Foreign Nationals Under Sentence of Death'. AMR 51/ - 1/1009.

⁴ Paraguay brought proceedings regarding Angel Francisco Breard in the ICJ. Breard was a Paraguayan but the Paraguayan consular authorities had not learnt about his arrest and trial until 1996, three years after he was convicted of the attempted rape and murder of Ruth Dickie in Virginia. The Court indicated provisional measures that the US 'should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings' but Breard was executed on 14 April 1998. The US also failed to comply with provisional measures issued on 3 March 1999 in a similar case, concerning Walter LaGrand. Sean D. Murphy, 'Execution of German Nationals Who Were Not Notified of Right to Consular Access', *American Journal of International Law (AJIL)*, 93 (1999), pp. 644-7.

⁵ The Helms-Burton Act (the Cuban Liberty and Democratic Solidarity Act or Libertad Act) was signed into law by President Clinton on 12 March 1996. This aimed to 'discourage third-country investment in Cuba by exposing foreign companies to potential claims in US courts and also by denying entry into the US for such foreign companies or their officers'. Most controversial was Title III which created a private right of action in US federal courts against third-country nationals who 'traffic in' property confiscated from US nationals. See Agora: *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act 90*, *AJIL*, 419 (1996). Title IV was also controversial because it precluded entry into the US of such third-country nationals who 'traffic in' property confiscated from US nationals, precluding entry of their officers and controlling shareholders and their families. There are several grounds on which this is considered illegal; the main one is its 'blatant violation of the international rules governing extraterritoriality'. Other grounds include that it violates: the most fundamental principles of international responsibility, the principle of non-intervention, the rules of the GATT/WTO, the NAFTA, the Charters of international organisations including the International Monetary Fund and the World Bank, and the rules of the Organisation for Economic Cooperation and Development. Brigitte Stern, 'Can the United States Set Rules for the World? A French View', *Journal of World Trade*, 31 (1997), pp. 10-11. Also controversial was the D'Amato Act (the Iran and Libya Sanctions Act of 1996 1996), 35 ILM 1273.

attitude. There is as yet no coherent theoretical explanation of the phenomenon that is able to reconcile the apparent discrepancy between the support that the United States showed for the system of international law in the immediate post-World War II years and the recent actions/inactions with which observers take issue. Realism, which has been the dominant paradigm in International Relations in the post-World War II era, has scant regard for international law. And yet this article suggests, somewhat counter-intuitively, that the most fundamental tenets of realism regarding state behaviour can in fact well account for US behaviour in relation to international law; the identified 'attitude' of the United States towards international law would appear to have been integral to the hegemonic rise of the United States.

Existing explanations for the United States' attitude towards international law

A number of explanations have been put forward for the supposedly undesirable attitude of the United States towards international law. Some of the actions or inactions on the part of the United States that have prompted criticism can, for example, be attributed to particular US foreign policy objectives. The US failure to come on board the Landmines Convention, for example, appears to have been based, at least in part, on US policy concerns regarding the Korean Peninsula.⁶ US objections to the Rome Statute of the International Criminal Court can, similarly, be understood to derive from what critics of US policy see as exaggerated concerns to protect US military personnel. Explanations at the foreign policy level are issue-specific and fail to account for all of the actions widely deemed to represent evidence of an undesirable attitude of the US towards international law.

Domestic political and institutional factors, such as federal-state relations, the role of the Senate in treaty-making, and interdepartmental relations appear to provide a better explanation of certain actions or inactions of the US for which it has come under criticism. The rejection of the interim measures of the International Court of Justice in the cases of *Breard* and the *LaGrand* brothers, for example, is not so easily explained as the outcome of any particular foreign policy objective so much as the executive giving preference to issues of federalism over foreign relations.⁷ The Senate, which must give two-thirds consent to a treaty before ratification by the President, can be blamed for the delays in ratifying human rights treaties.⁸ Senator Jesse Helms, former Chairman of the Senate Foreign Relations Committee, had announced in relation to the Rome Statute of the International Criminal Court, that a proposal for an international court that could prosecute

⁶ Christian M. Capece, 'The Ottawa Treaty and its Impact on US Military Policy and Planning', *Brooklyn Journal of International Law*, XXV:1 (1999), pp. 183–204.

⁷ Curtis A. Bradley and Jack L. Goldsmith, 'Agora: *Breard*', *AJIL*, 92:4 (October 1998), p. 675. But note that this was a policy decision rather than one of constitutional law. See Malvina Halberstam, 'The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve US Treaty Obligations or affect US Foreign Relations', *Indiana International Comparative Law Review*, 10:1 (1999), pp. 1–15.

⁸ For consideration of other reasons for the US reluctance to sign human rights treaties see Carl E. Schneider, 'America as Pattern and Problem', *The Hastings Center Report*, 30:1 (January 2000), p. 20.

American soldiers for war crimes would be 'dead on arrival' at his committee, regardless of the executive branch's position on the issue.⁹ Interdepartmental relations, involving a dispute between the Departments of State and Commerce over which agency should have the lead role in coordinating industry declarations and inspections, appears to account for the US having been in technical violation of the Chemical Weapons Convention.¹⁰

A more generalised explanation for the US attitude is that it is a phenomenon that goes hand-in-hand with sole superpower status and hence that it is a post-Cold War phenomenon.¹¹ International lawyers have contrasted the US efforts at institution-building following the Second World War with its behaviour in the post-Cold War years, during which the United States has not seemed to demonstrate as much leadership.¹² From this perspective, a United States' tendency towards unilateralism appears to have been exacerbated by the 'unipolar moment'.¹³ Implicit in much of what we have been hearing from those critical of the US attitude in respect of international law has been that we 'should' be able to expect more from the world's sole superpower. International law is, after all, supposed to serve as a check on unfettered power.¹⁴

It is true that George Bush Jr came to power opposed to US ratification of the Kyoto Protocol and prepared to jettison the ABM Treaty, but it is important to note that neither the shock and horror at the attitude of the United States towards international law nor the assumption that the US under a particular administration is not behaving as well as it did under a previous Administration, is new. The Reagan years (1981–89) 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'.¹⁵ Writing in 1986, Arthur Schlesinger com-

⁹ 'US Decision Not to Sign Treaty Establishing International Criminal Court', *AJIL*, 93 (1999), p. 186.

¹⁰ See Jonathan B. Tucker, 'Nonproliferation regimes at risk: Challenges to the Chemical Weapons Convention', *CNS Occasional Papers #3*. <<http://www.cns.miiis.edu/pubs/opapers/op3/tucker.htm>>, accessed 6 January 2001.

¹¹ 'How can the United States get away with [these double standards]? The answer, as in many other things, is simple: it is the world's only superpower.' 'World Law and World Power', *The Economist (US)*, 349:8097 (5 December 1998), p. 16(1).

¹² See remarks by Michael Byers on 'The Single Superpower and the Future of International Law', *American Society of International Law (ASIL)*. Proceedings of the Annual Meeting. Washington: 2000. '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.' Kenneth Roth, 'Sideline on Human Rights: America Bows Out', *Foreign Affairs* (March/April 1998), pp. 2–6 at 2.

¹³ For discussion of US unilateralism in relation to international law, see the special issues of the *European Journal of International Law*, 11:1 (March 2000) and 11:2 (June 2000). For discussion of unilateralism in US foreign policy, see Gwyn Prins (ed.), *Understanding Unilateralism in American Foreign Relations* (London: The Royal Institute of International Affairs, 2000). Criticism of the attitude of the US to international law has been matched by political criticism. 'No article on contemporary world affairs is complete without obligatory citations from diplomats and scholars complaining of US arrogance'. William C. Wohlforth, 'The Stability of a Unipolar World', *International Security*, 24:1 (Summer 1999), pp. 5–12, at 6.

¹⁴ Lauterpacht described the mission of international law as being 'to enhancing the stability of international peace, to the protection of the rights of man, and to reducing the evils and abuses of national power'. Cited in Steven R. Ratner, 'International Law: The Trials of Global Norms', *Foreign Policy*, 16:110 (Spring 1998), p. 65.

¹⁵ Burns H. Weston, 'The Reagan Administration Versus International Law', *Case Western Reserve Journal of International Law*, 19:295 (1987), pp. 295–302, at 295.

mented that American commitment to a world of law ha[d] in recent years ‘been in decline’.¹⁶ Moynihan 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’.¹⁷ And yet, when discussing the record of the Reagan administration, Burns Weston pointed out that American foreign policy had been ‘disrespectful’ of international law and cooperation at other periods and ‘irrespective of party politics’, as exemplified by the Bay of Pigs invasion of 1961, the Dominican Republic intervention of 1965, and of course Vietnam.¹⁸ Writing in 1986, Paul Kreisberg thought that, although Cyrus Vance had made continuing efforts to ensure that Carter Administration efforts were consistent with concepts of international law, it had been much more common ‘for [US] policy-makers to look on international law primarily as an instrument for public diplomacy and official rationalization, or as a source of “problems” to overcome’.¹⁹

Indeed, many of the specific issues to which critics are now responding have a long history. The dubious legality of the NATO use of force during the Kosovo crisis was certainly not the first example of a highly questionable US use of force, and the failure of post-World War II efforts to establish an International Criminal Court is usually attributed to the foreign relations climate between the United States and the USSR during the Cold War.²⁰ US withholding of payments to the UN dates from 1980,²¹ and there have been clashes between the United States and Europe (and elsewhere) over extra-territorial jurisdiction since the antitrust claims arising from the *Alcoa* case in 1945.²²

¹⁶ Arthur M. Schlesinger, Jr., *The Cycles of American History* (Boston, MA: Houghton Mifflin, 1986), at p. 83. Stuart Malawer referred to the ‘Reagan Corollary’ of international law, which he saw as supplementing the ‘Reagan Doctrine’ in foreign affairs. Stuart S. Malawer, ‘Reagan’s Law and Foreign Policy, 1981–1987: The “Reagan Corollary” of International Law’, *Harvard International Law Journal*, 29 (1988), pp. 85–109.

¹⁷ D. Moynihan, *Loyalties* (1984), at p. 67.

¹⁸ Burns H. Weston, ‘The Reagan Administration versus International Law’, *Case Western Reserve Journal of International Law*, 19 (1987), pp. 295–302, at 295.

¹⁹ Paul H. Kreisberg, ‘Does the US Government Think that International Law is Important?’, *Yale Journal of International Law*, 11:479 (1986), pp. 479–491, at 487.

²⁰ The ILC drew up two draft Statutes in 1951 and 1953. No further action was taken during the years of the Cold War; an international criminal court whose goals included the punishment of aggressive warfare was seen during these years as a threat to national sovereignty. Robert Rosenstock, ‘Symposium: Should There be an International Tribunal for Crimes Against Humanity?’, *Pace International Law Review*, 6 (1984), p. 84.

²¹ Sean D. Murphy, ‘Payments of US Arrears to the United Nations’, *AJIL*, 94 (2000), p. 348. In the late 1970s the US Congress expressed occasional frustration with the level of the UN assessments. On a few occasions, Congress threatened to act unilaterally to reduce US contributions with the aim of reaching a maximum assessment of 25 per cent of the regular budget. Jose E. Alvarez, ‘The United States Financial Veto’, *American Society of International Law Proceedings 1996*, p. 320. The US had, from the first session of the General Assembly, expressed this as being its goal. ‘United States Delegate Position Paper: Principal Issues Before Committee 5 (21 October 1946), in *Foreign Relations of the United States* (1946), p. 467.

²² Vaughan Lowe, ‘US Extraterritorial Jurisdiction: The Helms-Burton and D’Amato Acts’, *International and Comparative Law Quarterly*, 46 (April 1997), pp. 378–90, at 378. The United States has been credited with the distinction of perfecting the ‘art’ of unilateral sanctions on the international plane through the instrumentality of its domestic laws: V.S. Mani, ‘Unilateral Imposition of Sanctions through Extra-Territorial Application of Domestic Laws: A Tale of Two US Statutes’, *Indiana Journal of International Law*, 38 (1998), pp. 1–27, at 2. The trend was particularly apparent during the Cold War, aimed at the Soviet *bloc* or countries dealing with it. In response to the imposition of martial law in Poland at Christmas 1981 and imprisonment of the Solidarity

An even more generalised explanation of the phenomenon as a whole, which has often been drawn on by the US Government itself, is the idea of US exceptionalism. Deborah Madsen has argued that, ever since Founding Father James Madison saw America as an exceptional state,²³ an assumption of American exceptionalism has permeated American history:

Exceptionalism describes the perception of Massachusetts Bay colonists that as Puritans they were charged with a special spiritual and political destiny: to create in the New World a church and a society that would provide the model for all the nations of Europe as they struggled to reform themselves (a redeemer nation). . . . Thus, America and Americans are special, exceptional, because they are charged with saving the world from itself and, at the same time, America and Americans must sustain a high level of spiritual, political and moral commitment to this exceptional destiny – America must be as ‘a city on a hill’ exposed to the eyes of the world.²⁴

As described by Madsen, US exceptionalism is therefore about the US being a model for other states to follow. US exceptionalism is sometimes advanced by key figures in US foreign policy. Madeleine Albright proclaimed that ‘[w]e are not – most of us – crusaders. But we are proud that America is not just another country, and we want our foreign policy to reflect our status as the globe’s leading champion of freedom.’²⁵ Condoleezza Rice has referred to the United States as having a ‘special role in the world’.²⁶

While there is undoubtedly a belief in US exceptionalism amongst US decision-makers, it would not seem to be adequate to account for the US attitude towards international law simply because, if US leaders really believed themselves charged with ‘saving the world from itself’, they might be expected to model ‘genuine respect and support’ for international law, to place the development of the system as a whole ahead of self-interest. It is not surprising that US exceptionalism is therefore seen by many US observers as an excuse for the US refusing to accept the rules that

leadership the US took measures against the USSR, involving a prohibition on US exports of equipment and technology to be used in the construction of a natural gas pipeline from the Arctic regions of Siberia to Western Europe. Gary H. Perlow, ‘Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo’, *Case Western Reserve Journal of International Law*, 14:213 (1983), pp. 253–72, at 254. In June 1982 President Reagan extended the prohibitions to equipment manufactured abroad by foreign subsidiaries of US companies and even by wholly foreign-owned companies benefiting from technology licences granted by American firms. See discussion in Andreas F. Lowenfeld, ‘Congress and Cuba: The Helms-Burton Act’, *AJIL* 90 (1996), pp. 432–3. See also K. Blockstaff, ‘The Pipeline Affair of 1981/82: A Case History’, *German Yearbook of International Law (GYIL)*, 27 (1984), pp. 28–37; Detlav Vagts, ‘The Pipeline Controversy: An American Viewpoint’, *GYIL* 27 (1984), pp. 38–53. The measures were not popular with US allies in Western Europe and were enforced for only five months.

²³ Allan Gerson, ‘Multilateralism a la Carte: The Consequences of Unilateral “Pick and Pay” Approaches’, *AJIL*, 11:1 (2000), p. 62.

²⁴ Deborah L. Madsen, *American Exceptionalism* (Edinburgh: Edinburgh University Press, 1998), pp 1–2. America was once more required to save the world in the Vietnam War – not from misguided religious institutions this time, but from ‘corrupt political institutions that are inconsistent with the democratic capitalism that America is destined to exemplify and disseminate.’ The ‘setback’ in Vietnam was not seen as evidence that the ideology was wrong but that influential sectors of the American public had partially abandoned the ideology. ‘[L]ack of patriotic faith in the American mission defeats American purpose’. Deborah L. Madsen, *American Exceptionalism* (Edinburgh: Edinburgh University Press, 1998), p. 162.

²⁵ Madeleine K. Albright, ‘The Testing of American Foreign Policy’, *Foreign Affairs*, 77:6 (1998), p. 63.

²⁶ Condoleezza Rice, ‘Promoting the National Interest’, *Foreign Affairs*, 79:1 (January/February 2000), pp. 45–62.

it urges others to follow.²⁷ James Hathaway has defined American exceptionalism as ‘a belief that the United States has a unique mission to lead the world, but ought logically to be exempt from the rules it promotes’.²⁸ Hathaway was critical of the US’ capacity ‘to rationalize self-interested American unilateralism as a noble act of international leadership’.²⁹

A theoretical explanation of the US attitude towards international law would be able to reconcile the apparent discrepancy between the support that the United States showed for the system of international law in the immediate post-World War II years and the ongoing rhetoric in support of international law with the recent actions/inactions with which observers take issue. Without a coherent theoretical explanation of the US attitude towards international law – at least since World War II – we are left to respond only with justifications or with moral indignation. We have no adequate intellectual basis on which to debate alternatives and to seek change. At a time when the disciplines of International Law and International Relations are both seeking to develop interdisciplinary understandings of the political operation of international law, ongoing shock and horror at the ‘unprecedented’ US attitude towards international law is not enough.

Realism and international law

Efforts over the last decade to ‘bridge the gap’ between International Law and International Relations³⁰ have tended to seek links between international law and ‘Grotian’ approaches to world politics. Given the pessimistic attitude of realists towards international law it is not surprising that the assumption has generally been that interdisciplinary scholarship requires eschewing realism and forging connections with those who at least perceive world politics to include a meaningful space for international law.³¹ Even in its ‘weakest’ version, realism allows for only a very limited impact of international law in some very specific areas of low political

²⁷ ‘Anti-Americanism relies on American exceptionalism’. Bruce Grant, *A Furious Hunger: America in the 21st Century* (Melbourne University Press 1999), p. 214. See also ‘Rogue Nation’, *The Nation*, 272:21 (28 May 2001), p. 3.

²⁸ James C. Hathaway, ‘America, Defender of Democratic Legitimacy?’, *European Journal of International Law*, 11 (2000), pp. 121–34, at 121.

²⁹ *Ibid.*

³⁰ See, *inter alia*, Anthony Clark Arend, ‘Do legal rules matter: international law and international politics’, *Virginia Journal of International Law*, 38 (1998), p. 107; Kenneth W. Abbott, ‘Elements of a Joint Discipline’, Proceedings of the Annual Meeting of the American Society of International Law (1992), p. 167; Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt (eds.), *International Rules: Approaches from International Law and International Relations* (Oxford: Oxford University Press, 1996); and Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, *AJIL*, 92 (1993), p. 205.

³¹ ‘As international relations scholars have begun to reject the realist paradigm that places international law on the periphery of the relations of states, the potential for interdisciplinary scholarship between the two disciplines have flourished.’ J. Craig Barker, *International Law and International Relations: International Relations for the 21st Century* (London and New York: Continuum, 2000), p. 84.

significance.³² If we are to develop a generalised explanation of the US approach to international law, it would at first glance seem sensible to look to any theoretical approach other than realism for a lead.

On the other hand, realism has been particularly strong in both the International Relations field of academic enquiry and in the thinking of the United States Government since World War II³³ and the United States has certainly succeeded in the realist quest for power. On this basis, it would seem reasonable to expect that realist thought may have influenced US policy and actions in relation to international law. Perhaps it was no coincidence that some of the key US realist thinkers since World War II, including Morgenthau and Schwarzenberger, were, in fact, lawyers.³⁴ If we are going to provide one overall explanation of the attitude of the US towards international law, it may well be worth beginning by revisiting the key realist assumptions regarding the conduct of foreign policy, to see if they shed some light on our phenomenon under investigation. There is, of course, more than one school of realist thought.³⁵ But it is not the nuances of competing conceptualisations of realist philosophy that need concern us here. Let us rather begin by reviewing briefly the 'classic' writing of Morgenthau, the most influential realist theorist of the post World War II era, to see what he had to say regarding the conduct of state behaviour.

In his *Politics Among Nations: The Struggle for Power and Peace*, first published in 1948,³⁶ Morgenthau explained that all politics is a struggle for power.³⁷ Morgenthau believed that, if we appreciate that all actions taken by a state can be understood in terms of that state seeking to pursue its national interest as defined in terms of power, we will be able to understand the steps a statesman has or will take on the political scene, perhaps even better than he [sic] does himself. As a positive theory of how international politics works, realism is quite simple: [p]ower is what matters; and what matters in power is one's relative capabilities compared with those of others, especially other great powers.³⁸ States must not only seek to enhance their own power over other states but make sure that they are not vulnerable to others exercising power over them.

³² Andreas Paulus, 'Realism and International Law: Two Optics in Need of Each Other', 96 ASIL:

Proceedings of the 96th Annual Meeting of the American Society of International Law, 269 (2002).

³³ Consider, for example, the views of Condoleezza Rice, as expressed prior to the presidential election when she was Senior Fellow at the Hoover Institution and Professor of Political Science at Stanford University as well as foreign policy advisor to Republican presidential nominee George W. Bush. 'AMERICAN FOREIGN POLICY in a Republican administration should refocus the United States on the national interest and the pursuit of key priorities'. And a little later, 'POWER MATTERS, both the exercise of power by the United States and the ability of others to exercise it'. Condoleezza Rice, 'Promoting the National Interest', *Foreign Affairs*, 79:1 (January/February 2000), pp. 45–62.

³⁴ This is usually treated as a surprise or enigma. See Jutta Brunnee and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', *Columbia Journal of Transnational Law*, 39 (2000), p. 23, fn. 11.

³⁵ See, for example, Stephen D. Krasner, 'Realist Views of International Law', 96 ASIL PROC. 265 (2002).

³⁶ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 5th edn. (New York: Alfred A. Knopf, 1973), p. 5.

³⁷ *Ibid.*, p. 27.

³⁸ Thomas J. Christensen, 'Posing Problems without Catching Up: China's Rise and Challenges for US Security Policy', *International Security*, 25:4 (Spring 2001), pp. 5–40.

For realists, power and security are inextricably intertwined. Power matters because it is the key to national security. As Joseph Grieco explained:

Driven by an interest in survival, states are acutely sensitive to any erosion of their relative capabilities, which are the ultimate basis for their security and independence in an anarchical, self-help international context . . . [T]he fundamental goal of states in any relationship is to prevent others from achieving advances in their relative capabilities.³⁹

From a realist perspective, security is relative. In terms of military strength, there is no quantitative measure of military muscle that defines a state as 'safe' but rather its capacity relative to other states. Herz used the term 'security dilemma' to explain the resulting phenomenon:

Striving to attain security from . . . attack, [states] are driven to acquire more and more power in order to escape the impact of the power of others. This, in turn, renders the others more insecure and compels them to prepare for the worst. Since none can ever feel entirely secure in such a world of competing units, power competition ensues, and the vicious circle of security and power accumulation is on.⁴⁰

What is notable about Morgenthau's discussion of international law in *Politics Among Nations* is that it remained at a system-level, in a Part Four headed 'Limitations of National Power'. Morgenthau did not link his discussion of international law with that in Part Two on political power or even with that in Part Three on National Power. The discussion of state conduct was thus not integrated with that of international law. Many have noted the self-contradiction between the 'realist' and 'idealist' passages in *Politics among Nations*.⁴¹ Morgenthau had largely lost interest in international law after 1940; although he does make reference to it, his post-1940 writing is focused on political power and he failed to bring together his views on power and international law into one overarching theory.⁴²

In *Politics Among Nations* Morgenthau portrayed international law as a system seeking to constrain the powerful, and found it lacking. He was highly critical of what he perceived to be the absence of an effective international judicial system and of serious weaknesses in the system of enforcement. Viewing international law from a systems-level perspective, Morgenthau considered that its primitive system of law enforcement made it easy for the strong both to violate international law and to enforce it, thereby putting the rights of the weak 'in jeopardy'.⁴³

The inadequacies of international law were a disappointment to Morgenthau. The disappointment we find in *Politics Among Nations* is that we have witnessed more recently in the writing of the critical theorists in international law;⁴⁴ it is the

³⁹ Joseph M. Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism', *International Organization*, 42:3 (Summer 1988), pp. 485–507.

⁴⁰ John H. Herz, 'Idealist Internationalism and the Security Dilemma', *World Politics*, 2 (1950), pp. 157–8.

⁴¹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), p. 465.

⁴² *Ibid.*, 464–5.

⁴³ Morgenthau, *Politics Among Nations*, p. 27.

⁴⁴ Cf. Shirley Scott, 'Some Reflections on the New Stream', *Australian and New Zealand Society of International Law: Proceedings of the Fifth Annual Conference 29 May–1 June 1997* (Canberra: The Centre for International and Public Law, 1997), pp. 117–120.

disappointment of a legal positivist.⁴⁵ As a theory internal to international law, legal positivism posits that international law derives from the will of states; legal positivists are aware that states do not always comply with their international law obligations but assume that they *should* do so.⁴⁶ Legal positivism does not endeavour to provide explanations of political phenomena; indeed, within a positivist framework questions of legality are settled through the specific exclusion of all considerations of politics and morality.

Trained as a lawyer, Morgenthau was unable to escape his positivist perspective on international law even when writing a treatise on the impossibility of a state escaping the need to seek continually to enhance its power. In this Morgenthau was, in a sense, breaking his own rules, for Morgenthau emphasised the autonomy of the political sphere, to which all other standards of thought, including the moral, must be subordinated.⁴⁷ Morgenthau was well aware of the moral significance of political action but asserted that the state must be inspired by the moral principle of national survival. While the individual has the right to sacrifice him/herself for moral principles, the state has no right to sacrifice all those who are in its care. Realists believe that theirs is a theory 'which tries to understand international politics as it actually is and as it ought to be in view of its intrinsic nature, rather than as people would like to see it'.⁴⁸ From a realist perspective it is therefore irrelevant as to whether we consider US actions in relation to international law moral or immoral. As private individuals we may well have moral values but in seeking to account for the behaviour of the United States towards international law such values are irrelevant. Disappointment at international law not being adequate to constrain power, or moral condemnation of the 'US attitude' can thus both be seen to stem from an extension of legal positivism to the domain of political investigation and explanation.⁴⁹

Morgenthau defined power simply as 'man's control over the minds and actions of other men'.⁵⁰ And so, even though Morgenthau did not endeavour to explain the specific ways in which a state might use international law to enhance its power advantage, it is possible to build on his understanding of the fundamental operation of power politics so as to encompass the use of law to exert influence over others and to minimise the influence of other states over one's own policies and actions. The next section of this article will thus be devoted to extending Morgenthau's theory of state behaviour as found in *Politics Among Nations* to encompass the treatment by a state of international law, to see if this can help us understand the identified US 'attitude' to international law.

⁴⁵ J. Craig Barker notes that Morgenthau was strongly positivist. J. Craig Barker, *International Law and International Relations* (London and New York: Continuum, 2000), p. 73.

⁴⁶ F. Boyle, *World Politics and International Law* (Durham, NC: Duke University Press, 1985), p. 59.

⁴⁷ Morgenthau, *Politics Among Nations*. According to Morgenthau, the lawyer might ask whether a policy accords with the rules of law; the political realist asks how a particular policy affects the power of the state. *Ibid.*, p. 11.

⁴⁸ *Ibid.*, p. 15.

⁴⁹ This is comparable to the way economists used to discuss political questions before the creation of International Political Economy as a field of study. See discussion in Shirley Scott, 'Teaching International Law to Non-Lawyers', *International Legal Challenges for the Twenty-first Century*. Proceedings of a Joint Meeting of the Australian & New Zealand Society of International Law and the American Society of International Law, 26–29 June 2000, pp. 199–201.

⁵⁰ Morgenthau, *Politics Among Nations*, p. 28.

In doing so we will have to take account of recognised limitations of realism. Realism has in recent years met with considerable criticism on several grounds including its focus on states to the virtual exclusion of other actors such as multinational corporations and its neglect of the domestic arena as a determinant of outcomes in world politics (for example, internal troubles in the USSR contributing to the end of the Cold War). And, in recent years, security analysts have broadened understandings of security to encompass not only military and economic security, but environmental security⁵¹ and human security.⁵² Here, too, states are no longer the sole referent; the analytical focus of security studies now spans the individual, the group, the nation/state, the region, and the international.⁵³ It is likely that, through applying the basic tenets of a realist understanding of state behaviour to the attitude of the United States towards international law, we may also gain an appreciation of what we might understand by the legal security of a state.

Extending Morgenthau's theory of state behaviour to encompass a state's strategic use of the system of international law

The rule of law is . . . an essential contributor to American security.⁵⁴

Realists believe that states are constantly involved in struggle. At its most fundamental, this is a struggle for survival in an anarchic system. Beyond mere survival, states struggle to enhance their power relative to other states. The foreign policy of a state must therefore be designed to pursue the national interest as defined in terms of power. Security derives from being in a position of power relative to other states and from being able to influence what other political actors do more than they can impact on one's own policy choices and behaviour. If we now apply these basic principles to the issue of the relationship of US foreign policy to international law, many US policies and actions would appear to match what we might expect of a state seeking to maximise its relative power *via* international law.

International law is in a process of continuous evolution. A state seeking to maximise its relative power in all issue areas might therefore be expected to seek to influence the evolution of the substantive rules of international law such that they help to increase its relative power in a given issue area. Treaty negotiations can be

⁵¹ For a guide to literature on this topic that is available on the World Wide Web, see Marc A. Levy, 'Exploring Environment-Security Connections', *Environment*, 41:1 (January/February 1999), p. 3.

⁵² See, for example, Lloyd Axworthy, 'Human Security and Global Governance: Putting People First', *Global Governance*, 7 (2001), pp. 19–23 and Howard Adelman, 'From Refugees to Forced Migration: The UNHCR and Human Security', *International Migration Review*, 35:1 (Spring 2001), pp. 7–32.

⁵³ Eric K. Stern, 'Bringing the Environment In: The Case for Comprehensive Security', *Cooperation and Conflict*, 30:3 (1995), pp. 211–37, at 213. Influential in suggesting new referents for security was Barry Buzan's book: *People, States and Fear* in which he advocated conceptualising security at the level of the individual, the state, and the international system. Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd edn. (New York: Harvester Wheatsheaf, 1991).

⁵⁴ Secretary of State Madeleine K. Albright, 'Remarks at the National Judges College Beijing, China, 30 April 1998. As released by the Office of the Spokesman, US Department of State.

viewed as an opportunity to improve a state's relative power in a given issue area. It is possible to find a number of instances in which the US has done precisely this, including in the military arena. The Nuclear Non-Proliferation Treaty is an example of blatant inequality,⁵⁵ which has served to confirm the military lead of the nuclear powers, including the United States, over non-nuclear weapon States. Less obvious might be the prohibition on the use of force in the UN Charter.⁵⁶ While all states are bound equally by article 2(4), peace favours the *status quo*.

Economic security might be enhanced by the negotiation of treaties that increase the economic power of one's own state relative to that of other states. The international economy is competitive. It is nominally free trade, but there are many exceptions and not all goods are traded with equal freedom. In negotiating a free trade agreement it is important to ensure that the products that one wants to export most are included in the agreement but those for which one is primarily an importer are not covered. In such negotiations, the unspoken goal of an individual state as perceived from a realist perspective could be thought of as being to have complete freedom to enter other markets and yet to retain some capacity to control entry into one's own market.⁵⁷ The US was in favour of the Uruguay Round because it promised tariff cuts that would be far larger abroad than in the US, so helping the US export an extra \$250 bn per year in ten years.⁵⁸

The United States has on occasion influenced the policies of other states while at the same time limiting the influence of those states over the relevant policies of the United States by participating actively in negotiations for a multilateral treaty and then not signing the ensuing treaty. Other states are thereby bound to specific obligations in whose determination the US has played an influential role, making it easier for the United States to predict what others are going to do, but not being bound itself. The League of Nations was perhaps the most obvious example of this phenomenon but others include the 1951 *Convention Relating to the Status of Refugees* and the *Convention on the Rights of the Child*.

A 'realist' understanding of security, it will be remembered, involves being relatively more powerful than other states; power relates to the extent to which one

⁵⁵ Article I provides: 'Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.' Article II states 'Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.'

⁵⁶ 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

⁵⁷ *Time International* commented in relation to Seattle: 'Despite the free trade rhetoric, the aim of many countries seemed to be how to promote its own exports – and, as much as possible, avoid one another's imports.' 'The Battle in Seattle: Never Mind the Riots. The real threat to the WTO's free-trade agenda lies in discord among member nations.' *Time International*, 154:23 (13 December 1999), p. 22.

⁵⁸ Fact Sheet: 'Benefits of the Uruguay Round', US State Dept Dispatch Supplement, vol. 5, supplement no. 6 (July 1994), accessed 9 January 2001. <<http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1994/html/Dispatchv5Sup06.html>> Accessed 9 January 2001.

state can exert influence over the policies and actions of other states. International law can contribute to the security of a state. The notion of enhancing legal security denotes more than that of preventing a 'loss of sovereignty'. Some opposed to the apparent loss of state power through the process of globalisation view any participation in international law and institutions as an undesirable loss of sovereignty on the part of the state, believing that a state needs to make all the laws relevant to its people and territory itself and to eschew entirely international law and institutions. This understanding of the dangers of engagement is facilitated by the usual legal definition of 'sovereignty' in terms of independence from other states, as per Max Huber in the *Island of Palmas Arbitration*.⁵⁹ But, in political terms, sovereignty is better understood as the legal (and political) capacity to implement one's preferred policies.

Giving over the day-to-day policymaking to an international institution may be an efficient use of one's legal capacity in that it may better facilitate a state meeting its domestic responsibilities while at the same time enhancing its power in relation to other states, so long as that institution is pursuing a desirable policy approach and so long as one retains the capacity to alter one's own policy direction if one wants to. If a state wishes to pursue a free trade policy, for example, it may well be in its interests to participate in a free trade regime so long as it retains the capacity – whether by working within the system, changing the system, or in the extreme by opting out of the system – to implement some protectionist policies if it wishes to do so. Isolation from the international community may in fact lessen a state's relative power and leave it without the means to enhance its influence over the policies of other states.⁶⁰ What will facilitate the pursuit of greater relative power on the part of a state is its selective engagement with international law and institutions.

This extension of Morgenthau's thinking on the behaviour of states to encompass actions in relation to international law-making would lead one to expect that the United States would monitor closely the evolution of international law and institutions and participate only if and when it appeared to be in its policy interests to do so. It should not be surprising, then, that the United States retreated from the Kyoto Protocol which was to reduce the demands placed on developing states in comparison with developed in addressing the issue of climate change. The United States was careful not to become bound by a Landmines Convention that it considered to detract from the interests of US military security, especially on the Korean Peninsula.⁶¹ In the case of the International Criminal Court the United States did a triple flip as it evaluated and re-evaluated the repercussions of its involvement or lack thereof: participating in the negotiations, not signing, signing just before the deadline for doing so, and then 'unsigned'. When it became likely that the Treaty was going to enter into force and the deadline for signature was only

⁵⁹ 'Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.' *AJIL*, 22 (1928), p. 875.

⁶⁰ Cf. the argument in Peter J. Spiro, 'The New Sovereignists – American Exceptionalism and Its False Prophets', *Foreign Affairs*, 79:6 (November–December 2000), p. 9.

⁶¹ Christian M. Capece, 'The Ottawa Treaty and Its Impact on US Military Policy and Planning', *Brooklyn Journal of International Law*, XXV: 1 (1999), pp. 183–204, at 183–4.

hours away, Clinton authorised the United States to sign, although he recommended that the treaty not be submitted to the Senate for ratification until what he called 'significant flaws' had been addressed. 'With signature, we will be in a position to influence the evolution of the court' the President is quoted as saying. 'Without signature, we will not'.⁶² Later, dissatisfied that the Court would reflect US interests, the US announced that it would not proceed to ratification. In the case of the 1982 United Nations Convention on the Law of the Sea the United States did not sign until a subsequent agreement was negotiated that was deemed favourable to US interests.

International law does not consist only of substantive rules, principles, and concepts. It has at its core a body of law that governs the operation of the legal system itself: how international law is created, its relationship with municipal law, ways of monitoring and of enforcing compliance, and judicial mechanisms that determine disputes over questions of legality. It is these systemic rules that are the key to the legal security of a state, to reducing the vulnerability of a state to having other states seeking to influence one's own policy choices in various issue areas, as well as to being able to enhance one's own impact over the policy choices of another state. While having the substantive content of international law in one's favour may enhance the relative military, economic, or other form of power, of a state, legal security – the capacity to change one's policy choices and thereby influence those of others more so than others can influence one's own choices – comes through having favourable systemic rules. Of most importance here are the rules governing the operation of the Security Council, and in particular, the veto power of the permanent members. A decision of the Security Council is binding on all members of the UN.

Making strategic use of international law so as to enhance the (realist) quest for power could be expected to include not only the formulation of the substantive and structural rules of international law but also the enforcement of those rules. The 'National Security Strategy for the United States', transmitted to Congress in January 2000, listed as the first of three core objectives of US national security that to 'shape the international environment through, *inter alia*, diplomacy and law enforcement'.⁶³ The 'realist' aim in relation to the enforcement of international law as a mechanism by which to increase one's influence over the policies and actions of other states but to reduce as much as possible the influence of other states over one's own policies and conduct, would be to be in a position to determine against whom, and when, rules of international law are enforced and to make sure that they are enforced against oneself as seldom as possible. The United States institutionalised this capacity through the role of the Security Council in the United Nations Organisation. Of course the question as to whether a particular action complies with international law or whether it is an enforcement action is not intrinsic to a particular action or inaction but is established by rhetoric. The United States has made considerable use of the rhetoric of enforcement to justify actions that would

⁶² US President 'makes history' in last-minute assent to war crimes court'. *The Sydney Morning Herald*, 2 January 2001, at p. 9.

⁶³ 'Contemporary Practice of the United States: US National Security Strategy', *AJIL*, 94 (2000), at p. 380.

otherwise be illegal. It maintained, for example, that its use of force against Iraq was to enforce the cease-fire agreement [rather than to ensure that it retain its power differential with Iraq]. This line of argument has been ‘bought’ by the international community, legal debate centring on the details of when and how the Security Council can authorise the use of force⁶⁴ rather than on whether the United States was really involved in enforcing international law as opposed to simply acting to retain or increase its existing power differential with Iraq.

When ratifying a treaty the United States is careful that so far as possible it has not given away the capacity to formulate and enforce the law to be applicable to US citizens in that issue area. Where the US does ratify an international human rights treaty the accession is always qualified by a reservation that denies any obligations inconsistent with the US Constitution.⁶⁵ Legislation to implement the Uruguay Round agreements provided that United States’ law take precedence in the event of a conflict with one of the Uruguay Round Agreements and that WTO decisions do not have the power to change United States law.⁶⁶

The United States has accepted the ‘quasi-automatic, rules-based dispute settlement system’ of the WTO but the enforcement of the decisions of the Dispute Settlement System remains primarily power-based, favouring the strong; it is difficult to see how a weak country would benefit by imposing countermeasures on the strong.⁶⁷ A system of international dispute resolution that appears to place the United States on an equal footing with all other participants in the system thus does not do so in practice. As the most prolific user of the WTO dispute settlement system, the United States has more to gain from the system than most states.⁶⁸

When it comes to verification of compliance, a realist perspective would suggest that a state would ideally aim for a situation in which it could make sure that others complied but do so itself only when it wants to. This requires having verification measures that check up on other states more stringently than on itself. When the United States passed legislation to implement the Chemical Weapons Convention it included unilateral exemptions and restrictions that weakened verification of US compliance.⁶⁹

The realist aim in relation to international judicial proceedings would be to be able to take another state to a form of dispute resolution as a means of exerting

⁶⁴ See, for example, Frederic L. Kirgis, ‘The Security Council’s First Fifty Years’, *AJIL*, 89 (1995), pp. 506–539. Jules Lobel and Michael Ratner, ‘Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime’, *AJIL* (1999), pp. 124–54; John Quigley, ‘The “Privatization” of Security Council Enforcement Action: A Threat to Multilateralism’, *Michigan Journal of International Law*, 17 (1996), pp. 249–83; Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Clarendon, 1999).

⁶⁵ James C. Hathaway, ‘America, Defender of Democratic Legitimacy?’, *European Journal of International Law*, 11 (2000), pp. 121–34, at 134.

⁶⁶ William R. Sprance, ‘The World Trade Organization and United States’ Sovereignty: The Political and Procedural Realities of the System’, *American University International Law Review*, 13 (1998), pp. 1225–65, at 1263.

⁶⁷ Joost Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach’, *AJIL*, 94 (2000), pp. 335–47.

⁶⁸ Sprance, ‘The World Trade Organization and United States’ Sovereignty’, pp. 1225–65, at 1264.

⁶⁹ Jonathan B. Tucker, ‘Nonproliferation Regimes at Risk: Challenges to the Chemical Weapons Convention’. CNS Occasional Papers #3. <<http://www.cns.miis.edu/pubs/opapers/op3/tucker.htm>> Accessed 6 January 2001.

influence over its actions and policies but to be much less accountable oneself. Back in the days of the League of Nations, Henry Cabot Lodge, Chairman of the Senate Foreign Relations Committee, asked for 14 conditions to the treaty establishing the League, including language to ensure that the United States remains the sole judge of its own internal affairs and that the League not restrict any individual rights of US citizens.⁷⁰ In more recent times, the US ‘never allows its own citizens to seek the review of domestic human rights determinations before international bodies’,⁷¹ and, ‘with respect to ICJ adjudication of issues arising out of such a treaty, a typical US reservation declares that the US will agree to ICJ jurisdiction if, at some future time, the US actually does agree’.⁷² But the US did support the establishment by the Security Council of the *ad hoc* tribunals to address human rights atrocities elsewhere. In 1997 the Senate and House of Representatives endorsed the creation of an international criminal tribunal for the purpose of prosecuting President Saddam Hussein.⁷³

The United States sought to continue the structural advantage it had in respect of the *ad hoc* tribunals through a permanent criminal court to which cases were referred by the Security Council rather than initiated by a prosecutor. But a text emerged which provided for a two-track system of jurisdiction; situations could be referred to the Court by the Security Council and the jurisdiction of the Court would also come into play when domestic authorities were unable or unwilling to prosecute. The Court only has jurisdiction over a crime if the state or territory where the crime was committed or the state of nationality of the perpetrator of the crime is a party to the treaty or has granted its voluntary consent but the US objected to the fact that this meant that official actions of a non-party state could be subject to the court’s jurisdiction.⁷⁴ The US proposed instead that a state party should be entitled to limit its exposure to the court ‘unless, of course, the Security Council referred a situation to the ICC under its Chapter VII powers’.⁷⁵ Senator Jesse Helms, Chairman of the US Senate Committee on Foreign Relations, told the Security Council:

Consider: the Rome Treaty purports to hold American citizens under its jurisdiction – even when the United States has neither signed nor ratified the treaty. In other words, it claims sovereign authority over American citizens without their consent. How can the nations of the world imagine for one instant that Americans will stand by and allow such a power-grab to take place?⁷⁶

⁷⁰ ‘Address by Senator Jesse Helms Chairman, US Senate Committee on Foreign Relations before the United Nations Security Council’, 20 January 1999. <<http://www.senate.gov/~foreign/2000/pr012000.cfm>> Accessed 22 August 1999.

⁷¹ James C. Hathaway, ‘America, Defender of Democratic Legitimacy?’, *European Journal of International Law*, 11 (2000), pp. 121–34, at 134.

⁷² Jordan J. Paust, ‘Domestic Influence of the International Court of Justice’, *Denver Journal of International Law and Policy*, 26:5 (Mid-Summer 1998), p. 787.

⁷³ Sean D. Murphy, ‘Contemporary Practice of the United States relating to International Law’, *American Journal of International Law* (2000), p. 104.

⁷⁴ See explanation in Michael P. Scharf, ‘Results of the Rome Conference for an International Criminal Court’, *ASIL Insight*, August 1998. <<http://www.asil.org/insigh23.htm>>

⁷⁵ David J. Scheffer, ‘The United States and the International Criminal Court’, *AJIL*, 93 (1999), pp. 12–22, at 19.

⁷⁶ ‘Address by Senator Jesse Helms Chairman, US Senate Committee on Foreign Relations before the United Nations Security Council’, 20 January 1999. <<http://www.senate.gov/~foreign/2000/pr012000.cfm>> Accessed 22 August 1999.

Following entry into force of the Statute, the United States attempted to negotiate ‘impunity agreements’ by which to prevent US nationals accused of crimes within the jurisdiction of the ICC from being surrendered to the International Criminal Court.⁷⁷ The United States is, on the other hand, party to a number of anti-terrorism treaties that empower States Parties to investigate and prosecute perpetrators of any nationality found within their territory. ‘The United States has exercised jurisdiction over foreigners on the basis of such treaties, without the consent of their state of nationality [and even where the State of nationality was not Party to the Treaty].’⁷⁸

Implications of an extension of Morgenthau’s thinking for understanding the US and global security in the new millennium

The impact of the United States over international law has been preponderant at least since World War II and probably since Versailles. While we think of the advent of unipolarity as having coincided with the end of the Cold War, the two superpowers were, in an overall sense, ‘hardly equal’;⁷⁹ nor did they have equivalent influence over the system of international law. Grewe divided the history of modern international law into epochs, the divisions between which were ones of great upheaval in the international system. Each epoch was dominated by the great power of that age: Spain from 1494 to 1648, France from 1648 to 1815, and Britain from 1815 to 1919.⁸⁰ If we look back to where the international system was fundamentally different – particularly in terms of his criteria of constitutional development – and during which the US has been the point of reference for legal debates, then we need to go back probably to 1919. The United States has had a fundamental influence on international law throughout these years; that influence has sometimes been indirect (for example, non-membership of the League of Nations) but so was that of Britain during the nineteenth century. At neither the end-of-World War II nor end-of-Cold War divides was the US the losing party and in both cases the basic ‘constitutional’ structures of the international system have displayed strong elements of continuity. The UN and the League have had more in common than did the League and the Concert of Europe, and the Permanent Court of International Justice (PCIJ) and International Court of Justice more in common than the PCIJ and the Permanent Court of Arbitration. Grewe believed that the dominant power was the one against

⁷⁷ See Amnesty International, ‘International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes against Humanity and War Crimes’, August 2002; and Coalition for the International Criminal Court, ‘Bilateral Agreements Proposed by US Government’, and ‘Experts Available: US Threatening to Withhold Military Aid over ICC Experts Refute Legality of Immunity Agreements US is Seeking’, August 2002, obtainable at <<http://www.iccnw.org>>

⁷⁸ Richard Dicker of Human Rights Watch, cited in Michael P. Scharf, ‘Results of the Rome Conference for an International Criminal Court’, *ASIL Insight*, August 1998. <<http://www.asil.org/insigh23.htm>>

⁷⁹ William C. Wohlforth, ‘The Stability of a Unipolar World’, *International Security* 24:1 (Summer 1999), pp. 5–12, at 6.

⁸⁰ William G. Grewe, *The Epochs of International Law*, Translated and revised by Michael Byers, (Berlin: de Gruyter, 2000).

whose ideas regarding the system of international law all others debated,⁸¹ and this has been the case in relation to the US ever since the League was being established. It was the entry of the US into World War II that set in motion discussion regarding the new system to prevent wars,⁸² and the United States that had by far the most influence over the resulting UN Charter.⁸³ To be sure the US had to compromise on some points but then, like today, it was the US ideas regarding international law against which all others debated.

It has been suggested in this article that the twentieth century was not only the era of United States' dominance over the international legal system but also of the contribution of international law to US national power, understood in the sense of influence over the policies and actions of other states. The actions to which critics object have not necessarily been 'illegal' – as in the case of the US' lack of support for the Ottawa Landmines Convention, and they have not necessarily been unilateral – as for example, its use of force during the Kosovo crisis. But they add up to a certain attitude towards international law to which many observers have objected.

This article has extended Morgenthau's understanding of state behaviour to demonstrate that, if one accepts that states are primarily engaged in a struggle for greater power and that a perception of security derives from a position of greater relative power, then it is not difficult to accept that international law is integral to that struggle. Where there might appear to have been a considerable break with the past US approach to international law – as for example in the case of the US support for institution building after the Second World compared with its less than all-out support for an International Criminal Court, the element of continuity remains. The Charter served to reinforce US power and hence security, just as the current Administration may think that an international criminal court dependent for its operation on the Security Council would do so today. Viewing the United States' identified 'attitude' towards international law as the manifestation of its ongoing quest to enhance its relative power and thereby its legal security permits us to reconcile the 'two faces' of US actions in respect of international law.⁸⁴

⁸¹ Cf. Grewe, *Epochs of International Law*, p. 24. It was the Spanish age 'because the ideas held by the State which fought against Spain were not only marked by the colour of this age but also entangled in a polemical dependence on Spanish ideas and concepts'.

⁸² Bruno Simma, *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994), p. 2.

⁸³ *Ibid.*, p. 11.

⁸⁴ 'World Law and World Power', *The Economist (US)*, 349:8097 (5 December 1998), p. 16.