Identifying the Source and Nature of a State's Political Obligation Towards International Law

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It is not 'new' to be interested in the relationship between international law and its political context. It is not even 'new' to theorize connections between the two—consider Abram Chayes's 1974 functionalist analysis of the role of international law in the Cuban Missile Crisis,[1] or the work of the New Haven scholars. In seeking to respond to the query as to what I thought had been achieved through the interdisciplinary dialogue of the last ten to fifteen years, I have avoided the temptation to summarize the history of inter-disciplinary scholarship or to offer a panoramic overview of recent publications in the field. I have instead taken as my stepping-off point literature in key mainstream journals of both disciplines written on the 'core' issue of the 2003 invasion of Iraq. If interdisciplinary enquiry has really 'gotten somewhere' over the last ten to fifteen years, it is here, at the heart of each discipline, that its presence should be making an impact.

A mere glance through several mainstream journals, including *The International and Comparative Law Quarterly* and the *European Journal of International Relations*, suffices to demonstrate that linking politics and law is an accepted mainstream activity in both disciplines (though this is less apparent in the policy-oriented *Foreign Affairs*). The military action against Iraq has been widely recognized as constituting 'one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century.'[2] The basic legal question posed by the use of force against Iraq has therefore been that as to the impact, if any, of the United States-led military action on the specific content of the law of the use of force. Precisely because those lawyers undertaking black-letter, positivist, international legal analysis are not, by definition, investigating political context,[3] however, the vast majority of writings linking the politics with

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1 Abram Chayes, *The Cuban Missile Crisis* (London: Oxford University Press, 1974).

2 Lori Fisler Damrosch & Bernard H. Oxman, 'Editor's Introduction', *Agora: Future Implications of the Iraq Conflict* (2003) 97 Am. J. Int'l L. 553 at 553.

3 As encapsulated in Vaughan Lowe's comment that lawyers must 'explain what was the reason for using force against Iraq. Not the elusive motive—oil, or whatever has been the motive for invading Iraq … but the reason, which, if translated into a norm with legal force would become the justification which might be invoked in future by the US, the UK, or any other State in similar circumstances.' 'The Iraq Crisis: What Now?' (2003)

the law are in fact attempting to answer a political question regarding international law and the use of force against Iraq. The core political question regarding international law and Iraq has been that as to the effect of the military action on the future authority of the international legal system as a whole.

Recent theoretical literature on the political operation of international law, some written by lawyers and some by political scientists, can mostly be placed in the category of 'middle-range theorizing'. That is, it has offered a generalized explanation of one aspect or dimension of the international law-world politics relationship, such as that as to why states comply with 'normative structures' or 'alliances' or how to enhance their propensity to do so,[4] as opposed to developing a 'grand' theory of the relationship between international law and world politics as a whole. What is even more notable about recent interdisciplinary writing is, however, its diversity, causing me to ponder whether there is any sense in which those of us interested in the political functioning of international law can be said to share a common purpose. At the risk of being overly simplistic, but also to use my available word limit to be at least a little controversial, I have decided to answer in the affirmative—to say that yes, underpinning our various explorations, we could be said to be embarked on a common quest. After briefly outlining what I believe that quest to be, and my reasons, I will go on to offer my own perspective on the elusive goal of that quest.

I WHAT IS IT WE ARE SEEKING TO EXPLAIN THROUGH INTERDISCIPLINARY ENQUIRY?

If those practicing public international law or those undertaking black-letter scholarly analysis did not assume a normative role for international law they would no doubt come to find their work futile. Such lawyers are, more obviously on some occasions than on others, 'doing' international politics. Those attempting interdisciplinary analysis of the political operation of international law are, on the other hand, 'analyzing' international politics. They also tend to assume a normative role for international law. If one did not believe that international law functions normatively in world politics, why would one bother attempting to explain the nature of that role? Or why, for example, would one bother to advocate changes to legal institutions and

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52 Int'l & Comp. L.Q. 859 at 861.

4 For some recent International Relations contributions, though ones minimizing use of the 'l' word, see Brett Ashley Leeds, 'Alliance Reliability in Times of War: Explaining State Decisions to Violate Treaties' (2003) 57 Int'l Org. 801; and Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 European Journal of International Relations 189.

structures so as to shore up international law against pressure to weaken its limitations or resort to war?[5]

I would like to propose, firstly, that those of us engaged in drawing scholarly links between international law and politics share a belief that there is a normative role for international law, and secondly, that as a consequence of our belief in a normative role for international law, we sense a political obligation on the part of states towards international law. We may not all have thought of it in those terms, we may not have identified the source or defined the nature of that political obligation, and not all our writing points directly towards that goal, but explicating that obligation is the logical end point of our endeavours.

There is little doubt that a state is under a *legal* obligation to comply with international law. What is law, after all, but a system of rules, principles, norms, and concepts specifying the rights and obligations of its subjects? Certainly, those who act, as opposed to speculate, in international affairs—judges, diplomats, and statesmen—unhesitatingly assume the existence of such an obligation.[6] Because international law draws strength from the logical coherence of its system of thought, the source of the legal obligation to comply with international law must necessarily be located within the system of international law, not of international politics.[7] One of the most fundamental questions asked within the jurisprudence of international law is that of the source of the obligation to comply. Within a modern positivist framework the source of the binding quality of legal rules is the consent of states themselves.[8] Consent underpins and provides coherence to the mass of rules, principles, and concepts of international law as a whole, providing a foundation for sources jurisprudence.[9]

What I am suggesting is that a state may also be under a distinct *political* obligation towards international law. That obligation would appear to be broader than the legal obligation; it would include 'respecting' and 'supporting' the system rather than just compliance per se. Indeed, while compliance may be at the root of a state's legal obligation, the indeterminacy of international law means that compliance cannot also constitute the political obligation: it would not

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5 Jutta Brunnée & Stephen J. Toope, 'The Use of Force: International Law After Iraq' (2004) 53 Int'l & Comp. L.Q. 785.

6 H. Lauterpacht & C.H.M. Waldock, eds., *The Basis of Obligation in International Law and other Papers by the Late James Leslie Brierly* (Oxford: Clarendon, 1958) at 19.

7 See Christian Reus-Smit, 'Politics and International Legal Obligation' (2003) 9 European Journal of International Relations 591.

8 P.E. Corbett, 'The Consent of States and the Sources of the Law of Nations' (1925) 6 Brit. Y.B. Int'l L. 20.

9 Alternatives have been proffered. See the list in Oscar Schachter, 'Towards a Theory of International Obligation' (1968) 8 Va. J. Int'l L. 300.

be sufficiently clear-cut as to whether the obligation had or had not been upheld. While a state may sometimes get away uncensored (other than by some international lawyers) with actions that do not meet its legal obligation to comply, state behaviour and rhetoric that fails to meet the political obligation—especially that relating to questions of high political moment—is likely to invite general condemnation. This political obligation of a state in relation to international law may thus be recognizable primarily by the effects of its not having been upheld.

The United States has, for example, faced widespread criticism for actions that are not necessarily illegal. Take the American decision to withdraw from the *ABM Treaty* or to not ratify the *Statute of the International Criminal Court*, or the selective attitude of the United States towards international human rights law. If criticism of the actions or inactions of the United States in relation to international law that are not necessarily questions of compliance came only from those who were advocates of human rights, or the environment, or arms control, it might be that such criticism did not assume any particular obligation of the United States towards international law. Even strongly voiced warnings that the American 'attitude' towards international law is damaging the international legal system could be interpreted as political support in favour of particular causes, whether human rights, the environment, or arms control. But the voices warning of United States-inflicted damage to international law as a system have in recent years been so vociferous and so widespread as to suggest that there may be a perceived political obligation of a state towards international law in addition to the straightforward legal obligation to comply, and that the United States has been in breach of that obligation.

The last five years has witnessed three uses of force on the part of the United States and its allies whose legality has been the subject of considerable debate. While in strict positivist terms the majority of international lawyers did not consider legal the use of force against the Federal Republic of Yugoslavia during the Kosovo crisis, the apparent moral rectitude of the objectives of the NATO states largely excused the borderline legality of the bombing, at least amongst international lawyers in the NATO states. Afghanistan stretched the window of self-defence but the horrors of '9/11' and the extensiveness of the Coalition support pre-empted most criticism. To some, such as Anne-Marie Slaughter, then president of the American Society of International Law, it at first appeared as if Iraq might fit the pattern of possible legitimacy despite dubious legality.[10] One year later, however, mainstream scholarly opinion, even in the United States, had turned decidedly

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[10] See Anne-Marie Slaughter, 'An American Vision of International Law?' (2003) 97 Am. Soc'y Int'l L. Proc. 125.

against both the legality and the legitimacy of the American invasion of Iraq.[11]

A sceptic might suggest that the hardening of opinion against the legality of the invasion was due primarily to ongoing resistance in Iraq. But continuing violence in Afghanistan had not impacted on the regard in which that use of force was held; nor has there been a comparable revisionist interpretation of Kosovo. It would seem that other events relating to the occupation of Iraq may have impacted on the perceived legitimacy of the initial use of force, in particular the failure to find weapons of mass destruction, the obvious economic benefits received by American individuals and corporations from the occupation, and revelations of prisoner abuse. These did not in any direct way impact retrospectively on the legality of the initial invasion, pointing to the fact that opinion may have turned so squarely against the use of force not only because of a recalculation of whether it had been 'legal' but because of what had been revealed during this episode about the political treatment of international law. I want to suggest that while, depending on one's legal opinion, the initial use of force broke a legal obligation towards international law, it was subsequent American rhetoric and behaviour that failed to meet the political obligation of the United States towards international law.

II IDENTIFYING THE SOURCE OF THE POLITICAL OBLIGATION TOWARDS INTERNATIONAL LAW

Those in the broad realist family of scholarship do not, of course, think that international law counts for much in terms of sheer political weight. From a realist perspective the obligation of a state's rulers is to look after the interests of the state, defined in terms of increasing relative power and security. Indeed, this political obligation might on occasion require a decision-maker to breach or forego support for the system of international law if this were required in order to uphold the 'national interest'. Realism is unlikely to offer us much help in defining the nature of a political obligation towards international law.

What might broadly be classified as liberal approaches to international law maintain, on the other hand, that law is capable of enhancing peaceful relations between states—so long as states comply with their legal obligations. Thus, a liberal would generally share with a legal positivist the belief in the core obligation of a state to comply with international law, with the rationale that if all states were always to do so, the world would be a better and more peaceful place. Writers have offered various explanations as to why states generally comply with international law—often talking in terms such as reciprocity, mutual

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[11] Anne-Marie Slaughter, 'Reflecting on the War in Iraq One Year Later' *Newsletter of the American Society of International Law* (March/April 2004) 2.

obligation, shared expectations, or even self-interest. And yet, in struggling to define the *source* of what in this article I am referring to as a political obligation towards international law, we have no explicit theorization of the *nature* of an obligation towards international law broader than that of the legal obligation to comply.

The fact that critics of the American 'attitude' towards international law warn that the United States is damaging international law suggests that the political obligation of states towards international law may be related to the source of the political power of international law. That is, it is when a state is acting so as to weaken international law that it meets with such intense criticism. Not only do the realist and liberal traditions of IR theory not identify and define a political obligation towards international law, but they do not even define the source of the political influence of international law.

III INTERNATIONAL LAW AS IDEOLOGY

A theorization of international law as ideology (ILI), as I have developed it over the last decade, is an interdisciplinary account of the role of international law in world politics that locates the power of international law in an interrelated set of assumptions regarding the nature of international law.[12] The theory is eclectic in that it does not draw on any single theorist but on the work of several sociopolitical theorists who use the term 'ideology' to refer to an idea or small set of interrelated ideas integral to the distribution of power in a particular sociopolitical order. ILI draws on the proposition that within every sociopolitical structure of power there is one principle or small set of interrelated principles, which can be referred to as an ideology, integral to the distribution of power. That set of ideas plays a key role within that sociopolitical structure, stabilizing the set of power relations, defining who is a member of that sociopolitical order, and why those who are not are not.

ILI posits that international law derives its political power from the ideology of international law, the core idea of which is that international law is ultimately distinguishable from, and superior to, politics. This image of international law is conveyed by legal positivist writing, which eschews arguments based on philosophy, theology, science, or morality in favour of an argument founded on the contents of the formal sources of international law. According to ILI, the ideology of international law includes several other assumptions about the nature of international law, none of which is wholly true, but all of

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[12] I first outlined and justified the theory in Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 Eur. J. Int'l L. 313.

which contain a considerable amount of truth:

- International law is ultimately distinguishable from, and superior to, mere politics.
- It is possible to distinguish objectively between legal and illegal action.
- The rules of international law are compulsory.
- International law is politically neutral or universal in the sense that it treats all states equally.
- International law precedes policy.
- International law is (virtually) self-contained.
- It is possible to apply the rules of law objectively so as to settle a dispute between states.
- International law can deal with any issue that arises between states.

ILI draws on Anthony Giddens' theory of structuration to account for the relationship between structure and agency.[13] As with all ideologies, the ideology of international law is continually reinforced by rhetoric that assumes the ideology to be true. International lawyers uphold the ideology by giving it practical expression. The notion that there is a virtually autonomous set of rules that actors must obey underpins legal discourse. It is assumed that, even if the law on a particular point is not yet hard and fast, it will be so soon. It is not only the international lawyers themselves, but states in their political discourse, which uphold the ideology; indeed, they are required to in order to participate in the international community. This is easiest to do where the relevant law is clear-cut and strongly supports one's preferred policy choices.

According to ILI, the ideology is a source of political power on which political actors can draw in advancing their own interests in that arena. This can be done through closely associating one's preferred policies with the ideology. The ideology is upheld most strongly where the actions and rhetoric of a state make it difficult to discern a discrepancy between the ideology and reality. Where it can be seen that there are limits to the truth of the ideology—that, for example, international law treats some better than others or that there are gaps in international law—the ideology is being only weakly upheld if at all. An actor that wishes to draw on the ideology of international law to advance its interests must therefore engage in discourse that aligns its preferred policies as closely as possible with international law's source of political power. It is vital here, though, that the distinction is made between compliance and upholding the ideology. I do *not* claim that it is

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[13] Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Berkeley: University of California Press, 1979).

to the political advantage of a state to always comply with international law. It is, however, possible to uphold the ideology of international law even where one's actions might most readily be construed as 'illegal,'[14] by, for example, emphasizing the illegality of another state's actions in comparison with one's own, so upholding the image of the dichotomous legal/illegal divide as well as that of the obligation to comply. The ideology can be drawn on to improve one's political position by placing another state in a position such that if it is to uphold the ideology it must act as one wants it to.

In references to foreign policy decision-making, the ideology gives rise to what can be dubbed the 'rule-book' image of international law, according to which:

> A decision-maker faced with a decision as to how to act calls in the legal adviser. The legal adviser then consults the relevant page in this large volume, reads what it says must be done, and advises the decision-maker accordingly. The decision-maker should, of course, do as their advisers tell them to, and, if they do, the State will have 'complied' with international law.[15]

Policy-makers uphold the ideology of international law in references to their decision-making by conveying an image of international law as able to dictate policy. Of course, in practice, while legal considerations may contribute to a foreign policy decision on an issue of high politics, they are also often brought into play after the decision or its implementation, as justification for an action that had not been dictated by international law.

In identifying the ideology of international law we have located not only the source of the political power of international law but also the source of a state's political obligation towards international law. This approach suggests that international law is not weakened by non-compliance per se but by references to international law that, singly or in conjunction with actions, advertise the extent to which the image of international law conveyed by the ideology fails to match reality. This provides us with a theoretical basis on which to assess the impact of the military action against Iraq on the political sway of international law or to assess the prudence for the American national interest of the conduct of American policy regarding Iraq. It suggests that the choice for

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[14] S.V. Scott & R. Withana-Arachchi, 'The Relevance of International Law for Foreign Policy Decision-Making when National Security is at Stake: Lessons from the Cuban Missile Crisis' (2004) 3 Chinese J. Int'l L. 163.

[15] Shirley Scott, 'Beyond "Compliance": Reconceiving the International Law-Foreign Policy Dynamic' (1998) 19 Aust. Y.B.I.L. 35 at 37.

American decision-makers was not simply to invade or not to invade, but how best to go about implementing—in terms of international legal rhetoric—its chosen course of action.

IV International Law as Ideology and the American-Led Use of Force against Iraq

I have necessarily given only the most brief of introductions to my 'grand theory' of the overall relationship of international law to world politics. But even this may permit us to view the politics of the invasion of Iraq and its significance for international law in a new light.

It was always going to be difficult for the American administration to convey the image of international law as determining policy when referring to its decision to invade Iraq. The relevant international law on the use of force is quite clear-cut and, as Vaughan Lowe had pointed out prior to the use of force, offered no precedent for invading a country in order to bring about regime change.[16] When the American administration nevertheless wanted to push ahead with its desired invasion, government officials were able to build up a case for using force that upheld the principles of the ideology of international law by emphasizing illegal behaviour on the part of Iraq, and implying the legality of the United States' own behaviour as well as suggesting that it was international law that was dictating American policy. In a press briefing of 5 September 2002, Secretary Colin Powell commented:

> Inspections will be an issue, but they are not the primary issue. The primary issue is how do we get Iraq to comply with its obligations under these various UN resolutions. ... We cannot allow the international community to be thwarted in this effort to require Iraq to comply with the obligations it entered into at the end of the Gulf War and for a number of years thereafter.[17]

United States rhetoric had long contrasted the relationship of Iraq with international law to that of the United States. In a speech to the 55th United Nations General Assembly in 2000, Madeleine Albright had commented, for example:

> … we must also stand up to the campaign launched by Baghdad against the UN's authority and international law.

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16 A. Vaughan Lowe, cited in Danny Lee, 'Are Bush and Blair breaking the law?' *The Times [London]* (25 February 2003).

17 United States Embassy, Tokyo, Japan, Press Briefing, 'Text: Powell Says Iraq's Non-compliance with UN Rulings Concerns All' (5 September 2002), online: United States Embassy, Tokyo, Japan <http://japan.usembassy.gov/e/p/tp-se1651.html >.

> … we must also defend the integrity of this institution [the UN], our security, and international law.[18]

The Bush Administration thus continued what had long been an American theme: that it was defending the international legal system—and the United Nations—from an Iraqi challenge. While it might have been thought that a coalition invasion without Security Council authorization was a challenge to the United Nations and international law, Bush emphasized that it was Iraq that was posing the challenge. According to Bush, '[w]e'll see whether or not the United Nations will be the United Nations or the League of Nations when it comes to dealing with this man who for 11 years has thumbed his nose at resolution after resolution after resolution after resolution.'[19]

Many international lawyers did not accept the legality of the Coalition use of force,[20] but, as was to become apparent, they were in any case arguing against a decoy; international law had not been the real determinant of American policy. As the months went by, it became blatantly clear that key members of the American administration had long wanted to 'get' Iraq and that 9/11 had merely provided them with a pretext.[21] American failure to live up to its legal obligation had caused many international lawyers to protest, but it was when American rhetoric so clearly revealed the discrepancy between the image of international law as able to determine policy and American decision-making leading up to the invasion that opposition even to the original claim of legality for the invasion hardened. This was epitomized by United Nations Secretary-General Kofi Anan's change from earlier emphasizing the importance of the United Nations to his straightforward acceptance of an interviewer's wording that the war had been 'illegal.'[22]

Revelations of Abu Ghraib prisoner abuse detracted from the

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18 Madeline K. Albright, 'Speech' (Speech to the 55th UN General Assembly, United Nations, New York, 12 September 2000), online: US Mission to the UN <http://www.un.int/usa/00_124.htm>.

19 Wendy Ross, 'Bush: UN Must Support New Policy on Inspections in Iraq, or Become Irrelevant' *US Department of State, Office of International Information Programs* (3 October 2002), online: United States Mission to the European Union <http://www.useu.be/Categories/GlobalAffairs/Oct0302BushIraqUN Inspections.html>.

20 Sean D. Murphy, 'Use of Military Force to Disarm Iraq' (2003) 97 Am. J. Int'l L. 419 at 428.

21 See, *inter alia*, Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* (New York: Free Press, 2004).

22 'Iraq War Illegal, says Annan' *BBC News World Edition* (16 September 2004), online: BBC <http://news.bbc.co.uk/2/hi/middle_east/3661134.stm>.

image of international law as compulsory and from the contrast between the United States as international law-compliant and Iraq as international law-defiant, thereby further weakening the United States' upholding of the ideology of international law.[23] The treatment of international law by the United States defied observers to continue viewing international law as an absolute, apolitical standard of behaviour from which Iraq had departed, instead exposing international law as inextricably and messily mixed up with politics and thereby weakening the ideology of international law. While American human rights abuses in Iraq may not have been on the same scale as those perpetrated under the Hussein regime, the stark contrast between Iraqi illegality and American legality had been muddied. The United States may have earlier broken its legal obligation, but it was when it also failed so dramatically in its political obligation towards international law that the wisdom of its course of action was so widely called into question.

CONCLUSIONS

In this article I have sought a point of convergence in the varied interdisciplinary work currently underway. This has led me to advance the view that our common quest is to better understand the political obligation of a state towards international law. Identifying such an obligation has arguably long been a goal of those writing on the politics of international law even if they have not conceptualized their task in these exact terms. Focus has hitherto been on compliance and the political motivation behind such compliance.

Iraq has provided us with a case study of the interaction of international law and high politics. The lessons one learns from that case study necessarily reflect one's theoretical understanding of the political operation of international law. While for some scholars Iraq confirmed the demise of the United Nations Charter-based international law on the use of force;[24] I have suggested that from the perspective of a theorization of international law as ideology, Iraq illustrates the political obligation of a state towards international law by illuminating what happens when a state fails to meet that obligation.

Strident and increasingly widespread criticism of the legality of the 2003 invasion of Iraq is not fully explicable by the highly dubious legality of the action because previous uses of force of equally dubious

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23 Olivier Ambler, *'International Law as Ideology' and US Foreign Policy Objectives* (MA(IR) Research Project, U.N.S.W. School of Politics and International Relations, December 2004) [unpublished].

24 See e.g. discussion in 'Agora: Future Implications of the Iraq Conflict' (2003) 97 Am. J. Int'l L.; and I. Johnstone, 'US-UN Relations after Iraq: The End of the World (Order) As We Know It?' (2004) 15 Eur. J. Int'l L. 813.

legality had not provoked the same degree of criticism and because its questionable legality had been apparent long before the invasion took place. This suggests to me that the increasing strength of the criticism of the American attitude towards international law in relation to Iraq was about more than 'legality' or 'compliance' per se. I have posited the view that a state's political obligation towards international law requires a state to uphold through its words and actions a certain image of international law from which international law derives its power. Where that obligation is not met, the state in question can expect to meet with censure because the idea of international law is integral to the international political order and because it is a source of power to which all states have some degree of access. It is because the source of the political obligation is also the source of the political sway of international law that, when the United States fails to meet its political obligation, there are calls that the United States is damaging the system of international law.

This can help us to understand the reaction to other American actions, such as its withdrawal from the *ABM Treaty*. So many international lawyers and observers were so indignant at what was a perfectly legal move on the part of the United States. From an ILI perspective we can see that the American emphasis on the treaty as out-dated detracted from the image of international law as timeless, so prompting criticism of the United States' move. While on one level we all know that law is temporally relative, it is vital to a legal system that it be perceived as virtually timeless in order to increase the sense in which international law appears as an apolitical standard. The ongoing tension between the image and reality of international law is thus at the heart of the political functioning of the system of international law.