

The difficulty with setting a new course for the American Ship of State

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By James Rowles

President Barack Obama's Nobel Peace Prize acceptance speech in Oslo is of historic importance. If followed by actions consistent with its tenets, it may be cited by future historians as a major turning point in United States foreign policy, the moment when the ship of state began to steer away from the unilateralism so evident in recent years back toward renewed American support for the instruments of international law and institutions that have been, and are, so vitally important to the successful pursuit of peace.

Such a course correction represents a daunting task, given the extraordinary deviation from support for international law and institutions that has occurred since President Ronald Reagan took office in January 1981.

Particularly during the first Reagan administration, disdain for international law and international human rights grew ascendant, leading to such policy disasters as acquiescence in the Argentine invasion of the Falklands in 1982; providing assistance, particularly after 1982, to Saddam Hussein and Iraq in the war of aggression launched against Iran in September, 1980; the invasion of Grenada in 1983; US support of counterrevolutionary forces in Honduras seeking to overthrow the Sandinista government of Nicaragua, and direct military action against that country; refusal to take part in the merits phase of the proceedings brought by Nicaragua in 1984 against the US in the World Court; and, after losing the decision on the merits, withdrawal of US acceptance of the compulsory jurisdiction of the ICJ.

While President George H.W. Bush ordered the invasion of Panama in 1989, and President Bill Clinton authorized the bombing of Serbia in order to bring the abuses in Kosovo to an end, raising serious questions, it was not until the inauguration of President George W. Bush in 2001 that policies evidencing the deep distrust of international law of the first Reagan administration regained momentum.

The Bush administration in 2002 authorized so-called "harsh interrogation techniques" in apparent violation of the terms of the UN Convention Against Torture and other international norms; announced in September, 2002 a new doctrine endorsing the preemptive use of force against terrorist threats; invaded Iraq in March, 2003 without UN Security Council authorization; and reportedly authorized US forces in 2004 to conduct secret military missions against Al-Qaeda in a number of countries without the consent of the territorial state. According to reports, the US also authorized a number of instances of "extraordinary rendition," including a case in Italy in which the court found the corresponding US agents criminally responsible. The agents did not appear in court.

With respect to the International Criminal Court, President Bush withdrew the US signature to the Rome Statute of the ICC in 2001; signed into law legislation limiting the cooperation of US officials with the ICC; negotiated bilateral agreements with many countries stipulating they would not surrender a US national to the ICC without US consent; and conditioned different kinds of foreign assistance on recipient countries' signing such agreements.

Under President George W. Bush, moreover, the strategic arms control process effectively came to a halt. The US withdrew from the 1972 Anti-Ballistic Missile Treaty in 2001, with Russia responding by dropping efforts to ratify the SALT II treaty.

A disregard for international law or a failure to appreciate the benefits of its use was a key factor in all of these decisions.

Against this background, Obama faces two additional constraints. The first is the fact that the very words "international law" have become practically a taboo in American politics, much as the term "liberal" had become before the last elections in 2008. As a result, US presidents are handicapped not only in their ability to promote support for international law and institutions, but also even in the terminology they can safely use in doing so.

The second constraint faced by Obama is Republican obstructionism against Democratic initiatives for major change, from the stimulus package to healthcare reform. This obstructionism is both the result of and contributes mightily to the sulfurous climate that exists in the Congress, including the Senate, which must ratify all treaties by a two-thirds vote.

With these factors in mind, one can better understand both the context and the content of President Obama's speech, including the ambiguities it contains, the specific issues it raises, and the tasks Obama will need to undertake to get the nation back on a course of support for international law and institutions.

The Nobel speech itself is not perfect, and curious in a number of respects. It shows evidence of having been drafted or redrafted on the flight to Oslo, as reported in the press. More significantly, at its core, the whole discussion of just war theory seems to make little sense after the prohibition of aggression contained in the League of Nations Covenant (1919), the Kellogg-Briand Pact of 1928 outlawing the use of war as an instrument of national policy, and above all the United Nations Charter of 1945. For over 60 years, the use of force in international affairs has been regulated by the positive law of the UN Charter, and in particular by Article 2 Paragraph 4 of the Charter which provides, "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 ..."

This prohibition is universally recognized as a norm of jus cogens (mandatory law), that is to say a norm from which there can be no derogation by way of agreement. Individual and collective self-defense are permitted under Article 51 of the Charter in the case of an armed attack against a member state of the organization; significantly, actions in exercise of this right are to be reported to the Security Council. Given this history and over 60 years of state practice applying these Charter norms, speaking of a "just war" in the terms of theologians, philosophers, and policymakers sounds a little quaint.

The fact that discussion of the use of force has been framed in the discourse of American policymakers as a question of just and unjust wars underscores both the taboo against speaking of international law and just how far thinking among American policymakers has become removed from the language used by the rest of the world, which is the language of international law.

Consequently, we must understand Obama's discussion of just and unjust wars as an attempt to provide a framework for understanding for his countrymen that might appeal to policymakers and help generate bipartisan support. Such support is and will be needed for actions in support of international law and institutions, including international human rights and the mechanisms for their protection.

News reports suggest that his speech was in fact well received by Republicans, as well as Democrats. Similarly, his extended policy review of US strategy in Afghanistan, and his West Point speech, in the end received strong support from Senators and Representatives of both parties. It is evident that Obama is seeking to build bipartisan support for his foreign policy, and has initially made at least some progress.

James Rowles is a former lecturer at Harvard Law School, where he received a Doctor of Juridical Science degree in International Law. This article is written for the Daily Star as part of a series engaging President Obama on his Nobel Peace prize acceptance speech.