THE BUSH ADMINISTRATION AND INTERNATIONAL LAW: TOO MUCH LAWYERING AND TOO LITTLE DIPLOMACY

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The standard view of the Bush Administration's relationship to international law is something like this: The Administration did not take international law seriously and routinely disregarded it whenever it was thought to conflict with the national interests of the country. In doing so, the Administration substantially undermined both the rule of law and the United States' standing in the international community. Consequently, one of the priorities of the Obama Administration should be to recommit the United States to compliance with international law and its institutions.

In support of this view, critics of the Bush Administration invoke a variety of examples. First, the Administration withdrew from two treaties—the Anti-Ballistic Missile Treaty with Russia, and the Optional Protocol to the Vienna Convention on Consular Relations, which gave the International Court of Justice in The Hague jurisdiction over certain disputes relating to the arrest of foreign nationals in the United States. Second, the Administration allegedly took the unprecedented step of "unsigning" the treaty establishing the International Criminal Court. Third, the Administration concluded that it would not apply the protections of the Geneva Conventions to terrorist detainees, including the detainees held at the Guantanamo Bay naval base in Cuba. Fourth, the Administration announced a military preemption doctrine, a doctrine that many international lawyers think exceeds the international law right of self-defense. Fifth,

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the United States invaded Iraq in early 2003—an action that many regard as a violation of fundamental international law norms governing the use of force. Finally, the Administration allegedly authorized torture of terrorism suspects, in violation of treaty obligations and other international responsibilities.

This long bill of particulars certainly gives the standard view of the Bush Administration's relationship to international law some plausibility. Nevertheless, as I will explain, the standard view is both too simplistic and in some ways the reverse of the truth. As an initial matter, this view omits from its description some affirmative contributions that the Administration made to international law. More importantly, this view glosses over the fact that the Administration almost never directly repudiated international law and in many cases advanced perfectly respectable legal arguments to support its controversial actions.

In light of these complications, I will suggest a lesson from the Bush Administration's relationship with international law that is different from the standard view: Most of the problems associated with the Administration's approach to international relations did not result from a failure to treat international law as law. In fact, in some respects the problems were the result of the opposite—the Administration was *too* focused on the law and failed to take adequate account of other, non-legal considerations that are often central to good diplomacy. The situation improved during President Bush's second term, as the Administration became more pragmatic, and less legalistic, in its approach to international law.

At the outset, it is important to note that the Administration made affirmative contributions to particular areas of international law. Consider, for example, the area of nuclear non-proliferation, one of the most important issues in the world today. The Administration played a leadership role in pushing other nations to comply with and help enforce the Nuclear Non-Proliferation Treaty, and one of the Administration's major foreign policy successes was to persuade Libya to agree to give up its nuclear program.[1] It also worked with the United Nations Security Council to craft several key resolutions

1. David E. Sanger & Judith Miller, *Libya to Give Up Arms Program, Bush Announces*, N.Y. TIMES, Dec. 20, 2003, *available at* http://www.nytimes.com/2003/12/20/world/libya-to-give-up-arms-programs-bush-announces.html.

responding to nuclear activities by North Korea and Iran.[2] Furthermore, it helped launch the "Global Partnership Against the Spread of Weapons and Materials of Mass Destruction," to which it provided billions of dollars in funding.[3]

Perhaps not surprisingly, the Bush Administration also made significant contributions to international law concerning counter-terrorism and criminal law enforcement. After the September 11 attacks, the Administration worked with the Security Council to establish a Counter-Terrorism Committee, which has focused on restricting the financing of terrorist organizations and making sure that nations extradite or prosecute terrorists.[4] Concerns have been raised about some of the processes used by that Committee, but it is nevertheless an important development in the area of international law dealing with terrorism. After September 11, the United States also persuaded other nations to support the concept of a self-defense right in the context of terrorism.[5] In terms of law enforcement more generally, the United States helped negotiate and conclude important treaties on subjects such as cybercrime and organized crime.[6]

It is true, of course, that the Administration adopted a number of controversial positions relating to international law. But most of these positions did not involve repudiations of international law. Indeed, most of the Administration's positions involved perfectly respectable legal arguments, and sometimes even involved an almost obsessive attention to international legal process. The one exception may be the Administration's approach to the international law on torture, which I will discuss in more detail below.

Consider first the Administration's treaty withdrawals. International law generally allows nations to withdraw from treaties,

2. *See, e.g.*, S.C. Res. 1718, ¶¶ 1, 3, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (condemning North Korean nuclear tests and demanding that North Korea retract its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons); S.C. Res. 1803, ¶¶ 5–8, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (applying trade and other restrictions against Iran for refusing to suspend its uranium-enrichment and heavy-water-related projects).

3. *See* Press Release, The White House, Fact Sheet: G-8 Summit—Preventing the Proliferation of Weapons of Mass Destruction, *available at* http://www.nti.org/e_research/official_docs/pres/62702.WMD.pres.pdf (outlining the G-8's political and monetary commitment to preventing the proliferation of weapons of mass destruction).

4. S.C. Res. 1373, ¶ 6, U.N. Doc. S/RES/1372 (Sept. 28, 2001).

5. S.C. Res. 1368, pmbl. U.N. Doc. S/RES/1368 (Sept. 12, 2001).

6. Convention on Cybercrime, Council of Europe, Nov. 23, 2001, 41 I.L.M. 282, 2296 U.N.T.S. 167 (ratified by the United States in 2006); United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 334, 2225 U.N.T.S. 209.

subject in some cases to a notice requirement.[7] Moreover, the Anti-Ballistic Missile Treaty expressly includes a right of withdrawal upon six months notice,[8] which the Bush Administration provided prior to withdrawing.[9] The Administration explained to Russia that the treaty, which was originally concluded with the Soviet Union in 1972 during the height of the Cold War, no longer made sense in light of changed world conditions: the United States and Russia cease to rely on mutually assured nuclear destruction as a cornerstone of their foreign policy, and the danger that rogue states or terrorists would acquire nuclear weapons has increased.[10] This is hardly a frivolous position, and the Administration was acting in accordance with the treaty's withdrawal provision in articulating it.

The other treaty from which the United States withdrew, the Optional Protocol to the Vienna Convention on Consular Relations, did not specifically address withdrawal. But it has generally been understood that such jurisdictional treaties are subject to withdrawal.[11] Indeed, many nations have changed or withdrawn their consent to the International Court of Justice's jurisdiction during the last sixty years since the Court was created.[12] Although the Bush Administration withdrew from this treaty in 2004, it sought to comply with a judgment of the International Court of Justice that had been issued before withdrawal by taking the somewhat surprising step of ordering its state courts to provide new hearings for foreign nationals in certain death penalty cases.[13] The Supreme Court ultimately held in *Medellin v. Texas* that the Administration did not have the domestic

8. Treaty on the Limitation of Anti-Ballistic Missile Systems art. 15, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435.

9. George W. Bush, Remarks Announcing the United States Withdrawal from the Anti-Ballistic Missile Treaty, 37 WKLY. COMP. PRES. DOC. 1783 (Dec. 13, 2001).

10. *See id.* ("Today, as the events of September the 11th made all too clear, the greatest threats, to both our countries come not from each other or other big powers in the world but from terrorists who strike without warning or rogue states who seek weapons of mass destruction.").

11. *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 291 (2d ed. 2007) ("It will usually be possible to withdraw from a general treaty for the settlement of disputes between the parties even when it has no withdrawal provision.").

12. *See id.* ("[S]tates have withdrawn from such optional dispute settlement protocols to several United Nations treaties without (at least legal) objection, even when they contain no provision for this; and declarations under Article 36 of the Statute of the International Court of Justice (which is an integral part of the UN Charter) can be, and have been, withdrawn.").

13. *See* Medellin v. Texas, 128 S. Ct. 1346, 1353 (2008) (referring to President Bush's memorandum to the Attorney General charging state courts to "give effect" to the International Court of Justice's decision).

authority to issue this order.[14] Whatever this episode might reveal about the Administration's conception of executive power, it does not reveal an administration simply ignoring international law.

What about the United States' "unsigning" of the International Criminal Court treaty? Nations typically join multilateral treaties such as this one through ratification, which traditionally requires depositing an instrument of ratification with the United Nations. A nation's signature on such a treaty does not make the nation a party; the signature only suggests (at most) that the treaty is acceptable to the nation's executive branch. It is understood that in many nations, including in the United States, legislative approval may be required before the nation can actually join the treaty.[15]

The Clinton Administration signed the treaty establishing the International Criminal Court on December 31, 2000, about two weeks before President Clinton left office.[16] President Clinton stated that he had some significant reservations about the treaty and did not expect the United States to move towards ratification any time soon, but he thought it nevertheless important for the United States to be a signatory.[17] In 2002, the Bush Administration sent a letter to the Secretary-General of the United Nations stating that the United States did not intend to become a party to the treaty and that there should be no continuing legal effects associated with the Clinton Administration's signature.[18]

The Bush Administration did not attempt to physically remove the U.S. signature from the treaty. It merely announced its intention not to become a party to the treaty. This act was not only perfectly legal under international law, it actually followed the Vienna Convention on the Law of Treaties, which governs topics such as signing and withdrawal from treaties, to the letter. Article 18(a) of the Convention provides that if a nation has signed a treaty, it is obliged not to engage in acts that would defeat the object and purpose of the

14. *Id.* at 1367–72.

15. *See, e.g.*, Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007).

16. *See* William J. Clinton, Statement on the Rome Treaty on the International Criminal Court, 37 WKLY. COMP. PRES. DOC. 4 (Dec. 31, 2000) (statement of the President on December 31, 2000, detailing the treaty and the United States' reasons for signing it; President Clinton vacated office in January, 2001).

17. *Id.*

18. *See* Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS, May 2002, http://www.asil.org/insigh87.cfm#_edn4.

treaty "until it shall have made its intention clear not to become a party to the treaty."[19] It is hard to imagine a way to make a country's intention clearer than to send a public letter to the United Nations Secretary-General, who serves as the depository for many multilateral treaties, including the International Criminal Court treaty.

One can of course debate the policy wisdom of disassociating the United States from the International Criminal Court, an institution currently supported by over 100 nations. The central concern of the United States, expressed by both the Clinton and Bush Administrations, was that the Court could be used as a political device against the United States through biased investigations and prosecutions relating to United States military activities abroad.[20] This concern may be overblown given a variety of safeguards in the treaty.[21] But the key point is that the Bush Administration did not contravene or disregard international law; rather, it carefully followed international law governing "unsigning." Nor, it should be noted, did the Bush Administration oppose all international criminal law enforcement. It was a significant supporter of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone, and it even acquiesced in the Security Council's referral of the Darfur genocide case to the International Criminal Court.[22] The Bush Administration therefore was not antagonistic to international criminal law, but instead simply had particular concerns about the structure of the International Criminal Court, concerns that also had been expressed by the Clinton Administration.

Another example that is supposed to show the Bush Administration's disregard of international law is the

19. Vienna Convention on the Law of Treaties, art. 18(a), May 23, 1969, 1155 U.N.T.S. 331.

20. *See, e.g.*, Bradley, *supra* note 18 (quoting the Bush Administration's concern that the International Criminal Court lacks any "effective mechanism to prevent politicized prosecutions of American service members and officials"); Statement on the Rome Treaty on the International Criminal Court, *supra* note 16 (including among President Clinton's concerns "protect[ing] U.S. officials from unfounded charges").

21. *See, e.g.*, Rome Statute of the International Criminal Court arts. 17, 20, July 17, 1998, 27 I.L.M. 999 (regulating the discretion of the prosecutor in bringing cases before the International Criminal Court).

22. *See, e.g.*, Michael Abramowitz & Colum Lynch, *Darfur Killings Soften Bush's Opposition to International Court*, WASH. POST, Oct. 12, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101101964.html; Warren Hoge, *U.N. Votes to Send Any Sudan War Crime Suspects to World Court*, N.Y. TIMES, Apr. 1, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E0DE4D8103FF932A35757C0A9639C8B63&sec=&spon=&pagewanted=all.

Administration's detention policy in the War on Terror, which critics have argued violates the Geneva Conventions. The Geneva Conventions are four treaties that were negotiated after World War II. The treaty that is most often discussed in the context of the War on Terror is the Third Geneva Convention, which addresses the treatment of prisoners of war (POWs).[23] The Bush Administration's position has been that this treaty does not apply to the conflict with Al Qaeda and that, although it does arguably apply to the conflict with the Taliban in Afghanistan, Taliban fighters do not qualify for the protections accorded under the treaty to prisoners of war.[24]

The Administration's position at least with respect to the worldwide conflict with Al Qaeda has a strong legal basis. The Third Geneva Convention for the most part applies only to conflicts with contracting parties,[25] and Al Qaeda is not a contracting party and does not itself observe the Convention. Importantly, even in this context the Administration did not ignore or attempt to minimize the importance of the Geneva Conventions. Indeed, President Bush's February 2002 memorandum announcing the U.S. position with respect to the applicability of the Conventions to the War on Terror made clear that the United States "has been and continues to be a strong supporter of Geneva and its principles," and that, even though the detainees were not technically entitled to the protections of the Conventions, the United States would, "to the extent appropriate and consistent with military necessity," treat the detainees "in a manner consistent with the principles of Geneva."[26]

The Administration's legal position with respect to the Taliban is more debatable than with respect to Al Qaeda, since Afghanistan is a party to the Convention and Taliban fighters served as the ruling government's armed forces there. The language of the Third Geneva Convention suggests that a contracting party's armed forces automatically qualify for POW protection, whereas militias and irregular forces need to meet certain requirements such as wearing uniforms, having a command structure, and complying with the laws

23. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

24. Memorandum from President George W. Bush to Vice President Dick Cheney et al., Humane Treatment of al Qaeda and Taliban Detainees, ¶ 2d (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

25. Third Geneva Convention, *supra* note 23, at art. 2.

26. Memorandum from George W. Bush, *supra* note 24, ¶¶ 1, 3, 5.

of war in order to qualify for POW protection.[27] However, law of war treaties that predate the Geneva Conventions, and which the Conventions built upon, provide some support for the conclusion that the Conventions' reference to a party's armed forces implicitly includes those requirements, in which case the Taliban would have to comply with them in order to qualify as POWs.[28] This was the Administration's position, and it is at least plausible. In addition to having some historical support, this reading would provide an incentive for regular forces to follow these requirements and thus, for example, adequately distinguish themselves from civilians, which is a fundamental component of the laws of war.

I do not mean to suggest that it was wise for the Administration to adopt this interpretation with respect to Taliban fighters, and, indeed, my view is that the Administration would have been wiser to embrace more of the Geneva Conventions than it thought was technically required. This is what the United States government did during the Vietnam War—voluntarily applying the Geneva Conventions even to irregular Viet Cong fighters.[29]

In any event, it is important to keep in mind that even if the Taliban fighters were entitled to POW protections, the Third Geneva Convention would not bar their detention. Under that Convention, prisoners may be held until the end of hostilities,[30] and there continues to be fighting between the United States and the Taliban even today. So, even if the Administration violated the Geneva Conventions with respect to specific actions such as coercive interrogations or military

27. Third Geneva Convention, *supra* note 23, at art. 4(A)(1)–(2).

28. *See, e.g.*, MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 at 234–35 (1982) ("It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered to be unnecessary and redundant to spell them out in the [Geneva] Conventions."); INGRID DETTER, THE LAW OF WAR 136–37 (2d ed. 2000) (expressing similar view); United States v. Lindh, 212 F. Supp. 2d 541, 557 n.34 (E.D. Va. 2002) (same).

29. *See* GEOFFREY BEST, WAR AND LAW SINCE 1945 at 363 (1994) (detailing the United States' application of the Geneva Conventions during the Vietnam War).

30. Third Geneva Convention, *supra* note 23, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (plurality opinion) ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities."); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2096 (2005) ("[B]oth lawful combatants who qualify for prisoner-of-war status and unlawful combatants who do not can, under the laws of war, be detained until the end of active hostilities.").

tribunals, its general detention policy is not necessarily at odds with the Conventions.

There are two provisions in the Third Geneva Convention that pose special issues concerning U.S. compliance. First, Common Article 3, a provision iterated in all four Geneva Conventions, confers certain minimum protections on individuals detained in an armed conflict occurring in the territory of a contracting party, and does not apply only to conflicts *between* contracting parties.[31] This Article, however, is limited to "conflicts not of an international character,"[32] and, until 2006, the Bush Administration's position was that the conflicts, both between the United States and Al Qaeda, and between the United States and the Taliban, were international conflicts because they were not simply internal to a nation.

The Supreme Court ultimately disagreed with this reading of Common Article 3 in *Hamdan v. Rumsfeld*.[33] The Court concluded that "international" conflicts meant conflicts between nations—inter-*national*—rather than cross-border, and thus that the conflict with Al Qaeda was not of an international character, since Al Qaeda is not a nation.[34] The Administration's position, however, was reasonable as a legal matter, and indeed finds support in the original International Committee for the Red Cross commentary on Common Article 3, which suggests that it covers only internal conflicts such as insurgencies and civil wars.[35] In any event, Common Article 3 does not call into question the Administration's general detention policy, as opposed to its use of military tribunals.

The other provision in the Third Geneva Convention that poses a special issue is Article 5, which provides that when there is any doubt about whether captured individuals qualify for POW status, they shall be treated as POWs until their status is determined by a competent tribunal.[36] In failing to provide such competent tribunal hearings to

31. Third Geneva Convention, *supra* note 23, at art. 3(1)(A) (listing prohibitions against "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture").

32. *Id.* at art. 3.

33. Hamdan v. Rumseld, 548 U.S. 557, 630–31 (2006).

34. *Id.*

35. *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean S. Pictet ed., 1960) (stating that the conflicts covered by Common Article 3 are conflicts that "take place within the confines of a single country").

36. Third Geneva Convention, *supra* note 23, at art. 5.

captured Taliban fighters, the Administration took the fairly aggressive position that, since the Taliban *as a class* did not wear adequate uniforms and did not comply with the laws of war, there was no need for individualized hearings about POW status.[37]

There is a certain logic to the Administration's position: Why have individualized hearings when the problem with POW status was legal rather than factual? Nevertheless, this is another instance where the Administration probably should have embraced more of the Geneva Conventions than it thought was technically required, since the cost of these hearings would have been low and the Supreme Court eventually required the Administration to provide individualized hearings anyway. The State Department's Legal Adviser did argue within the Administration for POW status hearings for people captured in Afghanistan, but his advice was rejected.[38] This rejection occurred in 2002 at a time when there was a tense relationship between the State Department and the Office of Legal Counsel (OLC) over War on Terror issues. John Yoo of the OLC had informed the State Department that the OLC believed that the Geneva Conventions had no application in either Afghanistan or the War on Terror more generally, reasoning, among other things, that Afghanistan was a "failed state" and thus no longer effectively a party to the Conventions.[39] In response, Will Taft, the State Department Legal Adviser at the time, sent a long memo to John Yoo critiquing the OLC's analysis, and Taft included a note stating that "the most important factual assumptions on which your draft is based as well as its legal analysis are seriously flawed."[40]

President Bush never invoked the "failed state" theory that had been proposed by the OLC, which suggests that the State

37. Memorandum from President George W. Bush to Vice President Cheney et al, Humane Treatment of Taliban and al Qaeda Detainees, ¶ 2d (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

38. Memorandum from William H. Taft, IV, Legal Adviser to the Department of State, to Counsel to the President, Comments on your Paper on the Geneva Convention (Feb. 2, 2002), *available at* http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf.

39. Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

40. Memorandum from William H. Taft, IV, Legal Adviser to the Department of State, to John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Your Draft Memorandum of January 9 (Jan. 11, 2002), http://www.torturingdemocracy.org/documents/20020111.pdf (last visited May 20, 2009).

Department's dialogue with the OLC did have an effect, even during this tense period. The key point, again, is that the Administration as a whole was taking express account of international law and was ultimately adopting plausible interpretations of that law.

Still another controversial example of the Administration's treatment of international law is the Bush Doctrine on military preemption. In September 2002, the Bush Administration issued a policy paper that expressed the view that nations have the ability to take preemptive military action to prevent the use of weapons of mass destruction.[41] Some commentators have argued that this position violates the Charter of the United Nations, a treaty established in 1945 that is binding upon essentially all nations, including the United States.[42]

Article 51 of the Charter recognizes the inherent right to use military force in self-defense in response to an armed attack,[43] but it does not expressly contemplate the use of force to preempt an attack.[44] Nevertheless, there is a plausible argument that Article 51 leaves some room for preemptive military measures. In stating that "[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defense," Article 51 suggests that the Charter is not intended to override the historic right of self-defense.[45] That historic right arguably includes a right of anticipatory self-defense in response to imminent threats.[46] Interestingly, the Administration specifically invoked this historic right under customary international law as justification for its policy of preemption. The policy paper on the use of preemptive force stated, for example:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned

41. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf.

42. *See, e.g.*, Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 620 (2003).

43. U.N. Charter art. 51.

44. *See id.* (referring only to a right of self-defense in the event of an armed attack).

45. U.N. Charter art. 51 (emphasis added).

46. *E.g.*, THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS ch. 7 (2002).

> the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.[47]

This argument may or may not be convincing, but it is an argument that expressly attempts to work with, rather than ignore, international law.

We move into even more controversial terrain when we consider the Administration's justifications for the Iraq War. It is important to note that the Bush Doctrine on preemption, although announced prior to the Iraq War, was not the Administration's principal legal argument justifying the war. This is fortunate for the Administration, since weapons of mass destruction were never actually found in Iraq. The principal legal argument, rather, was based on Security Council resolutions.[48] Under international law, a nation may use military force against another nation either in self-defense[49] or with the authorization of the United Nations Security Council.[50]

The Security Council had authorized the use of force against Iraq in the Gulf War in 1991, after Iraq invaded Kuwait.[51] After coalition forces expelled Iraq from Kuwait, the Security Council issued a ceasefire resolution that was dependent upon Iraq's compliance with a variety of conditions.[52] These conditions included destroying various types of weapons, agreeing not to develop certain weapons, respecting designated no-fly zones, and subjecting itself to inspections and monitoring for compliance with the outlined conditions. Several years passed and Iraq repeatedly breached the terms of the cease-fire

47. NATIONAL SECURITY STRATEGY, *supra* note 41, at 15.
48. George W. Bush, U.N. General Assembly in New York City Address (Sept. 12, 2002), 38 WKLY. COMP. PRES. DOC. 1529 (Sept. 16, 2002).
49. U.N. Charter art. 51.
50. U.N. Charter art. 42.
51. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).
52. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

resolution.[53] At times, United States and British forces retaliated through air attacks on select facilities, with no complaint from the United Nations.[54] Furthermore, Iraq was so uncooperative in complying with the mandatory inspections that the inspectors abandoned their efforts and left Iraq in 1998. Following their departure, the Clinton Administration, along with forces from Great Britain, orchestrated a three-day bombing campaign designed to reduce Iraq's ability to develop weapons of mass destruction.[55]

Inspections were later resumed, but again there were significant problems with Iraqi cooperation. In November 2002, after weeks of drafting and negotiation, the Security Council issued Resolution 1441 stating that Iraq was in "material breach" of its obligations under prior resolutions.[56] Resolution 1441 gave Iraq a "final opportunity" for compliance[57] and stated that failure to comply would result in "serious consequences."[58] In the months preceding the Iraq War, there continued to be difficulties with Iraqi cooperation, although the extent of these difficulties is contested.

In light of this history, there was a respectable legal argument that the Security Council's original authorization of force was reinstated in light of Iraq's material breaches of the ceasefire resolution and subsequent resolutions. The Security Council seemed to envision this possibility in its use of phrases such as "final opportunity" and "facing serious consequences" in Resolution 1441.[59] In fact, Resolution 1441 was issued by the Security Council in November 2002, just one month after Congress publicly authorized President Bush to pursue a war in Iraq should the violations continue. To be clear, my own view is that the case against legality is somewhat stronger than the case for legality. But the case for legality is not insubstantial, and it is too simplistic to say that the Administration was simply disregarding international law.

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53. *See* BARRY E. CARTER, PHILIP R. TRIMBLE, AND ALLEN S. WEINER, INTERNATIONAL LAW 1058 (5th ed. 2007) (detailing Iraq's breaches of Security Council resolutions).

54. *See* William H. Taft, IV, & Todd F. Buchwald, *Preemption, Iraq and International Law*, 97 AM. J. INT'L L. 557, 559–60 (2003) (outlining several 1990s military campaigns against Iraq and arguing for their legality).

55. *See id.* (detailing operation "Desert Fox" aimed at Iraq).

56. S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (listing in the preamble several examples of Iraq's "material breach" of resolution obligations including not cooperating with weapons inspectors and not making significant disclosures of weapons programs).

57. *Id.* ¶ 2.

58. *Id.* ¶ 13.

59. Taft & Buchwald, *supra* note 54, at 563.

The final example to consider, and probably the most controversial issue involving the Bush Administration's treatment of international law, is that of torture. The United States has been a party to the Convention Against Torture since 1994, and many courts and commentators believe that torture also violates unwritten norms of international law.[60] In a memo that was subsequently leaked to the press, the OLC infamously adopted in August 2002 a very narrow definition of torture, reasoning that for an act to constitute torture, the resulting physical pain must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death," and for mental harm to constitute torture, "it must result in significant psychological harm of significant duration."[61]

The August 2002 memo contains problematic legal reasoning, especially because the OLC failed to take adequate account of how other parties to the treaty understand torture. Nevertheless, although the existence of this memo may tell us a lot about problems with the OLC culture during this period, I do not think it warrants general claims about the Administration's relationship with international law, for several reasons.

First, unlike essentially all other international law decisions made by the Bush Administration, the analysis in this memo did not involve any participation by the State Department, which is the part of the Executive Branch with the most expertise on international law. The lack of consultation with the State Department concerning an important issue of international may itself be worthy of condemnation, but it was not a characteristic of any of the other issues discussed in this essay. Second, despite some broad and unnecessary analysis in the memo about how President Bush had the domestic power to authorize torture, the President never in fact claimed such a power and in fact insisted that any instances of torture should be prosecuted.[62] That is, the President did not attempt to

60. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 883–85 (2d Cir. 1980) (concluding that torture, when carried out by a government actor, violates customary international law).

61. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto Gonzales, Counsel to the President, RE: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005), *also available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf.

62. *See, e.g.*, George W. Bush, Statement on United Nations International Day in Support of Victims of Torture, 40 WKLY. COMP. PRES. DOC. 1167, 1167–68 (July 5, 2004)

override, or simply disregard, international law. Attempting to read a legal prohibition narrowly may be problematic, but it is not the same thing as disregarding the prohibition or treating it as if it were not law. Third, unlike other controversial international law positions advanced by the Administration, the Administration did not stand by the analysis in this memo once its flaws became apparent—instead, the Department of Justice withdrew the memo and replaced it with a much more defensible analysis in 2004.[63] This further suggests the *sui generis* nature of the torture issue.

The Administration's actual practice with respect to torture deserves some further explication. We can all recall the abuses that came to light at the Abu Ghraib prison in Iraq, which, if not torture, at the very least involved degrading treatment of prisoners.[64] Whatever this abuse may tell us about lapses in the chain of command, however, the prisoners' treatment was not the direct result of any Administration position regarding international law: the Administration accepted the applicability of the Third Geneva Convention in Iraq from the start.[65] The Convention bars all mistreatment of prisoners, not just torture, and some soldiers were criminally prosecuted for the Abu Ghraib abuse. Similarly, it is far from clear that the interrogation techniques authorized for use at Guantanamo, the most aggressive of which involved isolation and changing sleep patterns, amount to torture (which the Convention Against Torture defines as involving the intentional infliction of severe pain and suffering).[66]

So did the Administration ever authorize torture? Reports suggest that the CIA was authorized to use so-called "enhanced" interrogation techniques against a number of high-level Al Qaeda

("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture.").

63. *Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A*, Op. Att'y Gen. (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm.

64. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact (detailing the abuses at Abu Ghraib).

65. U.S. Dept. of Defense, News Transcript, Defense Department Background Briefing (May 14, 2004), http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html (last visited May 20, 2009).

66. News Release No. 596-04, U.S. Dept. of Defense, DOD Provides Details on Interrogation Process (June 22, 2004), *available at* http://www.au.af.mil/au/awc/awcgate/dod/nr20040622-0930.htm; Memorandum from the Secretary of Defense for the Commander, U.S. Southern Command, Counter-Resistance Techniques in the War on Terrorism (April 16, 2003), *available at* http://www.au.af.mil/au/awc/awcgate/dod/d20040622doc9.pdf.

detainees, including slapping, forced standing for long periods, light and noise bombardment, and, for three of the detainees, waterboarding.[67] Of these enhanced techniques, many people consider at least waterboarding to constitute torture.[68] If so, then the Administration did violate international law in those select instances, although the CIA had been given reason to believe, based on the problematic OLC memo, that the technique did not violate the international ban on torture. But, by themselves, these individual instances no more elucidate the Bush Administration's general relationship with international law than, for example, President Clinton's bombing campaign in Kosovo (which also probably violated international law) tells us about the general relationship of the Clinton Administration to international law.

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In sum, despite caricatures about the Bush Administration's failure to treat international law as law or ignoring it altogether, the Administration actually made some important contributions to international law and generally—although admittedly not always—adopted defensible international law positions with respect to its controversial actions.

One might respond to these points by contending that even if the Administration did not disregard international law, it nevertheless displayed a lack of "good faith" towards international law. It is far from clear, however, that the concept of good faith is violated simply because a nation decides not to be a party to particular international instruments or institutions, or decides not to embrace the most expansive interpretations of their scope—actions that could instead simply reflect a good faith policy disagreement. To the extent that the charge of bad faith assumes that having more, and more expansive, international rules is always better for the world, this is at best an under-defended assumption. Moreover, a charge that the Administration did not apply international law in a sufficiently robust

67. Greg Miller, *CIA Chief Confirms Use of Waterboarding*, L.A. TIMES, Feb. 6, 2008, *available at* http://articles.latimes.com/2008/feb/06/nation/na-terror6; Jon Ward & John Solomon, *Interview of the Vice-President*, WASH. TIMES, Dec. 22, 2008, *available at* http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html.

68. *See, e.g.*, *Poll Results: Waterboarding is Torture*, CNN.COM, Nov. 6, 2007, http://www.cnn.com/2007/POLITICS/11/06/waterboard.poll/ ("Asked whether they think waterboarding is a form of torture, more than two-thirds of respondents, or 69 percent, said yes.").

way is a different charge, and is less obviously an inherent indictment, than the more common charge that the Administration ignored international law or did not take it seriously as law, especially since the Administration generally made at least plausible international law arguments.

Despite these contentions, my goal here is not to applaud the Bush Administration's approach to international relations more generally. I will concede that there were significant problems with the Administration's approach to international relations, especially during the Administration's first term, but my argument is that these problems did not particularly involve a disregard for international law. Instead, I shall go even further and suggest that the problem at times was that the Administration was *too* focused on law and that it neglected other non-legal considerations that are at least as important in the international arena.

One of the lessons from the Bush Administration, I want to suggest, is that the importance of international law does not lie solely, or even chiefly, in technical legal argumentation. Instead, it is intertwined with less legalistic considerations of credibility, engagement, and persuasion—considerations that are fundamental to the exercise of what Joseph Nye has famously called "soft power."[69] Soft power is the ability to have other nations support or acquiesce in your policies without being induced by either military or economic pressure or rewards—that is, by resorting to hard power.[70] This soft power strategy does not always work, of course, but when it does it is generally a much less expensive way of obtaining foreign policy success than using hard power.[71] Moreover, hard power is more costly and less effective if it lacks broad international support, something painfully illustrated when comparing the original Gulf War to the current Iraq War. To be sure, it is helpful to have diplomacy backed up by hard power, but good diplomacy also requires patience, understatement, and a willingness to listen, and those qualities were often in short supply in the Bush Administration.

Instead, the Bush Administration, especially during the first term, often gave the impression that it did not need to explain itself or

69. *See generally* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2005).

70. *E.g.*, *id.*

71. *Id.* at 5.

listen to others. It lashed out not only at adversaries, but also at allies that disagreed with it. This is illustrated by Secretary of State Donald Rumsfeld's dismissive reference to France and Germany as "old Europe"[72] and by David Addington, Vice-President Cheney's counsel, repeatedly remarking in meetings that foreign governments "don't have a vote."[73] The Administration also appointed John Bolton as Ambassador to the United Nations despite his open hostility to the institution. Furthermore, the Administration did not just decline to join the International Criminal Court treaty but actively sought to undermine the Court by pressuring countries that had joined it to make agreements that were arguably inconsistent with their obligations under the treaty.[74]

In relying on technical legal arguments about the Geneva Conventions, the Administration did not sufficiently take account of the symbolic value of the Conventions. It therefore neglected an opportunity to adopt positions that might be more generous than are compelled by a narrow reading of the law and thus to exercise a form of moral leadership. Its treatment of the Geneva Conventions also illustrated how the Administration was quick to find gaps in the law but slow to fill those gaps. Particularly when dealing with potentially indefinite detention, this situation of "no law" was not going to be acceptable either to our allies or to the courts, and good lawyers, as well as good policymakers, should have foreseen that.

The problems associated with the Administration's excessive focus on law likely extend well beyond international relations. Although the rule of law promotes important values, framing questions in legal terms can sometimes produce undesirable outcomes, even in the domestic realm. Among other things, when the focus is on what the law allows, there may be an insufficient focus on the underlying policy and moral questions, and there may be undue deference to lawyers, who may lack relevant policy or moral expertise. This is arguably what

72. *Outrage at "Old Europe" Remarks*, BBC NEWS ONLINE, Jan. 23, 2003, http://news.bbc.co.uk/2/hi/europe/2687403.stm (last visited May 20, 2009).

73. JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 126 (2007).

74. *E.g.*, James Crawford, Philippe Sands & Ralph Wilde, Joint Opinion, In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute (June 5, 2003), *available at* http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf.

happened as the Bush Administration began crafting its approach to the War on Terrorism.[75]

The Administration performed better on these "soft power" issues in President Bush's second term. The State Department's Legal Adviser, John Bellinger, gave a number of important speeches abroad both confirming United States support for international law and explaining and defending in some detail the Administration's specific positions on questions of international law.[76] He even bravely appeared before the U.N. Committee Against Torture in 2006 to address criticisms of U.S. practices.[77] The Administration also was more receptive to dialogue, even with adversaries such as North Korea and Iran, a big change from its "axis of evil" speech.[78]

None of this is to suggest that the United States should concede away its fundamental interests or values in order to please other countries. Presidents, regardless of their party affiliation, presumably will not do that. For that reason, my guess is that those who are assuming that President Obama will have radically different substantive positions on foreign policy than Bush may be disappointed. But process and tone also matter a great deal in international relations, and those considerations probably will change for the better in the Obama Administration, just as they started to change for the better in President Bush's second term.

75. *See, e.g.*, Philip Zelikow, *Legal Policy for a Twilight War*, 30 HOUS. J. INT'L L. 89, 92 (2007) (arguing that the Bush Administration, prior to 2006, focused too much on what it *could* do in the War on Terror under international law and not enough on what it *should* do).

76. *See, e.g.*, Press Release, John B. Bellinger, III, Embassy of the U.S. in London, Lecture at the Univ. of Oxford, Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007), http://www.usembassy.org.uk/ukpapress72.html (last visited May 20, 2009).

77. Tom Wright, *U.S. Explains Itself to U.N. on Torture Charges*, N.Y. TIMES, May 5, 2006, *available at* http://www.nytimes.com/2006/05/05/world/05cnd-rights.html?_r=1&scp=1&sq=bellinger%20torture%202006&st=cse.

78. *See, e.g.*, Helene Cooper, *North Korea Is Off Terror List After Deal with U.S.*, N.Y. TIMES, Oct. 11, 2008, *available at* http://www.nytimes.com/2008/10/12/world/asia/12terror.html?scp=2&sq=bush+north+korea+six+party&st=nyt; Helene Cooper & David E. Sanger, *A Talk at Lunch that Shifted the Stance on Iran*, N.Y. TIMES, June 4, 2006, *available at* http://www.nytimes.com/2006/06/04/world/middleeast/04iran.html?scp=20&sq=bush%20dialogue%20iran%202006&st=cse.