REFLECTIONS ON TRANSATLANTIC APPROACHES TO INTERNATIONAL LAW

JOHN B. BELLINGER, III

DUKE UNIVERSITY SCHOOL OF LAW
CENTER FOR INTERNATIONAL AND COMPARATIVE LAW
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OPENING

When Curt Bradley* asked me to speak at his new center, I accepted with pleasure. Curt was a wise counselor at the State Department, and I am delighted that he is now directing a center that is focused on teaching and research in the areas in which my lawyers and I work daily.

INTRODUCTION

Today, I would like to take advantage of the fact that I am in the company of students and scholars to reflect on some of my experiences over the past year—to put what I have seen and heard into perspective. For the past twelve months, on behalf of the Secretary of State, I have been engaged in an intensive dialog with our European partners on some of the most contentious and misunderstood issues of the day: namely, our counterterrorism laws and policies, especially those relating to the detention, questioning, and transfer of members of al Qaida and the Taliban. Those discussions have not always been easy, but I believe we have made headway in explaining to our European partners our laws and policies, including recent legal developments, such as the new Department of Defense detention and interrogation policies.

When I began this dialog a year ago, I felt that our disagreements did not reflect a growing transatlantic divide. I continue to believe that, and still think many of our so-called differences are rooted in

* Curtis Bradley is the Director of the Center for International and Comparative Law and the Richard and Marcy Horvitz Professor of Law at the Duke University School of Law.

misunderstanding, but I also believe that we do have different approaches on some issues.

George Bernard Shaw famously said that the United States and England are two countries divided by a common language. There are times when observers could be forgiven for wondering whether the United States and Europe are two cultures divided by a common system of (international) law. Reading the headlines, one would think that we have profoundly different, perhaps even irreconcilable, visions of international law and international legal order. But how do you square this with our longstanding—and shared—traditions of rule of law and respect for law? Or the network of treaties, institutions, and regimes that bind us and through which we work and cooperate successfully on a daily basis? Or the fact that the international legal framework that exists today was one the United States—with its European allies—was instrumental in creating?

The plain fact is that we have more in common than not. But this is sometimes forgotten, and our differences are distorted or magnified in ways that prevent, rather than promote, mutual understanding. Why? A somewhat glib explanation might be that this is the "narcissism of minor differences" at work. The term—coined by Freud—describes the phenomenon of fundamentally similar peoples who seize upon their minor differences, exaggerating them to the point of caricature or conflict. There may be some truth there, but if you look at the issues that have been the most divisive, they are primarily in the high-stakes, emotionally fraught field of combating transnational terrorism. Thus, in the larger scheme they may be minor differences, but they are not differences on minor issues.

What troubles me deeply, however, about the discussion of transatlantic differences is the conclusion that is sometimes drawn: that the United States, unlike its European partners, does not take international law seriously. This is patently wrong—and dangerous. Having differences is normal and natural, but turning them into something they are not—a cartoonish picture of the United States as an international actor that cares only about power, not law—erodes trust and impedes dialog.

Because this issue is so important, I want to take a moment to address it, before offering some thoughts on the nature and source of transatlantic differences and misunderstandings. Then I will discuss in greater detail a few areas in which such differences have surfaced.

I. THE UNITED STATES IS SERIOUS ABOUT INTERNATIONAL LAW

The U.S. Government believes that international law matters. The seriousness with which we take international law is evident in both our approach to its making and in our commitment to the resulting obligations. It is also reflected in our record of leadership on issues where international action is not merely desired, but is truly required. The irony is that this very seriousness can sometimes work against us.

Let me illustrate. Because we take our international obligations seriously, we do not enter into them lightly. In negotiations, my lawyers and I push for clarity of language—Congress and the public need to know what we are signing up to. Unfortunately, our efforts to fend off fudged language are sometimes criticized as obstructionist, or as attempts to block consensus.

In addition, we will not join a treaty until we know we can implement it. In some cases, it proves difficult or impossible to get implementing legislation—even when we are already substantially compliant with the obligations the treaty would impose. Contrast this with the many countries that join first and tackle implementation later—an approach particularly common in the fields of international environmental and human rights law. The result is that the United States can look like a laggard or malingerer, reluctant to make an international commitment. Ironically, in such cases we take a bigger reputational hit than those countries that join but then utterly fail to comply. Compliance issues do not lend themselves so readily to the sound-bite.

A related issue is our greater reluctance to sign up to a treaty simply to join consensus or set international standards, especially when we need to ignore well-founded concerns in order to do so. This can cost us, particularly when the treaty is—or seems to be—on a feel-good topic. For example, we have recently taken a drubbing over the UNESCO Cultural Diversity Convention, accused of being against culture, against diversity, and against treaties. This is nonsensical. The United States is one of the most multicultural nations on the planet. The Convention, however, reflects in part the efforts of some countries to engage in protectionist behavior under the guise of diversity. Its ambiguous language can be read to permit the imposition of restrictive trade measures on goods and services defined as "cultural," including books, newspapers, magazines, and perhaps even internet content. This could subvert other international

mechanisms, such as the WTO,* and could, by hindering the free flow of information, raise human rights concerns. It is also inconsistent with the values embodied in our First Amendment.

Failure to join a treaty regime, however, should not be equated with a lack of respect for international law. Nor should it be viewed as a lack of concern for the underlying substantive issue. There are more ways than one to demonstrate commitment. For example, in the case of the recently concluded U.N. Disabilities Treaty, we participated actively in the drafting and provided expert advice, although we do not intend to become a party. Our basic position—stemming in part from our experience with the Americans with Disabilities Act—is that the best way to improve the life of the world's disabled is for countries to concentrate on their domestic legal frameworks.

In contrast, on difficult issues that clearly *do* require international action, the United States has for years been a leader. Consider one example. When the United States adopted the Foreign Corrupt Practices Act in 1977, no other developed nation was willing to treat the bribery of foreign government officials by businesses as an impediment to international development and commerce. U.S. companies complained bitterly that our principled stand left them at a competitive disadvantage, and pointed out that for some European companies, such bribes were not only not illegal, but tax deductible. A quarter century of U.S. leadership, however, has led to both the OECD** Convention on Combating Bribery of Foreign Government Officials and the U.N. Convention Against Corruption. Without this leadership it is doubtful that we would now have these international regimes that serve the public interest in good government and transparency.

Before moving on, I want to briefly raise one last issue—the perception that the U.S. Government not only fails to take international law seriously, but that we believe we can ignore it altogether. To some extent, this view has reached the public consciousness through a narrow academic debate regarding the relationship between the Constitution and international law. It is sometimes recast like this: the United States, unlike many European countries willing to subordinate themselves to international law,

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* World Trade Organization

** Organisation for Economic Co-Operation and Development

places the Constitution above all else, and believes that presidential power reigns supreme.

This is simply not true. International law *can* form part of our national law. In fact, the Constitution has the effect of incorporating treaties into U.S. law, and it is thus silly to assert, as some have, that the United States believes that treaties are not binding on us. On the contrary, we certainly do recognize that they are binding. The Constitution also authorizes Congress to implement the "Law of Nations," what we now call customary international law. In these situations, compliance with international law becomes a matter of U.S. law.

II. THE NATURE AND SOURCE OF SOME TRANSATLANTIC DIFFERENCES AND MISUNDERSTANDINGS

The issues that I have just discussed highlight some general differences in approaches to international law, and so are a good jumping-off point to a more specific discussion of transatlantic differences and misunderstandings. The United States and some of its European allies do have a number of differences on international law, on a variety of levels: interpretive, substantive, institutional or process-related, and philosophical. But in this past year, I have realized that a surprising number of our so-called differences are overblown or erroneous, the product of faulty premises or shoddy analysis. For example, often what is billed as a legal difference is really a difference in policy; this type of mistake crops up with the issue of detainee status, which I will discuss in more detail later on.

People also regularly fall into the classic comparative law trap of contrasting an idealized version of their own legal system with the failures or aberrations of the foreign system—and then extrapolate a set of conclusions. This is made all too easy by the natural asymmetry in information, where impressions of foreign systems are formed primarily by news reports. Take Abu Ghraib. The abhorrent incidents of abuse of detainees by U.S. personnel created the perception in the minds of some that the U.S. Government condones torture. Repugnant and unlawful behavior becomes, in some minds, representative of U.S. policy. The United States, however, has taken steps to prosecute and punish such illegal behavior as well as to clarify treatment standards, for instance, by adopting the new Department of Defense detention and interrogation policies.

Such issues aside, many of our differences—and misunderstandings—can be traced to our distinct historical experiences and our legal cultures, traditions, and systems. Our respective milieu have shaped not only our approaches and attitudes to international law, but our expectations of what international law can and should do.

Our radically different experiences of World War II go some way towards explaining our respective approaches to international law. The United States emerged from the War with a pride in our nation and an unshaken faith in our institutions of democratic self-governance. For us, international law remained primarily a way to order relations among essentially self-reliant states. In contrast, many European countries were scarred by their experience with nationalism and popular politics. They lost confidence in the ability of national government to protect them not just from neighboring countries, but from their own worst selves. Some looked to international law as a greater good, a way to constrain some of the forces that had wreaked such havoc. These different experiences may help explain why Europeans appear more eager to legalize or judicialize international issues, even at the expense of domestic self-government, whereas Americans are more comfortable allowing issues to be sorted out in the fields of politics or international relations.

Our legal traditions and cultures have also affected how we engage on international legal issues. I am of necessity overstating, and simplifying complex issues, but there is a core of truth in the notion that our common law tradition and legal and political culture incline us to pragmatism and skepticism; we probe the purpose and function of law, examine it through the lenses of other disciplines such as economics and sociology, weigh its costs against its benefits, test its flexibility against the facts at hand, judge its value by its effectiveness, and seek, where we can, an equitable solution. We also have a tendency to approach legal solutions via the virtues that have been drummed into us: the proper starting point is a live case or controversy, not an abstract one; the issue must have reached a certain level of ripeness; and the solutions should be narrowly tailored—to survive the test of future fact patterns and possible challenge through the political process.

When we bring this pragmatic, problem-oriented approach to the international arena, our partners who are steeped in Continental legal and political traditions look at us askance. They are the products of a

tradition premised upon respect for abstract general principles and a rigorous and consistent application of a codified set of comprehensive rules. Their commitment to this approach is not merely intellectual. They see the peace, prosperity and respect for human rights that Europe has developed since World War II as resting on this approach to international law. To them, our approach can appear opportunistic or, worse, self-serving. In turn, we are sometimes taken aback by what we see among certain Europeans as an excessive formalism, a doctrinal inflexibility, and an unwillingness to acknowledge that different paths may lead to the same end.

Our problem-oriented approach also predisposes us to distinguish between issues that we believe lend themselves to international legal resolution and those that do not. This can be at odds with a European tendency—heightened by experience with the European Union—to see the ideal international legal framework as one that is comprehensive and cohesive, that covers the field. Europeans are more likely than we are to try to fill perceived gaps in the international framework, and to promote a synthetic, self-regulating international legal system. To us, this can look like an almost unquenchable desire for more law and process, a desire that is particularly mystifying when it comes at the expense of domestic self-government.

Finally, there is an important set of differences arising out of the relationships between international and domestic legal systems. I will touch on just one, a key one. The soon-to-be twenty-seven members of the European Union accept the role of an international tribunal, the European Court of Justice, as the final arbiter of questions of European law that have direct effect in their domestic law. Those countries and the other nineteen members of the Council of Europe also defer to the jurisdiction of the European Court of Human Rights, and domestic legislation in some countries gives direct effect to the decisions of that court. In the United States, in contrast, a debate exists as to whether our government has the authority to delegate to international tribunals the power to decide questions of international law that would have direct effect in our domestic law. But let us turn now to some concrete examples to examine in more detail how some transatlantic differences, imagined and real, misapprehended and not, play out.

III. INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is a fitting place to start, because our decision to "unsign" the Rome Statute—that is, to notify the U.N., as depository of the Rome Statute, that we did not intend to become a party—sparked accusations of unilateralism and helped foster a view of the United States that has haunted subsequent actions and decisions. Indeed, the story is sometimes framed as that of a superpower unwilling to accept any fetters on its freedom to act. In this story, we are contrasted to the Europeans, who—the better international citizens—are more willing to abide by international rules and submit their issues to international adjudication.

The story is easy to tell and simple to grasp, in part because it fits so nicely into a certain set of preconceived notions—but it happens not to be true. We share with the parties to the Rome Statute a commitment to *ensuring* accountability for genocide, war crimes, and crimes against humanity. Our record is strong and clear: from Nuremberg to our unwavering support for the U.N. tribunals established to prosecute crimes committed in the former Yugoslavia, Rwanda, and Sierra Leone.

What we disagree with is the ICC's method for *achieving* accountability. Our concerns are not frivolous, although to those who are products of different traditions these concerns may not be immediately convincing. It is a deeply held American belief that power needs to be checked and public actors need to be held accountable. From the U.S. perspective, the ICC lacks necessary checks and balances, in part because the Rome Statute gives the ICC prosecutor the ability to initiate cases without appropriate oversight by the U.N. Security Council, creating an undue risk of politicized prosecutions. We also object on principle to the ICC's claim of jurisdiction over persons from non-party states.

It is because of these and other flaws that we were unable to become a party to the Rome Statute. Should we have become a party despite these concerns? Would that have reflected a deeper commitment to the rule of law and proved us to be better international citizens? Some may think so, but I disagree. In fact, reaching back to a point I made previously, I think our actions show the opposite—how seriously we take international law. Embracing the Rome Statute in spite of our serious concerns could only reflect a cavalier attitude towards the Court and international law more generally.

Is this approach utterly at odds with that of other countries? Not really. It is natural for states to weigh the pros and cons of a particular action and make their choices accordingly. For example, we have not signed up to the ICC, but have submitted ourselves to the jurisdiction of other adjudicative or arbitral bodies, such as the World Trade Organization and the Iran-U.S. Claims Tribunal. In the context of the International Court of Justice, we do not accept the court's compulsory jurisdiction, but are not alone in this respect. Several major European powers have not: for example, France, Germany, and Italy. In fact, only one of the five permanent members of the Security Council has done so—the United Kingdom, with a number of reservations.

I also don't think that our decision on the ICC reflects a gap in values with the Europeans. We were weighing the same principles and considerations; we just reached a different result. We were deeply concerned about good process, institutional design, and the principle of political accountability. But our decision was in no way a vote for impunity. We were confident that our domestic system was capable of prosecuting and punishing our citizens for these crimes.

IV. STATUS OF DETAINEES AND MILITARY COMMISSIONS

The unfortunate image of the United States as unwilling to be bound by rules has spilled over into other issues, particularly in the field of international humanitarian law. Take the issue of whether the United States was wrong not to give prisoner of war status to people we picked up on the battlefields of Afghanistan. This is a subject on which there can be an honest policy disagreement. However, it is wrong to say, as I have heard many times in Europe, that there was no legal basis for our decision.

The United States did not invent the concept of "unlawful enemy combatants" to put people into a legal black hole. The distinction between lawful and unlawful combatants has deep roots in international humanitarian law—it can be traced back to The Hague Regulations of 1899 and 1907. Moreover, as a matter of law, al Qaida and Taliban detainees are simply not entitled to prisoner of war (POW) status. The Third Geneva Convention does not ensure that everyone who takes up weapons on a battlefield receives POW status. In fact, the bulk of Third Convention protections, including POW status, are limited to belligerents engaged in an international armed conflict. The U.S. Supreme Court's *Hamdan* decision reflects that the conflict between the United States and al Qaida is not an

international armed conflict, which means that captured al Qaida fighters are not entitled to POW protections. In contrast, although we are in an international armed conflict with the Taliban, which was the effective government of a party to the Geneva Conventions, the Taliban's fighters did not meet Third Convention requirements because they did not carry arms openly, wear a uniform recognizable at a distance, or respect the laws and customs of war.

Some have argued that even if the Taliban and al Qaida are not entitled to POW status as a matter of law, the United States should grant them POW status as a matter of policy. In fact, U.S. policymakers seriously considered doing this in 2002, but ultimately rejected this approach because they concluded that it would not serve the purposes of the Geneva Conventions to give POW status to a group responsible for the slaughter of thousands in disregard of the law of war.

The Third Convention creates a compact for those engaged in international armed conflict. Engage lawfully in combat and, if captured, you will receive comprehensive treatment protections. Ignore the laws of war, and you will not be entitled to those protections. POW status can thus be seen as an incentive to follow the rules. Weaken that incentive and the losers would be not only our own soldiers, but civilians—who bear the brunt of suffering when unlawful combatants operate surreptitiously within the general population.

Our decision to try these unlawful combatants before military commissions has also been roundly criticized, but when our critics see how the recently signed Military Commissions Act works in practice, I believe they will realize that it offers an appropriate framework for these trials. The Act provides all of the fundamental guarantees of fairness and due process, and addresses many concerns expressed by the international community. For example, the accused have an unqualified right to hear all the evidence against them and may appeal their convictions all the way to the Supreme Court.

Unfortunately, for some, any form of military justice carries a whiff of summary justice. The United States, however, has a long and honorable tradition of military justice that is worthy of respect in both its design and its functioning. Just look at the zealous advocacy of those military lawyers assigned to defend Guantanamo detainees. In some countries like Germany, for example, where there is no comparable tradition of military justice, the image of a kangaroo court is hard to shake.

V. PRIVACY

Finally, one area in which we have seen a difference in approach between the United States and Europe is in how each balances state security and personal privacy. As the U.S. Government increasingly looks for technological means of improving counterterrorism defenses, such as by building up electronic databases, foreign calls to protect data privacy have grown. In recent years, many Europeans traveling to the United States have become alarmed at our government's increasing demands for personal information. This conflict has played out most noticeably in difficult negotiations between the United States and the European Union, in 2004 and again this year, over our requirement that airlines electronically supply the Department of Homeland Security with extensive data, so-called passenger name records (PNR), on all arriving international travelers.

There are genuine differences between the underlying American and European legal regimes for protecting personal privacy. European Union member states have highly formal systems grounded in comprehensive laws, presided over by independent data protection commissioners. In particular, they limit the access of private firms to personal data. In the United States, privacy protections are more diffuse and decentralized, comprising a patchwork, flexible "common law" of privacy made up of constitutional, statutory and regulatory provisions. Other than medical records, we do not systematically and comprehensively regulate the efforts of private firms to acquire personal data. We also have no tradition of data protection commissioners. Ironically, however, in some areas, Europeans appear more willing to accept intrusions on their privacy than we are. For example, Britons submit to widespread video surveillance of public places, and Europeans universally carry national identity cards, something that does not exist in the United States, where even proposals to standardize state drivers' licenses meet with widespread anxiety.

Despite our differences, however, we have worked out mutually acceptable transatlantic privacy protections in the counterterrorism context. In 2002, an agreement was reached for sharing personal data between U.S. law enforcement agencies such as the FBI and its new European counterpart, the European Police Agency (Europol). In 2003, the United States and the EU concluded historic agreements on mutual legal assistance in criminal matters and on extradition, regulating among other things the terms for sharing personal data

needed for use in criminal proceedings in the other's territory. Just last week an agreement was signed with Eurojust, a new EU organization responsible for coordinating serious trans-border criminal proceedings, which will provide an enhanced basis for transatlantic prosecutorial cooperation. Even the sensitive question of sharing PNR data has been successfully settled between the United States and the EU, reassuring European passengers that their personal information is being safeguarded while giving the Department of Homeland Security a valuable tool for keeping terrorists and other criminals from our shores.

Now a more ambitious effort is in the offing—the development of a framework agreement. At a meeting in Washington on November 6, Attorney General Gonzales and Secretary of Homeland Security Chertoff and their European counterparts commissioned senior experts from their ministries and from the State Department to examine whether wide-ranging agreement would be possible in the law enforcement and border security areas. The fact that this initiative is being taken up shows that in this particular area, American and European approaches to protecting privacy are coming together rather than moving apart.

CONCLUSION

All of these areas of legal differences and misunderstanding underscore the timeliness of creating a center devoted to international and comparative law. Let me presume upon your hospitality to offer some of my hopes about what this Center might become.

First, I am confident that under Curt's leadership, this Center will address an unfortunate isolationist tendency in contemporary U.S. international and comparative law teaching and scholarship. This isolationism is not from the rest of the world, but rather from the rest of the legal education enterprise. Too often international and comparative law have been electives, cultural detours from core subjects such as constitutional law, federal courts, administrative law, property, and contracts. As a result, international and comparative law neither receive the respect they deserve, nor face the kind of bracing examination—using the same methodological tools and applying the same levels of intellectual discipline and energy—that is brought to bear on other law school subjects. To make clear its relevance to all facets of legal training, the disciplines of international and comparative law must incorporate the rigor, creativity and focus

that we see in the domestic fields. Curt's own scholarship stands as a wonderful example of how to integrate international and foreign law with the study of the U.S. constitution and the federal courts system.

Second, I hope this Center will break down the isolation of international and comparative law by encouraging teachers of all law school courses to draw on foreign and international examples and experience. For example, courses in criminal law and criminal procedure could explore the rules and methods of continental Europe to illustrate plausible alternatives to our approach. The same point applies to every subject in the regular law school curriculum. We Americans need to get past the unstated assumption that the accomplishments of our legal system are unique and possibly superior. Studying the achievements, as well as the failures, of other systems can illuminate our own.

Third, I hope the Center will expand the opportunities to work with and learn from foreign colleagues. Faculty and student exchanges can turn book learning about foreign law into something vivid and concrete. More foreign faculty and students mean greater opportunity for joint research and discussion, both inside and outside the classroom. Such collaborations not only educate the rest of the world about the best qualities of the United States—our enduring commitment to the rule of law and ordered liberty—but enrich our own understanding. I also hope that this Center can encourage Duke faculty and Duke students to work and study in foreign countries.

In conclusion, let me say that I am grateful to you, and particularly to Curt, for allowing me to take part in the inauguration of this Center. I look forward to learning from your work, and in having as colleagues, lawyers whom this Center has touched and made better.