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A View From the Top: American Perspectives on International Law After the Cold War

William H. Taft, IV[†]

In the early years of the last century, the United States was among the leading states promoting the development of legal regimes and institutions to bring about the peaceful resolution of disputes between nations. Our later failure to join the League of Nations reflected the reluctance of many of our citizens, then as now, to allow decisions about our vital national interests to be made by any but our own elected leaders. Later still, however, in the years following World War II, the United States exerted its influence to negotiate treaties to create international obligations and set up institutions to manage international relations on an unprecedented scale. These efforts reflected confidence that international agreements and dispute resolution mechanisms could promote our interests in many fields and that the risk that they would be politicized to our disadvantage was low. Certainly, our policy of promoting the rule of law in international affairs was often portrayed as a willingness to relinquish the capacity to decide matters for ourselves as they came up and to abide by the results of systems in which we had a voice but not control, in return for other states doing the same.

And this policy appeared for many years to be soundly based and enjoyed wide support. Overall, the growth of international law and its influence in the decades following World War II was a very positive development, and the United States and the world benefited enormously from the increased international cooperation it made possible. The United Nations Charter and a series of military alliances contributed significantly to our national security, as many potentially bloody conflicts were prevented from escalating into major wars. Other treaties and multilateral conventions involving trade, science, the environment and human rights have likewise been hugely beneficial. We have seen increased economic and social welfare for millions of people throughout the world. Several terrible diseases have been wiped out entirely and considerable progress is being made in the fight against other diseases, notably AIDS. Important portions of the global environment have been protected. Millions of people have received

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humanitarian assistance during armed conflicts and in the aftermath of natural catastrophes. Most nations now are parties to treaties that commit them to providing to their citizens a broad range of civil and political rights. The United States has been the principal advocate as well as a strong supporter, politically and financially, of these developments.

Many people thought that the end of the Cold War and the consequent reduction in tension between the world's two superpowers in the 1990s would see an acceleration of international cooperation and a strengthening of international institutions and the role of international law. The Security Council's effective action to force Iraq's withdrawal from Kuwait in 1991 lent some support to this view. On the whole, however, while many of our friends and allies were prepared to establish new international legal regimes, in some important respects the 1990s revealed a loss of enthusiasm in the United States for multilateral approaches. We declined to become a party to a number of international conventions most other states in the world had joined, including the Convention on the Law of the Sea (which had been revised specifically to address concerns the United States had expressed about an earlier text), the Kyoto Convention on global warming, the Comprehensive Test Ban Treaty, several human rights conventions, and the Rome Statute creating the International Criminal Court. The use of force to displace Serbian authority in Kosovo, without either a Security Council resolution or a public explanation of the basis in international law for the deployment of our military forces, was also a departure from our traditional practice of justifying such actions in terms of our international legal obligations and requiring other states to do likewise. It suggested, moreover, that such obligations could be discounted when they interfered with important political interests. Our apparent ability, as the sole superpower, to achieve our policy objectives without incurring formal legal obligations, as well as the desire of other states in some instances to adopt regimes that, whether intentionally or incidentally, affected the United States especially adversely because of its superpower status, also contributed to this development.

A review of the U.S. attitude towards international law over the past five years shows that in most respects skepticism about the value of multilateral conventions and undertaking new international legal obligations has continued. The United States did not ratify any of the major international treaties it had declined to join in the previous decade. Nor, with a few exceptions involving cooperation in law enforcement, did it engage in and promote the negotiation of conventions on new subjects. The Administration's preferred way to obtain international cooperation in support of its foreign policy objectives is well illustrated by the Proliferation Security Initiative, a political commitment by a dozen nations to act together to interdict trafficking in weapons of mass destruction and related materials on the sea. This has been an effective program, put in place quickly and carried out without the need to negotiate and reach agreement on detailed rules governing its operation. We should note, however, a small bit of irony here. To be successful, the initiative depended on the participants, including the United States, being able to agree that they would conduct operations in conformity with the provisions of the

Law of the Sea Convention, to which all the participants are parties except the United States.

In recent years, the United States has, in fact, enthusiastically supported the development of new international legal obligations in only one forum—the Security Council. In particular, the United States has supported resolutions by the Security Council to impose sanctions in several situations, to authorize the deployment of peacekeeping forces, and to authorize the use of force where necessary to carry out its decisions. We have also initiated and supported several resolutions by the Council that are intended to regulate financial transactions of persons involved in terrorist activities and to limit the proliferation of nuclear weapons.

Under the Charter, these resolutions require member states to take specific steps in their domestic law enforcement activities. Traditionally, states have undertaken international obligations of this sort only after extended treaty negotiations and careful review by their parliaments, which often make reservations to particular commitments contained in the treaty. The United States has, as is evident from the number of multilateral treaties we have not joined, generally been very cautious in carrying out this process. Our willingness to impose these same sorts of obligations on other states and assume them ourselves through the highly abbreviated process of adopting Security Council resolutions has, in light of this, been surprising. Some states, indeed, have queried the wisdom of using the Council as a “super-legislature,” pointing to its undemocratic composition and its limited resources for performing the legislative function. The vital importance of dealing with terrorism and nuclear proliferation on an international scale has, however, persuaded us that, at least in these areas, the Council should use all the authority available to it under the Charter. In addition, of course, our status as one of the five permanent members of the Council with the ability to veto resolutions we do not support means that the risk to our interests of establishing a precedent for this practice is small.

It is, nonetheless, hard not to see some incongruity in our continuing reluctance to enter into multilateral legal commitments through negotiated treaties and our enthusiasm for binding Security Council resolutions on selected subjects. Furthermore our partiality for a process in which we hold a privileged position has not enhanced our reputation for strengthening international law generally. But Americans have never had what Henry James called “the Gallic passion for theoretical completeness,” and the practical advantages of the Security Council process are significant for us.

There has been a similar inconsistency in our analysis of how international law applies to the conflict we have been engaged in with the organizations responsible for the attacks on September 11 and other terrorist acts in the last few years. On the one hand, we have invoked the traditional customs and rules of war as authority for detaining enemy combatants in custody as long as they may be able to provide us with valuable intelligence or are a threat to us if released. Under the Geneva Conventions prisoners of war may be detained in these circumstances without being charged with any crime, and are not generally represented by counsel if they wish to contest their

detention or for any other purpose unless criminal charges are brought. Enemy combatants who, for one reason or another, are not entitled to prisoner of war status are subject to detention on the same terms. While the Conventions themselves do not apply to the conflict with al Qaeda, which is not and could not be a party to them, it has been natural to rely on them as authority for our detention policy, and we have repeatedly emphasized that our policy is consistent with them in this regard.

On the other hand, when it comes to how detainees are to be treated, we have parted company with the body of law that establishes the right to detain in the first place. We have argued that the detainees have no legal right to be treated in any way other than what is prescribed for them as a matter of policy. We have authorized the use of coercive interrogation techniques, arguing that no law prohibits this, when both the law of war and customary international law hold that persons in detention shall not be subjected to coercion for the purpose of obtaining information from them—nor are they to be subjected to humiliating or degrading treatment. Finally, the Department of Justice prepared several memoranda advising that in the conduct of the war with al Qaeda the President had the authority to suspend our international treaty obligations altogether and could even make criminal conduct lawful.

The Supreme Court decisions in the summer of 2004 rejected some of the arguments put forward by the government concerning its treatment of the detainees, including its claim that the detainees had no right to have their status determined in accordance with procedures that would be subject to review by the courts. As a result, new procedures have been instituted that essentially conform to the requirements of the Geneva Conventions for determining the status of the detainees and whether they should continue to be held in custody. Relying on the fact that the Geneva Conventions do not apply to the conflict with al Qaeda, however, the government did not change the rules prescribing interrogation methods to correspond to the requirements of the Conventions or adjust its treatment of the detainees in other ways. This selective application of the customary standards to the conduct of our military forces engaged in combat, claiming the customary authority of the detaining power while denying the customary rights of the detainees, has not been easy to explain either as a matter of law or policy. It may be that enactment of the McCain Amendment to the Defense Appropriation bill will result in new procedures being promulgated, but it is not certain what they will be or, specifically, whether they will be the same as have been contained in the Army Field Manual, which reflected the traditional law of armed conflict in the past.

This is not to say that in the new type of conflict in which al Qaeda has engaged us it might not be necessary to make changes to the traditional law of armed conflict. There are certainly provisions of the Geneva Conventions that could benefit from updating. If, however, we are going to rely on the customary law of war for detaining enemy fighters in this new type of conflict, it is natural to expect some particular justification—or at least some demonstration of a practical benefit—for departing from it in our treatment of them. It is significant that, seeing no such justification or benefit when they

were considering the issue initially in January 2002, neither the military nor the civilian leadership of the Department of Defense proposed to deviate from the requirements of the Geneva Conventions in their treatment of the detainees at Guantanamo. The original rules of engagement issued to the forces fighting in Afghanistan had rather directed that the Geneva Conventions be complied with in the treatment of persons taken into custody, regardless of whether or not they were entitled to this. In this respect the rules followed the American practice in Vietnam, where the Viet Cong were treated in accordance with the Conventions even though it was understood that this was not required.

Notwithstanding the stated intention of the Pentagon's leadership to comply with the requirements of the Conventions without qualification, which really rendered any legal advice on the point unnecessary, lawyers at the Department of Justice nonetheless wanted to establish formally the government's conclusion that the Conventions did not apply to the conflict with al Qaeda as a matter of law. They also persuaded the President to qualify any commitment to apply the provisions of the conventions as a matter of policy to situations where this was "appropriate" and "consistent with military necessity." These qualifications initially appeared redundant, inasmuch as the conventions themselves are the result of an effort over many years to determine what is appropriate and consistent with military necessity. Later, however, it developed that the inclusion of these phrases had unfortunate consequences. Those responsible for the treatment of the detainees in Guantanamo were detached from the legal guidelines for interrogation methods reflected in the Conventions and embodied in the Army Field Manual for decades. Set adrift in uncharted waters and under pressure from their leaders to obtain information about the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far, and it is now clear that from time to time this happened.

Now I do not exclude that some important information—perhaps very important, life-saving information—may have resulted from the application of methods of interrogation that are not permitted by the Conventions and the Manual, although it is worth keeping in mind also that many detainees treated in accordance with the Conventions over the years have provided much valuable intelligence to their captors, and it is even possible that some information might have been obtained if we had adhered to our previous practices that has not been discovered by new ones. However this may be, it seems to me that if changes in methods of interrogation are to be made, some justification more than that unlawful combatants have no rights or that the laws of war prohibiting the use of such methods do not apply to the conflict with al Qaeda would be highly desirable. The advantages and disadvantages of proposed changes should be carefully weighed, and newly adopted methods publicly acknowledged and justified. This, of course, was not done, and when at least some of the new methods of interrogation being used were ultimately made known, together with the memorandum from the Department of Justice construing—or should I say misconstruing?—the Convention Against Torture and the statutes implementing it not to prohibit those methods, it was widely

believed that we were likely not complying with our obligations under the customary laws of war and international law and trying to make sure that nobody knew this.

The United States's increasing reluctance to become a party to treaties establishing new international legal commitments, its recent enthusiasm for Security Council resolutions imposing legal obligations on states designed to combat terrorists and the proliferation of weapons of mass destruction, and its selective approach to the application of the customary laws of war in its conflict with al Qaeda all represent significant departures from its practice in the decades of the Cold War. The first two changes are consistent with a diminished interest in developing international law in traditional forms but also reflect new conditions; the selective approach to the customary laws of war at least suggests a new policy preference to limit rather than expand the role of international law in regulating state conduct.

Our skepticism about joining new treaties, particularly multilateral ones designed to address global problems like the Law of the Sea, the Kyoto Treaty on climate change, and the Rome Statute establishing the International Criminal Court, is connected to the end of the Cold War and related developments. As the sole superpower, our ability to achieve our policy objectives has not seemed to depend so much on reaching agreement with other states and acquiescing in the inevitable compromises that reaching such agreement often requires. Other states have likewise not felt that they must accommodate our preferences in negotiations in the interest of preserving allied unity in the face of a common threat. Finally, and perhaps most importantly, because we are the superpower our interests are in a number of ways bound to be different from those of other states.

In short, with the end of the Cold War international law relating to a number of subjects seems to be neither as easy to make nor as important to make for the United States, at least in the near term, as it was previously. With the exception of the Convention on the Law of the Sea, which has been stalled at least as much because of objections that it is a multilateral convention as by specific concerns about the substance of its provisions (with which we have been complying for more than two decades in any event), the United States's increased reluctance to join treaties seems to me to derive as much from a concern that the policies embodied in the particular treaties simply are not in our interest as from a change in attitude towards the role international law can and should play. We could, however, work a bit harder on some of these negotiations, and if other states did not have the impression—which our past practice in some instances has encouraged—that even when they make concessions to us we will not finally become a party to the convention, we could probably get better results.

Our new-found willingness to use Security Council resolutions to combat terrorists and the proliferation of weapons of mass destruction is a product both of the increased opportunity to cooperate with Russia on these subjects and the urgency that has attached to these issues in recent years. Russia and the United States have experienced terrorist attacks of an unprecedented scale and character in the opening years of the twenty-first

century; they similarly share unique responsibilities for addressing risks from the proliferation of nuclear weapons. As leaders of the opposing camps during the Cold War, they enjoy enhanced credibility when they agree on a policy, and dreadful events have convinced each of them that no opportunity to reduce or eliminate terrorist activities and the proliferation of nuclear weapons should be missed. Again, it seems to me in considering this instance that substantive concerns and the course of events, not any shift in American policy towards international law as such, go far in explaining our new approach.

Regrettably, substance seems not to have played a significant role in our decision to make selective use of the customary law of war in the conflict with al Qaeda. No serious analysis of the advantages and disadvantages of adhering to the Geneva Conventions' rules regarding interrogation methods was undertaken before it was decided that because the Conventions did not apply as a matter of law they should not guide our conduct. As I mentioned earlier, both the civilian and military leadership of the Department of Defense proposed to follow the U.S. practice in Vietnam of treating all detainees in accordance with the Conventions, regardless of whether they were entitled to such treatment or not. It was the lawyers from the Department of Justice who pressed for a determination that the Conventions and other standards of international law and practice did not govern the conflict. Bearing an abstract hostility to international law, developed in the sheltered environment of academic journals, and equally unfamiliar and unconcerned with our broader policy interests in promoting respect for the rule of law among states as well as within them, these lawyers proposed to create a regime in which detainees were deprived of all legal rights and the conditions of their treatment were a matter of unreviewable executive discretion. Why lawyers, of all people, should want to establish the point that such a lawless regime could legally exist, even as a theoretical matter, much less recommend that one actually be created, is, I confess, beyond me, and in itself it a sad commentary on the extent to which sophistry has penetrated what used to be widely regarded as an honorable and learned profession.

Ultimately, of course, the Supreme Court found the regime to be inconsistent with domestic law, and there are indications that some in the government now regret that the United States abandoned in this case its practice of following customary international law and missed a chance to strengthen respect for the rule of law in international affairs, which has been so much to our advantage over so many years. Certainly, it was a mistake to disconnect as large an organization as the U.S. Army from a system of rules under which it had been operating for many years, tell it that there are no legal requirements for its future conduct, and give it no more guidance than to act humanely. Even when rules for how to treat detainees are well settled and troops are trained and disciplined to comply with them, the tension and the high passion involved in combat can easily result in abuses. When the rules are changing and their legal authority is in doubt, such abuses are virtually inevitable.

I have mentioned the role that the lawyers in the Department of Justice played in influencing the Administration's policy toward the treatment of detainees. Perhaps, in addressing this audience, at least, a few more words on this subject are in order.

Over the years when the United States played a leading role in promoting international law as a means of maintaining peace and security and increasing prosperity, policymakers rather than lawyers had the chief responsibility in this activity. They understood very well, of course, the fragile nature of a relatively immature system that depends for its definition in many instances on the recognition of a common practice observed by states as a matter of legal obligation, and that lacks any consistently effective method of enforcing its rules. While these characteristics cause lawyers professional discomfort, for policymakers the flexibility inherent in this less rigid structure has advantages. Even as they seek to build a stronger set of rules for international conduct to make the world safer and richer, they can choose from a number of courses that may be open to them. What has been peculiar about some recent experience is that lawyers, rather than advising their policymaking clients about the many options available to them, have on critical occasions tried themselves to determine outcomes.

The Administration's consideration of how to treat detainees in the conflict with al Qaeda is one instance of this. There, lawyers effectively turned what should have been, as it was in Vietnam, a question of how we wanted to treat the detainees into a debate about what our minimal obligations were under the law. The nation's foreign policy on which our liberty and prosperity depend, then, instead of being the product of a careful review of our national security requirements, our relations with other states, and our long-term interests, became simply the occasion for lawyers with but slight experience in and no responsibility for these matters to obtain official endorsement of an exotic legal proposition. Even if the proposition had been correct, which the Supreme Court determined it was not, this abstract exercise would have been a mistake. Of course, it's important to know what the law is, but it's even more important to know what it is in your interest to do. When you know that, it is time to ask the lawyers whether it is lawful, and if it is, you go ahead with it. This is the way foreign and national security policy have generally been made and carried out in the past, and international law has developed consistent with state practice determined by policymaking officials.

My hope is that those officials will soon reclaim control of U.S. policy concerning the role international law can play in protecting and advancing our interests. Policymakers, after all, have much accumulated experience and wide responsibilities. They cannot long forget that the world is a dangerous place, perhaps most dangerous for the strongest and most prosperous states because they have the most to lose. For the same reasons we promote the rule of law within states, we need also to promote it among them. That means states must reach agreements on how they are going to conduct themselves, how they will resolve disputes, and then abide by the rules and the systems they have agreed to. In the years since the end of the Cold War, from which the United States emerged as the world's sole remaining superpower, some have been tempted

to think that it would be possible for us to maintain our security and prosperity without entering into arrangements that undoubtedly limit our flexibility and subject our conduct to review and judgment by others. We have looked at that option long enough now to know that it's time to recommit ourselves to the policy that served us so well for more than half a century, the development and support of international law and institutions.

Indeed, I would go further. International law and institutions can be even more important to the United States in defending against the threat we face today from terrorist organizations than they were during the Cold War. The Soviet Union, after all, had so many things that al Qaeda lacks—nuclear weapons, mismanaged but substantial economic resources, an extensive network of alliances, a deceptively plausible ideology, and the international legitimacy that comes with being a recognized nation-state. Moreover, it had a permanent seat on the U.N. Security Council that assured no resolutions that adversely affected its interests could be adopted. International law could not hope to restrain such a superpower in any circumstances where it believed its vital interests were at stake, nor did it do so.

Today, we confront a handful of significant terrorist organizations and a larger number of small terrorist cells operating on their own initiative. Fanatically devoted to their cause and willing to lose their lives in its service, terrorists are less predictable than the Soviet Union and thus in some respects more difficult to defend against. Their policy, which at the moment looks no farther than killing as many people and disrupting as much of civilized society as possible, also complicates the task. Nevertheless, if the terrorists have some peculiar tactical advantages, we have by far the stronger hand—much stronger relatively than the hand we were dealt in the Cold War against the Soviet Union. And not the least important card in our hand today is international law. Rather than worrying about whether international law imposes excessive constraints on our flexibility, we ought to be using it now to hunt down and defeat al Qaeda and other terrorists groups that have no claim to legitimacy in the international system.

And the tools are already in place. A dozen international treaties call for the criminalization of terrorist acts. The Security Council has adopted resolutions condemning terrorism, requiring states to cut off the terrorists from the funds they need to finance their activities, and requiring states to prevent terrorists from gaining access to materials involved in making nuclear weapons. Conventions banning chemical and biological weapons have been in place for many years. In short, international law already condemns terrorism. What is needed is to strengthen respect for international obligations across the board and increase the cooperation among states that those obligations at the least encourage and in many instances require.

We cannot defeat the terrorists by ourselves, only with the help of other states. Fortunately, however, not all, but certainly most, other states agree with us in opposing terrorism. Their cooperation will assure that the terrorists are increasingly marginalized and ultimately defeated. International law can contribute significantly to this result, and will itself be strengthened in turn, when it is seen to be the foundation of what the terrorists fear most and what

the United States has sought for a century and still seeks to bring about—an ordered world based on the rule of law within and among nations.