

Changing the Rules: The United States, International Law and the War on Terror

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With the immediate recognition of the Al Qaida terrorist network as an active threat to the national security of the United States, Washington faces a dilemma: does it attempt to work within or over the boundaries of international law of a system developed fifty years ago? Given the unprecedented nature of modern terrorism discovered on September 11, 2001, American foreign policy processes have disregarded the traditional international legal framework in adapting to the emerging threat appropriately, challenging the validity of that system in the modern era.

Before attempting to justify the U.S. departure from the international legal framework, it is necessary to briefly outline the progression of threats against the U.S. since the establishment of the present, state-centered, English School system defined by the 1945 U.N. Charter. Doing so will expose the lack of equilibrium between what the system was designed for and what it meets today.

The Soviet Union, a sovereign entity, possessed all the characteristics of sovereignty, notably territory, population, and supreme and legitimate rule. Its responsibility for the survival of the Soviet people allowed for the successful implementation of the deterrence policy by the U.S. as a means to maintaining general global peace and stability. The 2002 National Security Strategy recalled, “The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy’s use of force, producing a grim strategy of mutual assured destruction [MAD].”¹ A balance of power reinforced by deterrence policies and MAD, along with a healthy international framework checking the activities of state actors, maintained general peace throughout the bi-polar second half of the twentieth century.

Al Qaida, a non-state actor, is not bound to any territory, population, or government; therefore, the fears of consequences that typically govern the activities of traditional state actors in the international system do not concern it. With the attacks on the W.T.C. in 1993 and 2001, and the numerous hotel and embassy bombings in between, Osama bin Laden revealed his strategy of a complete disregard for international law, human rights, and the rules of war. It is one thing to bomb an American barracks in Saudi Arabia or warship in Yemen; it is another to attack airliners and office buildings in New York. Al Qaida has displayed strategic intelligence, militaristic capability, and the strength and manpower to inflict significant damage: powers that, before 1991, only state actors possessed.

Under Articles 51 and 39 of the U.N. Charter, states may exercise military intervention against opposing states only in [1] self defense *after* an armed attack has occurred or [2] with the explicit approval of the Security Council. Identifying the aforementioned distinction and recognizing the current threat against the U.S., one may reasonably conclude that the present international legal framework, which denies states

¹ The National Security Strategy of the United States of America. Washington DC, September 2002.

the type of pre-emptive and preventive action necessary to deter a terrorist attack, is inept in dealing with this new and very real threat. Since the U.S. simply cannot wait for a 9/11-style terrorist attack before receiving permission from the international community to retaliate, common sense dictates that it must take all necessary measures to prevent such an attack from occurring. Implementing preventive foreign policy aimed at disabling rogue states, failed states, and hostile regimes developing or desiring to develop WMDs is undoubtedly a necessary measure in the context of the war on terror.

Following the September 11 attacks, the U.S. proceeded in a manner consistent with international law. The U.N. condemned the attacks immediately and passed resolution 1378 recognizing the Taliban Government's involvement with Al Qaida and Osama bin Laden.² Resolution 1378 provided implicit authorization for the U.S. to invoke its Article 51 rights to self-defense under the U.N. Charter, consequently allowing NATO to invoke Article 5 of the Washington Treaty for the first time in history. With the multilateral containment of Afghanistan, the international legal framework proved its effectiveness in the initial stages of the war on terror. Unfortunately, that would become the extent of its effectiveness

Much of Al Qaida's leadership and infrastructure was effectively killed or detained during the ongoing Afghanistan campaign. This produced mixed results. Al Qaida was now more decentralized, therefore more invisible and potentially more dangerous, as individual cells would now act independently and within their own discretion as to when, where, and how they will attack. With its infrastructure destroyed and its supporters neutralized or disciplined, Al Qaida's WMD acquisition became the primary concern of the American leadership³.

In September 2002, the White House released the National Security Strategy (NSS). This report outlined U.S. Foreign Policy for the 21st century and established the Bush Doctrine. It is necessary to quote at length various segments of the NSS doc since they are highly relevant to my ongoing argument:

The United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option.

In the Cold War, weapons of mass destruction were considered weapons of last resort whose use risked the destruction of those who used them. Today, our enemies see weapons of mass destruction as weapons of choice.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.

And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.⁴

The war on terror is not a war against any particular nation-state; it is a war against a tactic.⁵ Judging by the ambition and results of the September 11 attacks, this tactic, in the form of Al Qaida, has expressed the desire to acquire and use WMDs against the U.S. and its allies. Although Al Qaida does not and will never possess the infrastructure necessary to build WMDs, it may have the money to buy them.⁶ Therefore, the U.S. must either contain or neutralize those states which possess the infrastructure to build WMDs and the degree of anti-Western sentiments sufficient for a willingness to sell

² SC Res. 1378 (14 November 2001)

³ See NSS.

⁴ The National Security Strategy of the United States of America, *ibid*.

⁵ R Hutchings, 'X+9/11', *Foreign Policy*, no. 143, 2004, pp. 70-72, retrieved 14 March 2006, Business Source Premier database.

⁶ *Noontime Lecture Series: Adversary Use of Weapons of Mass Destruction: Are We Prepared?*, recording, World Affairs Council of Northern California, San Francisco, 4 October 2005.

these weapons to terrorist organizations such as Al Qaida. President Bush identified these rogue/failed states as the “axis of evil”⁷ in his 2002 State of the Union.

Within the present bounds of international law, the U.S. may legally invade Iraq only by presenting, at minimum, empirical evidence supporting a direct connection between Saddam Hussein’s regime and Al Qaida. Such a connection would allow the U.S. to provide a case for Article 51 on grounds that Iraq, similarly to Afghanistan, aided in the armed attack on New York in 2001. Any other justification, excluding humanitarian intervention or preemption following a direct threat of armed attack, would have been illegal. The need to tie Saddam to Al Qaida in order to permit the action necessary to destroy the likely potential of his regime to develop WMDs, which could fall into the hands of Al Qaida, led to a destabilization in the foreign intelligence-policy relationship following September 11.

The deterioration of the intelligence-policy relationship within the U.S. government resulted from an international legal framework that denied the type of preventive action necessary to deter a potential trade of WMDs between the Iraqi regime, defined as rogue by the NSS, and Al Qaida. Paul R. Pillar, the CIA national intelligence officer for the Middle East from 2000 to 2005, described serious “...problems in the intelligence-policy relationship,”⁸ stating that, “the greatest discrepancy between the administration's public statements and the intelligence community's judgments concerned not WMD (there was indeed a broad consensus that such programs existed), but the relationship between Saddam and al Qaida.”⁹ As the intelligence community was unable to provide any evidence linking Saddam to Iraq, the Bush administration had to base its justification on the case of Iraq’s illegal WMD possession.

Whether Iraq had an active WMD program or stockpile is irrelevant at the present stage of the conflict, since the unanimous passing of resolution 1441 clearly suggested that the various intelligence agencies of the UN Security Council (UNSC) suspected that Saddam possessed such a program. The U.N.’s inability to follow through on resolution 1441, which warned of “...serious consequences”¹⁰ if Iraq would not reveal its WMD program, led to the inevitable public undermining of the post WWII international legal framework when president Bush declared that, “The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.”¹¹ No statement more vividly revealed the new direction in U.S. foreign policy.

Following the invasion of Iraq, scholars criticized the U.S. for its policies of “aggressive unilateralism”¹² and for justifying its acts on “grounds that were wholly contrary to international law.”¹³ When the fifty founding members of the U.N. met in San Francisco in 1945 to draft the U.N. Charter, terrorism was not a concern, clearly indicated by the fact that the charter does not mention it. The system was developed to

⁷ George W. Bush, ‘State of the Union’, Address delivered to the American people, Washington DC, 29 January, 2002, <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>> retrieved 16 March 2006.

⁸ Pillar, P, ‘Intelligence, Policy, and the War in Iraq’, *Foreign Affairs*, vol. 85, no. 2, 2006, retrieved 14 March 2006, Academic Search Premier database.

⁹ *ibid.*

¹⁰ SC Res. 1441 (8 November 2002)

¹¹ George W. Bush, ‘Address to the Nation’, Address delivered to the American people, Washington DC, 17 March, 2003, <<http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>> retrieved 16 March 2006.

¹² J Hammond, ‘The Bush Doctrine, Preventive War, and International Law’, *The Philosophical Forum*, vol. 36, no. 1, 2005, pp. 97-111, retrieved 14 March 2006, Academic Search Premier database.

¹³ *America is Undermining the Global Legal Order... Or Not?*, recording, World Affairs Council of Northern California, San Francisco, 31 October 2005.

prevent inter-state wars of the type prior to its drafting, and it has been considerably effective up until 9/11. But the international system that the U.S. founded and led is lacking in dealing with non-state terrorist actors.

U.S. foreign policy processes since 9/11 have consistently displayed a pattern of rejection of the international legal framework founded in 1945. Besides invading two nation-states without explicit UNSC approval, the U.S. has also withdrawn from the Anti-Ballistic Missile (ABM) Treaty, against its terms, and proceeded with detention and interrogation policies challenging the Geneva and 1984 Torture Conventions. In the eyes of the idealist, such conduct deserves opposition and criticism. But Al Qaida is not a nation-state, it is not a signatory of any treaties, it does not recognize customary and formal international law, it attacks civilian targets, it executes its prisoners, and it has expressed a desire to kill U.S. citizens; therefore, the U.S. must adapt its foreign policy appropriately to deal with this new threat and, if necessary, work outside an international legal framework designed for inter-state conflict.

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