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The United States of America and international law

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Tony Lloyd, United Kingdom, Socialist Group

Summary

Although the United States of America (US), an observer to the Council of Europe, remains strongly committed to international law, the American administration has, especially since 11 September 2001 and in pursuit of its so-called "war on terror", inappropriately and unilaterally disregarded key human rights and humanitarian legal norms considered by it to be overly constraining or otherwise inappropriate in view of the perceived new situation. In so doing, it has done a disservice to the cause of justice and rule of law and has tarnished its reputation as a beacon in defending human rights and in upholding well-established rules of international law.

The US and Europe share common values and pursue the same goal of promoting and strengthening respect of human rights and the reinforcement of the rule of law. Indeed, few countries can rival the impressive case-law of the US Supreme Court, whose judgments have curtailed unfettered executive powers, guaranteeing the separation of powers and, as the recent *Hamdan* case has illustrated, respect for well-established international legal standards. However, by continuing to unlawfully detain persons in Guantanamo Bay and elsewhere, by the setting-up of a "spider's web" of secret detentions and unlawful inter-state transfers often in collaboration with countries notorious for their use of torture, by its attempts to undermine the effectiveness of the International Criminal Court and by making no effort to abolish the death penalty, the US' behaviour is incompatible with well-established international law standards.

The Committee on Legal Affairs and Human Rights finds that this situation has made it difficult for the US to work with allies in mounting an appropriate response to the very real threat posed by international terrorism. It proposes that the Assembly strongly urge the US authorities, in particular its parliamentary colleagues, to bring an end to this abnormal and unacceptable situation. The Assembly, composed of parliamentarians from 46 European countries, should reiterate its readiness to enter into dialogue with its fellow parliamentarians in the US.

The Assembly should also recommend to the Committee of Ministers that the US Government be reminded of its obligations, as an observer state to the Council of Europe, to respect human rights and the rule of law and that information should be sought from the US authorities with respect to matters raised in the report.

A. Draft resolution

1. The United States of America (US), an Observer to the Council of Europe, is traditionally and remains Europe's long-standing ally in resisting tyranny, upholding the rule of law and defending human rights. Since World War II the US has led efforts to create a modern, multilateral, rule-based system of international law and has been among the principal driving forces in establishing the current architecture of international institutions.

2. The Parliamentary Assembly recognises that the US remains strongly committed to a significant number of international legal norms, particularly those that promote economic interests. However, especially since the events of 11 September 2001, and in pursuit of its so-called "war on terror", the American administration has inappropriately and unilaterally disregarded certain key human rights and humanitarian legal norms considered by it to be overly constraining or otherwise inappropriate in view of the perceived new situation. In so doing, it has done a disservice to the cause of justice and rule of law and has tarnished its own hard-won reputation as a beacon in defending human rights and in upholding well-established rules of international law.

3. More specifically, the United States:

3.1. continues unlawfully to detain persons in Guantanamo and elsewhere (see Assembly Resolutions 1340 (2003) and 1433 (2005)), in flagrant breach of its international obligations, in particular under the UN International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1949 Geneva Conventions as well as other rules of international humanitarian law with respect to the treatment of persons captured or detained in the context of an international armed conflict;

3.2. has maintained – at least until very recently – a "spider's web" of secret detentions and unlawful inter-state transfers, often in collaboration with countries notorious for their use of torture (see Assembly Resolution 1507 (2006)), behaviour which is incompatible with UN and Council of Europe human rights standards;

3.3. by negotiating bilateral immunity agreements with parties and non-parties to the Statute of the International Criminal Court (hereinafter "ICC"), and exercising considerable pressure on countries to enter into such agreements, has attempted to undermine the effectiveness of this body which has jurisdiction over the international crime of genocide, war crimes and crimes against humanity when states are unwilling or unable to investigate or prosecute crimes;

3.4. despite recent encouraging national judicial findings, including those of its Supreme Court, has not made any efforts to abolish the death penalty (see Assembly Recommendation 1760 (2006)).

4. The Assembly strongly urges the US authorities, in particular its parliamentary colleagues in the Congress and in state legislatures, to do their utmost to bring an end to this abnormal and unacceptable situation. It reminds the US authorities that the country has paid a high price in terms of loss of international credibility for actions taken in Abu Ghraib, Guantanamo Bay and more generally in Iraq, without much evidence that greater security has been obtained. More significantly, the failure to guarantee basic human rights, especially those relating to the treatment of detainees, and the reluctance to cooperate with the ICC, has made it more difficult for the US to work with allies in mounting an appropriate response to the very real threat posed by international terrorism.

5. The Assembly recalls that the United States and Europe share fundamental common values and pursue the same goal of promoting and strengthening respect of human rights and the reinforcement of the rule of law. Indeed, few countries are able to rival the impressive case-law of the US Supreme Court, whose judgments have often curtailed unfettered executive powers, guaranteeing the separation of powers and, as the recent *Hamdan* case has illustrated, respect for well-established international legal standards.

6. Finally, the Assembly, composed of parliamentarians from 46 European countries, reiterates its readiness to enter into dialogue with its fellow parliamentarians in the American Congress, as well as at state level, be it on the subject of the lawfulness of detentions at Guantanamo Bay *"to pursue this issue further through bilateral dialogue"* (Resolution 1433 (2005), paragraph 11), or the abolition

of the death penalty (Resolution 1349 (2003) and Recommendation 1760 (2006)), or to provide the necessary impetus to launch, in partnership with the US, a truly global strategy to address the terrorist threat and which *"should conform in all its elements with the fundamental principles of our common heritage in terms of democracy, human rights and respect for the rule of law"* (Recommendation 1754 (2006), sub-paragraph 4.1).

Draft recommendation

7. The Parliamentary Assembly refers to its Resolution ... (2007) on the United States of America and international law.

8. The Assembly recommends that the Committee of Ministers:

2.1. transmit Resolution ... (2007) to the Government of the United States of America, reminding it of its obligations, as an observer state to the Council of Europe, to respect human rights and the rule of law, in accordance with Committee of Ministers Statutory Resolution (93) 26;

2.2. request the Government of the United States to provide information on its response to Assembly Resolutions 1340 (2003), 1433 (2005) and 1507 (2006), as well as Assembly Recommendation 1760 (2006) – relating to, in particular, the lawfulness of persons held in Guantanamo Bay and elsewhere, secret detentions and unlawful state transfers of detainees and the abolition of the death penalty – as well as on measures taken to comply with them;

2.3. include, at regular intervals, issues of common concern to its member states and to the United States on the agenda of the Committee of Ministers, and invite the United States to be represented at these meetings;

2.4. report to the Assembly, within six months of receipt, on efforts and progress made further to this recommendation.

C. Explanatory memorandum,[1] by Mr Tony Lloyd, Rapporteur

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Appendix I: Committee of Ministers Resolution (95) 37 on Observer Status for the United States of America with the Council of Europe

Appendix II: List of Council of Europe Conventions signed or/and ratified by the United States of America

I. Introduction

1. There has been considerable criticism, in informed circles, with respect to various actions of President George W. Bush's two Administrations (the Administration) which have raised serious issues concerning the nature and extent of the United States' engagement with the system of international law that has emerged since the Second World War. This explanatory memorandum addresses some of those issues, without seeking to be comprehensive.[2] Any assessment of the relationship between the US and international law must be complex and require consideration of wide-ranging historical and political issues.

2. The US and Europe share common values. Undoubtedly, the most important of these values are democracy and liberty. The US and the Council of Europe pursue the same goal of promoting and strengthening democratic institutions, the respect of human rights and the reinforcement of the Rule of Law. Also, few countries are able to rival the impressive case-law of the US Supreme Court, whose judgments in curtailing unfettered executive decision-making, even in times of war, guaranteeing the separation of powers and, above all, protecting fundamental human rights serve as a model of judicial independence to many countries in Europe and beyond.

3. Nevertheless, certain constructively critical observations probably need to be made at the very outset. Since the Second World War the US has led international efforts in creating the modern, multilateral rules-based system of international relations, and has been a driving force in establishing the current architecture of international institutions. As the rules of international law have become broader in scope and deeper in effect, the commitment to the modern system has faltered, and far-reaching questions have been asked as to whether the US remains well-served by its traditional approach. There is no question that the US remains strongly committed to a great number of international rules, implementing and applying them as much as any other state. This is particularly so with rules that promote economic interests. Such support has been masked, however, by the approach adopted by President Bush's Administration from the time it took office and, in particular, after the events of 11 September 2001 ("9/11"). In prosecuting the 'war on terror' the Administration has unilaterally determined that certain key rules in the field of humanitarian law and human rights law are inadequate or overly constraining. In dispensing with their application – and allowing a number of plainly unlawful practices to be adopted in relation to the treatment of detainees – broader questions

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[1] The Rapporteur wishes to express his appreciation for help he obtained from Mr Philippe Sands Q.C., Professor of Law at University College London. A background paper prepared by Mr Sands (with the assistance of Messrs Zachary Douglas, Lecturer in Law and barrister, and Mr Toby Fenwick, graduate student, both also from University College London) served as the principal source of this explanatory memorandum.
[2] For a more detailed account see Philippe Sands, *Lawless World* (Penguin 2006). See also "Symposium: The US and International Law" in volume 15 of the European Journal of International Law, 2004, pp. 617- 838.

have arisen as to the commitment to a rules-based system.[3] Whilst serious concerns remain, it is plain that there is now recognition within parts of the Administration (as well as decisions by the Supreme Court) that re-engagement with the rules-based approach is an urgent necessity.

II. After the Second World War

4. The current system of international law has a lengthy history,[4] although it is only since the Second World War that a rules-based system has emerged as an integral part of a global system of international law. The US has played a leading role in promoting the modern system, although there has always been a tension between two views: one that sees international law as undermining American sovereignty and constitutional democracy, and another that treats international law as an indispensable tool to promote American values. Currently that tension is reflected in fiercely competing claims concerning Common Article 3 of the 1949 Geneva Conventions, an issue which will be discussed later on in this explanatory memorandum.

5. Before World War II, international rules were few in number and limited in their constraining effects. The international institutional framework was largely limited to the League of Nations (which the US never joined, notwithstanding the key role played by President Wilson in its creation) and its Permanent Court of International Justice (PCIJ), as well as International Labour Organisation (ILO). In 1927 the PCIJ declared that states were free to do anything that was not expressly prohibited by international law.[5] Since at that time there were few international rules to constrain state action states were free to do a great deal. There were no rules of international law to protect fundamental human rights, and although piracy and slavery were outlawed, colonial domination was the norm and self-determination was not a legal principle. There was no general prohibition on the use of force. Limited rules sought to minimise war's barbarity, and there was no multilateral system to promote free trade or economic liberalisation.

6. President Roosevelt sought to change that. The 1941 Atlantic Charter marks a key moment in the move to a rules-based system.[6] The Charter reflected a US commitment to a new order based on three pillars: an obligation to renounce the use of force in international relations, except for self-defence or where duly authorised; the protection of the 'inherent dignity' and 'equal and inalienable rights' of all people; and the promotion of economic liberalisation by free trade and other rules. These principles were the basis for the 1945 United Nations Charter and the new global architecture that was put in place in the 1940s. The US was the driving force for an unprecedented period of international law-making.

7. The 1948 Universal Declaration on Human Rights (UDHR) sought to give effect to the principle reflected in the UN Charter that "human rights should be protected by the rule of law". It paved the way for legally binding International Covenants on Civil and Political Rights (ICCPR) and Economic and Social Rights, in 1966, as well as regional instruments, such as the European Convention on Human Rights. The UDHR gave rise to the moderns system of human rights treaties, starting with the 1948 Genocide Convention, and was followed in 1949 by the four Geneva Conventions on Armed Conflict which sought to regulate the methods and means of warfare, including the protection of combatants and non-combatants. This period also saw the emergence of modern international criminal law, with the Nuremburg and Tokyo tribunals.

8. A rules-based approach was extended to economic relations. The 1944 Bretton Woods Agreement creating the International Monetary Fund (IMF) and the World Bank (WB) provided the intellectual framework for an international trade organisation. Though lacking an institutional structure until the emergence of the World Trade Organisation (WTO) in the mid-1990s, in 1947 states created the General Agreement on Tariffs and Trade (GATT).

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[3] See, for example, the report of Kevin McNamara "Lawfulness of detention by the United States in Guantanamo Bay (Doc 10497), accompanying Resolution 1433 (2005) and Recommendation 1699 (2005), adopted by the PACE on 26 April 2005, and Dick Marty's report on "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states" (Doc 10957), accompanying Resolution 1507 (2006) and Recommendation 1754 (2006), adopted by PACE on 27 June 2006.

[4] 'De jure belli ac pacis' (The Law of War and Peace), Hugo Grotius, 1625.

[5] *SS Lotus (Turkey v. France),* Permanent Court of International Justice, Series A-No. 10, 1927.

[6] "Joint Statement by President Roosevelt and Prime Minister Churchill" (Atlantic Charter) 14 August 1941. Available from http://www.yale.edu/lawweb/avalon/wwii/atlantic/at10.htm.

9. By 1950 the foundations of a new international legal order had been put in place with the strong support of the US. In the following 30 years, the international legal order would grow in complexity and scope, covering arms control, social rights, environmental protection and increasingly, regional economic integration. Notwithstanding certain opposition, until the 1980s there was broad, bi-partisan support in the US for the system that had been put in place in the 1940s.

III. The 1980s

10. US engagement with the post World War II legal settlement took a change of direction in the 1980s during President Reagan's two terms. In 1982 the US joined the United Kingdom and (the then) West Germany in rejecting the UN Law of the Sea Convention, on the grounds that its provision on access to high seas resources were inconsistent with free-market principles. Shortly afterwards, the US withdrew its acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) after Nicaragua went to the Court to challenge US support for the "Contra" rebels.[7]

11. The US failed to persuade the Court that it had no jurisdiction to hear the case and later declined to appear in the merits phase. It then withdrew its consent to the Court's compulsory jurisdiction under Article 36(2) of the ICJ Statute,[8] signalling a move away from the Atlantic Charter's rule of law aspirations. These actions were lawful, echoing France's withdrawal from the Court's jurisdiction after the *Nuclear Tests* case.[9] Nevertheless, they indicated a significant a reappraisal of the US' relationship to the system of international rules, ultimately leading to the political instincts that caused President George W. Bush to keep the US out of the International Criminal Court and the Kyoto Protocol and – following the events of 9/11 – to adopt actions that would undermine the Geneva Conventions, various human rights conventions (including the 1984 UN Torture Convention) and the rules governing the use of force.

12. The impact of this changing approach was also seen in actions of the Clinton Administration, in two cases involving the 1963 Vienna Convention on Consular Relations (VCCR) and the death penalty. Shortly before the scheduled execution in April 1998 of a Paraguayan national, Angel Francisco Breard, Paraguay brought a case to the ICJ alleging that the US had violated the VCCR by failing to ensure that the authorities in Virginia inform Breard of his consular rights.[10] The Court ordered the US to take steps to halt the execution until the case could be heard on the merits. The Clinton Administration did not seek to comply with the ruling: although it requested the Governor of Virginia to suspend the execution, it also successfully argued before the US Supreme Court that the ICJ ruling was not binding and need not be followed. Breard was executed within hours of the Supreme Court ruling and before the ICJ had a chance to deal with the merits.

13. Under US pressure Paraguay withdrew its ICJ case after Mr Breard's execution. However, the issue returned to the ICJ in 1999, in the case of Walter LaGrand, a German national facing execution in Arizona. Again the Clinton Administration failed to halt the execution as ordered by the ICJ in

[7] *Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States of America), Merits, 27 June 1986, ICJ Reports (1986).
http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19860627.pdf

[8] Subsequent ICJ appearances by the United States would be limited to cases where either the United States entered an ad hoc agreement to accept the jurisdiction of the ICJ or where an international treaty had conferred jurisdiction to the ICJ in relation to disputes concerning the interpretation of that treaty: See *Elettroncia Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Reports (1989), at http://www.icj-cij.org/icjwww/icases/ielsi/ielsiframe.htm; *Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Reports (2003), at http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm; *Vienna Conventions on Consular Relations (Paraguay v. United States of America)*, available from http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm; *LaGrand (Germany v. United States of America)* ICJ Reports (2001), available from http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm; *Avena and other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports (2004), available from http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[9] *Nuclear Tests*, (Australia v. France), Merits, 20 December 1974, ICJ Reports (1974), http://www.icj-cij.org/icjwww/icases/iaf/iaf_ijudgment/iaf_ijudgment_19741220.pdf The US actions left the United Kingdom as the only Permanent Member of the UN Security Council to accept the compulsory jurisdiction of the ICJ under Article 36(2).

[10] United Nations Treaty Series, Volume 596, p. 261. Available from
http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf#search=%22%22vienna%20convention%20on%20consular%22%22.

interim proceedings brought by Germany. The case went to the merits. The ICJ ruled that the US had failed to comply with the VCCR and, by failing to halt LaGrand's execution, had violated its obligations to implement the ICJ ruling.[11]

14. The US' change of approach from an earlier era is seen in the fact that in 1979 the US went to the ICJ and invoked the same provisions of the 1963 Vienna Convention against Iran, after a large number of its diplomats were taken hostage in Tehran. Like the US some 20 years later, Iran did not comply with the ICJ's order requesting release of the hostages.

IV. International criminal justice

15. With the Nuremburg and Tokyo trials after World War II, the US led the international community in applying the principle that perpetrators of the most serious international crimes should be tried before courts of law. In the 1950s the US also took the lead in calling for a permanent international criminal court. That proposal only came to fruition in July 1998 with the adoption of the Rome Statute of the International Criminal Court (ICC), a body that has jurisdiction over the international crimes of genocide, war crimes, and crimes against humanity. If a definition can be agreed, it may one day also have jurisdiction over the crime of aggression. The ICC is governed by the principle of 'complementarity', which means that the ICC will only have jurisdiction if a State is either "unwilling or unable" to investigate or prosecute.[12]

16. The adoption of the ICC Statute proved controversial for some states, including the US, because it provided for an independent prosecutor and did not allow the Security Council a controlling veto. At Rome the US voted against the final text of the Statute, apparently joining just six other states (China, Libya, Iraq, Israel, Qatar and Yemen). Nevertheless, the Clinton Administration signed the Rome Statute on 31 December 2000.[13] The Bush Administration mounted a strong campaign against the ICC as soon as it was created. In May 2002 US Secretary of Defence Donald Rumsfeld summarized the Bush Administration's general objections to the Court, shortly before the Statute came into force:

> "The lack of adequate checks and balances on powers of the ICC prosecutors and judges; the dilution of the UN Security Council's authority over the international criminal prosecution; and the lack of an effective mechanism to prevent politicized prosecutions of American service members and officials."[14]

17. In effect the Administration was objecting to the fact that the US would not be able to control proceedings. Ambassador John Bolton has spoken out against the "unaccountable prosecutor and its unchecked judicial power."[15] US concerns appear to be increased by the prospect that the ICC could assert jurisdiction over US military personnel and civilians involved in counter-terrorist operations. In May 2002 the Bush Administration declared that it would not ratify the Statute, an action that was treated as the "unsigning" of the Statute.[16]

18. The Bush Administration's objections to the ICC are focused on two issues; first, prosecutorial independence; second, that the ICC can try American nationals even though the US is not an ICC State Party.

19. Under the ICC Statute the Prosecutor is subject to many constraints, including the principle of complementarity, with ultimate decision-making authority placed in the hands of the judges. The Prosecutor can only investigate and prosecute if he can persuade a three-judge Pre-Trial Chamber

[11] *LaGrand (Germany v. United States of America)* ICJ Reports (2001), paragraph 110. Under Article 94(1) of the UN Charter, all UN member states are obliged to comply with ICJ decisions in cases to which they are a party.
[12] Rome Statute, Article 17(a).
[13] The last day that the Rome Statute was open for signature.
[14] Statement issued by the US Department of Defence, Washington DC, 6 May 2002.
[15] Then Under Secretary of State for Arms Control and International Security; speaking at the Federalist Society, 14 November 2002.
[16] For the contemporaneous explanation from the Administration, see "Remarks by Marc Grossman, United States' Under Secretary for Political Affairs, to the Center for Strategic and International Studies on American foreign policy and the ICC", Washington DC, delivered 06 May 2002, available from http://www.iccnow.org/documents/USProsperUnsigning6May02.pdf.

(PTC) that crimes within the ICC's competence appear to have been committed. These constraints go beyond those imposed on prosecutors at the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY). As articulated, the US concerns have the unfortunate effect of suggesting that the protections that are adequate for Serbs, Croats, Bosnians and Rwandans are not sufficient for Americans. By adopting this position, the US is open to the criticism that the Bush Administration treats international criminal law as a set of rules to be applied only to others.

20. This seems to be confirmed by the Administration's second objection: that the ICC's jurisdiction over individuals is too broad, meaning that the ICC can try and convict American nationals even though the United States is not a party to the Rome Statute. Ambassador Bolton has stated that this undermines "the independence and flexibility that America needs to defend our national interests around the world."[17] This view is articulated in the 2002 US National Security Strategy, which states:

> "We will take all actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept."[18]

21. Yet the language of the Rome Statute makes it clear that the ICC has jurisdiction over any person who commits genocide, war crimes or crimes against humanity on the territory of an ICC State Party, irrespective of nationality. An American who is alleged to have committed an international crime on the territory of one of the 100 or so ICC State Parties – such as Afghanistan – is subject to the ICC's potential jurisdiction.

22. This US objection has given rise to far-reaching actions. In May 2002, shortly before the ICC Rome Statute came into effect, the Administration announced that the US would veto the renewal of UN peacekeeping missions unless the Security Council granted US military personnel serving in them immunity from ICC prosecution. Having failed to receive such immunity, on 30 June 2002 the US vetoed the mandate extension of the UN peacekeeping force in Bosnia-Herzegovina (UNMIBH).[19] This action prompted a letter from Secretary General Kofi Annan to US Secretary of State Colin Powell decrying the fact that "the whole system of United Nations peacekeeping operations is being put at risk" and stating that "the Council risks being discredited" if it were to unilaterally extend its mandate by illegally revising treaties.[20]

23. Nevertheless, the Security Council adopted resolution 1422 on 12 July 2002 under Chapter VII of the UN Charter.[21] This requested the ICC not to commence an investigation or prosecution "involving current or former officials or personnel" from a State that is not party to the ICC Statute, for a renewable twelve-month period from 1 July 2002.

24. This 'compromise' – in a temporal sense – was a retreat from the demand for blanket immunity with automatic annual renewal. For many UN members, however, resolution 1422 represented an unacceptable degradation of the principle of equal applicability of international rules. The arrangements foreseen in resolution 1422 were prolonged in July 2003.[22] In June 2004, however, following the exposure of abuses of Abu Ghraib, the Administration failed in its efforts to extend the principle.[23]

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[17] Ambassador Bolton speaking at the Federalist Society, 14 November 2002.

[18] "National Security Strategy of the United States of America", September 2002, p. 31. Available from http://www.whitehouse.gov/nsc/nss.pdf. See also, in this connection, the American Service-Members' Protection Act of 2002.

[19] The vote was 13-1-1, Bulgaria abstaining. Press Release SC/7437 of the 4563rd Security Council Meeting, 30 June 2002 available from http://www.un.org/News/Press/docs/2002/SC7437.doc.htm.

[20] Kofi Annan – Colin Powell letter on peacekeeping mandates, 3 July 2002 http://www.iccnow.org/documents/SGlettertoSC3July2002.pdf.

[21] Adopted 12 July 2002, and available from http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement.

[22] See Resolution 1487 (2003), adopted 12 June 2003, and available from http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement.

[23] See UN Secretary General's press statement: http://www.iccnow.org/documents/SGstatement_1487Renewal_23June04.pdf

25. The Bush Administration took further steps to prevent prosecution of American nationals at the ICC. 'Bilateral Immunity Agreements' (BIAs) have been negotiated with parties and non-parties to the ICC Statute. These go beyond the approach of Resolution 1422 by seeking to prevent transfer of any 'current or former Government officials, employees or military personnel or nationals' of the US either to the ICC (or to a third State or entity with the purpose of eventual transfer to the ICC) without US consent.[24] The Bush Administration has aggressively pursued BIAs. By August 2006 at least 99 have been signed, including 45 with ICC States Parties, of which 22 have been ratified.[25] Moreover, legal uncertainty has not deterred the Bush Administration from using a degree of coercion to persuade countries to sign BIAs: of the 56 states parties to the ICC that have not signed BIAs, 24 have seen economic and military aid withdrawn.[26]

26. The Administration argues that these agreements are "expressly contemplated" by Article 98(2) of the Rome Statute,[27] which obliges the ICC not to request the transfer of individuals if this would be in conflict with a State Party's international obligations. In a joint opinion[28], prepared in 2003 by Professors James Crawford SC, Philippe Sands QC and Dr Ralph Wilde, the authors expressed the view that Article 98(2) allows agreements of this kind only in relation to certain nationals (for example diplomats and servicemen). What it does not permit is a blanket exemption for all persons on grounds of nationality alone. An American who commits genocide or a war crime, for example, on the territory of a state party to the ICC is subject to the jurisdiction of the ICC unless it can be established that he or she is a 'sent' person within the meaning of Article 98(2). The blanket nature of the exemptions proposed under the BIAs amount to a determination that certain persons are – on nationality grounds alone – outside the scope of enforcement of this particular system of international criminal rules. That is a novel proposition which would take exceptionalism into a new domain.

27. A recent 'softening' of this position can perhaps be detected. On 2 October 2006, President Bush waived the prohibition on military assistance pursuant to the 2002 American Service-Members' Protection Act, effectively allowing the provision of military aid to countries that are parties to the Rome Statute of the ICC but which have not signed an Article 98 Agreement with the US. This waiver applies to 17 countries, including three Council of Europe member states, namely Croatia, Malta and Serbia. The presidential waiver, although limited in duration to one year, may be perceived as a positive step by the US in abiding by international law.[29]

V. 2001 and the Bush Administration

28. When the Bush Administration took office in January 2001 it had a clear objective of 'unbinding' the US from a number of global rules that were perceived to impose inappropriate constraints. Apart from the ICC other immediate targets included the Kyoto Protocol and various multilateral arms control agreements.

29. The intellectual roots for this 'offensive' on the established system of international law can be traced back to the Statement of Principles of the Project for the New American Century (PNAC).[30] PNAC is "a non-profit, educational organization whose goal is to promote American global leadership", that seeks to preserve and extend "an international order friendly to our security, our prosperity, and our principles."[31] In 2000 PNAC appears to have outlined a neo-conservative agenda in which "America's grand strategy should aim to preserve and extend this advantageous position as far into the future as possible".[32]

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[24] The draft BIAs also provide that if the signatory State transfers anyone to a third State, it cannot agree to the transfer of such individuals by the third State to the ICC without the permission of the United States.
[25] "Status of US Bilateral Immunity Agreements (BIAs)", Coalition for the International Criminal Court, 2 August 2006. Available from http://www.iccnow.org/documents/CICCFS_BIAstatusCurrent.pdf
[26] "Status of US Bilateral Immunity Agreements (BIAs)", ibid.
[27] Statement of Ambassador John Negroponte, United States Permanent Representative to the UN, 12 July 2002.
[28] "In the matter of the Statute of The International Criminal Court and in the matter of Bilateral Agreements sought by the United States un Article 98(2) of the Statute: Joint Opinion", Professor James Crawford QC, Professor Philippe Sands QC and Dr. Ralph Wilde, available from http://www.iccnow.org/documents/SandsCrawfordBIA14June03.pdf .
[29] See http://www.whitehouse.gov/
[30] See http://www.newamericancentury.org/.
[31] http://www.newamericancentury.org/statementofprinciples.htm
[32] Rebuilding America's Defences, Project for a New American Century, 2000,

30. PNAC called for significant increases in defence spending, including on a ballistic missile defence system, which – as was acknowledged - would violate the 1972 Anti-Ballistic Missile (ABM) Treaty.[33] The Clinton Administration's support for such international rules was a subject of criticism:

> "the administration's devotion to the 1972 [ABM] Treaty with the Soviet Union has frustrated development of useful ballistic missile defences".[34]

31. Relatedly, as early as January 1998 in an open letter to President Clinton PNAC called for "the removal of Saddam Hussein's regime from power."[35] PNAC called on the US Congress to:

- challenge Saddam Hussein's claim to be Iraq's legitimate ruler, including indicting him as a war criminal;
- establish and support (with economic, political, and military means) a provisional, representative, and free government of Iraq in areas of Iraq not under Saddam's control;
- use U.S. and allied military power to provide protection for liberated areas in northern and southern Iraq; and
- establish and maintain a strong U.S. military presence in the region, and be prepared to use that force to protect our vital interests in the Gulf - and, if necessary, to help remove Saddam from power.[36]

32. A number of the signatories of its Statement of Principles – including Donald Rumsfeld, Paul Wolfowitz and Dick Cheney- came into high office in the Bush Administration in January 2001.

33. The Bush Administration came into office in January 2001 committed, so it would appear, to pushing the PNAC approach to international rules. Kyoto and the ICC were immediate targets, together with various arms control agreements. It would appear that the attacks of 11 September 2001 provided an opportunity to revisit – and rewrite – global rules on the use of force and on the methods and means of warfare, including the treatment of detainees.

VI. The "War on Terror" and Detainees

34. The post 9/11 policies of the Bush Administration with respect to the so-called "war on terror" pose fundamental challenges on the international plane as well as in domestic law. Indeed, as concerns the latter, the US Supreme Court has in its docket important international law-related issues, including that of disproportionate restrictions placed on US non-citizens.[37] [38] Speaking in 2002, the then US Deputy Assistant Attorney General John Yoo confirmed that in respect of detainee issues "the Administration is trying to create a new legal regime."[39] International law became an early and intended casualty of the 'war on terror'.(as explained in Dick Marty's report, cited in footnote 2).

35. The response to 9/11 involved actions that would cause the US to hold a large number of foreign national detainees. Early decisions were taken at the highest levels of the Administration which had the effect of placing detainees in a legal 'black hole', outside the protection of international law.[40] The detention centre at Guantanamo and the other overseas detention facilities the existence of which were acknowledged by President Bush on 6 September 2006[41] were designed to avoid the

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http://www.newamericancentury.org/RebuildingAmericasDefenses.pdf, p. i.

[33] See http://www.state.gov/www/global/arms/treaties/abm/abm2.html.

[34] Rebuilding America's Defences, p. 52.

[35] http://www.newamericancentury.org/iraqclintonletter.htm

[36] http://www.newamericancentury.org/iraqletter1998.htm

[37] For an overview consult http://news.findlaw.com/legalnews/us/terrorism/cases/index.html

[38] When briefed by the then Secretary of State for Defence Donald Rumsfeld on 12 September 2001 on the limits international law placed on the options for a military response to 9/11, President Bush is reported to have declared: "I don't care what the international lawyer says. We are going to kick some ass" , quoted in "Against All Enemies", Richard Clark, Free Press, 2004, p. 24,

[39] Quoted in the Sydney Morning Herald, 17 May 2002.

[40] See *Lawless World*, supra note 1, at Chapter 7 and Kevin McNamara's report, supra note 2.

[41] President Bush said: "In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency", available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html. This admission fully vindicates our

constraints of international law. These decisions were based on legal advice that probably overrode the contrary views of senior State Department and military lawyers.

36. The relevant rules of international law comprise two distinct but related groups of treaties, as well as customary international law. The first group comprises international agreements that place limits on the methods and means of warfare, known as the *jus in bello* or international humanitarian law (IHL). These were set out in the 1907 Hague Regulations, the four 1949 Geneva Conventions of 1949, and the two Additional Protocols, of 1977, to the Geneva Conventions. Although not a party to the First additional Protocol, the US has long accepted that many of its requirements are declaratory of customary international law.[42] The second set of rules are those set forth in a multitude of human rights instruments adopted after the Second World War, including UDHR and the ICCPR, as well as specific treaties such as the 1984 UN Torture Convention.

37. Notwithstanding these international obligations, the Bush Administration considered that, in the "war against terror" traditional international norms were inappropriate, and took steps early after 9/11 to circumvent these rules in relation to the Guantanamo and other detainees. Several steps were taken. First, the Administration decided that the detainees had no rights under international humanitarian law, classifying them as "unlawful combatants", and later, as "enemy combatants". According to this argument, as Al Qaeda is a terrorist organisation that is not a state and therefore ineligible to accede to the Geneva Conventions, meaning its members are not covered by its protections. Taliban detainees too are "unlawful combatants" because they did not display a "fixed distinctive sign recognisable at a distance".[43] Those categorised as "unlawful combatants" or "enemy combatants" could be held until the President declared the 'war on terror' over, or until the individuals were no longer considered by the US to constitute a threat to its national security. The consequence of this decision was to prevent the detainees from claiming rights under Common Article 3 of the Geneva Conventions (establishing minimum standards of protection) or under Article 5 of Geneva Convention III (giving them access to a tribunal to determine their status).

38. Second, the Administration determined that none of the detainees had enforceable rights under international human rights norms, as they were held outside of the territory of the US. According to the US Solicitor General, the ICCPR "is inapplicable to conduct by the US outside its sovereign territory."[44]

39. Third, the Administration further determined that none of the treaties in question, such as the 1984 Convention against Torture, could impose additional legal constraints beyond those already found in American law. Accordingly, actions considered to be consistent with American law were deemed likewise to be consistent with international law.

40. By these three steps the Bush Administration purported to take the so-called "war on terror" beyond the scope of international law as understood by most informed observers.[45] In other words, the US has used the apparent "novelty" of the international terrorist threat to claim that it is not, in specific circumstances, constrained by certain well-established international legal norms. This is reflected in various actions, including the creation of secret detention facilities outside the US.

41. The approach was wrong as a matter of law. It was also difficult to see how it could be justified as a matter of policy. It was an approach that threatened serious consequences for the rule of law and the protection of human rights worldwide. To many independent observers – and states – it was deeply disturbing that lawyers in the service of a liberal western government that had been so strongly committed to the rule of law for over five decades could proffer advice to justify this approach.

Committee's proposal and the Assembly's decision to pursue consideration of these and related issues: see § 21 of PACE Resolution 1507 (2006), supra note 2.

[42] See William Taft IV, 'The Law of Armed Conflict After 9/11: Some Salient Features', 28 Yale Journal of International Law 319 at 322 (Summer 2003).

[43] On Al Qaeda detainees, see http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html; on Taliban, see http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

[44] *Rasul v. Bush,* 542 U.S. 466 (2004) Brief for the Respondents, October 2003. Shafiq Rasul, a British national had been released in March 2004, three months before the ruling was issued.

[45] For an overview see Helen Duffy *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2005).

42. As regards the claim that "unlawful" or "enemy combatants" did not enjoy the protections of international law, it is clear from the Third Geneva Convention covering Prisoners of War (POWs) that all persons taking no active part in hostilities enjoy certain minimum rights. Common Article 3(1)(d), for example, guarantees due process by prohibiting the imprisoning State from passing sentences without a trial affording procedural guarantees. Article 4 establishes the categories of prisoners entitled to POW status, and in cases of uncertainty, Article 5 establishes that individuals should be granted POW protection until their status has been determined by a "competent tribunal".[46]

43. The Article 5 obligation to determine POW status by a "competent tribunal" lies at the heart of the debate concerning the treatment of the Guantanamo detainees – their right of due process. The Bush Administration decided that, since it had no doubt that the detainees were not entitled to POW status, there was no need to grant them access to a "competent tribunal" to clarify their status. In June 2004 the US Supreme Court rejected that argument in the case of *Hamdi v. Rumsfeld*.[47]

44. In the *Hamdi* case the Supreme Court held that the petitioner had been denied due process and had to be provided with a meaningful opportunity to contest the facts allegedly underlying his designation as an "enemy combatant" before an objective decision maker.

45. The Bush Administration's second argument – that detainees had no enforceable rights under international human rights norms when held outside of the territory of the US – was equally difficult to justify. Under ICCPR Article 2(1), each State Party undertakes to "respect and to ensure to all individuals within its territory and subject to its jurisdiction."[48] In line with the UN Human Rights Committee,[49] and as the US Supreme Court accepted in *Rasul*, Guantanamo Bay falls within American jurisdiction, even if it is not formally part of US territory.[50] Any other approach would encourage States to frustrate the Covenant by removing detainees from their national territory, for the purpose of avoiding constraints under the ICCPR. The *Rasul* case is a landmark case in which the Supreme Court set aside the Administration's argument that the US court system did not have the authority to decide whether non-US citizens held in Guantanamo Bay were rightfully imprisoned.

46. The Bush Administration's third contention is especially problematic. To claim that acts permitted under US law must necessarily be legal under international law has the effect of denying the very existence and effectiveness of international law. The approach strikes at the heart of an international legal order, premised as it is on the well-established principle that in the event of conflict between domestic and international law the latter must prevail.[51]

47. The US system of government has self-correcting mechanisms and eventually the US courts have intervened, with significant effect. In June 2004, the US Supreme Court ruled on the legality of holding detainees without trial. In *Hamdi*, as explained above, it held that due process demanded that a US citizen held as an enemy combatant had to be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.[52] *Rasul* established narrower rights to a hearing before the US Courts for non-US nationals.[53]

48. As a result the Bush Administration was required to provide "competent tribunals" to determine the POW status of Guantanamo detainees in accordance with Article 5 of the Third Geneva Convention. These were the Combatant Status Review Tribunals (CSRTs). At the suggestion of Justice Sandra Day O'Connor in *Hamdi*, CSRTs were procedurally based on US Army Regulation 190-8, which details how the Third Geneva Convention's Article 5 Tribunals should be conducted. It

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[46] Geneva Convention III (Prisoners of War), Article 5.
[47] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Hamdi, a US-Saudi dual national, subsequently agreed to be deported to Saudi Arabia, accepted travel limitations and was stripped of his US citizenship.
[48] International Covenant on Civil and Political Rights, 1966, Article 2(1).
[49] General Comment 31 of the UN Human Rights Council, CCPR/C/21/Rev.I/Add.13 (2004)
[50] *Rasul v. Bush,* 542 U.S. 466 (2004) at 2700, Justice Kennedy concurring. "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities … From a practical perspective the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extends the "implied protection" of the United States to it." at 2700.
[51] See, in this connection, Andrea Bianchi's article "International Law and US Courts: the Myth of Lohengrin Revisited", in vol.15 European Journal of International Law, 2004, pp.752-781.
[52] *Hamdi*, p. 1.
[53] *Rasul*, 124 C.St at 2696.

would appear that serious flaws still remain, causing detainees to pursue further proceedings before the US courts.

49. In an attempt to limit the recourse of detainees to the US courts after the judgment in *Rasul*,[54] the Bush Administration supported the passage of the Detainee Treatment Act (DTA) in late 2005.[55] Section 1005(e) of the DTA purported to remove any right for detainees to have access to US courts, so that "no court, justice, or judge shall have jurisdiction" to consider "a writ of habeas corpus"[56] or "any other action against the United States … relating to any aspect of the detention … at Guantanamo Bay, Cuba."[57] To limit the appeals to the United States Supreme Court, "exclusive jurisdiction" was vested in the Washington DC Circuit Court. Within its own terms, the 2005 Act expressly postponed even these limited appeals until after the CSRTs and the Military Commissions had made their rulings. Relatedly, the US Senate voted overwhelmingly (by 90 votes in favour and nine against) to support Senator McCain's amendment to the 2006 defence appropriations bill to define and limit interrogation techniques of detainees so that they met minimum international standards.[58] The amendment was eventually accepted by President Bush, although with a signing statement that raised doubts about his commitment.[59]

50. In June 2006 the system of Military Commissions established by Presidential decision was found to be illegal by the US Supreme Court in the case of *Hamdan*.[60] The Military Commissions were found to fail both the standards required by the Geneva Convention's Common Article 3(1)(d) and the US' own Uniform Code of Military Justice (UCMJ).[61] Writing in the New York Review of Books, Professor David Cole of Georgetown Law School noted that this alone provided sufficient procedural grounds for rejecting the Military Commissions, but the Supreme Court went further in two important areas.[62]

51. First, it held that the US Congress had mandated that the Military Commissions had to comply with the law of armed conflict, including customary international law.[63] Second, the Supreme Court held that the conflict between the US and Al Qaeda was international in character, so that Al Qaeda members came within the Geneva Convention's Common Article 3.[64] This also meant that the minimum protections found in Article 75 of Additional Protocol I must apply.[65]

52. Concluding for the Court in *Hamdan*, Justice John Paul Stevens wrote that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[66] This would appear to amount to a serious rebuke to the effort to "create a new legal regime". Shortly after the decision in *Hamdan* the US Secretary of Defence determined that Common Article 3 was to be applied *inter alia* in relation to detainees at Guantanamo. The consequence of the US Supreme Court's determination that Common Article 3 applies is that any person involved in the treatment of detainees that has not met that international standard is exposed to possible investigation or prosecution for war crimes.

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[54] *Hamdi* itself was of limited impact, as the only other United States citizen acknowledged to be captured in Afghanistan, John Walker Lindh was not held at Guantanamo and negotiated a plea bargain in 2002.
[55] Text available from: http://www.justicescholars.org/pegc/detainee_act_2005.html.
[56] DTA Section 1005(e)(1).
[57] DTA Section 1005(e)(2).
[58] 'Senate Supports Interrogation Limits', *Washington Post*, 6 October 2005, page A1.
[59] The signing statement provides: "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks."
[60] *Hamdan v. Rumsfeld,* 548 US.
[61] *Hamdan* at 69. The violation was of Article 36(b) of the UCMJ, which is available from: http://www.au.af.mil/au/awc/awcgate/ucmj.htm.
[62] 'Why the Court said No", David Cole, New York Review of Books, Vol. 53, No. 13, 10 August 2006. Available from http://www.nybooks.com/authors/10813.
[63] Justice Kennedy concurring *Hamdan,* at 85.
[64] *Hamdan* at 75.
[65] *Hamdan* at 79.
[66] *Hamdan* at 80.

53. The Military Commissions Act entered into force in October 2006. This legislation was enacted in response to the Supreme Court's judgment in *Hamdan* and, consequently, the relevant rules of international law. Significant aspects of the new law, other than the suspension of habeas corpus, is that it grants the President power to make his own interpretation of Common Article 3 in such a way as to allow the CIA to continue to carry out intrusive interrogations. It also amends the US War Crimes Act by providing immunities to persons involved in the treatment of detainees that have not met Common Article 3 standards. It also broadens the definition of "unlawful enemy combatants" to include those "who have purposefully and materially supported hostilities against the US".[67]

VII. War

54. Until the twentieth century there were no international rules prohibiting the use of force by one state against another. Following the failure of the League of Nations and the 1928 Kellogg-Briand Pact and World War II, the Atlantic Charter declared that "all of the nations of the world for realistic as well as spiritual reasons must come to the abandonment of the use of force."[68] Strict limitations on the use of force were incorporated in the UN Charter, adopted in San Francisco in June 1945.

55. The US joined forty-six other countries in outlawing the use of force in Article 2(4) of the UN Charter. There are two established exceptions to Article 2(4). The first is the use of force duly authorised by the UN Security Council under Chapter VII. The second is self-defence: Article 51 states that nothing in the UN Charter "shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations".[69] However, this right is not unconstrained, and it applies only until the UN Security Council "has taken measures necessary to maintain international peace and security". An emergent third exception is the use of force to prevent massive and systematic violations of fundamental human rights (sometimes referred to as humanitarian intervention).

56. Article 51 raises certain questions, not least that of pre-emptive self-defence – can Article 51 be invoked before an armed attack has taken place? Classical international law states that self-defence does not require a State to wait for the bombs to start falling before responding, but it must "show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."[70] This is known as the 'Caroline' test by virtue of the precedent that gave rise to it.

57. The US' National Security Strategy of 2002 – articulated not long after 9/11 - declared that the US had the right to "exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country".[71] This approach may be considered to have gone beyond the anticipatory self-defence envisaged by the *Caroline* test.

58. Indeed, there is strong argument to suggest that the 2002 National Security Strategy appears to be incompatible with established international rules. There will always be doubts about the extent to which international law can actually limit the use of force by states; there have been countless examples of force in the sixty years since the adoption of the UN Charter. It is noteworthy, however, that when states do use force they invariably try to justify their actions in law. If nothing else, since the adoption of the UN Charter there is acceptance that force is subject to legal constraints.

59. The 2003 Iraq conflict brought the rules on the use of force into mainstream political debate. The question as to whether or not the prospect of a war was justifiable on grounds of self-defence without explicit UN Security Council authorisation added to public debate.[72]

60. In retrospect, it seems clear that President Bush and his closest advisors were committed to the removal of Saddam Hussein and his Ba'ath Regime from the earliest days of the Administration, as

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[67] http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN03930:@@@D&summ2=m&. See also http://jurist.law.pitt.edu and "concerns" expressed by Mr J. Kellenberger, President of the ICRC in speech delivered at Georgetown University, Washington D.C. on 19 October 2006 http://www.icrc.org

[68] Atlantic Charter, Paragraph 8.

[69] United Nations Charter, Article 51.

[70] *The Caroline*, 29 British Foreign and State Papers 1129, 1138 (Webster to Fox) (1840–1). See War, Aggression and Self Defence (4th Edition), Yoram Dinstein, Cambridge University Press, 2005, pp. 244-251.

[71] "National Security Strategy", footnote 17, at p. 6.

[72] For a fuller analysis of the legal issues see *Lawless World*, supra. note 1, at Chapters 10 and 12.

PNAC had demanded. It remains unclear why. There was no hard evidence that a weakened Iraq militarily threatened the region, and some indication that UN-sponsored containment was broadly working even if causing great hardship to many sectors of the Iraqi population. After 9/11 there was no evidence of a relationship between the Iraqi regime and al Qaeda.[73]

61. UN Security Council Resolution (UNSC) 1441 was adopted in November 2002. The Resolution merits careful consideration of the context in which it was adopted. It stated that Iraq "has been and remains in breach of its obligations under the relevant resolutions including 687 (1991)"[74] and that it had failed to cooperate with UN Inspectors and the International Atomic Energy Agency (IAEA).[75] Resolution 1441 afforded Iraq "a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council,"[76] and set up an enhanced inspection regime, requiring Iraq to provide an accurate, full and complete declaration of its programmes to the United Nations Special Commission (UNSCOM) and the IAEA within 30 days.[77] Resolution 1441 directed Hans Blix of UNSCOM and Mohammed El Baradei of the IAEA to report to the Security Council any failure by Iraq to comply. And it decided that false statements and omissions would constitute a material breach, which would be reported to the Council.[78]

62. On receipt of a report, the Council would then convene "in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."[79] And whilst resolution 1441 "Recalls" that the Council had "repeatedly warned Iraq that it will face serious consequences as a result of its continued violations",[80] it does not in terms authorize the use of force.

63. During January and February 2003 the US, the United Kingdom and Spain laid the groundwork for a second resolution. By the end of January, military planners informed their leaders that mid-March was the optimal time to attack, putting pressure on the politicians and diplomats to agree a second resolution. This was tabled on 24 February 2003. There was no agreement within the Security Council on this point; indeed, France, Germany and Russia tabled a separate memorandum stating that, "the conditions for the use of force are not fulfilled."

64. When it became clear that the second resolution was unobtainable, the US (with the support of the United Kingdom) maintained the argument that a further resolution was not necessary as the authorisation for the use of force in UNSCR 678 was revived by a finding of Iraqi non-compliance in UNSCR 1441, which ended the ceasefire in UNSCR 687.

65. A broad body of opinion, including the UN Secretary-General, consider that the use of force in Iraq in 2003 was illegal.

[73] UNSCR 678 (1990).
[74] UNSCR 1441, OP1.
[75] UNSCR 1441, OP2.
[76] UNSCR 1441, OP2.
[77] UNSCR 1441, OP3.
[78] UNSCR 1441, OP4.
[79] UNSCR 1441, OP12.
[80] UNSCR 1441, OP13.

VIII. The economic domain

66. Broadly speaking the US has remained fully engaged with multilateral rules that promote economic interests, in particular free trade rules. These and other rules on foreign investment protection and intellectual property rights have become the engine of 'globalization', and the US has been among their leading proponents ever since the Atlantic Charter as a principal tool to promote economic interests and associated political values. This is an area for which the Bush Administration has continued to lend active support.[81]

67. But just how strong is that support, and will it continue as the US loses cases or strong domestic interests (for example agriculture) turn against the global rules? Whilst the EU and the US have been involved in several long-running trade disputes – from bananas and genetically modified organisms to steel and large civil aircraft – the binding WTO dispute settlement understanding has provided developing and smaller states with a platform to promote interests that may not be shared by the US.

68. A case brought by Antigua and Barbuda against the US concerning on-line gambling provides an illustration.[82] Antigua objected to US efforts to stop American media outlets advertising Antigua-based on-line casinos, with the intent of stopping Americans gambling in these on-line casinos on the grounds that they would have been illegal if based in the US. The WTO found that the American regulations prohibiting online gambling violated international trade rules, and that the US was obliged to remove them. The WTO Appellate Body largely upheld the panel's ruling, leading to strong criticism in the US Congress.

69. This was financially insignificant, however, as compared with the successful Brazilian WTO litigation holding that American cotton subsidies worth $12.5bn were illegal[83] and pressurising the US (and the EU) to dismantle their agricultural subsidies. As WTO rulings are binding, the US was obliged to "withdraw the prohibited subsidies … without delay and, at the latest, within six months of the date of adoption". The political impact was immediate and significant.

70. Notwithstanding these developments the Bush Administration has been a strong supporter and advocate of a multilateral rules-based system, served by efficient institutions and enforceable sanctions. Indeed, in contrast to its approach in removing itself from compulsory ICJ jurisdiction, the US played a leading role in ensuring that binding dispute resolution was built into the international trade framework. This was prompted by the concern that without binding dispute resolution, free riders would gain economic advantages and the system would be undermined. Trade is an area where the Bush Administration is comfortable with a multilateral, rules-based process – in contrast to its position on the Kyoto Protocol or the ICC.

71. At the very least, the Bush Administration's support for the multilateral trade rules indicates that there is no *a priori* American objection to multilateralism, or to rules of international law *per se*. The bifurcated approach – there is good international law and bad international law – tends to undermine certain neo-conservative claims that the US Constitution imposes constraints on international commitments; rather, it demonstrates that the actual calculation when considering the worth of existing – or the attractiveness of new – international obligations, is a cost-benefit analysis based on national interest, rather than anything to do with issues of American constitutional law.[84]

72. Put another way, when rules of international law are seen to provide direct economic benefits there is a presumption of public benefit that makes them worth supporting. Whether that support remains as strong when the free trade roles intersect with other areas – such as environment and human rights – remains to be seen. Thus, the WTO Appellate Body has decided in cases such as

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[81] "Trade Agreements and the States", Ambassador Peter F. Allgeier, Acting U.S. Trade Representative speaking to the US National Conference of State Legislatures, 16 April 2005. Available from: http://www.ustr.gov/assets/Document_Library/USTR_Speeches/2005/asset_upload_file62_7628.pdf
[82] "United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services", WTO Dispute DS285, Arbitration Report dated 19 August 2005. See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.
[83] "United States — Subsidies on Upland Cotton", WTO Dispute DS267. See: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.
[84] See "The Two World Orders", Jeb Rubenfeld, Wilson Quarterly, Autumn 2003.

Reformulated Gasoline and *Shrimp/Turtles*[85] that free trade rules are not to be interpreted in "clinical isolation" from the rules of general public international law. This suggests that the US' decision not to participate in certain multilateral environmental agreements, notably the Kyoto Protocol, may open the door to WTO action for unfair trade practices. This could take the form of banning the import of goods from the US because they are made in a way that harms the environment, or imposing duties to reflect the subsidy that US producers enjoy because, unlike their EU competitors, they do not have to pay for their carbon dioxide emissions. Such a position has already been outlined by New Zealand Prime Minister Helen Clark, who noted in June 2005 that:

> "I think it entirely likely in future that countries that are not meeting environmental standards could well find new kinds of trade barriers erected against them".[86]

73. If and when this happens, support for the multilateral system of WTO trade rules may not remain as strong as it is today.

IX. Conclusions

74. It is matter of very great regret that under the Bush Administration the US has departed from traditional US support for a multilateral rules-based system. The US has paid a high price for the actions it has recently taken. Abu Ghraib, Guantanamo and Iraq have undermined US moral authority, without much evidence that greater security has been obtained. More significantly perhaps, the failure to comply with global rules – for example in the treatment of detainees – has made it more difficult for the US to work with friends and allies in mounting an effective response to the very real threat posed by international terrorism.

75. There is evidence that within the Bush Administration and within the Republican group in the US Senate there are growing elements that recognize the urgent need for the US to re-engage with its traditional approach. There are also some signs that policy and actions have been modified to take account of views from outside the US and those within the State Department and the Department of Defense whose views were overridden in the first term. The recent legislative successes of the Democrats, both in the House of Representatives and the Senate, may help bring about the necessary changes.

76. In yet another case ICJ case concerning the Vienna Convention on Consular Relations – this time involving a Mexican national[87] – the Bush Administration complied with the ICJ ruling for a stay of execution (although this was accompanied by a decision to withdraw from the VCCR Optional Protocol that gave the ICJ jurisdiction).[88]

77. The campaign of vilification of the ICC has been toned down. With the acceptance of the McCain Amendment a renewed commitment to the obligations of the 1984 Torture Convention has emerged. And steps have been taken to bring the treatment of detainees within the constraints of the international legal order.

78. These changes appear to reflect a shift within the Administration, with Condoleezza Rice's State Department pushing more strongly for international rules against the sceptical opposition of Vice-President Cheney and the former Secretary of Defense Rumsfeld. With the US Supreme Court's authoritative declaration in *Hamdan* that Common Article 3 applies to the conflict with al-Qaeda, and in effect ruling out any legislative work-around, it appears that the Administration recognizes that it must act within the rules.

79. The jury is out as to whether there has been a real change of approach. It appears that the Bush Administration is divided, with one group (Vice President Cheney, now weakened by the departure of former Secretary Rumsfeld) retaining a commitment to the approach adopted in the Administration's first term and another (coalescing around Secretary Rice) pushing more forcefully for

[85] "United States — Import Prohibition of Certain Shrimp and Shrimp Products", DS58. Available from: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.
[86] Oral answers, 21 June 2005. Available from: http://uncorrectedtranscripts.clerk.govt.nz/Documents/20050621.htm.
[87] *Avena and other Mexican Nationals (Mexico v. United States of America)*, (2004).
[88] Washington Post, p. A2, 9 March 2005.

a re-engagement with the rules of international law and the US' traditional approach. On the international plane, the recent conflict in Lebanon does not provide any basis for optimism. Yet on the domestic front, the democratic 'checks and balances' provide indications for guarded optimism. Recent legislative changes are likely to recalibrate the balance with the Administration. And, perhaps more importantly, the Supreme Court is and will undoubtedly continue to uphold human right standards, including the need to hold in check attempts by the executive to restrict due process requirements.

80. And President Bush's speech – on 6 September 2006 – suggests that the Administration remains torn about the nature and extent of its commitment to rules of international law that are perceived to be overly constraining. The President acknowledged that the US had – through a CIA programme – held and questioned detainees at facilities outside the US, but did not commit himself to the permanent closure of that programme.[89] He proposed legislation that would set up a system of military commissions that would not meet minimum international standards. And he proposed a unilateral redefinition of Common Article 3 of the Geneva Conventions that would permit certain interrogation techniques that are inconsistent with the requirements of Article 3.

81. In April 2005 our Assembly declared that the US had "betrayed its own highest principles" in pursuing its war on terror.[90] Regrettably, whilst there have been some improvements, there remain serious concerns about President Bush's commitment to the international rule of law.

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82. The United States of America, an Observer State to the Council of Europe[91], is Europe's long-standing ally in resisting tyranny and defending human rights and the rule of law. We cannot and should not forget the longstanding tradition of transatlantic friendship between the US and Europe.[92] We also have a deep respect for the US legal system of checks and balances, which functions well and in which a real separation of powers exists, with an independent Supreme Court whose case-law has been an inspiration to many European jurisdictions. The Assembly has already sent a strong message, in June of this year[93], that terrorism can be vanquished by lawful means, thereby proving the superiority of the democratic model founded on respect of human dignity. We must reiterate the Assembly's call on the US to co-operate more closely with us in ensuring that our understanding of international law - respectuous of international human rights and the rule of law – remains a basis upon which effective democracy is maintained and strengthened.

83. The Assembly, being composed of parliamentarians from 46 European countries, has already in the past indicated its readiness to enter into dialogue with fellow parliamentarians in the American Congress, be it on the subject of lawfulness of detentions at Guantanamo Bay "*to pursue this issue further through bilateral dialogue"*[94], the abolition of the death penalty[95] or the launching, with the US, of a common, truly global strategy to address the terrorist threat, a strategy which "*should conform in all its elements with the fundamental principles of our common heritage in terms of democracy, human rights and respect for the rule of law*".[96] The Rapporteur is convinced that now is the time to commence such a dialogue.

[89] http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html
[90] Resolution 1433 (2005), http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta05/FRES1433.htm
[91] See Appendix I.
[92] See Resolution 1421 (2005) and Recommendation 1694 (2005) on relations between Europe and the United States (Rapporteur Mr Claudio Azzolini).
[93] Resolution 1507 (2006), § 20, referred to in footnote 2.
[94] Resolution 1433 (2005) (Rapporteur Mr Kevin McNamara), § 11.
[95] See Resolution 1349 (2003), as well as a more recent Recommendation 1760 (2006), Rapporteur Mrs Renate Wohlwend.
[96] Recommendation 1754 (2006) on alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states (Rapporteur Mr Dick Marty), § 4.1.

Appendix I

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

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RESOLUTION (95) 37

ON OBSERVER STATUS FOR THE UNITED STATES OF AMERICA

WITH THE COUNCIL OF EUROPE

(Adopted by the Committee of Ministers on 7 December 1995 at the 551st meeting of the Ministers' Deputies)

The Committee of Ministers,

In view of the interest officially expressed by the United States of America in obtaining Observer Status with the Council of Europe in the context of Statutory Resolution (93) 26 and according to the terms of the letter of 22 August 1995 of the Assistant Secretary of State for European and Canadian Affairs;

Considering that the United States share the ideals and values of the Council of Europe;

Conscious of the particular interest of the United States of America in strengthening co-operation with a view to increasing stabilisation in the new democracies of Central and Eastern Europe;

Bearing in mind the necessity to intensify functional co-operation between the Council of Europe and the OSCE in the Human Dimension field, recognised in the Vienna Declaration of 1993;

Pending confirmation of the positive opinion of the Parliamentary Assembly,

Decides to invite the United States of America to become an Observer with the Council of Europe. This status will give the United States the possibility of:

i. naming a permanent observer to the Council of Europe;

ii. sending observers to those Committees of Experts of the Council of Europe instituted in application of Article 17 of the Statute to which all member States may designate participants;

iii. sending their permanent observer to the subsidiary meetings of the Deputies, including those devoted to the planning and programming of the activities of the Council of Europe aiming at the strengthening of democratic institutions, the establishment of the Rule of Law and the reinforcement of Human Rights;

iv. sending, following an invitation from the host country, observers to Conferences of Specialised Ministers;

v. participating in the activities of the Partial and Enlarged Agreements following invitation and in conformity with the rules applicable to such Agreements.

Appendix II

List of Council of Europe conventions signed or/and ratified by the United States of America[97]

Treaties signed but not ratified as of 17/01/2007

No.	Title			Opening of the treaty	Entry into force	E.	N.	C.
165	Convention on the Recognition of Qualifications concerning Higher Education in the European Region			11/4/1997	1/2/1999	X	X	X
	Signature: 11/4/1997							
173	Criminal Law Convention on Corruption			27/1/1999	1/7/2002	X	X	X
	Signature: 10/10/2000							

Treaties signed and ratified or having been the subject of an accession as of 17/01/2007

No.	Title			Opening of the treaty	Entry into force	E.	N.	C.
112	Convention on the Transfer of Sentenced Persons			21/3/1983	1/7/1985	X	X	
	Signature: 21/3/1983	Ratification or accession: 11/3/1985	Entered into force: 1/7/1985					
127	Convention on Mutual Administrative Assistance in Tax Matters			25/1/1988	1/4/1995	X	X	
	Signature: 28/6/1989	Ratification or accession: 13/2/1991	Entered into force: 1/4/1995					
185	Convention on Cybercrime			23/11/2001	1/7/2004	X	X	
	Signature: 23/11/2001	Ratification or accession: 29/9/2006	Entered into force: 1/1/2007					

Notes: Convention(s) and Agreement(s) opened to the member States of the Council of Europe and, where appropriate, to the: E. : **European** non-member States - N. :**Non-European** non-member States - C. : European Community. See the final provisions of each treaty.

Source : Treaty Office on http://conventions.coe.int

[97] The United States of America has also participated in the work of the European Commission for Democracy through Law (Venice Commission) as an Observer since 10.10.1991 and of the Enlarged Partial Agreement establishing the Group of States against Corruption (GRECO) since 20.09.2000.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10388, Reference No 3041 of 24 January 2005

Draft resolution and draft recommendation adopted unanimously by the Committee on 23 January 2007

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György Frunda, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya Atanasova, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany,** Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Giorgi Bokeria, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mrs Ingrīda **Circene**, Mr Telmo Correia (alternate: Mr João Bosco **Mota Amaral**), Mrs Lydie Err, Mr Valeriy Fedorov, Mr Aniello Formisano, Mr Jean-Charles Gardetto, Mr Jószef Gedei, Mr Stef Goris, Mr Valery Grebennikov, Mr Holger **Haibach**, Mrs Gultakin **Hajiyeva**, Mrs Karin **Hakl**, Mr Nick Harvey (alternate: Mr Christopher **Chope**), Mr Serhiy **Holovaty**, Mr Michel **Hunault**, Mr Rafael Huseynov (alternate: Mrs Ganira **Pashayeva**), Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želiko **Ivanji**, Mr Sergei Ivanov, Mrs Kateřina **Jacques**, Mr Antti **Kaikkonen**, Mr Karol Karski (alternate: Mrs Ewa **Tomaszewska**), Mr Hans Kaufmann (alternate: Mr Theo **Maissen**), Mr András **Kelemen**, Mrs Kateřina **Konečná**, Mr Nikolay Kovalev, Mr Jean-Pierre Kucheida, Mr Eduard Kukan, Mrs Darja **Lavtižar-Bebler**, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony **Lloyd**, Mr Humfrey **Malins**, Mr Pietro Marcenaro, Mr Alberto Martins (alternate: Mr Ricardo **Rodrigues**, Mr Andrew McIntosh, Mr Murat Mercan, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić, Mrs Carina Ohlsson (alternate: Mrs Tina **Acketoft**), Ms Ann Ormonde (alternate: Mr Paschal **Mooney**), Mr Claudio Podeschi, Mr Ivan Popescu, Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen **Rustamyan**, Mrs Rodica Mihaela **Stănoiu**, Mr Christoph **Strässer**, Mr Mihai Tudose, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis **Varvitsiotis**, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krysztof Zaremba, Mr Vladimir Zhirinovsky, Mr Miomir Žužul (alternate: Mr Slaven **Letica**)

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin