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HEARTS AND MINDS AND LAWS: LEGAL COMPLIANCE AND DIPLOMATIC PERSUASION

CHRISTOPHER J. BORGEN*

INTRODUCTION

While political observers at least from Tocqueville onwards have commented on "American exceptionalism," that term took on new connotations during the eight years of the Bush Administration. Robert Kagan—who, along with William Kristol, founded the neoconservative Project for a New American Century in 1997—set out his conception of U.S. exceptionalism in his article, Power and Weakness. For him, to understand American exceptionalism in the realm of foreign and military affairs, one first had to appreciate what the rest of the world was like. Europe no longer had traditional security threats and was styling itself as a sort of "postmodern paradise." It was inward-looking and satisfied that it had found a set of rules that fostered peace and prosperity, at least within Europe. However, there were, by contrast, the tough places in the world—swaths of Africa, the Middle East, and Asia—that were outside this post-modern paradise. These states, in Kagan's view, were still mired in the modern and the pre-modern world of Hobbes. The United

* Associate Professor of Law, St. John's University School of Law. This Essay benefited from comments and suggestions from Lori Outzs Borgen, Peggy McGuinness, and Brian Tamanaha. I am also grateful for the comments of the participants in the South Texas Law Review Ethics Symposium, held in September, 2008. Finally, I would like to thank Professor Geoff Corn both for organizing the symposium and for his helpful comments, and also the editors and staff of the South Texas Law Review, especially Editor in Chief Bryan Hanna, for their suggestions and fine editorial work. Any mistakes are solely my own. The main text of this article was completed in March, 2009.

States was the exception; it had to navigate between these worlds, maintaining security for the post-modern world by remaining engaged with the modern and the pre-modern. This had implications for international law: the United States had not incorporated the relatively rigid legalism of those who lived their lives within the post-modern paradise because of its need for flexibility to be able to address the problems emanating from the rest of the world.

International law was fine for the paradises of the world, but of little use for those who had to venture into the areas where history had not yet ended. Thus, U.S. presidential administrations—and especially that of George W. Bush—have had world views that emphasized flexibility over legalism.

But it is one thing to value flexibility over legalism—if that is defined as a pedantic and narrow reading of law—it is another thing altogether to go beyond eschewing narrow legalism to actually ignoring the law. The neoconservatives in the Bush Administration held two somewhat contradictory views about international law. Some were actively hostile to there being international legal regulation of U.S. actions. Others seemed to allow for some role for the trappings of international law, such as legal memoranda, Security Council Resolutions, and so on, but were instrumentalists to an extreme in their use of law. Neither of these groups seemed to consider international law as something that may exist outside of the decisions of the Administration's lawyers. Ultimately, they did not appreciate that, in international relations, law matters and that the reputation of the United States as a law abiding country also matters.

While the United States may be facing new threats, at least one constant remains: International law is both the language and the grammar of international relations. To a large extent it defines what can and cannot be said in modern diplomacy:

Law structures the relations among States by providing a common frame of reference. It is the language of international society: to present one's claims in legal terms means to signal which norms one considers relevant and to indicate which procedures one intends to follow and would like others to follow.2

Yet, while the Bush Administration argued that legal constraints were least relevant in matters of national security and warfighting, these constraints matter most internationally: "Law has become the

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common vernacular of this dispersed elite [of experts involved in military issues], even as they argue about just what the law permits and forbids."

This Essay considers the role of international legal argument in the war on terror and, in particular, in the attempts to justify the use of military force. Part I looks at challenges posed by the evolution of military conflict and how this affects diplomacy. In particular, I argue that a reputation for honoring one's treaty commitments and for legality, more generally, is an important part of fostering cooperation and undercutting the support of our adversaries. Part II focuses on how the Bush Administration moved between hostility to international law and attempts to rewrite the rules of international law concerning the use of force. Finally, Part III considers some of the effects of these legal policies on U.S. foreign policy.

I. INTERNATIONAL LEGAL ARGUMENTS AND THE CRAFTING OF A DIPLOMATIC NARRATIVE

A. The Challenges of New Conflicts

The war on terror has been called a "fourth generation" conflict, to use a term that was defined in an influential article in the Marine Corps Gazette in 1989. Using this scheme, the mass warfare exemplified by the Napoleonic Wars was the first generation. The Industrial Revolution spurred the second generation, which was typified by the harnessing of entire economies to produce war materiel. The second generation peaked with the widespread deployment of new weapons, such as the machine-gun and poison gas, in World War I. The third generation reacted to the trenches and picket lines of the second generation by adapting new transportation technology (cars, trucks, tanks, and planes) and devising new strategies of maneuver warfare. This generation was fully realized in World War II with the use of the blitzkrieg, but aspects of it can be seen in the 1991 Gulf War.

The laws of armed conflict shifted and adapted in each of these instances to respond to the new ways that war was fought. But, in each

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case, the change in law was an attempt to curb the worst proclivities of
the combatants, not enable them.

Since World War II, the framework for the law of armed conflict
has included the United Nations Charter, concerning issues of the use
of force (*ius ad bellum*) and the four Geneva Conventions, concerning
conduct in an armed conflict (*ius in bello* or international
humanitarian law). This Essay will focus on use of force issues, with
some mention of international humanitarian law topics.

Article 2(4) of the U.N. Charter prohibits the use of force in
disputes between member states. It envisions the Security Council
managing the use of international violence and, through a
determination that there is a threat to international peace and
security, authorizing the use of force in certain instances. The Charter
also allows for individual and collective self defense when the U.N. is
unable to act. As Thomas Franck explains, the U.N. essentially has a
two-tiered system concerning the use of force: (a) an upper tier which
posits an ideal world in which no state would use violence but, if one
did, it would be met through the collective force of the U.N. via a
determination of the Security Council, and (b) a lower tier which
would allow for individual and collective self defense when the U.N. is
unable or unwilling to counter aggression in a timely manner.5

This schema was almost immediately under stress by multiple
developments. The Cold War brought the Security Council to near
deadlock.6 States increased the use of covert operations and proxy
combatants rather than standard declarations of war, making it more
difficult to assign responsibility for violations.7 Technological advances
made waiting to be attacked a risk that states were increasingly
unwilling to take and made attacking first—or anticipatory self-
defense—more common.8 Finally, increasing concern of human rights
and the memories of the Holocaust made states more willing to
intervene militarily in order to prevent a humanitarian crisis.9

Today we live in an era defined less by superpower conflict than
by a myriad of “small wars.” Due in part to the advent of cheap and
powerful computers and global communication, this is a time when
individuals and small groups are able to act in a manner—for good or
evil—that formerly had been the preserve of states. Consider not only

5. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST
THREATS AND ARMED ATTACKS 3 (2002).
6. Id.
7. See id. at 3–4.
8. Id. at 4.
9. Id.
the United States hunting down al Qaeda but also Israel fighting Hamas in Lebanon and the constantly mutating struggle for Somalia. The enemies of the United States are no longer necessarily other states organized in formal bureaucracies but increasingly are substate organizations including terrorist networks, drug cartels, marauding pirates, separatist belligerents, and so on. Armed conflicts increasingly straddle the line between "traditional" war and counterinsurgency. The future of warfare will look less like the 1991 Iraq campaign—armored columns storming through the desert—and more like Iraq in 2004—a complex mix of occupation and counterinsurgency—or Mexico in 2009—with aspects of both law enforcement and urban combat.

These developments in organized violence—the commodification of computing power, the expansion of communication capabilities, the shift from hierarchical to networked organization, the sharing and improvement of tactics and technology—are combined with an older strategy of irregular warfare "to waste the strength of the strong—to bleed the target state dry morally and economically."

These are conflicts not only among communities but often within communities. In such situations the public's perception is crucial:

[W]hen the strong are seen beating the weak (knocking down doors, roughing up people of interest, and shooting ragtag guerillas), they are considered to be barbarians. This view, amplified by the media, will eventually eat away at the state's ability to maintain moral cohesion and drastically damage its global image.

As the state's soldiers continue to fight weak foes, they will eventually become as ill disciplined and vicious as the people they are fighting, due to frustration and mirror imaging. Citizens lose their feeling of solidarity with the goals of their government when they perceive it to be acting immorally.

In such a conflict, it is important to maintain a sense of cohesion and the rightness of one's cause. Fourth generation conflicts are, in the words of military analyst John Robb, "primarily moral conflicts" where "[t]he key is maintaining moral cohesion."

10. MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 197 (1991) (concerning the new enemies of states as "terrorists, guerillas, bandits, and robbers").
12. Id.
13. Id. at 28–29.
14. Id. at 26–27.
We can think of the state speaking to three audiences. One audience is a state’s own citizenry, which needs to believe in the rightness of the state’s policies that are likely to spill both blood and wealth. A second audience is foreign governments; allied governments will need to be bolstered, neutral governments persuaded, and enemies warned of our resolve. This is the realm of diplomacy. The final main audience is the citizenry of other states. This is the arena of public diplomacy, of how a state “tells its story,” not to other governments (that is traditional diplomacy) but to the publics of other states. And, increasingly, the language of international law plays an important part in crafting credible narratives for all three audiences.

B. Compliance, Reputation, and Legitimacy

As much as pundits write about global hegemons (like the United States) and regional hegemons (such as Russia), being able to act unilaterally on matters of national security, states often prefer—and may need—the participation of other states. Diplomacy—both in its traditional form and in the new form of public diplomacy—is more important than ever: “a strategic principle for the network age [is that] the advisable way to out-compete is to out-cooperate.” Absent some level of cooperation, national bureaucracies are unlikely to be effective against transnational terrorist networks. Moreover, dominant states cannot simply impose or project their norms on others; the process is interactive and requires the “offering up of reasonable arguments.” Reasonable arguments are those that fit within a wider context of shared understandings about the rules of international life. If they do not fit, they are not likely to be persuasive and no amount of material power is going to change that.

The ability to persuade other states using nonmilitary means has been called “soft power.” Such power “is inherently inter-subjective; those on whom it is projected must accept and internalize the values, ideas and understandings that are espoused.”

16. Id. at 14-15.
Harold Koh explains that a key component of soft power is a state’s good reputation for compliance. As he put it, “the process of visibly obeying international norms builds U.S. ‘soft power,’ enhances its moral authority, and strengthens U.S. capacity for global leadership in a post-September 11 world.”\textsuperscript{20} Moreover, according to Andrew Guzman: “A reputation for compliance with international law is valuable because it allows states to make more credible promises to other states. This allows the state to extract greater concessions when it negotiates an international agreement.”\textsuperscript{21}

Even if a reputation for compliance can at times be beneficial to states, that does not mean that states will actually comply with a legal rule; they may simply seek to conceal their noncompliance or, if that is not possible, differentiate their activities in an attempt to maintain that the legal rule they are allegedly breaching does not, in fact, apply.\textsuperscript{22}

While this is surely true, it is important to note that whether or not those legal arguments are credible depends on factors outside of the control of the individual state; as Ian Johnstone put it, soft power is “inter-subjective.” Consequently, there are limits as to what can be credibly argued. Johnstone explained that:

Law is not infinitely manipulable. It cannot be wielded randomly... because if its invocation is to have the desired effect, the proffered interpretation must be credible to intended addresses. After all, if the relevant interpretive communities do not attach any credibility to a State’s claim that its actions are within the law, the claim would be meaningless and therefore pointless.\textsuperscript{23}

Thus, states seeking allies for coordinated action need to both maintain a reputation for respecting their international obligations and, when they act in a manner that is legally questionable, they need to be able to justify it using a reasonably credible legal argument. No mere figleaf is enough.

Credible legal arguments are needed if a state wants its arguments to have any type of legitimacy. An interpretation of international law that is legitimate can “pull” other states towards

\textsuperscript{23} Johnstone, \textit{supra} note 2, at 418.
adopting such an interpretation or at least accepting the action of the state in question.\textsuperscript{24} An interpretation that is perceived as legitimate thus eases cooperation and decreases the risk of sanctions.

In light of the foregoing discussion, one of the problems that the United States faced in the post 9/11 world is that it responded with a series of interpretations of international law that were highly questionable and a series of actions that were perceived as being illegitimate. Thomas Franck explained the ramifications:

A grave responsibility is thus incurred by those who undermine the general belief in the independent capacity of law to affect compliant behavior, even if they direct their attack to one particularly vulnerable subset of laws. For, in essence, the debate is not merely about Article 2(4) of the UN Charter. It is not just about whether a universal treaty adhered to by 191 countries is a disposable instrument. It is about the weighing of power against legitimacy. It is a struggle for the soul of the community of nations.\textsuperscript{25}

We will turn to that struggle in Part II.

II. LAW AND THE DIPLOMATIC HIGH GROUND IN THE WAR ON TERROR

A. Legitimacy and the War on Terror

In March 2003, on the eve of the Iraq War, Fareed Zakaria wrote:

America is virtually alone. Never will it have waged a war in such isolation. Never have so many of its allies been so firmly opposed to its policies . . . . In fact, the debate is not about Saddam anymore. It is about America and its role in the new world . . . . A war with Iraq, even if successful, might solve the Iraq problem. It doesn't solve the America problem. What worries people around the world [above all else] is living in a world shaped and dominated by one country—the United States.\textsuperscript{26}

\textsuperscript{24} Regarding legitimacy more generally, see THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (stating "[l]egitimacy is a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process").


\textsuperscript{26} Koh, supra note 20, at 1524–25 (quoting Fareed Zakaria, The Arrogant Empire, NEWSWEEK, Mar. 24, 2003, at 18, 20–23).
The "America problem" that the world faced was, for the United States, actually a two-pronged legitimacy problem. As Zakaria described, one problem stemmed from the then-pending war with Iraq. As will be discussed below, the interpretation of the rules of self-defense that the United States proposed did not sit well with close allies including Germany and France, let alone with competitors such as Russia and China. Moreover, this problem was not limited to the Iraq War but was actually a broader question of whether and how the U.S. was attempting to redefine the rules governing unilateral military action. The question implicated (on the one hand) the U.S.'s own security concerns and (on the other hand) its concerns that other states, such as Russia or China, could use new interpretations for their own ends.

The second legitimacy problem for the United States stemmed from the host of issues concerning the treatment of detainees in the War on Terror: torture, Abu Ghraib, military tribunals, solitary confinement, and the ever-increasing list of activities that were of questionable legality, if not morality. The United States is no stranger to criticism of its human rights practices, but in years past those criticisms have often been about U.S. hypocrisy in being quick to condemn the human rights abuses of its enemies but slow to address the abuses of its allies. However, the moral clout of the United States dropped to a new low during the Bush Administration. Beyond turning a blind eye to the bad acts of our allies, the United States itself resorted to torture and to undermining the legal regime against torture with the use of indefensible legal interpretations. Foreign political leaders as well as average citizens both from foreign countries and from the United States were shocked by the ongoing revelations of the use of harsh interrogation techniques, "black sites," and so on. This sapped the United States of the ability to speak with moral strength while it simultaneously energized anti-American rhetoric.

In this short Essay, though, I do not wish to focus on the arguments concerning the treatment of detainees, issues of due process, the use of torture, renditions, and so on. These issues have been well analyzed and do not need recounting here. What I do want to focus on is how, at a time when promoting the rule of law and maintaining ethical legitimacy should have been important aspects of

27. The simple fact that the Bush Administration, on its last day in office, disavowed the pre-existing Office of Legal Counsel (OLC) memos speaks volumes of the shoddiness of the legal arguments they had made. See generally Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice (Jan. 15, 2009), available at http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf.
U.S. policy, the Bush Administration adopted a rhetoric that was actually hostile to international law.

B. The Neoconservative Turn from International Law

For all the talk of "American exceptionalism," Harold Koh posits that this concept is muddled. He explains that there are actually four types of American exceptionalism: a distinctive conception of rights (such as the American emphasis on racial equality); the use of different labels for related concepts (such as where the world uses terms like torture, we speak of "cruel and unusual punishment"); the "flying buttress mentality" (which views the U.S. as being supportive of international law yet does not allow international law within itself); and finally the use of double standards.\(^2\)

Of these types of exceptionalism, double standards are especially troubling in the context of the War on Terror. As Koh writes:

[B]y espousing the double standard, the United States often finds itself co-opted into either condoning or defending other countries' human rights abuses, even when it previously criticized them (as has happened, for example, with the United States critique of military tribunals in Peru, Russia's war on Chechen "terrorists," or China's crackdown on Uighur Muslims).\(^2\)

But, the Bush Administration went beyond double-standards to adopting a rhetoric that was hostile to international law. In 2005, the National Defense Strategy promulgated by the Department of Defense warned that: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."\(^3\) This was not just inartful turn of phrase but was U.S. policy. It was emblematic of an attitude of the Bush Administration that international law, far from being important to uphold, was a threat to the United States and its interests.

This was reinforced by neoconservative pundits. Some U.S. commentators started using the term "lawfare" to describe law being used as a weapon, often against America.\(^3\)

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29. Id. at 1487.
The neoconservative view is epitomized by John Bolton, who seemed to object to international law largely for its constraining of unilateral U.S. action. In making John Bolton the U.N. Ambassador, the Bush Administration sent to the United Nations "a lawyer who has written that international law is not law as we know it domestically, but rather a matter of political understandings adopted for the convenience of states and subject to unilateral change when such understandings prove inconvenient." Thus, many influential people in the Bush Administration believed that international law was not really "law." For example, by emphasizing domestic statutes over treaties, neoconservatives only allowed treaties moral or political (as opposed to legal) weight. Charles Krauthammer argued—before September 11th—that the United States should set aside international law and act as it wants:

America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will.

At times, the Bush Administration practiced "à la carte" multilateralism—turning to the U.N. and international law when it suited them, other times trying to adjust the content of international law, but often just ignoring international law and institutions. Instead of arguments based on law, the Bush Administration employed a moralistic rhetoric of good and evil. America was against an "axis of evil." President Bush described the war against terror as a "crusade," an especially poor choice of words as, "[f]or many in the [Middle East], it underscored Western colonialism, Israeli occupation, and the current U.S. domination." The result of supplanting legalism with a Manichean moralism was the polar opposite of the goal of public diplomacy: rather than telling America's story in a manner to

34. Vagts, supra note 322, at 846-47.
persuade the citizens of other states, the Bush Administration antagonized the so-called "Arab street." As President Bush put it, "[e]ither you are with us or with the terrorists."\(^{37}\)

In the absence of legal argumentation, it was difficult to actually foster a sense of legitimacy. The United States was viewed as a hypocrite that only invoked international law to control others. In the capitals of Europe, there was a growing concern about unilateralism and trustworthiness. There was also an increasing sense that the United States was not concerned with upholding international law. Finnish scholar and former diplomat Martti Koskenniemi voiced the view of the Europeans who believed that for the United States, "[i]egalization, is just a policy choice, a matter of costs and benefits— with no a priori reason to believe that the latter would outweigh the former."\(^{38}\)

Thus the Bush Administration chose as a matter of policy to try to loosen the strictures of international law on itself and to increase the indeterminacy of the law's rules (at least applied to the United States). However, many of these norms had been established in international law due to the efforts of the U.S. since the Second World War. Now, because of those efforts, those norms had become accepted as legal principles by many states. Those states became defenders of the rules of international law that had previously been espoused by the U.S. but were now being either loosened, repudiated, or ignored by the Bush Administration. As a practical matter, this meant that attempts to revise the norms of non-intervention, the multilateral management of conflicts, and criminal liability for certain breaches of international humanitarian law were met by deep skepticism.

The Bush Administration seemed to oscillate between ignoring international law and an extreme instrumentalism which sought to rewrite the rules of the system to suit the present needs of the United States.\(^{39}\) Either way, the views of the other members of the interpretive community were all but ignored.

\(^{37}\) Id. at 265.

\(^{38}\) Koskenniemi, supra note 33, at 117.

C. The (Mis-)Use of Legal Arguments Concerning Military Intervention

Although the Bush Administration had not placed a priority on engaging the international community on issues of international law, this was a time when a careful consideration of the norms of the community was all the more important. While Bush Administration officials were derisive of international courts and fora, they also did not truly appreciate that

"...on the international stage, there is only the "Court of World Public Opinion." As a lawyer, advising the military about the law of war means making a prediction about how people with the power to influence our success will interpret the legitimacy of our plans. What will our allies or our own citizenry say? If we will need the cooperation of citizens in Iraq, or Lebanon or Pakistan, what will they have to say? We have seen the cost in political legitimacy and international cooperation that comes when we play by rules others don't recognize."

At first, there seemed to be at least some attempt in the weeks and months following September 11th to engage the international community. Via the U.N. Security Council, the United States attempted to rework international law of the use of force to include new rights of intervention that had not been articulated until that point. José Alvarez points to the Security Council revamping the rules of the use of force with three new general norms: (a) the reconfiguration of certain types of terrorist violence as an "armed attack for purposes of UN Charter" Article 51 rights of self-defense; (b) the harboring of terrorists as justification for the use of military force against a state; and (c) although an ongoing terrorist threat may be unpredictable, the use of force against a state harboring terrorists does not necessarily "become impermissible retaliation or illegal anticipatory self-defense, or exceed the rules of proportionality." These new rules are "exceptionally indeterminate."

Yet, while the United States was able to foster a new understanding of international law that legitimized the invasion of Afghanistan, the invasion of Iraq was another matter.

40. Kennedy, supra note 3, at 184.
42. Alvarez, supra note 41, at 879 (internal quotation marks omitted).
43. Id. at 881.
Arguments that tried to link Iraq to September 11th were problematic. Moreover, many countries considered whatever threat Iraq posed to the United States to be so remote as to deny any argument that the United States could strike based on any reasonable interpretation of self-defense. Ultimately though, it became clear that the United States would invade Iraq with or without a new Security Council resolution.

However, despite its hostility to international law, the Bush Administration did not say it was setting aside international law in its invasion of Iraq. International law still had some sway to the extent that the Administration made desultory arguments that the United States was acting in furtherance of international law by upholding Security Council resolutions. (This seemed like a mere figleaf.) Perhaps more significantly, President Bush enunciated what became known as the Bush Doctrine, a revision of the principles of self-defense to allow early intervention without having been attacked or without an attack being imminent. If generalized into an actual legal rule, this interpretation would give broad leeway for unilateral use of military force in anticipation of a theoretical armed attack that may occur at some future, unspecified date. Based on the understood framework of the international law of the use of force (even including the post-September 11 adjustments), the international community did not find this interpretation persuasive. To the other extreme, many argued it was dangerous.

The Bush Administration’s use of questionable legal arguments regarding Iraq, and particularly its arguments widening the possibility for unilateral military intervention, stands in sharp contrast to the legal arguments of American leaders in previous administrations. During the Cuban Missile Crisis, for instance:

Abram Chayes, who was State Department Legal Adviser at the time, states that the looser interpretation of article 51 was not adopted by American officials partly because it would have set a ‘bad precedent’ weakening the ‘normative atmosphere’ in which States act.

In the run-up to the invasion of Grenada, Reagan Administration officials focused on what legal principles it used:

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45. See, e.g., Johnstone, supra note 17, at 830–31.
One could quibble about facts, [State Department lawyer] Michael Kozak would later suggest, but it was important that there be "nothing new in international law."

Too facile an appeal to law, the Legal Adviser's Office recognized, might well come back to haunt the Reagan administration. The Legal Adviser's Office was particularly concerned that it not create a justification for "another Afghanistan." Accordingly, [Legal Adviser Davis] Robinson's letter deliberately eschewed appeals to "humanitarian intervention" and to "new interpretations" of the U.N. Charter's article 2(4).

Thus, "[i]f the United States were to endorse a self-defense rationale, Kozak feared, it would open a gap in article 51 that armies could march through, armies that in the future might not be those of the United States and its allies."48

Perhaps because the Bush Administration did not take international law seriously, it made arguments that undercut the very foundations of the law of the use of force. It acted in a way that maximized short-term flexibility and damaged the reputation and efficacy of the United States (at least into the medium-term) and may have weakened some of the foundational principles of international law.

III. POWER, RESPONSIBILITY, AND REPUTATION

In 1943, Winston Churchill told an American audience: "The price of greatness is responsibility."49 Today, the United States is in a position of great power that makes it especially influential in shaping international law. In Wilhelm Grewe's history of international law, he found that for the last five hundred years, "[t]he hegemon in each case led the way in formulating the international law rules of the time."50 The policies of the Bush Administration proved to be troubling not only for America's ethical standing in the world but also for the evolution of international law.

48. Id. at 795 (footnote omitted).
50. Vagts, supra note 32, at 844.
First, the Bush Administration seemed to conclude that reputation was not that important due to the predominant power of the United States. Some theorists have previously argued that:

Once the United States became a great power, and particularly after it became hegemonic in the West, other countries could not avoid dealing with it. The United States was "the only game in town," and even if its reputation suffered, other governments had little choice but to deal with it.51

However, this reasoning misses the other half of the equation: In a world of transnational threats, America has little choice but to deal with the rest of the world. The willingness of other states to cooperate with the U.S. on issues ranging from extradition of criminals to the allocation of troops for a military intervention is in part reliant on the reputation of the United States for abiding by international law (Will the extradited suspect face torture? Is this intervention legal?).

Beyond the Bush Administration’s cavalier attitude towards America’s reputation in the world, there was its oscillation between hostility towards international law and extreme instrumentalism that sought to rewrite some of the basic rules. Thus we had the winnowing of the Geneva Conventions, the expansion of the unilateral use of force, and so on . . . all under cover of legal memoranda that have since been repudiated by the Bush Administration itself.52

Between unburdening itself of concern over a reputation for lawfulness and drafting legal arguments that mocked the very law it supposedly interpreted, during the Bush Administration abandoned the use of credible legal arguments.

This had the potential to be especially damaging since, due to its position of primacy, the United States has a unique responsibility in shaping international law and acting as law’s steward. By contrast, the Bush Administration adopted a sort of “predatory hegemony” in the field of international law. A predatory hegemon was “less willing to subordinate its own interests to those of its allies; instead, it tended more and more to exploit its hegemonic status for its own narrowly defined purposes.”53

While such a strategy may have increased its short-term flexibility, the longer-term effect was a loss of reputation, prestige, and influence. This spilled over into other areas beyond the War on

52. See, e.g., Memorandum from Steven G. Bradbury, supra note 27.
Terror and the War in Iraq. For example, in the crisis surrounding the Russian invasion of Georgia in August 2008, the Russians seemed to have been less concerned by the reaction of the United States than with the lack of support from the Shanghai Cooperation Organization ("SCO"), the nascent security organization consisting of Russia, China, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan.\footnote{See Charles King, The Five-Day War: Managing Moscow After the Georgia Crisis, FOREIGN AFF., Nov./Dec. 2008, at 2, 2-6.} Furthermore, France, not the United States, took the lead in diplomatic engagement from the West in the early days of the conflict.\footnote{See France: Cease-Fire, Not Peace Reached in Georgia, CNN, Aug. 12, 2008, http://m.cnn.com/cnn/ne/europe/detail/152454/full?sessionid=C9FD314B01097D84948AA65564E6C32E.} After its arguments trying to support its invasion of Iraq, the United States was not in a position to criticize others on issues of territorial integrity and the use of force.

Moreover, "Russia is not alone in questioning the consistency of the United States' responses to territorial conflicts around the world or the evenhandedness with which the West doles out labels such as 'democratic,' 'terrorist,' or 'rogue state.'"\footnote{See King, supra note 54, at 4.} As we look beyond the Iraq War and back to the broader set of foreign policy challenges faced by the United States, how the U.S. is perceived by the citizens and leaders of other countries is vital as "[i]n the future, the real contest will be over which powers are best able to spin their flaws and speak convincingly to an increasingly savvy world citizenry that is as skeptical about the United States' messianic democratizing as it is about Russia's nationalist posturing."\footnote{Id. at 11.}

Rather than the predatory legal hegemony of the Bush Administration, wise leadership would build institutions that would serve the common good, and provide long term stability and equity;\footnote{See, e.g., ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 246-47 (1984) (concerning the value of institutions during a period of hegemonic decline).} in other words, help build an international system the great power would want to be a part of, even when it was no longer a great power.\footnote{Id. at 246.}

The structure of international law must play a key role in the broader strategy of the United States in addressing threats to its security and its use of force overseas. Law is especially important in an era of fourth generation warfare. David Kennedy explains that:
Law now offers the rhetorical—and doctrinal—tools to make and unmake the distinction between war and peace. As a result, the boundaries of war can now be managed strategically.

Take the difficult question—when does war end? The answer is not to be found in law or fact—but in strategy. Declaring the end of hostilities might be a matter of Election Theater or military assessment. Just like announcing that there remains “a long way to go,” or that the “insurgency is in its final throes.” We should understand these statements as arguments. As messages—but also as weapons. Law—legal categorization—is a communication tool. And communicating the war is fighting the war.\(^{60}\)

Due to their ideological dislike of international law, the neoconservatives of the Bush Administration, in their ideological repulsion from international law, ignored that international law is a crucial tool in statecraft. In her confirmation hearing testimony before the Senate Foreign Relations Committee, Senator Hillary Clinton echoed Suzanne Nossel’s formulation of “smart power” when she said,

I believe that American leadership has been wanting, but is still wanted . . . . We must use what has been called smart power, the full range of tools at our disposal—diplomatic, economic, military, political, legal, and cultural . . . . With smart power, diplomacy will be the vanguard of foreign policy.\(^{61}\)

The relationship between law and international relations is a complex one. Sometimes law is used as an instrument of power. However, there is “good” instrumentalism and “bad” instrumentalism. Good instrumentalism would be using law as a means towards broader goals of the international community (such as peace and prosperity) without destabilizing the structure of international law. Bad instrumentalism, by contrast, is the use of law for the narrow goals of one (or only a few) state(s), especially if it is being used in such a manner as to undercut international law in one or more substantive areas. The Bush Administration moved further and further into the realm of bad instrumentalism during its term.

As we have seen, while international law can enable power, it can also constrain power.

\(^{60}\) Kennedy, supra note 3, at 182–83 (emphasis added).

In either case, international law is ignored at the ignorer’s peril. This is a lesson that many in the United States seem to have learned from our experiences in the past eight years.

America is exceptional in many ways. But being able to turn its back on international law without any consequence is not one of them.