

2012

Presidential Foreign Policy: An Opportunity for International Law Education

Laurie R. Blank

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Laurie R. Blank, *Presidential Foreign Policy: An Opportunity for International Law Education*, 45 Case W. Res. J. Int'l L. 101 (2012)
Available at: <https://scholarlycommons.law.case.edu/jil/vol45/iss1/12>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

Case Western Reserve Journal of International Law

Volume 45

Fall 2012

Issues 1 & 2

PRESIDENTIAL FOREIGN POLICY:
AN OPPORTUNITY FOR INTERNATIONAL
LAW EDUCATION

Laurie R. Blank

PRESIDENTIAL FOREIGN POLICY: AN OPPORTUNITY FOR INTERNATIONAL LAW EDUCATION

*Laurie R. Blank**

This essay explores an interesting opportunity for the president in the foreign policy arena: the role of educator on international law and its central principles, for both the president and his surrogates in the executive branch. In the current environment in which the United States is engaged in extensive, wide-ranging, and challenging military operations against diverse foes, this educational role has significant potential in the arena of the law of armed conflict specifically. With reference to historical and current examples of how presidents have used—or not used—international law as an effective communication medium, this essay highlights how the president can communicate effective messages with regard to international law, and the law of armed conflict in particular, to the public through a much more focused and proactive view of the president as an educator in this area.

On August 2, 1990, Saddam Hussein's Iraq invaded Kuwait, its tiny neighbor to the southeast. Under the leadership of President George H.W. Bush, the United States marshaled a multinational coalition, secured UN authorization for the use of force, and launched military operations to push Iraqi forces out of Kuwait and liberate Kuwait.¹ On the eve of Operation Desert Storm, the military operations launched on January 16, 1991, President Bush spoke to the nation, explaining the background to and purpose of Operation Desert Storm.² In so doing, he set forth a comprehensive and effective description of *jus ad bellum* and the U.S. justification for using force against Iraq in that instance.

* Director, International Humanitarian Law Clinic, Emory University School of Law. I would like to thank Tariq Mohideen (JD expected 2013, Emory Law School) for his creative and helpful research assistance in the preparation of this essay.

1. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF CONFLICT: AN INTERIM REPORT TO CONGRESS, 1-1 (1991), *available at* http://www.dod.mil/pubs/foi/operation_and_plans/PersianGulfWar/305.pdf.
2. President George H.W. Bush, Speech Announcing U.S. Attack on Iraq, 1991 (Jan. 16, 1991) [hereinafter President Bush Speech], *available at* http://infousa.state.gov/government/overview/bush_iraq.html.

Jus ad bellum is the Latin term for the law governing the resort to force, that is, when a state may use force within the constraints of the UN Charter framework and traditional legal principles.³ The UN Charter prohibits the use of force by one state against another in Article 2(4): “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁴ International law provides for three exceptions to this prohibition on the use of force: consent, UN Security Council authorization for a multinational operation, and self-defense. The last of these exceptions formed the foundation for US action in the Persian Gulf in 1991.

Under Article 51 and the historical right of self-defense, a state can use force in individual or collective self-defense in response to an armed attack as long as the force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.⁵ Thus, the law focuses on whether the defensive act is appropriate in relation to the ends sought. The requirement of proportionality in *jus ad bellum* measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. The requirement of necessity addresses whether there are adequate non-forceful options to deter or defeat the attack. To this end, “acts done in self-defense must not exceed in manner or aim the necessity provoking them.”⁶

In his January 16th speech, President Bush addressed each of these components of *jus ad bellum* in turn, essentially providing the American people with a primer for the international law governing the use of force. First, President Bush identified the armed attack—the trigger for any use of force in self-defense: “the dictator of Iraq invaded a small and helpless neighbor. Kuwait . . . was crushed; its

-
3. The United Nations Charter prohibits the use of force with two exceptions: the right to self-defense and the multilateral use of force authorized by the Security Council under Article 42. U.N. Charter art. 2, para. 4 (prohibiting the use of force); *id.* art. 51 (recognizing the inherent right of self-defense); *id.* art. 42 (providing for the authorization of multilateral use of force).
 4. *Id.* art. 2, para. 4.
 5. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246 (July 8); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 102–04 (June 27); Jus ad Bellum, Partial Award, Ethiopia v. Eritrea, at 2–7 (Eritrea Ethiopia Claims Comm’n, 2005), <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>.
 6. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 132 (1986).

people, brutalized.”⁷ Second, President Bush introduced the collective action to defend Kuwait against that armed attack: “the 28 countries with forces in the Gulf area hav[ing] exhausted all reasonable efforts to reach a peaceful resolution—have no choice but to drive Saddam from Kuwait by force.”⁸ Third, President Bush showed that the United States was in compliance with the principle of necessity: “[s]anctions were tried for well over 5 months, and we and our allies concluded that sanctions alone would not force Saddam from Kuwait,” and “[r]egrettably, we now believe that only force will make him leave.”⁹ Finally, President Bush also showed the United States was complying with the principle of proportionality: “[o]ur goal is not the conquest of Iraq. It is the liberation of Kuwait,” and “[o]ur objectives are clear: Saddam Hussein’s forces will leave Kuwait. The legitimate government of Kuwait will be restored to its rightful place, and Kuwait will once again be free.”¹⁰ President Bush may not have used the legal term *jus ad bellum* or referenced specific provisions of the UN Charter, but he nonetheless offered a remarkably clear statement of the legal parameters for U.S. action and how the U.S. operation fit squarely within international legal frameworks.

President Bush’s speech highlights an interesting opportunity for the President in the foreign policy arena: the role of educator on international law and its central principles. President Woodrow Wilson and President Franklin Roosevelt also engaged in this type of dialogue with presentations to the American public, most notably with respect to the League of Nations and the US entrance into World War II, respectively.¹¹ In the post-9/11 world, both President George W. Bush and President Obama have had countless opportunities to engage in such an educational role with regard to international law. And yet few of those opportunities have been seized, at least in as direct and effective a way as the example described above from Operation Desert Storm.

7. President Bush Speech, *supra* note 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. See President Woodrow Wilson, Final Addresses in Support of the League of Nations (Sept. 25, 1919), available at <https://www.mt.holyoke.edu/acad/intrel/ww40.htm> (attempting to “remove the impressions” and “check the falsehoods” surrounding the League of Nations); President Franklin D. Roosevelt, Address to Congress Requesting a Declaration of War (Dec. 8, 1941), available at <http://millercenter.org/president/speeches/detail/3324> (addressing the nation regarding the state of affairs after the Japanese attacks in Hawaii and throughout the Pacific).

Soon after the 9/11 attacks made al-Qaeda a household word throughout the United States and much of the world, the Bush Administration characterized US efforts to defeat al-Qaeda and associated terrorist groups as a “war on terror.”¹² One response to the attacks could have been to reinforce the United States’ commitment to the rule of law, no matter who its foe or how they fought. In contrast, however, for the first several years, the rhetoric of the war on terror facilitated and encouraged the growth of authority without the corresponding spread of obligation in many cases. One of the unfortunate consequences of the use of the rhetoric of a “war on terror” was a growing sense that “war” can displace law and rights. As Harold Hongju Koh (Legal Advisor to the U.S. Department of State from 2009–2013) wrote soon after the 9/11 attacks: “In the days since, I have been struck by how many Americans—and how many lawyers—seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules.”¹³ Similarly, the Bush Administration often promoted the more explicit notion that some people simply fall outside the bounds of the law. Thus, the US government took the approach that persons detained in the course of operations against al-Qaeda are neither combatants nor civilians—terms with specific protective connotations under the law of armed conflict—but rather, that they fell outside the law’s existing parameters. Indeed, the highly problematic statement that the Geneva Conventions did not apply to members of al-Qaeda, and sometimes even the Taliban, was a common refrain in the early years of the war on terror.¹⁴ In effect, the Bush Administration did not simply avoid an active educational role with regard to international law; rather, in many cases, it went in the other direction entirely and eschewed international law principles in its public pronouncements, leaving the public in the dark about guiding norms and principles applicable to current events.

-
12. See President George W. Bush, Address to Joint Session of Congress (Sept. 21, 2001), *available at* http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US.
 13. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23 (2002). Koh continues: “In fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this.” *Id.*
 14. See, e.g., Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* <http://www.dia.mil/public-affairs/foia/pdf/detainee/Humane%20Treatment%20of%20al%20Qaeda%20and%20Taliban%20Detainees.pdf> (determining that various articles of the Third Geneva Convention do not apply to either al Qaeda or Taliban detainees).

The Obama Administration has seemed outwardly to take a wholly opposite tack, especially in the past few years. At the beginning of his first term, President Obama regularly referred—at least in broad strokes—to international principles when announcing efforts to close the Guantanamo Bay detention center or to eliminate all coercive forms of interrogation, for example.¹⁵ The exponential increase in the use of drone strikes, however, produced the most notable and comprehensive engagement with international law of President Obama's first term. Beginning with then-Legal Advisor Koh's speech in March 2010 and culminating in a series of speeches by senior Obama Administration officials throughout 2011 and 2012, the President appeared to offer extensive explanation of the international legal principles governing the use of drone strikes against al-Qaeda operatives in various locations around the globe. At first, the Administration announced that the United States was using targeted strikes because it "is engaged in an armed conflict or [is acting] in legitimate self-defense."¹⁶ Subsequent addresses by Department of Defense General Counsel Jeh Johnson,¹⁷ Attorney General Eric Holder,¹⁸ and senior counterterrorism advisor John O. Brennan¹⁹ continued this same theme of a combination of law of war and *jus ad bellum* paradigms to justify and explain the parameters for the use of targeted strikes. On first glance, these speeches seem to accomplish precisely the same purpose and effect as the 1991 speech by President Bush noted above: clear statements of international law and reasons for US action. However, the United States' insistence on referring to both legal paradigms as justification for individual attacks and the broader program of targeted strikes raises significant concerns

-
15. See Mark Tran, *Obama Signs Order to Close Guantanamo Bay*, THE GUARDIAN (UK), Jan. 22, 2009, <http://www.guardian.co.uk/world/2009/jan/22/hillary-clinton-diplomatic-foreign-policy>.
 16. Harold Hongju Koh, Legal Adviser, US Dep't of State, Keynote Address at the Annual Meeting of the American Soc'y of Int'l Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.
 17. Jeh Johnson, Dep't of Defense General Counsel, National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), *available at* <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.
 18. Eric Holder, Attorney General, Remarks Regarding Targeted Killing at Northwestern University School of Law (Mar. 5, 2012), *available at* <http://www.cfr.org/terrorism-and-the-law/holders-speech-targeted-killing-march-2012/p27562>.
 19. John O. Brennan, White House Counter Terrorism Adviser, Speech on US Drone Strikes Targeted at al-Qaida at the Woodrow Wilson Center (Apr. 30, 2012), *available at* <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>.

for the use of international law and the protection of individuals by blurring the lines between the key parameters of the two paradigms.²⁰ In reality, therefore, the series of speeches ultimately undermined the educational possibilities in the service of a specific policy goal.

Notwithstanding political pressures and the broader needs of policy, it is possible to conceive of an effective educational role for the President and his surrogates in the executive branch with regard to international law. Indeed, in the current environment in which the United States is engaged in extensive, wide-ranging, and challenging military operations against diverse foes, this educational role has significant potential in the arena of the law of armed conflict. President George W. Bush's approach suggested a disregard for law and morality in the conduct of military operations—a message that was loudly and clearly communicated to the public, whether by word or by deed. President Obama's approach suggests a much greater comfort level with international law and willingness to reference and rely on international legal principles for policy purposes, but evinces an unfortunate manipulation of the law that can have problematic effects over time. In an ideal world, the President can communicate three effective messages with regard to international law, particularly the law of armed conflict, to the public through a much more focused and proactive view of the President as an educator in this area.

First, the law of armed conflict has at its core principles of honor, morality, and dignity that look much like the principles underlying our own constitutional rights and protections in the United States. Humane treatment and respect for the rule of law are common threads in domestic law and international law and thus can form the foundation for a productive conversation about why compliance with the law of armed conflict is a positive feature of rather than a negative imposition on US operations.

Second, international law, and specifically the law of armed conflict, facilitates US effectiveness by creating a framework within which the United States can engage with allies and foes alike. The law forms a constraint, but also creates opportunity, and this notion of law as a medium for increased possibility and effectiveness is rarely presented to the public at large. Rather, international law is too often portrayed as an external constraint that interferes in the government's ability to accomplish its goals. Here, the President can play a significant role in educating the American public about the value of international law (whether the law of armed conflict or other areas of international law) in facilitating relations between states and

20. See generally Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 38 WM. MITCHELL L. REV. 1655 (2012).

protecting U.S. service members and civilians in a dangerous and complex world environment.

Finally, the United States has been at the heart of nearly all major developments in international law and the law of armed conflict over the past century and more. The President should seize the opportunity to educate the American public regarding the role the United States has historically played in the development of the law and why the United States has promoted such developments. An obvious example is the International Criminal Court. Notwithstanding the United States' reluctance to join the Rome Statute,²¹ it would be useful for the American public to understand the United States' view of the value of international criminal justice and its contribution to the establishment of the International Criminal Court. Recognizing the role the United States has played can only help the American public develop a more nuanced understanding of how and why the United States engages on a variety of levels in the international legal arena.

These three messages require a more sophisticated conversation about international law, about the United States' place in the international community, and about the complexities of constraint and opportunity inherent in international law. Taking on this educational role may thus be more complicated, especially with regard to the relationship between law and policy, but offers long-term benefits for both the government and the public that should not be overlooked.

21. Carr Center for Human Rights Policy, *The United States and the International Criminal Court* 5 (Harvard Uni., Working Paper T-00-02), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/ICC.pdf>.