

OBAMA'S PLEDGE TO INTERNATIONAL LAW: A LOOK AT THE FIRST SIXTEEN MONTHS IN OFFICE

*Federico Rojas**

Introduction

Barack Obama entered the Oval Office with a task that was nothing short of monumental. He faced the worst financial crisis since the Great Depression, two major wars, terrorist threats from Al Qaeda and other terrorist organizations, the prospect of a nuclear Iran and North Korea, a tarnished American global image, and the omnipresent Israel/Palestine conflict for good measure. There appear to be insurmountable expectations for the Obama administration to succeed in tackling these issues by both the American public and the rest of the world alike. To add insult to injury, many have expected Obama to undertake these issues while doing something that the Bush administration was strongly criticized of not doing – following international law. International law advocates are unlikely to be naïve enough to think that Obama would place international law at the forefront of American foreign policy (which has never really happened under any American administration), but at least not to show it the level of disregard and arguably contempt that the Bush administration did. Essentially, a return to the Clinton era was expected a minimum.

More than fifteen months have passed since Obama took office, which is undoubtedly too soon to make any major judgments on the Obama administration's approach toward international law. But be that as it may, Obama's rhetoric and policies up to now do provide some indication of the role that international law will play in Obama's foreign policy, as does the newly released National Security Strategy. This paper will seek to explore the impact that the Obama administration has had with regard to international law and what we may expect to see in the following years.

I Changes in America's National Security Strategy

The 2010 National Security Strategy (NSS) does not contain anything new with regard to the Obama administration's foreign policy, but is rather a reaffirmation of rhetoric and policies that Barack Obama has highlighted since the beginning of his presidency. International law advocates will be pleased to see that there are significant changes to the Bush administration's National Security Strategy from 2002 and 2006, as Obama's NSS contains a

* Federico Rojas has a BA from the University College Maastricht and is currently finishing his thesis for the LL.M. Public International Law: Law and Politics of International Security, at the Vrije Universiteit Amsterdam. For the last 8 months he has been interning as a policy analyst at the Hague Center for Strategic Studies in the Defense Transformation program.

stronger focus on the importance of international law, cooperation with the United Nations and international institutions, the scaling down of Bush's preemption doctrine, and a clear prohibition on the use of torture.

1.1 International Law and the United Nations

In the 2002 and 2006 NSS, international law and the United Nations appear to have been mentioned as an afterthought. The 2002 document refers to international law on only two occasions, whereas the 2006 document does not refer to it at all. The first time international law is mentioned in NSS 2002 is to condemn rogue states that brutalize their own people, are determined to acquire weapons of mass destruction, and display no regard for international law¹. The second time is to justify preemptive action by stating that "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack."²

The United Nations is also not given much importance in either document. In NSS 2002, the UN is first cited in the preface as an important international institution: "The United States is committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and NATO as well as other long-standing alliances."³ The UN is further cited as an organization that can help the United States fight the terrorists in Afghanistan: "As we pursue the terrorists in Afghanistan, we will continue to work with international organizations such as the United Nations, as well as non-governmental organizations, and other countries to provide the humanitarian, political, economic, and security assistance necessary to rebuild Afghanistan so that it will never again abuse its people, threaten its neighbors, and provide a haven for terrorists."⁴ NSS 2006 states that the United States has supported UN reform to improve its ability to carry out peacekeeping missions.⁵

In NSS 2010 on the other hand, both the United Nations and international law are mentioned a lot more frequently and their importance to American foreign policy is highlighted to a considerable degree. The document emphasizes that a strong United Nations is a key factor for maintaining international peace and security and establishing an international order. Listed below are some of the fragments that illustrate this:

¹ The White House, 'The National Security Strategy of the United States of America', *The White House* 2002, p.14

² *Ibid*, p.15

³ *Ibid*, preface

⁴ *Ibid*, p.7

⁵ *Ibid*, p.16

“That is precisely the reason we should strengthen enforcement of international law and our commitment to engage and modernize international institutions and frameworks. Those nations that refuse to meet their responsibilities will forsake the opportunities that come with international cooperation.”⁶

“This modernization of institutions, strengthening of international norms, and enforcement of international law is not a task for the United States alone—but together with like-minded nations, it is a task we can lead.”⁷

“We succeeded in the post-World War II era by pursuing our interests within multilateral forums like the United Nations—not outside of them.”⁸

“Enhance Cooperation with and Strengthen the United Nations: We are enhancing our coordination with the U.N. and its agencies. We need a U.N. capable of fulfilling its founding purpose—maintaining international peace and security, promoting global cooperation, and advancing human rights. To this end, we are paying our bills. We are intensifying efforts with partners on and outside the U.N. Security Council to ensure timely, robust, and credible Council action to address threats to peace and security. We favor Security Council reform that enhances the U.N.’s overall performance, credibility, and legitimacy. Across the broader U.N. system we support reforms that promote effective and efficient leadership and management of the U.N.’s international civil service, and we are working with U.N. personnel and member states to strengthen the U.N.’s leadership and operational capacity in peacekeeping, humanitarian relief, post-disaster recovery, development assistance, and the promotion of human rights. And we are supporting new U.N. frameworks and capacities for combating transnational threats like proliferation of weapons of mass destruction, infectious disease, drug-trafficking, and counterterrorism.”⁹

1.2 The use of Force

The Bush doctrine on the use of force:

“The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction – and the more

⁶ *Ibid*, p.12

⁷ *ibid*, p.3

⁸ *ibid*, p.12

⁹ *ibid*, p.46

compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.

There are few greater threats than a terrorist attack with WMD. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.”¹⁰

Obama's doctrine on the use of force:

“Military force, at times, may be necessary to defend our country and allies or to preserve broader peace and security, including by protecting civilians facing a grave humanitarian crisis. We will draw on diplomacy, development, and international norms and institutions to help resolve disagreements, prevent conflict, and maintain peace, mitigating where possible the need for the use of force. This means credibly underwriting U.S. defense commitments with tailored approaches to deterrence and ensuring the U.S. military continues to have the necessary capabilities across all domains—land, air, sea, space, and cyber. It also includes helping our allies and partners build capacity to fulfill their responsibilities to contribute to regional and global security.

While the use of force is sometimes necessary, we will exhaust other options before war whenever we can, and carefully weigh the costs and risks of action against the costs and risks of inaction. When force is necessary, we will continue to do so in a way that reflects our values and strengthens our legitimacy, and we will seek broad international support, working with such institutions as NATO and the U.N. Security Council.

The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force. Doing so strengthens those who act in line with international standards, while isolating and weakening those who do not. We will also outline a clear mandate and specific objectives and thoroughly consider the consequences—intended and unintended—of our actions. And the United States will take care when sending the men and women of our Armed Forces into harm's way to ensure they have the leadership, training, and equipment they require to accomplish their mission.”¹¹

¹⁰ The White House, ‘The National Security Strategy of the United States of America’, *The White House* 2006, p.19

¹⁰ The White House, ‘The National Security Strategy of the United States of America’, *The White House* 2002, p.18

¹¹ The White House, ‘National Security Strategy’, *The White House* 2010, p.22

NSS 2010 does not contain any fundamental changes to Bush's doctrine on the use of force. The right to act unilaterally and outside the law when the country deems it to be necessary is clearly reserved, which opens the door for a preemptive use of force without a Security Council approval. However, the document does appear to send out the message that the United States will make a bigger effort to follow international law before employing the use of force, and it avoids using the term *preemption* at any stage.

I.3 Torture

Whereas torture is not mentioned even once in either of Bush's NSS, the Obama administration has reiterated its prohibition on the use of torture and other brutal methods of interrogation.

“Brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world. They serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods.”¹²

II Obama's Progress

II.1 Executive Orders

Obama began his presidency by signing three Executive Orders on January 22nd 2009, all of which made strides toward following the Geneva Conventions on the issue of the treatment of detainees under US custody. Executive Order 13491¹³ placed a strict ban on the use of torture and limited interrogation techniques to those from Army Field Manual 34-52, which does not contain the infamous extreme sensory-deprivation techniques such as waterboarding. The document makes reference to the definitions on *lawful interrogation* by the Geneva Conventions and the United Nations Convention Against Torture. It also prohibited the CIA detention facilities¹⁴ in which prisoners do not have access to the International Committee of the Red Cross.

¹² *ibid*, p.34

¹³The White House, 'Executive Order 13491 - Ensuring Lawful Interrogations', *The White House* 2009

¹⁴ Also referred to as *black sites*

Executive Order 13492¹⁵ called for the closure of Guantanamo Bay Prison by January 22nd 2010, while stating that all Guantanamo detainees have the right to *habeas corpus*, and thus have the right to challenge the lawfulness of their detention on federal courts. Executive Order 13493 called for the creation of a Special Interagency Task Force “to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.”¹⁶

II.2 International Justice and Multilateralism

Sarah Cleveland, a Columbia University Law School professor who is currently serving as counselor on international law with the State Department's Office of the Legal Adviser, recently complimented Obama's positive effect on international law. The achievements that Cleveland listed include multilateral engagement, joining the U.N. Human Rights Council, the increased efforts to bring international criminals from Sierra Leone and Yugoslavia to justice, and the order to allow the International Committee of the Red Cross to be given notice and access to anyone detained in an armed conflict. “There are those who would say the Obama administration has not done enough, and the work is unquestionably ongoing...But the fact of the matter is that for a scant 12 months, these are not small achievements. What might be appropriate with regard to a situation we did not create might not be appropriate with regard to what would be our future policy.”¹⁷

II.3 Obama's Brand of Liberal Institutionalism

Political thinkers have had a tough time when attempting to describe what Obama's political ideology actually is. “But almost a year into his first term, there's something particularly elusive about Barack Obama's political identity. He's a bipartisan bridge-builder — unless he's a polarizing ideologue. He's a crypto-Marxist radical — except when he's a pawn of corporate interests. He's a post-American utopian — or else he's a willing tool of the national security state...We're well into the Obama era, but neither his allies nor his enemies can quite get a fix on exactly what our 44th president really represents.”¹⁸

Nonetheless, Obama's rhetoric and policies in his first sixteen months in office have shown an inclination toward liberal institutionalism, which tends to favor following international law, as it advocates for support toward

¹⁵ The White House, ‘Executive Order 13492 - Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities’, *The White House* 2009

¹⁶ The White House, ‘Executive Order 13493 – Review of Detention Policy Options’, *The White House* 2009

¹⁷ Virginia School of Law, Cleveland Outlines Obama's Effect on International Law, *University of Virginia* 2010

¹⁸ R. Douthat, ‘The Obama Way’, *The New York Times* 2009

international institutions as the key to foreign policymaking. Renowned liberal institutionalists such as John Ikenberry advocate for an American foreign policy in which the United States establishes its global dominance through the provisioning of international rules and institutions with a willingness to operate within them.¹⁹ Liberal institutionalists generally argue for a return to a post-World War II foreign policy in which the United States led a loose rule-based international order through international institutions.⁹

NSS 2010 contains various references to the importance of strengthening international institutions in order to advance American global interests, also citing American foreign policy post-World War II. “We succeeded in the post-World War II era by pursuing our interests within multilateral forums like the United Nations—not outside of them... Indeed, the basis for international cooperation since World War II has been an architecture of international institutions, organizations, regimes, and standards that establishes certain rights and responsibilities for all sovereign nations.”²⁰

However, this does not mean that liberal institutionalism is an ideology that argues for international law to be followed without any exceptions. Liberal institutionalists advocate in favor of international institutions as a way to establish a liberal American hegemony in the international system. The United States is essentially meant to mould these institutions to the extent that they suit the country’s agenda. Thereupon, it is implicit that when an international institution or international law does not benefit the United States, they should be either changed or possibly ignored.

III Areas of Controversy

III.1 Detainment

The Executive Orders discussed in Section II have fallen short of their full implementation. Guantanamo Bay Prison remains open to this date, over 5 months past its intended closure. There have also been various allegations that CIA agents and other special operatives have continued the practice of transporting detainees to black sites where extreme coercive interrogation techniques are implemented. This includes allegations by two Afghan teenagers that they were held in a detention center north of Kabul where they were beaten, photographed naked, deprived of sleep and held in solitary confinement for at least two weeks while undergoing daily interrogation about their alleged links to the Taliban.²¹

Furthermore, the CIA has continued the practice of extraordinary rendition, which consists of the extradition of detainees from one country to another

¹⁹ J. Ikenberry, *Grand Strategy as Liberal Order Building*, Princeton University 2007

²⁰ The White House, ‘National Security Strategy’, *The White House* 2010, pp.12-13

²¹ D. Dwyer, ‘Five Reasons Guantanamo Won’t Close This Year’, *ABC News* 2010

without conducting any legal proceedings.²² Extraordinary rendition was frequently used during the Bush administration to transport detainees to countries such as Egypt and Syria, where local authorities would torture them for information.²³ Extraordinary rendition has also been used to transport detainees to CIA *black sites* for interrogation. The Obama administration has claimed that a higher degree of oversight has been implemented to ensure that detainees who are renditioned are not tortured, but agencies such as Human Rights Watch have been critical in claiming that stricter limits still need to be imposed.²⁴

III.2 Military Drones

Toward the end of its tenure, the Bush administration greatly increased the frequency of drone strikes in Pakistan, and this has continued under the Obama administration.²⁵ Drones are unmanned aerial vehicles that can be used for surveillance and reconnaissance purposes, but in the last four years they have been extensively used to conduct military strikes on suspected Al Qaeda and Taliban personnel along the Afghani-Pakistan border.²⁶ Drone attacks have been conducted by both the U.S. military and the CIA.

The legitimacy and legality of conducting drones strikes has been a source of major controversy in the international community. The bulk of the controversy revolves around the accuracy of the strikes and potential violations of Pakistan's sovereignty. There have been various reports that the number of civilian casualties has been very high. The Brookings Institution cited reports of death tolls of 700 civilian casualties for only 14 terrorist kills, which represents a ratio of 50 civilians for every militant target.²⁷ The high number of civilian casualties is partially attributed to allegations that the CIA has received secret permission to strike suspected militants without confirmation of their actual identity. "The expanded authority, approved two years ago by the Bush administration and continued by President Obama, permits the agency to rely on what officials describe as "pattern of life" analysis, using evidence collected by surveillance cameras on the unmanned aircraft and from other sources about individuals and locations. The information then is used to target suspected militants, even when their full identities are not known, the officials said."²⁸

²² S. Grey, *Ghost Plane: The True Story of the CIA Torture Program*, New York: St. Martin's Press 2006

²³ *ibid*

²⁴ D. Johnston, 'US Says Rendition to Continue, but With More Oversight', *New York Times* 2009

²⁵ G. Bobby & M. Thompson, 'The CIA's Silent War in Pakistan', *Time* 2009

²⁶ *ibid*

²⁷ P.W. Singer, 'Attack of the Military Drones', *Brookings* 2009

²⁸ D. Cloud, 'CIA Drones Secretly Allowed to Kill Unnamed Suspects in Pakistan', *Los Angeles Times* 2010

On the issue of Pakistan's sovereignty, drone attacks allegedly occur without the Pakistani government's approval on a regular basis.²⁹ Beyond violating Pakistan's sovereignty, Pakistani officials have blamed the drone strikes for fanning Islamic insurgency activities across northern Pakistan. As Pakistan's Foreign Minister Shah Mehmood Qureshi stated with regard to some of the unauthorized drone attacks, "Pakistan has not allowed these drone attacks, there was no permission before nor is there any now... This is happening without any understanding and it is affecting our sovereignty, and we think that it is causing collateral damage."³⁰

Furthermore, a recent report by the Human Rights Council³¹ questioned whether the use of drones for targeted killings was a violation of international humanitarian law (IHL). Some of the concerns listed in the report include the intelligence on which the strikes are based. "...a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence."³² Additional concerns include the potential "Play Station" mentality to killing that may develop as operators conduct missions based hundreds of miles away entirely through computer screens and remote audio-feed.³³ States must therefore ensure that training programs for drone operators who have never been subjected to battle instill respect for IHL and adequate safeguards for compliance. Finally, the report makes the claim that the use of drone strikes outside of the context of armed conflict should be highly restricted. The only legal justification for such a strike would be invoking the right to anticipatory self-defense against a non-state actor, which should be limited to special cases.³⁴

However, the validity of the criticisms on drone strikes has also been called into question. C. Christine Fair, an assistant professor in the Center for Peace and Security Studies, highlighted the lack of accuracy of the data on civilian casualties as well as a general misperception on the alleged opposition of the Pakistani government to the strikes.³⁵ The only publicly available civilian casualty figures for drone strikes in Pakistan comes from the Pakistani Taliban, which report the alleged figures to the Pakistani press. No one has independently verified the Taliban's reports, as journalists cannot travel to FATA³⁶ to confirm the casualties. Moreover, drone opponents tend to conflate drone strikes with air strikes in Afghanistan, which elevate the casualty figures significantly. Fair further claims that the Pakistani

²⁹Reuters, 'Suspected U.S. Drone Hits Militant Nest in Pakistan', *Reuters* 2009

³⁰ *ibid*

³¹ Human Rights Council, 'A/HRCRC/14/24/Add.6 – Study on Targeted Killings', *United Nations* 2010

³² *ibid*, p.24

³³*ibid*, p.25

³⁴ *ibid*

³⁵ C.C. Fair, 'Drone Wars', *Foreign Policy* 2010

³⁶ Federally Administered Tribal Areas in the northwest of Pakistan

government's public condemnation of the drone strikes does not necessarily represent reality. Musharraf allegedly gave permission to the United States to launch drone strikes back in 2006, while warning US officials that the strikes would have to be protested publicly out of domestic necessity. "Musharraf also warned U.S. President George W. Bush beforehand that Pakistani military and civilian officials alike would protest the strikes, out of domestic political necessity – it was nothing personal. Presidents Asif Ali Zardari and Barack Obama have inherited this combination of operating agreements and kabuki politics."³⁷

Conclusion

International law advocates are likely to be generally pleased with the Obama administration's first sixteen months in office. Obama has not managed to live up to all his promises, which is nothing shocking for a politician, but there has been a notable change of direction from the Bush administration's approach toward international law. The issues of detention and military drones will continue to be major points of debate, but tangible progress has certainly been made with regard to international cooperation, multilateralism, and detainee interrogations. The Obama administration has shown a willingness to include the United Nations and other international institutions in America's decision-making process.

We are unlikely to see the United Nations and international law move significantly beyond the periphery when it comes to hard power politics, as this has never been a trait of American foreign policy. This is reflected in the 2010 National Security Strategy, in which the fundamentals for military intervention remained unchanged. But this does not mean that the Obama administration will not continue to make progress toward giving the United Nations and international law a more important role in American foreign policy.

- *The Amsterdam Law Forum is an open access initiative supported by the VU University Library* -

³⁷ C.C. Fair, 'Drone Wars', *Foreign Policy* 2010