EIGHTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[†]

WILLIAM H. TAFT, IV[*]

Let me begin by thanking the Army's Judge Advocate General's Legal Center and School for inviting me to deliver this year's Waldemar A. Solf Lecture in International Law. Colonel (COL) Solf was a distinguished lawyer and Soldier. He fought in World War II as a young man and served in increasingly important positions during his long career as a judge advocate. He became a legend in the practice of military justice. Later in life, COL Solf played an important role in the negotiation and analysis of the Additional Protocols to the 1949 Geneva Conventions[1]—a subject that I have considered repeatedly in my role as

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[†] The Judge Advocate General's School, U.S. Army, established the Waldemar A. Solf Chair of International Law on 8 October 1982, in honor of Colonel (COL) Waldemar A. Solf (1913-1987). Commissioned in the field artillery in 1941, COL Solf became a member of the Judge Advocate General's Corps in 1946. Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the U.S.; the Staff Judge Advocate of the Eighth U.S. Army and U.S. Forces Korea, the United Nations Command, and the U.S. Strategic Command. He also served as the Chief Judicial Officer, U.S. Army Judiciary, and as the Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf reaffiliated himself with the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and accepted an appointment as the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

[*] This is an edited transcript of a lecture delivered on 2 March 2005, by William H. Taft, IV, to the members of the staff and faculty, distinguished guests, and officers attending the 53d Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

legal adviser to the Secretary of State over the last four years and which I would like to consider again with you this morning. It is a privilege to speak at this lecture series that honors this remarkable man of many accomplishments.

The United States has long promoted the rule of law both in the domestic affairs of states and in their relations with each other. The rule of law is a fundamental aspect of our own democracy. We rely on international law to advance our foreign policy interests. We appeal to it as a source of authority. We develop it to advance U.S. interests. We employ it as a means to secure a peaceful world and to establish and

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Mr. Taft served as the legal adviser to the Secretary of State from April 2001 through February 2005. In this office, Mr. Taft was the principal adviser on all domestic and international legal matters to the Department of State, the Foreign Service and diplomatic and consular posts abroad, as well as the principal adviser on legal matters relating to the conduct of foreign relations to other agencies and, through the Secretary of State, to the President and the National Security Council.

Before joining the Department of State, Mr. Taft had been a litigation partner in the Washington, D.C., office of Fried, Frank, Harris, Shriver and Jacobson, concentrating in government contracts counseling and international trade. Upon completion of his government service he returned to Fried, Frank as a litigation partner.

Prior to joining Fried, Frank in 1992, Mr. Taft was U.S. Permanent Representative to NATO from 1989 to 1992. Before that, he served as Deputy Secretary of Defense from January 1984 to April 1989 and as Acting Secretary of Defense from January to March 1989. From 1981 to 1984, Mr. Taft was General Counsel for the Department of Defense.

Prior to his initial appointment to the Department of Defense, Mr. Taft was in private law practice in Washington, D.C., from 1977 to 1981. Before entering private practice, he served in various positions at the Federal Trade Commission, the Office of Management and Budget, and the Department of Health, Education and Welfare, where he was appointed by President Ford in 1976 to serve as General Counsel.

Mr. Taft received his J.D. in 1969 from Harvard Law School and his B.A. in 1966 from Yale University. He is admitted to the bar in the District of Columbia.

[1] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3, *reprinted in* 16 ILM 1391 (1977); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

protect the rights of U.S. citizens and companies. We use it as a standard to which we hold other countries, and it is a measure by which other countries judge our actions. Through international law, we have achieved important objectives in nearly every area—trade, investment, security, environment, human rights, technology, health, law enforcement, and so forth. In short, international law is indispensable to the successful conduct of our foreign and security policy.

It is important here to recall the United States' historic role in the development and expansion of international law. For nearly a century, the United States has led the world in the promotion of international law and has been the key player in negotiating treaties and setting up international institutions to resolve disputes. During this period, the United States has seen a huge increase in the quantity and complexity of its international engagements, and the United States and other countries have had to develop more international law to carry out these new engagements. More countries have accepted international law as a set of rules that must be followed or according to which their actions must be justified. Even the most powerful countries offer international legal justifications for their actions to obtain greater legitimacy. Certainly, the United States does this.

Overall, the growth of international law and its influence over the past century has been a very positive development, and the United States and the world have benefited enormously from increased international cooperation. We have seen increased economic and social welfare for millions of people throughout the world. Several significant and terrible diseases have been wiped out entirely and considerable progress is being made in the fight against other diseases, notably AIDS. Important portions of the global environment have been protected. Millions of suffering people have received humanitarian assistance during armed conflicts and natural catastrophes, including recently on an unprecedented scale in response to the devastation following the massive earthquake in the Indian Ocean. Potentially bloody conflicts have been prevented from escalating into major wars, and most nations now are parties to treaties that commit them to provide to their people a broad range of widely accepted human rights.[2] Many of the treaties and

[2] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (154 parties); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (170 parties);

conventions brought about by the United Nations (UN) and other regional and international organizations as well as numerous multilateral treaties in technical, economic, and scientific areas have been critical in making all this happen.

Although the United States has been the principal advocate, as well as a strong supporter, politically and financially, of the modern international legal system and its key institutions as they developed over the last century, recently our credibility as an advocate of the rule of law has not gone unquestioned. Our reputation for compliance with our international obligations—and hence our ability to pressure other states to carry out their obligations—has been diminished as a result.

Strengthening our reputation as a country that abides by the rule of law would help us achieve our foreign policy and security objectives by encouraging other countries to cooperate with us and by allowing us more effectively to use legal principles to influence other countries' behavior. We need to enhance both our reputation and authority in this regard.

As lawyers on the front lines of our foreign and security policy, you regularly provide legal advice to military leaders regarding treaties, international conventions, and rules of engagement, and you observe and report on trials of U.S. personnel in foreign countries to ensure that their due process rights are respected. You know, I dare say, from your experience that our respect for the rule of law is important not only as an academic matter but also in practice.

There are many areas where emphasizing respect for rule of law as a central element of our foreign and security policy, while simultaneously taking steps to assure that our own conduct is consistent with our international obligations, will help us achieve our objectives. I would like to focus this morning on three different places where this issue is in play in different ways: (1) the treatment of detainees in the global war terrorists are currently fighting against us; (2) the situation in Iraq; and, (3) our attitude towards the International Criminal Court (ICC).

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and United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (138 parties).

Treatment of Detainees in the Global War on Terror

The Bush administration's detainee policy and associated legal positions in the global war on terrorism remain a focus of international criticism. They complicate our diplomatic as well as our military efforts to achieve our foreign policy and national security objectives, and in particular instances have isolated us from friends and allies who could provide us with more help in fighting the terrorists. In the last three years we have offered a number of explanations for our treatment of detainees. Our arguments have not been frivolous, but most states have rejected, among other things, our position that the law of armed conflict applies to the war on terrorism and, as a consequence, they have found themselves in many instances unable to detain their own nationals who have engaged in it but committed no crime against their laws. For this reason, almost all the people who have been captured in the fight against al Qaeda are being held by the United States. Some states have also alleged that we have not properly complied with the law of armed conflict, even assuming it is applicable; questioned whether we have treated the detainees humanely, as they believe customary international law of war requires; and felt that the military commissions we have established fail to meet fundamental requirements of either the law of war or human rights law.

In addition, several U.S. court decisions on detainee issues, including from the Supreme Court,[3] have set aside legal positions asserted by the administration and held that in a number of respects the executive branch has exceeded its authority. Our practice of adjusting our conduct only after a court requires it, combined with our restrictive interpretations of adverse decisions when rendered, has not enhanced our reputation for upholding the rule of law.

The fact is, of course, that neither the administration nor its critics have candidly acknowledged that the fight we are engaged in with al Qaeda does not fit the historical model of an armed conflict for which the Geneva Conventions were designed and then followed up by making serious proposals as to what to do about it. We have not felt able as a practical matter to comply strictly with the law of war. Our critics have not been able to accept that traditional law enforcement tools are totally

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[3] *See* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

incapable of dealing with an organization in which thousands of people are engaged in military operations on a global scale. Instead, both the United States and our critics have tended to emphasize those elements of one or the other body of law that is being complied with or ignored without being able to show that either the law of war or human rights law is or even should be consistently applied in its totality.

The transition to President Bush's second term is an opportunity for the administration to revisit its legal policies and legal positions with respect to detainees, and craft diplomatic and legal strategies to repair and strengthen the relationships with other countries that are necessary to deal with terrorists effectively. A critical step in achieving this objective would be to develop a common international approach to the treatment of people captured in the global war on terrorism, one that is consistent with the principles of the Geneva Conventions and guarantees humane treatment to all detainees,[4] but also recognizes the authority, traditional under the law of war, to detain terrorists who, if released, will rejoin al Qaeda or other organizations committed to killing not just our Soldiers, but any of our citizens whenever they can.

Also, the administration needs to address key outstanding legal concerns that have been raised publicly by the International Committee of the Red Cross (ICRC) and others regarding U.S. detention practices. These include allegations that the United States is holding detainees whose identities have not been declared to the ICRC, that it is operating undisclosed detention facilities and arranging unlawful transfers of detainees to third countries.[5] There is no basis in the law of war, criminal law or human rights law for such practices. Nor is it tenable

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[4] Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[5] *See* Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions*, WASH. POST, Oct. 24, 2004, at A1; Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison, CIA Has Run a Secret Facility for Some Al Qaeda Detainees, Officials Say*, Dec. 17, 2004, WASH. POST, at A1.

after the Supreme Court's rulings last summer,[6] for the United States to assert that persons detained by it have no legal rights of any kind, that they may not contest with the assistance of competent counsel of their own choosing the legal basis for their detention, that the government has complete discretion to determine the conditions of their detention, or that whether they are to be treated humanely or not is a question only of policy. The fact is that our well-publicized mistreatment of detainees, whether condoned by our policies or not, has badly undercut our entirely valid position that we have the right to keep them in custody when, if released, they would continue to fight us.

A comprehensive review of detainee policy is overdue. While no one, and certainly not the United States' critics, has all the answers to the hard questions raised by the issue of detainees in the global war being waged by terrorists against the civilized world, simply for the President to announce a comprehensive review of the administration's policy would greatly enhance the United States' credibility as a strong advocate of the rule of law at a time when this could be extremely useful in advancing our other foreign policy goals.

Situation in Iraq

I must say simply that, with regard to Iraq and our conduct in the conflict there, I find the criticism that the United States acted contrary to international law unjustified and, for that reason, particularly disappointing. Our government's actions and policy in Iraq have been and are entirely lawful though they have unquestionably been marred, as every government's policies are from time to time, by the conduct of individuals who failed to follow the rules for their behavior.

Operation Iraqi Freedom in 2003 was the final episode in a conflict initiated more than twelve years earlier by Iraq's wanton and unprovoked invasion of Kuwait on August 2, 1990.[7] Almost immediately after that invasion, the Security Council adopted Resolution 660, the first of a series of resolutions condemning Iraq's actions and demanding Iraq's withdrawal from Kuwait.[8] Since then and in the buildup to and

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[6] *See supra* note 3 (listing the relevant Supreme Court case law from 2004).
[7] COLIN L. POWELL, MY AMERICAN JOURNEY 445 (1995).
[8] S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/Res/660 (1990).

execution of Operation Iraqi Freedom in the last two years particularly, the United States has taken great care to assure that UN Security Council resolutions have authorized any actions we have taken in Iraq, including:

- United Nations Security Council Resolution (UNSCR) 1441, in which the Security Council afforded Iraq one final opportunity to comply with its obligations, an opportunity no one believes Iraq took advantage of in the time set out in the resolution;[9]

- UNSCR 1483, where the Security Council, in May 2003, put in place the legal structure for the period following the end of major combat operations;[10]

- UNSCR 1511, which in October 2003 authorized a multinational force, and provided a basis for continued military operations in Iraq;[11] and

- UNSCR 1546, adopted in the spring of 2004, which provided and still today provides the framework for Iraq's political transition to a democratic government and the legal basis for the operations being conducted by U.S. and other foreign armed forces there.[12]

While there have been arguments about what these resolutions mean, we have always acted consistent with our understanding of them, and we have never suggested that they could be disregarded, even if in particular instances we did not believe they were necessary. We should continue to emphasize that the legal basis for our actions in Iraq lies in the UN resolutions and assure that we act consistently with them. In this regard, I must say I find the remarks of the UN Secretary General challenging the lawfulness of our use of force in Iraq regrettable,[13] insofar as they suggest that we willfully ignored the Security Council's authority. We

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[9] S.C. Res. 1441, U.N. SCOR, 58th Sess., 4644th mtg. at 3, U.N. Doc. S/Res/1441 (2002).

[10] S.C. Res. 1483, U.N. SCOR, 54th Sess., 4761st mtg., pmbl. 8(e), U.N. Doc. S/Res/1483 (2003).

[11] S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/Res/1511 (2003).

[12] S.C. Res. 1546, U.N. SCOR 58th Sess., 4987th mtg., U.N. Doc. S/Res/1546 (2004).

[13] BBC News Interview with United Nations Secretary General Kofi Annan (Sept. 16, 2004), *available at* http://news.bbc.co.uk/1/hi/world/mid-dle_east/3661134.stm.

have never sought to diminish the Council's role in preserving peace in this way.

In addition to seeking and getting UN Security Council authorization for its actions in Iraq, the United States has worked hard to provide Iraq in the Transitional Administrative Law and the Coalition Provisional Authority directives a workable set of laws upon which it could build its democracy. How well Iraq lives up to the rule of law will be an important factor in the success of our Iraq policy with significance for our ability to conduct policy generally. There should be no doubt, however, that the rule of law, instead of a dictator, is exactly what we are committed to creating in Iraq. It is a worthy goal, and the course we have followed in pursuit of it has been consistent with the rule of law itself.

International Criminal Court (ICC)

There are many good reasons for our decision not to join the ICC and we are, of course, perfectly within our rights in not becoming a party to the Rome Statute (Statute).[14] It is important to recall, however, what the basis for our decision not to join was and what it was not. Most emphatically, the United States' disagreement with parties to the ICC treaty is not with the principle of accountability.[15] The United States has been, and remains, committed to ensuring that perpetrators of war crimes, crimes against humanity, and genocide are investigated and brought to justice. No state, in fact, has done more over the years in this regard, and I am not referring here just to our extensive support for tribunals prosecuting foreign nationals.

Nor is the United States' problem with the ICC, as it has sometimes been portrayed, that we want Americans to be exempt from criminal liability we would impose on others.[16] Our statutes already impose

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[14] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 11, 37 I.L.M. 999, 1010 [hereinafter Rome Statute], *available at* http://www.un.org/law/icc/statute/romefra.htm.

[15] Marc Grossman, Under Secretary of State for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002), *available at* http://www.state.gov/p/9949.htm.

[16] *See, e.g.*, Sonni Efron, *Dispute Over ICC Hampers United Effort on Darfur*, L.A. TIMES, Feb. 26, 2005, at A6 (commenting that the United States "opposes the ICC

criminal penalties on Americans who commit war crimes, crimes against humanity, or genocide, and we have prosecuted these cases where appropriate.[17] Our problem is with the way that the Statute purports to achieve accountability. The Statute seeks to supplant the appropriate role of the UN Security Council in determining threats to international peace and security by including within the ICC's jurisdiction—and planning to define—the crime of aggression.[18] It creates a new and objectionable form of jurisdiction over the nationals of non-party states, even where their democratically-elected representatives have not agreed to become bound by the treaty.[19] Also, the ICC prosecutor may commence investigations on his own initiative, without a referral from the UN Security Council or from states.[20] This creates a real possibility of inappropriate or politically-motivated prosecutions,[21] and states like the United States that maintain an active involvement in military or peacekeeping activities are at particular risk of becoming targets of such prosecutions. Finally, by diverting responsibility and resources to the ICC, the incentive for states to develop adequate national processes and to themselves address unacceptable actions by their nationals is diminished, and this hinders the development of the rule of law in countries in transition. National reconciliation is a difficult process that experience shows states need to undertake in different ways—South Africa, Chile, Sierra Leone, Yugoslavia and Cambodia are simply not the same. A court sitting in The Hague may have a role to play in one or another of them, or in other situations that develop, but it just as likely will not. Whether to involve it in a particular case should be a matter for the Security Council, which has a responsibility for all aspects of maintaining international peace and security, of which accountability is, of course, an important one, but not the only one.

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because it fears the court could be used to prosecute U.S. military personnel and government officials").

[17] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(a)(3) discussion (2002) (referencing specifically the Geneva Convention Relative to the Protection of Civilian Persons in Time of War); R.C.M. 202(b) (proscribing jurisdiction for law of war offenses—personal jurisdiction); R.C.M. 203 (proscribing jurisdiction over law of war offenses).

[18] Rome Statute, *supra* note 14, art. 5(1)(d).

[19] *Id.* arts. 12, 13.

[20] *Id.* arts. 13, 15.

[21] Jack Goldsmith, Editorial, *Support War Crimes Trials for Darfur*, WASH. POST, Jan. 24, 2005, at A15 (stating that the United States believes the ICC "is staffed by unaccountable judges and prosecutors who threaten politically motivated actions against U.S. personnel around the globe").

In spite of these and other problems with the ICC and the availability of suitable alternatives in most situations, such as credible national judicial systems and ad hoc tribunals established by the UN Security Council, however, the ICC is here to stay. The United States needs, therefore, to find a way to talk about the ICC—and the underlying issues of war crimes, genocide, and crimes against humanity—that helps dispel the idea that our opposition to the ICC amounts to a rejection of the rule of law. It is essential, in this regard, that we avoid exaggerated statements that the ICC is somehow itself "illegal." We also need to develop a positive agenda for dealing with issues potentially within the purview of the ICC, such as bringing to justice the perpetrators of genocide in Sudan. It is not enough to be against the ICC, which in at least a few instances may—let's admit it—be precisely the right forum, unless we can present an alternative vision for dealing effectively with these difficult issues and those cases it is not well-suited to deal with. Most of the court's work has no direct impact on the United States. If we simply try to obstruct it, we will look foolish when it does well and be blamed when it fails—a loser either way.

Dealing with these three issues, then, could provide important opportunities for us to enhance our reputation for abiding by international law and strengthening that key element underlying global security and prosperity. There are other opportunities, of course, —becoming a party to the Law of the Sea Convention[22] comes to mind—and we should seize them too, but these stand out at the moment. We need a comprehensive review of our policy for the treatment of detainees in the global war on terrorism and some fundamental changes in the legal assumptions underlying our approach. We should continue to emphasize the legal bases for our actions in Iraq in the UN resolutions and assure that we act consistently with them. And we need to find a way to defuse the largely abstract confrontation with the European Union over the ICC.

Many of you have been or will be called upon in your careers as military lawyers to provide legal advice to military leaders in these and similar areas. Strong policy preferences will tempt your clients

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[22] Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/62-122 (1982); *see also* David B. Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, BROOKINGS INST. POL'Y BRIEF NO. 137, at 1 (Aug. 2004), *available at* http://www.brookings.edu/comm./policybriefs/pb137.pdf.

sometimes to give short shrift to the United States' legal responsibilities, but making the right choices in these contexts will be critical for strengthening our security and meeting our foreign policy objectives over the long run.

I encourage you, then, to remain committed to the rule of law as your guiding principle as you advise your military clients on what will surely be a wide range of interesting and difficult international and domestic issues. That commitment, together with your good judgment, integrity, and strong moral compasses, will help you preserve and even enhance the historic reputation and authority of our country in international law.