

International Affairs Forum Interview

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IA-Forum speaks with Professor Philippe Sands QC about international law issues and his latest book, [Lawless World: America and the Making and Breaking of Global Rules \(Viking\)](#). Mr. Sands is an international lawyer, professor at University College London, and a practicing barrister at London's Matrix Chambers. He has been involved in many recent high-profile cases in the World Court and elsewhere, including the interests of British detainees in Guantanamo and the efforts to extradite Augusto Pinochet to Spain. He has also written for the Los Angeles Times, San Francisco Chronicle and Washington Post, has taught at NYU and Boston College, and appears regularly on CNN and the BBC.



IA-Forum: In your book, you discuss America's historical record of supporting international law then you describe a current "exceptionalist" America - a view that international law is for others but not the U.S. Do you think this ambivalence towards international law has always existed in the U.S.? Is exceptionalism a new phenomena or has this view always existed, but is now stronger than before?

Philippe Sands: America has been a positive force in contributing to the modern system of international laws. If you go back to the beginning of the twentieth century and look at Woodrow Wilson and the creation of the League of Nations, you see there's an American instinct there for a rules-based system. But even then, Wilson was not able to persuade Congress to ratify the League of Nations. So there was a strong current of exceptionalism keeping the United States aside from developments in the international legal order.

With the Second World War, that changed. There was a bipartisan support for the United Nations and for the rules-based system that Franklin Roosevelt and successive Presidents (Democrat and Republican) wanted to put in place and then maintained. Rules were seen as promoting American values, and interests. This is a system that I think has served the United States very well. For about forty years, that consensus continued. It changed in the 1980s. The change became apparent during President Reagan's two Presidential terms in office. At that time, a group of individuals emerged, many of whom are in the current Bush administration – Rumsfeld, Cheney, Wolfowitz – who thought that international laws and institutions were part of the problem, not part of the solution. That view has carried

forward over the last fifteen to twenty years culminating in George W. Bush taking office, with many of the same individuals assuming high office.

Even before 9/11, the current administration put into place efforts to undermine international rules (e.g., rejection of the Kyoto agreement, the International Criminal Court, various arms control agreements) but then of course, 9/11 came along. And it was used by the administration, or a part of the administration, to put forward a political agenda in relation to America's relationship to its national rules. It must not be forgotten, however, that there were some parts of the administration (and many of its lawyers) who recognized the dangers of abandoning international rules and fought vigorously to retain America's engagement with them.

IA-Forum: Let's talk about the Second Gulf War from an international law perspective. Some are of the opinion that the U.S. acted legally going into Iraq because the U.S. is an individual signatory to the ceasefire agreement suspending the first Gulf War. Your thoughts?

Sands: It's not a view that's held by many people outside of the United States. In the United Kingdom, I only know of one seasoned international lawyer who shares that view and the overwhelming majority who do not share it, including legal advisors at the British Foreign Office, present and past.

I think the easiest way to deal with that argument is to refer to the autobiography of Colin Powell, the Secretary of State at the time of the Second Gulf War. In response to the criticisms of, "why didn't the U.S. topple Saddam Hussein in 1991?", he said: "we couldn't topple him because our right to use force was limited to getting Iraqi forces out of Kuwait. We did not have a mandate under the Security Council Resolution to remove him from office." So if those Security Council Resolutions did not give the mandate to remove Saddam Hussein in 1991, and it's the same Resolutions they're relying on in 2003, I do not see how it can be argued that resolutions that didn't allow his toppling in 1991 somehow did allow his toppling in 2003.

IA-Forum: That being the case, they international laws were circumvented then? How?

Sands: They circumvented international laws in exactly the same way they worked around international laws in other issues – detention, rendition, torture, and the treatment of detainees. After 9/11 we now know a small group of lawyers in the Justice Department adopted certain positions related to what's now known as the 'empirical presidency'. This basically said that, in times of war, the U.S. president was free to act unconstrained by these international commitments. That reflects the type of thinking that got the U.S. into the difficult situation in which it now finds itself. At the heart of

all these issues is a small group of lawyers parachuted in by the administration with strongly ideological views that do not reflect the mainstream American legal approach.

IA-Forum: So why did the United Kingdom go along?

Sands: The U.K's government went along with the Administration on the Iraq issue but did so at great political cost to the government and in particular to Tony Blair. The issue of Iraq - and the legality of the war - has continued to undermine Tony Blair's credibility. No one really knows why he went along. Presumably, because he felt it was the right thing to do. But he didn't go along because he thought it was legal, that's pretty clear. I think that Tony Blair thought that the UK's position is to be alongside the United States through thick or thin, under any circumstances. That seems to have been the defining principle that caused Blair to go along with it.

IA-Forum: ...and override his legal sense and background?

Sands: I think overriding a broader political judgment. It's pretty clear from the material that's emerging to the public domain that the British Prime Minister has assumed a somewhat supine position in terms of wanting to be absolutely supportive of the U.S. President under any circumstances, and irrespective of military and legal advice.

IA-Forum: Can military action be legitimate (legal) without Security Council approval?

Sands: Yes. A state is free to use force in self defense. That never requires the approval of the United Nations. The United States was entitled to use force in the autumn of 2001 in Afghanistan in relation to a threat coming from that country that it plainly faced. It was entitled to use force without receiving Security Council approval to remove that threat. Iraq was a very different situation. There is another area that is emerging: the right to use force to protect fundamental human rights. But that didn't apply in the Iraq situation and was not invoked by the US or Britain as legal justification.

IA-Forum: What about that situation? Of a country accused of violating fundamental human rights? For example, Sudan?

Sands: One of the things I regret greatly as a consequence of the Second Gulf War is that it's going to make it very difficult to justify the US or European countries or African countries using force to protect fundamental human rights in Darfur [Sudan]. The argument of humanitarian convention is now going to be treated with suspicion as though it's similar to the Iraq type of situation. It will be seen as an argument being made by large, powerful countries to justify the use of military force where there may be no justification. So Iraq has made the world a less safe place for people in

Sudan and other places where people face fundamental human rights threats. It has turned the tide back on the right of humanitarian intervention. That is very regrettable.

And look at what's happening now with Iran...by all accounts, the situation in Iran may be more serious than the situation was in Iraq in Spring, 2003. But now when leaders tell us that they have intelligence indicating a country is doing something contrary to its international obligations, we treat their claims with suspicion, we don't believe them, their credibility is undermined because we feel we have been misled on an earlier occasion. So, arguably, even if we face a serious threat, we're going to treat those claims by British and American governments with considerable suspicion.

IA-Forum: A result of the war Iraq as well as in Afghanistan and war on terror actions are prisoners and suspected terrorists being held in Guantanamo and other places. What are their rights under international law and what, if any, discrepancies, are there with the situation they're in?

Sands: It's a long and complex question but the bottom line is that under international law they are in a legal black hole. There is no person who can be deprived entirely of the minimum rights that exist in the Geneva Conventions or human rights laws. For example, the positions in Article 75, of the Protocol of 1977, or Common Article 3 to the 1949 Geneva Conventions. And yet the circumstances in which individuals were being detained plainly did not meet those standards.

The heart of the problem has been caused by the administration's characterization of the present situation as a war. You'll notice that in my book, I refer to the "war on terror" in quotation marks. I don't believe that we are in a situation of war. America is not a nation at war. It would have been much more sensible to proceed on the basis that a great number of these individuals engaged in pure terrorist activities are to be treated as criminals, not as warriors.

IA Forum: With any group or person then?...IRA, Hamas, Al Qaeda...

Sands: Yes, these people should not be treated as warriors. They should be treated as criminals. During the conflict in Northern Ireland that lasted many decades, the IRA wanted to be treated as warriors. The British government, quite rightly, said that they weren't warriors, they were criminals; and it wasn't going to apply the rules of armed conflict to detainees. They would be subject to the criminal law modified appropriately to the risk they presented. I think the same situation applies in relation to Al-Qaeda, and in relation to Hamas. It is a mistake to treat them as warriors, with all that term implies in law, from limits on interrogation to the conditions of detention.

But in relation to detention of individuals in various parts of the world, I don't think we're in a situation of war and it will be for the criminal law to apply. Having decided there was actually a situation of war, it was not for the U.S. administration to then unilaterally decide that the rules of war didn't apply. Having decided that they were at war, they're stuck with the rules of armed conflict which require the minimum standards of treatment for all detainees.

IA-Forum: If the war in Iraq was illegal, should President Bush and/or any of the administration staff have fear of prosecution under international law?

Sands: Absolutely. I would say that President Bush, Prime Minister Blair, Secretary of Defense Rumsfeld, Mr. Wolfowitz have all been involved in contributing to a decision that led to an illegal war in Iraq. A senior British legal officer resigned calling the illegality of the war "a crime of aggression". It is worth remembering that in some countries the crime of aggression is actionable as a domestic crime." I end the latest edition of the book (UK edition) with a note to the British Prime Minister that once he's out of office, he may want to think very carefully where he travels. The same principle applies equally to former President Bush once he's out of office, as well as Secretary of Defense Rumsfeld once he's out of office. They will have to look very carefully where they travel because they could be subject to proceedings for violating international laws. The possibility also cannot be excluded of individual criminal liability for torture and war crimes, although that must of course turn on the facts.

IA-Forum: How do you see the current situation of international laws? Do you think they're good in their present state or do they need to be modified?

Sands: Governments are right to look very carefully at the adequacy of existing international rules in the face of the serious threat that we now face, from Al-Qaeda and other groups. It's entirely right to say the character of the threat has changed – it's more serious, more elevated – the nature of the threat has changed and we need to look at the adequacy of the rules.

I'm not starry-eyed about international rules, I recognize entirely that there may be gaps that need to be filled and that there are changes that may need to be made. The way forward is to engage in a proper analysis, identifying with allies the weaknesses the weaknesses that may exist. Then sensible decisions may be made on a consensual basis with other countries to make the changes that may be necessary. But at the end of the day, most governments, including the British government, think that the Geneva Convention – that the United States has tried to shred – are perfectly adequate to deal with the present situation. Interestingly, at the UN Summit in September of 2005, the Bush Administration signed on to the outcome document of that summit that states clearly the view of all states: rules in the UN system on the use of force are adequate to meet present threats and

challenges. So it doesn't appear that governments have identified an overwhelming need to revisit the basic rules.

IA-Forum: What effect do you think exceptionalism has had on the United States and international community?

Sands: American exceptionalism is problematic. In my view, the United States has been a positive force in the international community, warts and all, and without the U.S., the system of rules and institutions that have been put in place would be weaker and undermined. So when the U.S. decides to go at it alone, or acts on the belief that the rules don't apply to it and only apply to others, I think these approaches undermine the very essence of the rules. So the principal reason I've written the book is really to explain why, at the end of the day, I believe the rules have served the U.S. well and the U.S. is more threatened by the abandonment of the rules than by anyone else.

IA-Forum: How do you foresee the future of international law?

Sands: Well, I'm an optimist. I end the book on an optimistic note. I think the rules of international law will outlast the current Bush administration. One of the most striking things is that, despite the virulent attack on international rules, particularly after 9/11, the administration hasn't managed to change any of the rules.

One of the noticeable things is that, within the administration and also in the Senate, a group of individuals who have recognized that very serious damage has been done to the reputation of the United States and the rules based system that the US has contributed to putting into place. I think the jury is still out but we see with people like Sen. McCain and possibly Condolezza Rice and her legal advisor, John Bellinger, individuals who are beginning to take significant steps to repair damage and to re-engage with a more positive approach to international rules. I think you see that in some of the recent statements of the Secretary of State.

IA-Forum: Thank you, Mr. Sands.

Comments? Please send them to editor@ia-forum.org

