Reflections on National Security and International Law Issues During the Clinton Administration

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I. BACKGROUND

I have spent my entire professional life in Washington, DC. Because I am a Democrat, most of that time has been in private practice. But I have worked twice in the Executive Branch: once as a “baby” special assistant for Secretary of Defense Harold Brown during the Carter Administration, and then as the General Counsel of the Department of Defense for more than five years during the Clinton Administration. While my experience with Secretary Brown made me slightly more credible (and genuinely more oriented) when I was lucky enough to be nominated as General Counsel, it is fair to say that my fifteen years in private practice had not been focused on national security policy. When I was confirmed for my new job in September 1994, almost two years into the Administration, I was clearly behind the policy curve.

When I arrived, the Administration had already been chastened by events in Somalia, but had nevertheless mounted a humanitarian effort to relieve famine and massive population displacement in Rwanda. And just days before I settled into my new office, pursuant to United Nations Security Council Resolution (“UNSCR”) 940, the United States had sent forces to Haiti. Thus from the day I arrived, I found myself immersed in a sea of questions relating both to our activities in Haiti—and to what was going to happen to the 15,000 Haitian refugees who had sought to escape the turmoil of their own country by boat, and were instead brought to Guantanamo Bay while we tried to figure out what to do next.

Much has been written about how the end of the Cold War totally shifted the post World War II framework of foreign policy and national security assumptions for the United States, and for the rest of the world. Desert Storm underlined both that shift and the extraordinary military force that could be brought to bear by the United

* Judith Miller is a partner at the law firm of Williams and Connolly, LLP. She served as General Counsel for the United States Department of Defense from 1994 to 1999.
States. The Clinton Administration was obviously the first American administration forced to grapple with what that shift meant in terms of how to define our national interest; how and when to use the military; how to preserve or redefine our relationships with both traditional allies and traditional "enemies." This transitional period necessarily lacked the intense policy focus on terrorism that resulted from the terrible events of September 11th. And because, shortly after I arrived, both Houses of Congress shifted into Republican control, this transition almost by definition would feature classic struggles between the Congress and the Executive branch, as well as between the parties controlling each branch of government. All the same, I would argue that the Clinton Administration’s efforts to deal with Haiti, Bosnia, Iraq, North Korea, Kosovo, and East Timor, along with the newly effective power of non-governmental organizations on the international treaty scene (for example, landmines, the proposed International Criminal Court) offer some lessons to build upon now.

II. Haiti

Apart from the personal coincidence of our deciding to use military force if need be in Haiti just as I started my new job, Haiti was a continuing lesson for all of us in how hard it is to deal successfully with a country’s problems once you have decided to lend a hand. Haiti may not have sunk to the "failed state" that we now encounter in Afghanistan, but its incoherent and allegedly corrupt government had created thousands of refugees; it had a minimal public works infrastructure, an apparently corrupt police and military, and a non-functional Ministry of Justice and court system. Although lawyers in my office and on the ground had encountered similar issues in Somalia, Haiti was my initial introduction to the questions of what the Department of Defense or other departments could or should do: who would be participating in the United Nations-authorized peacekeeping force; how to resolve chain of command questions; how to develop Rules of Engagement ("ROE"); and the almost always central question of who pays. As the Principals and Deputies Committees led by the National Security Council struggled with objectives and how long we should keep at it, my counterparts and I were trying to figure out whether the Department of Justice was equipped to help the justice system and/or rebuild the police department; how to provide medical facilities; whether the US military’s ROE allowed intervention in criminal activity occurring before its eyes; whether police papers that had come into US possession should be handed over to the new government, as it demanded; what to do about the rickety electric-generating system; whether we would use draw-down authorities (under Foreign Assistance Act § 506(a)(1)) to assist other nations sending personnel to participate in the UN force; and so on. These questions played out against a backdrop of political hostility. Among other things, the proposed “Contract for America” sought to put restrictions on the military’s participation in UN peacekeeping efforts. Other proposed legislation sought to undermine participation...
in UN efforts by forbidding American military units to be commanded by anyone other than Americans.

At one level, the political debate about our intervention in Haiti reflected a complete lack of consensus on what US policy should be in this newly depolarized world. It also highlighted a debate currently playing out in Afghanistan about whether the US should engage in either "nation-building" or peacekeeping. For me, this was my first immersion into the practical realities of the United States being prepared to use military force.

For all of its difficulty and danger, the American military knows how to plan and carry out effective military action. What comes next is also quite difficult, because we have not traditionally trained our people for peace-keeping, and neither the UN nor any other body had a standing police force either to keep the peace or to train indigenous forces when the need for military peacekeeping had subsided.¹ This is not to say that a solution cannot be cobbled together for the short term—a number of countries ultimately contributed police to the UN to deal with these issues in Haiti. But long-term, this hole in the international infrastructure is one we have faced many times since—in Bosnia, Kosovo, and now in Afghanistan. It remains to be dealt with.

III. NATO, BOSNIA, AND KOSOVO

In the aftermath of North Atlantic Treaty Organization’s ("NATO's") actions in Bosnia and Kosovo (and now Macedonia)—and NATO's invocation of Article V of the North Atlantic Treaty after September 11th—it is almost hard to remember that NATO had traditionally not been a proactive force since its founding in 1949. It was a classic defensive alliance for the West in its face-off with the East; its objective was deterrence, its operations fortunately limited to exercises and war games. The transformation of the Soviet Union, and the resultant freedom for Poland, Czechoslovakia, Hungary, and the rest of Central and Eastern Europe—put the identity and mission of NATO just as much in play as it did US policy. There was debate in the press about whether NATO really had any role to play at all. The Clinton Administration, with NATO, embraced as a first step the "Partnership for Peace" ("PFP"), where former Eastern Bloc countries could begin to work with NATO to develop democratic institutions that could supervise their militaries, and generally to explore cooperating with the West without instantly becoming full-fledged members of the alliance. Against this backdrop of initial cooperation, however, a storm was brewing in the Balkans.

In 1995, we were watching civilians being shelled in a marketplace, and were hearing stories of mass murder at places like Zeba and Srebenica. We also watched as

UN peacekeepers, our allies, were chained to Serbian facilities as shields against NATO bombing. That bombing, supported in the UN, was in turn authorized by NATO's North Atlantic Council acting proactively but atypically to use military force to maintain European security.

I distinctly remember the senior leadership at the Pentagon literally consulting the North Atlantic Treaty to understand the NATO decisionmaking process, which suddenly needed to work in real time. Bosnia—first in the bombing which preceded the Dayton Peace agreement and then in the follow-on Bosnian Implementation Force ("IFOR") and its successor Security Force ("SFOR")—was remarkable for NATO in several ways. First, despite the fact that we are still involved there, something extraordinary has been accomplished. In the first year alone, warring forces were separated, land was transferred, weapons were secured in storage areas, and national elections were held. The achievement of these goals was the product of a terrific effort of leadership. Obviously, the Dayton Peace agreement laid the groundwork for this success and was remarkable in itself. But putting together a multinational military force, consisting of the NATO nations, fourteen of the PFP countries, plus a number of non-PFP forces, represented a gargantuan task. Our traditional institutions, such as the North Atlantic Council, the NATO military chain of command, and the UN, all had to stretch to new limits to facilitate this operation. In many instances, the necessary decisionmaking processes for resolving issues among the entities simply did not exist. Finding the pertinent legal authorities, determining who should pay, who should command, and even when to shoot, were all questions that my office helped to answer.

Defense lawyers worked on the Dayton Peace agreements, the UN and NATO authorizing resolutions for IFOR, and the military plans for the operation. Our greatest concerns were the legal mandate and ROE for the forces. A host of issues surrounded the legal authorities for US logistical support for IFOR participants and related NATO funding issues. We also dealt with various legal questions relating to "military stabilization," that is, the efforts to restore a military balance in the former Yugoslavia, as well as the vital status of forces and transit agreements needed for the deployment.

At home, the Administration constantly struggled with Congress over whether to take action, and how quickly, once taken, we would stop, and how often we would report. For example, Section 8117 of the Fiscal Year 1996 Appropriations Act for the Department of Defense required fifteen days advance notice before certain transfers of articles or services could be made for peacekeeping and humanitarian assistance. This requirement clearly reflected continuing unease on the part of Congress with US involvement in UN peacekeeping operations. Practically, it meant we needed to give Congress fifteen days general notice of articles and services transferred in the context of Bosnia operations, as well as specific notice of such mundane matters as space available on aircraft.
Looking back, what stands out for me about the Bosnia effort, apart from its success in stopping the endless round of killing, was that some relatively untried institutions could in fact work. Peacekeeping is hard, but General George Joulwan's meticulous insistence on rigorous training before deployment made it much less harrowing than it might have been. The PFP paid dividends repeatedly: Hungary crucially permitted us to base troops in Tuzla and also to do needed refresher training of our troops on their territory; Russia actually contributed troops to the peacekeeping force; numerous PFP members jointly staffed an intelligence-sharing unit in support of operations at SHAPE ("Supreme Headquarters Allied Powers Europe") headquarters.

For me personally, how far we had come from the Cold War came home in three experiences: meeting the Russian senior general who as liaison to NATO had an office just down the hall from General Joulwan's at SHAPE; being briefed by a Russian colonel on Russian peacekeeping efforts in support of IFOR in the field in Bosnia; and being asked repeatedly by PFP representatives about how they could achieve civilian control of the military (and what really did it mean).

Kosovo obviously presented another challenge in the Balkans. The first time I really focused on it was about a year before NATO first concluded it could—but then did not—take action there. Walt Slocombe, Under Secretary for Policy at the Department of Defense, said at a morning meeting that he was worried about what was happening in Kosovo. I distinctly remember thinking that I didn't have any idea what he was talking about.

During 1998, the UN Security Council in Resolution 1199 determined that the situation in Kosovo constituted a threat to peace and stability in the region. In a report to the Council pursuant to Resolutions 1160 and 1199, the Secretary General found that some 200,000 people in Kosovo had been forced to flee their homes, and that there had been widespread and indiscriminate attacks against the civilian population, wanton killings of innocent civilians, and wholesale destruction of homes, farms, farm machinery, and livestock. These ruthless and unlawful attacks were generating a "spillover" effect into the nations adjacent to the Federal Republic of Yugoslavia ("FRY"). Refugees had spilled into Albania, which was no longer capable of absorbing them and was itself experiencing widespread instability, and there had been border clashes between Albania and the FRY, each one accusing the other of causing these incidents and shooting across borders. Refugees were also spilling into Macedonia, Bosnia-Herzegovina, and Montenegro, increasing the potential for instability and violence in these areas.

This destabilization also threatened the hard-won peace in Bosnia. The Secretary General emphasized that continuation of the current attitude by the Government of the FRY most certainly would lead to a humanitarian catastrophe, which could only further destabilize the countries in the entire Balkans region—an area that has historically sparked numerous international conflicts. Destabilization of the Balkans, with its attendant violence, would pose a direct and immediate threat of
armed conflict which could in turn engulf such NATO members as Greece and Turkey, and do irreparable damage to the entire Southern Flank of NATO.

In October 1998, NATO first approved an order authorizing action, or "ACTORD," which authorized the use of military force in Kosovo to compel compliance with the security, humanitarian, and political objectives of UNSCR 1199. Because of an agreement Ambassador Holbrooke achieved with President Milosovic that month, the order was not implemented. But after another sustained round of diplomatic negotiations at Rambouillet, NATO again decided to act, despite the fact that no United Nations Security Council ("UNSC") Resolution had explicitly authorized the use of force. I have discussed the legal rationale for this decision elsewhere. What I would like to emphasize here is how much NATO had changed in the space of three years. In the very midst of the bombing campaign of Operation Allied Force in Kosovo, NATO leaders gathered in Washington, DC to celebrate its fiftieth anniversary and to welcome its three new members from the PFP: Hungary, Czech Republic, and Poland. So that NATO planes could operate effectively over Kosovo and Serbia, Italy had greatly restricted use of its own airspace for domestic purposes. NATO, a defensive alliance for its entire history, had in rapid succession undertaken its first two real world military operations. It had worked out issues of command and control, rules of engagement, interoperability, and the process of North Atlantic Council ("NAC") decisionmaking. Far from being moribund, it had displayed resilience, relevance, and strength.

In my view, NATO had also laid the groundwork for its swift post September 11 invocation of Article V of the North Atlantic Treaty—that an attack on one member is an attack on all. This was yet another unexpected paradox for an organization that most assumed would see the United States rushing to give aid to its allies in Europe rather than itself suffering the attack that led to NATO's decision to invoke Article V.

I would not argue that the Clinton Administration was entirely successful in its policy towards NATO—interoperability is still far from being achieved. Terrorism deserved much broader attention from the alliance—and as it integrated, the European Union began to pursue the idea of commanding a military force separate from NATO. The Kosovo campaign, in demonstrating the gulf between American military capabilities and those of some of its closest allies, became a point of stress as well as success. But the Administration did help to start a process of redefining, reviving, and expanding on alliance for the post Cold War world that can be built upon, legally as well as politically.

IV. IRAQ AND NORTH KOREA

Throughout the time I was at the Pentagon, Iraq constantly preoccupied us. We were engaged there operationally every day. Pursuant to UNSC Resolutions dating from Iraq’s invasion of Kuwait in 1991, US Central Command and US European Command have mounted Operation Southern Watch and Operation Northern Watch, respectively—enforcing and on occasion expanding a no-fly zone over the North and South of Iraq, and a no-drive zone in the South, and responding to Iraqi military actions. These operations have been possible because of the facilities made available to United States and coalition forces by Saudi Arabia, Kuwait, Bahrain, and other Gulf States, and by Turkey in the North. During this period, the United States, working with the United Nations Special Commission on Iraq (devised at the conclusion of Desert Storm to inspect and monitor the elimination of Iraq’s weapons of mass destruction program), also expressed growing concern and frustration with constant Iraqi interference and defiance of monitoring and inspections. As is evident, the same set of issues confront the current administration.

Some members of Congress repeatedly criticized the Clinton Administration for failing to do more to support Iraqi opposition groups seeking regime change—although that too was tried. Iraq often has seemed to be an intractable problem. Saddam Hussein has demonstrably not complied with applicable Security Council resolutions—but the continuing enforcement of economic sanctions under the UN’s authority has also created a palpable fatigue among some of our allies, and a concern that only the Iraqi people are disproportionately suffering from them (despite the creation of the UN Oil for Food Program in 1996). Pointing out that this suffering is a result of deliberate decisions by Saddam Hussein did not carry the day during the 1990’s. Saddam was, however, “kept in the box” during the Clinton Administration. For example, in late 1996, in response to an Iraqi attack on Irbil, the President expanded the no-fly zone; ordered strikes against a variety of surface-to-air missile sites and command and control centers; and substantially strengthened the US presence in the region. Similarly, in 1998, when Iraq barred UNSCOM inspections, the President ordered the more substantial military response of Desert Fox. As a containment strategy, I would argue American policy worked, but a stable solution evaded us.

North Korea presented a different problem. At the outset of the Clinton Administration, the primary focus was on finding a means to negotiate a verifiable agreement to keep the North Koreans from deriving nuclear weapon grade material from spent nuclear fuel rods. The framework negotiated gave assistance to North Korea to develop other energy sources. In my view, there are similarities between this effort and the extraordinarily successful Nunn-Lugar legislation and program in the former Soviet Union, which enabled us to help Russia, Ukraine, and Kazakhstan to dismantle thousands of nuclear weapons and find more productive pursuits for former nuclear weapons scientists. The North Korean agreement nevertheless came under
withering scrutiny in Congress. And other efforts by the Clinton Administration and South Korea to find ways to productively engage with the North Koreans are clearly not consistent with the new administration’s initial approach.

V. TERRORISM

The United States and its military have been subject to terrorist attacks since 1983, when the Marine barracks in Beirut were blown up by a truck bomb, killing 241 people. A disco in Germany frequented by American soldiers was blown up in 1986. Of course, the first attack on the World Trade Center occurred in 1993. In 1995, the Saudi Arabia National Guard’s Office of Program Management, which had American military assistance, was attacked. Five Americans were among those killed. In 1996, Khobar Towers in Saudi Arabia was blown up, again by a truck bomb, killing nineteen Americans and wounding hundreds more. In 1998, our embassies in Kenya and Tanzania were attacked. In 2000, the USS Cole was attacked by a small boat loaded with explosives. Although not directed at the United States, there was also the quite troubling sarin gas attack in Japan in 1995. Not all of these events can be attributed to al Qaeda, but many can.

Although I had returned to private life by the time of the Cole bombing and the threatened, but disrupted, efforts to mount attacks during the millennium celebration, I think it is fair to say that terrorism and anti-terrorism preparation increasingly engaged the attention of the Clinton Administration during my five years, and thereafter. It touched my immediate office in a variety of ways: working on interagency plans to deal with potential terrorist attacks at the Atlanta Olympics in 1996; thinking through how to implement new authorities for the use of the military with respect to chemical and biological weapons of mass destruction that were provided in legislation adopted after the Oklahoma City bombing; dealing with supervisory guidelines and financing issues for training “first responder” teams; trying to think through and find funds to deal with vaccine and other preparedness issues; dealing with cyber security and cyber attacks both at home and abroad; and working on revisions to the Unified Command Plan, which created a new Joint Task Force for Civil Support (with the mission of providing military assistance to civilian authority in the wake of a weapons of mass destruction event in the United States). The Administration also took military action against al Qaeda in August 1998, and established a special office in the National Security Council to bring more urgency and top-level attention to these issues. What we did not have—and what we all fervently wish our country had never had to face—was the galvanizing effects of September 11.

VI. LESSONS LEARNED

I have barely touched on the multiple national security and international law issues that I worked on in one way or another while I was at the Department of
Defense. I have particularly dwelled on several instances of the use of the military—whether in the use of force, or in peacekeeping or humanitarian operations—for the obvious reason that these decisions had a direct impact on the Department I served. These specific instances also taught me how important it is to have international support and assistance for whatever actions we undertake.

From a legal perspective, ever since the United Nations Charter came into being, the most straightforward exercise of force is either in individual or collective self defense or pursuant to United Nations approval, typically by the Security Council acting under Chapter VII. The UNSC granted authorization for Iraq, Haiti, and Bosnia. In Kosovo, we acted pursuant to a decision by NATO, as a regional defensive alliance which is also given some status under the UN Charter. From daily experience, I learned how helpful it is to have a UNSC resolution authorizing the use of force: it gives a unifying legal basis for action and analysis that we did not have in Kosovo, where each participating nation took its own path to concluding that action there was consistent with international law. The varying paths to that conclusion sometimes led to very real disagreements about whether certain actions or targets in prosecuting the campaign were proper. More pragmatically, I saw every day how our ability to fight or even to preposition supplies is necessarily dependent on other countries who willingly permit overflights; allow us basing privileges; or share resupplies, intelligence, and a host of other facilitators that make it possible for our men and women in uniform to operate effectively.

For better or worse, the world is also increasingly embracing international treaties and agreements that can directly affect us even if we disagree. Non-governmental organizations have also increasingly been granted a seat at the table for these negotiations, and drive them in different ways than was perhaps typical in the past. The antipersonnel land mine agreement has not been signed by the United States but it has been ratified by virtually all of our allies, on whose territory we are often deployed and with whose forces we would fight. This requires us to adjust our actions despite not joining the agreement. We face a similar conundrum with the International Criminal Court: President Clinton signed the treaty during his final days in office while calling for changes in some of its terms. The Treaty of Rome explicitly purports to assert jurisdiction over citizens of non-signatories. In other realms, the organizations that deal with spectrum rights and satellite orbits, or in intellectual property issues, have not traditionally been the focus of Department of Defense or Department of State attention, yet all have the potential to directly affect how the United States will be able to deploy and use military force in the future. Finding a way to be more effective and attuned to these venues is crucial.

In sum, I learned almost every day at the Department of Defense that virtually every action the United States takes outside of its borders is intricately enmeshed in international law—whether customary, or through multilateral treaty or convention. Devoting sustained attention to improving it could pay real dividends.