# BOOK REVIEW*

*Lawless World: America and the Making and Breaking of Global Rules*

PHILIPPE SANDS
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## A TIMELY RESTORATION OF ORDER TO THE UTTER LAWLESSNESS[1] OF A NEW INTERNATIONAL 'LAW'

In the last few years, discussion and evaluation of international law has increased in significance beyond its traditional legal and related forums, and become more prominent in general political discourse and the public consciousness. The reasons for this are fairly obvious: economic liberalisation and globalisation, environmental concerns, inroads into traditional notions of state sovereignty through human rights doctrines, and the war on terror are challenging the accepted international legal order and practices. The fact that these developments have a direct effect upon the lives of the citizenry has meant that democratic governments have inevitably had to justify their actions through a claimed compliance with international law. In so doing, a tension has appeared between the principles and assumptions of the post World War II international legal order and a new international legal order sought by the Bush administration in the United States, indicating the high stakes at play in that contest.

It is against this background that Philippe Sands, in his book *Lawless World: America and the Making and Breaking of Global Rules*, engages large and contemporary international legal issues. Reflecting the broad and practical effect of such issues upon national and international communities, Sands eschews an academic focus, preferring to articulate his case as 'a practical book based on personal experiences' and one which 'might cause taxi drivers to talk about international law'. This approach reflects an important principle of the everyday interaction of international law and politics – its regular point of contact with national life. It is doubtless facilitated by the author's combined background as a Professor of Law at University College, London and a Queen's Counsel specialising in international law.

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1 Adapted from Lord Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 6, 13.

The particular methodology and its reach to an audience belie, however, the significance of the enterprise. Sands' central task is complicated and illustrative. It begins with the need to identify the characteristics of the rules based system of international law sponsored and cultivated by the United States and Britain in the 1940s, which has subsequently reached into everyday life, profoundly affecting democratic governance and accountability. That system, established but dynamic, is considered to be under severe challenge and threat from the present US administration, determined to re-make global rules to its own preferences and requirements in a variety of areas. Part of that challenge is propelled by a traditionally distinctive US outlook on international law, characterised by a perceived superiority of US constitutionalism and domestic law over international law. Sands shows at different points how that endeavour has been aided by British silence and complicity.

In analysing and responding to the challenge to the rules based system of international law, Sands alerts us to the impracticalities of unilateralist reform of the international legal order in a globalising, interdependent world and in doing so, sets the foundations for his case for international rules. Such advocacy, acknowledging the need to craft a new range of rules to cover, for example, non-state and failed state actors, nonetheless places great store in the legitimising nature, boundaries and standards of international law. The author's methodology is to provide bookends in the form of the first and final chapters, between which a range of topical international law subjects are examined in discrete chapters. This allows integration and interrogation of the main themes within these subjects and so constructs and substantiates the author's argument about the making and breaking of global rules.

The first chapter provides a short and recent history of international law. This serves as a foundation for comparison and examination of distinctive issues in subsequent chapters. Background arguments are made that in the UK international law issues commonly affect political debate and more generally, international law provides a standard against which the actions of states can be assessed for legitimacy. The evolution of the international rules based system from the 1941 Roosevelt–Churchill *Atlantic Charter* is sketched, with the three pillars of that agreement – restraint from the use of force, the maintenance of basic human rights and free trade and economic liberalisation – outlined.

The *Atlantic Charter* is rightfully seen as pivotal in inspiring major developments in the international legal framework in rapid succession – the *Charter of the United Nations*, the Commission on Human Rights, the *Universal Declaration of Human Rights*, the *Convention on the Prevention and Punishment of the Crime of Genocide* and the four *Geneva Conventions*, as well as the establishment of the World Bank, International Monetary Fund and the General Agreement on Trade and Tariffs. These developments in turn provided the foundations for the growth of the new international legal order from the 1950s onwards, largely mediated by regional and international treaties. Sands' identification of this system as providing great stability is balanced with his observation that, in the context of the Cold War, a range of Anglo-American interests were promoted against Eastern bloc interests.

This outline of the evolution of the international legal order also serves as a departure point to explore different and competing challenges to its maintenance. The first set of challenges to the international legal order in more modern times emerges from a new US exceptionalism, first appearing in relation to non-economic interests such as environmental standards, the International Criminal Court ('ICC'), consular protection and US withdrawal of consent to the jurisdiction of the International Court of Justice. Such exceptionalism has been given a sharper edge through the US neo-conservative Project for the New American Century,[2] which, it is said, aims to re-shape the international legal order to accord with and advance US interests. The war on terrorism has provided a pretext for intensifying such aspirations, through disregard for human rights and humanitarian law and the use of pre-emptive military force.

Sands explores a second and more generic set of challenges to the international legal order: respectively globalisation, technological innovation, democratisation, privatisation and deregulation. These matters are correctly identified as generating expansive requirements for international law, as well as generating a need for it to rapidly adapt, evolve, and transform the way it is perceived.

It becomes apparent to the reader that these two sets of challenges are competitive and difficult to reconcile – ultimately focusing our attention on the problem of the evolution of the international legal system to cater for more broadly based needs than the ambitions of the present US administration.

The ensuing chapters can be described in contrasting ways. There is a natural division between discrete non-economic and economic subjects. The non-economic areas, subjects and focuses divide between pre- and post-September 11, after which US efforts to unilaterally re-shape international legal principles greatly intensified. A minor criticism of the author's approach is that these features could be made more explicit, providing a more detailed framework to comprehend the enormity of change sought by the US, its contradictions and inconsistencies – and the interests at stake – in each subject area of a rules based international system. Similarly, organising the sequence of the book into non-economic and economic chapters would probably have lent a sharper focus to the themes pursued.

Chapters Two and Three deal with developments in international criminal law. Chapter Two examines the issues and litigation surrounding the attempted extradition of Augusto Pinochet from the UK. It is neatly concluded that the denial of immunity from jurisdiction signalled a re-alignment of individual and human rights interests relative to state interests, confirming the enhanced role of international law in the interpretation of UK legislation, subsequently producing a positive impact upon the Chilean legal system.

Chapter Three examines broader parallel developments in international criminal law by surveying the relationship of the United States to the

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2 See *Statement of Principles* (1997) The Project for the New American Century <http://www.newamericancentury.org/statementofprinciples.htm> at 10 August 2005. The Project for the New American Century is a Washington think tank, founded in 1997 by Dick Cheney and Donald Rumsfeld. Other prominent members who hold or have held appointments in the Bush administration include Richard Armitage, John Bolton, Paul Wolfowitz and Robert Zoellick.

establishment of the International Criminal Court ('ICC'). The author openly acknowledges the limitations and pitfalls of an internationalised criminal justice system, making his exploration of the Bush administration's concerted efforts at undermining the ICC all the more telling. Such efforts have included 'unsigning' and then declining to ratify the Rome treaty, objections to ICC prosecutorial independence, passage of the *American Service Members Protection Act*[3] authorising the President 'to use all means necessary and appropriate' to release any American national subject to the ICC. They have also included prohibition of US cooperation and military assistance to the ICC and a program to sign states up to Article 98 (2) agreements undertaking not to transfer American citizens to the ICC under any circumstances. These concerted objections are juxtaposed in their inconsistency with 1950s US initiatives within the US to establish an international criminal court, its support for the ad hoc Yugoslavia and Rwanda international criminal tribunals and for the indictment of the head of state of Liberia, Charles Taylor. The exceptionalist position reflected in the approaches to the ICC is convincingly argued as counter-productive to US legitimacy and credibility in its support for the latter two measures.

The US exceptionalist position to international criminal law is but a mild precursor to several developments explored by the author in three later chapters on the post-September 11 topics of Guantanamo Bay, the Iraq invasion and interrogation and torture. These chapters reveal a sustained and systematic program to re-shape notions of international legality as amenable to perceived US interests, frequently through a claimed inapplicability or tendentious reinterpretation of relevant international legal principles.

Chapter Seven is aptly titled 'Guantanamo: the Legal Black Hole'.[4] The selection of a US naval base on leased territory in Cuba was made on the belief – subsequently proven to be erroneous – that it was beyond the reach of international law and US constitutional law. The author outlines the scheme creating a series of fictions: the inapplicability of the *Geneva Conventions* as the President had decided that all detainees were 'unlawful combatants', falling outside the *Geneva Conventions'* classifications; the inapplicability of international human rights norms binding the US since the installation was outside of its territory; and the inability of international human rights treaties to superimpose legal obligations over those found in US law. A succinct and effective exposition of relevant international humanitarian law follows, refuting the unlawful combatant claim. The applicability of the ICCPR to actions of the US, regardless of territory, is also substantiated by the author.

The role of lawyers in constructing the purported legal framework of Guantanamo Bay is a compelling issue. The author outlines how predominately senior legal political appointees within the US Defense and Justice Departments constructed a legal framework that extensively curbed or eliminated international

3 Pub L No 107– 206, 116 Stat 820 (2002).

4 For a comprehensive account of the detention facilities and processes at Guantanamo Bay, see also Michael Ratner and Ellen Ray, *Guantanamo: What The World Should Know* (2004).

law constraints on interrogation and detention.[5] This methodology prompted distinct ethical and professional responsibility issues, as apparent in the objections and advice made by government career lawyers, particularly within the State Department. Presidential acceptance of the unlawful combatant category meant that the *Geneva Convention* requirement for humane treatment of detainees was made contingent upon 'the extent appropriate and consistent with military necessity'. It abandoned fundamental rule of law principles, such as the requirement in Article 5 of the *Geneva Convention Relative to the Treatment of Prisoners of War* that doubts concerning prisoner status are to be determined by a competent tribunal.

The author also surveys the US Military Commission hearing, outlining its manifest deficiencies in rights and process, which further reflects exceptionalist principles. Of considerable interest to the Australian reader is the success of the UK authorities in securing the release of nine UK nationals from Guantanamo Bay and the military commission process, demonstrating a greater, more public engagement of the UK authorities with international standards.[6] It is also indicated that the US Supreme Court[7] and the UK Court of Appeal[8] did not share the US administration's perception of unreviewable executive detention and military commission proceedings.

The legal fictions underpinning Guantanamo Bay prefaced even larger legal creativity about justifications for the use of force in the context of the Iraq invasion. Chapter Eight, 'Kicking Ass in Iraq', provides a detailed appraisal of the rationalisations and incidences of the Bush doctrine of pre-emption. It also contrasts the constraining framework of international legality upon the UK government with the US executive, once the latter had been granted Congressional authority to use force. The tension between conservative and neo-conservative proponents in the US executive is rightly seen as played out in the debate about whether there was a need to obtain a further Security Council resolution authorising the use of force, subsequent to Security Council Resolution 1441. That difference of opinion did not merely condense contemporary US attitudes towards international legality. From the decision to seek a second Security Council resolution, which ultimately was not forthcoming, a range of other intriguing issues emerge which are clearly articulated by the author.

Amongst these is the prominent role of public opinion in the UK, committed to the legality and legitimacy of the Iraq invasion as central to public and political debate, a live constraint upon UK support for US Iraq policy. An additional relevant factor identified by Sands is the absence of UK legal acceptance of the

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5 See especially Joshua Dratel, 'The Legal Narrative' in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers The Road to Abu Ghraib* (2005) xxii–xxiii.

6 See also Ratner and Ray, above n 4, and the 175 page statement of three of the UK nationals released from Guantanamo Bay: *Composite statement: Detention in Afghanistan and Guantanamo Bay: Shafiq Rasul, Asif Iqbal and Rhumel Ahmed* (2004) Centre for Constitutional Rights <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf > at 11 August 2005.

7 *Rasul v Bush,* 124 S Ct 2686 (2004)

8 *Abbassi v Secretary of State for Foreign and Commonwealth Affairs* (2003) 42 *International Legal Materials* 358.

US doctrine of pre-emption. The failure to obtain a second Security Council resolution meant that somehow a legal justification had to be crafted to support the Iraq invasion. The clearest option was seemingly to base the authority to use force in a combination of Security Council resolutions.[9] The author includes some illuminating material regarding legal advice in this respect.

Advice given by Foreign Office lawyers consistently maintained, before and after Security Council Resolution 1441, that separate explicit Security Council authorisation of the use of force was required. However, the Foreign Office Minister Jack Straw declined such advice, so the legality issue fell for determination by the Attorney-General, Lord Goldsmith. Sands outlines the two versions of the Attorney-General's advice of 7 March 2003 (that no further resolution was needed, that the Prime Minister could determine non-compliance, but raising concerns should the legality be tested in a court) and of 17 March 2003 (giving much briefer and unequivocal advice). Sands raises a number of unanswered questions about the protracted delays in receiving the written advices, the withholding of the advices from Cabinet, potential influence over the Attorney-General of Prime Minister Blair and of a senior legal adviser to the US National Security Council and of failing to communicate legal standards by which Prime Minister Blair could certify the existence of a material breach by Iraq. Exposition of each of these issues provides further persuasion in the author's case that the legal rationalisations for the Iraq war were ill founded.

In a broader sense, Sands argues that the Bush pre-emption doctrine, implemented in Iraq, threatens the international legal order and fails to establish a workable framework of rules to mediate force in relation to international terrorism. It is plausibly argued that this absence of rules undermines both the effectiveness and legitimacy of international terrorism responses, rendering small states vulnerable to unilateralist intimidation and force by state actors beyond the US. That point is overwhelmingly convincing, since the pre-emptive doctrine is shown to depart radically from known positions of inherent self-defence, use of force authorised by the UN Security Council and the embryonic doctrine of humanitarian intervention.

Chapter Nine, 'Terrorists and Torturers' is similarly incisive. The reader is once again confronted by elaborate legal fictions in the construction of an exceptionalist international legal framework, in this instance to justify torture and cruel, inhuman and degrading treatment. Sands shows the Abu Ghraib scandal to be the end point of inexpert and distorted US appraisals of the *International Covenant on Civil and Political Rights*, the *Convention Against Torture* and the *Geneva Conventions* as well as customary international law, primarily by

9 Security Council Resolutions 678, 687 and 1441 reviving the authority to use force in Security Council Resolution 678 and the US able to enforce the 'will' of the Security Council, without any further reference of the matter to it. For the parallel Australian legal opinion from the Attorney-General's Department and the Department of Foreign Affairs and Trade, see Bill Campbell and Chris Moraitis, 'Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq' tabled by Prime Minister Howard in Parliament: Australian Parliament, House of Representatives *Hansard*, 18 March 2003, 788. The advice is reprinted in (2003) 4 *Melbourne Journal of International Law* 178, 178–82.

politically appointed US legal office holders.[10] Their appraisals cast these international conventions as subject to the supremacy of US interpretation and of US domestic law, including inherent Presidential authority. The most striking appraisal of this phenomenon is found in the legal advice by Assistant Attorney-General Bybee that torture as a legal concept covers only the most extreme acts, limited to 'severe pain difficult for the victim to endure' and of 'such intensity as to cause death or organ failure'.[11] Similarly, the Working Group on the interrogation of detainees[12] accepted and built upon the legal analyses of the political appointees and approved 35 techniques, of which 24 were approved by Secretary of Defense Rumsfeld for use at Guantanamo Bay. The author extrapolates from subsequent circumstances that the President's General Counsel[13] was unwilling to deny that the remaining techniques were being applied by agencies outside of the Defense Department, including the CIA. The author alludes to the possible operation of a parallel interrogation system conducted by the CIA at undisclosed locations for questioning detainees with 'unprecedented harshness' under the reputed authority of a secret Presidential Order.

The striking aspect of this contrived legal framework to skirt around applicable international law standards is its close technical similarities to the international legal exceptionalism supporting the Iraq invasion. The author argues that there is a direct association between the doctrine of pre-emption and the consequences of Guantanamo and Abu Ghraib, namely a disdain for global rules.

Sands also includes three other chapters on international environmental issues, global trade and global investment respectively, to provide a more rounded and contrasting appreciation of US approaches and interests in international law, outside of those areas explicitly linked by a traditional human rights dimension. In the chapter 'Global Warming: Throwing Precaution to the Wind', the author surveys the background to the modern rules of international environmental law and incorporates his own experience in acting on a public interest basis for developing countries on issues of environment and development, including for the Alliance of Small Island States generally and for a Caribbean state of St Lucia at the 1990 World Climate Conference.

The major focus of the chapter is found in the conclusions and observations able to be drawn from US policies and approaches from the 1992 *Framework Convention* and the 1997 Kyoto Protocol. Sands notes that the US was among the first to ratify the 1992 Framework Convention, but then considers in some depth the US objections (in which Australia joined) to the Kyoto Protocol, such as

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10 See also Anthony Lewis, 'Introduction' in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers The Road to Abu Ghraib* (2005) xiv–xv.

11 See also Karen Greenberg and Joshua Dratel (eds), *The Torture Papers The Road to Abu Ghraib* (2005) 183.

12 See *Working Group Report on Detainee Interrogations in the Global war on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations* (2003) Centre for Constitutional Rights <http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf > at 11 August 2005.

13 Alberto Gonzales, subsequently appointed as US Attorney-General in the second Bush administration.

unfairness and ineffectiveness and the demand that China, India and other large industrially developing nations accept formal responsibility for reducing emissions. This approach is said to ignore the effectiveness of the two-tiered approach of the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*, which binds industrialised countries first, and developing countries later. Reinforcing arguments presented elsewhere, Sands argues that these attitudes provide further evidence of a selective US application and re-shaping of global rules. In the case of environmental concerns, this exceptionalist approach can produce many counter-productive and self-defeating consequences, in the same way that US approaches to human rights related issues have caused counter-productive responses to international terrorism.

Two further chapters on economic issues highlight the particularities of US approaches to international rules. On the one hand, support for international economic rules demonstrates an inconsistency in the denial of rules relating to non-economic international legal matters. On the other hand, such support carries with it the risk of unintended consequences, as increasingly non-economic obligations are extrapolated from international economic adjudication.

In the chapter 'Good Trade, Bad Trade, Cheap Shrimp', the present and future consequences for the US from economic globalisation are explored through non economic matters such as labour, and environmental and cultural standards. The influence of the World Trade Organisation ('WTO') in expanding public interest in the operation of international law is highlighted, as is the WTO's impact upon domestic non-trade matters. The author makes the point that the US has strongly supported global trade rules, effective institutions and enforceable sanctions on the basis that these serve its interests. The US has also sought in two major cases – the Tuna Dolphin case and the Turtle Shrimp case – to advance domestic environmental concerns through import restrictions from states whose practices threaten particular marine species. The latter case, permitting in-principle restrictions on imports on environmental grounds, is rightly considered as a turning point through the location of international trade rules within a broader social context and in fracturing the barrier between trade and other international law issues. The reader is alerted to the irony of this success for continuing US commitment to WTO rules, especially in the face of successful challenges to steel, cotton and other matters. Proper speculation occurs of the likely future adverse reciprocal impact upon the US, as well as its commitment to free trade rules. This will happen by other states using WTO rulings to constrain US imports, on the basis of US failure to comply with social and environmental standards.

The chapter on international regulation of investment raises similar themes – in this instance, the effects of international investment arbitration decisions, giving extended meanings to protection against expropriation of investor property and interests, thereby constraining the application of domestic health, environment and employment standards, while treating such rules as isolated from other international law obligations. Sands again speculates about the future of US commitment to foreign investment rules within the framework of the WTO in the context of increased constraints through interpretation in cases –

highlighting in particular the omission of investor state arbitration in the US–Australia free trade agreement and other agreements, narrowing the meaning of what constitutes expropriation.

The final chapter attempts to draw together the book's central themes, and to reach conclusions and make predictions about US unilateralist attempts to re-shape international law. The firm view advanced is that the present US attempt to re-make global rules will not succeed for two key reasons. Firstly, it will be difficult, if not impossible, to sustain selective acceptance of international rules in the economic area and quarantine applicability and liability of international rules in the non-economic areas. This difficulty will be both on a conceptual level and also on a practical level, as international economic adjudication directly or indirectly engages with non-economic matters.

Secondly, the compelling pressures of globalisation generate a range of interdependent needs, including the need to develop law in relation to non-state actors and failed states, as well as predictability in international legal relations, which makes unworkable a return to a pre-regulatory environment, where states effectively make their own rules commensurate with military, economic and diplomatic power. Sands' view is reinforced in the fact that compliance with international rules is emerging as a significant domestic political factor in assessing the legitimacy of government action in states such as the UK.

The success of the author's enterprise is perhaps best assessed in the book's compelling story of the significance of international law as a modern legal normative phenomenon and the resultant need of the US to engage those legal principles in order to form a new legal order amenable to a particular conception of US interests. That story is prosecuted with both detail and imagination across a range of contemporary international law topics. The commitment in *Lawless World* to the accessibility of international law to a non-academic and non-legal audience is itself an unfashionable and subversive political statement of the need to defend and strengthen an international rule of law[14] by appealing to the hopefully better informed instincts of an engaged domestic body politic. Evidence has emerged overseas that the judicial branch of government has started to listen to that call.[15] In Australia, questions remain about how far and how persistent the Executive will be in assimilating aspects of the exceptionalist doctrine, particularly in relation to foreign policy, free trade and the war on

14 A clear illustration of the real threat to that rule of law is the extraordinary statement of the US Defense Department identifying a threat to national security and alliance with terrorism through the use of international forums and the courts: 'Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism': *The National Defense Strategy of The United States Of America* (2005) US Department of Defense <http://www.defenselink.mil/releases/2005/nr20050318-2245.html> at 24 June 2005.

15 See, eg, *A and Others v Secretary of State for the Home Department* [2004] UKHL 56; *Rasul v Bush* 124 S Ct 2686 (2004); *Rumsfeld v Padilla* 124 S Ct 1904 (2004); *Hamdi v Rumsfeld* 124 S Ct 2633 (2004). Cf *Hamdan v Rumsfeld* 542 US 507 (2005). US Court of Appeals for the District of Columbia held that the relevant 1949 *Geneva Convention* did not confer upon Hamdan a right to enforce its provisions in court: 'The Court's decision in *Rasul* had nothing to say about enforcing any Geneva Convention. Its holding that federal courts had habeus corpus jurisdiction had no effect on *Eisentrager*'s interpretation of the 1929 Geneva Convention. That interpretation, we believe, leads to the conclusion that the 1949 Geneva Convention cannot be judicially enforced'.

terror.[16] If only for those questions, *Lawless World* deserves a broad local readership. It may even cause taxi drivers (and presumably their passengers) to talk about international law.

16 A telling example is Australian advocacy of the doctrine of pre-emptive strike, with particular reference to the Asia-Pacific region: see Michael O'Connor, 'Terrorism and national security' (2005) 49 *Quadrant* 26, 31–2 and the observations of the Foreign Affairs Minister Alexander Downer: see, eg, ABC Television, 'Interview with Alexander Downer', *Lateline*, 26 July 2005 <http://www.foreignminister.gov.au/transcripts/2005/ 050726_abc_lateline.html> at 25 August 2005; Alexander Downer, 'The Australia-Japan Partnership – Growing Stronger Together' (Speech delivered at the Japan Institute for International Affairs, Melbourne, 22 March 2005) <http://www.foreignminister.gov.au/speeches/2005/050322_jipa.html> at 25 August 2005.