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CENTER ON NATIONAL SECURITY AND THE LAW
GEORGETOWN LAW

NOVEMBER 29—NOVEMBER 30, 2012

RITZ-CARLTON HOTEL
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1150 22ND STREET, NW
WASHINGTON, DC
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National Security and International Law

Moderator: Robert F. Turner
U.S. National Security Law and International Law: Links and Implications

Nicholas Rostow

Introduction

A glance at the table of contents of leading case books on U.S. national security law\(^1\) demonstrates that the connection between international law and national security law is possibly even stronger today than it was when the Declaration of Independence set forth a legal brief for independence in the court of European opinion.\(^2\) The U.S. Constitution makes the same point by intending to "provide for the common defence."\(^3\)

As the Civil War demonstrated, "defense" has meaning as a subject of both domestic and international law. The Supreme Court observed in 1836 that the United States, "[a]s a member of the family of nations," enjoys sovereignty equal to the sovereignty enjoyed by every other member of the international community; international law, whether expressed in treaties, understandings, or general principles, defines that sovereignty.\(^4\) Today, the UN Charter, which is part of the supreme law of the land,\(^5\) articulates the framework principles for the conduct of foreign relations. Foreign relations are intimately connected to the preservation of the "national security," however defined. Accordingly, national security and international law are inseparable if not necessarily congruent subjects.\(^6\)

This chapter illuminates the linkage between international law and national security law by a brief review of subjects generally considered to be covered by national security law with references to significant writings. A short chapter cannot address every topic of national security concern. Therefore, it will not take up debates about the International Criminal Court,\(^7\) the lawfulness of nuclear weapons,\(^8\) U.S. and international treaty law,\(^9\) and surveillance.\(^10\) Rather, the focus here is on decisions regarding the use of force, particularly the use of force against terrorists, which has dominated attention in the last decade.
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1. National Powers

The United States enjoys and exercises national power as a sovereign among other sovereigns in the international community. How it exercises such power involves international and municipal law. The Constitution allocates power among the President, Congress, and the courts. Decisions binding the United States in domestic law, which are implemented internationally, are given effect in a different legal regime. Thus, for example, national decisions to use force must meet customary international law requirements of necessity and proportionality and comply with the Charter of the United Nations.

The Power to Make and Declare War

How the Constitution allocates responsibility creates the process through which U.S. national security is defined and defended. The U.S. Constitution abhors unaccountable power. In some cases the three branches of government are accountable to the people politically, in others, the branches exercise elements of the nation's power, thus holding each other responsible and in check. The "declare war" clause of the Constitution provides an example of the decision-making system. The Constitution provides that "The Congress shall have power . . . to declare War." Scholars have disagreed about the meaning of these words, and the Supreme Court has not resolved the disagreement. On the one hand, some have argued that the language means that Congress must authorize every U.S. use of force. On the other hand, some argue that Congress follows where the President leads. From this perspective, particularly in cases of self-defense, Congress need never act apart from appropriating funds because the power to "declare war" is limited to the important power to declare that a legal state of war exists. Congress may authorize a use of force, prospectively or retroactively, but, according to this perspective, such authorizations would be political acts that are not necessarily required by the Constitution. The Congressional power of the purse is independent of an authorization to use force. The point is that the decision to declare war and/or the decision to use force is a political choice, made in a constitutionally defined decision-making process in which all the branches participate.

Whatever the Framers of the Constitution intended with respect to the initiation of a U.S. use of force, there can be no doubt that the three branches play important roles. U.S. courts, particularly the Supreme Court, occasionally highlight the applicable framework. Thus, the Supreme Court decided that, although in the midst of the Korean War, the President could not unilaterally proclaim a national emergency and seize steel mills to keep them functioning.
when the workers threatened to strike.16 When President Carter abrogated the Taiwan defense treaty, the Court upheld the President's authority to do so without congressional approval.17 The Court upheld the President's use of statutory authority to resolve claims as part of the resolution of the Iranian hostage crisis of the late 1970s.18 And, the Supreme Court held that those parts of the War Powers Resolution that allowed Congress to mandate presidential action without presentment to the President of a bill for signature or veto had violated the Constitution.19

The War Powers Resolution remains on the books.20 It requires the President to report to Congress within 24 hours of introducing Armed Forces equipped for combat into the territory or air space of a foreign country or into hostilities. If Congress does not act within 60 days to authorize or refuse to authorize the deployment, the President must withdraw the forces. This requirement was put under a lens in 2011 during the Libyan campaign.

Acting under authority of UN Security Council Resolution 1973 (2011) to use all necessary means "to protect civilians and civilian population areas under threat of attack,"21 the United States and its closest allies in the Atlantic Alliance and North Atlantic Treaty Organization (NATO) imposed a no-fly zone and conducted aerial operations against Libyan government forces. The Obama Administration argued that the situation did not involve hostilities, notwithstanding the fact that U.S. aircraft, not ground forces, were involved in lethal attacks on Libyan forces; because the mission, the exposure of our armed forces, the risk of escalation, and the military means used were limited.22 In addition, the Administration argued that the operation, like its counterterrorism efforts, met the customary international law requirements of necessity and proportionality.23 As a result, the Administration argued, the lack of Congressional authorization did not mean that U.S. participation in NATO's Libya operation had to cease at the 60-day mark. Some commentators were not persuaded.24

II. The Use of Force and the Laws of War (Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL))

National security law and international law overlap most obviously in the event of a decision to use force and in the conduct of military operations. Any assertion of a right to use force in self-defense must conform to UN Charter requirements. Though the Charter affirms the "inherent right of individual or collective self-defense if an armed attack occurs," it holds out the possibility of limiting the exercise of that right "until the Security Council has taken measures necessary to maintain international peace and security."25 A state exercising the right of self-defense, must report to the Security Council. Though the
right may emanate from the "nature of things," the UN Charter regulates its invocation. Any other use of force should follow UN Security Council authorization although Security Council action is no protection against controversy.

Another area of overlap involves the conduct of operations and the characterization and treatment of detainees. The Geneva Conventions, other conventions dealing with armed conflict, and other bodies of law that constitute parts of customary international law govern U.S. military operations. U.S. Armed Forces in general follow the rule of discrimination between military and civilian targets. This principle is at the core of the laws of war. Difficult as it may have been to apply the Geneva Conventions to the letter in earlier armed conflicts, the attacks launched by Osama bin Laden and al Qaeda on September 11, 2001, have raised even more troubling issues of international and national security law than previous conflicts. These include issues of definition—how does one define the battlefield in a conflict with terrorists? And status—how should one characterize terrorists under the laws of war? The U.S. government has wrestled with these questions, and the answers, if any, have not been accepted without debate. Congress and the courts have helped clarify the issues. Officials and commentators have focused on the targeted killing of individuals presumed to be members of al Qaeda or other terrorist organizations. Some commentators have concluded that new law is needed.

Obama Administration officials set forth the government's position on targeted killing in a series of consistent speeches. A speech by the State Department Legal Adviser, Harold Koh, is exemplary. On March 25, 2010, Koh said that the Administration's premise is that the attacks of September 11, 2001, triggered the U.S. right of self-defense under international law against al Qaeda, the Taliban, and other terrorist organizations. The United States therefore is engaged in a number of armed conflicts simultaneously: "[A]s a matter of international law, the United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks and may use force consistent with its inherent right to self-defense under international law." In this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al Qaeda leaders who are planning attacks. Koh said that the use of force in self-defense includes controversial targeting practices: "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." As a result of this "authority" and "responsibility," the United States recognizes the applicability of the law of armed conflict and the core principles of distinction and proportionality. Targeting individuals who are legitimate
military objectives, such as commanders, planners, supporters, and the like, is within international law. Killing such persons is not to deprive them of judicial due process, for none is due; for the same reason, such killings do not violate U.S. legal prohibitions on assassination.39 Legitimate and lawful acts of self-defense are not crimes. Finally, Koh defended the use of unmanned vehicles as increasing the precision of attacks and limiting collateral damage.40

In recent years, armed conflicts with their inevitable damage to civilian life and property have caused some to argue that international human rights law continues in effect despite the controlling operation of the lex specialis, the laws of war. The Special Rapporteur of the UN Human Rights Council on Extrajudicial, Summary, or Arbitrary Executions, notably argues for the enduring application and enforceability of human rights law, especially where he believes the laws of war, or the application of such laws, are not clear.41

The laws of war themselves contain necessary human rights provisions, ensuring minimal standards for the treatment of detainees. Depending on the classification of the particular armed conflict in question and the status of the detainee, the Geneva Conventions contemplate different standards of treatment. The highest standard is reserved for combatants, who enjoy prisoner of war status upon detention. Non-combatants, such as terrorists or others who do not meet the standards for combatant and thus prisoner of war status, nonetheless are protected by law with respect to treatment as a detainee. When the Supreme Court in Hamdan v. Rumsfeld held that the United States is engaged in a "conflict not of international character"42 with al Qaeda and its allies, the Court was ensuring that such persons were not treated as if in a legal no-man's land or vacuum. The Court's decision ended debate and uncertainty about U.S. detention practices in the counter-terrorism context. The Court's decision is authoritative for the United States domestically and internationally despite the fact that the notion of a global non-international armed conflict seems to be less than coherent. Hamdan v. Rumsfeld makes Common Article III of the Geneva Conventions the governing minimum standard for the U.S. treatment of detainees without regard to status.

III. Technological Context and Consequences

We live in a period of rapid technological change in at least six areas: computing power, digital communications and cyber technology, biology, cognitive science, sociology, and robotics. The international legal community and government writ large under-appreciate the impact of technological change on society, including social media on governance, and the global security environment. The speed of change in each area means that international and domestic
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law always runs the risk of answering the wrong questions or developing the wrong prescriptions. Recent revelations about the stuxnet and flame computer network events highlight the difficulties. The cyber-technology domain alone challenges established habits of thought and analysis. It raises non-linear issues requiring new legal approaches. The law develops slowly; technological change waits for no one.

Computer networks form essential components of advanced societies, infrastructures, and military power. They are components of the sinews of war. Defending, exploiting, and "attacking" them involve national security decisions crossing international boundaries, invading private property, and disrupting established diplomatic relationships. In the United States, defending, exploiting, and attacking computer networks is the responsibility of more than one Executive department or agency, with different legal authorities. The government needs to respect decision-making processes to ensure that our values are not discarded as a matter of expediency or convenience.

Political leaders, military officers, intelligence officials, law enforcement personnel, theorists, corporations, legal experts, and legislators worldwide are struggling to deal with cyber threats, computer network events such as stuxnet, and the growing reality that future conflicts probably will involve the hostile exchange of computer code along with artillery shells. When do computer events cross a threshold and become the equivalent of a use of force? What is the appropriate response if they do? Issues of attribution, that is, who or what is the source of the event, challenge decision-makers and the rules to apply. Oversimplification is easy. Private sector networks may raise additional, complicating issues, as they would in an armed conflict. These are among the national security law issues raised by the technological context of our time.

The answers depend on circumstances, which include public perceptions and sentiment. We should not imagine that we could provide elected officials with predetermined thresholds. U.S. policy is intentionally uncertain or ambiguous, which contains a certain deterrent power.

The technological revolutions affect the international legal environment. NATO's cyber technology center in Tallinn has been a focal point for collecting, analyzing, and studying bodies of law possibly relevant to the cyber domain. They are expecting to publish a substantial manual on the subject in 2012. In 2012, the Naval War College was the site of a conference on the subject as well, and numerous other conferences and forums on the subject have been held globally. Though inevitably lagging behind the needs of policy-makers and military operators, both efforts should help us understand the legal implications of the technological context in which decisions have to be made, conflicts erupt, threats to national security develop, and armed conflicts conducted.
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IV. Conclusion

The preceding chapter is a snapshot of national security law and international law concerns the United States faces today and relevant readings that address them. National security law and international law have intricate and deep links because both legal regimes shape and affect foreign and domestic policy on multiple levels. When the United States acts abroad, the first question often asked of a President or other leader is, is the action lawful? The answer involves both domestic and international law. It is a cliché to observe that the world is ever more interconnected. Clichés contain truth. It follows that we should understand American national security law, just like American national security itself, in the wide international context that frames it. As the United States continues to play a dominant role in our global system, American national security law cannot escape the international law context.
Grand Strategy and International Law

by Nicholas Rostow

Grand strategy is, or should be, the "calculated relationship of means to large ends." Interrelated strategic and legal dimensions provide a leitmotif to the modern history of relations among powerful states. States employ an array of means to achieve their large ends—military power, as well as diplomatic, informational, economic/financial, and legal tools and influence. They differ in effectiveness and precision. In the web of interactions that shape contemporary international relations, the legal dimension as a framework and guide to choices is more often overlooked than particular legal instruments that might be invoked in the belief, or more often the hope, that they will serve policy and strategic objectives.

Views of the relevancy and content of international law vary. At one extreme, Dean Acheson famously remarked that "law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty." At the other end of the spectrum is the view that the effectiveness of the International Criminal Court is the test of the health of international law and legal regimes. The truth does not lie in between: whether or not the International Court of Justice is a success—and defining success depends on one's perspective (for some, failure would be success)—is not a test of the health of international law.

As grand strategy deals with subjects that touch the sources of sovereignty, is there—can there be—a relationship between law, much less international law, and grand strategy? The answer, of course (despite the skeptics), is yes; it is a different "yes" than advocates of this or that legal or other international institution might intend. At the same time, the nature of the relationship is both complex and straightforward. To unravel it, this essay begins with the general subject, examines the U.S. relationship with international law, and offers some thoughts on U.S. grand strategy now and in the foreseeable future and its connection to international law.
International law reflects the nature of the political system, framing the world as we know it. For the moment, it reflects the strength, values, and purposes of the democracies more than of the dictatorships, although its elements respect the state system without regard to internal management. The legal regime as an effective framework for international politics and authoritative decisions is inseparable from the balance of power. The world, after all, is divided among independent states; there is no global government.

Grand strategy and international law are, or should be, natural partners

As the system is not hierarchical, international law is not either. Grand strategy operates within the same non-hierarchical system. Grand strategy and international law are, or should be, natural partners. Grand strategists consider power and values. Those are what the "ends and means" language and calculus of strategists involve. Legal concepts of "necessity" and "proportionality" imbue and frame the calculations of strategists. The law represents the pattern of behavior that a society deems right achieved through processes equally deemed right. The result is authoritative decisions infused with legitimacy. The definitions of legitimacy, strategy, and law are similar, although the definition of law is more aspirational in that it speaks in terms of right and wrong rather than in terms of what the great powers agree.

In the present international arena, law and strategy are almost inseparable, especially when the use of force or other coercion is at issue. That is not to say that every use of force or strategy accords with international law. Rather, grand strategy is linked to the fundamental, constitutive norms of the international system because it is developed and implemented within the system even if it is sometimes apparently at odds or in tension with the system. Neither grand strategy nor international law is frozen in time or place. Moreover, neither is autonomous: each develops through interaction among independent states and other actors in the international system. At the same time, law has the aura of permanence, and strategy seems to be on the move all the time. Neither impression is quite right but each affects how the other is understood.

Let us begin by imagining that we are grand strategists on the Moon, contemplating Earth. With a lunar perspective, we see the Earth as a whole. As we travel from the Moon to Earth, we begin to see a world divided among states, but states having certain common interests that, over time, gave rise to norms of behavior. Norms of behavior constitute important features of law. We encounter international law as the political configuration of the Earth as it comes into relief. Just as the grand strategist must think about large ends—the definition and defense of vital national interests, for example—the relevant international law affecting grand strategy concerns war and peace, not the important legal arrangements that permit a bank account holder to withdraw funds from an ATM machine in New York, Beijing, or Ouagadougou, although they can become significant in the event states impose economic sanctions, seize assets, and engage in other forms of economic coercion.

Every state has an interest in the international legal order. International law limits and shapes grand strategic choices. Democracies require that their strategies be rooted in domestic and international law. Even tyrannies have an interest in law, although they may not profess it or know it. All states, whatever their governmental type, have certain rights; each, therefore, should have an interest in respect for such rights. The United Nations (UN) Charter expresses these rights as involving "matters which are essentially within the domestic jurisdiction of any state," unless and until the international community working through the UN Security Council determines that the internal so affects the external as to threaten or breach international peace and security or constitute acts of aggression. Technology has made that boundary smaller today than at any previous time. Events inside one country, perhaps too easily, may affect another, even distant, country in a matter of seconds.

Law is a process of authoritative decision. In regard to international law, one looks in vain for a single decision- or lawmaker. By encompassing
different societies and cultures, with different conceptions of justice, mores, and customs, the international system contains numerous actors, values, and centers of authoritative decision for specific purposes. Some processes and decisions have wider application in the international system than others.⁹

Power and the balance of power are inescapable international realities. Thucydides described these twin forces best in the Melian dialogue in which the Athenians assert that "the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept."¹⁰ Power and war go hand-in-hand. International organizations represent a stage in historical efforts to minimize the risk of general war by structuring international relations. That effort hasparalleled the development of rules fundamental to the existence of the international system. But neither rules nor multilateral institutions have done away with power in human affairs. In my view, therefore, U.S. grand strategy involves keeping the arsenal intact.

**International Law in Relation to Grand Strategy and Vice Versa**

The state may well be the most effective warmaking machine the world has ever known.¹¹ As a result, the international system built on states contains the potential for explosiveness at its core. Managing the risk of explosion is a responsibility of statesmanship conducted within a map drawn by grand strategists in a context shaped by international law.

The international system seems rigid, but in fact it is in motion. Some states are changing in character. Two decades ago, Yugoslavia disappeared. Sudan recently split into two states. Kosovo seems to be independent. Some, such as the Palestinian National Authority, are states coming into being because they already have attributes of statehood. Other states continue to exert power over groups that probably would prefer independence or at least a high degree of autonomy. In addition to independent states, voluntary groupings of states such as the European Union have acquired state-like characteristics, while their members retain important aspects of independence.

International organizations, such as the United Nations, are supposed to provide structure to international relations and safeguards against the propensity of states to use force. UN members have delegated certain authorities to the United Nations but without creating a world government. The United Nations has acquired additional authorities over time with member consent or at least acquiescence with the result that the UN family of organizations has grown, creating worlds within worlds. This fact adds actors to international affairs and additional complexity to the context within which grand strategy is made.¹² When it spreads itself and its resources too thinly, the United Nations weakens its capacity to maintain peace.

From this brief and incomplete description of the international system, one may see how a classical statement of international law as the "rules and principles of action which are binding upon civilized states in their relations with one another"¹³ necessarily is incomplete. For one thing, international law is as comprehensive as domestic law, governing everything from war and peace to the environment, business and finance, and outer space. The classical definition leaves out, among other things, the law governing international organizations; treaties such as those concerning human rights that have made individuals subject to international law in a way not hitherto recognized; nongovernmental organizations, which play important roles in international relations and in the development of international law to which states consent; and the development of new fundamental norms that go beyond the realm of state-to-state relations.¹⁴

Another traditional starting point for understanding the reach and content of international law is Article 38 of the Statute of the International Court of Justice:

*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions . . . ; (b) international custom as*
evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the [provision of the statute restricting the binding force of the court's decisions to the parties before it,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.\textsuperscript{15}

The modest, authoritative reach of international judicial decisions as precedents reflects the lack of a single international decisionmaker or lawmaker. As a result, most international law is treaty-based, binding parties through their consent to be bound. In principle, treaties give the law certainty. The last time I looked, the UN Treaty Series contains 158,000 treaties. In theory, treaties clarify and simplify. What, however, is one to make of 158,000 for 193 countries?\textsuperscript{16} The process of complication may dilute the effectiveness of law.

\underline{the 1949 Geneva Conventions are binding on all states, whether or not they are parties to them, and all face consequences for violations}

Useful as the Article 38 definition is for the International Court of Justice, it does not capture the generation and flow of authoritative prescription in the international system. For example, some treaties have become part of customary law. One pertinent example in view of the controversies of the past decade: all UN member states are party to the four 1949 Geneva Conventions. As a result, those Conventions have become customary, not just treaty-based, law. They are binding on all states, whether or not they are parties to them, and all face consequences for violations.\textsuperscript{17} They form the core of the law of armed conflict. Another example is the Universal Declaration of Human Rights. A substantial number of decisionmakers and commentators treat it as having become part of the fundamental law of the international community. Not all states act as if they agree.

States have the power to ignore or violate international law, as Germany did in 1914 when it invaded Belgium, a country whose neutrality Germany had guaranteed. But, as Germany discovered when it lost World War I, such violations may have legal, political, and strategic consequences. Similarly, Germany's and Japan's relations with their respective neighbors remain colored by their aggression and war crimes during World War II. These examples illuminate the enduring impact of war and peace on the subject at hand and how law and strategy have to work together. Wars have driven the international community to become an international community. The grand strategist develops designs and options in this context.

With the helpful pressure of progeny such as the United States, Europe and European wars generated the creative drive of the international system and made it a system. More than the Thirty Years' War, the wars of the French Revolution and Napoleon introduced the idea of national and total war. Governments and commentators alike emerged from these conflicts agreeing that war among the great powers was the greatest evil—\textit{summum malum}. Napoleon himself was designated an enemy of peace—a first—and exiled to St. Helena without judicial process as punishment for his aggressions. His fate was not taken to heart by the next pretenders to European hegemony. Had it been, perhaps World Wars I and II would not have happened.

In the wake of Napoleon, European governments conceived the first efforts at structured diplomacy to keep the peace—thus, the Concert of Europe. The Concert did not prevent war among the Great Powers, as the Crimean War and the wars of German unification showed, but it did induce a certain moderation in the conduct of diplomacy and military operations.\textsuperscript{18} Nor did the Concert mean that the Great Powers agreed on how states should best be organized. But, on matters of international conflict, the Concert played a usefully moderating role. Engaged early enough in a crisis, the Concert could facilitate agreement and prevent armed conflict among the Great Powers. It
was not always successful. In 1875, for example, the British had to signal to the Germans, outside the Concert system, that it would not tolerate a further diminution in France's status as a great power. The British were responding to a provocative story in a German newspaper. The event was forgotten or rather the Germans dismissed the British army as a significant factor in 1914. The Concert of Europe disappeared in the catastrophe of 1914–1918. World War I, which started in Europe, provided impetus for the formation of the League of Nations; World War II, which started in Asia, produced the United Nations, and the Cold War, fought on every inhabited continent, resulted in the strengthening of the United Nations and the globalization of law.

While Europe can claim most of the credit for originating the contemporary international system and the international law governing war and peace, Europe was not alone. The Americas and Asia participated, and Africa now helps shape our world as well. Colonialism and other European interactions with the larger world expanded the European impact. But the present system truly is global in origin and reach.

Much international law owes its source to World War I. After that war, the international community codified the post-Napoleonic notion that aggression was a crime and agreed that there were such things as crimes against civilization. The few trials in Turkey as a result of the genocide of the Armenians and the few war crimes trials in Europe made this point clearly. The Kellogg-Briand Pact of 1928 outlawing aggressive war did nothing to prevent World War II but helped provide a basis for the Nuremberg and Tokyo trials afterward. This history is the backdrop for the UN Charter and the development of the contemporary law governing the use of force and the law of armed conflict. Its relevance for the grand strategist lies in the process and the result: structures for decisionmaking and heightened political, legal, and strategic consequences for wrong or wrong-headed strategic conceptions and tactical decisions. One feature of the last 40 to 50 years has been the invocation of criminal law in the context of policy disputes. In recent decades, Henry Kissinger, Donald Rumsfeld, and Israeli generals, among others, have faced criminal law entanglement as a result of national strategies and decisions. Others, such as Argentina’s General (and President) Augusto Pinochet, have faced trials as a result of domestic decisions and their vulnerability, unlike, for example, Adolf Hitler or Joseph Stalin or Mao Zedong, to judicial process at home or abroad.

Contemporary international norms are fundamental to the international system and to the grand strategist because international law reflects the complexity of the global system.

Contemporary international norms are fundamental to the international system and to the grand strategist, especially the American grand strategist, because international law reflects experience and the complexity of the global system. International norms seem to resonate with Americans especially, perhaps because of their attitude toward the Constitution, which has been called “the great unifying force and spiritual center of the nation’s life.” The drafters of the UN Charter aspired to a document that could achieve a similar status in the world.

The UN Charter sets forth principles for international relations that reflect global historical experience. They recognize the many forms of coercion and accept the reality that the United Nations was not replacing the independent state. These principles are easily summarized:

- the sovereign equality of all UN members
- the prohibition of the threat or use of force against the territorial integrity or political independence of any state
- the right of individual or collective self-defense against an armed attack.

These principles form overriding law for the international system. From them follows the requirement to
settle disputes peacefully and the direction to the UN Organization to see that nonmember states adhere to these principles as necessary to the maintenance of international peace and security. American diplomats were at the center of the conceptual and drafting process that resulted in the UN Charter. Parts of it echo the U.S. Constitution.

The principles were adopted, and the United Nations was created, at the dawn of the atomic age although the drafters of the UN Charter did their work unaware of the atom bomb: they learned of it when the world did. Their work nonetheless was realistic in that it captured the enduring state-based structure of the international system.

For Americans, even if unarticulated by such early post–World War II strategists as George Kennan, the fundamental norms expressed in the UN Charter guided the formation and execution of U.S. grand strategy during the Cold War. They remain significant in this regard today—significant because, for some commentators and officials, guiding principles seem to have fallen by the wayside. One does not have to go far to read that international law does not exist or does not matter if it does exist, at least not to matters of war and peace. A responsibility of grand strategists, concerned as they are with large issues, is to rearticulate principles at the core of grand strategy, lest those they advise be forced to relearn them through more bitter and bloody experience.

The United States and International Law

For the moment, the United States is the most important single participant in international relations. Therefore, the grand strategist on the ride from the Moon to Earth will seek to understand the sources of U.S. grand strategy. As part of this exercise, the grand strategist will need to consider the U.S. relationship to international law.

The Constitution signals the importance U.S. decisionmakers should attach to law, including international law. For example, it empowers Congress to define and punish offenses against the law of nations and makes treaties part of the supreme law of the land and requires the President to conclude them only after obtaining the advice and consent of two-thirds of the Senate—always a difficult task. A principal focus of the Constitution, perhaps the principal focus, concerns the lawful exercise of power; it is hardly surprising therefore that U.S. foreign policy and grand strategy, developed under the same Constitution, should involve the lawful exercise of power as well. This conclusion is consistent with the Framers' view of the importance of law, particularly in light of the risk that failure of the constitutional experiment could result in the separate states preparing to cut one another's throats. The Framers were realists. They designed a system to prevent tyranny through the inevitable friction among the parts of government. Just as overreaching and lawless politicians at home would not surprise them, so they would not have been surprised that some Presidents would disregard international law.

The U.S. commitment to foreign and national security policies grounded in law, domestic and international, nonetheless is not merely rhetorical; it reflects central ideas about America and significant instincts of Americans. It is part of what has been called American "exceptionalism." One example is that American officials, civilian and military alike, and new immigrants take an oath to the Constitution, not to a flag or a territory (I therefore dislike the name "Homeland Security"). At bottom, we are a people of laws. For this reason, as Justice Stephen Breyer has observed, however disputed the Supreme Court's decision in Bush v. Gore, the country went along with it. A second example is that the first question the Chairman of the Joint Chiefs of Staff received from the press during his briefing on the 1989 invasion of Panama was whether the operation was legal. No one was surprised or should have been. Finally, seeking political advantage, Congress and others have been more preoccupied with whether the recent Libyan affair was conducted in a manner consistent with the War Powers Resolution than whether it was effective or prudent. Americans tend to argue about policy and politics in the language of law. The explanation lies in the role of law in American life—or at least the national myth.
that Americans act lawfully—and the historical context in which the United States took responsibility for maintaining minimum world order.

The United States grew to maturity in international relations in a period during which, for the most part, the British provided a protective cocoon. In the wake of the wars of the French Revolution and Napoleon, Great Britain and its navy anchored a balance of power within which the United States could pursue its goals. It could expand west, fight the Civil War, industrialize, and watch its economy and population grow without interference. The United States was not passive. But it was not internationalist in any systemic sense. Did it have a strategy during this period much less a grand strategy? George Washington’s Farewell Address articulated a strategic goal of freedom of action: “we may choose peace or war, as our interest guided by justice shall counsel.” The Farewell Address and Monroe Doctrine seemed to provide the United States with all the grand strategy it needed.

These documents were the sources of the first of the two ideas, isolationism and internationalism, that have competed to dominate American grand strategy. Isolationism reflects a simplified reading of Washington’s Farewell Address and his admonition to be wary of foreign entanglements. What he really meant was that the United States has to protect its own interests and should be no one’s pawn. World War I ended in the first disastrous American attempt to participate systemically in international affairs. Under President Woodrow Wilson’s leadership, the United States tried to shape and participate in global governance. The effort was disastrous, not because American ideas were horribly wrong-headed, but because Americans refused to carry through with them and abandoned Wilson’s ideas for maintaining international peace. Perhaps U.S. participation in the League of Nations would not have prevented World War II; U.S. absence from the League meant that the international police department was short-handed.

The attack on Pearl Harbor killed isolationism as a respectable American position. World War II meant that the United States, as the most powerful democracy in the world, had to take responsibility for maintaining international order and building respect for international rules that could keep the dogs of war at bay and provide space for democracies, ruined by the war, to recover. One had only to recall the images of Hiroshima, Nagasaki, or Bikini Atoll to reinforce the message: nuclear weapons meant that there could be no retreat from the effort to build respect for basic legal principles of international conduct and to construct international institutions to foster and strengthen peace and prosperity. Success would be measured, not only in the number of crises averted but also in the avoidance of nuclear war. This understanding underlay the Cold War division of the world into spheres of influence where two bodies of international law effectively operated. The nuclear reality became perhaps the most important influence on U.S. grand strategy. Concerns about proliferation of nuclear and other highly lethal weapons and fear that proliferation would increase the probabilities of a third, nuclear world war became the central point of U.S. strategy and policies. No administration has trusted nuclear weapons to restrain their possessors. This technological context of international politics helped the United States define its vital national interests, for which it would fight and maintain the means necessary to do so.

U.S. diplomacy and military operations since World War II have taken place as a result of this historical development. Of course, these operations defended an international system that suited American interests. Above all, nuclear weapons exerted hydraulic-quality pressure. They reinforced the need for rules of minimum order, rules the UN Charter articulated and the United States, with or without the formal blessing of the UN Security Council, has defended in the conflicts since World War II: Korea, Vietnam, Iraq in 1991, the Balkans in 1999, and since September 11, 2001, each conflict accompanied by more or more or less controversy. These actions should not obscure the fact that policies of minimum international order, codified in the UN Charter, were the effort of many nations and work for all states. They are neither American nor Chinese, European nor African, but the world’s. At the same time, for the past nearly 70 years, these policies
have driven U.S. foreign actions even when the principal actors and decisionmakers did not use the language of the law to explain their thinking and decisions.

Grand Strategy

Our travelling grand strategist arrives in Washington and is invited to advise the U.S. Government. What is or should be the advice? As a first step in formulating this advice, it is useful to recall first principles:

1. Because of nuclear weapons, peace is the absence of nuclear war.

2. Because of nuclear weapons, the United States may not relapse into isolationism, leaving to unspecified others responsibility for peace.

3. Because of nuclear weapons and because of the kind of people Americans are or like to think of themselves as—people of the law—international law is important to U.S. security and policy because it can strengthen the barriers to international conflict and provide boundaries on those that occur.

4. Because the United States is a democracy, its natural allies are democracies.

5. Because the United States is an island off the Eurasian landmass, it is the natural enemy of would-be hegemonic powers in Europe or Asia.

6. Because, for the moment at least, the United States is the single most important international actor, it is “the critical margin required to make any international collaborative effort succeed.” Others may replace the United States in this role. But for the moment none does—not China, not Russia, not India, not Brazil, not the European Union. The recent Libyan enterprise made this point clear to even the heartiest of skeptics.

These points constitute themes for U.S. policy because they reflect abiding interests rooted in historical experience. They lead naturally to certain conclusions about strategy, diplomacy, and military requirements. For example, the United States needs close diplomatic relationships with the great democracies in Europe and Asia, backed by military capability, to ensure that no power is tempted to follow the example of Napoleon or Hitler or Hirohito. In certain cases—India and Pakistan come to mind—the United States needs energetic diplomacy to prevent rivalries, particularly between nuclear weapons states, from spinning out of control. Why the United States? The risks from inaction, from just assuming that other states will perform this function, are too great.

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The contemporary grand strategist must take account of contextual realities

The United States also needs nuclear deterrence capabilities to have the hope of preventing nuclear war. The United States and Russia seem to share the same or much the same perspective on nuclear weapons, with which they have many arms control treaties going back to the days of the Soviet Union and opposition to nuclear proliferation. Do the United States and China have a common understanding about nuclear weapons and proliferation? Over the last couple of decades, China has transformed a deficient military into one capable not only of dominating its own littoral but also of reaching distant continents through long-range delivery systems with nuclear weapons. China’s public doctrine of minimal nuclear deterrent capability remains as it was in Mao’s time. Has it changed in fact during this period of military modernization? Does the United States or international community more broadly understand how to ensure that North Korea refrains from reckless proliferation and nuclear weapons development? Or how to contain Iran’s nuclear weapons aspirations and wish to
dominate its region using proxies? The same holds true for other countries.

In addition, the contemporary grand strategist must take account of contextual realities. Dominating these realities are high-velocity changes in computing, information technology, nanotechnology, biotechnology, robotics, and cognitive technology, and the sociological changes they bring. The law has not been able to keep up with these changes—not has the grand strategist. It has proved difficult to integrate rapid technological change into strategic thinking. Strategists therefore rely on timeless principles of war and politics and hope they remain relevant in new contexts. Rapid technological change puts particular pressure on defense budgets because the development of new weapons and delivery systems, whether offensive, defensive, or dual-use, takes decades. Costs rise as new technologies need to be incorporated. We are a far cry from the Manhattan Project, development of the Spitfire, or invention of the V1 and V2.

U.S. grand strategists similarly rely on what they hope are still relevant longstanding ideas about U.S. interests and how to defend them. Therefore, the goals of U.S. foreign policy remain what they have been since World War II, that is, the minimization of the risk of great power conflict together with its threat of the use of weapons of mass destruction—nuclear, but also biological and chemical weapons capable of inflicting massive casualties. Consequently, if the United States is not to cede its interest in regional balances of power in Eurasia and the power to project its power to maintain those balances. I understand the need to restore our economic well-being and confidence. The need is particularly acute in this politico-military context. But a choice between needed defense and economic health is a false choice. Our alliance commitments may one day need to be fulfilled. However exceptional Americans may think their country is, the United States has responsibilities for the hope of controlling nuclear proliferation and preventing nuclear conflict. It cannot escape them.

To enlarge on this point, consider China, another state that thinks of itself as "exceptional." For millennia, China thought of itself as the center of the world. Only in recent decades has it talked about itself as a developing power. As it has become an economic behemoth in recent years, it has flexed its political-military muscle. It asserts sovereignty over islands claimed by Japan and Vietnam and indicates no desire for adjudication as a means of peaceful dispute resolution. It claims sovereignty in the South China Sea. All states with coastlines on that sea and all seafaring states disagree with China's position. So far, no resolution is in sight. China is investing heavily in its armed forces and advanced defense technologies. Yet it has no obvious enemies, nearby or far away. The United States, whose armies fought Chinese soldiers in Korea and Vietnam, has no interest in armed conflict with China. At the same time, it would find Chinese domination of Asia and perhaps more than Asia a threat just as it found Japanese and German imperialism a threat. Will the United States have to choose sides? It would be better to manage the relationship. To do so requires reducing American economic dependence on China and maintaining sufficient military strength to deter would-be hegemonial assertions. The United States should conduct itself so that no power, including

*international law is a necessary element of maintaining and strengthening international peace and security and preventing nuclear war*

China, can assume the United States away. As Washington remarked in a less well-known part of his Farewell Address: "Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even [put in] second [place] the arts of influence on the other." The time is more than ripe for the "arts of influence" to have their day.

In addition, the United States should maintain and nurture its existing alliances with democracies in Europe.
and Asia. Those relationships constitute reserve strength in the sense of Thucydides’ analysis of power. They also support the rule of law in international affairs. China in the South China Sea—and elsewhere other states, such as Iran—challenge the rule of law. They must be deterred. But that requires a grand strategy and willingness to maintain defense capabilities. If the United States maintains its capabilities, it will deter would-be aggressors, strengthen international law and order, and help maintain peace.

International law is a necessary element of maintaining and strengthening international peace and security and preventing nuclear war. Skeptics should recall the powerful taboo codified in the Non-Proliferation Treaty of 1968. The Treaty divided the world into nuclear weapons and nonnuclear weapons states. Nonnuclear weapons states undertook not to obtain nuclear weapons in return for a guarantee by the nuclear weapons states against any nuclear threat against states without nuclear weapons. In addition, the nuclear weapons states pledged to work to reduce their arsenals. However real the risk of nuclear proliferation, new nuclear weapons states have to contend with the fact that the international community will not welcome them but coalesce in an effort to understand how to induce the new nuclear weapons state to act responsibly, recognizing that the weapons are not to be used except as a last resort to defend itself, and certainly not as a political stick. Perhaps to reinforce this fact, the 1968 Security Council nuclear weapons states’ guarantee of nonnuclear states against nuclear weapons states should be revised and reissued for present circumstances. China should join it. One does not have to reach back as far as Thomas Hobbes or use his graphic language to understand the point that most law, and international law is no different, needs a policeman to enforce it.15

The history of the Non-Proliferation Treaty and guarantee to nonnuclear weapons states emphasize another aspect of U.S. grand strategy that often is overlooked. To advance U.S. national interests—such as the prevention of proliferation, struggles against terrorism and transnational crime, and the need to protect the environment—requires international cooperation. This fact means leveraging global assets and spreading risks and costs. A substantial number of other international problems, including those requiring regional peacekeeping, invite multilateral approaches as well. Multilateralism from this perspective is particularly practical given the diversity of international threats and challenges. While the United States has vital interests it must and will defend alone if necessary, they are few in number: nuclear and conventional deterrence, fulfillment of alliance commitments, and the like.

If we do not put our strategic thinking caps on, our fiscal managers will determine our interests and our strategy. And, in their bones, they approach international affairs, whether political or military whether diplomatic or strategic, with the words of Hilary Mantel’s Thomas Cromwell firmly in mind: “No ruler in the history of the world has ever been able to afford a war. They’re not affordable things. No prince ever says, ‘This is my budget; so this is the kind of war I can have.’ You enter one and it uses up all the money you’ve got, and then it breaks you and bankrupts you.”16 Grand strategy is too important to be left to chief financial officers—or, one might add, to international lawyers, although I would argue they have much to contribute.

Conclusion

We live in a world of rapid change. Despite claims to the contrary, certain institutions, such as the state, show resiliency. Accordingly, the law governing their relations with each other must be equally resilient. New challenges emerge in each historical and technological period. Because the law is not ossified, whether domestic or international, policymakers and citizens alike turn to it for help in sorting through competing priorities and challenges. It is instrumental to strategy, and strategists should appreciate this feature of law. That is its strength and the reason why it is important—and why it is a process of authoritative decision through the identification of participants, objectives and values, methods and claims.

Strategists and students of strategy often deny the relationship between law and strategy. Yet the international political system in Europe that emerged from the Roman
Empire developed rules and habits within which grand strategists considered their goals and means for achieving them. It became a system of law in development, as the commentaries of Grotius and his successors showed. In addition, of course, there were specific grand strategic decisions with legal consequences. They built and globalized the present international legal and political regime, which is supposed to serve all states. However exceptional a state may believe itself to be, its stake in this regime is real, as it finds out when its independence is threatened.

Since World War II, international law, broadly understood, has never been far from U.S. policymaking and grand strategy because it has been consistent with U.S. interests in the balance of power in Eurasia and the prevention of another world war. When Iraq invaded and purported to annex Kuwait in 1990, the international community rallied, not out of love for Kuwait, but in order to preserve the bedrock principles of international order, of vital interest to every state, that aggression cannot be allowed to prevail.

Similarly, the North Atlantic Treaty Organization campaign in Kosovo in 1999, carrying out a threat made by President George H.W. Bush in 1992, preserved the postwar arrangements in Europe. President Bush had stated that, while the United States had no vital interest in the outcome of the breakup of Yugoslavia, the use of force against Kosovo could not be tolerated. President Bill Clinton acted on his predecessor’s insight because both Presidents understood that a failure to protect Kosovo would allow aggression in the center of Europe to succeed. That the aggression technically did not cross international boundaries did not negate the conclusion that, if tolerated, Europe’s post–World War II order would be threatened.

Of course, at various times in the history of the Arab-Israeli conflict, the United States worked to contain conflict. The reason is simple: the goals were to avoid nuclear confrontation and preserve a balance of power that would permit the international system to function according to law as an essential interest of every member of the international system. These goals, which are both legal and strategic, remain core elements of U.S. grand strategy and foreign policy. They have and should continue to guide us as we make a new grand strategy for our times.

Notes


4. Cfr. Morton A. Kaplan and Nicholas deB. Katzenbach, The Political Foundations of International Law (Hoboken, NJ: Wiley, 1961), 3–6. “Perhaps the purest analytical concept of ‘law’ is that in which an impartial judge objectively applies a pre-established rule to decide a controversy. And perhaps the purest analytical concept of ‘politics’ is that in which the stronger influence or interest regulates the social distribution of values. In the real world, however, judges cannot avoid exercising at least some political discretion in the decision of cases. And in any stable political system, the political process is also subject to normative constraints.... We must speak of the ‘rule of law’ or a ‘government of laws,’ we clearly do not mean the rule of judges or a government of judges. We are talking about the larger, formal process, through which members of the society pursue and realize values in an orderly way.”

5. In the 19th century, John Austin argued that law required a hierarchical structure to exist, thus negating the possibility of international law. Ibid., 6.

6. Henry Kissinger sees legitimacy in international relations as “no more than an international agreement about the nature of workable arrangements and about acceptable aims and methods of foreign policy. It implies the acceptance of the framework of the international order by all major powers, at least to the extent that no state is so dissatisfied that, like Germany after the Treaty of Versailles, it expresses its dissatisfaction in a revolutionary foreign policy.... Diplomacy in the classic sense, the adjustment of differences through negotiation, is possible only in ‘legitimate’ international orders.” Henry A. Kissinger, A World Restored: Metternich, Castlereagh, and the Peace of 1812–22 (London: Weidenfeld and Nicolson, 1957), 1–2. See also Kissinger, Diplomacy (New York: Simon & Schuster, 1994), 82.


8. Ibid., Art. 39.

9. For example, by Article 25 of the UN Charter, states agree to carry out the decisions of the UN Security Council. Ibid., Art. 25. With respect to the judgments and opinions of the International Court of Justice, states “undertake to comply with the decision of the International Court of Justice in any case to which it is a party.” Ibid., Art. 94, para. 1. No similar requirement binds the entire international community, or even those UN bodies that request and receive advisory opinions of the court. Ibid., Art. 196.


32 One of the most insightful observers of the UN realities had this to say as a caution: "I found it very difficult and exciting to write about the UN, that complex and unpredictable institution, which is at once and the same time intimately immersed in world events and yet prudently self-contained—truly, a 'play within the play.'" Pascal, if he had lived in our times, might well have written the definitive book about the United Nations—and perhaps would have concluded that the UNU a de raison que la raison ne connaît pas." Hernane Tavares de Sá, The Play Within the Play: The Inside Story of the UN (New York: Knopf, 1966), ix.


34 Traditional definitions simplify the ways in which states consent to be bound by international legal obligations.

35) International Court of Justice Statute, Art. 38.

36) Nothing requires a state to join a treaty, and probably no state is party to 158,000 treaties.

37 Opprobrium, more than prosecutions, has proved a powerful agent for positive change in the wake of U.S. violations of international law in the past decade and before.

38 This moderation did not extend to the European empires. See Isabel V. Hull, Absolute Destruction: Military Culture and the Practice of War in Imperial Germany (Ithaca: Cornell University Press, 2005). It did mean, however, that conflicts among empires in Africa, for example, were not allowed to escalate, as the Fashoda crisis, among others, provides an example.

39 One might note that the ferocity of the U.S. Civil War showed the direction war was likely to take when the Great Powers again engaged in battle. They seem to have ignored the warning.


41 These proceedings represent more than victor's justice and less than the universal application of one law. They might best be understood as steps toward a universal view that does not presently obtain and may never obtain. Yet as Amin Maalouf writes, "It is an unforgivable error to compromise on fundamental principles on the principle that others are not ready to adopt them. There is no one set of human rights for Europe and another for Africa, Asia, and the Muslim world... every time this fundamental truth is overlooked, we betray humanity and we betray ourselves." Times Literary Supplement, January 20, 2012, 13.


43 UN Charter, Art. 2, paras. 1 and 4; Art. 51. Article 51 is worth quoting because its construction has been the subject of academic and diplomatic exchanges: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." See, inter alia, Nicholas Rostow, "International Law and the Use of Force: A Plea for Realism," Yale Journal of International Law 34, no. 549 (2009).

44 UN Charter, Art. 2, para. 6.

45 One needs to distinguish between the charters that codified overriding and fundamental norms and the organization it created, which has been the subject of much criticism, particularly in the United States.

46 The reference is to George F. Kennan's celebrated article, "The Sources of Soviet Conduct," published under the pseudonym "X" in Foreign Affairs in July 1947.

47) This is not the place to analyze the constitutional meaning of executive agreements or other agreements, which also are treaties for purposes of international law.


51 To be contrasted with global government.

52 Truman made it the central theme of his administration and memoirs. See Harry S. Truman, Year of Decision, vol. 1, Memoirs (Garden City, NY: Doubleday, 1955), xi.


54 It is interesting to compare the time necessary to produce the revolutionary vessel, the Monitor, during the Civil War, with the lead times required for contemporary advanced weaponry. See John Tierney, "A Brief Dry Spell for the U.S.S. Monitor," The New York Times, August 8, 2011, available at: www.nytimes.com/2011/08/09/science/09monitor.html?pagewanted=all.

55 Thomas Hobbes, Leviathan, 1651 (Menlo Park, West Yorkshire: Scolar P., 1969), chapter XVII: "And covenants, without the sword, are but words and of no strength to secure a man at all."


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Director, Center for Strategic Research

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Law Abiding
Restoring America’s Global Reputation

Nicholas Rostow

For decades, the United States was the loudest advocate of international relations according to law, as well as the scourge of the Soviet Union as a consistent and frequent violator. Today, America has become a symbol of international lawlessness. This phenomenon may owe much to the workings of the balance of power, whereby coalitions of states form against the strongest in order to impose views of the law that impede its freedom of action. Nevertheless, criticism of the United States on international law grounds is especially notable because of the very nature of the United States as a country: the United States is defined by law. Its oaths of citizenship and office holding are pledges to the Constitution, not to a flag, not to a territory, not to the mother- or fatherland, and, of course, not to a sovereign. The law defines who an American is, and it binds each of us to every other.

That is part of the reason why the United States cannot long sustain foreign policies at odds with international law: In the end, Americans will not support them. The American people ask "Is it legal?" before they ask any other question about foreign policy actions short of self-defense against direct aggression. So whatever one may think about the nature of international law, the next administration will have to address the sullied international legal image of the United States. To prepare for this task, we should review the record.

Why International Law Matters

In the wake of World War II, the relevance of international law was obvious. The human cost of the breakdown of international law and order in 1914 and during the 1930s answered the question. The attack on Pearl Harbor killed isolationism as a respectable American position. What it meant was that the United States, as the most powerful democracy and perhaps the most powerful country in the world, had to take responsibility for maintaining international order and building respect for international rules that would keep the dogs of war at bay. One had only to recall images of Hiroshima, Nagasaki or Bikini Atoll to reinforce the message: Nuclear weapons meant there could be no retreat from the effort to build respect for basic legal principles of international conduct and to construct international institutions to foster peace and prosperity. Success would be measured not just in the number of crises averted, but in the avoidance of nuclear war.

One also did not have to explain that the United States was a rule-of-law society and country. The Constitution itself specifies the special place in American law of international law. Article VI provides that treaties are part of "the supreme Law of the Land", so they are jus-
tifiably difficult to sign and ratify. Since the Declaration of Independence and Washington’s Farewell Address, American legal and moral values were there for all to see, and where they were not, Americans were the first to trumpet them. Americans have struggled to fulfill their own legal and moral aspirations and have paid the price for their failings. The price has often involved much blood and treasure: the Civil War, the ongoing struggle for civil rights, the never-ending struggle to establish legal equality for all, and the equally long-lived effort to ensure that no person is above the law, to name the most obvious. All of our efforts to dictate the rule of law have occurred in public, open to the critical assessment of the entire world. Indeed, a watchful world often has been part of the process of vindication, and it is now.

Since the end of the Cold War, we have lived in a Golden Age of international law. There are more treaties covering more subjects and more international organizations than ever before. But we are not concerned here with the kind of international law that means a person with a bank account in Dar es-Salaam can withdraw money from an ATM in New York, Tokyo or Beijing, valuable though it may be. We are concerned, rather, with bodies of law such as those governing the international use of force. These are frequently disparaged or dismissed as non-existent. Even though it has been centuries, if not millennia, since the law truly has fallen silent during the clash of arms, some voices proclaim that such law does not really exist, that it is feeble admonishment, cannot be enforced and has no standing comparable to law within civil society. The United States, on the contrary, has always held that such law does exist and that it is vital to America’s survival.

In the 19th century, the United States was the first country to codify the laws of war, and it was the leading voice for international treaties to outlaw specific classes of weaponry and create international organizations to strengthen peace. In the 20th century, U.S. leadership was indispensable to the creation of the League of Nations, just as our unwillingness to participate in it was a central cause of the League’s failure. Similarly, U.S. support was essential to the creation of the United Nations, and U.S. participation and leadership has been central to such successes as that institution has achieved.

These bodies of law and these organizations are important, not for sentimental but for practical reasons. Respect for the fundamental rules of the UN Charter—such as the prohibition on the threat or use of force against the territorial integrity or political independence of any state—represents a core protection of peace within a system of independent states. Universal respect for this rule alone would do much to reduce international tensions and the risk of war, and to increase prospects for international cooperation—including cooperation to eliminate terrorism by non-state actors.

For all its warts, the UN has spread out the costs of peacekeeping operations, fed millions of hungry and provided legitimacy to the proposition that aid or comfort given to terrorists violates international law. These points were taken for granted during the Cold War, as U.S. officials, among others, understood that international law was part of the fabric of international society that helped reduce the risk of nuclear war. Strengthening the law—defending the law—adopted lessons learned in the brutal first half of the 20th century to the nuclear age. So, to be so wistfully accused now of having forsaken these understandings and policies is severe criticism indeed.

Doubting America

Iraq, Israel, Kosovo, the International Criminal Court, the Kyoto Protocol, the Land Mines Convention, the Law of the Sea Convention. The list is not quite endless, but it evokes a succession of crises or issues or, what is worse, mistakes such as Abu Ghraib, that have given the United States an international legal black eye. The use of private contractors to conduct governmental security functions has given the United States a domestic law black eye, as well.

But the real sin is that most of the time the

1Of course, the United States has a history of making complicated and even uncertain the meaning of this idea. Without getting into the debate about the degree to which treaties are “self-executing”, one is safe in saying that, under the Constitution, the United States is bound to obey the terms of treaties to which it is a party.
problem: U.S. policymakers too often do not take the law seriously, and lawyers too often do not address real policy concerns in their legal analyses.

A Return to Basics

There are three steps the next president and secretary of state should take that would have a positive impact on America's image as a state that abides by the rule of law both at home and abroad. Some of them might produce results quickly; some require longer-term commitments of diplomatic and political resources. All are important and deserve the attention of the best an administration has, not the second string.

First, the president could direct the armed forces and the rest of the U.S. government to return to first principles (Geneva and Hague) with respect to the treatment of prisoners. Second, the president and the secretary of state could engage with the Senate to obtain approval of the Law of the Sea Convention. Third, they could direct a top-flight negotiating team to engage friends and allies—mainly our European Union allies—on the issues we have with existing treaties to which we are not a party, with a view to achieving appropriate changes in order to become parties. In all cases, the president and the secretary of state should explain U.S. views on these and other subjects in terms of law as well as politics.

Prisoners: The treatment of prisoners is an obvious example of U.S. international law problems at several levels. First and foremost, it has been a self-inflicted political and legal disaster for the President and the country. A good place to start to put matters right looking to the next administration is to apply to prisoners in the so-called war on terror the law as we would like it applied to Americans when they are held as prisoners.

It may be that, as a matter of legal theory, the Geneva Conventions apply only to armed conflicts among states, and the existence of non-state terrorist fighters does in truth create a legal no-man's land. Someone engaging in armed conflict, or helping others to do so, without meeting the Geneva Convention standards for combatant status, however, fails a
legal test and becomes subject to prosecution. The more rational and formal the process for making such determinations of legal status the better, and it is not difficult, certainly not for the United States, with armies of lawyers at its command, to conduct appropriate proceedings to make the necessary determinations.

The Bush Administration has not done this. It has instead invoked national security arguments in order to keep judgments about prisoner status out of public view, and these judgments are beholden to no obvious process of review. Others have argued in the Administration’s favor that these kinds of proceedings are time-consuming and anyway not required by U.S. treaty or statutory obligations. One also frequently hears the argument, including with regard to creating specialized national security courts, that this area of law is hyper-technical. In fact, it is no more technical than any other body of law, and a good deal less so than most. Moreover, U.S. courts have addressed issues touching on national security matters at least since the days of Shay’s Rebellion, with no notable diminution of the nation’s security. And, of course, the Supreme Court is not a specialized court, yet it decides cases arising from specialized courts.

If a formal process determines that a prisoner is not entitled to prisoner-of-war status under the Geneva Conventions, then one has to dispense justice without unreasonable delay, and with all the proper safeguards vouchsafed by the Constitution. Holding prisoners in places beyond the reach of the Constitution, such as in Guantanamo, is obviously meant as a way to avoid the obligations required by it. What dismay many friends of the United States abroad is the simple fact that those who took an oath to defend the Constitution of the United States—and who are the highest legal officials of the land—should go out of their way, in broad daylight, as it were, to devise stratagems whose purpose is to evade that Constitution.

If a formal proceeding determines that a captured combatant is entitled to the protections of the Geneva Convention, then we are on more familiar terrain—or we should be. At the operational level, the United States has traditionally trained its armed forces to treat prisoners in accordance with the 1949 Geneva Conventions, especially so following the Vietnam War. One goal was to make the job and the guidance pertaining to it as simple and clear as possible, so that individuals did not have to exercise judgment beyond necessity. The Conventions are reasonably easy to follow and apply. These facts made the Abu Ghraib revelations all the more shocking.

In addition to the proscription against degrading or inhumane treatment, the Convention against Torture and U.S. law ban torture. No one can say with precision that any particular interrogation technique violates the torture ban, but an arguable case for a technique’s legality is hardly enough to commend it. As the strongest and most insistent guardian of Western civilization, the United States needs not just clean hands, but cleaner hands than others, if it takes that role and responsibility seriously.

As a result, before determining the status of those captured and certainly after—while they are awaiting criminal proceedings or incarceration as privileged combatants—prisoners have to be treated somehow, and the more humanely the better. And in determining what that somehow should be, we could do a lot worse than to focus on what works. Professional interrogators assert that all one needs is time to obtain reliable information from most prisoners. Vasily Grossman’s Life and Fate provides ample evidence of what one can obtain with torture: anything one wants to hear. The evidence from our own experience, not least in World War II, suggests that treating prisoners better than they expect to be treated generates more cooperation than threatening torture, or actually engaging in it.

We have heard arguments to the contrary, including some holding that the special problem of terrorism requires the use of unsavory methods of interrogation in order to save lives. If it ever carried weight, this argument has long since lost its luster. One only has to recall the infamous internment of Japanese-Americans during World War II to realize how judges can behave when confronted by wartime conditions and unsubstantiated claims of threats to national security. It is therefore not enough for officials to claim, as the Vice President did most recently on October 21, that information obtained by torture has saved lives, without specifying exactly how. Even if one could demonstrate that torture worked, one would need to show that other methods could not have
worked as well as readily. No one has made either demonstration.

The treatment of prisoners has become a subject of debate in part because of the need to categorize persons seized in the course of counter-terrorism operations. Different countries are bound by different bodies of relevant law. For example, the United States is bound by the Hague and Geneva Conventions, by the customary law of war, and by its own domestic law. In addition to the Hague and Geneva Conventions, most other countries are bound by the 1977 Geneva Protocols I and II, to which the United States is not party—correctly, in my view—in part because Protocol I arguably gives combatant, and hence prisoner-of-war, status to terrorists. The next administration should therefore call for a new international conversation on the issue of categorization. The aim should be to bring effective and agreed rationality to a difficult problem by the end of the next presidential term in January 2013. Such a conversation would not make the struggle against terrorism more difficult, and it would show that the United States is concerned about conducting that struggle within the rule of law.

The Law of the Sea: Diplomats, commentators and non-governmental organizations view acceptance of certain treaties as a litmus test of a state’s commitment to law. The Law of the Sea Convention, awaiting U.S. adoption for more than a decade, is one such treaty. The next president and secretary of state would do well to push it through if it is not ratified before they take office.

That the Law of the Sea Convention serves U.S. interests is evident from the fact that, even without being a party, the United States follows its tenets anyway. But it does so without one of the principal protections that would result from adoption: the guarantee that other parties will treat America according to the terms of the treaty. Adherence to the Convention would give the United States a stronger hand in asserting freedom of the seas. More important, it would affirm treaty rules that are superior to those that exist in customary law or prior treaty law with respect to innocent passage through straits and archipelagoes and the exploration of seabed resources. Accession would thus simultaneously benefit U.S. interests and the rule of law itself.

By not adhering to the Convention, the United States loses important fruits of diplomatic success. We impede our own ability to insist that the rule of law governs the oceans—a rule of law that reflects successful achievement
of our negotiating agenda and that serves our interests as a premier naval and sea-going power. We sacrifice our ability quickly to advance the development of resources beyond 200 nautical miles (approximately 15 percent of our continental shelf). By not adhering, we do not sit on the International Seabed Authority when the Convention gives the United States, and only the United States, a permanent seat and a veto, thus recognizing and acceding to the U.S. price for participation. In any event, the International Seabed Authority’s jurisdiction is narrow, focused only on deep seabed mining, not control of the oceans, where no state has national territorial rights.

If all this is true—and it is—why do some advocate rejection? Criticisms of the Convention—that it creates supranational bodies that detract from the sovereignty of the United States (or other states), that it transfer taxing power to the United Nations, or that it impedes U.S. national security operations on the high seas or deep seas—have no basis in fact. The Navy, the Coast Guard, even the Senate, know these assertions to be false. Yet one reads essays to the contrary signed by authors who should know better.

**Crimes, the Environment and Mines:** While adherence to the Law of the Sea Convention ought to be an easy rule-of-law “win” for the United States, the Rome Statute on the International Criminal Court, the Kyoto Protocol and the Land Mines Convention require a different approach. These issues have become exhibits for the proposition that the United States is opposed to international law and the rule of law in international affairs. This accusation is unfair.

While there are those who will never accept anything less than full U.S. ratification of these treaties on an “as is” basis, the next administration must still explain to our allies and friends why we cannot accept these texts as they are, and specify what changes would make them acceptable. The United States might not succeed in the way it did with the Law of the Sea Convention, but at least it will have made its case known and shown itself to be interested in international conventions on the subject. The reason for this attitude is neither sentimental nor symbolic: The problem of horrific, criminal conduct in international affairs is real; the problem of climatic change is real; and the problems generated by landmines are real, too. The solutions to all these challenges require multilateral approaches. U.S. participation is essential to success, not because the United States is the “sole superpower” but because, alone for the moment, the United States is the “critical margin” required to make any international collaborative effort succeed.

The U.S. objection to the International Criminal Court has three elements. First, the Court is not accountable. Unlike a domestic court, which is accountable within the domestic political system, the International Criminal Court is accountable only to the Assembly of States Parties to the Rome Statute, which means in practice that it is not accountable at all. The consequence is that there is no real oversight of how it exercises its authority to review decisions by governments of whether and how to investigate, prosecute and sentence defendants. Second, there is no appeal from its decisions outside the structure of the International Criminal Court itself. And finally, there are no guarantees of trial by jury or due process and protections against multiple jeopardy, as required by the Constitution. Defenders of the Court respond to these criticisms without evoking legal principles; rather, they point to the officials chosen for the Court and the views of its supporters as “guarantees” that the Court will not go off the rails.

The United States should try again to persuade its allies and friends that our points of dissent must be addressed. At a minimum, the United States could propose, as a pilot program, a scaled-back International Criminal Court, one that could operate only at the behest of the UN Security Council and be accountable to it, just as the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda are accountable to it. The Security Council, not the International Criminal Court, should be the judge of the political considerations and consequences of introducing the Court into a situation of conflict or political turbulence. If such a pilot program were to succeed, one could then re-evaluate the idea of a more independent international court. At the moment, the International Criminal Court is a world-governmental institution with no world government to control it.

The Kyoto Protocol is equally problematic. Multi-faceted and multi-layered interests throw
up obstacles to achieving consensus on the right way to balance growth and environmental sustainability in a world of enormous economic and social variation. Yet the effort is worth undertaking. The Kyoto process resulted in some countries feeling that they were the targets of rules whose real purpose was less ameliorating climate change than constraining the U.S. economy. It is almost impossible to imagine a U.S. Senate agreeing to a treaty that it believes to be unfair to the United States.

Avoiding this outcome will require a different negotiating strategy. Perhaps the lessons learned and applied between 1919 and 1945 can serve as an example. In the case of the United Nations, the United States did not repeat Woodrow Wilson’s tactical errors with the Senate. Rather, Roosevelt made sure that the Senate was on board and involved at each stage of the process. As a result, the UN Charter was ratified without a hitch. That should be the goal with respect to any new convention on climate change. No one can guarantee in advance that the Senate will approve a treaty, but one can keep senators fully informed of the progress of a negotiation, just as one can use the fact that two-thirds must approve an eventual document as negotiating leverage.

Similarly, the United States should reexamine the Land Mine Convention to see if some kind of accommodation can be reached. Among the obstacles, of course, is our dependence on mines to protect the demilitarized zone on the Korean peninsula. On the other hand, land mines and anti-personnel mines have been the instruments of terrible, indiscriminate destruction and usage contrary to the laws of war. A way forward might be to reinforce the existing international prohibitions on indiscriminate use of such weapons. The goal would be to allow appropriate defensive use of self-deactivating devices, but not permit the kind of indiscriminate use that has caused great suffering for non-combatants in the past.

None of these ideas provides an easy way ahead for the next president. That is why a first-class negotiating team will be needed to advance them. Our goal should be to have all of these current elements of the damaged U.S. international legal reputation—the applicability of the Geneva Conventions to non-state actors; the Law of the Sea Convention; and the follow-on treaties to the Kyoto Protocol and the Land Mines Convention—settled by January 2013. That may seem like a long time from now, but it is not. We will have our hands full with this agenda alone, not to mention other unforeseen legal issues that may arise along the way.

Restoring the reputation of the United States as a rule-of-law country means working with friends and allies, even occasionally adversaries, to strengthen existing legal norms and develop new ones that ultimately serve the interests of the entire world. That was the hallmark of the UN Charter’s prohibition on the threat or use of force. It has been a standard all have come to recognize as serving their interests, not just the interests of the victorious powers of World War II.

The nuclear non-proliferation regime is an example of an international law development that serves the entire international community. Despite frequent criticism of the 1968 Non-Proliferation Treaty as a failure, any new nuclear weapon state immediately encounters worldwide condemnation for becoming one. This fact testifies to the broad consensus that the world is safer with fewer rather than more numerous nuclear weapons states. It also suggests that the United States can build up the rule of law against proliferation by reminding the international community that it understands and continues to accept the obligation to protect and if necessary defend non-nuclear weapons states against threats of intimidation by any nuclear weapons state—and certainly never to issue such threats itself. That promise, more than any pledge to disarm, is the glue of the non-proliferation regime. Reaffirming the commitment made at the UN Security Council in 1968 might go a long way toward stabilizing the non-proliferation regime and restoring the U.S. rule-of-law reputation.

The effort to restore the reputation of the United States as law-abiding is worth undertaking because the rule of law and true security are ultimately inseparable. The erosion of that reputation has not been the fault of any single party—Democratic and Republican Presidents alike have been cavalier about the law. Restoring our reputation, therefore, should be a bipartisan goal.
THE LAWS OF WAR: AND THE KILLING OF SUSPECTED TERRORISTS:
FALSE STARTS, RABBIT HOLES, AND DEAD ENDS

Nicholas Rostow*

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I. INTRODUCTION

The variety of circumstances in which individuals and governments have used terror to advance their goals suggests there

1. I prefer this older term to the Law of Armed Conflict ("LOAC") or International Humanitarian Law ("IHL"). The "Law of War" is more specific and knowable. For example, the International Committee of the Red Cross (ICRC) prefers the term International Humanitarian Law. Yet the ICRC does not regularly distinguish in speech or documents among countries that are not parties to conventions, such as the 1977 Protocols I and II to the 1949 Geneva Conventions. Nor does the ICRC recognize that its views of the customary laws of war have invited criticism by states and commentators alike. See generally 71 INTERNATIONAL LAW STUDIES, THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM (Michael N. Schmitt & Leslie C. Green eds., 1998) (containing nineteen articles on LOAC).

* Distinguished Professor, Senior Director, Center for Strategic Research, National Defense University. Member of the New York and District of Columbia Bars. B.A., 1972, Ph.D (history), 1979, J.D., 1982, Yale University. The views expressed are my own and do not necessarily represent those of the National Defense University, the Department of Defense, or any other institution of the U.S. government. Ashley E. Dean, class of 2013 of the University of North Carolina School of Law, ably assisted in the preparation of this paper for publication.
must be an array of lawful responses. While the justice system
seems adequate on practical, as well as conceptual grounds, to deal
with Timothy McVeigh and his ilk, how should states treat members
of groups like Hamas or Hezbollah or al-Qaeda? Those entities fit on
a spectrum of organizational maturity from governmental to armed
band. They use terrorist tactics as a normal way of conducting
hostilities because they offer the best chance of success at low cost to
themselves. Counterterrorist operations, whatever their nature, are
far more costly than terrorist operations. That is part of the nature
of asymmetric warfare. Terrorism also creates a reputation for
violence that by itself intimidates and thus helps achieve political or
diplomatic goals. Are these groups governed by the same body of
law? Do the laws of war, for example, apply and, if so, the law of
international or non-international armed conflict? If neither applies,
how should governments and their armed forces, which espouse the
rule of law, handle such issues as targeting and detention? Does
physical location of the group and ease of access dictate whether one
should use military force or the police in the effort to enforce the law
against terrorists? Are terrorists on a spectrum, allowing
governments to use a particular tactical response depending on the
particular circumstance? For example, could a government
reasonably use police, intelligence, or military tactics against the
same person or group depending on their location and how they
operated? And, what of their supporters: financiers, chauffeurs,
families, flacks, and others more or less directly connected to
terrorists and their activities?

Governmental tactics and public concerns underline the
relevancy of these questions. For example, in recent years, the
United States in its battle with al-Qaeda has confronted dilemmas
about how to treat captured terrorists or suspected terrorists. The
results have been unsatisfactory. Some have been held in
Guantánamo Bay, presumably in the belief that the U.S.

2. Differentiating McVeigh and those like him as individuals with more personal
agendas as opposed to the broader political goals and activities of formal terrorist
organizations. See Anne-Marie Slaughter, Beware the Trumpets of War: A Response to
Kenneth Anderson, 25 HARV. J.L. & PUB. POL’Y 965, 971-72 (2002); George P. Fletcher,
On Justice and War: Contradictions in the Proposed Military Tribunals, 25 HARV. J.L.

3. See, e.g., Eyal Benvenisti, The Legal Battle to Define the Law on Transnational
Asymmetric Warfare, 20 DUKE J. COMP. & INT’L L. 339, 339-40 (2010); Eyal Benvenisti,
Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against

4. I observed this phenomenon at the United Nations, where small countries
acted out of a sense of vulnerability to terrorism rather than out of conviction or policy.
Senegal reportedly broke diplomatic relations with Israel after the Six Day War in
June 1967 because President Nasser of Egypt threatened to kill Senegalese
ambassadors around the world.
Constitution and its protections for defendants did not apply there. The United States has not granted these detainees prisoner of war status out of the mistaken belief that doing so would prevent interrogation and perhaps prosecution for prosecutable war crimes, thus changing their status from persons subject to prosecution. Others have been held by foreign governments, whose rules of criminal procedure are different from those of the United States. Others have simply been killed, perhaps in order to avoid having to deal with detention and its attendant controversies. It is past time to clarify legally permissible options and consequences.

The first part of this Article identifies different results if al-Qaeda, for example, controlled a state—let us call it Al Qaeda county for these purposes—if al-Qaeda is a true nonstate actor with no state support, and if al-Qaeda is a voluntary organization that operates with the knowledge and support of governments or parts thereof.

The second part takes up three examples of analysis: the U.S. Department of State Legal Adviser's defense of U.S. counterterrorism policy as a matter of international law; the critique by Professor Philip Alston as “Special Rapporteur on extrajudicial, summary, or arbitrary executions” of the UN Human Rights Council; and the analysis by John Bellinger, former Legal Adviser to the National Security Council and Legal Adviser to the U.S. Department of State. The final part will take up the case for leaving the Geneva Conventions alone and for applying common sense to the problems evoked by terrorists of the nongovernmental stripe.

I. TERRORISTS AND TERRORIST STATES

Al-Qaeda's attacks on the United States on September 11, 2001, seemed to end the debate about whether terrorists are subjects of criminal law only or also are legitimate, lawful military targets depending on the circumstances. As time has passed and military operations against suspected terrorists have continued with a high degree of lethality, doubts about the lawfulness of such counterterrorist methods have displaced certainty.

At the time of his death, Osama bin Laden and al-Qaeda did not control a state; at the time of the September 11, 2001 attacks, they appeared to have done so, or at least to have had sufficient influence in Afghanistan as to amount to control. In any event, their control or lack of control of a state does not determine the permissible range of responses under international law. Rather, a state victim of an armed attack emanating from another state, whether or not conducted by members of the state's armed forces, may have a right to use force in self-defense depending on the ability of the state from which the attacks emanated to prevent additional attacks and to
punish the perpetrators. The customary law principles of necessity and proportionality govern actions taken in these circumstances.  

This conclusion is independent of whether or not the Geneva Conventions of 1949 apply or are deemed to apply; indeed, terrorists like bin Laden, as a formal matter, fall outside the protections of the Geneva Conventions of 1949. Such individuals do not meet the Conventions’ definition of a combatant, which in relevant part is as follows:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

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6. States must apply the Geneva Conventions, whether or not they are a party, because the international community universally accepts them as part of customary international law and because so many states are parties to them. See, e.g., DOCUMENTS ON THE LAWS OF WAR 196 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). At the same time, states may decide to apply the Conventions even in the event that the other side is not a state or does not meet the criteria for combatant status. See infra text accompanying note 16.

7. See Article 2, common to the four Geneva Conventions; see also, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (who, as a matter of law, is a combatant and entitled to prisoner of war treatment).

8. Third Geneva Convention, supra note 7, art. 4. Professor Amos N. Guiora of the S.J. Quinney College of Law, the University of Utah, has summarized the Conventions’ definition clearly. See Amos N. Guiora, Determining a Legitimate Target: The Dilemma of the Decision Maker, 46 Tex. Int’l L.J. (forthcoming Aug. 2011) (citing Third Geneva Convention, supra note 7, art. 2), available at http://iscru.com/abstract=1805130 (“According to the traditional law of armed conflict, in order to be defined as a lawful combatant—and thus a person who may rightfully be identified as a legitimate target on the battlefield—a participant in a conflict must wear a uniform, carry his weapon openly, belong to a chain of command, and have readily identifiable insignia.”). Al-Qaeda, operating from Afghanistan in September 2001, may have “belonged” to Afghanistan for purposes of this Article.
In addition, "[e]very prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information." Article 3 common to the four Geneva Conventions makes clear that a state is free to apply the Geneva Conventions as a matter of policy choice in cases where it is not formally required to do so. For this reason, the Article sets forth minimum standards for treating enemy fighters.

a. Al Qaeda country

It is conventional wisdom that al-Qaeda is a nongovernmental organization, a nonstate actor. What if it were a state—Al Qaeda country—with a territory to control and foreign relations to conduct? Al Qaeda country's attacks on the United States on September 11, 2001, would have been unlawful uses of force, in violation of Article 2, paragraph 4, of the UN Charter. The United States would have had the right to strike back with military force, a necessary response to an unprovoked attack that left little reasonable basis for thinking another approach would bring an end to the threat of more such attacks. The United States could use a quantum of force reasonably calculated to bring to an end the situation that gave it the right to use force in the first place—a proportional use of force. U.S. Armed Forces would have to conduct themselves according to the U.S. Uniform Code of Military Justice, of course, which incorporates into U.S. law the 1949 Geneva Conventions and other customs and usages of war. As such, U.S. Armed Forces would have to discriminate between military and civilian targets and use only the force reasonably necessary to achieve the lawful military goal of bringing to an end the threat of continued attacks against the United States by Al Qaeda country.

In these circumstances, Al Qaeda country forces, wearing uniforms and conducting themselves under command in accordance with the laws and customs of war, would be combatants enjoying the status of prisoners of war on capture. As such, they would not have

9. Third Geneva Convention, supra note 7, art. 17.
10. Id. art. 3.
11. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").
12. See Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006) ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' . . . including, inter alia, the four Geneva Conventions signed in 1949.") (citation omitted) (quoting Ex Parte Quirin, 317 U.S. 1, 28 (1942)).
to respond to questioning beyond identifying themselves, but they could be questioned.\textsuperscript{13} They could be detained until the end of hostilities.\textsuperscript{14} If there was evidence that they had been involved in carrying out the September 11, 2001 attacks, they would be subject to prosecution as accessories to intentional targeting of civilians, which would violate a principle embedded in the Geneva Conventions and the contemporary law of war.\textsuperscript{15} Thus, the defendants would have to answer charges that they had engaged in grave breaches of the 1949 Geneva Conventions—which are accepted as customary law binding on all states whether or not parties to them\textsuperscript{16} and other applicable law. If they were tried, convicted, sentenced, and imprisoned, they would return to prisoner of war status at the end of the sentence in the event the conflict had not ended and prisoners were not returned home.\textsuperscript{17}

Given Al Qaeda's country's history of using terrorism as an instrument of national policy, the question arises whether overthrowing the regime is a lawful purpose of military force used in self-defense. If it were reasonable to conclude, taking into account the totality of the circumstances, that leaving the government of Al Qaeda's country in place, although its armed forces were defeated, would not bring to an end the threat of additional terrorist attack by Al Qaeda's country, then removal of that regime arguably would be a lawful use of force in self-defense in response to the initial attacks.

\textbf{b. Al-Qaeda as Nonstate Actor}

Of course, so far as is known, there is no state of Al Qaeda's country. The United States and other victims of Al Qaeda's terrorism have had to deal with irregular forces. Al-Qaeda has "declared war" on the United States.\textsuperscript{18} Yet the use of military force against Al-Qaeda, including its leaders and supporters as well as those undertaking or preparing to undertake terrorist attacks, raises questions that do not arise in the event of armed conflict with another state. At the most basic is the question why may one use lethal force against Osama bin Laden and not against, for example, Al Capone (except in self-defense or to prevent lethal force being used against another)? Both engaged in criminal conduct. But of the two,

\begin{itemize}
\item \textsuperscript{13} Third Geneva Convention, supra note 7, art. 17.
\item \textsuperscript{14} Id. art. 118.
\item \textsuperscript{15} See id. art. 82.
\item \textsuperscript{16} See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27) (stating the Court may apply the Conventions on its own initiative, even when they are not invoked).
\item \textsuperscript{17} See Third Geneva Convention, supra note 7, art. 118.
\item \textsuperscript{18} See, e.g., LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 307 (2006) ("The bombings would be worthy of bin Laden's grandiose and seemingly lunatic declaration of war on the United States . . . ").
\end{itemize}
only Osama bin Laden had a political agenda and proclaimed his
determination to use force against the United States, its people, its
friends, and its allies whenever and wherever the opportunity
arose. In addition, of course, Al Capone did not engage in attacks
on the scale of those of September 11, 2001, and trumpet his
willingness—eagerness—to repeat the experience. Al-Qaeda, unlike
individuals such as Al Capone, specializes in the international use of
force to obtain political and social change by means of terrorist
attacks.

Even if they are legitimate military targets, when they are not
combatants as defined in the third Geneva Convention of 1949,
irregular forces pose difficulties for their opponents. If they are
captured, whether by police or members of the armed forces, they are
subject to prosecution for unlawful acts, conspiracy, and the like. If
they are acquitted, they must be set free. As we have seen, such is
not necessarily the case for prisoners of war accused of crimes, even
those who are successfully prosecuted. As a result, as a matter of
prudence, belligerents should consider treating all detainees as
prisoners of war.

In the United States, the defendant is entitled to legal
representation and to remain silent. The defendant need not
testify. The state bears the burden of proving guilt beyond a
reasonable doubt. Evidence used must have been obtained
lawfully. This prosecutorial burden is high. Battlefield conditions
make it higher. For example, the capture of a person on a battlefield
who does not meet the standards for combatant status may be
prosecuted for accessory to murder. Prosecutors may find it hard to
to obtain evidence of the crime that can be used in court. In addition,
intelligence requirements may lead to interrogations, which, even if
they do not amount to torture, violate the U.S. criminal law
requirements of legal representation and Miranda warnings.

19. See id.
20. See Third Geneva Convention, supra note 7, art. 4; see also TIMOTHY SNYDER,
chief of staff later fantasized about using nuclear weapons to clear [Belarus'] wetlands
of human population.").
21. Third Geneva Convention, supra note 7, art. 121.
22. See id. art. 5.
23. Such a policy would have the added advantage that guards would be trained in
one system of detention applicable to all those captured.
(explaining that the Sixth Amendment right to counsel is fundamental and essential to
a fair trial).
25. U.S. Const. amend. V.
26. See U.S. Const. amend. IV.
Soldiers are not trained to be policemen. They are not looking for evidence. They capture people not only based on past acts but also on the basis of capability to inflict harm in the future. A boot camp trainee, even in an al-Qaeda boot camp, may not be a criminal; his or her capture is based on the notion of potential future harm.

II. KOH, ALSTON, BELLINGER

Three documents shed light on these issues: first is the position of the Obama administration as articulated by the Department of State Legal Adviser, Professor Harold Koh of Yale Law School. The second is the report of Professor Philip Alston of the New York University Law School acting as “Special Rapporteur on extrajudicial, summary, or arbitrary executions” of the UN Human Rights Council. The third is the analysis by John Bellinger, Harold Koh’s predecessor at the Department of State, of the law governing detention of suspected terrorists.

a. Koh

Koh’s March 2010 speech to the American Society of International Law began with the assertion that the attacks of September 11, 2001, triggered the U.S. right of self-defense under international law against al-Qaeda, the Taliban, and other terrorist organizations. Koh said that the United States is engaged in a number of armed conflicts simultaneously: “[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks and may use force consistent with its inherent right to self-defense under international law.”

Koh’s premise is important because it puts the struggle into the arena where the international use of force is permissible. “[I]n this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.” All decisions about targeting, location, and treatment of prisoners flow from this proposition. In addition, armed conflict means that one applies the laws of war.

Koh said the use of force in self-defense includes controversial
targeting practices: "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."30 As a result of this "authority" and "responsibility," Koh stated that the United States recognizes the applicability of the law of armed conflict and the core principles of distinction and proportionality. Targeting individuals who are legitimate military objectives, such as commanders, planners, supporters, and the like, is within international law. Killing such persons is not to deprive them of judicial due process, for none is due; for the same reason, such killings do not violate U.S. legal prohibitions on assassination. Legitimate and lawful acts of self-defense are not crimes. Finally, Koh defended the use of unmanned vehicles as increasing the precision of attacks and limiting collateral damage.31 He did not address the question of where law enforcement ends and the international use of force begins.

The U.S. position raises additional questions, such as the use of precision weapons. What legal consequences flow from possession of such weapons? Do they affect the way a state, as a matter of law, must conduct military operations, including those in exercise of the inherent right of self-defense codified in Article 51 of the UN Charter?32 Do precision weapons eliminate recognition that error is endemic to warfare and mean that civilian casualties, if they occur, must be intended (as the Goldstone Report suggests)?33 How does the requirement to distinguish between military and civilian targets affect, if it does, the right to use force in self-defense when the state with the right does not possess precision weapons, and its enemy hides among, or otherwise exploits, civilians?

b. Alston

Alston's paper has stimulated much interest because it addresses subjects of current concern.34 Up to a point, Alston shares

30. Id.
31. Id.
32. See UN Charter art. 51.
Koh's view, particularly in setting forth in general terms the international law governing the use of force and the rules for military operations. Alston begins by focusing on unmanned aerial vehicles and weapons fired from them as among the most controversial instruments used in the conflict with terrorists. He asserts that a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with [International Humanitarian Law].

Alston argues that each use of force must be consistent with conclusions about proportionality reached with respect to "each attack individually, and not for an overall military operation." He thus slides the *jus ad bellum* and the *jus in bello*. While each operates in different contexts and with different understandings, Alston treats them as unified, which leads to confusion, mistake of law, and uncertainty. Recognizing that the proportionality standard must be met for a use of force to be lawful and that the principle at the core of the modern law of armed conflict is discrimination between military and civilian targets, Professor Yoram Dinstein put it better than Alston: those who plan attacks need to take into account the need to minimize civilian casualties.

Perhaps because his audience is the UN Human Rights Council, and perhaps because the focus of his own work is international human rights law, Alston looks at uses of force with international human rights concerns foremost in his mind. First, he takes a limited view of what constitutes a legitimate target for killing in armed conflict: "combatant," "fighter," or, in the case of a civilian, only for such time as the person "directly participates in hostilities." Alston asserts, without analysis:

It is not easy to arrive at a definition of direct participation that

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36. *id.* ¶ 93.

37. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 126 (2004). Of course, the nuclear weapon raises a question about all these principles.

38. See Alston Report, supra note 35, ¶ 30. Alston cites common Article 3 of the Geneva Conventions as support for his assertion. Quite apart from the fact that Alston misquotes Article 3—it provides for humane treatment of "persons taking no active part in the hostilities," not persons who take no "direct" part—common Article 3 is concerned with humane treatment, not differentiation among combatants, fighters, and civilians. Third Geneva Convention, supra note 7, art. 3.
protects civilians and at the same time does not “reward” an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize that regardless of the enemy’s tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does [sic] not constitute direct participation.39

Alston thus asserts that “direct participation” excludes activities that may support “the general war effort”—e.g., political advocacy, supplying food or shelter, economic assistance, and propaganda.40 He adopts what he calls the “farmer by day, fighter by night” distinction to protect the farmer by day from being a legitimate target.41 Such an approach, included in Additional Protocol I,42 favors the terrorist.43

The “farmer by day, fighter by night” distinction is aligned with the guidance of the International Committee of the Red Cross with respect to direct participation in hostilities, as it permits it to stop and start on a continuing basis. One becomes a legitimate target only when engaged in a targetable activity.44 This position will not win many advocates among those engaged in combating terrorists and their attacks.45 Thus, Alston’s report suffers by seeming to take terrorism less seriously than governments and publics do.

The UN Security Council has suggested that one take a broader view of the issues Alston, in particular, addressed. In Resolution 1373 (2001), adopted after September 11, 2001, the Security Council “decide[d]” that all states shall:

39. Id. ¶ 60 (footnote omitted).
40. Id. ¶ 61.
41. Id.
43. The United States is not a party to Additional Protocol I because of this bias, among other things. See Message to the Senate Transmitting the Protocol, 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987) (“The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.”).
44. Alston Report, supra note 35, ¶ 82 (“[T]he ICRC Guidance takes the view that direct participation for civilians is limited to each single act: the earliest point of direct participation would be the concrete preparatory measures for that specific act . . . and participation terminates when the activity ends.”).
45. Further, if his goal is “to protect the vast majority of civilians,” then one might have thought he would have emphasized the importance of suppressing terrorism, which, after all, aims at civilians above all other targets. See id. ¶ 60.
Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.\textsuperscript{46}

While engaging in criminal support for terrorism may not per se make one a lawful target, it does suggest that Alston is rather too quick to narrow the categories of legitimate military targets.

UN Security Council resolutions are both more inclusive and more imprecise. Their language reflects political compromises achieved through the drafting process—compromises that allow unanimous adoption of counterterrorist resolutions. Thus, UN Security Council resolutions routinely reaffirm:

[T]hat terrorism in all its forms and manifestations constitutes one of the most serious threats to [international] peace and security . . . .

. . . [and] the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts . . . .\textsuperscript{47}

Those engaged in combating terrorism may use this UN Security Council language as a standard against which to evaluate plans. While Alston may regard command and control, training, and supplying of material as putting one in the category of legitimate target, the fact that he excludes financiers is troublesome. By not evaluating the impact of UN Security Council resolutions on his assumptions, Alston undermines the usefulness of his work.

Alston’s report also raises problems with his interpretation of terrorism and terrorists. Achieving a general definition of terrorism has bedeviled the international community. At the same time, through a series of UN Security Council resolutions and multilateral treaties, the same community has narrowed the definitional gap for disagreement about whether a particular act is, or is not, terrorist by defining acts usually committed by terrorists as “terrorist.”\textsuperscript{48} Alston seems to define terrorist in such a way as to make status severable. Thus, for Alston, the terrorist can be many things at once, each one separable from the other, with different legal consequences for each.


\textsuperscript{48} See G.A. Res. 49/60, ¶ 3, U.N. Doc. A/RES/49/60 (Dec. 9, 1994) (“Criminal acts intended or calculated to provoke a state of terror . . . . are in any circumstance unjustifiable . . . .”).
Alston insists that the laws of war and international human rights law apply in the context of armed conflict without analyzing how they do and what the consequences for operations are. Thus, Alston asserts, where the law of armed conflict is unclear or uncertain, "it is appropriate to draw guidance from human rights law." At the same time, he does not specify the content of such law and whether, to the extent it derives from treaties, all or just some states are parties. The same is true in his treatment of the law of armed conflict, as his references to the 1977 Geneva Protocols show. Alston's operational concern is procedural. He argues that, as a result of failing to disclose the legal basis for individual targeting decisions and who has been killed with what collateral consequences, "clear legal standards [have been displaced] with a vaguely defined licence to kill, and the creation of a major accountability vacuum." As Alston notes, targeted killings have taken place in a variety of contexts—Russia's war in Chechnya; the U.S. war with al-Qaeda; Sri Lanka's war with rebel groups; and Israel's war with Arab states, quasi-states, and groups are a few examples. Alston sums up the situation as follows:

Although in most circumstances targeted killings violate the right to life, in the exceptional circumstances of armed conflict, they may be legal. This is in contrast to other terms with which "targeted killing" has sometimes been interchangeably used, such as "extrajudicial execution[,]" "summary execution[,]" and "assassination[,]" all of which are, by definition, illegal.

This approach to conceptually distinct acts reflects a rush to conclusion based on insufficient and imprecise analysis.

Alston raises an additional issue—the status of CIA officers engaging in armed conflict with al-Qaeda and its allies. Do they, as Alston asserts, not enjoy combatant status even if they meet the requirements of the Geneva Convention? Should one distinguish between the CIA officer engaged in cloak and dagger and those who

50. Id. ¶ 52 ("The tests for the existence of a non-international armed conflict are not as categorical as those for international armed conflict . . . . The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions.").
51. Id. ¶ 3.
52. See id. ¶¶ 11-26 (detailing targeted killing policies in Israel, the United States, and Russia); see also Guidera, supra note 8 (citing AMOS N. GUIORDA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 37-48 (2d ed. 2011)) (addressing operational counterterrorism efforts in Russia, Spain, China, India, Israel, and the United States).
engage in military operations and look and behave like the regular armed forces except for the source of their paycheck?

c. Bellinger

Former Department of State and National Security Council Legal Adviser John Bellinger recently took on the issues raised here in the context of examining the George W. Bush administration's view of relevant law, categorization of detainees, and detention policies in general. Bellinger argues that:

The traditional international armed conflict paradigm, featuring prisoners of war detained until the end of hostilities, breaks down in a conflict of indefinite, and potentially unending, duration, with actors not entitled to combatant status under international law. Likewise, the criminal law model developed for peacetime arrests of those within a state's jurisdiction is typically unavailable or, at best, impractical for detaining nonstate actors that military or intelligence personnel pick up outside a state's borders. In these circumstances, a state is left without clear, comprehensive international rules to govern its detention operations.

While undoubtedly it is going too far to conclude that the Bush administration blames a shortage of law for its detention policy woes, a substantial number of commentators advocate the conclusion that the international community needs new law in this area.

Bellinger's premise, which he shares with others, is that the

55. See generally John B. Bellinger, III & Vijay M. Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, 105 AM. J. INT'L L. 201 (2011) (arguing that existing law provides inadequate guidance to governments involved in combating nonstate actors in conflicts of indefinite duration).

56. Id. at 202.

57. See id. at 241 ("Our goal has been to demonstrate the need to develop new international law regarding the detention of persons in conflicts with nonstate actors.").


59. See, e.g., Derek Jinks, The Declining Significance of POW Status, 45 HARV.
1949 Geneva Conventions primarily apply to conflicts between or among states party to the Conventions. Therefore, in a conflict between a state and a nonstate entity, such as al-Qaeda, "[o]nly common Article 3 and Additional Protocols I and II apply, as a matter of treaty law, to at least some conflicts involving nonstate groups." Among the questions this premise raises for policymakers is how to apply the law we have in a way that makes sense and, at least, is consistent with the policies represented by the texts. Two generations ago, Myres McDougal and Florentino Feliciano addressed this issue:

"Because the law of war is designed for the benefit of all mankind and not merely of certain belligerents, most observers agree, further, that this most basic policy of minimum unnecessary destruction of values applies to all forms of hostilities, irrespective of the characterization of the resort to violence as lawful or unlawful; of the formal character of one or the other participant as an intrastate rebel group or unrecognized government or authority, or international organization; of the intensity of the violence and its extension in time and space; and of recognition or nonrecognition of the existence of a technical state of war." Further, McDougal and Feliciano make clear that they are analyzing "the actual and active application of violence between contending belligerents." Their analysis is tied not to particular words but to the values and policies those words express; hence, therein lies the ongoing relevance of their perspective and methodology. In fact, contrary to Bellinger's view, U.S. detention policies have matured over the past decade to the point that they may well provide a new international standard for implementing the Geneva Conventions.

60. Bellinger & Padmanabhan, supra note 55, at 205 (footnotes omitted).
62. Id. at 520.
63. Unlike most writers on international law, they sweep into their analysis as many dimensions of reality as possible. The result is a jurisprudence of originality and exceptional realism. For this reason, McDougal and Feliciano's work retains its vitality and relevance fifty years after publication.
III. THE GENEVA CONVENTION APPROACH

The Geneva Conventions, binding as they are on all states, provide a useful guide for governments. If one accepts that the variety of potential terrorist activities justifies a variety of counterterrorist activities, then terrorists may be legitimate targets for military operations and criminal prosecution as well. The issue becomes one of feasibility rather than theory.

Professor Yoram Dinstein has offered a practical and legal approach. He notes that confusion about definitions, stemming from the Supreme Court’s decision in Hamdan v. Rumsfeld, which found there to be a global, non-international armed conflict, has resulted in a loss of common sense. Dinstein’s analysis of the relevant international law led him to conclude that a non-international armed conflict is confined to the territory of a single state. It involves armed conflict between a government and an armed group, or groups, or among organized armed groups in the absence of government. In Dinstein’s view, international law does not recognize as non-international an armed conflict that crosses borders. Accordingly, the U.S. conflict with al-Qaeda is an international armed conflict, governed by the international law applicable to such conflicts. Whether or not one agrees with Dinstein’s analysis, one may urge the United States to treat the conflict as governed by the international law of armed conflict, thus simplifying the problem of administering the law with respect to targeting decisions and to the treatment of detainees.

Academic and political debate about the categorization of armed conflict as international or non-international has long roots, as President Reagan noted in 1987. As Dinstein explained, a non-

("The legal regime that emerges from this era will likely alter for all time the way nations and states apply the rule of law in combating external, transnational terrorist threats."); see also U.S. Dept of Def., Testimony of William K. Lietzau, Deputy Assistant Secretary of Defense for Defense Policy House Armed Services Committee, Sub-Committee on Oversight and Investigations (Apr. 13, 2011), http://www.dod.gov/dodc/docs/testLietzau04132011.pdf (discussing the Obama administration’s desire to maintain a flexible approach to detention policy in light of twenty-first century warfare).


66. 548 U.S. 557, 630 (2006) ("The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations."). Perhaps the Supreme Court decision lies behind John Bellinger’s conclusion.

67. See Dinstein Remarks, supra note 65.

international armed conflict involves civil war, territorially bounded. As a result, one is left with the choice of categorizing the conflict with al-Qaeda, for example, as an international armed conflict, which makes geographical sense, or neither a non-international armed conflict nor an international armed conflict. If it is neither, then the international community may need a new set of rules, an outcome that would be extremely difficult to negotiate. From a practical standpoint, it makes sense to treat conflicts with terrorist groups that involve more than one state's territory as international armed conflicts, governed by the relevant laws of war. Doing so would also simplify the problem of deciding when the use of the armed forces or police forces is appropriate.

For the United States, this approach would mean that the government should treat captives according to the same rules, regardless of their technical status as combatants who are entitled to prisoner of war status as a matter of law, or as noncombatants who are not allowed to conduct battlefield operations without committing murder or being accessories to murder. The advantage would belong to the capturing party—it would apply one set of rules for which it can train all its armed forces. It would not have to worry about having different rules for different people. And, whether convicted of a crime or not, the detainee could be held until the end of hostilities or some other time short of that which is humane and prudent.

For example, the United States' killing of Anwar al-Aulaqi poses no legal dilemma under Dinstein's paradigm for analyzing the targeted killing of terrorists under international law. Because al-Aulaqi was a publicly identified terrorist who served as an "operational leader" of the command structure of al-Qaeda in the

69. See Dinstein Remarks, supra note 65.
70. The Supreme Court has also used the term "unlawful combatant." See Ex Parte Quirin, 317 U.S. 1, 30-31 (1943) ("By universal agreement and practice the law of war draws a distinction between . . . those who are lawful and unlawful combatants."). The term represents a confusion between those engaged in hostilities who are allowed to be so engaged because they meet the standards of the Third Geneva Convention, see supra notes 5-10 and accompanying text, and those whose engagement in hostilities is not sanctioned by law. This fact makes them criminals per se, although proving that fact beyond a reasonable doubt poses challenges that most prosecutors believe to be insurmountable. The Court would have avoided much subsequent confusion had it used the term "fighters" instead of "combatants." If one is a combatant, one may engage in military operations. If one is not a combatant, one may not lawfully do so.
71. See Dinstein Remarks, supra note 65; see also John B. Bollinger III, Editorial, Obama's Drone Danger, WASH. POST, at A17 (Oct. 3, 2011) ("The United States also believes that drone strikes are permitted under international law and the United Nations Charter as actions in self-defense, either with the consent of the country where the strike takes place or because that country is unwilling or unable to act against an imminent threat to the United States.").
United States' crossborder conflict with the terrorist organization; his U.S. citizenship is irrelevant and the analysis simple: the United States maintained the international law and constitutional authority to kill an operational threat to the United States in an international armed conflict.

IV. CONCLUSION

Koh, Alston, and Bellinger have raised numerous issues of high importance to success in the effort to combat terrorism and terrorists. Other issues are significant as well, including the fact, which seems often to be forgotten, that the use of force is a political act, aimed at political objectives. This is true whether the goal is capitulation or change of policy. For the United States, the goals invariably include persuading the adversary to comply with international legal standards of behavior. At the same time, the tactical choices made also have political consequences. These need to be considered as one goes forward with a use of force. In addition, calls for the introduction of judicial process in military decisions, not just the detention of prisoners, seem to be growing louder. Is such involvement of the judiciary necessary or wise? And what are the consequences of introducing judicial process as a routine part of military operations?

If al-Qaeda were a state—Al Qaeda country—these questions would be simpler to answer. Dinstein comes closest to providing answers and suggesting policies that are coherent and realistic. Following his view that non-international armed conflict refers to intra-state conflict, one sensibly may treat hostilities between a government and an organized armed group as an international

72. See Peter Finn, In Secret Memo, Justice Department Sanctioned Strike, WASH. POST, at A9 (Oct. 1, 2011) (discussing an unclassified Department of Justice memorandum justifying the Obama administration’s killing of al-Aulaqi). In fact, an Obama administration official made clear, [a]s a general matter, it would be entirely lawful for the United States to target high-level leaders of enemy forces, regardless of their nationality, who are plotting to kill Americans both under the authority provided by Congress in its use of military force in the armed conflict with al-Qaeda, the Taliban, and associated forces as well as established international law that recognizes our right of self-defense.

Id.

73. See Bellinger, supra note 71; Koh, supra note 28; see also Authorization of Use of Military Force, 50 U.S.C. 1541 § 2(a) (2006) (authorizing the President to use “all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . persons”). But see Mary Ellen O’Connor, Editorial, Explaining the Aulaki Killing, WASH. POST, Oct. 6, 2011, at A20.
armed conflict, applying, as a matter of choice, the international law of armed conflict to al-Qaeda and associated forces. Doing so would resolve most of the issues Koh and Alston have raised. As the war with al-Qaeda and its associates continues with no end in sight, getting the analysis and argument right is a political and legal necessity.
Debate--The United Nations: Still Relevant After All These Years?

Shashi Tharoor, Ruth Wedgwood, James Traub, Joanne J. Myers

Public Affairs

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Introduction

JOANNE MYERS: Good afternoon. I’m Joanne Myers, Director of Public Affairs Programs. On behalf of the Carnegie Council, I’d like to thank you all for joining us as we welcome this illustrious panel which will shortly be discussing the relevancy of the United Nations.

Critics and supporters of the United Nations have sometimes seemed worlds apart. As an organization that represents 191 nations, it is asked to accommodate the wishes of the most powerful countries while giving a voice and acknowledging the needs of smaller nations. As it struggles to maintain peace in a world where violence and warfare are, unfortunately, still the norm, we wonder whether it can continue to address the challenges of our world today.
To debate this issue, we have gathered together a “dream team” of panelists—a pundit, a pandit, and a professor—to discuss whether in this, the sixth decade of its founding, the United Nations is still relevant after all these years. Jim Traub, Shashi Tharoor, and Ruth Wedgwood are seated beside me, and they are eager to begin.

Please join me in giving these exceptionally knowledgeable and gifted speakers a very warm welcome. It is a pleasure to have you all here.

Remarks

JAMES TRAUB: The format of this evening—or so I’ve been told—is that I kind of referee while the two of them engage in edifying battle for your benefit. Normally I try to instruct the people I’m dealing with not to blunt their differences in the interest of politesse, but I don’t fear that in this case. But I will count on you to make my job easier by sharpening your own differences.

Our subject tonight is UN reform, but I would like to begin by asking Shashi and Ruth a few questions that have to do with the U.S.-UN relationship, because, frankly, practically everything winds up turning on this question. We happen to have a fresh provocation on that subject just over the course of the last week, which I’m sure you have all been avidly following. Mark Malloch Brown, the deputy secretary-general, gave a quite strikingly sharp speech in which he criticized the United States, in terms that are very unusual for a sitting Secretariat official. John Bolton took this very personally and fired back. Then Mark Malloch Brown gave a series of responses, in which he more or less stood his ground. I gather, as of today’s Financial Times, which Ruth just showed me a little bit of, that the secretary-general has somewhat retracted. But the issues that were raised in the course of this spat are very relevant.

So I actually want to begin by asking Shashi if he shares what I understand to be the critique that Mark Malloch Brown was laying out in the course of this speech that he gave, which was essentially that the United States insists on taking maximalist positions when perfectly acceptable compromise positions are available, thus creating an incredibly negative dynamic in the institution, where others take maximalist positions.

He also said that Washington practices what he called a “stealth diplomacy,” in which it constantly uses the UN in all sorts of practical ways and has a very solid relationship on a hundred different subjects, but refuses to actually talk about it in public, so that the public comes away thinking that the UN just means the oil-for-food scandal and a few spectacular failures, and there is no sense of the actual day-to-day relationship between the United States and the UN. More broadly, that the United States in recent years has simply failed to consistently commit itself to the success of this institution in a way that is now endangering the institution.

Shashi, do you agree with that?

SHASHI THAROOR: I think I’ll let my friend and colleague Mark Malloch Brown speak for himself. He has done that, I think, very strongly and pertinently.

Perhaps one logical consequence of this recent debate is the perception on the part of many of us in the Secretariat that perhaps characterizing member-state actions is not the most effective way forward. So let me rephrase, if I might, your approach to all of this.
It’s not so much a question of how the United States conducts itself at the UN, which I think is something for Americans to analyze and sort out for themselves. It is, rather, the larger problem of how the UN is perceived in this country, by this administration and by the broad public.

It has always been striking to me that for years, even decades, the UN ran consistently at between 78 percent and 82 percent approval in public opinion polls in this country. The American public, by and large, liked the idea of the UN, and liked what they knew about the UN. But the fact was, they didn’t know very much. It was a kind of support that was a mile wide and an inch deep. The moment specific sorts of bad news arose, I think it’s fair to say that people didn’t retain their affection for the organization. You all like motherhood and apple pie, and then if you take a bite of the apple pie and don’t like the apple, I guess you end up wanting to spit it out. We have been spat out a few times in recent years. That has been part of the challenge that we have been suffering from.

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There, I would turn to the gatekeepers of public opinion as well. I turn to political leaders. I think practically no congressman or senator actually feels that the UN is one of the top half-dozen or top dozen issues on the minds of their constituents, their voters, when they go to their home districts. So it becomes an issue where it really isn’t of much political salience to them.

The media, quite frankly, as a general proposition, doesn’t really spend a whole lot of time portraying the UN. I say this quite honestly and with some chagrin, as somebody whose job it is to try to get the message of the UN out around the world. I don’t find it easy, myself, to appear on mainstream American television or to promote those of my colleagues who have a story to tell in these programs. Yes, we can get on PBS. We can get on CNN International, but much less frequently on CNN Domestic.

So if the American public as a whole is blissfully unaware of what the UN does that is in America’s interest, it’s partially because their political leaders and their media gatekeepers by and large haven’t found this a story worth finding space for.

JAMES TRAUB: So, Ruth, Shashi has found an artful way of not directly answering the question about the validity of Mark’s claims. I should add, by the way, that in his speech Mark made it clear that he was not speaking only of the Bush administration. He was saying this is a longstanding problem with the relations between Washington and the institution.

Leaving aside the tactical value, or lack thereof, of his having said this, do you feel there was any merit in the criticisms that he made?

RUTH WEDGWOOD: Let me first misuse your question again—since it is your fate as moderator to be misused—just to note that in today’s Financial Times, there is a piece that is signed by Kofi Annan. Who might have been part of the wordsmith team, I don’t know. I do think there is a retrenchment from the high rhetoric of Mark Malloch Brown. In the third column, it says, “Both sides in the argument over the UN need to turn down their rhetoric and engage in serious negotiations to work out a sensible compromise as a basis for fundamental change later.”

I do think that, much as I like Mark Malloch Brown—he is a very smart guy. We spent some time together in Cambridge, Massachusetts, at a Harvard conference. He does give a dandy barn-burner speech, with no notes.—But this time I wish he hadn’t used his notes and let his own sense of the occasion reign, because I do think, as Shashi has intimated, that attacking countries by name, attacking people by designation, is not a becoming etiquette and doesn’t do anything to try to mend fences.
Some people speculate that he was trying to earn kudos with the G77 (Group of 77 developing nations) by showing he had a barb for the Americans, and therefore would aid the ultimate reform process. That's too Machiavellian for me.

I just think that a certain kind of courtesy, which is wanting in Washington often nowadays, is almost prerequisite to hearing the substance of other people's arguments, on whether these are new problems or not new problems, obviously. The problem of getting political consensus on a crisis is as old as the beginning of the charter in 1947, when the Israeli-Palestinian partition plan was put forward by the General Assembly. It was never adopted by the Security Council in a Chapter 7 resolution, and the Israelis were allowed to fight off the Arab armies by themselves, with no UN backing whatsoever.

Or the problem of the withdrawal of peacekeepers in 1973 from Sharm el-Sheikh. And when I teach the Congo crisis nowadays, even though we all worshipped Dag Hammarskjold, the actual purpose of the intervention is quite murky and evolves as it goes on.

So the sense that there is a kind of political confusion is not new. The worry about the efficacy of the machinery is not new.

JAMES TRAUB: But, Ruth, let me stop you for a second. I do want to push on this. I have to say that as I have learned more about the UN, I have been surprised at how dense is the weave of relations that binds Washington, how indispensable the one is to the other. I do want to push on this question. That is, do you think it's right that there is a widespread perception in this country that the UN is this kind of feeble organization which mostly gets itself into trouble and does relatively little to advance American interests? And if that's so, is that unfair? Does that, in part, rest with the unwillingness of policymakers to actually speak truthfully about this nuanced, if incredibly vexed, relationship?

RUTH WEDGWOOD: If it's feeble—if you Google the phrase "Security Council," in The New York Times or even in the Omaha paper, you discover "Security Council" pops up at least once or twice or three times a day, as you use the Council for various crises, whether it's Darfur or Iran or the wonderful work that's being done on the Harari investigation and to try to free Lebanon from Syria's dominance.

So it may well be that the readers are less interested in the instrument. If you ask the question, "Does the normal reader of an American newspaper care about the Senate Appropriations Committee?" no. They care about the issues that the Senate Appropriations Committee is addressing, whatever instrument is effective.

Also there is the phenomenon in the American media that they love car crashes and train wrecks. So, of course, when there's a scandal, they love it. That's what fills the news hole. But on good news, it is likelier to be the debate over the merits of the solution than the instrument itself.

SHASHI THAROOR: That's an excellent point, if I may chip in right there, because I think Ruth has put her finger on it. People don't care about the Senate Appropriations Committee; they care about the expenditures that the Appropriations Committee is authorizing and so on. But that's precisely because in the United States you take the Senate for granted. No one is threatening the existence or the funding of the Senate. No one is essentially concerned about the future of the institution. It's embedded in the Constitution. It's taken for granted.

The problem in the United States is that the UN is still up for debate. There are still people who challenge the very utility of the institution that is delivering all these goods.
One of the striking things about why the UN was created in the first place is that we had a horrendous first half of the 20th century. I think if you look back at those forty-five years where you had two world wars, countless civil wars, mass expulsions of populations, genocide, the horrors of the Holocaust and Hiroshima—my gosh, if the century had gone on like that, we wouldn’t have survived to the 21st.

The farsighted statesmen and stateswomen of the world at the end of the Second World War said, “We need to do something to prevent the second half of the 20th century from looking like the first half.” So they set up a system—we call it global governance today—a system of interlocking institutions, rules of the road by which the world could live, and they put the UN as the sort of keystone of this new arch that they had built, this architecture of global governance.

At the heart of it, therefore, lay the idea that in order to keep the peace, in order to help human beings to progress and so on, you needed a mechanism, as well as a system of rules that would actually be to the benefit of all. President Truman, when the charter was adopted, said it’s not about any one country trying to seek advantage; it has to be the interests of all.

FDR, in fact, in his address to the joint houses of Congress before San Francisco, obviously, since he passed away that spring, said that the UN would be the alternative to all the military alliances, the balance-of-power politics, the disastrous arrangements that had led to war so often in the past.

So you actually lose sight of the fact that the UN exists because of a very real reason. Once it came into existence, it was given a number of tasks, which it has fulfilled.

One of the things that Americans surely haven’t allowed themselves to forget is the indispensable role the UN played during the Cold War. It was a vital factor in ensuring the Cold War didn’t turn hot. Why? Because it provided a roof under which the two superpower adversaries could meet and engage, instead of coming to blows. It was actually a place where they could talk and work together. Through the amazing invention of peacekeeping—a concept not even found in the charter—you had a mechanism to prevent local and regional conflicts around the world from igniting a superpower clash and a third world war.

So the UN did all of that. Now we have gone past the Cold War phase. We have an opportunity to make much more of a difference. This globalizing world is full of so many of what we like to call these “problems without passports,” problems that cross our frontiers uninvited, everything from terrorism, climate change, human rights, drug trafficking—you can pick your issue—problems that no one country or even one group of countries, no one coalition, can be rich enough or strong enough or powerful enough to solve on their own. These are, by definition, problems you need the whole world to come around on.

Therefore, it’s unthinkable that it wouldn’t be of use to the United States to have a United Nations to deal with all these problems. And day in and day out, the UN does.

It has often struck me that when we had all this focus on the disputes in the UN about Iraq, back in 2003—those eight to ten weeks leading up to the war when the UN seemed so bitterly divided—no one noticed that in that same eight to ten weeks, the same fifteen ambassadors, the same Security Council, met and agreed on a dozen different issues unanimously—on Liberia, on Congo, on Afghanistan, on Cote d’Ivoire, the Ivory Coast, and so on, things that were life-and-death issues for people in those countries. We just focused on the divisions of Iraq.

I think it’s important to remember that the UN is indispensable for all this.
JAMES Traub: Let's focus on a piece of what's all there, especially the last point that Shashi made. That is, at the same time as these spectacular failures, the UN transacts a great deal of very important business with the United States that shows a kind of surprising degree of efficacy. Is that fair, or do you think that's overdrawn?

RUTH Wedgwood: First, I want to amuse Shashi and the audience by telling them a vignette about UN history which I don't think anybody else remembers. I ran into an old cold warrior in Washington last week, and he recounted for me that at San Francisco in 1945, in the American delegation were two young Navy lieutenants. One was named Richard Nixon and the other was named Cord Meyer, who was later with the CIA.

JAMES Traub: John Kennedy was there as well, right?

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RUTH Wedgwood: So it was quite a smorgasbord of people.

I also note for my students, however, that the end of the world war in the Pacific, through the tragedies of Hiroshima and Nagasaki, came two months after the meeting in June of 1945. So the signing of the charter was not the birth of a halcyon world of lamb and lion supping at the same table.

Clearly, you have to have a place to talk to folks. Where my naughty op-ed comes in—on "competitive multilateralism"—is that you no longer have to meet at the clock in the middle of Grand Central Station when you haven't otherwise gotten instructions, because you can now reach each other on cell phones. So there are no SOP (standard operating procedure) ways of doing things anymore, and you don't necessarily have to have a single venue in which you meet and talk. OSCE (the Organization for Security and Co-operation in Europe) has done terrific work in human rights by hoodwinking the Russians into thinking it was just about security. Guess what? It was also about other baskets.

I was quite surprised to discover, when I began to spend nine weeks a year on the UN Human Rights Committee, that most of the European states think they have exempted from themselves from the petition jurisdiction of the committee by saying that if the European Court of Human Rights has dealt with the issue, ça suffit.

JAMES Traub: I want to get out of the long weeds of some of these. Let's go back to something else, which is the whole question of Iraq and what meaning we should ascribe to that. This whole reform process began in the fall of 2003—that is to say, four, five, six months after this catastrophic failure to reach an agreement on a resolution to go to war in Iraq. Kofi Annan said, "We have reached a fork in the road." That is, the UN is either going to advance and progress and become a relevant institution in this new world or slide back. He was talking about Iraq, above all, when he said that.

First, I'm curious. What meaning do you ascribe to that failure to reach agreement over Iraq?

RUTH Wedgwood: The great puzzle is actually why Franklin Roosevelt and Harry Truman supposed that a wartime alliance would endure. And it didn't. It was quite predictable.

One more shaggy dog story. There is an interesting diplomatic historian at Tulsa who says that FDR and Truman knew exactly what would happen. They simply thought that the moniker of the United Nations and the Council would be sufficient to counter an otherwise quite traditional American isolationism; that, in fact, the pretense of consensus would be the mechanism you would use to keep America engaged abroad at all.

JAMES Traub: Well, if you do a good thing for a bad reason, that's fine.
RUTH WEDGWOOD: But, clearly, anybody who sits around the building can't ignore the fact that countries vote their national interests, that the organization works on regional groups, that, in fact, there is a tremendous pressure on members of regional groups to maintain the discipline of their caucus. It's quite painful for them to break away from the G77, qua G132, because that's who they have to go to for all of their issues.

Therefore, this picture of this perfect—if people knew universities, they would never use this metaphor—this perfect, wonderful academic discourse of what is really Kantian or Habermasian—it doesn't obtain. The politics of energy says that if you have a deal with Sudan or a deal with Iran for billions of dollars of energy, you are less likely to vote in favor of intervention.

So the real problem has been oftentimes, how do you, in fact, craft a consensus? Can you afford to wait that length of time? If you can't get consensus on the ultimate action resolution, is there sufficient consensus before and after, as you had in Kosovo and Iraq, where the UN diagnosed the problem beforehand and came in afterwards, to give legitimacy and a kind of emerging legality to the use of force?

But I don't think you can ever survive in the institution without a kind of Machiavellian political virtue. If you go in naively and think that invoking world federalism or universalism is going to get you what you need—

JAMES TRAUB: But, Ruth, obviously, this was a unique level of catastrophe, this train wreck of the failed resolution on Iraq. Is your point that it's naïve to expect that a thing that is as divisive as that actually could be resolved by the mechanism of the Security Council, and therefore such disagreements are inevitable and rooted in the institution?

RUTH WEDGWOOD: No. I think UNSCOM, the UN weapons monitoring commission headed by Rolf Ekeus, worked quite well up through 1995. Then Saddam began to detect the splits politically in the Council, with the Russians and the French, and he exploited them, craftily and subtly. From 1995 onward, it was very hard sailing.

Would the dramaturgy of an intervention have been better if it had occurred in 1998 rather than in 2003? You betcha. But it didn’t.

I do think that one can make a multilateral argument for the intervention, in the sense that the force of the mandate of the Council was being quite openly disregarded by Saddam, and the credibility of future mandates might, in part, depend upon that. Prudence and legality are different issues. But I don't think one should see it as a unilateral act, because the Council, beforehand, had said over and over and over again that Saddam was in flagrant breach of Resolution 687.

JAMES TRAUB: Shashi, certainly the view inside the institution, which I know the secretary-general shared—and many people shared—was that Washington had put the institution in an impossible position and essentially pushed it beyond the limits whereby it could function, and did provoke a structural crisis—thus, the sense of a fork in the road.

Do you share that view? Or are you going to allow yourself to say whether or not you share that view?

SHASHI THAROOR: I'll tell you what did happen. In fact, in the summer of 2003, just after the war, the Pew organization, a respected organization, conducted a poll in twenty countries around the world about the UN. They discovered the UN's image had gone down in all twenty. It had gone
down in the United States because the UN had not supported the U.S. administration on the war. It went down in the nineteen other countries because the UN had been unable to prevent the war.

So, you see, we got hit from both sides of the debate. We disappointed both sets of expectations. Do you want to describe that as an impossible position for the institution to be in? Sure, it was pretty impossible.

But then, as Yogi Berra said, when you come to a fork in the road, take it. And we took it.

JAMES TRAUB: That was another diplomatic dodge there. Should I infer that these are directions I just shouldn’t push you in too far, because it would be foolish for you to hazard an opinion?

SHASHI THAROOR: The topic that you advertised here is: Is the United Nations still relevant after all these years? I think so. I remember, in 2003, giving a dozen interviews a day—

RUTH WEDGWOOD: It sounds like a Cole Porter song. (Laughter)

SHASHI THAROOR: You can sing it, Ruth, I’m sure.

I remember a BBC interviewer at one point said, “So how does the UN feel about being the ‘I’ word, irrelevant?” He was about to go on when I interrupted him and said, “Oh, I think the ‘I’ word for us is actually ‘indispensable.’”

I wasn’t just trying to score a debating point, because, in fact, I think it’s clear that, as on many occasions, the UN is often irrelevant to a decision about a war. In fact, the UN has really only been involved in about two-and-a-half decisions to authorize war in its entire sixty-one years of existence. But it’s extremely relevant to the ensuing peace and to all sorts of other disastrous and important situations around the world, other than war. Right now, for example, we have had our hands full with disaster after disaster in Asia. We have had to deal with the tsunami and its aftermath, the earthquake in Kashmir, most recently the Indonesia earthquake and then the violent volcano eruption.

These are the sorts of things for which, competitive multilateralism or no, Ruth, there is simply no competition for the UN.

There is, again, one very sound reason where the universality of the UN becomes so relevant here. No one government likes to be second-fiddle to any other. Lots of governments are giving aid and assistance, but no one wants to do it under the umbrella of another government. But if the UN goes in there and the blue flag is flying, it means the whole world is taking charge. It means that humanity is responsible, not one government. In that process, the universality of the United Nations gives you a mechanism to actually deliver effective results.

RUTH WEDGWOOD: There’s a reason why the founding fathers in Philadelphia rejected the idea of a collective executive. They thought that it would be very hard to actually take a decision if you had to get a huge number of people to do it — so it depends, in part, whether you think inactivity is a better state of existence than activity—

SHASHI THAROOR: I don’t think there’s been much inactivity in all these humanitarian disasters.

RUTH WEDGWOOD: There are occasions when one has to move forward.

I will concede the relevance of the UN, and stipulate it— relevance. Monopoly? No, because, indeed, the very premise of the collective security system broke down in the first years, and the UN can’t
demand, can’t legally require—at least it chooses not to legally require—that any country, in fact, donate troops.

**SHASHI THAROOR:** This is a straw man. No one is claiming monopoly. The UN has never said it’s the only answer to the world’s problems.

**RUTH WEDGWOOD:** Well, you’re one-stop-shopping.

**SHASHI THAROOR:** It has said it’s the only answer to those problems that affect the whole world, which is different. You do have regional situations in which, of course, there are regional actors. My gosh, the Security Council was only too glad to let ECOWAS (the Economic Community of West African States) initially handle Liberia and Sierra Leone, until the UN had to step in.

**JAMES TRAUB:** Let me move this in a slightly different direction. Ruth, you made the point that the premise broke down in the initial years—that is to say, that these five powers could collectively police the world, because they had a collective interest in world order.

**RUTH WEDGWOOD:** This was supposed to be a worldwide NATO.

**JAMES TRAUB:** A worldwide NATO, that’s right. They were created more or less at the same time.

**SHASHI THAROOR:** No, no. It was created earlier than NATO. The UN was the original treaty organization. It was when the Cold War started that NATO was—

**JAMES TRAUB:** Yes. I meant approximately. But let me try to move forward here.

So then, clearly, that proves to be false, because the Cold War line went straight down the middle of the Security Council. The Cold War ends. Then there’s the hope that now, finally, the dream of 1945 can be realized.

Is what we’re seeing now, in part, an actual re-creation of the Cold War division of the Security Council, where, in most cases, you have Russia and China on one side, on a whole range of issues, and the U.S., the U.K., and France on the other side, such that you have a kind of new version of that old paralysis?

**RUTH WEDGWOOD:** It’s sort of a fractal cold war, with lots of different factions. Where the French will be, you have to predict, and the Germans, obviously, if they become permanent members of the Council, might be quite at odds with us on the need to intervene in various situations.

If I may, one of the unspoken themes in Security Council expansion, which nobody really dares openly address, is that if you expand the Council with a great many countries that don’t feel themselves to be the intervener but the “intervenee,” you may actually make it harder for the Council to do the very kind of anti-genocidal, anti-civil conflict intervention that is really its bread and butter nowadays. Countries will vote their world view, along with their national interests. Countries just have, often, different views.

The other thing I worry about in the relevance-versus-monopoly debate is just the moral hazard problem. If you tout the UN in a naïve fashion, to build up its prestige with the American people or whatever, my worry is that it creates the belief that the UN will, in fact, be there to act effectively in every crisis. There are problems which, often unpredictably, it can’t do because of political fracture. So you can get a kind of moral hazard where some leader, like Izetbegovic, supposes that the West
will intervene to kick the Serb army out. And guess what? It didn’t happen. You can actually encourage reckless behavior by national leaders if they take for granted this premise of the automatic, frictionless, perpetual-motion UN machine.

So it’s a very dangerous trope—

SHASHI THAROOR: Another straw man. No one is suggesting that that’s the case.

I have just been through this very interesting exchange in *The New York Times* letters pages not too long ago. After a rather idealistic column deploiring the UN’s failure to solve Darfur, I wrote in saying that the things that the world was prepared to do about Darfur were:

- First, humanitarian aid, sending in humanitarian workers, both in Darfur and across the border in Chad.

- Second, trying to do the very best we could at “boots on the ground”—in this case, African Union boots on the ground, because that’s all the government was prepared to accept. Where these African Union soldiers were deployed, their presence did make a difference. But there are 7,000 of them in a country the size of Texas.

- Third, of course, was pressure on all sides to come to a peace agreement in Abuja to end the conflict, so that then a peace could be kept. Then, of course, a UN peacekeeping force could go in.

I said, “This is really what we were trying to do, and now the pressure must be on the government of Sudan to accept a robust UN peacekeeping force and let an assessment team go in so we can plan for such a force.”

There was a very nice but anguished letter from a rabbi the next day or two days later, saying, “But if the UN isn’t able to impose itself on Darfur, then the UN has failed”—

JAMES TRAUB: But, Shashi, I don’t think it’s only this anguished rabbi who might feel that way.

SHASHI THAROOR: But that’s exactly the point I’m making in response to Ruth’s about expectations.

JAMES TRAUB: Let me ask it in this way. Let me ask Ruth this question. Two things:

One, should we say that the Security Council’s behavior in regard to Darfur—should we call that a failure? It seems to me that Shashi is saying, in part, it’s only by the standard of unreasonable expectations—

SHASHI THAROOR: No, no. Wait a minute. The point I’m trying to say is, if the UN didn’t exist tomorrow—

JAMES TRAUB: That was part two of my question to Ruth.

SHASHI THAROOR: —is there any country on earth that is actually prepared to go to war to impose a peace on Darfur?

JAMES TRAUB: You may answer both or either of those questions.
SHASHI THAROOR: There isn’t. We have to make do with the best we can.

RUTH WEDGWOOD: Rhetoric actually matters, and when you talk about the world or mankind or humanity, it sounds so much more efficacious than when you talk about a collection of member states that have very different agendas. Actually—since I’ve known Shashi for a good long time—whenever something goes bad, it’s, “Don’t forget, we’re only a collection of member states.” When something goes well, it’s mankind speaking. (Laughter)

You have to watch him, because he has a rhetorical fork in his road—much as I love him.

SHASHI THAROOR: And you have a fork in your tongue, my dear. (Laughter)

JAMES TRAUB: I told you this wouldn’t require any encouragement from me.

Continue.

RUTH WEDGWOOD: The great tragedy is that there is, if you will, a surprisingly modest limitation on usable democratic military power in the world. One of the great tragedies of Europe’s demilitarization, though they don’t expect to go to war amongst themselves—is that they can’t project power. They have a very limited ability to deploy ready-reaction forces. We are still waiting for the 50,000 corps that the European Union is supposed to have. They have all had bad peacekeeping experiences.

One of my non-Holbrookean reasons for expanding NATO was that every Western European country has already had a bad experience in peacekeeping, whether it’s Srebrenica or the Belgians in Rwanda, and I wanted some sort of—

JAMES TRAUB: Give them a chance to have bad experiences in NATO as well.

RUTH WEDGWOOD: Yes—once more for the Gipper.

JAMES TRAUB: So back to Darfur, let’s say that—

RUTH WEDGWOOD: The problem there is the absence of countries willing to put themselves in the middle of a very difficult conflict, where the Janjaweed are just utterly bloody-minded and morally feeble and indiscriminate.

SHASHI THAROOR: So it’s not the UN’s fault. It’s that no country will do it.

RUTH WEDGWOOD: And on the other side, some of the rebel groups won’t at the moment compromise. So it’s a very difficult peacekeeping situation. Very few countries are willing to risk the actual deaths—

JAMES TRAUB: So there is no different architecture, there is no reform that would make the UN a more effective instrument when it comes to these kinds of atrocities?

RUTH WEDGWOOD: The UN has to go around with its begging bowl, just as everybody else does, to try to put together a coalition force. One should not have any over-expectation of the willingness of democracies to put their troops at hazard, particularly in areas where the kind of war you are fighting is so difficult to game.

JAMES TRAUB: Now that we’ve sort of begun to verge on the reform—are we running out of time here, Joanne?
JOANNE MYERS: About five more minutes. We want to open it up.

JAMES TRAUB: Okay. Let’s talk about some of these reforms. The Human Rights Council has now come into existence. The United States chose not to join it because it felt that this is not what we had in mind.

Ruth, do you think that was the right decision? Could there have been a much more effective human rights council that, alas, did not come into being?

RUTH WEDGWOOD: My fear, which I hope will not be realized, is that the same folks that brought you the Human Rights Commission are going to bring you the Human Rights Council. The pressures on countries to conform in their voting behavior are still there.

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If there is one thing I would change at the UN—and I don’t know how to do it. If Shashi becomes secretary-general, he can change it by decree. The inner discipline of the regional groups is so great that concessions you can get in capital-to-capital, bilateral conversations fall by the wayside when—and pick your group, any group. I will, for the sake of argument, say the G77, which is the G132, which is the two-thirds of the GA (General Assembly), which is the voting majority you need for any important decision. If they take a position, it’s a very brave member that would fall away.

To that degree, I worry about the capacity to really have conversations on the merits about what you need. Now, the Human Rights Council—we all know all the arguments on both sides. One hopes it will not have the singular permanent agenda item on Israel. One hopes that Israel will finally get into WEOG (Western European and Others Group), which, I think, Jan Eliasson had hoped to—

JAMES TRAUB: To explain, that’s the European group of members. Be careful with the shorthand. We have some lay people here.

RUTH WEDGWOOD: But you “can’t do nothing” if you’re not a member of a regional group. The Western European and Others Group, which is also the commonwealth group—Australians, New Zealanders, Canadians, Americans, and Turks are allowed in, but not Israel. Israel has no capacity to function in the Human Rights Council. Jan Eliasson, the president of the GA, had hoped to change that as part of his negotiation. He didn’t succeed.

So I’ll wait and see. I have an optimistic hope that it will be as bad as people suppose. But the same pressures that brought you the original commission, over time, I fear, may degrade the council.

JAMES TRAUB: Shashi, you could argue that here’s an institution whose Security Council can’t find a way of even putting Zimbabwe on its agenda, to even talk about it. Why would you expect that this same institution is going to create a different organ, the Human Rights Council, in which they will act effectively or speak effectively?

SHASHI THAROOR: They actually have done so. One of the fundamental reasons why I disagree with Ruth’s point about it being just like the commission is that, in the commission, which had become an over-politicized body, you had a lot of bizarre merchant business going on where countries got themselves elected to the commission to prevent scrutiny of their human-rights records. They would indeed say, “I’ll vote to prevent your human rights being examined if you vote to prevent my human rights being examined”—

JAMES TRAUB: So why can’t they do that now?
SHASHI THAROOOR: They can’t do that now because the founding document and the resolution creating the council explicitly mandates a universal peer review. Every country on the council, the day they are elected, guarantees that their human-rights records will be examined.

JAMES TRAUB: Assuming that the peer review is so scathing that Cuba is going to be forced to leave the Human Rights Council?

SHASHI THAROOOR: We’ll see how honestly they conduct it. Obviously, the proof of the pudding is always in the eating. But we actually have a recipe that can work.

JAMES TRAUB: The huge obstacle that the institution is facing now, which could be leading to quite a train wreck, is this question of management reform. The White House has said that if the UN can’t prove that it can run itself effectively, then we are going to use the budget as a lever to force it to do so.

I guess the question is—and I believe, Ruth, you may have written this in a piece you wrote in The National Interest—

RUTH WEDGWOOD: That was my very naughty piece.

JAMES TRAUB: Is this an insoluble problem, because most of the members actually are perfectly happy to have an ineffective UN, because an effective UN isn’t so important to them and other things are important to them?

RUTH WEDGWOOD: I think Kofi Annan has rightly said to the membership at large, “It’s crazy. The stuff we’re doing is largely to help you guys.” Here I’m going to sound like Shashi Tharoor. Most of what the UN does, apart from security crises, are things that are aimed at helping the less developed countries. Not wasting money, having procurement that actually purchases goods at a market price, not having sinecures where people sleep—I have a lot of students at Johns Hopkins who want to join the UN and I take these kids around. I think the best way for them to see it is the field operations.

I won’t quote the former official from the personnel department. When I asked, “Why is there such an early retirement age at the UN?” the person said, “How else would we get rid of them?”

This person’s point was that the way that people are recruited into the main Secretariat is so random. I tell my kids they have to watch the UN Web site—you can’t even put a Google alert—you have to watch the UN Web site to hope that your country comes up in your specialty as underrepresented before you turn thirty-two. So if Albert Einstein applies in physics but they have too many Germans or Americans at that point, too bad.

You want people mid-career who can come in and come out. You want the secretary-general—here I’m right onboard—to be able to redeploy people to urgent missions, to be able to reprogram money. To have to be micromanaged at this level of detail I take as proof, somehow, that some members don’t just worry that the SG (secretary-general) will be subject to superpower domination; they don’t trust the SG himself. And that’s a terrible testament to, I think, a kind of distrust of a different kind within the organization.

JAMES TRAUB: Shashi, what do you think about that?

SHASHI THAROOOR: I think we can rise above this. I do believe this is a problem on the way to a solution.
But I want you to look back a little bit. I actually, on the 1st of May, celebrated the twenty-eighth anniversary of my having joined the United Nations system. I began with the UN High Commissioner for Refugees.

If on the day I joined I had said to my seniors that I was joining an organization that I expected would one day run elections in sovereign states; that would one day send intrusive inspectors to conduct inspections for weapons of mass destruction; that would one day impose sanctions on the entire import-export trade of a medium-sized member state; that would one day send human-rights monitors to see how a monarch was treating his own people; that would one day set up an international criminal tribunal to try former heads of state for crimes against their own people, but under international law; that would one day run entire territories, and so on and so forth—my seniors would have looked at me and said, “Young man, what are you smoking?” The fact is, they would not have said to me that I understood the UN that I was trying to join.

Yet, in the career span of this one official, the UN has done all these things and more. I believe the transformation has come because the UN has proved itself to be an organization that is capable of adapting, with sufficient flexibility, to the changes—

RUTH WEDGWOOD: But that’s dodging the question, because those are issues of intrusion. Clearly, legally, the charter has evolved, in a much greater sense, that it can look at human rights, which is some of its best work, that it can look at democratic governance. We’re quite far from the moment of the agenda for democracy, when I used to get calls from the thirty-eighth floor—

SHASHI THAROOR: We set up a democracy fund, just in September.

RUTH WEDGWOOD: The thirty-eighth floor was doubting whether democracy was a universal norm.

Let me give you an example from my Human Rights Committee. I call it my pajama party. I spend nine weeks a year doing it, unpaid, living on my little stipend in Geneva or New York. I think it does good work, because it engages with countries around the world that otherwise would fall beneath the bilateral political radar. Suriname—who would care, in strategic politics? But you do get some conversation. If we put it on the radio, it will have a huge effect on civic society, or on the Web.

But also, in terms of efficiency, just think about small factoids that aren’t shared with the public. Our work costs $10,000 an hour to convene, with note takers, translators. If we take a fifteen-minute coffee break, that’s $2,500 that could have gone for an HIV/AIDS retroviral vaccine.

Our pages cost $1,600 to produce. So if we do a thirty-seven-page opinion when an Austrian zoning lawyer writes to the UN Human Rights Committee demanding his claim under the general right of equality, Article 26, we have wasted $50,000 that could have gone to a better use.

So some sense of money versus product is essential.

JAMES TRAUB: Let me stop, because I think we want to turn it over to the audience.

Just one last thing. We have had this reform process now. It obviously has some way to go. Briefly, I would like each of you to say whether we should feel, as a result of all this, that, yes, this institution is capable of adaptation and things are moving in a positive direction, or, no, the real meaning is the limits of what it can do and things are not moving in a positive direction.

Just a couple of sentences from each of you on that, and then we’ll turn it over to the audience.
SHASHI THAROO: To some degree, I've answered that question, so I won't take away more time from the audience. But let me add that fifty years ago, when the UN was being criticized, Dag Hammarskjold put it perfectly when he said the UN was not created to take mankind to paradise, but to save humanity from hell. Sometimes we can prevent—

RUTH WEDGWOOD: In a cost-efficient way.

SHASHI THAROO: That rider, I think, entirely escaped him.

But the point, I think, that's important to note is that the United Nations has adapted, can adapt, must adapt. But at the same time, it remains this one indispensable global institution in this globalized world of ours. It's the one place where we can get every country together, not, frankly, to give up any of their sovereignty—they won't—but to leverage their sovereignty collectively for the common goals, the common purposes that all countries agree upon.

JAMES TRAUB: Ruth, a couple of sentences on your part.

RUTH WEDGWOOD: First, Shashi said “can,” “must.” You didn’t say “will.” So this was a cautious statement.

If I were SG (unlikely as that would be), what I would do differently, I think, is to say the oversight of national parliaments—this very active conversation, which has been wished for from the days of the moderate reservationists, the mild reservationists on the League, and now Democrat and Republican alike in Congress—this can actually help me. This is Lyndon Johnson's desire for a street demonstration to help him pass legislation.

What the UN doesn't get—there used to be a slogan, “No one's married in Bosnia.” I won't go into fully unraveling that. But the temptations of hyperspace, of being international, of representing the world and humanity and the future of mankind, do lead to a sense of immunity. The normal transparency you expect in government—an FOIA (Freedom of Information Act) premise that everything will become public eventually, allowing national parliaments to see how their money is used, having disclosure forms and conflict-of-interest that are available to the public, on the Web, as opposed to only member missions—would all be to the good.

Then, if you want to engage the public, treat them like adults. In a democracy, voters expect to have a great deal of information about what their delegates and agents do, not just what you put out in a public information campaign, but to be able to scrutinize and critique. It's why someone invented the GAO (US Government Accountability Office) and the Congressional Budget Office and IGS (Inspectors General) in every department of the U.S. government. It's a lesson that I think the UN still hasn't taken. They seem to suppose too often that transparency is the enemy, that this has to be controlled—“what will the children think?”

JOANNE MYERS: I'd like to thank you, Jim, Ruth, and Shashi. I think we've all benefited from your banter and discussion.

Now I'd like to open up the floor to discussion.

Questions and Answers

QUESTION: Thank you all very much.
First of all, just a quick point. One of the themes in a number of the writings on the UN is to distinguish between the UN as a forum and the UN as an actor. I do think that a lot of the criticism of the UN is when it’s only a forum. In other words, the Security Council not being able to agree on Iraq had to do with member states. I think much of it falls on the member states, the shortcomings—including the United States, which is not prepared to send any troops anywhere in Africa, just to take the Darfur example. So I don’t think it can just all be laid on the UN Secretariat or the secretary-general.

But I did want to come back to the very first point you made about it being the media and the politicians in the United States who were not doing enough to promote an understanding of the UN. I was at the U.S. Mission in the Carter years. I always felt that was something very hermetic about the UN system. There was what I used to call “a glass wall down First Avenue.” People were generally satisfied with themselves inside the Secretariat, and there was very little outreach to the Congress. There was this kind of once-a-year meeting between the president and the secretary-general, and that seemed to do it.

I wonder, since you have been there twenty-eight years, whether you do feel that, not only yourself personally, but the senior membership does have enough of an outreach or whether it could do much more than it is doing. I do think Fox News and all these people put out a terrible impression, a misinformed impression. But I do think there’s much more the Secretariat could perhaps do, above and beyond this particular speech that Mark Malloch Brown made the other day.

I wondered if you wanted to comment on that.

SHASHI THAROOR: First, you mentioned Congress. Yes, we do much more with Congress than we ever used to. Nowadays, not only do we have frequent visits from New York down to Congress, to talk to Congress people and their staffers, but whenever we have people coming in from the field, such as the head of the UNRRA (UN Relief and Rehabilitation Administration) who was here recently or one of the peacekeeping operations, we do send them out to Washington too. Because, of course, the United States is the biggest paymaster, and these folks in Congress are the ones who need to understand what the missions are accomplishing or not. They need to ask the questions, get satisfactory answers, so they can vote the necessary funds. That has become a key part of our work relationship with the U.S. administration—not just the administration; Congress as well.

On the larger public—I would say that we are always available and all too willing to go on every available medium to speak to the American public. Just last week, we had a whole bunch of talk-show radio hosts up at the UN doing live dispatches from there. We will accept any invitation to put ourselves on, to get word out.

That doesn’t necessarily mean that we will always have a chance to say what we want to say or that we won’t be out-shouted by other voices. But that’s part of the risk we would be prepared to take.

But as a general proposition, we do find it much easier to be heard or to get a hearing elsewhere in the world than in the United States, and we would certainly love to see that change, which is not a criticism of the American people. Whenever I meet people and talk to them, there’s a lot of interest and a lot of sympathy. But it’s more a question of media judgment, as well, as to what the gatekeepers think will be of interest to their publics.

A final thought about whether we can do an effective job putting this message across. There’s an old Indian proverb that says, “You can’t wake a man who is pretending to sleep.” Think about that for a minute. If some people don’t want to hear you, they will not hear you.
RUTH WEDGWOOD: If I could just sashay onto this question, I do think there still is—Shashi is too sophisticated for this—some inner belief inside the building that you can control information, that what is wanted is delivery of information, instead of a very porous blogosphere, an omnivorous desire for actual statistics and facts.

The pay scale at the UN is classified. What does an ASG or a USG or a P5 or P3 make? How many women are there in P5s? All of this is an inner culture, where you have to have a building pass and take people to lunch—

SHASHI THAROOR: We’re quite willing to make that public, Ruth, any time. I mean it.

RUTH WEDGWOOD: Seriously, the premise that everything should be public, unless there’s a really good reason not to—there ought to be an FOIA, which, after twenty-five years or forty years, with omissions for personalities, and sensitive confidential assurances given, allows even the inner diplomacy of the UN to be available, just as every democracy ought to make its own diplomatic history available. There’s a premise that “this is our business; you should trust us.”

QUESTION: The last time I was here about the UN, someone asked, “What about better PR?” I just thought at the time to myself that one form of PR would be if a statesman-like addressing of all the issues that were brought up today, the complexity of it, were in a paper like The Times, where people could hear, not one side, but what was addressed today here at the Carnegie Council. That might be one way to add to helping the process. I just wanted to throw that out.

JOANNE MYERS: Thank you.

SHASHI THAROOR: You would have to press it with the editors of The Times. We’d certainly be game to play along with that.

QUESTION: In the interest of full disclosure, I work for UNDP (UN Development Program) as an outreach and communications adviser. I’m on the other side of the street.

My question doesn’t go to defending the existence of the UN, but to ask the question: What would happen in this borderless world of ours, where borders have become so porous and things like drugs, human trafficking, bird flu, and environmental disasters don’t recognize nation-state boundaries in the way they did fifty years ago, when the UN was formed?

Since the UN was formed, so many more countries have come to independence. Is it a problem of just an outdated organization that needs modernization and updating? Or, if we are to get rid of the UN, who’s going to deal with all these cross-boundary problems that we have, other than war?

RUTH WEDGWOOD: If I may just jump in on that, there are lots of different forms of coordination. There is a kind of horizontal coordination.

One method, used in drugs and other kinds of crimes, is to have a treaty framework in which nation-states are required to create a category of crime and to repress it. You are not running all the operations through the eye of a single needle. You’re simply recognizing a mutual obligation to take precautionary action against a problem of the commons.

So it doesn’t have to be run from New York, in the sense that you have a tsar who is telling nation-states exactly what to do. They can undertake mutual promises to each other without necessarily having it be “tsared” by a particular person.
I do think having someone like the UN's Peter Piot in HIV/AIDS is hugely important to persuade heads of state that they ought to admit that they have a sex-trade problem and that they have a high incidence, and it's not a shame; it's an opportunity to help people. That kind of "bully-pulpiting" can be very useful.

Where I think the UN often gets into trouble is in the kind of random shots—this is closer to home, forgive me—it takes in various crises. I'm just amazed. One of the interesting features of learning how the thirty-eighth floor works is that statements aren't vetted. You'll have different characterizations of who did what to whom in the Middle East coming from different actors who are out on holiday at various conferences around the world. Is it an unlawful occupation or just an occupation?

Those kinds of freighted words, which are not the problem of the commons—these are particular security crises—often alienate communities in the most profound ways, in an untutored, unstudied, random, kind of drive-by shootings with words—that I think the UN needs to get much more clearly under control. There needs to be a process on the thirty-eighth floor which understands that words also are weapons. That, I think, would conserve the political capital and prestige of the secretary-general in a much more useful way.

JAMES TRAUB: Ruth, in your kind of ideal world—because you would get rid of some things that the UN has a monopoly on—what stuff should the UN not be doing that it is doing now or should be doing much less of that it is doing now?

RUTH WEDGWOOD: One profound change over the decades has been the movement of development toward the World Bank and the International Monetary Fund. When I was researching Jesse Helms's critique of the budget back in 1996, I was surprised to learn that about three-quarters of the budget goes for things that aren't security, in a narrow military sense, or Security Council or Department of Political Affairs or the SG's function. It goes through various kinds of economic commissions, social commissions, sustainable development, and developmental sustainability. The question of possible redundancy in those jobs is very much at issue.

Now, I understand that at times countries that don't qualify for commercial capital have felt they need a way to get access to capital that is effective for their purpose. But that's where, indeed, the World Bank itself has come in and shopping projects to the bank. So much of the old Secretariat development function has, I think, necessarily, gone to the Bretton Woods institutions, and if you're looking for redundant mandates, you could shut down a few there.

SHASHI THAROOR: Not entirely, no. I think the important point here is that for developing countries to have a forum in which they actually have a voice, where they have the one-country/one-vote situation in the General Assembly, to be able to articulate, if you like, their political views on development issues, is extremely important—

RUTH WEDGWOOD: That doesn't require three-quarters of the budget.

SHASHI THAROOR: You have five regional commissions in five different parts of the world that are actually doing a lot of the economic and social work. There's norm building that is done at the UN. We certainly do not have a significant portion of the money that goes into development—even the Bretton Woods institutions, which are, of course, the key players financially, and the World Trade Organization, which we haven't even mentioned, which is technically outside the UN system. In addition to that, there's now the private sector which is playing a big part.
I don’t think the UN is trying to compete with any of those, but the UN has its own special place in this issue. Certainly, the G77 you mentioned so much today would not be happy to hear you suggest that they should be shut down.

RUTH WEDGWOOD: I didn’t say shut down; I said rationalized. Again, what one wishes for is the delivery of development capital to countries in a way that helps them—even, dare I say, in the debate on the Millennium Challenge Goals—

JAMES TRAUB: The Millennium Development Goals.

RUTH WEDGWOOD: Excuse me, “challenge” is the American parlance.

When you talk to people who have worked in the Bank—say, in Chad, in Cameroon, in Italy, in many countries—you have to worry about how money reaches the ground in a fashion that it helps people. One of the concerns that a great many development people have is that simply shoveling money out the door can make kleptocracy worse, not better. You could have a multilateral “Dutch disease” if you will, not simply an oil “Dutch disease.”

JOANNE MYERS: We’ll take one last question.

QUESTION: Thank you. It’s clearly a very provocative presentation.

As I was listening to Ruth’s analogy of the UN to the pristine and fertile conditions of an academic institution and how inapposite the analogy is, I was thinking that I learned early on that academic politics are so vicious because the stakes are so small.

At the UN the stakes are huge, and yet the politics sometimes don’t seem vicious enough. As you look at this extreme spectrum between irrelevance and indispensability, as you try to stake out the right point on that spectrum, what’s the role of introspection—really serious introspection? When you analyze your own twenty-eight-year career and what preceded you and where you are going forward, how do the remedial measures to date make the place more effective?

But more importantly, we wouldn’t have entertained this debate had there not been a point of view that is—I won’t say hostile, but skeptical of whether or not the UN has achieved what it could achieve in a cost-effective way.

I mean this as a general question, but one specific point that Ruth raised—she didn’t really posit it as a question, but she certainly taught us laypeople a new acronym. When you have the marginalization of a country like Israel—and without talking about specific resolutions, you have a marginalization here that is a byproduct of the internal bureaucracy of WEOG—and yes, you can be included or you can’t be included. There’s a certain mandate or jurisdiction that falls to some of the regional groups. Is there an entity—whether it’s a task force or a think tank or some other group—within the United Nations that looks at these infirmities, if you will, and thinks about enabling member states to really have a fair voice?

JOANNE MYERS: Is this directed to Shashi?

QUESTIONER: It is, yes.

RUTH WEDGWOOD: I’ll answer it, too.
SHASHI THAROOR: I'm sure we can both answer it. It's an excellent question. I enjoyed your point about politics.

The fact is that on the Israel situation, you're not talking about something, frankly, that has anything to do with bureaucracy, but rather to do with politics amongst member states. Admission into regional groups is something that member states alone can decide—who gets into their group. It so happens that Israel belongs to WEOG in New York, but has not been given full admission in Geneva. That was what Ruth was referring to in the context of human rights.

But Israel, I'm pleased to say, is a vice president of the General Assembly and is not, in that sense, a marginalized state at the General Assembly in New York. But, certainly, participation in a regional group is a passport to election to office, election to various councils and committees, and so on. That's something that the secretary-general and others have pushed for which should happen for Israel in Geneva and everywhere else.

But on the broader question of introspection, which I thought was a very interesting one, sure, we have lots of task forces, working groups, committees. My gosh, the open-ended working group that is studying Security Council reform is now universally dubbed "the never-ending working group," because it has been discussing the issue for so long without a concrete solution. In fact, it's a very good example, Security Council reform, of a problem where—it's like doctors gathering around a patient, and they all agree on the diagnosis but they can't agree on the prescription. So introspection goes on, and action doesn't follow, in that particular instance.

But introspection ultimately is an individual quality. I think one can say that the capacity for introspection of a secretary-general like Dag Hammarskjöld or Kofi Annan has a great deal of value in and of itself. Kofi Annan's speech on intervention to the General Assembly in 1999 is a striking example of how one person's introspection essentially helped change the world agenda on this issue. It resulted in, in many ways, a thousand flowers blooming at think tanks around the world, and also then led directly to the evolution of what is now called "the responsibility to protect," which was enshrined in the Summit Declaration of the World Summit last September. This is the notion that sovereignty carries with it the responsibility to protect your own citizens; but if you are unable or unwilling to exercise that responsibility, the international community has to think of doing so. That's a whole new idea, and it has emerged from a process of, to use your word, introspection.

So I believe introspection does have a place in the international system. But that doesn't always immediately lead to action. Action in all these things requires a combination of resources, of political will. That political will is something that member states' governments have to find for themselves.

Going back to the Darfur thing, we have no standing army we can send off to a place like Darfur. For any intervention, you need a collective decision by member states in the Security Council. You then need countries willing to give you the troops, the materiel, the money to make it work. Then you can make a difference.

So there are these various stages and processes. Sometimes it will seem inadequate. I can understand the impatience of people around the world who see horrors on their television screens and want to see them end. We all want to see them end. But the fact is the United Nations is a mirror of the world. It reflects our disagreements, the feebleness of our collective political will, as well as our hopes, our aspirations, and sometimes, indeed, our effective determination to deliver results.

I just want to go back to an old metaphor of Dag Hammarskjöld's. When the UN was criticized in the 1950s, he said it's rather like the Santa Maria sailing off across uncharted waters to new lands, beset
by stormy weather. There are people onshore blaming the problems on the ship rather than on the weather.

We operate in an environment. We operate within the global climate. We operate within what governments will allow us to do.

RUTH WEDGWOOD: If I may, just a couple quick aphorisms. One is, you can make your own weather, to some degree. How one conducts oneself, what is said, especially from the thirty-eighth floor, can affect the tenor of the rest of the conversation.

I am a big fan of Kofi’s 1999 speech on sovereignty and intervention—the ellipsis in that speech, when he said, “If you had Rwanda to do over again and the Security Council wouldn’t vote a resolution, but several other countries would come in to stop the genocide, what should you do?” And he doesn’t say what, but it certainly admits, as a conceivable legitimate choice, an ad hoc intervention. So I think Kofi should be given, actually, credit for inventing competitive multilateralism. I cede my copyright.

But I also want to say a word for extrospection, which is that a lot of the current debate about the legitimacy of the methods of reform has been: Is it a mortal sin or a venal sin to threaten to withhold your dues for some period of time if you think that something needs changing?

I will now resort to the blogosphere. Ms. Suzanne Nossel, who is a charming and smart gal who used to work for the number five in the U.S. Mission under Bill Clinton, a Harvard Law School graduate, has a great blog called Democracy Arsenal. When Mark Malloch Brown was giving his speech, she had a very funny passage. She’s blogging as he is speaking.

Suzanne says, “He’s acknowledging that the Group of 77 developing countries have opposed vital reforms,” and she continues:

"I hope he doesn’t attribute their recalcitrance wholly to resentment toward the U.S.... "

"Yup, he just did."

Then she goes on, “He’s calling for no more take-it-or-leave-it demands by the U.S.”

Yet, often, take-it-or-leave-it is all that works. My daddy was a labor negotiator for thirty-five years. I always recount that if you look at UN history, the gentlemen’s agreement in the mid-1980s that budgets should be decided by consensus, the creation of the IG in the mid-1990s, the budget deal done by Holbrooke with 22 percent for the United States in the late 1990s—all were done by take-it-or-leave-it propositions. It’s a bargaining technique, ladies and gentlemen; it’s not a rejection of world public order.

Therefore, I do think that in the to-and-fro of states that are indeed staking out positions and hoping to reach some moderate ground, that there should not be a Manicheanism, much less ad hominem attacks, on people who feel that it is their professional role to make propositions that are maximalist in their aspiration.

So, therefore, withholding funds for reform, I think, in the past, alas, despite the ICI’s (International Court of Justice) opinion in the Congo case, despite my credibility as a lawyer, has been in fact politically one of the few ways to get change at the UN.
JAMES TRAUB: I just wanted to add one thing about introspection. If by that one means dwelling on painful experience in order to extract lessons from it, which it seems to me is one of the primary purposes of introspection, this has in fact been quite alien to UN culture until extremely recently. Now, I should say it's quite alien to human nature probably as well.

If you look at the UN now, in terms of the Secretariat, one of the reasons I think that the Peacekeeping Department actually is quite a bit more effective than it used to be is that it has engaged in quite systematic and serious introspection. Other parts of the institution have not. But I should also add that there is no mechanism whatsoever for introspection on the part of the members.

JOANNE MYERS: Well, I think by the size of the audience, it should be an indication to you, as well as to us, how important this issue is. I thank all three of you for being here.
Letters to the Editor

U.S. and U.N.: The Ties That Bind

John R. Bolton's argument ("U.S. Isn't Legally Obligated to Pay the U.N.," editorial page, Nov. 17) that our U.N. Charter obligations are not really "legal obligations" would be amusing were the stakes not so serious. Even in essence, he is suggesting that because under our Constitution the Congress possesses the power to violate our international legal commitments, international law is not really "law.

How do we know that international treaty commitments are legally binding? Knowing that every single one of the 195 states that are members of the United Nations, and every one of the 170 states that are not, acknowledge that fact. Article 29 of the Vienna Convention on the Law of Treaties recognizes the fundamental and historic principle of pacta sunt servanda: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

We have used, like some of our own citizens, members of the international community of states do on occasion, violate international obligations. But when they do, they never assert that treaty commitments are merely non-binding "political" undertakings. Stalin, Hitler, Kim Il Sung, Gadhafi and Saddam Hussein all either denied the allegations against them, pretended that their acts of flagrant international aggression were really in "self-defense" to a prior attack by their victims, or preferred some other legal basis for their conduct. Not one of them asserted that treaties were "not binding," because they realized that no country would accept such a patently specious assertion—it simply would not pass the straight-face test.

Trying to evade U.N. assessments is hardly an original idea.35 years ago, the Soviet Union argued that it was not legally bound to pay assessments related to U.N. peacekeeping operations in the Congo. But not even the Soviet Union had the audacity to assert a "Bolton Doctrine." They continued to pay, because the Charter was not legally binding—their argument was that the Congo peacekeeping operation, which had been authorized by the General Assembly, exceeded the legal authority of the Assembly, and as an ultra vires act, its costs were not legally binding upon member states.

The U.S. took the lead at that time in persuading the General Assembly to seek an Advisory Opinion from the International Court of Justice on the legally binding character of the assessment in question. When the World Court upheld the legality of U.N. financial assessments in the 1962 Certain Expenses case, the U.S. Congress passed a resolution that called upon the U.N. to "take immediate steps" to give effect to the opinion. For some reason, Mr. Bolton does not mention this resolution—which is still on the statute books—obviously when he confidently assures us that U.N. treaties are not a legally binding obligations of the U.S.

Mr. Bolton tells us that treaties have no "higher status" under our Constitution than acts of Congress. While in Federalist No. 44, John Jay argued that under the new Constitution treaties would be "beyond the lawful reach of legislative acts," and in 1798 Secretary of State Jefferson assumed President Washington that a treaty was "a law of superior order, because it not only repeals past laws but cannot itself be repealed by future ones." Mr. Bolton is correct in noting that the Supreme Court ultimately held that treaties and acts of Congress are of equal dignity as domestic law of the U.S.

When a treaty and a statute cannot be reconciled, the most recent expression of the sovereign will controls; a more recent statute will be given effect by U.S. courts over a prior treaty, and a more recent treaty can effectively repeal an inconsistent prior legislative act. But—ignoring for a moment the fact that a more recent statute does not repeal the international legal effect of a treaty, but merely makes the U.S. a law-breaker—by what logic can one conclude that a treaty is not "law" because it is only equal in authority to an act of Congress? If treaties are not law, then how can a statute—which can be repealed by a subsequent treaty—be considered law? As the Supreme Court noted in the 1958 case of Mississippi v. Baltimore & Ohio R.R. Co.: "A treaty...by the express words of the Constitution, is the supreme law of the land, binding alike National and state courts..."

For the life of me I cannot understand why some people who call themselves "conservatives" seem determined to reject the rule of law in international affairs. If we undermine this principle, and assert instead a right to pick and choose which of our treaty commitments are convenient from day to day, then by the doctrine of reciprocity we will be diminishing a small right for others to ignore inconvenient laws. We will no longer be able to say that blatant international aggression, terrorism or even the use of chemical or biological weapons against our citizens are illegal. The necessary increases in our defense budget will quickly dwarf the U.N. debt. Mr. Bolton's impervious reasoning would seek to evade...

Admittedly, the United Nations is an imperfect and often frustrating institution, and international law is hardly the entire solution to our problems. But, even at times our treaty commitments may even make our goals more difficult to achieve, particularly when our diplomats prove to be poor negotiators. America must remain strong—rigidly committed to acting multilaterally when possible, unilaterally when necessary—to uphold our fundamental rights and values. But one of the things we ought to be fighting most strongly in defense of the rule of law—a conservative value—in world affairs...

Charlottesville, Va.  
Robert F. Turner

(The author is associate director of the Center for National Security Law at the University of Virginia School of Law and a former Stockton Professor of International Law at the U.S. Naval War College. In September he debated Mr. Bolton on this issue under the auspices of the ABA and the Federalist Society in Washington.)
Article

Jus ad Bellum Before the International Court of Justice

John Norton Moore
Jus ad Bellum Before the International Court of Justice

JOHN NORTON MOORE*

The norms controlling initiation of military force, or jus ad bellum as traditionally designated in international law, are among the most important normative principles in the international system. As properly understood, they stand firmly against aggression and facilitate the minimum order, which serves as the stable basis for exchange, agreement, and human creativity. As such, one would expect that the International Court of Justice, itself created as a barrier against war, would serve as a powerful force against aggression in expounding these norms. Sadly, however, the decisions of the International Court in this area have too frequently adopted an approach that encourages, rather than discourages, aggression. This is particularly so in the most important contemporary threat spectrum, that of “secret warfare,” covert attack and terrorism. This Article will briefly explore the requirements of a normative system effective in discouraging aggression, review the spectrum of forms of aggression and the contemporary importance of “secret warfare,” assess the normative structure of jus ad bellum under the United Nations Charter, and then analyze the principal use of force decisions of the International Court of Justice. The Article concludes not only that the Court has distorted the Charter framework in ways that encourage aggression, but also that in its legal analysis getting there, the Court has departed from the high quality of legal craftsmanship one expects of the Court. Finally, the Article urges that, given the central importance of the normative principles of jus ad bellum, foreign offices need to engage more openly and vocally in supporting the core Charter principles against aggression.

* Walter L. Brown Professor of Law and Director of the Center for National Security Law at the University of Virginia. Formerly, he served as Counselor on International Law to the United States Department of State, United States Ambassador to the Third United Nations Conference on the Law of the Sea, Chairman of the National Security Council Interagency Task Force on the Law of the Sea, and Chairman of the Board of the United States Institute of Peace. Of relevance to the Nicaragua case, he served as Deputy Agent for the United States during the jurisdictional phase of the case and argued several of the admissibility grounds before the Court. The author would like to thank Zachary Gutterman and Joel Sanderson, who worked as student assistants on this project.
INTRODUCTION

A core fundament of international law is that nations may not use force as a modality of change. That is, although nations are free to interact and seek change through peaceful means, they may not use force for change. This principle, introduced centrally into international law by the Kellogg-Briand Treaty of 1928, subsequently became a cornerstone of the United Nations Charter ("Charter") when adopted in 1945. It is widely known as the prohibition against aggression, or within international law circles, the normative principle of jus ad bellum. This principle of minimum order is a crucial starting point of a cooperative international order.

Correctly understood, modern jus ad bellum is not a blanket prohibition against use of force. Rather, it permits defense against aggression, actions lawfully authorized by the United Nations, actions undertaken with sovereign consent, and certain other regional and humanitarian actions. Of particular importance, for jus ad bellum as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, it treats aggression and defense equally, by failing to effectively differentiate between them, or even worse, it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own

immune system against itself, thus encouraging aggression. Moreover, international institutions effectively ignoring aggression while condemning defense — thus supporting an inverse of the critically important principle banning use of force as a modality of change — will themselves inevitably be harmed as they, in turn, undermine the rule of law. Elsewhere, I have referred to an approach to *jus ad bellum* that effectively fails to differentiate between aggression and defense as a “minimalist” interpretation of the Charter.³ “Minimalism” seems principally driven by a naïve belief that the road to peace is to sanction all use of force, whether defensive or otherwise. This mindset, along with its “realist” opposite of simply rejecting the relevance of *jus ad bellum* and, more broadly, rejecting international law itself, do a disservice to the Charter framework and to our aspirations for a more peaceful world.

This Article, through a brief examination of principal *jus ad bellum* decisions of the International Court of Justice, will examine whether those decisions have strengthened the important law of the Charter or whether, sadly, they have too frequently adopted a minimalist approach undermining the Charter and encouraging aggression, particularly aggression in the “secret warfare” spectrum. First, however, this Article will briefly review underlying theory as to how a normative principle can deter aggression, the Charter normative framework, and principal forms of aggression in the contemporary international system.

The International Court of Justice is one of the world’s most historic and visible efforts to promote peace, as is evident in the name of its beautiful building in The Hague, “The Peace Palace,” and the motivation of Andrew Carnegie in making the building possible.⁴ It is particularly incumbent upon us, if we believe in the Court as an institution capable of making a difference in inhibiting war and aggression, that we support the Court through careful analysis of its work and suggestions for improvement where warranted. The opposite approach of “My Court Right or Wrong,” in the long run, neither respects nor serves the Court. It is in that spirit, as a supporter of international law and the Court, that this Article is written.

I. DETERRING AGGRESSION

Understanding of the causes of war and aggression is still in its infancy.⁵ Nevertheless, in the last century, newer data about “the democratic peace,”

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5. The first useful database for the study of war, the Correlates of War Project, was only

To read the entire article, go to: http://www.vjil.org and download Vol. 52- Number 4
Global governance, the next new thing in trendy international thought, has been typically portrayed as the nearly inevitable evolution upward from the primitive nation-state and its antiquated notions of constitutionalism and popular sovereignty.

Not "world government," wildly unpopular among knuckle-draggers in America, but a rebranded alternative, more nuanced and sophisticated, would creep in on little cat feet before the Neanderthals knew what was up.

American exceptionalism was on its way to the ash heap. Terms like shared and pooled sovereignty were bandied about like new types of cell phones rather than fundamental shifts in the relationship between citizens and state. Multilateral treaties on an astounding array of issues were in prospect—not just the usual subjects of international relations, but matters heretofore quintessentially decided by nation-states: gun control, abortion, the death penalty, among others.

Although George W. Bush’s troublesome flag-waving tenure represented an unwelcome bump on the road, Barack Obama’s 2009 inauguration was surely the high point of global governance’s advance. Here was a president who saw global warming as the threat it was, promising to stop the seas from rising. This self-proclaimed “citizen of the world” rejected U.S. unilateralism, took the United Nations seriously, and understood that European Union-style institutions were the real future. Not only would America have social democracy domestically, but it would join its like-minded confederes worldwide to celebrate global governance’s emerging transcendence. What could go wrong?

Fortunately, while globalists academics, their handmaiden in the political commentariat, leftist think tanks, and non-governmental organizations were hard at work, others, in the late ’90s, were awakening to the consequences of all that buzz. Sometimes derided as “new sovereigntists” by the multilateralist chorus, these analysts and practitioners began examining both the precepts and the implications of the global-governance agenda.

Prominent among them was John Fonte, then at the American Enterprise Institute, now at the Hudson Institute. His latest effort, Sovereignty or Submission, has as its subtitle the sobering question: Will Americans Rule Themselves or Be Ruled by Others? That is, indeed, the question.

Fonte warns against the “globalista” technique of international norm setting, whereby self-selected, transnational elites fashion rules of conduct through multilateral negotiations, which are then carried down to the nation-state level to be rubber-stamped by pliant parliaments. This model is actually not far from current European Union (E.U.) governance practices. U.K. Prime Ministers Gordon Brown and David Cameron, for example, have both estimated that approximately 50% of significant parliamentary actions involving economic policy simply rally, without possibility of amending or rejecting, what E.U. bureaucrats or diplomats in Brussels have already decided.
Against the globalistas - Foreign and Defense Policy - AEI

BUY FONTE'S BOOK "SOVEREIGNTY OR SUBMISSION: WILL AMERICANS
TRUST THEIR GOVERNMENT?"

The world has always been a puzzle, solved by real people, the only
legitimate basis for the state's monopoly of coercive power. We are not
considering here authoritarian or less-developed countries where free
expression and representative government are absent or inadequate. One
could argue in such cases that international norm setting might provide
standards or models from which emerging free governments could pick and
choose. (Of course, one could also argue that the United States provides a
perfectly acceptable model all on its own, which emerging democracies can
emulate or not, without any need for America to "multilateralize" its
uniqueness.)

Ironically, however, the global governance advocates focus less on countries
like Iran, Cuba, and North Korea than on the United States. There is a reason
for this skewed focus. The United States is the main threat to global
governance, with its antiquated attachment to its Constitution rather than to
multilateral human rights treaties and institutions. Fonte explains the
philosophical development of this antagonism toward the United States (and
others holding similar views elsewhere), and poses his own alternative, which
he labels "Philadelphian sovereignty," in contrast to the more familiar term,"Westphalian sovereignty."

The point is more than semantic, because Fonie is not simply defending
national sovereignty in the abstract (and indeed the concept has a plethora of
sometimes contradictory definitions). Instead, he is defending how America
has developed the concept, resting on the Constitution's opening phrase,
"We the People."

For Americans, sovereignty is not an abstract concept of international law
and politics, nor was it ever rooted in an actual "sovereign" as head of state.
Starting with the Revolution, we rejected sovereignty and legitimacy outside
of a constitutional framework of representative government. "No taxation
without representation" was one early formulation, and "We the People" the
most famous and broadly influential. America's focus on a personal right is
so personally vested with sovereignty, an inalienable attribute of citizenship, and
they therefore react with appropriate concern when globalists insist that
"pooled" or "shared" sovereignty will actually benefit them. Since most
Americans already believe they have too little control over government, the
notion of giving up any authority to unfamiliar peoples and governments
whose tangible interests likely bear little relation to our own is decidedly
unappealing.

Moreover, for those watching recent E.U. developments, events there are a
source of considerable concern rather than admiration. Euroskeptics (or
Eurorealists, as they prefer) have repeatedly highlighted the E.U.'s
"democratic deficit," a phrase often associated with Margaret Thatcher's E.U.
critique. Not only are E.U. institutions and processes remote, opaque, and
unaccountable but also, as a consequence, they lack the legitimacy so
fundamental to acceptable governance. The euro's unfolding debacle only
underlines this point.

Fonte provides several case studies of the global-governance philosophy at
work, including international efforts to direct U.S. domestic policy;
transforming the laws of war to constrain U.S. options and practices; the
international Criminal Court (ICC); isolating and delegitimizing Israel; and
international migration and assimilation policies. The globalista agenda is
lengthy, including major issues such as climate change, but Fonte's
examples certainly rank among their top priorities.

In describing the intrusion of foreign actors into U.S. domestic policy, Fonte
uses a phrase of former German Foreign Minister Joschka Fischer, "global
domestic politics," which neatly captures the problem. In the globalista view,
there is no room for national variation from their norms, or tolerance for
contrary majorities in different countries. This attitude explains the ongoing
efforts to homogenize E.U. member states, and the growing tendency to
second-guess what have been seen historically as entirely domestic issues.

http://aei.org/print/against-the-globalistas
Fonte focuses primarily on how various seemingly innocuous international "human rights" conventions, and numerous U.N. bodies (such as the United Nations Human Rights Council), have been used to criticize and harass the United States in recent years.

Fonte does considerable original thinking about how America has assimilated immigrants, cutting through much of the current debate about illegal immigration and how to deal with it. By stressing the longstanding importance of Americanizing newcomers to the United States, an approach directly contrary to the "multicultural" view now embraced by the International Left, Fonte explains why the globalists are so irritated by our adherence to the Constitution and our other basic values. The debate here is not about enforcement versus amnesty or any of the other hot buttons, but what to do with people who are in this country and almost certainly staying.

During the height of immigration in the late 19th and early 20th centuries, our ancestors had no hesitancy in tossing millions of new arrivals straight into the melting pot, and no one was embarrassed by Americanization. Because the melting pot directly forms the shared values of citizens who see themselves as "We the People," when assimilation is disrupted or frustrated, the unifying bonds of citizenship are similarly weakened. These are critical issues regardless of one's views on the broader question of who should be let in and who excluded.

In considering traditional foreign affairs issues, the laws of war, the ICC, and the isolation of Israel are all excellent examples of the globalist approach. They seek to exploit both international law and domestic U.S. law to limit, constrain, and intimidate the United States and its political and military leaders from robustly defending our national interests abroad. One should begin here with skepticism for the very idea of International law, a skepticism now increasingly justified by a torrent of wide-ranging scholarship. Jeremy Rabkin, John Yoo, Jack Goldsmith, Eric Posner, and many others have dealt the globalists setback after setback, precluding even the Obama Administration from following its basic proclivities.

Nonetheless, there is no doubt that the proponents of "lawfare" have used this strategy successfully against Israel, and increasingly against the United States. By threatening U.S. officials with prosecution for alleged war crimes or human rights abuses, asserting jurisdiction over them when they travel abroad, for example, the globalists seek to impose their version of international law over our own constitutional authorities. The American response should be that we recognize no higher earthly authority than the Constitution, which no valid treaty can supersede or diminish. And we certainly do not accept that "customary international law" which we do not voluntarily follow can bind us, especially today's variety, formed not by actual custom but by leftist academics who hardly have our best interests at heart.

John Fonte deserves our thanks and praise for wading through the morass of globalist writings, conference papers and speeches, U.N. resolutions and reports, and the panoply of studies written over decades while many in the United States proceeded blithely on their way, unaware of the mounting challenges to "Philadelphia sovereignty."

The struggle to preserve our constitutional system of liberty and representative government is a great unfolding political war, and the outcome is far from certain. Those armed with Fonte's analysis, however, will be well-armed and heavily armored for the battles ahead.

John R. Bolton, a former U.S. permanent representative to the United Nations, is a senior fellow at the American Enterprise Institute.
In the aftermaths of both World War I and World War II, the United States engaged in significant domestic political debates over its proper place in the world. President Wilson’s brainchild, the League of Nations, was the centerpiece of the first debate, and the United Nations the centerpiece of the second. The conventional wisdom is that the dark forces of isolationism defeated Wilson’s League in the Senate, and that the advent of the Cold War gridlocked the nascent United Nations, preventing it from assuming the role intended for it in preserving international peace and security. While the mythology surrounding both of these important debates is wrong and incoherent in many respects, there is no doubt of the far-reaching implications of American political decisions attendant on them.

Neither the debate over the League nor the one over the United Nations settled the issue of America’s proper relationship with other governments and international organizations. During the Cold War, there was little or no occasion for the debate to re-emerge in the United States because the life-or-death struggle with Communism dominated U.S. attention, at least at the national level. Nonetheless, below the surface, largely in academic circles, those debates favoring international legal measures to constrain the independence of nation states continued their efforts, both here and in Europe. Although motivated by a wide range of considerations, many of which were contradictory, one broad theme was that it was the nation state itself, and the seemingly inescapable at-
ary step following the Nuremberg tribunal, and a logical institutional development over the ad hoc war crimes courts in Bosnia and Rwanda.

So described, one might assume that the ICC fits logically into history’s orderly march toward the peaceful settlement of international disputes, sought since time immemorial. But the real (if usually unstated, and far distant) objectives of the ICC’s supporters are to assert the supremacy of its authority over nation states, and to promote prosecution over alternative methods for dealing with the worst criminal offenses, whether occurring in war or through arbitrary domestic power. This is but one of many reasons why the Statute of Rome is harmful to the national interests of the United States, is unsound foreign policy, and is a threat to the independence and flexibility that America’s military forces need to defend U.S. national interests around the world.

In fact, the court and the prosecutor are illegitimate. The ICC’s principal failing is that its components do not fit into a coherent “constitutional” design that delineates clearly how laws are made, adjudicated, and enforced, subject to popular accountability and structured to protect liberty. Instead, the court and the prosecutor are simply “out there” in the international system. This approach is clearly inconsistent with American standards of constitutional order, and is, in fact, a stealth approach to erode our constitutionalism. That is why this issue is, first and foremost, a liberty question.

The ICC’s failing stems from its purported authority to operate outside (and on a plane superior to) the U.S. Constitution, and thereby to inhibit the full constitutional autonomy of all three branches of the U.S. government, and, indeed, of all states party to the statute. ICC advocates rarely assert publicly that this result is central to their stated goals, but it must be for the court and prosecutor to be completely effective. And it is precisely for this reason that, strong or weak in its actual operations, the ICC has unacceptable consequences for the United States.

The court’s illegitimacy is basically two-fold: substantive and structural. As to the former, the ICC’s authority is vague and excessively elastic. This is most emphatically not a court of limited jurisdiction. Even for genocide, the oldest codified among the three crimes specified in the Rome Statute, there is hardly complete clarity on its meaning. The ICC demonstrates graphically all of the inadequacies of how “international law” is created.

The U.S. Senate, for example, cannot accept the statute’s definition of genocide unless it is prepared to reverse the position it took in February 1986 in ap-

11. There is no doubt that such an effort fails under long-accepted standards of American Constitutional law. See, e.g., Reid v. Covert, 354 U.S. 1 (1957). There, Justice Black’s plurality opinion stated unambiguously that the “Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.” Id. at 17.
proving the Genocide Convention of 1948, when it attached two reservations, five understandings, and one declaration. By contrast, Article 120 of the Rome Statute provides explicitly and without any exceptions that “[n]o reservations may be made to this [s]tatute.” Thus confronted with the statute’s definition of “genocide” that ignores existing American reservations to the underlying Genocide Convention, the Senate would not have the option of attaching these reservations (or others) to any possible ratification of the statute. Stripped of the reservation power, the United States would risk expansive and mischievous definitional interpretations by a politically motivated court. Indeed, the “no reservations” clause appears obviously directed against the United States and its protective Senate, and is a treaty provision we should never agree to.

The Rome Statute’s two other offenses, crimes against humanity and war crimes, are even vaguer, as is the real risk that an activist court and prosecutor can broaden the language of the terms essentially without limit. It is precisely this risk that has led our Supreme Court to invalidate state and federal criminal statutes that fail to give adequate notice of exactly what they prohibit under the “void for vagueness” doctrine. Unfortunately, “void for vagueness” is largely an American shield for civil liberties.

A fair reading of the treaty, for example, leaves the objective observer unable to answer with confidence whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II. Indeed, if anything, a straightforward reading of the language probably indicates that the court would find the United States guilty. A fortiori, these provisions seem to imply that the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki. This is intolerable and unacceptable.

The list of ambiguities goes on and on. How will these vague phrases be interpreted? Who will advise a President that he is unequivocally safe from the retroactive imposition of criminal liability if he guesses wrong? Is even the defensive use of nuclear weapons a criminal violation?

We are nowhere near the end of the list of prospective “crimes” that can be added to the statute. Many were suggested at Rome and commanded wide support from participating nations. The most popular was the crime of “aggression,” which was included in the statute but not defined. Although frequently easy to identify, “aggression” can at times be something in the eye of the beholder. Thus, Israel justifiably feared in Rome that its preemptive strike in the Six-Day War almost certainly would have provoked a proceeding against top

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15. Id. arts. 7, 8.2(b)(1)(iv).
16. Some governments and NGOs proposed in Rome that the use of nuclear weapons be specifically prohibited. While these proposals were not accepted, the statute’s actual language can certainly support arguments about the “criminal” effects of nuclear weapons for those seeking to outlaw them.
17. Rome Statute, supra note 10, arts. 5.1(d), 5.2.
Israeli officials. Moreover, there is no doubt that Israel will be the target of a complaint concerning conditions and practices by the Israeli military in the West Bank and Gaza. The United States, with continuous bipartisan support for many years, has attempted to minimize the disruptive role that the United Nations has all too often played in the Middle East peace process. We do not now need the ICC interjecting itself into extremely delicate matters at inappropriate times. Israel, therefore, was one of the few governments that voted with the United States against the statute.

But even beyond this risk is the larger agenda of many ICC supporters, of the nearly endless articulation of "international law" that continues ineluctably and inexorably to reduce the international discretion and flexibility of nation states, and the United States in particular. In judging the Rome Statute, we should not be misled by examining simply the substantive crimes contained in the final document. We have been put on very clear notice that this list is illustrative only, and just the start.\textsuperscript{18}

The fundamental problem with the latitude of the ICC's interpretive authority stems from the decentralized and unaccountable way in which "international law," and particularly customary international law, is made.\textsuperscript{19} It is one of those international law phenomena that just happens "out there," among academics and activists. While the historical understanding of customary international law was that it evolved from the practices of nation states over long years of development, today we have theorists who speak approvingly of "spontaneous customary international law" that the cognoscenti discover almost overnight. This is simply not acceptable to any free person.

The idea that nations and individuals can be bound through "international law" has a surface appeal precisely because it sounds so familiar and comfortable to citizens of countries such as ours, where we actually do live by the "rule of law." In reality, however, this logic is naive, abstract to the point of irrelevance from real international relations, and in many instances simply dangerous. It mistakes the language of law for the underlying concepts and structures that actually permit legal systems to function, and it seriously misapprehends what "law" can realistically do in the international system.\textsuperscript{20}

In fact, what happens in "international law," especially in "customary international law," meets none of the tests of what we understand "law" to be. In

\textsuperscript{18} Article 10 of the Rome Statute states explicitly that nothing in the substantive jurisdictional provisions "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute."

\textsuperscript{19} Japan's Permanent U.N. Representative, serving as the head of Japan's delegation to the Rome Conference, said approvingly that "[t]he war crimes which are considered to have become part of customary international law should also be included, while crimes which cannot be considered as having crystallized into part of customary international law should be outside the scope of the Court." See Statement of Ambassador Hisashi Owada, June 15, 1998, at 2 <http://www.un.org/icc/speeches/615jpn.htm>.

\textsuperscript{20} For an extended—and completely unintentional—display of most of the errors of this approach, see generally \textit{The Commission on Global Governance, Our Global Neighborhood} (1995).
common-sense terms, "law" is a system of rules that regulates relations among individuals and associations, and between them, and sources of legitimate coercive authority, that can enforce the rules. The source of coercive authority is legitimate to the extent it rests on popular sovereignty. Any other definition is either incoherent, or unacceptable to anyone who values liberty.

To have real "law" in a free society, there must be a framework—a constitution—that defines government authority and thus limits it, preventing arbitrary power. As the great scholar C. H. McIlwain wrote, "[a]ll constitutional government is by definition limited government." There must also be political accountability, as demonstrated through reasonably democratic popular controls over the creation, interpretation, and enforcement of the laws. These prerequisites must be present to have agreement on three key structures: authoritative and identifiable sources of the law for resolving conflicts and disputes among parties; methods and procedures for declaring and changing the law; and the mechanisms of law interpretation, enforcement, execution, and compliance.

In "international law," essentially none of this exists. There is no process tying international authority to the political consent of the global population, for true democratic legitimization. There is no definitive dispute-resolution mechanism, and no agreed-upon enforcement, execution, or compliance mechanisms. No international organization that exists today honestly meets any acceptable test for accountable law-giving, law-interpreting, or law-enforcing institutions.

Particularly important for Americans, of course, is how all of this applies to us. Proponents of international governance see the United States as the chief threat to the "new world order" they are trying to create. Small villains who commit heinous crimes can kill individuals and even entire populations, but only the United States can neutralize or actually thwart the "new world order" itself. Under our Constitution, any Congress may, by law, amend an earlier act of Congress, including treaties, thus freeing the United States unilaterally of any obligation. The Supreme Court made this point explicitly in the Chae Chan Ping case:

A treaty... is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force... it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.\textsuperscript{22}

If treaties cannot legally "bind" the United States, it need not detain us long to dismiss the notion that "customary international law" has any binding legal effect either. The idea that the amorphous concept of what is "customary" can bind the world's nation states seems to assume tacitly that the Global Constitu-

\textsuperscript{21} Charles Howard McIlwain, Constitutionalism: Ancient and Modern 23 (1958).
\textsuperscript{22} Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).
tion contains a Global Supremacy Clause. But this is simply an exercise of false advertising.

Moreover, we must also understand some facts of international political life. If the American citadel can be breached, advocates of binding international law will be well on the way toward the ultimate elimination of the “nation state.” Thus, it is important to understand why America and its Constitution would have to change fundamentally and irrevocably if we accepted the ICC. This constitutional issue is not simply a narrow, technical point of law, certainly not for the United States, where the overwhelming popular and political consensus supports the superior status of the Constitution over the claims of international law. Those who disagree must explain to the people of America how the world’s strongest and most free representative democracy, simply by adhering to its own Constitution, somehow contravenes international law.

As troubling as the ICC’s substantive and jurisdictional problems are, the problems raised by the statute’s main structures—the court and the prosecutor—are still worse. Particularly important here is the independent prosecutor, who is responsible for conducting investigations and prosecutions before the court. The prosecutor may initiate investigations based on referrals by states’ parties to the statute, or on the basis of information which he or she otherwise obtains.\(^{23}\) While the Security Council may refer matters to the ICC, or order it to cease a pending investigation, the Council is essentially barred from any real role in the ICC’s work.\(^{24}\)

What is at issue in the prosecutor is the power of law enforcement, a powerful and necessary element of executive power. Never before has the United States been asked to place any of that power outside the complete control of our national government. Our main concern should not be that the prosecutor will target for indictment the isolated U.S. soldier who violates our own laws and values, and his or her military training and doctrine, by allegedly committing a war crime. Instead, our main concern should be for our country’s top civilian and military leaders, those responsible for our defense and foreign policy. They are the real potential targets of the ICC’s politically unaccountable prosecutor.

Unfortunately, the United States has had considerable experience in the past two decades with “independent counsels,” and that depressing history argues overwhelmingly against international repetition. Simply launching massive criminal investigations has an enormous political impact. Although subsequent indictments and convictions are unquestionably more serious, a zealous independent prosecutor can make dramatic news simply by calling witnesses and gathering documents, without ever bringing formal charges.

Indeed, the supposed “independence” of the prosecutor and the court from “political” pressures (such as the Security Council) is more a source of concern

\(^{23}\) See Rome Statute, supra note 10, arts. 13(a), 13(c), 14.

\(^{24}\) See id. arts. 13(b), 16.
than an element of protection. "Independent" bodies in the United Nations system have often demonstrated themselves to be more highly politicized than some of the explicitly political organs.25 True political accountability, by contrast, is almost totally absent from the ICC, which lacks both any semblance of democratic accountability or effective governmental oversight and control. If anything, "public choice" analysis tells us that the ICC will be "captured" not by governments but by NGOs and others with narrow special interests, and the time and resources to pursue them.

The American concept of separation of powers, imperfect though it is, reflects the settled belief that liberty is best protected when, to the maximum extent possible, the various authorities legitimately exercised by government are placed in separate branches. So structuring the national government, the framers of the Constitution believed, would prevent the excessive accumulation of power in a limited number of hands, thus providing the greatest protection for individual liberty. Continental European constitutional structures do not, by and large, reflect a similar set of beliefs. They do not so thoroughly separate judicial from executive powers, just as their parliamentary systems do not so thoroughly separate executive from legislative powers. That, of course, is entirely their prerogative, and substantially explains why they appear to be more comfortable with the ICC's structure, which closely melds prosecutorial and judicial functions in the European fashion. They may be able to support such an approach, but we should not.

In addition, the Constitution provides that the discharge of executive authority will be rendered accountable to the citizenry in two ways. First, the law-enforcement power is exercised only through an elected President. The President is constitutionally charged with the responsibility to "take Care that the Laws be faithfully executed,"26 and the constitutional authority of the actual law-enforcers stems directly from the only elected executive official. Second, Congress, all of whose members are popularly elected, both through its statute-making authority and through the appropriations process, exercises significant influence and oversight. When necessary, the congressional impeachment power serves as the ultimate safeguard.

In European parliamentary systems, these sorts of political checks are either greatly attenuated or entirely absent, just as with the ICC’s central structures, the court and prosecutor. They are accountable to no one. The prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Rome Statute. The prosecutor, and his or her as yet uncreated investigating, arresting, and detaining apparatus, is answerable only to the court, and then only partially. The Europeans may be comfortable with such a system, but that is one reason why they are Europeans and we are not.

25. UNESCO and the ILO, both of which the United States has withdrawn from (although later remaining within the ILO), are two examples of "specialized agencies" that became highly politicized.
26. U.S. Const. art. II.
By longstanding American principles, the ICC’s structure completely fails to provide sufficient accountability to warrant vesting the prosecutor with the statute’s enormous power of law enforcement. Political accountability is utterly different from “ politicization,” which all can agree should form no part of the decisions of either the prosecutor or the court. Today, however, precisely contrary to the proper alignment, the ICC has almost no political accountability, and carries an enormous risk of politicization. This analysis underscores that our main concern is not the isolated prosecutions of individual American military personnel around the world. It has everything to do with the fundamental American fear of unchecked, unaccountable power.

Beyond the particular American interests adversely affected by the ICC, are the ICC’s more general deficiencies that will affect all nations. Thus, although the gravest danger from the American perspective is that the ICC will be overbearing and unaccountable, an at-least-equally-likely possibility is that, in the world at large, the new institution will be powerless and ineffectual. While this analysis may sound superficially contradictory, the ICC is ironically one of those rare creations that may be simultaneously dangerous and weak because its intellectual underpinnings are so erroneous or inadequate in so many respects.

The most basic error is the belief that the ICC will have a substantial, indeed decisive, deterrent effect against the possible perpetration of heinous crimes against humanity. Rarely if ever, however, has so sweeping a proposal had so little empirical evidence to support it. The evidence demonstrates instead that the court and the prosecutor will not achieve their central goal because they do not, cannot, and should not have sufficient authority in the real world.

Behind their optimistic rhetoric, ICC proponents have not a shred of evidence supporting their deterrence theories. In fact, they fundamentally confuse the appropriate roles of political and economic power, diplomatic efforts, military force, and legal procedures. No one seriously disputes that the barbarous actions about which ICC supporters complain are unacceptable, but they make a fundamental error in trying to transform international matters of power and force into matters of law. Misunderstanding the appropriate roles of force, diplomacy, and power in the world is not just bad analysis, but bad and potentially dangerous policy.

Recent history is filled with cases where even strong military force or the threat of force failed to deter aggression or the commission of gross abuses of human rights.27 ICC proponents concede as much when they cite cases where the “world community” has failed to pay adequate attention, or failed to intervene in a sufficiently timely fashion to prevent genocide or other crimes against

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humanity. The new court and prosecutor, it is said, will now guarantee against similar failures.

But this is surely fanciful. Deterrence ultimately depends on perceived effectiveness, and the ICC fails badly on that point. Even if administratively competent, the ICC's authority is far too attenuated to make the slightest bit of difference either to the war criminals or to the outside world. In cases where the West in particular has been unwilling to intervene militarily to prevent crimes against humanity as they were happening, why will a potential perpetrator feel deterred by the mere possibility of future legal action? A weak and distant court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the truly weak and vulnerable is simply a cruel joke.

Beyond the predictive issue of deterrence, it is by no means clear that "justice" is everywhere and always consistent with the attainable political resolution of serious political and military disputes, whether between or within states. It may be, or it may not be. Human conflict teaches that, unfortunately for moralists and legal theorists, mortal policymakers often must make tradeoffs among inconsistent objectives. This can be a painful and unpleasant realization, confronting us as it does with the irritating facts of human complexity, contradiction, and imperfection. Some choose to ignore these troubling intrusions of reality, but an American President does not have that luxury.

The existing international record of adjudication is not encouraging. Few Americans argue that the International Court of Justice ("ICJ") has garnered the legitimacy sought by its founders in 1945. This is more than ironic, because much of what was said then about the ICJ anticipates recent claims by ICC supporters. These touching sentiments were not borne out in practice for the ICJ, which has been largely ineffective when invoked and more often ignored in significant international disputes. Indeed, the United States withdrew from the mandatory jurisdiction of the ICJ after its erroneous Nicaragua decisions, and it has even lower public legitimacy here than the rest of the United Nations.

Among the several reasons why the ICJ is held in such low repute, and what is candidly admitted privately in international circles, is the highly politicized nature of its decisions. Although ICJ judges supposedly function independently of their governments, their election by the United Nation's General Assembly is a highly politicized matter, involving horse trading among and within the United Nation's several political groupings. Once elected, ICJ judges typically

29. The ICJ at least fits more conventionally into traditional notions of "international law" than the ICC, because the ICJ has jurisdiction only over disputes between states, not over individual guilt or innocence for violations of international codes of conduct. See ICJ Statute art. 34(1). The ICJ can also render advisory opinions to the United Nations. See U.N. Charter art. 96 (1945).
30. The Nicaragua decisions are discussed at length in Robert Bork, The Limits of International Law, 18 Nat'l Interest 3 (Winter 1989-90).
vote along highly predictable national lines except in the most innocuous of cases. We do not need a repetition of that hypocrisy.

Although supposedly a protection for the ICC's independence, the provisions for the "automatic jurisdiction" of the court and the prosecutor are unacceptably broad. They constitute a clear break from the basic premise of the ICJ that there is no jurisdiction without the consent of the state parties.\textsuperscript{31} Because parties to the ICC may refer alleged crimes to the prosecutor, we can virtually guarantee that some will, from the very outset, seek to use the court for political purposes.

Another significant failing is that the Rome Statute substantially minimized the Security Council's role in ICC affairs. In requiring an affirmative Council vote to stop a case, the statute shifts the balance of authority from the Council to the ICC.\textsuperscript{32} Moreover, a veto by a permanent member of such a restraining Council resolution leaves the ICC completely unsupervised. This attempted marginalization of the Security Council is a fundamental new problem created by the ICC that will have a tangible and highly detrimental impact on the conduct of U.S. foreign policy. The Council now risks having the ICC interfere in its ongoing work, with all of the attendant confusion between the appropriate roles of law, politics, and power in settling international disputes. It seriously undercuts the role of the five permanent members of the Council, and radically dilutes their veto power.

More broadly, accumulated experience strongly favors a case-by-case approach, politically and legally, rather than the inevitable resort to adjudication contemplated by the ICC. Circumstances differ, and circumstances matter. Atrocities, whether in international wars or in domestic contexts, are by definition uniquely horrible in their own times and places.\textsuperscript{33}

For precisely that reason, so too are their resolutions unique. When the time arrives to consider the crimes, that time usually coincides with events of enormous social and political significance: negotiation of a peace treaty, restoration of a "legitimate" political regime, or a similar milestone. In such momentous circumstances, there are typically issues beyond administering justice to those who committed heinous crimes during the preceding turbulence. Many questions are clearly political, not legal: How shall the formerly warring parties live with each other in the future? What efforts shall be taken to expunge the causes of the previous inhumanity? Can the truth of what actually happened be established so that succeeding generations do not make the same mistakes?

One alternative to the ICC is South Africa's Truth and Reconciliation Commission.\textsuperscript{34} In the aftermath of apartheid, the new government faced the dif-

\textsuperscript{31} Although "automatic jurisdiction" is not expressly stated in the Rome Statute, it follows from Article 12. See Alan Baker, The International Criminal Court: Israel's Unique Dilemma, 18 JUSTICE, 18, 22 (Autumn 1998).

\textsuperscript{32} See Rome Statute, supra note 10, art. 16.

\textsuperscript{33} A recent discussion of these complexities may be found in MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

\textsuperscript{34} See id. ch. 4.
ficult task of establishing and legitimizing truly democratic governmental institutions while dealing simultaneously with earlier crimes. One option was widespread prosecutions against the perpetrators of human rights abuses, but the new government chose a different model. Under the Commission's charter, the alleged offenders came before it and confessed past misdeeds. Assuming they confessed truthfully, the Commission in effect pardoned them from prosecution. This approach was intended to make public more of the truth of the apartheid regime in the most credible fashion, to elicit thereby admissions of guilt, and then to permit society to move ahead without the continued opening of old wounds that trials, appeals, and endless recriminations might bring.

One need not argue that the South African approach should be followed everywhere, or even necessarily that it was correct for South Africa. But it is certainly fair to conclude that that approach is radically different from the ICC, which like most criminal law-enforcement institutions seeks vindication, punishment, and retribution as its goals.

It may be that, in some disputes, neither retribution nor complete truth-telling is the desired outcome. In many former Communist countries, for example, citizens are still wrestling with the handling of secret police activities of the now-defunct regimes. So extensive was the informing, spying, and compromising in some societies that a tacit decision was made that the complete opening of secret police and Communist Party files will either not occur, or will happen with exquisite slowness over a very long period. In effect, these societies have chosen "amnesia" because it is simply too difficult for them to sort out relative degrees of past wrongs, and because of their desire to move ahead.

One need not agree with these decisions to have at least some respect for the complexity of the moral and political problems they address. Only those completely certain of their own moral standing and utterly confident in their ability to judge the conduct of others in difficult circumstances can reject the amnesia alternative out of hand. Our experience should counsel for a prudent approach that does not invariably insist on international adjudication even over a course that the parties to a dispute might themselves agree upon. Indeed, with a permanent ICC, one can predict that one or more disputants might well invoke its jurisdiction at a selfishly opportune moment, and thus, ironically, make an ultimate settlement of their dispute more complicated or less likely.

Another alternative, of course, is for the parties themselves to try their own alleged war criminals. Indeed, there are substantial arguments that the fullest cathartic impact of the prosecutorial approach to war crimes and similar outrages occurs when the responsible population itself comes to grips with its past and administers appropriate justice. ICC advocates usually disregard this possibility, either because it is inconvenient to their objectives, or because it utilizes national judicial systems and agreements among (or within) nation states to implement effectively. They pay lip service to the doctrine of "complementarity," or deference to national judicial systems, but like so much else connected with the ICC, complementarity is simply an assertion, utterly unproven and un-
tested. In fact, if complementarity has any real substance, it argued against creating the ICC in the first place, or, at most, creating ad hoc international tribunals. Indeed, it is precisely the judicial systems that the ICC would likely supplant where the international effort should be to encourage the warring parties to resolve questions of criminality as part of a comprehensive solution to their disagreements. Removing key elements of the dispute, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together.

Take Cambodia. Although the Khmer Rouge genocide is frequently offered as an example of why the ICC is needed, its proponents never explain why the Cambodians should not themselves try and adjudicate alleged war crimes. To create an international tribunal for the task implies the incurable immaturity of Cambodians and paternalism by the international community. Repeated interventions, even benign ones, by global powers is no substitute for the Cambodians coming to terms with themselves.35 ICC proponents frequently assert that the histories of the Bosnia and Rwanda tribunals established by the Security Council demonstrate why a permanent ICC is necessary.36 The limited and highly unsatisfactory experience with ad hoc tribunals proves precisely the contrary. Bosnia is a clear example of how a decision to detach war crimes from the underlying political reality advances neither the political resolution of a crisis nor the goal of punishing war criminals.37 ICC proponents complain about the lack of NATO resolve in apprehending alleged war criminals. But if not in Bosnia, where? If the political will to risk the lives of troops to apprehend indicted war criminals there did not exist, where will it suddenly spring to life on behalf of the ICC?

It is by no means clear that even the tribunal’s “success” would complement or advance the political goals of a free and independent Bosnia, the expiation of war-time hostilities, or reconciliation among the Bosnian factions. In Bosnia, there are no clear communal winners or losers. Indeed, in many respects, the war in Bosnia is no more over than it is in the rest of former Yugoslavia. Thus, there is no agreement, either among the Bosnian factions or among the external intervening powers, about how the war crimes tribunal fits into the overall political dispute or its potential resolution. There is no serious discussion about Bosnia conducting its own war crimes trials. Bosnia shows that insisting on le-

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38. For descriptions of the collapse of Yugoslavia, see generally David Owen, Balkan Odyssey (1995); Laura Silber & Allan Little, Yugoslavia: Death of a Nation (1996); Susan L. Woodward, Balkan Tragedy: Chaos and Dissolution after the Cold War (1995).
gal process as a higher priority than a basic political resolution can adversely affect both the legal and political sides of the equation.

In short, much of the Yugoslav war crimes process seems to be about score settling rather than a more disinterested search for justice that will contribute to political reconciliation. If one side believes it is being unfairly treated, and holds this view strongly, then the "search for justice" will actually have harmed Bosnian national reconciliation by hardening pre-existing animosities. This is a case where it takes only one to tango. Outside observers might disagree with this assessment, but the outside observers do not live in Bosnia.

The experience of the Rwanda war crimes tribunal is even more discouraging. Widespread corruption and mismanagement in that tribunal's affairs have led many to hope that it expires quietly before doing more damage. At least as troubling, however, is the clear impression many have that score settling among Hutus and Tutsis—war by other means—is the principal focus of the Rwanda tribunal. Of course it is, and it is delusional to call this "justice" rather than "politics."

Although disappointed by the outcome in Rome, the Clinton Administration worked actively to bring the United States into the ICC. It continued to negotiate with signatories in the hope of obtaining sufficient amendments to allow the United States to sign on. In fact, whether the ICC survives and flourishes depends in large measure on the United States. For those opposed to the ICC, therefore, the correct policy now is to press Congress and subsequent administrations to ignore the ICC in official U.S. statements, and attempt to isolate it through U.S. diplomacy, in order to prevent it from acquiring any further legitimacy or resources. America's posture toward the ICC should be "Three Noes": no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to "improve" the ICC. Such a policy cannot entirely eliminate the risks posed by the ICC, but it can go a long way in that direction.

The United States should raise our objections to the ICC on every appropriate occasion, as part of our larger campaign to assert American interests against stifling, illegitimate, and unacceptable international agreements. The plain fact is that additional "fixes" to the ICC will not alter its multiple inherent defects, and we should not try to do so. The United States has many alternative foreign policy instruments to utilize that are fully consistent with our national interests, leaving the ICC to the obscurity it so richly deserves. Signatories of the Rome Statute have created an ICC to their liking, and they should live with it. We should not.

U.S. Isn’t Legally Obligated to Pay the U.N.

Adjourning for the year, Congress stung the Clinton Administration by refusing to appropriate any funds for the payment of U.S. "arrears" (unpaid assessments) to the United Nations. U.N. supporters contend that the U.S. must pay up in order to meet its "solemn legal obligations." Failure to pay, they assert, is "illegal" under the "treaty commitment" the U.S. entered into by ratifying the U.N. Charter in 1945.

This line of argument is flatly incorrect. Its widespread acceptance, moreover, is based on several misperceptions about the Constitution.

Rule of Law
By John R. Bolton

Constitution, U.S. obligations under international treaties, and the attendant policy implications for American decision makers.

First, treaties have no special or higher status than other acts of Congress or, for than matter, than the U.S. Constitution. There is widespread confusion on this point, even among sophisticated foreign policy analysts, based in large part on some expansive dicta by Justice Oliver Wendell Holmes in a 1926 Supreme Court decision. At the time of the U.N.'s formation, some pointed to Holmes's dicta to reinforce their worry that treaties might be used as a "back door" to amend the Constitution.

Perhaps sensing the need to quiet these concerns, the Supreme Court revisited the issue in 1957 in Reed v. Covert. It ruled that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." It stressed that "this Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." Whatever the legal impact of a treaty, that impact must be determined consistently with the Constitution and subordinate American law.

Second, treaties are "law" only for U.S. domestic purposes. In their international operation, treaties are simply "political" obligations.

The Supreme Court recognized this distinction as far back as 1884, holding that a treaty "is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." As for the international aspects, the court held clearly that a treaty "depends for the enforcement of its provisions on the interest and honor of the Governments which are parties to it." If they don't work? "If these fail, its infrac-tion becomes the subject of international negotiations and reconciliations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war, As it said in 1871 in The Cherooke Tobacco, "an act of Congress may supersede a prior treaty." There is no doubt that, whatever the U.N.'s assessment notice may say, Congress is fully within its rights to pay it, ignore it or do anything in between.

Appropriations Clause (Article I, Section 9). It would certainly come as news to Congress that the U.N. Charter has modified its power over the purse. The Supreme Court has been consistent on this point. As it said in 1871 in The Cherokee Tobacco, "an act of Congress may supersede a prior treaty." There is no doubt that, whatever the U.N.'s assessment notice may say, Congress is fully within its rights to pay it, ignore it or do anything in between.

Fourth, American constitutional requirements override "international law." It's hard to imagine that any member of Congress would seriously argue, given that point. That the U.S. is "bound" to pay its U.N. assessments because there is a "higher" authority--an authority over and above the Constitution--that somehow compels such a result.

Some acolytes of international law, however, make precisely that argument, contending that whatever the provisions of American jurisprudence, it must bend its knee to higher international authority. In their view, this is just the next step up from saying that state law gives way before contrary federal law. In that sense, they say, failing to acknowledge higher international authority renders the nonpayment of U.S. assessments "illegal.

The argument that the U.S. Constitution is subordinate to international law, erroneous though it is, at least has the virtue of clarity. Either the U.N. Charter amended the U.S. Constitution to diminish congressional discretion over appropriations or it does not. If it does, then the utopian internationalists are right, and the U.S. is a global urchin. If not, then the normal constitutional powers of Congress (and the president) are undiminished, and Congress can legitimately override any treaty provision it chooses. There is no escape from this logic.

Of course, the decision on whether and what amounts the U.S. should pay for U.N. matters, political though it may be, is not an excuse for obtaining benefits on the cheap. It does not follow inevitably that because the U.S. is not legally obligated to pay, it should not pay. Indeed, the correct conclusion is that the U.S. should meet its commitments when it is in its interests to do so and when others are meeting their obligations as well. It is precisely the dissatisfaction with the performance of other member governments and U.N. secretariats that has led to Congress's withholding of appropriations before--and which may well do so again.

Mr. Bolton, senior vice president of the American Enterprise Institute, was assistant secretary of state for international organization affairs in the Bush administration.
Is International Law Really Law?

May 1, 1998
John R. Bolton

On September 25, 1997, the International and National Security Law Practice group co-hosted a debate with the ABA Standing Committee on National Security Law on the subject of the binding force of treaties. We have excerpted the remarks of the two speakers, John Bolton and Robert Turner.

Treaties have no special or higher status than other legislative acts, or the U.S. Constitution.

I have been surprised, in conversations even with knowledgeable and sophisticated foreign policy analysts, to hear repeated reference to treaties as possessing some special status in the American legal system. I believe that the confusion stems from the misreading both of the Supremacy Clause of the Constitution, and of the well-known opinion by Mr. Justice Holmes in Missouri v. Holland, 252 U.S. 416 (1920).

The Supremacy Clause provides:

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Constitution, Article VI, clause 2.

The inclusion of "treaties" in the Clause was a deliberate effort by the Framers to subordinate contrary State laws to treaties entered into by the national government. Under the Articles of Confederation, States had frequently enacted laws which, for example, clashed with the Treaty of Paris of 1783. Just as the Framers intended duly enacted laws at the national level to supersede contrary State laws, so too, national treaties were intended to trump State law under the Supremacy Clause.

The Constitution entrusted the treaty-making power solely to the national government, by providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...." U.S. Constitution, Article II, Section 2, clause 2. Indeed, the Framers also provided that "No State shall enter into any Treaty, Alliance, or Confederation...," to make it completely clear that the treaty power belonged only to the national government. Id. Article 1, Section 10, clause 1.

In Missouri v. Holland, supra, the State of Missouri challenged the constitutionality of the Migratory Bird Convention of 1916 with Great Britain, as well as statutes and regulations intended to implement the treaty. Missouri argued that the Convention, which attempted to limit the killing and capturing of migratory birds in the U.S. and Canada, violated the Tenth Amendment. The Supreme Court rejected Missouri's argument, and upheld the validity of the treaty, as well as the implementing statute and regulations.

Justice Holmes specifically concluded that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution." 252 U.S. at 433. Nonetheless, his opinion added expansively that:

"It is said that a treaty cannot be valid if it infringes the Constitution; that there are limits, therefore, to the treaty-making power; and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do ...."

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States ... We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found [citation omitted]."

http://www.fed-soc.org/publications/detail/print/is-international-law-really-law

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Id. at 432-33.

Having dealt with the Convention, Justice Holmes summarily upheld the implementing statute: "If the treaty is valid, there can be no dispute about the validity of the statute under article 1, [Sec.] 8, as a necessary and proper means to execute the powers of the government." Id. at 432.

Perhaps sensing the need to quiet the concerns generated by Missouri v. Holland, the Supreme Court revisited the issue in Reid v. Covert, 354 U.S. 1 (1957). There, the Court invalidated the murder convictions of wives of American servicemen who had accompanied them as dependents overseas, and who were convicted of murdering them by military courts martial. A plurality of the Court concluded that military trials of civilians generally violated the Constitution, while Justices Frankfurter and Harlan limited their opinion only to capital cases.

The plurality opinion by Justice Black rejected an argument by the government that courts martial of dependents accompanying the U.S. military overseas were required to implement international agreements made with the countries where they were stationed. The Court concluded that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16.

After quoting the Supremacy Clause, Justice Black stated:

"There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution... It would be manifestly contrary to the objections of those who created the Constitution, as well as those who were responsible for the Bill of Rights -- let alone alien to our entire constitutional history and tradition -- to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."

Id. at 16-17.

Justice Black added that "[t]his Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." Id. at 17 (emphasis added). He then concluded expressively: "There is nothing in Missouri v. Holland [citation omitted] which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution." Id. at 18.

Thus, for purposes of American law, treaties do not exist apart from or outside of that body of law, or in a position superior to or superseding the Constitution, or any of its requirements or prohibitions. Whatever the legal impact of a treaty -- a point I turn to next -- that impact must be determined consistently with the Constitution and subordinate American law.

Treaties are "law" only for U.S. domestic purposes. In their international operation, treaties are simply "political," and not legally binding.

Another major source of confusion about the effect of U.S. treaty obligations is what it means to say that they constitute, in the Constitution's phrase, "the supreme Law of the Land." In normal American usage, the word "law" denotes a binding obligation. In the context of UN assessments, the argument is frequently made that these assessments are the result of a treaty obligation, hence are the "law of the land," and hence are "legally binding" on Congress to pay in full and in a timely fashion.

This line of argument is flatly incorrect. To the extent that adherence to the UN Charter carries any obligation, it is political in nature, and subject to all of the possibilities for modification or abrogation of any political arrangement. That renders it fundamentally different from a treaty that affects the domestic relationships between the government and its citizens, or between private citizens, as the Supreme Court has repeatedly recognized.

In Edve v. Robertson, 112 U.S. 580 (1884) (the "Head Money Cases"), the Court upheld as constitutional a per-person fee on immigrants, to be used for the support of those who need care or assistance after landing. The ship owners challenging the fee's validity argued that the statute establishing the fee violated several U.S. treaty obligations. The Court rejected this argument, and in so doing articulated the important distinction between the effect of treaties in the international arena, on the one hand, and within the United States, on the other. While respect to the international arena, the Court said:

"[a] treaty, then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."

_Id._ (emphasis added)

The Supreme Court's distinction in the _Head Money Cases_ echoed the same point made in _The Federalist, Number 75_ : treaties "are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." As the Court indicates, when treaties operate as "municipal law," they are justiciable as are all other similar legal requirements. "An illustration of this character is found, in treaties which regulate the mutual rights of citizens and subjects of the contracting Nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." 112 U.S. at 598. In the international arena, however, resolution of disputes arising under treaties requires political adjustments -- not legal adjudications -- among the states party to the treaty, up to and including war.

In short, treaties are "law" to the extent that they constitutionally adjust private-private and private-public relationships within the United States. They are "political," and not legally binding, to the extent that they purport to affect relations among national governments. There may be good and sufficient reasons to abide by the provisions of a treaty, and in most cases one would expect to do so because of the mutuality of benefits that treaties provide, but not because the U.S. is "legally" obligated to do so. As the Supreme Court observed in _Chae Chan Ping_: "whilst it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty, the power to do so was prerogative, of which no nation could be derived without deeply affecting its independence." 130 U.S. at 502 (emphasis added).

*John R. Bolton is Senior Vice President of the American Enterprise Institute.*

1. See _Reid v. Covert_, 354 U.S. 1, 16-17 (1957).

Related Links
International Law Really is Law
International Law Really is Law

May 1, 1998

Robert F. Turner

On September 25, 1997, the International and National Security Law Practice group co-hosted a debate with the ABA Standing Committee on National Security Law on the subject of the binding force of treaties. We have excerpted the remarks of the two speakers, John Bolton and Robert Turner.

What do we mean when we inquire whether International Law is law? Over the centuries the term "law" has been used to identify some quite different concepts. The Old Testament tells us that "law" is "the will of God" -- as in the Ten Commandments.

Beginning about three centuries ago, writers like Thomas Hobbes argued that "law" was but a command of a sovereign enforced by a sanction. In this tradition, more than a century ago John Austin wrote in The Province of Jurisprudence Determined that:

"[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."

By this definition, of course, "international law" is admittedly not "law." Indeed, such a narrow definition would exclude much of what we Americans regard as "law" in the late 20th Century. It would certainly exclude, for example, the U.S. Constitution and our Bill of Rights -- which are designed in no small part to constrain government power rather than to issue commands to individual subjects or citizens.

Clearly, any archaic definition that fails to include any of the three categories which or Founding Fathers declared would be the "supreme law of the land" within the United States is not very useful for this afternoon's inquiry.

What I would submit is far more indicative of the perceived binding nature of International Law is that when States do find it in their interest to violate International Law, they never seek to justify their behavior by asserting that the rules don't matter or that International Law is not legally binding and may be disregarded when inconvenient:

- When Hitler invaded Poland, and Kim II Sung invaded South Korea, they issued careful statements alleging that they were acting in "self-defense."
- When the Soviet Union Invaded Hungary, Czechoslovakia, and Afghanistan, it alleged that it had been "invited" In: and Leninist International Law experts also crafted the so-called "Brezhnev Doctrine" to provide additional legal facade to their aggression.¹
- In 1960, North Vietnam engineered the creation of a "National Liberation Front" in South Vietnam to conceal its efforts to overthrow its neighbor -- a highly successful strategy that persuaded many of America's most respected international lawyers to conclude that Hanoi was innocent of aggression for many ears thereafter.²
- Colonel Khadafii routinely denied any knowledge of the terrorist attacks he had ordered; the Nicaraguan Sandinistas swore to the World Court that they had not given any support to guerrillas in neighboring El Salvador³; and Saddam Hussein's spokesmen raised a panoply of alleged legal defenses for the invasion of Kuwait -- ranging from the absence of agreed-upon borders to alleged Kuwaiti theft of Iraqi oil deposits.

International Law is "Law" under the U.S. Constitution.

Let me now turn to my second point -- that the United States Constitution clearly establishes that international treaties are binding "law."

Few issues were debated at greater length during the Federal Convention of 1787 than the allocation of the power to bind the Nation to solemn commitments with foreign States. After more than three months of deliberations during which treaties were discussed on scores of occasions, concern over the magnitude of this power led the Framers to require the consent of two-thirds of the Senate before the President could ratify a treaty.
If treaties did not incur solemn legal obligations for the nation, and could simply be ignored when inconvenient, there would have been little reason for the framers to include this quite anti-democratic provision in the new Constitution — permitting one-third-plus-one of the Senate to block the will of the majority.

There can be no doubt that the constitutional Framers viewed treaty obligations as binding "law." Indeed, it was because treaties were to be "law" that James Wilson, of Pennsylvania, proposed on Friday, September 7, 1787, that the President also be required to obtain the consent of the House of Representatives before ratifying a treaty. Roger Sherman of Connecticut was one of several delegates to argue that treaties required a degree of secrecy that would be incompatible with a large deliberative assembly like the House of Representatives, and Wilson's motion failed by a vote of 10 to 1.

As finally approved, Article 6, paragraph 2, of the Constitution provides in part that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land..."

Admittedly, the constitutional text does not expressly establish a hierarchy among the three types of "supreme law of the land." Clearly, a statute of Congress was to be inferior to the Constitution itself, but how did Treaties fit into the picture.

Certainly the most authoritative public exposition of the treaty power prior to ratification of the Constitution was John Jay's *Federalist* Essay No. 64, in which our most experienced diplomat responded to critics of the new Constitution who argued "that treaties, like acts of assembly, should be repealable at pleasure" rather than being designated "supreme laws of the land."

Noting that other countries considered Treaties to be absolutely binding legal obligations, Jay reasoned, and I quote:

This idea [that treaties should be repealable at pleasure] seems to be new and peculiar to this country, but new errors as well as new truths often appear. These gentlemen would do well to reflect that ... it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it.... The proposed Constitution...has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

The Problem of Sanctions

First of all, I would suggest that "sanctions" and "enforcement mechanisms" have more to do with the question of whether law is effective than with whether it is law. Let me give you a couple of examples.

As most of you probably know, on April 27, 1861, President Lincoln secretly authorized the Army to suspend the writ of habeas corpus. When John Merryman, a Maryland state legislator, was arrested by the Army and imprisoned at Ft. McHenry, Chief Justice of the United States Roger Taney promptly issued a writ of habeas corpus ordering the Commanding General at Ft. McHenry to produce Merryman the following day. But the General elected instead to obey his Commander in Chief, and refused.

Chief Justice Taney declared that the President had acted unconstitutionally and that Merryman should be released. He noted that his Marshal had authority to summon the posse comitatus to assist in seizing the General and bringing him before the Court on a contempt charge; but he acknowledged that the General commanded a more powerful force and could successfully resist capture. The Chief Justice concluded his ruling in *Ex parte Merryman* with these words: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."

Does it follow that the U.S. Constitution is not law because there are instances in which its provisions can not be enforced?

Consider for a moment what might have happened in 1974 if President Nixon had defied the Supreme Court's order in *United States v. Nixon* and simply asserted that the tapes had already been erased and thus could not be produced? Did the Court have the coercive power to compel compliance by the President with its order? Could it have sent a Marshal over to the White House gate armed with a search warrant? It would not have been a pretty sight.

Fortunately, we need not get bogged down on the question of whether unenforceable law is really law, because the reality is that International Law is regularly enforced through a wide-
range of quite effective sanctions. Our time is limited, so let me just touch on a few examples of ways in which International Law is enforced:

- Under Chapter 7 of the UN Charter, the Security Council is expressly empowered in the event of an act of aggression or threat to the peace to take appropriate action "to maintain or restore international peace and security." While largely ineffective during the Cold War, North Korea and Iraq can confirm that the system can work. Countless other potential aggressors may also have been deterred.
- Don't forget that for more than 50 years there has been an International Court of Justice, in The Hague, which I might add since February has had a brilliant American national as its President. The ICJ -- which in 1980 unanimously ordered Iran to return the American diplomats it was holding hostage -- currently is considering nine cases.
- Article 94 of the Charter requires UN Members to "comply with the decisions of the International Court of Justice" in any case to which they are a party, and empowers the Security Council to enforce such decisions.
- In 1993 the Security Council established the International Criminal Tribunal for the former Yugoslavia, to prosecute persons responsible for serious violations of international humanitarian law. As of July, the Tribunal had indicted 77 individuals and 10 were in custody awaiting trial. Evidence had been taken from nearly 200 witnesses, and the first two trials had led to convictions and lengthy prison sentences.
- International Law is routinely enforced by individual States through their domestic laws, courts, and police forces. Thus Article I, Section 8, of the U.S. Constitution empowers Congress to "define and punish .... offenses against the Law of Nations."
- Ultimately, a fundamental reason International Law is effective is because States perceive it to be in their self-interest to have legal rules and to be perceived by other States as a law-abiding member of the International Community.

Conclusions

Let me conclude by addressing another question. Does it really matter whether we view International Law as being really "law"?

It does matter, and I suggest it matters tremendously. To think otherwise is to misunderstand the power of the Rule of Law in promoting human freedom and world peace.

In June of 1993, at another program sponsored by the ABA Standing Committee, I recall hearing Ambassador Max Kampein discussing Gunnar Myrdal’s distinction between the "is" and the "ought" in political institutions and societies. Max observed that agreeing upon the "ought" -- even if we sometimes fail to achieve that standard -- is a terribly important thing.

In retrospect, getting the Soviet Union to accept Basket Three in the Helsinki Process in 1975 was a grand accomplishment. It took a few more years before the Iron Curtain and the Berlin Wall crumbled, but once Moscow had acknowledged that individuals had rights which were beyond the reach of governments a major bridge had been crossed over which they were never able to retreat.

Ideas have consequences. It is tremendously important to establish as legally binding rules -- obligatory upon all nations, and enforceable by a range of sanctions in many if not most cases -- certain key principles:

- That aggressive war is a crime against all people and its perpetrators are subject to prosecution and punishment;
- That sovereign power ultimately resides not in kings, queens, and dictators, but in the will of the people, authoritatively expressed through free and democratic elections;
- That individuals have certain fundamental rights that can not be denied them even by a majority of the people;
- Thanks to International Law, each of these "oughts" is now becoming firmly established as a legally binding principle throughout much of the world.

*Professor Robert Turner is the Associate Director of the Center for National Security Law at the University of Virginia School of Law, from which he holds both professional and academic doctorates. A veteran of two Army tours in Vietnam and former Public Affairs Fellow at Stanford’s Hoover Institution, he spent five years as national security adviser to a member of the Senate Foreign Relations Committee and has also served as Principal Deputy Assistant Secretary of State for Legislative Affairs and as the first President of the U.S. Institute of Peace. During 1994-95 he held the Charles H. Stockton Chair of International Law at the U.S. Naval War College, and he has also been a Distinguished Lecturer at the U.S. Military Academy at West Point. The author or editor of more than a dozen books and numerous articles, he has testified before more than a dozen committees of Congress.*

Related Links
Is International Law Really Law?
AMERICAN SELF-DEFENSE SHOULDN'T BE TOO DISTRACTED BY INTERNATIONAL LAW

JEREMY RABKIN*

INTRODUCTION

Since the attacks of September 11, 2001, the United States government has pursued a series of energetic policies designed to protect America from the threat of Islamist terror networks.¹ Some of these policies are intensely controversial.² Critics in other countries protest that the United States has acted in defiance of international law. Some of this criticism has been embraced by domestic opponents of the Bush administration, particularly those in American law schools. Professor Jeremy Waldron, for example, offered a version of such criticism during the 2005 Federalist Society Student Symposium and in earlier writings, illustrating the larger pattern of criticism.

The purpose of this Article is not to mount a defense of any particular American policy of recent years. Instead, this Article challenges the critics' underlying premise that international law has the same sort of claim on our government as domestic law and that war measures abroad can accordingly be judged in the same terms as police abuses at home.

The arguments in this Article follow the three general kinds of arguments advanced by critics of international law. First, international law does not usually have the clarity and specificity of domestic law, particularly in most areas invoked by critics. International law in these areas is "law" by courtesy or aspiration more than it is a reliable guide to actual international conduct. Second, although some critics try to escape the obvious legal deficiencies of international law by appealing to the underlying values that treaties are supposed to embody, as

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soon as one looks behind limited or ambiguous treaties to seek out the fundamental principles of those treaties, one must quickly reckon with the most fundamental principle: the right and obligation of self-defense. As the Founders saw it, that principle was paramount to any legal standard. Will such arguments leave international law without any moral force? Should nations not, as some critics suggest, hearken to international standards to preserve at least the possibility of a law-bound world? The last section of this Article addresses this argument, with this countering point: If international standards are to reflect enduring principles of justice, they must be flexible enough to accommodate new circumstances. It is not in America’s interest—in the longer view, it is in no one’s clear interest—to try to preserve dysfunctional international standards merely for the sake of showing devotion to the idea of standards.

I. INTERNATIONAL LAW IS LESS RELIABLE THAN DOMESTIC LAW

The idea that some legal standards transcend national boundaries—that otherwise independent nations are subject to a more general law of right conduct—is an old idea. According to Hugo Grotius, the seventeenth-century Dutch jurist, this idea was already well recognized among the ancient Greeks and Romans. But Grotius, like his predecessors, still associated this more general law with jus gentium (“law of nations”). This older term was used by Roman jurists and was then adapted by medieval commentators who gave it a somewhat different significance. The term implies something broad, encompass-

3. In the introduction (“Prolegomena”) to his treatise, Grotius explained that in setting out his explanations, he had “preferred ancient examples, Greek and Roman, to the rest” because “illustrations have greater weight in proportion as they are taken from better times and better people.” HUGO GROTIIUS, DE JURE BELLI AC PACIS LIBRI TRES 26 (Francis W. Kelsey trans., Oceana Publications 1964) (1625). The great treatise of Grotius, De jure belli ac pacis (“On the Law of War and Peace”), was so influential that Grotius came to be regarded by later generations as the “father of international law.” When serving as U.S. Secretary of State, James Madison offered his version of the conventional wisdom of his day, acknowledging Grotius as “not unjustly considered . . . the father of the modern code of nations.” 2 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 234 (1865). Yet this very honorific implies that later generations did not fully agree with the claim of Grotius that he was merely clarifying a set of legal standards that were already well established.
4. GROTIIUS, supra note 3.
5. HENRY SUMNER MAINE, INTERNATIONAL LAW 26–30 (1888).
ing, and perhaps foundational—a law recognized by all nations. Hence, as Grotius indicated, it was a law closely related to the law of nature. Later in the seventeenth century, the German jurist Samuel Pufendorf, often regarded as an intellectual heir to Grotius, published a treatise called De Jure Naturae et Gentium ("On The Law of Nature and Nations") highlighting the close connection between the law of nature and law of nations.

By contrast, the modern term "international law" sounds much more specialized and precise than the "law of nature." Legal studies are divided into subjects like "labor law," "tax law," and "contract law." International law is often referred to as if it were one more well-defined body of distinctive rules and procedures. There are specialized treatises and textbooks on international law similar to those in other subjects. Law schools do not, in the same way, provide first or second year law students with general courses or special case books on "the law of nature," which seems too vague or speculative for the training of practicing lawyers.

The change in nomenclature appears to have been made quite deliberately. The new term, "international law," was coined in 1789 by the English legal reformer Jeremy Bentham. Bentham wanted to emphasize that international law had nothing to do with natural law or with principles common to legal systems in many different nations. He complained that the term "law of nations" might be taken "to refer to internal jurisprudence," whereas the new term would clarify that it was only concerned with "mutual transactions between sover-

6. For example, Grotius says "certain laws... originate as between all states, or a great many states... [having] in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature." GROTIUS, supra note 3, at 15. In the opening chapter of the treatise, he explains that the law of nature can be identified "at least with every probability" from observing what "is believed to be such among all nations, or among all those that are more advanced in civilization." Id. at 42. Only two pages later he explains that the "proof for the law of nations"—that a particular standard can be described as such—is "found in unbroken custom." Id. at 44.


eigns." Having narrowed the subject in this way, Bentham then offered very little comment on the substance of this specialized law—presumably because he did not think there were many clear standards of obligation from one state to another.

Because "international law" has the same verbal form as "contract law" or "patent law," it is easy to fall into the trap of assuming that it has the same clarity or reliability as other kinds of law. Until quite recently, however, international law had a very vulnerable and questionable status.10 If one looks at actual treatises on international law in the nineteenth century and down to quite recent times, one almost always finds an initial discussion of an apologetic nature, trying to address doubts about whether international law should truly be considered real law.11 Yet critics who protest that the Bush administration has "defied international law" in its war policies speak as though international law has now achieved a degree of clarity, precision, and reliability that it never used to have. How could that be so? There is still no international legislature to declare or elaborate international legal standards. There is still no reliable means of interpreting or enforcing most standards that do exist.

Skepticism toward international law did not begin with the Bush administration. It can be traced back through the entire history of American diplomacy. The American Founders did not have high expectations for international law.12 The Constitution was drafted before the new term had come into use, so it still refers to the "law of nations."13 In context, the reference implies that the relevant "law" is too uncertain to be recognized by American courts without action by the American legislature. At

9. Id.

10. International law has to operate without any of the basic organs that articulate and implement law within a state; by contrast, domestic laws are generally based on legislative enactments, reliably enforced by police agencies, and systematically interpreted and clarified by standing courts.

11. See, e.g., CHARLES PENWICK, INTERNATIONAL LAW 40 (1924) ("[S]cholars have long debated whether the term 'law' can justly be applied to international law."); T.J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 8-9 (4th ed., 1910) ("We have to consider whether international law is law at all. . . . The controversy [on this 'first question'] is always with us.").

12. Far from being a novelty of the current administration, highly guarded appraisals of international law were already sounded in the writings of the American Founders. See generally JEREMY RABIN, LAW WITHOUT NATIONS? 62-66, 89-93, 98-107 (2005).

13. U.S. CONST. art. I, § 8, cl. 10 (giving Congress power to "define and punish . . . Offenses against the Law of Nations").
the constitutional convention in Philadelphia, there was a direct challenge to this provision, on the ground that no one legislature could "define" for itself the content of "the law of nations." 14 The challenge was met with the counter-argument that the relevant "law" here was too vague, in many areas, to provide reliable standards without such unilateral legislative clarifications. 15 The Constitution does include "treaties" within the "supreme Law of the Land," 16 but it does not, in this connection, mention customary law or any other aspects of the general "law of nations." Even the supremacy given to treaties does not place them on a higher plane than ordinary legislative enactments at the federal level. The implication, repeatedly embraced by the Supreme Court, is that an ordinary federal statute will supersede the most solemn treaty commitment if the statute is enacted after the ratification of the treaty. 17

Turning from the text of the Constitution to what the Founders said in its defense, it is clear that the limited provision for "international law," as it is now known, was not an oversight. For a number of reasons, the Founders cautioned against placing great trust or hope in international law. 18 The Federalist did not miss the implications for what is now called international law. In fact, The Federalist No. 15 begins by invoking the obvious failings of international treaty schemes to prove that the

15. Id.
17. See, e.g., Moser v. United States, 341 U.S. 41, 45 (1951); Chinese Exclusion Cases, 130 U.S. 581, 600 (1889); Whitney v. Roberson, 124 U.S. 190, 194 (1888); Head Money Cases, 112 U.S. 580, 599 (1884).
18. To start with, the Founders were intensely skeptical of laws without sanctions, or at least quite skeptical that laws without reliable sanctions could do the work of properly-supported laws. Concern about effective laws, after all, was central to the argument for the Constitution. "It is essential to the idea of a law," The Federalist No. 15 remarks, "that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation." The Federalist No. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet, "there is, in the nature of sovereign power, an impatience of control" that resists "all external attempts to restrain or direct its operations." Id. at 111. The "vices" of the Confederation could only be cured by establishing full governing powers in the federal government: "The majesty of the national authority must be manifested through the medium of the [national] courts of justice. The government of the Union . . . must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is [e]trusted." The Federalist No. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
American states will not reliably cooperate unless placed under a common government with full governing powers. In Europe, "all the resources of negotiation were exhausted" in arranging elaborate treaty schemes for "establishing the equilibrium of power, and the peace of that part of the world," but these schemes were "scarcely formed before they were broken . . . ."20 The same discussion concedes that there is "nothing absurd or impractical" in an "alliance between independent nations . . . for certain defined purposes precisely stated in a treaty; regulating all the details of time, place, circumstance, and quantity . . . ."21 It cautions, however, that even more focused "comacts" of this kind, which "exist among all civilized nations," are "subject to the usual vicissitudes of peace and war; of observance and non-observance, as the interests or passions of the contracting Powers dictate."22

One might respond to this sober view by pointing out that the Founders lived in a different world. They wrote before the Hague Peace Conferences, the Geneva Conventions, the UN Charter, and UN-sponsored human rights conventions. Still, the "law" which has received so much attention in recent controversies about American policy remains "law" in a rather special sense, at least when it is international law. Do conditions of confinement of suspected terrorists at Guantanamo Bay violate the Geneva Convention? The Convention stipulates that it applies to uniformed (or at least, clearly marked) combatants, acting under military discipline, and observing the laws of war23—conditions that do not seem, in any way, to apply to terror operatives from Afghanistan. Do some interrogation methods at Guantanamo or elsewhere violate the UN Convention Against Torture? Its central prohibition—against "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted"24—is remarkably vague. It might

20. Id.
21. Id. at 83–84.
22. Id. at 84.
cover only the most excruciating torment or might cover everything on the far side of discourtesy, depending on how one interprets the crucial term "severe." Meanwhile, by its terms, the Convention also prohibits the "return" of "a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture," which might well be read to prohibit the "return" of Guantanamo detainees to Afghanistan or Pakistan—or perhaps even to France.

Treaties like the Third Geneva Convention and the Convention Against Torture are framed in very general terms, and there is no authoritative guide to their proper construction. Interpretations offered by UN committees or by "experts" of the International Red Cross have no more status than the ruminations of law professors. These treaties have almost never been interpreted by national courts, let alone systematically expounded by the International Court of Justice. In any case, interpretations by other jurisdictions would not be binding on U.S. courts, which have not treated these treaties as self-executing—that is, law capable of direct application by American courts. Consequently, there is almost no case law from United States courts.

Therefore, it should not surprise anyone that there is disagreement over the interpretation of these international standards. In particular, it should not surprise anyone that the Bush administration has assumed or asserted interpretations that are questioned by human rights advocates and other critics. In domestic policy, almost every time a government policy is challenged in litigation, the challengers protest that the government is acting unlawfully or even "lawlessly." Courts do not always endorse such claims. More often than not they reject them.

In some areas of international law, such as in disputes over trade agreements, provision for international arbitration can provide a good deal of clarification about what a disputed treaty term means. There has, however, been almost no international arbitration of treaties related to American anti-terror

25. Id. art. 3, para. 1.
policy. This is so, among other reasons, because practitioners of terror and torture do not consent to arbitration.  

In the midst of world-wide conflicts with terror forces, one would expect each government to interpret international standards in ways most favorable to its own aims, "subject," as The Federalist put it, "to the usual vicissitudes of peace and war; of observance and non-observance, as the interests or passions of the contracting Powers dictate." Americans might argue about whether a particular interpretation advanced by the legal authorities of the United States government will actually serve American "interests." But arguing about "interests" means that the discussion has already left the terrain of law, or in any case, the terrain of non-policy-oriented legal analysis.

On first inspection, then, the critics' argument appears to be that the Bush administration has not followed the law because it has not followed what is, in the critics' view, the correct interpretation of the relevant law. As soon as one notices that the law in question is extremely vague and uncertain, the critics' argument seems in danger of collapsing into the assertion that the critics ought to be in charge of the Justice Department—and perhaps the State Department and the Defense Department—rather than the officials appointed by President Bush. This would seem to be an argument settled, at least for the time being, by the President's re-election in 2004.

II. HIGHER LAW IS NOT INDIFFERENT TO SECURITY

The debate does not usually end, however, once it is pointed out that relevant legal standards, particularly in international law, are often quite vague. Serious critics are well aware of this fact. The critics may sometimes denounce the Bush administration as "lawless," in a tone implying that international standards, even those most pertinent to international security, are as well-developed and precise as the Internal Revenue Code. When pressed, however, critics will appeal to the spirit of the law or to some authority more imposing than disputable treaty language.

28. The United States might bargain with enemy states over the meaning of reciprocal obligations in such treaties as the Geneva Convention, but terrorists do not care to engage in such bargaining; indeed, no enemies faced by the United States in major wars since the drafting of the Geneva Conventions in 1949 have demonstrated a desire to bargain over their treatment of U.S. prisoners, hostages, or victims of kidnapping and torture.

29. THE FEDERALIST No. 15, supra note 18, at 84.
Such appeals beyond the letter of the law are not mere debate tactics. Many critics do seem to feel genuine indignation over American policy, and they are not ingnant over technicalities. These critics are rarely mollified by the showing that serious lawyers in the Bush administration can defend recent policies with plausible interpretations of international treaty commitments. The argument is not really (or, certainly not solely) about who scores more points in dueling legal briefs.

Members of the Federalist Society do not need to stand on the letter of the law as if positive law were the only law worth arguing about. The Founders became founders of a new nation by appealing to natural law and natural rights to justify a revolution when appeals to the established law of England failed them. They became Framers by side-stepping the legal technicalities that stood in the way of the new constitution, appealing from the most likely reading of the Articles of Confederation to the general spirit of the revolution or to more general human imperatives. The Founders were perfectly comfortable with appeals to higher principles. But it is doubtful that they would have followed critics of the Bush administration to where the latter have headed.

The critics would assert that beyond the actual text of various treaties there is, at least in some cases, a general moral purpose. According to the critics, one ought to focus on such higher aims rather than letting oneself be diverted by legalistic parsing of any particular provision in any one treaty. Professor Waldron illustrates this style of argument in a recent article. He denounces the "narrow textualism" of Bush administration lawyers who read the Third Geneva Convention on prisoners of war as not applying to al-Qaeda and Taliban detainees. Waldron concedes that there may be a category of detainees "that does not exactly fit the literal terms" required for coverage by the Constitution. But he argues that it "might be reasonable to think that the earlier categories give us a sense of how to go on—how to apply the underlying rule—in new kinds of cases. That is how lawyers generally proceed." Similarly, he berates Bush administration lawyers for trying to clarify the meaning of the Convention Against Torture's prohibi-

31. Id. at 1694.
32. Id.
33. Id.
tion on inflicting "severe" pain. According to Professor Waldron, it should be obvious that a government official is "taking a huge risk in relying upon casuistry about 'severity' as a defense against allegations of torture."34

What is notable about this sort of argument is its impatience with actual legal distinctions. The text of the Geneva Convention itself suggests, by stipulating specific situations in which it applies and enumerating precise categories of covered personnel, that its prohibitions are not universal. Moreover, the International Committee of the Red Cross implicitly conceded that the original 1949 Convention had gaps and omissions in its coverage by sponsoring a conference in the mid-1970s to propose "Additional Protocols" to address such gaps.35 The United States, by refusing to ratify the main Additional Protocol,36 has indicated that it does not endorse the notion of wider coverage. The Convention Against Torture itself invites distinctions between "severe" pain and lesser penalties.37 When the United States Senate ratified the treaty, it stated in an accompanying resolution of understanding that the United States would commit itself only to a carefully qualified prohibition on "cruel, inhuman or degrading treatment or punishment . . . ."38

Appeals to the spirit of the law, if taken too far, always threaten to undermine one of the basic purposes of law: specification or clarity. There is little point in hiring lawyers to carefully formulate a contract if the parties will be bound not by the

34. Id. at 1697–700.
37. See Convention Against Torture, supra note 24, art. 1, para. 1 ("[T]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").
38. 136 CONG. REC. S17, §1 (1), at 491 (daily ed. Oct. 27, 1990). This ratifying resolution stipulates, among other things, that the United States limits the treaty’s prohibition on "cruel, inhuman or degrading treatment or punishment" to treatment or punishment already "prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Id. §1 (1). The resolution further restricts "mental pain or suffering" to that which would result from threatened or actual "severe pain or suffering" or administration of "mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality"; or from "threat of imminent death"; or from threats of such actions against "another person." Id. § II (1) (a).

Under these provisions, it is not immediately apparent that such humiliating treatments as those shown in photographs from Abu Ghraib would constitute "torture," though they seem to have violated other provisions applicable under U.S. military law.
actual provisions of their agreement, but by an outsider's notion of what they should have been aiming to achieve. Similarly, there is no point in requiring the House, the Senate, and the President to agree on the specific statutory language of a bill before it becomes a law, if that law is later reduced to its principles or spirit. And finally, there is not much point in subjecting treaties to formal ratification—let alone to ratification with specific reservations or understandings—if a treaty is to be interpreted not by reference to the precise terms in its text but by what outsiders imagine the treaty was or might have been aiming to establish.

Professor Waldron tries to accommodate such obvious concerns by acknowledging that, in many cases, lawyers are quite justified in harping on the precise wording of legal instruments to get around challenges from wider principles. In particular, he concedes that a lawyer representing a private client would be entirely justified in interpreting every ambiguity of text or precedent to the client's benefit, as when a tax lawyer tries to claim as much for a client's allowable deductions as possible. In these cases, Professor Waldron acknowledges, the private client has, in a liberal state, an acknowledged right to insist on every advantage to which the law might entitle him—since liberty would not be secure if there were not a presumption against unauthorized constraints. But when the client is the state, Professor Waldron insists, the presumptions go the other way and the government lawyer must think about general principle more than immediate, tactical advantage.39

But it takes only brief reflection to realize that we do not always condemn government lawyers for seeking their client's advantage, even when the advantage derives from rather technical claims. "Men must turn square corners when they deal with the Government," Justice Holmes admonished.40 What he meant was that, at least in some situations, government lawyers are well within their professional duty to insist on holding private claimants to dotted i's and crossed t's, as when interpreting the terms of government contracts.

Ultimately, Professor Waldron falls back on the more unusual claim that the prohibitions against torture comprise an "archetype" of the law, a kind of iconic standard that deserves broad deference whenever it might be invoked. Such "arche-

types,” he says, not only “operate[s] as rules or requirements” in particular areas but serve “as emblems or icons of whole areas of legal principle or policy.”

The argument is not inherently absurd, but it is hardly the only way of construing what Professor Waldron calls the legal “background” in these disputes about torture. If one wants to appeal from the letter of the law to higher principles, Professor Waldron’s appeal to the “archetype”—perhaps something akin to the concept of the “super-duper precedent”—has a somewhat post-modern flavor. Like Ronald Dworkin’s conception of judge-made law as a novel with serial authorship, the notion of adherence to legal “archetypes” seems designed to facilitate appeals from positive law to some higher standard of rightness without entangling that higher standard in moral or political disputes about “natural law.” But if Professor Waldron wants to appeal to higher standards, he cannot ignore the fact that others have deeply held convictions about the source of legal norms, and these competing convictions hardly turn on anything so academic or intricate as an “archetype.”

Ordinary Americans, lacking the benefits of exposure to the latest fashions in legal theorizing, will be more familiar with an older sort of appeal, that of drawing natural law directly from its original source, for example:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...

If one still holds to this view—and surely we have not reached the point where a government lawyer must apologize for embracing one of the country’s founding charters—then it follows that one cannot simply subordinate the rights of private citizens to the legal ambitions of “the state.” Rather, a

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41. Waldron, supra note 30, at 1724.
42. Id. at 1683.
44. See, e.g., RONALD DWORIN, A MATTER OF PRINCIPLE 158–64 (1985).
45. Waldron, supra note 30, at 1692, 1749.
46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
government exercising "just powers" acts with the consent of its citizens and on their behalf so that they can adequately "secure" their fundamental rights. Even the property rights of citizens, which include the rights of taxpayers, have a claim to be "secure." That is sufficient reason to insist that government contractors learn to "turn square corners." When the issue is not merely the size of the tax bill, but protection of life and limb from foreign enemies, the moral claims are much weightier.

Professor Waldron sometimes emphasizes that government is an artificial entity, whose claims derive from more fundamental—or natural?—human claims. But he then obscures the most obvious implications of this point by identifying the real or ultimate claimant as "humanity" rather than the particular people (or the particular political community) for which a particular government assumes responsibility. When one appeals to higher claims in order to stray from the letter of the law, one should keep in mind that among the very highest claims is the claim of the people to security.

The claim to security, in fact, provides the underpinning for the central doctrine in the Declaration of Independence. When the threat is severe enough, ordinary legal obligations must give way to the imperatives of security:

But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right [that is, "the Right of the People"], it is their duty, to throw off such Government . . . .

What is notable about this right to supersede ordinary law is that, according to the Declaration, it can not only apply under the most extreme form of tyranny, "absolute despotism," but can also be invoked against "abuses" that merely indicate a future danger. This indication may not be entirely conclusive; what "evinces a design" may not always amount to proof beyond a reasonable doubt. But the pertinent response, when the stakes are large enough, is not a criminal prosecution. The Declaration envisages a resort to force and acknowledges that to preserve security, people may act preemptively in their resort

47. Waldron, supra note 30, at 1747 (arguing that government lawyers have a duty to international human rights law not to assert contrary United States constitutional claims).

48. The Declaration of Independence para. 2 (U.S. 1776).
to force, rather than risk waiting until it is too late to defend themselves at all.

The historical context of the argument set out in the Declaration indicates that it applies not only to domestic insurrection but also (and perhaps especially) to foreign war. The occasion for proclaiming the “self-evident” truths of the Declaration—war with Britain—was one of those moments “in the Course of human events” when “one people” finds it “necessary” to “dissolve the political bands which have connected them with another,” and to “hold them, as [with] the rest of mankind, Enemies in War, in Peace Friends.” At some level, then, considerations of security may take precedence over nearly every other obligation.

The Founders did not appeal to such doctrines only as revolutionaries in the midst of an actual war. They also embraced the doctrine in calmer times as constitutionalists. The Articles of Confederation were unanimously adopted by the original thirteen states and styled as “articles of perpetual union.” How then could the Framers of the Constitution propose in Article VII to have a new constitution take effect when only nine states would have agreed to ratify it? The Federalist No. 43 answers this question by appealing to the aforementioned principles of the Declaration of Independence:

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature, and of nature’s God, which declares that the safety and happiness of society, are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.

Nor is the principle restricted to supreme moments of constitutional change. One can find the doctrine invoked to justify lesser acts of executive authority aimed at preserving the constitutional arrangements normally in force. Consider, for example, John Locke’s Second Treatise of Government, which, with its affirmation of fundamental natural rights and a right of revolution to preserve them, is often regarded as a principal

49. Id. at paras. 1, 5.
50. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.”).
philosophic source for the Declaration of Independence. Locke acknowledged the necessity, in some circumstances, of recognizing extra-legal powers in the executive:

'Tis fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, viz. That as much as may be, all the Members of the Society are to be preserved. . . . [There exists this Power to act according to discretion, for the publick [sic] good, without the prescription of the Law, and sometimes even against it . . . because . . . it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick [sic] . . . therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.

Thomas Jefferson, upon entering the presidency, also recognized that necessity must sometimes take precedence over constitutional proprieties. So, in a notable case, he acquiesced to the Louisiana Purchase despite constitutional doubts about its legality. But it was one of Jefferson’s successors who provided the most memorable public defense of this approach to law. Before he took office, Abraham Lincoln said that he “never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.” Then, as President, Lincoln invoked the Declaration’s doctrine of higher law when he claimed the right, during the supreme emergency of rebellion and civil war, to suspend in some areas the right of habeas corpus. It was not, Lincoln insisted to Congress, unlawful for the executive to detain plotters against the government without access to civil courts.

52. See, e.g., PAULINE MAIER, AMERICAN SCRIPTURE: THE MAKING OF THE DECLARATION OF INDEPENDENCE 87 (1997) (“By the late Eighteenth Century, ‘Lockean’ ideas on government and revolution were accepted everywhere in America.”).
56. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in LINCOLN, supra note 55, at 252–53.
If prohibitions against torture are an "archetype" of the law, the protection of habeas corpus is surely even more so. Professor Waldron himself acknowledges that "habeas corpus statutes" are the "best example" of his concept of legal archetypes.57 And, in fact, habeas corpus is expressly mentioned in the Constitution and discussed at some length in The Federalist, whereas the prohibition against torture appears nowhere in our founding documents.58 Nonetheless, President Lincoln defended his unilateral revocation of the Great Writ:

57. Waldron, supra note 30, at 1724 (acknowledging that the writ "is subject to suspension and may be limited in its application"). Still, he claims "[c]alling it an archetype is without prejudice to all of that: Archetypes stand for general principles or policies in the law, and principles or policies may differ in their weight." Id. He does not explain why his archetypal prohibition on torture would not be "limited in its application" in some circumstances, or why lawyers might not "differ" regarding the "weight" to assign to the archetype in particular disputed situations.

58. U.S. CONST. art. I, §9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); THE FEDERALIST No. 84, at 511-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that this guarantee of access to habeas corpus and others associated with it in Section 9 may well be "of equal importance with any which are to be found" in state constitutions, thus indicating that a separate bill of rights would not be necessary in the federal constitution). When this argument failed to persuade skeptics, proponents of the new constitution promised to add a separate bill of rights. As finally adopted, this set of guarantees included a prohibition against being "twice put in jeopardy of life or limb" for the same offense, which seems to imply that loss of a limb would be an acceptable penalty, so long as the sentence were handed down after conviction in the initial trial. U.S. CONST. amend. V.

In addition to the actual cutting off of hands and ears and feet, early American law imposed such penalties as whipping and placement in wooden stocks or in irons and chains, which severely constrained physical movement in ways that could be extremely painful, not to mention degrading to personal dignity. The subsequent prohibition on "cruel and unusual punishments," U.S. CONST. amend. VIII, might be taken to imply disfavor of physical abuse, but in fact it seems to have been understood as a requirement for regularity rather than humanity (in the sense of withholding painful punishments). The Eighth Amendment's association with torture was not articulated by the Supreme Court until the Twentieth Century, and then by distinguishing ordinary American punishments from the "cruelty" of Spanish penal practice in colonial Philippines. See, e.g., Weems v. United States, 217 U.S. 349, 377 (1910) (commenting, in striking down a Filipino punishment involving extended chaining of prisoners, that the punishment "has no fellow in American legislation" and distinguishing prior American cases upholding whipping as a punishment).

Waldron's exposition of the Eighth Amendment prohibition disregards nearby language in the Fifth Amendment, gives no attention to actual practice at the time of the Founding, and mainly recites, as authority for its more edifying interpretation, dicta in Supreme Court rulings of recent decades. See Waldron, supra note 30, at 1730–31.
The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official [presidential] oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?  

Quite obviously, this kind of argument might be abused and, if invoked too often or too readily, end by swallowing up all protections of law. Even Lincoln, having presented this first argument, immediately fell back on a second, less controversial claim that the suspension of habeas corpus might well have been entirely lawful in the circumstances, rather than merely an exception to the normal law. This second argument might avoid the alarm provoked by the first argument, but it also draws force from the threat to invoke the appeal to extraordinary powers if an accommodating legal interpretation is not accepted.

The contemporary application of this view is obvious enough. One has only to ask, is the threat since 9/11 minor? Might there be circumstances where the President would have to suspend ordinary law? As a government attorney, would it be more reasonable to strive to encompass necessary actions within a plausible reading of the law, when the alternative would be to acknowledge lawless action which the President, given his duty to preserve the Constitution for the future, might otherwise feel obliged to pursue? Of course, there is a danger that appeals to "necessity" will undermine the rule of law. There is also a danger, however, that appeals to "archetypes," to the imperatives of respecting some abstract rule of principle, will result in too little concern about security. On the one side, there is danger of falling into cynicism. But on the other, there is danger of fetishism.

59. Lincoln, supra note 56, at 252–53.
60. Id.
In the first case, the danger of abuse arises from focusing excessively on one goal—for example, defeating terrorism—and overlooking other goals, such as retaining respect and cooperation from other nations or maintaining political and moral confidence in American policies domestically. Focusing too intently on one goal presents the danger of losing perspective in this way. However, such concerns ought not be overstated. Focusing on one goal offers some hope of perspective and even corrective calculation. If there are heavy costs to a certain policy, even incidental and unanticipated costs from effects on bystanders (or reactions of bystanders), such costs may eventually work their way into policymakers’ calculations and influence them to make suitable adjustments. It appears, in fact, that early reports of abuse at Guantanamo Bay prompted the Defense Department to impose tighter controls and higher standards for U.S. interrogation methods there.  

Additionally, focusing on a narrow goal provides the opportunity to judge proposed policies by their contribution to the goal. For example, in the conflicts following the 9/11 attacks, the United States never attempted the kind of mass bombing of civilians so prominent in World War II strategy against Germany and Japan. In these new conflicts, there has been no reason to think that such unrestrained bombing would do much to influence Saddam Hussein, the Taliban, or the guerrilla forces that took up their banners. Focusing on a narrow goal does provide a discernable benchmark for judging the appropriateness of tactics.

In the second case, if one makes adherence to “the law”—or rather, adherence to “the principle” behind the law or to the mysterious “archetype” that the law is supposed to honor—an end in itself, one may be left with a limitless obligation. From this reverential perspective, context does not seem to matter any more than consequences. Moreover, that perspective offers no frame of reference for judging whether the “principle” (or the “archetype”) should apply in any particular setting.

Professor Waldron insists that it is wrong even to think about matters of degree. It is wrong, he says, for government lawyers to ask whether some degree of pain or discomfort is so “severe” as to constitute, in the proper legal sense of the word, “torture”: “There are some scales one really should not be

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This stance is reminiscent of Justice Hugo Black's insistence that when the First Amendment demands "no law ... abridging the freedom of speech," the admonition must be taken as absolute: "no law means no law." More generally, it embodies Ronald Dworkin's argument that when thinking about "rights" and when "taking rights seriously," one must recognize that rights are moral claims that do not admit compromise, certainly not the sort of pragmatic adjustment that goes with mere "policy."

Behind these appeals is the spirit of Kant: "Fiat iustia, pereat mundus—'Let justice be done, even if the world should perish!'" Some people find this sort of thing inspiring. Professor Waldron might be called a Kant scholar. But such intransigent moralism would likely be more inspiring to those who do not actually expect the heavens to fall, or those who at least remain confident that calamitous consequences will fall only on others. That outlook is not one that Americans can accept in a commander-in-chief. The President has a sworn duty not to "law" in the abstract, much less to universal principles or "archetypes," but to "preserve, protect and defend the Constitution of the United States," that is, the particular constitutional structure of the particular nation so constituted. From the standpoint of a particular government with a particular responsibility, the sort of appeal launched by Professor Waldron looks unlimited, as it embraces principles which purport to be universal. As The Federalist noted, asserting such open-ended responsibility is, as a political matter, inherently unreasonable.

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62. Waldron, supra note 30, at 1701 (emphasis removed).
63. U.S. CONST. amend. I.
64. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (quoting Transcript of Oral Argument, supra, at 76 (No. 783)).
65. See DWORKIN, supra note 44, at 9–32. This might seem a noble stance, if one did not care at all about possible consequences, even the most terrible.
66. IMMANUEL KANT, PERFECTUAL PEACE AND OTHER ESSAYS 133 (Ted Humphrey trans., 1983). Kant himself somewhat flinches from the implications of this motto, rendering it (in Humphrey's translation) "Let justice reign, even if all the rogues in the world should perish." But the righteous would perish with the rogues if "the world should perish."
68. U.S. CONST. art. II, § 1, cl. 8.
69. See The Federalist No. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961) ("Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party . . . .").
III. INTERNATIONAL TREATIES ARE NOT HIGHER LAW

If critics are not swayed by the above arguments, one reason may be that their protest is not ultimately about particular values or principles that might be set off against others in disputing particular legal claims. Rather, these critics seem distressed by the very idea that there may be trade-offs or conflicts between important principles because that inevitably means that there may be ongoing conflicts between different political communities. It may be, therefore, that international law has featured so prominently in attacks on the Bush administration because international law seems to embody the hopes of a world where law, in the sense of universally agreed standards, really can prevail.

At the deepest level, the critics' concern does not seem to be that a certain policy is mistaken, but that the perspective of Bush administration lawyers has been systematically self-serving and threatens the possibility of an orderly, law-bound world. By allowing American policy to maneuver freely through international legal benchmarks, the United States places itself on a slippery slope. The United States will then find fewer and fewer obstacles on its downward slide, as Americans become more and more obsessed with the fear that others will gain some advantage on the United States by moving yet lower.

The critics, therefore, demand fidelity to international law, even when it works against the United States. To give force to

70. One example is the influential appeal to cosmopolitan values in the writings of Martha Nussbaum. Noting that prominent academic voices had stressed "the centrality to democratic deliberation of certain values that bind all citizens together," she protested, "But why should these values, which instruct us to join hands across boundaries of ethnicity, class, gender, and race, lose steam when they get to the borders of the nation? By conceding that a morally arbitrary boundary such as the boundary of the nation has a deep and formative role in our deliberations, we seem to deprive ourselves of any principled way of persuading citizens that they should, in fact, join hands across these other barriers." MARTHA NUSSBAUM, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 14 (1996) (emphasis added). If the "boundary" that demarcates citizenship is "morally arbitrary" it would seem to follow (or already to be presumed) that one citizen body has only a "morally arbitrary" claim to hold to a different policy than citizens of other nations—and only a "morally arbitrary" claim to defend its independence against others. From such premises, it is a short step to the claim that a nation's defense policies may not give preference to its own citizens over others—a seemingly absurd claim that does, in fact, seem to be advanced in recent writings (regarding the war on terror) by Ronald Dworkin and others. The absurdity might be reduced by recurring to the thought that conflict is inherently improper or inherently at odds with a true system of "law."
this hope, they demand that America embrace the tenets of international law, without mental reservation or purpose of evasion. Here is Professor Waldron’s version:

The expressed willingness of one very powerful state to subject itself to legal restraint where its interests are most gravely at stake sends a message that international law is to be taken seriously. But the abandonment of the archetype by such a state sends a message too—that international law may be of no account if even the most powerful regime, the one that can most afford to sustain damage, is willing to dispense with legal restraint for the sake of a tactical advantage.  

Given the context of this debate, it might be uncharitable to dwell on the implications of that phrase, “afford to sustain damage,” with its apparent suggestion that a country as populous as the United States can afford a few more 9/11 attacks with thousands (or tens of thousands) more civilian casualties in its cities. We may dispose of this rather morbid algebraic analysis by glancing at the experience of a much smaller state which has already suffered far more terror casualties, proportionately, than the United States. Does Israel, with one-fiftieth the population of United States, therefore have fifty times the moral claim to disregard international legal standards? Advocates for international legal standards do not seem to have embraced this calculation.

What force there is in such appeals—clinging to international law for the sake of retaining international law—seems to draw a great deal on domestic analogies. If the United States allowed domestic law to rest on the imperatives or policy advantages of the moment, it would soon find itself with no real law. Instead, the practice in America is to admonish citizens not to “take the law into their own hands.” There is an appeal to citizens to remember the needs of the larger community for orderly procedures. Practices like vigilante justice are condemned, even when the immediate victims may indeed have committed crimes deserving of punishment. Those who demand respect

71. Waldron, supra note 30, at 1746.
72. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 ILM 1009 (July 9, 2004) (condemning the construction of the security barrier, without disputing its success in reducing terror attacks on Israelis, because the barrier has imposed considerable hardships on Palestinians). Reducing the number of Israeli deaths from terror attacks seems to be an aim that carries very little weight with the justices of the International Court of Justice.
for international law in this way can acknowledge that international law is not so reliable as domestic law and turn the point around: since there is no reliable international enforcement mechanism in international law, that is all the more reason for powerful nations to set an example of dutiful devotion to international law without compulsion.

Those who hold to this view are not easily dissuaded. If one points out that the American Founders did not share such high hopes for international law, the response is likely to be that times are different now, and that America in those days could not so readily "afford" to make sacrifices for the higher good. For people attracted to the idea of an international duty that transcends national claims to self-defense—for people, that is, who are inspired by the thought that their own fellow citizens deserve no more consideration from "law" than humanity at large—the argument has drifted very far from anything the American Founders could recognize as a reasonable legal argument. But the argument is worth pursuing, because some version of it still seems to claim considerable respect, at least in contemporary legal scholarship. At the least, pursuing this argument may help to clarify why earlier generations of American statesmen did not share this outlook any more than legal advisers of the Bush administration today.

To start with, then, it is important to remember that even the obligation to obey the law at home was never thought to be absolute because obedience to law was not thought to be an end in itself (or, at least, not the most compelling end of civil life). There is, of course, a general obligation to respect the law and the rights of others. In general it is wrong to destroy the property of others, but in special circumstances it might be defensible to destroy the tea in the ships of the East India Company in Boston Harbor. In general it is wrong to resist the lawful commands of government, but in special circumstances it might be defensible to resist the confiscation of weapons and ammunition in the Concord armory. Locke’s treatise acknowledges a right to use deadly force against a robber on the highways, so long as no police are nearby. With somewhat more caution, Blackstone’s Commentaries affirms a somewhat similar standard.

73. LOCKE, supra note 53, at 297–99.
74. See WILLIAM BLACKSTONE, 4 COMMENTARIES *1, *3 ("In these cases, if the party himself ... be forcibly attacked in his person or property, it is lawful for him to repel force by force; and breach of the peace, which happens, is chargeable upon him only, who began the affray." (emphasis added)); id. at *176, *183–84
cally, almost all American states recognized—and many states still acknowledge—a right to use deadly force against an intruder in one's own home. Circumstances count for a great deal, even when it comes to the claims of law at home.

On the other hand, for all their skepticism about treaty guarantees, the Founders were quite prepared to acknowledge a law above and beyond the authority of any one state or nation. The Declaration of Independence appeals to precisely this sort of law. The opening sentence invokes the "Laws of Nature and of Nature's God," which "entitle" independent peoples to a "separate and equal station" with others. The conclusion of the Declaration seems to appeal to this same understanding of international "entitlements" when it asserts that the new states of America "have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

The reference to war and alliances acknowledges that even if one thinks of this law as the law of nature, even if one thinks of it as reflecting the will of the Creator—or claiming, as the last line of the Declaration suggests, "the protection of divine Providence"—the conclusions of this law may be disputed.

Colonial Americans, for example, after claiming a right to independence, soon asserted their right to "contract [an] Alliance" with France. No one imagined that Britain, so long as it contested the American claim to independence, would accept French aid to America with equanimity. As everyone had ex-

("Homicide, in self-defence ... upon a sudden effray, is also excusable ... .") 75 Id. at 184–85 ("For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant . . .").

75. See generally Annotation, Homicide or Assault in Defense of Habitation or Property, 25 A.L.R. 508 (1925) (supplemented by 32 A.L.R. 1541 (1924) and 34 A.L.R. 1488 (1925)) (discussing both common and statutory law approaches in the various states regarding the use of deadly force in defense of the home).

76. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

77. Id. at para. 6.

78. Id.

79. Furthermore, Vattel's Law of Nations, the leading treatise at the time, admonished that "foreign Nations have no right to intrude themselves into the government of an independent state," so a state "is justified in resisting such interference." 3 EMER DE VATTEL, THE LAW OF NATIONS 132 (Charles G. Fenwick trans., Carnegie Institution 1916) (photo. reprint 1995) (1758). "[A] sovereign has a right to treat as enemies those who undertake to interfere in its domestic affairs otherwise than by their good offices [that is, by offering to mediate a dispute, subject to the consent of the relevant sovereign]." Id. But Vattel does also acknowledge that:
pected, the French alliance with America provoked Britain into a new war with France. When other European nations accepted the invitation to establish trading relations with independent America—honoring its right to "establish Commerce" with other nations—the nations organized a naval force of "armed neutrality" to prevent British retaliation on their trade.80

The law of nations, at the time of the Founding, thus included a considerable body of customary understandings, in addition to natural law principles. Still, no one imagined that these standards would always be respected or that every nation that adhered to the standards would always interpret them in the same way. It was hoped that treatises on the law of nations would help to reduce disputes between nations or contain their destructiveness, but no one imagined that treatises or treaties would put an end to war. To the contrary, war was generally depicted as the ultimate recourse for a nation whose rights under the law of nations had been violated. Grotius, like many previous commentators, conceived war as an international counterpart of criminal law, so that at least some of the hardship (even some of the horror) of war might be seen, in some circumstances, as morally justified.81

The simple truth is that if the law of nations required precise agreement on all details to be considered true law, then no one could reasonably have spoken about the law of nations. So the authors of the great treatises on the subject had to be content with general principles, with tendencies rather than agreed standards, or with generally agreed standards coupled with acknowledged, but very imperfectly defined, exceptions.82

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80. See Grotius, supra note 3, at 462–521 (discussing, among other things, permissible grounds for punitive war).

81. Vattel, for example, admonishes that "an injury alone is a just ground of war" and "to be lawful, it must be the only means of obtaining just satisfaction, which implies a reasonable assurance as to the future. . . . [I]t is [also] clear that the injured party alone has the right to punish independent persons [through war]." Vattel, supra note 79, at 247.

But only a bit further along in the same exposition, he acknowledges that if there is a state with such overweening power that its neighbors feel threatened and "if this formidable sovereign should betray unjust and ambitious dispositions
Even when international conferences tried to establish more precise standards for such generally agreed objects as limitations on the ferocity of warfare, they conceded that the standards would depend on context and circumstances.

The Hague Convention on the laws of war, initially negotiated in 1899, then slightly revised in 1907, attempted "to codify customary standards in this area." Its Preamble proclaims the "desire to diminish the evils of war, as far as military requirements permit ... ." The Preamble goes on to acknowledge that it had not "been found possible at present to concert Regulations covering all the circumstances which arise in practice," so many matters must still be left to "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Article Two then clarifies the broad range of cases left to these generalities, by stipulating that the precise standards of the Convention (more than 50 separate articles in all) will only "apply ... between Contracting Powers [i.e., parties to the Convention], and then only if all the belligerents are parties to the Convention." The governments that negotiated this well-meaning convention were not even prepared to commit themselves to adhere to it if one among several nations at war deserted from it, lest the nations allied to the scoundrel state derive advantage from its derelictions.

So, even while embracing "humanity" and "conscience" and "civilized" standards, the drafters of the Hague Convention acknowledged the competing claims of "military requirements." They acknowledged that sustaining legal standards in war would be a difficult and complicated challenge, not something that could reasonably be settled with unqualified prohibitions.

When did it become easier to settle proper standards in war? After World War II, when it became clear how horrible unlim-

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84. Id. para. 6 (emphasis added).
85. Id. paras. 7, 9.
86. Id. art. II.
87. Id. para 6.
ited war could be? But that war also showed how horrible it is to fall victim to an enemy that respects no limits. In the ensuing Cold War, each superpower threatened to annihilate the major population centers of its opponent. It is hard to see much room left for any “civilized” standards or claims of “conscience” amidst threats of “mutually assured destruction.” And yet, when U.S. Catholic bishops were contemplating a denunciation of this defense posture in the 1980s, Pope John Paul II overruled them, on the ground that terrible threats might be necessary to avert terrible dangers.86

Since September 11, 2001, America has had to contemplate the danger that weapons of mass destruction may fall into the hands of terrorist networks, which do not even have a clear national base against which to threaten retaliation. Things are—to say the least—still complicated. There remain, of course, many serious arguments for observing restraints in military operations and for taking into account what others view as the relevant requirements of international law. But surely it is not enough to say that because some law professors have parsed language in a treaty, therefore the United States must be bound by their interpretation of these words.

Legalism—adhering to settled law just because it has been settled as law—makes much more sense in a domestic setting than in international affairs. Even in a domestic setting, in a sufficiently pressing emergency, the law might rightly give way to security imperatives. But if this is not contemplated very often in the domestic setting, it is because—normally, at least—Americans take for granted a wide range of continuing protections in domestic affairs. It makes far less sense to yield this trust to foreigners, particularly those associated with hostile powers or hostile terror networks, and particularly in wartime or in times of special vulnerability to attack. Americans have more reason to trust fellow Americans than to trust foreigners. Moreover, the fear that deviations from legality will undermine respect for law is far more worrisome at home than in international affairs because our own fully elaborated legal system must mean more to Americans than the very thin and loose threads of international treaties.

86. TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 101 (1991) ("'In current conditions "deterrence" based on balance, certainly not as an end in itself but as a step on the way to progressive disarmament, may still be judged morally acceptable.'" (quoting Pope John Paul II, Message of His Holiness Pope John Paul II to the General Assembly of the United Nations (June 7, 1982))).
To get around this difficulty, critics of the Bush administration tend to entangle claims about domestic and international law, as if they were of comparable authority or comparable importance. But if that were truly so, it would be impossible to know what law to apply in the event of a conflict between U.S. law and international law. There is no ambiguity, however, about which prevails in U.S. courts (and therefore, what must prevail on all who are subject to challenge in U.S. courts) because the Supreme Court has repeatedly insisted that American law takes priority.89

If American law did not take priority, even Congress would be constrained from enacting laws contrary to an existing treaty. Ratifying a treaty would then have an effect comparable to ratifying a constitutional amendment. In a way, a ratified treaty would impose even more constraint because a constitutional amendment can be undone by a subsequent amendment. If the United States were bound by treaties, as by constitutional amendments, it could only escape from a treaty by persuading all other parties to renounce the treaty or to agree to American withdrawal from it.

American statesmen have never embraced this understanding of international obligations. It does not make sense in a world that has no means of securing universal respect for treaty commitments, much less assuring reliable compliance with common interpretations of treaties. It is not by historical accident, of course, that the world now finds itself with no such binding legal supremacy for treaties. Rather, most nations do not wish to subject themselves to international institutions with the strength of domestic government—a government over governments.

Of course, America has entered into many treaties, and these treaties differ in significance. Some treaties deal solely with technical matters, like mutual reduction of tariffs and other commercial concessions. These treaties have varied over time and are repeatedly renegotiated. Treaties on issues like the treatment of war prisoners or the prohibition of torture might seem to be of a different category, as treaties that embody moral claims might seem to command more respect.

The intuition here is almost certainly misleading, however. All great works on natural law have agreed that natural law

89. See supra note 17.
needs to be clarified or made effective in positive law. On this point, at least, there is complete agreement between major natural law theorists who looked to Aristotle and Thomas Aquinas, stressing the human urge to participate in political community, and those Enlightenment thinkers who stressed the natural rights of individuals. All important natural law theories acknowledged some need for human beings to live in political communities with something like a legislative authority. The whole point of talking about natural law at all is to distinguish fundamental moral principles from the transitory enactments of positive law which, with greater or less efficacy or fidelity, may embody particular principles. It is not easy to see why any one treaty should have the prestige or the guiding authority of the underlying principle that it may (or may not) embody.

Even those who first sought to codify laws of war did not have such exalted expectations for their efforts. The Preamble to the Hague Convention refers to "ever progressive needs of civilization"—a sentiment which, although possibly reflecting questionable optimism about moral progress, certainly acknowledges that new circumstances will require new standards. Only eight years after the first effort to codify restraints in war, a second Peace Conference was convened at the Hague in 1907. It not only negotiated conventions on new subjects but agreed to revisions of the 1899 convention on the laws of land warfare. The general expectation was that such rules would be periodically revisited in new conferences, every few years.

By contrast, the 1949 Geneva Convention, about which so much has been heard in debates over Guantanamo Bay, was

90. See, e.g., Heinrich Rommen, THE NATURAL LAW 230 (Thomas R. Hanley trans., Liberty Fund 1998) (1956) ("[O]nly the eternal structural laws of the social life of man as such are of natural law, not the concrete architectural form . . . . The natural law calls, then, for the positive law.").

91. The priority of communal (or "national") legislative authority, even for such natural rights theorists as John Locke, is well explained in Jeremy Waldron, The Dignity of Legislation (1999). For a discussion of Locke, see id. at 63–91.

92. The Nineteenth Century view was stated in Henry Wheaton’s Elements of International Law: "[O]ne or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point." Henry Wheaton, Elements of International Law 21 (George Grafton Wilson ed., Clarendon Press 1956) (photo. reprint 1995) (1866). By this standard, one would doubt the authority of any one treaty, even a multilateral treaty.

93. Hague Convention, supra note 83, para. 3.
drafted more than five decades ago. That is a long time in the
history of warfare. It is, for example, more time than elapsed
between the bayonet charges at Gettysburg and the tank offens-
ive at Cambrai in World War I. It is more time than elapsed
between the cavalry charge of the Rough Riders at San Juan
Hill and the dropping of atomic bombs on Hiroshima and Na-
gasaki. Why would anyone expect rules of a quite different era
to have such authoritative force so many decades later? Did the
drafters of the Geneva Conventions consider the scale of threat
now posed by Islamist terror networks seeking weapons of
mass destruction? Did law professors in the 1960s demand that
the Supreme Court follow the constitutional doctrines of the
1920s on such matters as the scope of congressional power to
regulate interstate commerce?

If there has ever been a serious thinker who argued in un-
qualified terms for such rigid adherence to an international
standard, it was perhaps Immanuel Kant. Kant dismissed the
great treatises on international law; treatises that acknowl-
exged a country's right to resort to war in self-defense in terms
that were bound to be disputed in particular cases (with both
sides claiming to be in the right). Kant argued instead that all
states must submit themselves, unconditionally, to the rules of
restraint embodied in an international peace federation. Kant
argued that no one could know for sure that such a federation
would be incapable of protecting its members by establishing
perpetual peace, so all governments had the moral obligation
to act as if it could do so and submit to the authority of such a
structure. As the inscription on the building that houses Har-
vard's Center for European Studies has it, "Du kannst, denn du
sollst" (you can, so you ought).

Few statesmen have found the argument very compelling
because, among other things, it appeals to an abstract possibil-

94. KANT, supra note 56, at 116 ("Hugo Grotius, Pufendorf, Vattel and others
whose philosophically and diplomatically formulated codes do not and cannot
have the slightest legal force . . . are always piously cited . . . [but] no example can
be given of a nation having foregone its intention [of going to war] based on the
arguments provided by such important men.").

95. Id. at 116-17 ("But without a contract among nations peace can be neither in-
augurated nor guaranteed. A league of a special sort must therefore be estab-
lished, one which we can call a league of peace . . . which will be distinguished from
a treaty of peace . . . because the latter seeks merely to stop one war, while the for-
mer seeks to end all wars forever.").

96. See id. at 89 ("For my own part, I place my trust in the theory about what the
relation among men and nations ought to be . . . and thus to assume that it is pos-
ible . . . that it can exist.").
ity above ordinary probabilities. In practice, peace at any cost can be extremely costly. It certainly offers a free pass to tyrants, as the American Founders well recognized. A peace federation, James Madison warned (regarding Rousseau's similar proposal), would likely be "as preposterous as it was impotent"; still, to the extent that it did succeed in suppressing resort to force, it would have "the tendency ... to perpetuate arbitrary power wherever it existed." The American Founders were well aware that they owed their independence to the willingness of an outside power to risk international conflict to aid their struggle.

A far stronger America still faces risks and choices in its foreign policy. The issue is not simply whether or not to seek peace, but peace at what price? Theodore Roosevelt, who presided over American participation in the second Hague Peace Conference and subsequently won the Nobel Peace Prize for his mediation effort in the Russo-Japanese War, has some claims to be heard on the question of devotion to peace:

The worst infamies of modern times—such affairs as the massacres of the Armenians by the Turks, for instance—have been perpetrated in a time of nominally profound international peace, when there has been a concert of big Powers to prevent the breaking of this peace, although only by breaking it could the outrages be stopped. Be it remembered that the peoples who suffered by these hideous massacres, who saw their women violated and their children tortured, were actually enjoying all the benefits of "disarmament." Otherwise they would not have been massacred ....

Yet amiable but fatuous persons, with all these facts before their eyes, pass resolutions demanding universal arbitration for everything, and the disarmament of the free civilized powers and their abandonment of their armed forces .... They go wrong at the outset, for they lay all the emphasis on peace and none at all on righteousness .... As Americans their folly is peculiarly scandalous, because if the principles they now uphold are right, it means that it would have been better that Americans should never have achieved their independence, and better that, in 1861, they should have peacefully submitted to seeing their country split into half a dozen jangling confederacies and slavery made perpetual.88

Professor Waldron wants to elevate a particular international standard—the vaguely worded prohibition in the convention against torture—into an "archetype" of legal reasoning. He wants to claim an authority for this "archetype" that will pre-empt any normal consideration of means and ends, cause and effect, an authority that will command obedience even if coercive interrogation practices—which, by his lights or some other, might violate this standard—would contribute greatly to the fight against terrorism.99 Governments owe this extreme deference, he thinks, to some claim of legal conscience that supersedes other considerations because this claim has now become an "archetype" of international law.

What does it really take to become an international "archetype"? The old way of thinking about international standards was to look not at what diplomats say but at what governments actually do.100 Otherwise, the pious and trusting would be prey to the hypocrisy or deceit of the devious. It is mildly interesting that most governments have signed a convention that purports to outlaw torture. But based on what governments actually do, it is clear that restraining torture has not been much of a priority. Reports of torture in China or Russia, in Saudi Arabia or indeed in Saddam Hussein's Iraq, evoked almost no consequences in the actual foreign policy of actual nations.101

If one wants to think about international "archetypes"—those with real reverberations—there are surely better ones. Perhaps the most consequential of the past century concerns the disregard of international norms. The norms in question concerned claims about neutrality and neutral trading rights, which were, in fact, far more central to the law of nations for several centuries than more recent (and generally more frivolous) talk about supposed international human rights norms.102 Relying on this ac-

99. See Waldron, supra note 30, at 1711 (calling for a way to "make sense—without resorting to religious ideas—of . . . a noncontingent prohibition, a prohibition so deeply embedded that it cannot be modified or truncated . . . ").


101. See Oona A. Hathaway, Do Human Rights Treaties Make a Difference? 111 YALE L.J. 1935, 1976–79 (2002) (showing that "noncompliance [with human rights treaties] seem[s] to be rampant" and "countries with poor human rights ratings are sometimes more likely to have ratified the relevant treaties than are countries with better ratings").

102. A glance at any textbook or treatise on international law published in the nineteenth century or down to the middle of the twentieth century will confirm
cumulated body of legal understandings, the Netherlands and other neutral states protested the British war policy which sought to impose a strict blockade of Nazi Germany at the outset of World War II. Winston Churchill insisted that Britain must reject “interpretations of neutrality which give all the advantages to the aggressor and inflict all the disadvantages upon the defenders of freedom . . . .”\(^{103}\) In other words, he appealed from the established rules to the higher cause.

As former neutrals were overrun by German tanks, some of these issues were mooted. But the United States, while still officially neutral, disregarded more and more traditional legal restraints on neutral powers in order to provide Britain with “all aid short of war” and to pressure Japan into abandoning its Asian conquests. Rather than neutrality, the Roosevelt administration claimed the status of “non-belligerency”—a status entirely unknown in the established standards of international law.\(^{104}\) The result was that Japan was goaded into attacking the United States, and Germany was goaded into joining Japan with its own declaration of war. Thereafter, Britain and America mobilized vast forces that ultimately brought freedom to all the nations of Western Europe, to much of Asia, and even to Germany and Japan after their unconditional surrender. By disregarding technical rules of international legality concerning neutrality, Churchill and Roosevelt saved half of the world from monstrous tyrannies.

The lesson of this “archetype” of international action is not that any end justifies any means or that lawyers have no role to play in formulating foreign and defense policies. The lesson is that in times of crisis, no great power can be guided by legalism, or by moralism, or by some combination of the two, inflated into a new theory of law.

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that neutrality and neutral trading rates were a central theme, whereas human rights—in the sense of duties owed by governments to their own citizens—were scarcely treated at all. In the most recent times, it is true, textbooks devote space to international human rights. However, their discussion is about treaties rather than actual episodes in which states are held to account for compliance with these treaties—since such episodes do not happen in the real world. By contrast, disputes about neutrality were quite serious, because states routinely invoked neutral claims against other states. It is up to the reader’s whimsy to know what Professor Waldron means by “the human rights tradition.” Waldron, supra note 30, at 1715.


\(^{104}\) See Edwin Borchard, War, Neutrality and Non-Belligerency, 35 AM. J. INT’L L. 618, 621 (1941).
Americans may hope that, in the end, the "course of human events" will vindicate certain broad notions of natural law on which the nation was founded. But international law must remain answerable to the security concerns of nations. International law must be read in the light of broad and enduring principles rather than lawyerly debating points. A "doctrinaire logic," as Justice Jackson observed, may "convert the constitutional Bill of Rights into a suicide pact."105 In today's world, "doctrinaire logic" risks reducing international law to an academic symposium, which is safer, so long as everyone understands that it is altogether unserious.

FORBIDDEN TREATIES IN INTERNATIONAL LAW
COMMENTS ON PROFESSOR GARNER'S REPORT ON "THE LAW OF TREATIES"

BY ALFRED VON VERDROSS

Professor of International Law, University of Vienna, Associé de l'Institut de Droit International

I. THE PRINCIPLE

James Wilford Garner has given us a profound, detailed and highly valuable Report on The Law of Treaties.¹ This report contains, it is true, a rule concerning the validity of a treaty which is in conflict with an earlier treaty.² On the other hand, there is no consideration, as far as this writer can see, of treaties which are in conflict with general international law, a problem which has been discussed many times.³

But as there is no settled opinion on this problem, it is necessary, in this writer's view, to unroll this problem once more. Our starting-point is the uncontested rule that, as a matter of principle, states are free to conclude treaties on any subject whatsoever. All we have to investigate, therefore, is whether this rule does or does not admit certain exceptions. The answer to this question depends on the preliminary question, whether general international law contains rules which have the character of jus cogens.⁴ For it is obvious that if general international law consists exclusively of non-compulsory norms, states are always free to agree on treaty norms which deviate from general international law, without by doing so, violating general international law. If, on the other hand, general international law does contain also norms which have the character of jus cogens, things are very different. For it is the quintessence of norms of this character that they prescribe a certain, positive or negative behavior unconditionally; norms

¹ Harvard Research in International Law, this JOURNAL, Vol. 29 (1935), Supp., pp. 655-1238. (The credit which the author attributes to Professor Garner for this report must be shared by the assistant reporter, Dr. Valentine Jobst, and, of course, by the Advisory Committee who collaborated in its preparation.—J. W. G.)
³ Cf. Jen, Zwingendes Völkerrecht (1933).
of this character, therefore, cannot be derogated from by the will of the contracting parties.

The existence of such norms in general international law is particularly contested by those authors who base the whole international law on the agreement of the wills of the states; consequently, they know no other international law but treaty law. But they overlook the fact that each treaty presupposes a number of norms necessary for the very coming into existence of an international treaty.⁵ These are the norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled that an international treaty may come into existence, what juridical consequences are attached to the conclusion of an international treaty. These principles concerning the conditions of the validity of treaties cannot be regarded as having been agreed upon by treaty; they must be regarded as valid independently of the will of the contracting parties. That is the reason why the possibility of norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties, cannot be denied a priori.

But this reasoning does not decide the problem whether such compulsory norms concerning the contents of international treaties do exist in fact. A careful investigation, however, reveals the existence of such norms. Two groups of these norms can be distinguished. The first group consists of different, single, compulsory norms of customary international law. General international law requires states, for instance, not to disturb each other in the use of the high seas. An international treaty between two or among more states tending to exclude other states from the use of the high seas, would be in contradiction to a compulsory principle of general international law. International law authorizes states to occupy and to annex terrae nullius. In consequence, an international treaty by which two states would bind themselves to prevent other states from making such acquisitions of territory would be violative of general international law. In the same way, a treaty binding the contracting parties to prevent third states from the exercise of other rights of sovereignty acknowledged by general international law, such as passage through the territorial waters of other states, would be in contradiction to international law.

But apart from these and other positive norms of general international law, there is a second group which constitutes jus cogens. This second group consists of the general principle prohibiting states from concluding treaties contra bonos mores. This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.

⁵ In this sense Ottolenghi, "Sulla personalità internazionale delle unioni di Stati" in Rivista di Diritto Internazionale, XVII (1925), p. 335 et seq.
This principle is valid also in international law because the general principles of law recognized by civilized nations are also binding between the states, as the history of international arbitration as well as Article 88, point 3, of the Statute of the Permanent Court of International Justice incontestably prove. It may even be said that no other principle of law is so universally recognized as this one. It follows that its validity in international law is free from doubt as soon as it is admitted that the general principles of law recognized by civilized nations are valid in international law.

It could be objected against this argument, it is true, that the general principles of law have only a subsidiary validity in international law and are, therefore, only applicable if there are no contradictory customary or treaty norms. On the strength of this reasoning, Balladore Pallier, e.g., is of the opinion that there can be no conflict between the general principles of law and the other sources of international law. For the general principles of law cannot be resorted to if there are customary or treaty norms on this subject. But this argument does not take into consideration that the principle of merely subsidiary validity of the general principles of law cannot be true without exception. It is only reasonable as far as it applies to noncompulsory norms. But a compulsory norm cannot be derogated either by customary or by treaty law; if that were not so, compulsory norms could never be applied in international law. In this case the most essential and indispensable principles of law would be excluded from the realm of international law, a situation which necessarily leads to absurd results. A treaty norm, violative of a compulsory general principle of law, is, therefore, void; on the other hand, a general norm of customary international law in contradiction to a general principle of law cannot even come into existence because customary law must be formed by constant custom based on a general juridical conviction.

II. THE DIFFERENT KINDS OF INTERNATIONAL TREATIES CONTRA BONOS MORBES

The application in international law of the general principle, according to which treaties contra bonos mores are void, is not free from difficulties. These difficulties are the consequence of the fact that the ethics of the international community are much less developed than the ethics of national communities; further, the international community embraces different juridical systems, built upon different moral conceptions. But, on the other hand, these difficulties must not be overestimated. For, as we shall show, there are between the subjects of international law far-reaching agreements concerning many single values notwithstanding different basic conceptions.

In order to advance the solution of our problem, it is necessary to see what

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treaties are regarded as being contra bonos mores by the law of civilized nations. To this problem the decisions of the courts of civilized nations give an unequivocal answer. The analysis of these decisions shows that everywhere such treaties are regarded as being contra bonos mores which restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights.\(^7\)

This and similar formulas prove that the law of civilized states starts with the idea which demands the establishment of a juridical order guaranteeing the rational and moral coexistence of the members. It follows that all those norms of treaties which are incompatible with this goal of all positive law—a goal which is implicitly presupposed—must be regarded as void.

This general principle is not disproved by the fact that different states have different conceptions as to the position of the members of the community. There is, e.g., a different conception as to the position of men toward the community under a democratic, fascist or socialistic régime. But everywhere treaties are regarded as immoral which force one contracting party into a situation which is in contradiction to the ethics of the community.

In order to know what international treaties are immoral, we must ask what are the moral tasks states have to accomplish in the international community. In doing so, we must restrict ourselves to find those principles which correspond to the universal ethics of the international community. We must, so to speak, try to find the ethical minimum recognized by all the states of the international community, and must leave aside those particular tasks of the state represented only by particular régimes.

Using the utmost prudence, we can say that the following tasks most certainly devolve upon a state recognized by the modern international community: maintenance of law and order within the states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad. A treaty norm, therefore, which prevents a state from fulfilling one of these essential tasks must be regarded as immoral.

On this basis the following international treaties are immoral and, consequently, void:

1. An international treaty binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor or the property of men on its territory. Such a treaty would, however, also be violative of positive international law, if the state were prevented from protecting the

above-named rights of aliens, because international law obliges states to protect aliens in ways common to civilized nations (principle of the international minimum standard). 10

2. An international treaty binding a state to reduce its army in such a way as to render it defenseless against external attacks. It is immoral to keep a state as a sovereign community and to forbid it at the same time to defend its existence. 11

The situation is different if a state is placed under the protectorate of another state, because in this case the defense of the protected state against external attacks is the duty of the protecting state. The same is true if the existence of a state is effectively guaranteed by one or more Powers, because in this case the defense is the duty of the guarantor. But it would be immoral to oblige a state to remain defenseless. 12

3. An international treaty binding a state to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress. 13

This idea is to be found in the answer given by the Government of the Union of South Africa to the questionnaire addressed by the League of Nations to its members on the occasion of the preparation of the Codification Conference (1930). This note stresses the principle that a state cannot be bound to close its schools, universities or courts, to abolish its police or to reduce its public services in such a way as to expose the population to the dangers of disorder and anarchy, in order to obtain the necessary funds for the satisfaction of foreign creditors. 14

11 Cf., e.g., the declaration of Mr. Koumanoudj, Minister of Foreign Affairs of Yugoslavia, at the League of Nations. Journal Officiel, Supp. Spécial No. 28, Acte de la Vème Assemblée, Séances plénières, Compte-rendu des débats (1924), p. 217: "Le défenseur du territoire national et de l’indépendance politique constitue le devoir primordial et sacré de chaque État. Le peuple qui attaque ne se défend pas n’est pas un peuple." The same thought can be found in the Allgemeine Schweizer Militärzeitung, Vol. 77 (1931), p. 125 et seq.: "Il n’est pas logique d’interdire à toute une collectivité ce qui est accordé à des individus. . . . Ce n’est pas faire preuve de militarisme que de préparer la défense de la patrie, c’est un droit sacré et un devoir." Cf. further the Rapport Général présenté à la Vème Assemblée au nom des Ière et IIème Commissions par M. Politis, Société des Nations, IX (1924), A 185, p. 6: "L’État attaqué . . . doit commencer par se défendre par ses propres moyens. . . ."
12 Cf. The Austrian memorandum of March 2, 1936, transmitted to the Powers, on the re-establishment of compulsory military service. This memorandum considers the unilateral disarmament imposed by the Peace Treaties "a compulsory measure in contradiction to the natural law of nations, and having its origins in the unfortunate war-psychosis." Cf. Völkerbund und Völkerrecht, III (1936), p. 395.
These examples prove in a particularly obvious way the absurd con-
sequences of that pseudo-positivistic doctrine which denies the prohibition of
immoral treaties in international law and pretends that international treaties
may contain any stipulations whatsoever. These fruits show us with terri-
fying clarity the dogmatic positivism which wishes to separate positive law
from its ethical mother soil. A truly realistic analysis of the law shows us
that every positive juridical order has its roots in the ethics of a certain
community, that it cannot be understood apart from its moral basis. Posi-
tivism, allegedly giving us a realistic doctrine, is, therefore, not realistic at
all because it arbitrarily narrows the picture of the law and only sees its sur-
face.

4. An international treaty prohibiting a state from protecting its citizens
abroad. But a treaty is valid if it confers the protection of citizens upon
another state; for, in this case, the care for the welfare of the human beings in
question is undertaken by another subject of international law.

It is no objection to all these cases that international law admits the fact
of *debellatio* and recognizes treaties by which a state binds itself to be
merged in another state and that, therefore, argument *a majori ad minus*,
treaties are valid which impose upon a state restrictions which do not go so
far. This conclusion is wrong because these restrictions do not constitute a
*minus*, but something quite different. In the case of the extinction of a
state, the nationals of the extinguished state become, indeed, the nationals of
the new state and the care for their welfare is transferred to the new com-

munity. But if a state were burdened with obligations making it impossible
to fulfill the universally recognized tasks of a state, no community would
exist which would be able to care for these human beings in an adequate
way. Therefore, Ansilotti is entirely correct in his individual opinion ac-
companying the advisory opinion of the Permanent Court in the affair of
the Customs Régime between Germany and Austria when he says that it
can be questioned whether there is not a certain contradiction in the fact of
obliging a state to live and of putting it at the same time into a situation
which renders its life extremely difficult.15

That immoral treaties are void in international law is also recognized by
the dissenting opinion of Judge Schücking in the Chinn Case. Schücking
comments that the Permanent Court would never recognise an interna-
tional treaty in contradiction to *bonos mores*.

III. THE DETERMINATION OF THE IMMORALITY OF TREATIES

As the conclusion of immoral treaties is forbidden by general international
law, no valid obligation can come into existence concerning the immoral
contents of a treaty. Therefore, every arbitration tribunal or the Perma-

15 Series A/B, No. 41.
16 Series A/B, No. 93: "Jamais . . . la Cour n'appliquerait une convention dont le contenu
serait contraire aux bonnes moeurs."
nent Court, to which a conflict is submitted in which such a treaty is involved, is under a duty to take judicial notice 17 that such treaties are void, even if there be no demand by a party to this effect. This principle follows from the consideration that all organs of international law have to apply international law. They cannot, therefore, order a state to do something forbidden by international law. The statement that the contents of a treaty are immoral has, therefore, no constitutive, but simply a declaratory character; it states that no obligation with such contents has ever come into existence.

In consequence, a formal voidance of immoral contents of treaties is not necessary. The burdened state has the right simply to refuse the fulfillment of such an obligation. If the other party contests the immorality and if agreement cannot be reached by diplomatic means, the conflict has to be submitted to an arbitral or judicial procedure, as it is certainly a legal dispute.

If, however, there is no obligation of this kind between the parties, and if they do not agree to submit the dispute in question to an arbitral or judicial procedure ad hoc, the Council of the League of Nations has jurisdiction, provided that both the parties to the dispute are members of the League. If this is not the case, two solutions are possible: either one state submits to the refusal of the other contracting party to fulfill the treaty, or it resorts to self-help in order to enforce its alleged right. In this case another immoral treaty may be made, which again would be void in international law. For never can the immoral contents of a treaty really become law no matter how often it may borrow the external form of the law.

IV. PROPOSALS

In consequence of the above deductions, this writer ventures to propose to amend Professor Garner's report by an Article 22a, to the following effect:

A treaty norm is void if it is either in violation of a compulsory norm of general international law or contra bonos mores.

A treaty norm is contra bonos mores if a state is prevented by an international treaty from fulfilling the universally recognized tasks of a civilized state.

Such tasks are: the maintenance of the public order, the defense of the state against external attacks, the care for the bodily and spiritual welfare of its citizens at home and the protection of nationals abroad.

If the immorality of a treaty norm is contested, the dispute has to be submitted to the decision of an arbitration tribunal or of the Permanent Court of International Justice.

17 In this sense Judge van Eysinga and Judge Schücking in their dissenting opinions in the Chien Case, Series A/B, No. 68.
Panel V:

The Law of Armed Conflict: Past, Present and Future

Moderator:
The Honorable Scott L. Silliman

The Law of Armed Conflict

David E. Graham

Introduction

Perhaps no other area of National Security Law has experienced a more dynamic evolution over the past fifty years than that of the Law of Armed Conflict (LOAC). This has been the product of a period of persistent hostilities, ranging in size, scope and location. Indeed, the substance and even the original nomenclature of this legal regime have undergone a fundamental transition. The concept of declared “wars” that dominated the first half of the twentieth century has given way to the reality of any number of conflict scenarios that have failed to fall within the ambit of the traditional definition of “warfare.” Thus, the “Law of War” (LOW) that, as of the 1960s, purported to exclusively regulate the methods and means of State-on-State conflict has increasingly become referred to, over the ensuing years, as “The Law of Armed Conflict.” In turn, the international community, during the decades in issue, has constantly wrestled with the matter of whether, and, if so, how even this revised LOAC might be adapted to use-of-force situations that arise between States and various non-State entities. This normative difficulty, consequently, has resulted in a persistent claim by some that modern conflict can no longer be regulated by “The Law of Armed Conflict,” but by “International Humanitarian Law,” a somewhat contentious term when used to denote a relatively uncertain blend of both the LOAC and Human Rights Law.

In identifying the most significant developments in, and related articles and documentation addressing the LOAC over the past fifty years, note is made that our subject is, exclusively, jus in bello, the law applicable to the actual conduct of conflict, rather than jus ad bellum, the law dictating when armed force might be used legitimately. Over the last five decades, there have occurred more high profile incidents involving the latter legal regime, than the former. However, this observation is not meant to minimize the importance of the evolution of the LOAC during this period of time, but to simply distinguish the nature of our subject.
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As we trace the substantive formulation of the LOAC since the early 1960s, it is fitting to recognize the general disinterest afforded this law at that point in time by the international community. This disregard is reflected in these words penned by Richard Baxter, author of the U.S. Army's 1956 Field Manual on the Law of War,\(^1\) distinguished professor of international law at Harvard, and, later, a member of the International Court of Justice:

The dismissal by an important law school (Columbia) of the rules of warfare as "largely obsolete" may be an appropriate occasion for recording that 106 states are now formally bound by the Geneva Conventions of 1949 for the Protection of War Victims. That small embattled band of persons within and outside the armed forces, who interest themselves in the law of war, would gain greater satisfaction from this admirable number of parties if they were persuaded that they did not stand alone. A little less talk about the obsolescence of the law of war might also be welcomed by the victims of warfare.\(^2\)

As if on cue, however, shortly following this admonition by Baxter, the moribund status then accorded the LOW came to a sudden, and permanent, end. The long and painful American involvement in Vietnam had begun—a watershed event for the United States, its military, and ultimately, the evolution of the LOAC. The nature of the hostilities in Vietnam introduced the United States, and the international community at large, to nuanced operational LOAC issues that had not arisen in the conventional State-on-State wars of the past. The enemy, wearing no uniforms, inflicted casualties, then blended into the civilian population; North Vietnamese Surface to Air Missile Sites (SAMS) were embedded amongst the civilian population—and placed on dams and dikes; and, in violation of 1949 Geneva Convention requirements, captured U.S. personnel were deemed "war criminals" and systematically abused. Suddenly, the LOW was a topic of intense interest and debate, and LOW-related articles appeared in numerous law journals.

1960s-1970s

The Peers Inquiry Report and the DOD Law of War Program

Dominating both the political and military landscape of the U.S during the 1960s and 1970s, events occurring within Vietnam resulted in a number of significant LOW developments. The murder of Vietnamese civilians, at My Lai, by members of the Army's Americal Division in March, 1968, led to an
extensive investigation of this incident and the publication of the Peers Inquiry Report. Among its findings, the Report noted that inadequate training in the Law of War had been a contributory cause of the killings and that members of the unit involved failed to understand either their legal obligation to treat civilians humanely or their responsibility to report war crimes. This, in turn, led to the establishment of the Department of Defense Law of War Program in 1974, which, for the first time, mandated that a Judge Advocate (JA) become involved in the operational planning process for the purpose of ensuring operational compliance with the LOW. This initiative was particularly significant, as the insertion of a JA into operational planning not only substantially enhanced the importance that the military would place on the LOW; it soon led to JAs providing legal advice on all aspects of military operations—an approach that resulted in the practice of a military legal discipline now known as Operational Law.

Protocols I and II Additional to the 1949 Geneva Conventions

Arguably the most substantive development impacting the LOW/LOAC during the decade of the 70s, as well as future decades, was the negotiation of, and controversy surrounding, Protocols I and II Additional to the 1949 Geneva Conventions, which focused on international and non-international conflicts (NIACs), respectively. Driven largely by issues evolving from the Vietnam conflict, four sessions of the Diplomatic Conference on International Humanitarian Law, beginning in 1974 were convened under the auspices of the International Committee of the Red Cross (ICRC). The objective was the modernization of the LOW dealing with both the law of land warfare and that of aerial bombardment. Significantly, however, there was no attempt to deal with the Law of Naval Warfare and the protection of civilian persons and property at sea.

It was during these sessions of the Diplomatic Conference that support was voiced for the idea that, given the nature of the Vietnam hostilities, and other contemporary conflicts (wars of national liberation and self-determination), it was appropriate that the Conference products reflect the increasingly "close relationship" between the LOAC and Human Rights Law. This view was particularly manifested in Protocol I, which merged the 1907 Hague Convention IV regulations pertaining to the methods and means of conducting warfare with those of the 1949 Geneva Conventions dealing with the protection of the various categories of "victims" of warfare. It was this approach that led to some of the more controversial provisions of Protocol I, not the least of which was Article 1, which made all of that Protocol ap-
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applicable to "... armed conflicts in which peoples are fighting against colonial domination, alien occupation, and against racist regimes in the exercise of their right of self-determination. . . ."

While the great majority of States (over 170) have embraced Protocols I and II, the United States has chosen not to do so, a decision resulting in substantial controversy within the international community that, though initiated in the 1970's, continues to this day.7

U.S. DEPARTMENT OF DEFENSE (DOD) WEAPONS REVIEW PROGRAM

Yet another significant LOAC development of the 1970's resulted from a response by the Acting DOD General Counsel, in 1974, to a member of Congress who had raised questions regarding the Army's use of the M-16 rifle. One question dealt with whether DOD conducted a "systematic" review of each of its weapons for its conformity with the LOAC. The Acting General Counsel wisely responded that, while no such review mechanism was then in place, the Department "... intended to take the necessary measures to have such procedures formulated and adopted."8

In October of that year, DOD issued DOD Instruction 5500.15, which set forth a review process that would ensure DOD compliance with international law with respect to the development and procurement of all weapons in its inventory. It was the first weapons review process established by any State in the international community, and, refined over the years, it has since served as a model for a number of other countries.9

1980s

The decade of the 1980's witnessed extensive discussion concerning jus ad bellum issues surrounding the concept of "self-determination" and the use of force to counter terrorism, particularly "State-sponsored terrorism." The U.S. Marine Corps suffered an extensive loss of life when a barracks complex was bombed in Lebanon; the U.S. engaged militarily in Grenada and launched air strikes against Libya; the International Court of Justice issued a landmark decision—"Military and Paramilitary Activities in and Against Nicaragua",10 and the U.S.S. Vincennes mistakenly downed an Iranian Airbus. From a LOAC perspective, however, this decade's most notable development arguably occurred in connection with the regulation of weaponry. In 1980, after several false starts dating back to 1971, The Conference On Prohibitions or Restrictions On the Use of Certain Conventional Weapons

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was convened and produced the 1980 United Nations Conventional Weapons Convention.

Conventional Weapons Convention

The Conventional Weapons Convention (CCW), which restricts, regulates, or prohibits the use of certain otherwise lawful conventional weapons, also contained three separate Protocols: Protocol I (Non-Detectable Fragments); Protocol II (Prohibitions Or Restrictions On The Use Of Mines, Booby Traps And Other Devices); and Protocol III (Prohibitions Or Restrictions On The Use Of Incendiary Weapons). While the United States did not ratify the Convention and Protocols I and II until 1995, and Protocol III and two additional Protocols [Protocol IV (Blinding Laser Weapons) and Protocol V (Explosive Remnants of War)] until 2008, this Convention and its Protocols continue to represent the most comprehensive and substantive development in regulating the use of weapon systems that has occurred since the turn of the century.11

Given the "internal" nature of the armed conflicts that had become prevalent in the 1970s and 1980s, it soon became evident that the originally agreed Protocol II of the CCW, dealing with mines, was inadequate, as it had no real effect on long-lived anti-personnel mines that could result in casualties for decades. Accordingly, after extensive negotiations extending into the 1990s, additional safeguards were set forth in an Amended Mines Protocol in 1996.12 While a substantive LOAC achievement, this instrument was to be largely overshadowed by a complete ban on the production and use of anti-personnel mines contained in the 1997 Ottawa Convention.13 While over 150 States have become parties to this Convention, the United States, China, and Russia have not, and the use of anti-personnel mines remains a controversial issue to this day.

1990s

The 1990s began with the U.S. military intervention in Panama, witnessed the launch of the first Gulf War against Iraq, observed a mid-decade U.S. military action in Haiti, and saw the United States and its coalition partners engage in military operations in both Kosovo and the Balkans. Yet, while each of these activities involved an extensive application of the LOAC, and the decade embarked with the publication of what still stands as a definitive work on the applicability of the LOAC to air operations, "Air Law and the Law of War,"14
the 90s can best be characterized as a period during which international judicial forums played a prominent LOAC role.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

Unresolved in the 1980s, the matter of distinguishing international from non-international armed conflict, to include the discernment of the scope of the LOAC applicable to this latter type of hostilities, had become increasingly problematic. Coincidentally, in May of 1993, the UN Security Council established an international tribunal for the purpose of prosecuting individuals responsible for violations of international humanitarian law (LOAC) committed during the conflict waged in the former Yugoslavia (ICTY).15 And, while the Council also established the International Criminal Tribunal for Rwanda (ICTR) in 1994,16 it is a ground breaking decision of the ICTY which merits particular attention.

THE ICTY TADIC JURISDICTION DECISION

On October 2, 1995, the Appeals Chamber of the ICTY issued the Tadic Jurisdiction Decision.17 This first contested case to be heard by the ICTY has proven to be a formative pre-judgment ruling, seminal in nature, and one that many feel has contributed significantly to the development of the LOAC, specifically with respect to non-international armed conflict. The Tribunal addressed a number of difficult issues associated with what are known as Common Article 3 NIACs.18 It attempted to define when an “armed conflict” exists; it purported to narrow and clarify the definition of an Article 3 conflict; it spoke to the manner in which a “battlefield” should be defined; it set the stage for the possibility that “war crimes” and “grave breaches” (of the 1949 Geneva Conventions) could be committed, and charged, in Article 3 conflicts; and ruled that customary LOAC applied to such conflicts. The first of a number of Tadic opinions, this ruling was regularly cited in subsequent ICTY decisions and has since often been referenced authoritatively in the literature.19

THE ICJ NUCLEAR WEAPONS CASE

On December 20, 1994, the International Court of Justice (ICJ) received a request from the UN General Assembly for an urgent advisory opinion on a single question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”
In its July 8, 1996 opinion, the Court, on those matters related exclusively to the LOAC, held, unanimously, that a threat or use of nuclear weapons should be compatible with the LOAC, particularly with respect to the rules on proportionality and discrimination. However, in a seven-to-seven vote, it ruled that, while the threat or use of nuclear weapons would generally be contrary to the LOAC, given the then state of the applicable law and the facts before the Court, it could not definitively conclude whether the threat or use of such weapons would be either lawful, or unlawful, in an extreme circumstance of self-defense in which the very survival of a State would be at stake. Secondly, the Court declined to rule on the legality of whether nuclear weapons could lawfully be used in belligerent reprisal—that is, in proportionate response to a serious violation of the LOAC committed by another State. In brief, as a result of this ICJ decision, the use of nuclear weapons remains a viable and legal option.  

The International Criminal Court  

The most controversial aspect of this decade profiling the international judicial forum ultimately proved to be the establishment of an International Criminal Tribunal. Focusing on a Draft Statute for an International Criminal Court produced by the International Law Commission in 1994, a UN Preparatory Committee, following four more years of work, tabled a draft Statute for an International Criminal Court (ICC) that was submitted to a UN Diplomatic Conference in Rome in 1998. The Court was to be imbued with jurisdiction over acts of genocide, crimes against humanity, war crimes, and the crime of aggression.  

Originally vigorously supported by the U.S., the Rome Statute of the ICC was finalized on July 17, 1998, amidst a strident domestic debate as to whether the United States should become a party to this agreement. While a decision was made by the Clinton Administration to sign the Rome Treaty, the Bush Administration later withdrew this U.S. signature, and the U.S. remains one of the few States that is a non-Party to the Court.  


As a new century arrived, one that would almost immediately give rise to the horrific events of September 11, 2001 ("9/11"), the resultant conflicts in Afghanistan and Iraq, and the LOAC issues particularly associated with an Administration's "Global War on Terrorism" (GWOT), three significant articles dealing with the LOAC appeared in the 2000 edition of the American Journal of International Law (AJIL).
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The first, "The Laws of War on Land," identified what the author considered to be the "most troubled" areas of the LOAC at the turn of the century. With respect to what he deemed "other armed conflicts" (NIACs), he singled out these issues: (1) the extent to which the LOAC regulates non-international conflicts, and (2) the applicability of the LOAC to conflicts which are partly international and partly non-international in nature.

In addressing the extent to which he believed the LOAC then applied to NIACs, a matter of recurring debate over the preceding two decades, he contended that, as of the close of the twentieth century, there had occurred a substantial expansion of the customary LOAC applicable to such conflicts, particularly in the context of criminal prosecution. Citing as evidence of this conclusion the ICTY Tadic decision and the Rome Statute of the ICC, he then predicted an even more extensive application of this law to future NIACs. 22

Just as the seminal article, "Air Law and the Law of War", had ushered in the 1990s, the second of the three AJIL articles, "The Law of Naval Warfare at the Turn of Two Centuries," served the same function for the first decade of the new century. A succinct but comprehensive analysis of the law of naval warfare, it detailed both the development and current status of such law and identified its most relevant references and resources. 23

The third article of note, "The Humanization of Humanitarian Law," cogently addressed many of the more challenging and unresolved LOAC issues of the time. The article is of particular relevance in the sense that the author framed his analysis in the context of what he deemed an evolutionary "humanization" process of the LOW, driven largely by human rights. Indeed, in his view, the increasing use of "international humanitarian law" for the terms "law of war" and "law of armed conflict" simply reflected the large degree to which the human rights movement had succeeded in influencing this body of law. And, in support of this contention, he noted that, while the term "international humanitarian law" had initially referred only to the four 1949 Geneva Conventions, it had since become commonly used to refer to the LOAC as a whole. 24 This asserted confluence of LOAC and Human Rights Law as an accepted reality remains, however, a much debated issue.

Post 9/11 and LOAC

Post 9/11, the first decade of the new century confronted novel LOAC issues resulting from a frequently strained U.S. attempt to apply both codified and customary LOAC to both those responsible for the events of 9/11 and those seized in a United States-declared "Global War On Terrorism" (GWOT).
SOTH ANNIVERSARY

The authority to conduct such a "war" was said to be based not only on the President's inherent constitutional authority as Commander-in-Chief, but on a Congressional statutory sanction set forth in the 2001 Authorization for the Use of Military Force (AUMF). 25

The United States' decision to selectively apply LOAC principles to what many viewed as acts of terrorism, rather than as combatant actions taken in the context of an ongoing "armed conflict," generated significant controversy within the international community. Principal among such LOAC issues was the manner in which the U.S. chose to accord status and treatment to those taken into U.S. custody in Afghanistan, Iraq, and in the subsequent GWOT. All such individuals were deemed to be "unlawful enemy combatants"—subject to detention until the termination of this global conflict, but, as "unlawful combatants," not entitled to the rights and protections of the LOAC, specifically those contained in the Third Geneva Convention Relative to the Treatment of Prisoners of War. 26

Incarcerated at the U.S. Navy Base at Guantanamo Bay, Cuba, and in secret detention sites outside the United States, certain of these individuals were subjected to interrogation techniques that, while unlawful under LOAC standards, were nevertheless validated under a U.S. interpretation of what it considered the applicable law. 27 Concomitantly, the U.S. also established a Military Commission process for trying "violations of the LOW" committed by personnel it deemed to be "unlawful enemy combatants." 28

Both of these U.S. actions were subjected to intense criticism, and, following the 2004 revelation of the abuse of U.S.-held detainees in Iraq—attributed to the migration of a number of the interrogation techniques used to solicit information from detainees held at Guantanamo and elsewhere—the U.S. Supreme Court issued a trilogy of opinions which limited the U.S. government's power to subject "unlawful combatant detainees" to indefinite detention and trial by a Military Commission. 29

Reacting to both the public revelation of the abuse of United States-held detainees in Iraq and these Supreme Court decisions, Congress attempted to legislatively resolve a number of the more controversial matters associated with detainee interrogation and trial. In passing the 2005 Detained Treatment Act (DTA), it mandated a definitive standard of detainee treatment and interrogation for U.S. Department of Defense-held detainees and prohibited U.S. courts from hearing writs of habeas corpus filed by any detainee. 30 Brushing aside this DTA-imposed limitation on judicial review, however, the Supreme Court ruled in Hamdan v. Rumsfeld (2006) that the Military Commission process violated both the Uniform Code of Military Justice and Common Article 3 of the 1949 Geneva Conventions. 31
Responding to *Hamdan*, Congress quickly passed the 2006 Military Commissions Act (MCA)—legislation that purported to speak definitively to a number of LOAC matters. The Act’s definition of “enemy combatant” was exceptionally broad, potentially subjecting individuals who had never committed belligerent acts against the United States in a battlefield environment to seizure, indefinite confinement, and trial by Military Commission. It also authorized the use of a detainee’s coerced testimony before such a Commission; again stripped U.S. federal courts of jurisdiction to hear habeas appeals from incarcerated individuals deemed to be “enemy combatants”; and confirmed the President’s exclusive authority to interpret, on behalf of the United States, the meaning of the provisions of the 1949 Geneva Conventions and to determine when these Conventions would and would not apply to both U.S. actions and those of its agents.\(^\text{32}\)

Finally, but very significantly, the MCA required the President to issue an Executive Order that would purportedly provide guidance concerning non-DOD detainee treatment and interrogation practices he deemed to be compliant with the provisions of Common Article 3, including that which prohibits humiliating and degrading treatment.\(^\text{33}\) Long awaited when issued in 2007, this Executive Order 13,440, instead simply reaffirmed prior U.S. detainee-related LOAC policy and legal determinations.\(^\text{34}\)

With the arrival of 2009 and a new Administration, the U.S. approach toward detainee issues underwent change. In 2008, the U.S. Supreme Court had again acted to provide greater due process to individuals held at Guantanamo, ruling in *Boumediene v. Bush* that these detainees might challenge their designated status as “unlawful enemy combatants” through the filing of writs of habeas corpus in the U.S. District Court for the District of Columbia.\(^\text{35}\) And, on its second day in office, the new U.S. Administration issued a series of Executive Orders intended to substantially reverse the prior Administration’s policies and practices relating to detainee detention, treatment, and interrogation including the revocation of the above-noted 2007 Executive Order.\(^\text{36}\)

Nevertheless, at the turn of the decade, the U.S. detainee detention facilities at Guantanamo Bay remained open, and the new Administration had formulated its own basis for the government’s authority to indefinitely hold detainees at these facilities. Such a right was premised not on the President’s Commander-in-Chief authority to continue to detain “unlawful combatants,” but on the statutory authority of the 2001 AUMF, informed, it was submitted, by the LOAC as to the scope of the President’s authority to act under this statute.\(^\text{37}\)

Detainee-related issues continue to pose challenges, particularly with respect to both the government’s ability to hold certain individuals indefinitely
without trial, and with regard to the manner in which a decision is to be made
as to whether detainees charged with crimes will be tried in federal court or by
a Military Commission process imbued with greater due process protections by
a revised 2009 Military Commissions Act. 38

INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) INITIATIVES

Though detainee matters and the conflicts in Afghanistan and Iraq were the
subjects of primary concern during this decade, this period was not without
other significant LOAC-related developments. In March 2005, the ICRC re-
leased a report that identified—on the basis of empirical data concerning state
practice and opinio juris gathered from nearly fifty countries and forty recent
armed conflicts—principles of “international humanitarian law” that it sub-
mitted had achieved the status of customary law. 39 While a substantive effort
and endorsed by a number of States, the ICRC’s methodology used in arriving
at its conclusions in the report has been deemed faulty by both scholars and
government representatives. 40 A general criticism has been that the report rep-
resents more of what the ICRC would desire the customary LOAC to be (ex
ferenda), than what it actually is. Debate continues over the credibility to be
accorded this report.

In view of the increasing number of non-international armed conflicts,
the “irregular” status of those who engage in such conflicts, the contention
that the LOAC and Human Rights Law overlap in hostilities of this nature,
and the continued claim by the U.S. that it is engaged in an ongoing “global
armed conflict” against a transnational terrorist organization, the ability
to effectively apply the basic LOAC principle of “distinction” has been in-
creasingly challenged. To address this concern, the ICRC concluded that it
was necessary to establish guidelines that would assist governments in de-
termining those individuals who are—and are not—protected from direct
attack. At the core of this task was the ability to define the phrase, “taking
a direct part in hostilities.” That is, who qualifies as a “civilian”? And, when
and how does a civilian lose his protected status by taking a “direct part” in
hostilities?

Though the ICRC oversaw five meetings of experts on this subject, con-
ensus could not be achieved on a number of the more fundamental issues
involved. Finally, in 2009, the Committee published its own interpretive guid-
ance concerning the manner in which to assess an individual’s “direct par-
ticipation” in a conflict. 41 However, as in the case of its earlier report which
purported to set forth the customary LOAC, this publication has also drawn
strong criticism—and has failed to gain acceptance as authoritative in nature. 42
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2010-Present

As a new decade begins, the international community continues to wrestle with the extent to which both the codified and customary LOAC or, perhaps, a mixture of this LOAC and Human Rights law, applies to the conduct of a non-international armed conflict and to those who wage such hostilities. Moreover, still subject to debate is the even larger issue of the manner in which the very existence of a NIAC is to be determined. Is it possible, under the existing LOAC, to engage in a “transnational NIAC” against a terrorist organization? And, if so, what is the extent to which the LOAC applies to a “conflict” in which none of an adversary’s personnel are deemed to be lawful combatants? And, ultimately, if these questions cannot be sufficiently answered, does this signal a need for a substantial revision of this law?

Equally challenging is the ongoing debate over the use of certain weapon systems, such as anti-personnel mines and cluster munitions, and, as the decade unfolds—and these issues remain unresolved—new LOAC matters confront us. Principal among these are the struggle to determine the applicability of conventional LOAC principles to cyber warfare and to the use of unmanned aerial vehicles to selectively target individuals overseas, including U.S. citizens, who pose an “imminent threat” to the security of the United States.

Closing

In closing, recall that, in 1965, Judge Richard Baxter, writing under the heading of “A Weary Word on the Law of War,” bemoaned both the persistent talk of the “obsolescence” of this law and the general lack of interest shown it. Some 50 years after the establishment of the ABA Standing Committee on Law and National Security, Dick Baxter would draw great satisfaction from the fact that this is, unequivocally, no longer the case.
AFTER "TOP GUN": HOW DRONE STRIKES IMPACT THE LAW OF WAR

LAURIE R. BLANK*

"We have just won a war with a lot of heroes flying around in planes. The next war may be fought by airplanes with no men in them at all . . . . Take everything you've learned about aviation in war, throw it out the window, and let's go to work on tomorrow's aviation. It will be different from anything the world has ever seen."

— General Henry H. "Hap" Arnold

In 2010, the United States launched 118 drone strikes in Pakistan, an exponential increase over past years.¹ In a broader view, in 2009, the U.S. Army reported a 400% increase in drone flight hours over the previous ten years.² Drones are regularly used in combat operations in Afghanistan³ and Libya,⁴ and have

* Director, International Humanitarian Law Clinic, Emory University School of Law.


³ See, e.g., Christopher Drew, For Spying and Attacks, Drones Play a Growing Role in Afghanistan, N.Y. TIMES, Feb. 20, 2010, at A6 (discussing the expansion of the use of drones in Afghanistan).

been used to launch targeted killings in Somalia\textsuperscript{5} and Yemen.\textsuperscript{6} The most widely reported drone strike in 2011 was the killing of Anwar al-Awlaki in Yemen on September 30, 2011.\textsuperscript{7} Although surveillance and reconnaissance capabilities make drones a workhorse of modern intelligence gathering and targeting determinations, public discourse and outcry have focused on the so-called "robots in the sky"\textsuperscript{8} that launch aerial attacks on targets within armed conflict and counterterrorism operations, forming a central platform in United States operations from Pakistan to Somalia. One major topic of debate and a steady source of news is the number of civilian casualties from such strikes. Estimates of the number of civilians killed in U.S. drone strikes over the past several years vary wildly, with some reports in the thousands and others in the hundreds.\textsuperscript{9} In contrast, the U.S. government recently announced that Central Intelligence Agency ("CIA") drone strikes in Pakistan have caused zero civilian casualties in the past year.\textsuperscript{10}

The debate over civilian casualties goes far beyond war, incorporating the morality of targeted killing, the viability of U.S.

\textsuperscript{5} See Mark Mazzetti & Eric Schmitt, U.S. Expands its Drone War into Somalia, N.Y. TIMES, July 2, 2011, at A1 (discussing the expansion of drone strikes into Somalia on a theory of collaboration between Islamic militants in Yemen and Somalia).

\textsuperscript{6} See Siobhan Gorman & Adam Entous, CIA Plans Yemen Drone Strikes, WALL ST. J., June 14, 2011, http://online.wsj.com/article/SB10001424052702303848104576384051572679110.html ("The Central Intelligence Agency is preparing to launch a secret program to kill al Qaeda militants in Yemen . . . .").


\textsuperscript{9} Perhaps the most well-known and respected study on this data is that collected by the New America Foundation in 2011: The Year of the Drone, supra note 1. According to its findings, non-militant fatalities comprise approximately twenty percent of all casualties from U.S. drone strikes in Pakistan.

\textsuperscript{10} See Scott Shane, C.I.A. is Disputed on Civilian Toll in Drone Strikes, N.Y. TIMES, Aug. 12, 2011, at A1 (presenting the public debate over the CIA’s contention that U.S. drone strikes into Pakistan caused no civilian deaths in 2011).
counterinsurgency strategy, and the parameters of self-defense against terrorists. However, the debate puts a laser focus on the impact of drone strikes on interpretations of the law of armed conflict. These issues range from potential new—and possibly problematic—understandings of key principles to questions regarding the geographical parameters of the battlefield and the impact of non-military personnel engaging in drone strikes.

Drones, unmanned aerial vehicles (UAVs), unmanned aerial combat vehicles, remotely piloted weapons—a long list of names currently describes the enormous range of aerial vehicles that do not carry a human operator. The U.S. Department of Defense defines an unmanned aerial vehicle as:

[a] powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload. Ballistic or semiballistic vehicles, cruise missiles, and artillery projectiles are not considered unmanned aerial vehicles.\(^\text{11}\)

It is important to note, however, that drones are not truly "unmanned," but rather remotely piloted. In fact, experts have noted that the operation of drones involves more people than F-16s or other fighter planes piloted in-person.\(^\text{12}\) For example, beyond the pilot and the sensor operator, who operate the vehicle from a remote location, recoverable drones also involve launch and recovery teams, numerous intelligence analysts, and other legal and operational decision-makers.\(^\text{13}\) Many therefore favor the term "remotely piloted aircraft," but since "drone" is one of the most commonly used terms, this Article will continue to use it as well.

\(^{11}\) Joint Chiefs of Staff, Joint Pub. 1–02, Department of Defense Dictionary of Military and Associated Terms 571 (2009).


\(^{13}\) See Scott Shane & Thom Shanker, Yemen Strike Reflects U.S. Shift to Drones as Cheaper Tool of War, N.Y. Times, Oct. 2, 2011, at 1, 14 (stating that "[b]ehind each aircraft is a team of 150 or more personnel, repairing and maintaining the plane and the heap of ground technology that keeps it in the air, poring over the hours of videos and radio signals it collects, and gathering the voluminous intelligence necessary to prompt a single strike").
During the past decade, the number and variety of drones have increased dramatically. "Within the current United States inventory, [drones] range in size from the Wasp and the Raven, at 38 inches long, both of which are ‘launched’ by being thrown in the air by hand, to the twenty-seven foot long Predator and the forty-foot long Global Hawk." The most commonly-used drones in the U.S. arsenal are the MQ-9 Reaper and the MQ-1B Predator, both of which are designed for persistent intelligence, reconnaissance, and surveillance, as well as target acquisition and “destroy and disable” capabilities. Both systems are armed with Hellfire missiles. Another example is the tiny helicopter drone Libyan rebels used to coordinate attacks. At present, the United States and Israel are the only countries using armed drones, although Canada recently announced that it planned to acquire and use armed drones in the near future. More than forty countries—and some non-state actors—possess and employ unarmed drones, including Russia, India, Pakistan, China, and Iran.

The U.S. drone program has sparked extensive and intense public commentary—academic, policy-oriented, and media—regarding targeted killing of terrorist operatives using armed drones. However, such attacks comprise only a small portion of...
the various ways in which drones are or can be used. Drones are used extensively for intelligence, surveillance, and reconnaissance (ISR), including identification of targets, and to support troops on the ground. In the past several years, there has been extensive academic and policy debate regarding the lawfulness of UAV strikes and other targeted killings of al Qaeda and other operatives. A host of interesting questions arise from this use of drones, including the use of force in self-defense against non-state actors, the use of force across state boundaries, the nature and content of state consent to such operations, and the use of targeted killing as a lawful and effective counterterrorism measure. These issues do not stem from the particular weapon or weapons system; instead they flow naturally from the jus ad bellum, the law governing the resort to force as enshrined in the United Nations Charter. Thus, although in some situations the nature of drones might enable a broader range of options for the use of force, the issues raised above are generally not drone-specific. Rather, they address

20 See Michael N. Schmitt, Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law,' 13 Y.B. INT’L HUMANTARIAN L. 311, 311-26 (2010) (illustrating the exponential increase in drone use and how drones are used against Taliban operations and militants); Henry Kenyon, Army Deploys More Small Drones in ISR Surge, DEF. Sys., June 24, 2011, http://defense��统.com/articles/2011/06/24/army-briefing-uas-platforms.aspx (“The Army is getting ready to deploy additional numbers of unmanned aircraft systems in Southwest Asia. Ranging from large, long-duration platforms to small, hand-launched tactical platforms, these new systems will support warfighters ….”).


23 See Mary Ellen O’Connell, Seductive Drones: Learning from a Decade of Lethal Operations, J.L. INFO. & SCI. (forthcoming 2011) (arguing that drones have made the use of force more likely due to the reduced domestic political consequences from their use, as opposed to the use of manned airborne weapons platforms).
complex contemporary challenges posed by transnational terrorism and the proliferation of conflict between states and non-state actors.

This Article focuses on contemporary *jus in bello* (law of war) questions posed by the use of drones and will analyze drones as a weapons system within the law of armed conflict, leaving the *jus ad bellum* questions aside. Questions regarding the use of drones for targeted killings of terrorist operatives outside of armed conflict—or for any other purpose outside of armed conflict—raise interesting and challenging legal issues, but remain outside the scope of this Article.

The first Section will address foundational questions regarding the application of the law of armed conflict to drones, including the legality of armed drones as a weapons system and their use in accordance with the key law of armed conflict requirements of distinction, proportionality, and precautions in attack. Although many argue that the "joystick mentality" of remotely piloted aircraft and weapons can lead to desensitization and a decreased likelihood of adherence to international norms, the examination below demonstrates that drones indeed offer extensive and enhanced opportunities for compliance with the law of armed conflict.

In the second Section, this Article will explore how the burgeoning use of armed drones raises new questions for some traditional concepts and categories within the law of armed conflict, such as the status of persons and the geographical locus of attacks and hostilities, and potentially new challenges in the implementation of distinction and proportionality. Drones' "capacity for persistent surveillance [has] given unprecedented intelligence capabilities to U.S. and allied military forces in Iraq.

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25 See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶ 84, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston Report] (suggesting that drone operators could potentially be inclined to disregard combat norms because they control the weapons far from the actual battlefield, described as the "Playstation mentality").
and Afghanistan, [often] . . . . reshaping the capability of military commanders and their advisers to comply with law-of-war obligations . . . .”

26. Notwithstanding significant hue and cry regarding their use during the past several years, the use of armed drones offers the potential for improved law of armed conflict compliance and protection of civilians during armed conflict.

1. DRONES AND LOAC: A FOUNDATIONAL ANALYSIS

The law of armed conflict (LOAC), otherwise known as international humanitarian law or the law of war, applies to situations of armed conflict and governs the conduct of hostilities and the protection of persons during conflict. 27 At its foundation, LOAC is based on four key principles, which undergird the spirit and purpose of the law and drive determinations in areas such as targeting, detention, and treatment of persons. The principle of distinction mandates that all parties to a conflict distinguish between those who are fighting and those who are not, and direct attacks only at the former. 28 The principle of proportionality seeks to minimize incidental casualties during war and operationalizes

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28. See AP I, supra note 27, art. 48 ("Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").
LOAC's fundamental premise that the means and methods of attacking the enemy are not unlimited. Thus, a commander must refrain from any attack in which the expected civilian casualties will be excessive in light of the anticipated military advantage gained. The principle of military necessity recognizes that a military has the right to use any measures not forbidden by the laws of war that are "indispensable for securing the complete submission of the enemy as soon as possible." Finally, the fourth principle is the principle of humanity, also commonly referred to as the principle of unnecessary suffering, and aims to minimize suffering in armed conflict. Once a military purpose has been achieved, the infliction of further suffering is unnecessary. In

29 See id. art. 35(1) (establishing the principle that parties to a conflict may not use any "methods or means of warfare" whatsoever).

30 See id. art. 51(5)(b) (defining any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" as an indiscriminate attack and therefore prohibited).

31 DEP'T OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 4 (1956). The Lieber Code provides the earliest codification of military necessity: Article 14 states "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war," and Article 16 states:

[M]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district.


32 The Martens Clause is the clearest statement of the principle of humanity, found in the preamble to the Hague Convention of 1899:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

addition, weapons that by their nature cause unnecessary suffering are outlawed.\textsuperscript{33}

1.1. Drones are Lawful Weapons

As the United Nations Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions stated in his recent report on targeted killings, “a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.”\textsuperscript{34} The first question, addressed in this Section, is whether a particular weapon is prohibited due to its inherent characteristics. Section 2 below will examine whether armed drones are used in accordance with international law principles of distinction, proportionality, and precautions.

International law prohibits two categories of weapons in armed conflict: indiscriminate weapons and weapons that cause unnecessary suffering. The first prohibition appears in Article 51(4) of Additional Protocol I, which defines indiscriminate attacks as (1) attacks “not directed at a specific military objective,” (2) attacks “which employ a method or means of combat which cannot be directed at a military objective,” or (3) attacks “which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.”\textsuperscript{35} Means of combat generally refers to weapons or weapons systems. Thus, as the International Court of Justice declared in its advisory opinion in the \textit{Legality of the

\textsuperscript{33} See AP I, note 27, art. 35(2) (prohibiting the use of weapons and methods of warfare that cause “superfluous injury or unnecessary suffering”).

\textsuperscript{34} Alston Report, supra note 25, ¶ 79.

\textsuperscript{35} AP I, supra note 27, art. 51(4)(a)–(c). In addition, Article 35 of Additional Protocol I sets forth the following basic rules:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

\textit{Id.} art. 35(1)–(3).
Threat or Use of Nuclear Weapons, parties to a conflict may not “use weapons that are incapable of distinguishing between civilian and military targets.”36 There is little doubt that any weapon can be used in an indiscriminate way during conflict, such as spraying machine gun fire into a crowd with no regard for the presence of civilians or others who are hors de combat. Such illegal use does not make the machine gun an unlawful weapon, however. One example of inherently indiscriminate weapons is the rockets that Hamas and Hezbollah have fired into Israel for many years.37

The ban on indiscriminate weapons focuses on those weapons that are, by design or other shortcoming, “incapable of being targeted at a military objective only, even if collateral harm occurs.”38 The ban on indiscriminate effects encompasses both these types of indiscriminate weapons and the use of otherwise lawful weapons in an indiscriminate manner. For example, the use of cluster munitions is highly disputed for this reason.39 As the International Committee of the Red Cross has stated,

"[t]hese characteristics [of cluster munitions] raise serious questions as to whether such weapons can be used in populated areas in accordance with the rule of distinction and the prohibition of indiscriminate attacks. The wide area effects of these weapons and the large number of unguided submunitions released would appear to make it

36 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 [*78] (July 8) [hereinafter Nuclear Weapons].

37 See, e.g., Gaza/Israel: Hamas Rocket Attacks on Civilians Unlawful, HUM. RTS. WATCH (Aug. 6, 2009), http://www.hrw.org/news/2009/08/06/gazaisrael-hamas-rocket-attacks-civilians-unlawful (noting that the rockets Hamas has fired on Israel are indiscriminate because “they cannot be aimed with any reliability”).

38 Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 588–89 [*] 24] (July 8) (dissenting opinion of Judge Higgins). Examples could include missiles with a faulty guidance system resulting in an inability to aim only at military objectives or biological weapons that can spread contagion among the civilian population when not checked by an antidote. Michael N. Schmitt, Future War and the Principle of Discrimination, 28 ISR. Y.B. HUM. RTS. 51, 55 (1996).

39 See, e.g., Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 463 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007) (holding that “the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets . . . . [thereby rendering it] an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties.”).
difficult, if not impossible, to distinguish between military objectives and civilians in a populated target area."

Others argue that cluster munitions may well be a more discriminating weapon in certain circumstances because if they were banned, many more missions would be needed to achieve the same effect and cover the same amount of area. By increasing the number of missions, the attacking force consequently would expose more of its force and more civilians to a heightened risk. Further, cluster munitions could reduce collateral damage because of their small detonating impact; otherwise, forces would have to use a more highly explosive weapon to accomplish the same military goal, thereby creating more damage.

Second, weapons that cause unnecessary suffering or superfluous injury are prohibited. The goal is to minimize harm that is not justified by military utility, either because of a lack of any utility at all or because the utility gained is considerably outweighed by the suffering caused. The international community’s first effort at regulating weapons was the St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of December 11, 1868, which sought to outlaw “the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.” Repeated in Article 23(e) of the Annex to the

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41 See Nout van Woudenberg, The Long and Winding Road Towards an Instrument on Cluster Munitions, 12 J. CONFLICT & SEC. L. 447, 450 (2007) (“Where use is made of an alternative to cluster weapons, more missions are needed in order to cover the same area.”); see also Thomas J. Herbel, On the Chopping Block: Cluster Munitions and the Law of War, 51 A.F.L. REV. 229, 258–59 (2001) (noting that cluster munitions may be deployed lawfully in certain circumstances).

42 See van Woudenberg, supra note 41, at 450 (explaining that, in particular situations, cluster weapons can pose less danger to civilian populations than weapons that have larger explosive charges).

43 See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 401 [¶ 1414], (Claude Pilloud et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY] (“The principle is that of the prohibition of weapons which would unnecessarily increase the suffering of men rendered hors de combat, or which would inevitably lead to their death.”).

44 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight pmbl., Nov. 29–Dec. 11, 1868, reprinted in 1
1907 Hague Convention IV, this prohibition is recognized as custom international law. See Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land art. 23(e), Oct. 18, 1907, 36 Stat. 2277 (hereinafter Hague Convention No. IV) ("In addition to the prohibitions provided by special Conventions, it is especially forbidden... (c) To employ arms, projectiles, or material calculated to cause unnecessary suffering"); see also W. Hays Parks, Conventional Weapons and Weapons Reviews, 8 Y.B. INT'L HUMANITARIAN L. 55, 120 (2005) (asserting that, of the many provisions dealing with the use of conventional weapons, Article 23(e) of the Hague Convention IV is perhaps the only one that is clearly respected as "customary international law").

45 See Nuclear Weapons, supra note 36, at 275 [¶ 78].

fighter aircraft. These missiles are not banned by any international agreement and do not manifest any characteristics that cause superfluous injury as understood in international law. In fact, the precision-guided munitions that drones carry and their extensive surveillance capabilities make them particularly discriminate weapons. The ability to track a target for hours, even days, before launching an attack facilitates accurate targeting and enhances the protection of civilians by giving drone operators the ability to choose the time and place of attack with an eye towards minimizing civilian casualties or damage. Therefore, armed drones can easily be aimed at only military objectives and have effects that can be limited, as much as possible, to military objects, thus meeting the standards in Article 51(4) of Additional Protocol I.\footnote{See, e.g., MQ-1B Predator Fact Sheet, \textit{supra} note 15 (noting that the MQ-1B remotely piloted drone carries AGM-114 Hellfire missiles); MQ-9 Reaper Factsheet, \textit{supra} note 15 (noting that the MQ-9 remotely piloted drone carries Hellfire missiles).}

The fact that armed drones could be used—and perhaps have been used—in indiscriminate attacks does not make them an inherently unlawful weapon or weapons system. Determinations of legality, such as those required in new weapons reviews under Article 36 of Additional Protocol I,\footnote{For an articulation of Article 51(4)'s required elements, see \textit{supra} Section 1.1, note 35 and accompanying text.} do not mean that states must anticipate any possible unlawful use of a weapon. Rather, as noted at the 1974–1977 Diplomatic Conference that produced the Additional Protocols, the question is “whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances. A State is not required to foresee or analyze all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.”\footnote{See AP I, \textit{supra} note 27, art. 36 (“In the study, development, acquisition or adoption of a new weapon, means or method of warring, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”).}

The normal or expected use of armed drones falls clearly within the parameters of lawful weapons under international law.

\footnote{See PROTOCOL COMMENTARY, \textit{supra} note 43, at 424 \textit{[\textbf{F}]} 1469].}
1.2. Lawful Use of Drones

Upon a determination that armed drones are lawful weapons, the next step is to examine how they are being used and whether such use complies with, and perhaps even enhances, the implementation of LOAC. As noted above, a lawful weapon can be used unlawfully in certain circumstances, such as in deliberate attacks on civilians or in indiscriminate attacks. In order to comply with LOAC, parties launching attacks must abide by the principle of distinction, the principle of proportionality and the obligation of precautions in attack. Access to reliable factual information about the United States UAV strikes in Afghanistan, northwest Pakistan, Yemen, or other locations, for example, is difficult to obtain in many circumstances.\(^52\) Disputes regarding facts on the ground, numbers of persons killed, identities of those killed, and other key information do impact the ability to analyze compliance with LOAC norms. However, it is reasonable, in light of existing information, to examine the use of armed drones within the framework of the central principles of distinction, proportionality, and precautions.

Many critics argue that drones “make it easier to kill without risk to a State’s forces, so policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.”\(^53\) The analysis below, however, will demonstrate that, as one international legal expert explains:

> [T]here is little reason to treat drones as distinct from other weapons systems with regard to the legal consequences of their employment. Nor is there a sound basis for heightened concern as to their use. On the contrary, the use of drones may actually, in certain cases, enhance the protections to which various persons and objects are entitled under [LOAC].\(^54\)

The extensive capabilities of drones urge examination not only of whether their use complies with LOAC, but also whether they

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\(^{52}\) See e.g., Shane, supra note 10 (noting a wide disparity between the official American record of civilian casualties and unofficial sources).

\(^{53}\) Alston Report, supra note 25, ¶ 80.

\(^{54}\) Schmitt, supra note 20, at 313.
offer better opportunities for adherence to the law. Drones "now not only perform persistent surveillance to identify and track targets—on missions that may exceed the limited endurance and skills of human pilots—but also constitute lethal weapons platforms with a continuous presence, enabling attacks on more targets in more situations than ever before." Many more situations triggering analysis of LOAC's key principles therefore arise with the use of armed drones.

1.2.1. Distinction

Identifying who or what can be targeted is one of the most fundamental issues during conflict. In traditional conflicts, one could distinguish between soldiers—who wore uniforms—and civilians—who typically did not venture near the battlefield—in most circumstances. Similarly, identifying military and civilian objects was usually feasible. Contemporary conflicts introduce a whole set of new challenges in this area, however, demanding ever-greater efforts—through intelligence-gathering and surveillance—to determine who is who in the zone of combat operations.56

Article 48 of Additional Protocol I sets forth the fundamentals of the principle of distinction:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.57

Distinction lies at the core of IHL's seminal goal of protecting innocent civilians and persons who are hors de combat. The obligation to distinguish forms part of the customary international law of both international and non-international armed conflicts, as the International Criminal Tribunal for the former Yugoslavia

55 Beard, supra note 26, at 414.
56 See Laurie Blank & Amos Guiora, Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare, 1 HARV. NAT'L SEC. J. 45, 45-48 (2010) (analyzing the challenges of implementing the law of war in contemporary state versus non-state actor conflicts).
57 AP I, supra note 27, art. 48.
("ICTY") held in the Tadic case.\textsuperscript{58} As a result, all parties to any conflict are obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to distinguish themselves from civilians and their own military objects from civilian objects.

The purpose of distinction—to protect civilians—is emphasized in Article 51 of Additional Protocol I, which states that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."\textsuperscript{59} Article 51 continues, stating:

Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.\textsuperscript{60}

\textsuperscript{58} See Prosecutor v. Tadic, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 111, 127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (citing U.N. General Assembly Resolution 2675: "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types . . . [the General Assembly] affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . 2. [i]n the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations"). See also Nuclear Weapons, supra note 36, at 257 [¶ 79] ("[T]hese fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."); JEAN-MARIE HENCKAERTS & LOUISE DOSSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES, at rules 3–11, 25–32, 34–76 (2005) [hereinafter CIHL] (referencing rules based on the principle of distinction that have become part of customary international law); Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 177 (1998) (noting that the obligation to distinguish between combatants and civilians is customary international law).

\textsuperscript{59} AP I, supra note 27, art. 51(2).

\textsuperscript{60} Id. art. 51(4).
Furthermore, Article 85 of Protocol 1 declares that nearly all violations of distinction constitute grave breaches of the Protocol, and the Rome Statute of the International Criminal Court similarly criminalizes attacks on civilians and indiscriminate attacks.

Upon examination, several features of drones and aspects of how armed drones are used demonstrate a substantial, even heightened ability to conform to distinction’s obligations. It is important to note, again, that armed drones, like any other weapon or weapon system, can be used to engage in deliberate or indiscriminate attacks against civilians or other protected individuals during armed conflict. The first aspect of distinction in which drones offer extensive capabilities is in the identification of targets. A lawful attack must be directed at a legitimate target: either a combatant or a civilian directly participating in hostilities. In international armed conflicts—those occurring between states—all members of the state’s regular armed forces are combatants and can be identified by the uniform they wear, among other

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61 Id. art. 85(3) ("[T]he following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(ii) . . . .")

62 See Rome Statute of the International Criminal Court arts. 8(2)(b)(i–ii) & (iv–vi), 8(2)(e)(i–ii & iv), July 17, 1998, U.N. Doc A/CONF.183/9 [hereinafter Rome Statute] ("For the purpose of this Statute, 'war crimes' means: . . . Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; . . . Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; [a]tacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; [k]illing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; . . . Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; . . . Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives . . . .")
characteristics. In state versus non-state actor conflicts, including counterterrorism operations within the context of an armed conflict, determining who is a legitimate target is significantly more complex. The legal obligation remains the same, however, requiring parties "to distinguish between an innocent civilian and an individual who, although dressed in civilian attire, may pose an immediate threat and is therefore a legitimate target." In addition, a commander must assess whether and when to target manifestly hostile persons deliberately hiding among the civilian population.

Persons who are members of an organized armed group are legitimate targets at all times—but dress the same as civilians either for a lack of uniforms or specifically to blend into the civilian population for protection. In such cases, the surveillance capability of drones plays an essential role in differentiating such persons from innocent civilians. A second category of legitimate target, as noted above, is the civilian directly participating in hostilities. The concept of what constitutes direct participation has been the subject of extensive analysis and debate and is outside the scope of this Article. Nonetheless, regardless of the particular parameters

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63 See GC III, supra note 27, at art. 4(A) (providing that all members of the regular armed forces of a State party to an international armed conflict are entitled to prisoner of war status and thus considered combatants).

64 Blank & Guirao, supra note 56, at 58.

65 See Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 50 INT’L REV. RED CROSS 991, 995 (2008) (adopted by ICRC Assembly Feb. 25, 2009), available at http://www.icrc.org/eng/assets/files/other/icrc-872-reports-documents.pdf [hereinafter Interpretive Guidance] (stating that organized armed groups are targetable based on status in non-international armed conflict). See also Jimmy Gurule & Geoffrey S. Corn, Principles of Counter-Terrorism Law 70–76 (2011) (discussing the rules governing targeting of enemy forces in international and non-international armed conflict and noting "a member of an enemy force...is presumed hostile and therefore presumptively subject to attack" in international armed conflict, and "[s]ubjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts").

of direct participation, the essence of the targeting determination in this situation is that persons directly participating in hostilities—whether all the time or only once or intermittently—must be distinguished from innocent civilians.\textsuperscript{67} As in the case of members of organized groups who appear to be civilians, intelligence information and extensive surveillance will be the key to accurate and discriminatory targeting of such persons—and thus the key to protection of innocent civilians from the consequences of combat operations. When neither hostile persons nor members of armed groups wear uniforms or carry their arms openly, the intelligence, surveillance and reconnaissance capabilities of drones offer great benefits for the implementation of the obligation of distinction.

Drone attacks rely on high resolution imagery usually transmitted in real time to a drone crew which, undistracted by any threat, engages the target. When feasible and necessary, drones can be used to carefully monitor the potential target for extended periods before engaging it with precision weapons. Compared to attacks by manned aircraft or ground-based systems, the result is often a significantly reduced risk of misidentifying the target [or attacking the wrong target].\textsuperscript{68}

Using drones, commanders can track and analyze the daily activities of suspected militants, helping to ensure that civilians are not mistakenly targeted. For such planned targets, the "pattern of life analysis"—an assessment of who lives and works in a particular structure or area—is a linchpin of distinction. "Unmanned systems [therefore] seem to offer several ways of determining the legality of Israel's policy of targeted killings, and concluding that the legality of such strikes must be determined on a case-by-case basis).\textsuperscript{69}

\textsuperscript{67} See Targeted Killings Case, 57(6) IssSC 285, ¶¶ 31–33 & 40, available at http://elyor1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf (highlighting the importance of the direct participation analysis for the effective implementation of the principle of distinction).

\textsuperscript{68} Schmitt, supra note 20, at 320.

\textsuperscript{69} For example, until at least August 2010 in Afghanistan, the International Security Assistance Force rules of engagement mandated a forty-eight-hour pattern of life assessment before any target could be approved. See Rajiv Chandrasekaran, Petraeus Reviews Directive Meant to Limit Afghan Civilian Deaths, Wash. Post, July 9, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070806219.html (describing General Petraeus’s intention to review the tactical directive giving rise to the 48-hour rule).
reducing the mistakes and unintended costs of war," such as using “far better sensors and processing power,” “allow[ing] decisions to be made in a more deliberate manner” and “remov[ing] the anger and emotion from the humans behind them.”70

1.2.2. Proportionality

Once a legitimate target is identified, the legal analysis does not end. Rather, the attacking party must then assess whether the attack satisfies the principle of proportionality.71 LOAC flatly prohibits any intentional targeting of civilians, but armed conflict involves an infinite array of circumstances in which civilians may die or suffer grievous injury as a result of attacks launched directly at military targets and combatants. Technical malfunctions, inclement weather, faulty intelligence and navigation errors can all also cause a bomb to fall short and cause significant unanticipated civilian casualties. Beyond errors and accidents, on many occasions, a commander can anticipate that some civilians will suffer harm: there may be civilians near the person being targeted or in a building or location identified as a legitimate target. The commander planning the attack may have a range of choices in terms of tactics and weapons in attacking the target, which could result in different consequences for civilians in the area; in some situations, there may only be one option.

LOAC seeks to minimize such incidental civilian casualties as well, such that proportionality effectively operationalizes LOAC’s fundamental premise that the means and methods of attacking the enemy are not unlimited. Article 35 of Additional Protocol I


71 See Nuclear Weapons, supra note 38, at 587 [¶ 20] (dissenting opinion of Judge Higgins) (“[E]ven a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”).
declares that “[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited,” a basic principle that dates back at least to the 1907 Hague Convention. Importantly, however, the law does not prohibit all civilian deaths—and in fact accepts some incidental civilian casualties. At the same time, it does mandate that the only legitimate object of war is to weaken the military forces of the enemy. In this way, proportionality balances military necessity and humanity. To protect innocent civilians from the effects of war and minimize undue suffering, LOAC prohibits disproportionate attacks. Therefore, commanders must refrain from attacks where the expected loss of civilian life or damage to civilian property from an attack will be excessive in relation to the anticipated military advantage gained from the attack.

Collateral damage, a term seen regularly in news reports regarding drone strikes and targeted killing, refers to civilians killed in the course of attacks on military objectives—that is, the incidental casualties from an attack. Given the focus of this Article on the lawfulness of armed drones within the law of armed conflict, it is crucial to understand a fundamental distinction between LOAC and human rights or domestic criminal law. Both legal regimes forbid the deliberate killing of innocent civilians.

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72 AP I, supra note 27, art. 35. See Hague Convention No. IV, supra note 45, art. 22 (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”).

73 See Judith Gardam, Necessity and Proportionality in Jus ad Bellum and Jus in Bello, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 283-84 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) (“The immunity of non-combatants from the effects of warfare . . . has never been regarded as absolute. The incidence of some civilian casualties has always been tolerated as a consequence of military action.”).

74 See The Declaration of St. Petersburg, 1868, supra note 44, para. (“[T]he only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy . . . .”).

75 See AP I, supra note 27, art. 51(5) (“Among others, the following types of attacks are to be considered as indiscriminate: . . . [a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”). The same language appears in Article 57 of Additional Protocol I, which refers specifically to precautions in attack. Id. at 57(2)(b).

76 See AP I, supra note 27, art. 51(2) (“The civilian population . . . shall not be the object of attack.”); International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that every human being shall have an
LOAC, however, anticipates and accepts that parties may knowingly kill civilians without violating the law. Thus, a party attacking a military objective may know for certain that some number of civilians—perhaps janitorial staff working in the building—will die when the building is hit. Such knowledge does not mean the party has committed a crime; rather, LOAC allows for such incidental civilian casualties to the extent that they are not excessive in relation to the military advantage gained from the attack.\textsuperscript{77} The crux of the issue, therefore, is how to interpret “excessive” in relation to military advantage and from which perspective.\textsuperscript{78} As the very language of Additional Protocol I shows, referring to “anticipated” military advantage and “expected” civilian casualties, proportionality must be viewed prospectively, not in hindsight. Instead, the information available and the circumstances at the time of the military operation in question must govern how we approach the balance between military advantage and civilian casualties. Because combat, even a minor firefight, involves confusion and uncertainty—the “fog of war”—these “decisions cannot be judged on the basis of

\textsuperscript{77} See W. Hays Parks, \textit{Air War and the Law of War}, 32 A.F. L. REV. 1, 4 (1990) (“Within both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed; so long as injury to noncombatants is ancillary (indirect and unintentional) to the attack of an otherwise lawful target, the principle of noncombatant immunity is met.”).

\textsuperscript{78} See Michael N. Schmitt, \textit{Fault Lines in the Law of Attack, in Testing the Boundaries of International Humanitarian Law} 277, 293 (Susan C. Breau & Agnieszka Jacheń-Neale eds., 2006) (“Focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured.”); Joseph Holland, \textit{Military Objective and Collateral Damage: Their Relationship and Dynamics}, 7 Y.B. INT’L HUMANITARIAN L. 35, 47 (2004) (“Clearly, one cannot always attribute every civilian death after an attack to the attacker. . . . One cannot assess incidental civilian losses for which the attacker is responsible by simply conducting a body count. Such an oversimplification is as superficial as assessing the quality of a hospital by only counting the bodies in its morgue.”); William J. Fenrick, \textit{The Prosecution of Unlawful Attack Cases Before the ICTY}, 7 Y.B. INT’L HUMANITARIAN L. 153, 175 (2004) (“The actual results of the attack may assist in inferring the intent of the attacker as he or she launched the attack but what counts is what was in the mind of the decision maker when the attack was launched.”).
information which has subsequently come to light." The proportionality of any attack—and thus both the anticipated military advantage and the expected civilian casualties—must thus be viewed from the perspective of the military commander on the ground, taking into account the information he or she had at the time.

Just as with distinction, proportionality mandates that parties to a conflict gather and assess information about the target, the target area, and those persons and objects in the vicinity of the target. In the context of proportionality, drones appear to be particularly well designed for adherence to these obligations. The heart of this comprehensive surveillance and intelligence-gathering process is the "pattern of life" analysis. Using drones, which can loiter over a target and the surrounding area for days, commanders can follow a target and gather information about the civilian population in the area and the potential for civilian casualties in possible strike locations and at certain times.

Because the drones provide high quality information about the target area in real-time (or near real-time), for extended periods and without risk to the operators, they [thus] permit more refined assessments of the likely collateral damage to civilians and civilian objects. The ability of armed drones to observe the target area for long periods before attacking means the operators are better able to verify the nature of a proposed target and strike only when the opportunity to minimize collateral damage is at its height.80

At a preliminary level, therefore, the capacity that armed drones offer for pre-attack surveillance and at-the-moment awareness of the target and civilians in the area offers great

79 Canada, Reservations and Statements of Understanding made upon Ratification of Additional Protocol I, 20 Nov. 1990, § 7, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_ca_rule14. See also, Belgium, Interpretative Declarations Made Upon Ratification of Additional Protocol I, 20 May 1986, § 3, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_be_rule15_SectionD ("[T]he only information on which [proportionality determinations] can possibly be taken is such relevant information as is then available and that it has been feasible from him to obtain for that purpose.").

80 Schmitt, supra note 20, at 314.
opportunities for compliance with LOAC's proportionality obligations. There is little doubt that better information about where and when civilians are present can help to minimize civilian casualties from strikes on military targets.

1.2.3. Precautions in Attack

LOAC mandates that all parties take certain precautionary measures to protect civilians. In many ways, the identification of military objectives and the proportionality considerations are, of course, precautions. But the obligations of the parties to a conflict to take precautionary measures go beyond that. Beginning at the broadest level, Article 57(1) of Additional Protocol I states: “[I]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”81 This provision is a direct outgrowth of, and supplement to, the Basic Rule in Article 48, which mandates that all parties distinguish between combatants and civilians, and between military objects and civilian objects. The practical provisions forming the major portion of Article 57 discuss precautions to be taken specifically when launching an attack. Precautions are, understandably, a critical component of the law's efforts to protect civilians and are of particular importance in densely populated areas or areas where civilians are at risk from the consequences of military operations.82 For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful.

First, parties must do everything feasible to ensure that targets are military objectives.83 Doing so helps to protect civilians by limiting attacks to military targets, thus directly implementing the principle of distinction. Second, they must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage.84 For example, during the 1991 Persian Gulf War, “pilots were advised to attack bridges in urban areas along a longitudinal axis. This measure was taken so that bombs that

81 AP I, supra note 27, art. 57(1).
82 See Protocol Commentary, supra note 43, at 679 [¶ 2190] ("It is clear that the precautions prescribed here will be of greatest importance in urban areas because such areas are most densely populated.").
83 AP I, supra note 27, art. 57(2)(a)(i).
84 Id. art. 57(2)(a)(ii).
missed their targets—because they were dropped either too early or too late—would hopefully fall in the river and not on civilian housing.”85 Another common method of taking precautions is to launch attacks on particular targets at night when the civilian population is not on the streets or at work, thus minimizing potential losses. In addition, when choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects.86 Each of these steps requires an attacking party to take affirmative action to preserve civilian immunity and minimize civilian casualties and damage—in effect, to take “constant care.” Proportionality considerations are also a major component of the precautions framework. Parties are required to refrain from any attacks that would be disproportionate and to cancel any attacks when it becomes evident that the civilian losses would be excessive in light of the military advantage.87 Finally, Article 57(2)(c) of Additional Protocol I requires attacking parties to issue an effective advance warning “of attacks which may affect the civilian population, unless circumstances do not permit.”88

At the same time, it is important to note that, as in other areas, LOAC is at its foundation concerned with practicalities. The obligation is to take precautions that are feasible in the circumstances, given the information available to the commanders and military planners. The Eritrea-Ethiopia Claims Commission explained that, “[b]y ‘feasible,’ Article 57 means those measures that are practicable or practically possible, taking into account all circumstances ruling at the time.”89 Precautions cannot be judged by whether a certain result was obtained after the fact;90

85 Jean-François Quégüiner, Precautions Under the Law Governing the Conduct of Hostilities, 88 INT’L REV. RED CROSS 793, 801 (2006) (noting that this angle of attack “also means that damage would tend to be in the middle of the bridge and thus easier to repair”) (citing Michael W. Lewis, The Law of Aerial Bombardment in the 1991 Gulf War, 97 AM. J. INT’L L. 481, 501 (2003)).
86 AP I, supra note 27, art. 57(3).
87 Id. art. 57(2)(a)(iii) and art. 57(2)(b).
88 Id. art. 57(2)(c).
90 Rather, the language of both provisions, speaking of attacks that “may affect” the civilian population in AP I, supra note 27, art. 57(2)(c), and accounting for “circumstances” or events within the commander’s “power,” in Hague IV,
nonetheless, they do demand that parties gather, analyze, and act on all relevant information in the planning process. The ability of drones to loiter over a target and gather information greatly increases the time during which a target can be analyzed and verified, in most cases significantly improving the accuracy of attacks.

Distinction and proportionality considerations do not generally turn on the choice of an armed UAV rather than a missile fired from a piloted aircraft. The actual choice of weapon or weapons system, however, is a component of the obligation to take precautions.\footnote{See Protocol Commentary, supra note 43, at 682 [¶ 2200] (noting that although the rule itself does not imply a prohibition of specific weapons, "their precision and range should be taken into account . . .").} Means and methods of warfare must be chosen with an eye to minimizing or even avoiding civilian casualties.

Here a drone must be used when reasonably available and its use is operationally feasible, but only if such use would minimize likely collateral damage without sacrificing military advantage. Conversely, drones may not be used when other means or methods of warfare that would result in less collateral damage with an equivalent prospect of mission success are available.\footnote{Schmitt, supra note 20, at 325.}

The legal issue concerns what amount of information constitutes sufficient available information for an acceptable determination regarding precautions and proportionality. As the ICTY stated, the question is "whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."\footnote{Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).} In an age when the information-gathering capabilities of drones make extraordinary amounts of information available, it is reasonable to examine whether using drones adds any heightened standard for the use of information in analyzing targets, potential collateral damage and other considerations. The new "persistent
surveillance” capabilities of drones, including “network-centric access to related ISR data throughout the command structure, the improving quality and types of information collected by virtual platforms (especially real-time data), and the complete lack of risk involved in the collection of information”\(^4\) are continually reshaping these questions. Some therefore argue that the obligation to take all feasible precautions extends beyond analysis of information gathered on-scene to include “assessment[s] of the key methods, procedures, and systems necessary to support the effective use of the virtual technologies to be deployed, including a careful evaluation of whether appropriate efforts are being made to ensure that databases are sufficiently accurate to catch mistakes by the human operators.”\(^5\)

In all three areas—distinction, proportionality, and precautions—drones’ unique and advanced capabilities suggest great potential for adherence to LOAC’s obligations. Drones are not automatons; they depend on human operators, analysts, and decisionmakers. As a result, the use of armed drones in compliance with the law also depends on these same categories of human participants. Some critics challenge the growing use of armed drones, arguing that remote operators are desensitized to the effects of combat and risk approaching targeting—and killing—as a video game rather than a war with real life-and-death consequences.\(^6\) In the same vein, such detractors raise concerns that because drones “make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.”\(^7\) These concerns are certainly legitimate, but perhaps a bit unfounded. Pilots who have flown both fighter jets and drones explain that while the F-16 pilot

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\(^4\) Beard, supra note 26, at 435, n. 139 (citing Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 Int’l Rev. Red Cross 445, 461 (2005)).

\(^5\) Id. at 441.

\(^6\) See David E. Anderson, Drones and the Ethics of War, RELIGION & ETHICS NEWSWEEKLY (May 14, 2010), http://www.pbs.org/wnet/religionandethics/episodes/by-topic/international/drones-and-the-ethics-of-war/6290/ (citing one critic of drone strikes who argues that “[T]he real ethical issue... is the greater propensity to kill’ made possible by the ‘video game-like’ quality of drone combat.”).

\(^7\) Alston Report, supra note 25, ¶ 80.
engages the target and then returns to the base, drones, in contrast, are intimately connected to the battlefield, the target and the aftermath of the attack. "The amount of time spent surveilling an area—sometimes hundreds of hours are devoted to a single mission—creates a greater sense of intimacy than with other aircraft," debunking the myth of the "Playstation mentality." As one UAV commander explains,

"There's no detachment. . . . Those employing the system are very involved at a personal level in combat. You hear the AK-47 going off, the intensity of the voice on the radio calling for help. You're looking at him, 18 inches away from him, trying everything in your capability to get that person out of trouble."\textsuperscript{98}

In addition, the UAV will remain over the attack site and go from launching an attack into a battle damage assessment immediately thereafter.\textsuperscript{100} UAV pilots and sensor operators have significantly greater engagement with the battlefield and the destruction of war than other pilots. In the end, though, it is compliance with the law that matters to ensure protection for civilians and others under LOAC, not the moral or mental motivation of the attacker in fulfilling the obligations of distinction, proportionality, and precautions.

2. THE IMPACT OF DRONES ON TRADITIONAL LOAC CATEGORIES AND CONCEPTS

The increased use of armed drones over the past decade, both in armed conflict and in counterterrorism operations outside of armed conflict, has also played a major role in introducing some questions regarding the application of traditional LOAC concepts and categories to today's conflicts and situations. As the media have reported extensively, U.S. drone strikes in Pakistan are generally planned and executed by intelligence agencies and


\textsuperscript{99} Id. (internal quotation marks omitted).

\textsuperscript{100} See Blanchard, supra note 12 (explaining in detail the U.S. Air Force's process of drone targeting and acquisition).
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operatives, rather than the military. In some cases, contractors play a significant role in the operation of the drones as well, often at the launch and recovery sites overseas. The involvement of non-military personnel, whether intelligence operatives or contractors, can have consequences for the application of LOAC to such persons during armed conflict. Another challenging issue involves the geographical parameters of the battlefield. The ability to use armed drones across state borders without risk to personnel who could be shot down or captured across those borders could have an expansive effect on the location of conflict and hostilities, in essence broadening the battlefield beyond traditional parameters. Finally, extensive media coverage of the psychological and emotional impact of the UAV campaigns, particularly in northwest Pakistan, raises questions about whether there are second-order effects from the UAV strikes beyond the fundamental questions of applying LOAC principles to the actual targeting and strikes.

2.1. Status of Operators and Direct Participation

LOAC is relevant not only in analyzing the lawfulness of particular attacks, but also in determining the rights and privileges of persons involved in the operation and targeting of drones. In international armed conflict, LOAC recognizes two categories: combatants and civilians. This status, whether on the battlefield or off, determines whether a person can lawfully engage in hostilities, is immune from attack, and enjoys the privileges of prisoner of war status upon capture, among other questions. In non-international armed conflict, LOAC does not contemplate combatant status and leaves classification of persons to the state's

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102 See James Risen & Mark Mazzetti, C.I.A. Said to Use Outsiders to Put Bombs on Drones, N.Y. TIMES, Aug. 21, 2009, at A1 (describing how the Xe company, formerly known as Blackwater, has assumed an important role in the U.S. military's anti-terrorism drone operations).

103 See GC III, supra note 27, art. 4 (defining prisoners of war); API, supra note 27, art. 50 (defining civilians and civilian populations).
domestic law. This distinction raises two questions: who has a legal right to launch attacks using armed drones, and what are the consequences for those who do so in the absence of such legal authority?

For the purposes of the instant discussion, the first key difference between combatants and other persons during armed conflict is that combatants are entitled to engage in hostilities—lawful belligerents do not commit crimes when they engage in lawful killing or destruction of property in the course of hostilities. Thus, a soldier who kills the enemy in accordance with the law of war—the person killed was a legitimate target, the attack complied with basic LOAC principles, and so forth—is not engaging in what would, under domestic law, be murder. In this way, the law effectively permits acts that would be criminal during peacetime, reflecting the fact that soldiers act as agents of the sovereign state. Persons who do not qualify for combatant status, in contrast, can be prosecuted for acts on the battlefield under domestic law, because they do not enjoy the privilege of combatant immunity.

As members of the regular armed forces of a state, military personnel who operate drones are combatants and therefore do not pose any questions regarding the authority to use lethal force in the course of armed conflict. U.S. drone strikes in Afghanistan, or Israeli drone strikes against Palestinian militants in the course of that armed conflict, do not raise questions regarding status and

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104 See ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 259 (2008) (“[T]here is no prisoner of war status under NIAC. The state where the non-international armed conflict takes place can treat the rebels as simple criminals and try them for having taken up the arms against the government, contrary to the criminal law of that state.”).

105 See, e.g., United States v. Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002) (holding that an American who fought for the Taliban was not a lawful combatant, and therefore was not entitled to combatant immunity under GC III).

106 See, e.g., LIEBER CODE, supra note 31, art. 57 (“So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”).

107 See, e.g., Lindh, 212 F. Supp.2d 541 (concluding that Lindh was not a lawful combatant and was therefore not entitled to combatant immunity).

108 Although news reports talk of Israeli drone strikes, Israeli officials generally maintain that drones are used only for reconnaissance and targeting planning.
combatants' privilege, therefore. In contrast, it is widely reported that the CIA is the lead—perhaps sole—agency planning and executing U.S. targeted strikes using armed drones in Pakistan. Neither intelligence agents nor contractors fall within the category of combatant under LOAC. They are not members of regular armed forces, civilians engaged in a levée en masse, or members of a regular militia under responsible command, carrying arms openly, wearing a distinctive emblem, and abiding by the laws of war. As a result, they do not enjoy the right to engage in hostilities within the law of war and the concomitant immunity that accompanies that right—combatant immunity. A person who engages in hostilities without combatant status does not violate LOAC per se, but does not enjoy the protection from prosecution that combatant status provides. Thus, CIA agents or contractors who launch UAV attacks can be subject to prosecution under the domestic law of the countries where the attacks occur and would not be protected by the LOAC principle of combatant immunity.

A second, and closely related, issue that arises from non-military personnel operating armed drones during armed conflict is that such personnel can be liable to attack as a result of their legal status.

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109 The extent of the hostilities between the United States and militants in Pakistan, including Tehrik-e-Taliban Pakistan (TTP) and other groups, suggests that the United States is engaged in an armed conflict in Pakistan. See Laurie R. Blank & Benjamin R. Farley, Characterizing U.S. Operations in Pakistan: Is the United States Engaged in an Armed Conflict?, 34 FORDHAM INT'L L.J. 151, 151-52 (2011) (considering whether the United States' involvement in Pakistan is an armed conflict). In Yemen and Somalia, however, where the United States has also employed UAV strikes against terrorist operatives, the United States is operating within the international law of self-defense and is not engaged in an armed conflict at this time, making the legal analysis, particularly regarding the status and rights of persons, wholly different.

110 See GC III, supra note 27 (setting forth the categories of individuals entitled to combatant status).

111 See Lindh, 212 F. Supp.2d 557-58 (noting that persons who engage in hostilities without lawful combatant status do not have immunity from prosecution under domestic law).

112 See Nathan Hodge, Drone Pilots Could Be Tried for “War Crimes,” Law Prof Says, WIRED.COM (Apr. 28, 2010, 4:15 PM), http://www.wired.com/dangerroom/2010/04/drone-pilots-could-be-tried-for-war-crimes-law-prof-says/ (describing how drone operators could be prosecuted in the country in which they carried out the drone-related actions because these operators "[are not] combatants in a legal sense.")
participation in hostilities. One of the central tenets of LOAC is that civilians are immune from attack. Article 51(2) of Additional Protocol I states: "The civilian population as such, as well as individual civilians, shall not be the object of attack." Direct targeting of civilians is therefore strictly prohibited. But the protection for civilians is significantly broader than protection from direct attack. Article 51 sets the foundation for a framework of protections to ensure that "the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations."

However, the practical and functional needs of the law lead to one important exception: direct participation in hostilities. Article 51(3) of Additional Protocol I sets forth this exception, stating that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." In certain limited circumstances, therefore, civilians may be directly and intentionally targeted during hostilities, notwithstanding their civilian status. As the Israeli Supreme Court held in its 2006 Targeted Killings judgment,

A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy—during that time—the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g., those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which

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113 See AP I, supra note 27, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.").

114 Id. art. 51(2).

115 Id. art. 51(1).

116 Id. art. 51(3).
that function entails and ceases to enjoy the protection granted to a civilian from attack.\footnote{See Targeted Killings Case, 57(6) IsrSC 285, ¶ 31, available at http://elyon1.court.gov.il/files_eng/02/650/007/A34/02007690.a34.pdf; see also Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 178 (1998) ("Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants.") (emphasis omitted).}

From a practical standpoint, enabling civilians to engage in hostilities but maintain their immunity from attack would upend LOAC’s delicate balance between military necessity and humanity.\footnote{See Michael N. Schmitt, Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, 50 Va. J. INT’L L. 755, 803 (2010) (explaining the interplay between necessity and distinction).} Direct participation thus also comports with the basic right of individual self-defense by recognizing that a soldier engaged in conflict has the right to respond with force to someone posing a threat, whether that person is a combatant or a civilian.

Although the parameters and definition of direct participation in hostilities has been the subject of extensive debate, the nature of the activities that intelligence operatives and contractors engage in as part of UAV attacks fall squarely within the context of direct participation in hostilities.\footnote{See Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgement, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008) (listing the following examples of direct participation in hostilities: “bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces”) (citations omitted); MINISTRY OF DEFENSE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, 2004, JP 383, at § 5.3.3 (U.K.) [hereinafter U.K. MANUAL] (including amongst “those taking a direct part in hostilities . . . [c]ivilians manning an anti-aircraft gun or engaging in sabotage of military installations”); U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/CMWP 5-12.1/COMDT/PUB F5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, § 8.2.2 (2007) (“Direct participation in hostilities must be judged on a case-by-case basis. Some examples include taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property.”). See also Interpretive Guidance, supra note 65, at 991 (noting that the conduct of hostilities falls within the definition of direct participation in hostilities).} Therefore, such persons lose their
immunity from attack and can be targeted during armed conflict. Direct participation in hostilities is not, in and of itself, a violation of LOAC, however, and any civilians who engage in drone strikes are not liable for violations of LOAC unless they launch those attacks in violation of the law—such as deliberate targeting of civilians, disproportionate or indiscriminate attacks, or a failure to take precautions, for example.¹²⁰ In the context of who operates drones and launches or participates in attacks, the growing use of armed drones does pose interesting questions regarding status and the consequences of that status, with regard to the loss of both immunity from attack and immunity from prosecution.

2.2. Geography of Attacks

Even a cursory reading of the front-page news from the past several years demonstrates an expanding geography of UAV attacks: Afghanistan, Pakistan, Yemen, Somalia, and Libya. Some of these, such as in Afghanistan—and now Pakistan—and Libya, fall within the generally recognized parameters of an armed conflict. Others, such as Yemen and Somalia, raise more complicated questions regarding where force is being used and what that means for the application of LOAC. A secondary part of this inquiry is the difficulty of determining which groups form part of the enemy in this armed conflict and which groups are separate entities.

Some argue that the use of armed drones is extending the battlefield to locales wherever UAV attacks against terrorist operatives take place.¹²¹ Indeed, the United States has used drones extensively beyond the existing conflict regions of Afghanistan and Pakistan. In the first targeted killing after September 11, a CIA

¹²⁰ See Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform, 111th Cong. 27 (2010) (statement of David W. Glazier, Professor of Law, Loyola Law School Los Angeles) (also arguing, however, that under the legal theories adopted by our government in prosecuting Guantánamo detainees, these CIA officers, as well as any higher level government officials who have authorized or directed their attacks, are committing war crimes).

¹²¹ See Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the H. Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform, 111th Cong. 20 (2010) (statement of Mary Ellen O’Connell, Professor of Law, University of Notre Dame) (arguing for strict rules limiting the use of armed drones to legally determinable combat zones).
drone launched a Hellfire missile into southern Yemen, killing six suspected al Qaeda members, including the man believed to be responsible for the bombing of the U.S.S. Cole.\(^\text{122}\) More recently, the United States used a drone strike to kill Anwar al-Awlaki, the Muslim cleric who served as an operational commander of al Qaeda in the Arabian Peninsula (AQAP), who was suspected of planning the failed attack against Britain’s ambassador to Yemen in April 2010, and who was allegedly involved in the Fort Hood massacre of November 2009 and the attempted airline bombing on Christmas Day 2009.\(^\text{123}\) In Somalia, as early as January 2007, the United States launched attacks against al Qaeda members suspected of involvement in the 1998 bombings of U.S. embassies in Kenya and Tanzania.\(^\text{124}\) After multiple failed drone strikes against Saleh Ali Saleh Nabhan, the al Qaeda militant suspected of masterminding the 2002 attack on the Paradise Hotel in Mombasa, Kenya, the U.S. launched a commando raid in broad daylight, killing Nabhan and at least eight others.\(^\text{125}\) And in June 2011, the United States used an armed UAV to attack two senior members of al-Shabab who had direct ties to al-Awlaki.\(^\text{126}\)


In response to the growing use of drones, some suggest that it is "easier" to send unmanned aircraft across sovereign borders because there is no risk of a pilot being shot down and captured, making the escalation and spillover of conflict more likely. Similarly, one might argue that it is easier to group more entities or individuals within the category of "enemy" because of the greater ease in reaching them with drones. An armed drone is simply a weapon, much like any other, and a weapon does not drive the legal interpretation of what constitutes armed conflict and against whom the conflict is being fought. To the extent that one country engages in extensive UAV strikes against another state—creating an international armed conflict—or against a non-state actor so as to create a situation of protracted armed violence, then what was an isolated UAV campaign against selected targets could morph into an armed conflict. In the contemporary arena of a conflict between states and non-state terrorist groups, the more complex questions involve the consequences of UAV strikes for the parameters of that conflict against terrorist groups—the extension of an existing and admittedly hard-to-define conflict instead of the creation of new conflicts.

The present conflict between the United States and al Qaeda and affiliated terrorist groups poses significant, yet seemingly fundamental, questions about not only the law applicable to

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127 See O'Connell, supra note 23 (presenting evidence that the availability of unmanned combat vehicles (UCVs) is lowering psychological and political barriers to killing).


129 See Prosecutor v. Tadić, Case No. IT-94-1-L, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (defining armed conflict as "protracted armed violence between . . . governmental authorities and organized armed groups or between such groups within a State").

130 See Blank & Farley, supra note 109, at 188-89 (characterizing the United States' engagement in Pakistan, including the use of unmanned drones, as an armed conflict).
operations against terrorists, but also about where the conflict is
taking place and where that law applies. Beyond the obvious areas
of Afghanistan, Iraq, and the border areas of Pakistan, there is, at
present, little agreement on where the battlefield is—that is, where
this conflict is taking place—and an equal measure of uncertainty
regarding when it started and how it might end. In traditional
conflicts, military operations could take place beyond the territory
of any neutral party.\footnote{See Yoram Dinstein, War, Aggression and Self-Defence 20 (4th ed. 2005) ("In principle, all the territories of the belligerent States, anywhere under their sovereign sway, are inside the region of war. As a corollary, the region of war does not overstep the boundaries of neutral States, and no hostilities are permitted within their respective domains.").} The law of neutrality generally "defines the
relationship under international law between states engaged in an
armed conflict and those that are not participating in that
conflict."\footnote{U.K. Manual, supra note 119, § 1.42.} Neutrality law thus led to a geographic-based
framework in which belligerents can fight on belligerent territory
or the commons, but must refrain from any operations on neutral
territory. In essence, the battlespace in a traditional armed conflict
between two or more states is anywhere outside the sovereign
territory of any of the neutral states.\footnote{See Dinstein, supra note 131, at 26 ("[T]he region of war does not include the territories of neutral States, and no hostilities are permissible within neutral boundaries.").}

Today's conflicts, however, pit states against non-state actors.
The latter are actors and groups who often do not have any
territorial nexus beyond wherever they can find safe haven free
from government intrusion. Once we are outside the belligerent-
neutral framework that defined the traditional battlespace,
determining the parameters of the contemporary battlefield or
zone of combat becomes significantly more complicated. Simply
superimposing the approach applicable in traditional armed
conflict onto conflicts with terrorist groups does not provide any
means for distinguishing between different conceptions of
the battlefield. In the past several years, arguments have centered on
whether there can be a global battlefield or whether the conflict
with al Qaeda is limited solely to Afghanistan.\footnote{See Laurie R. Blank, Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat, 39 GA. J. INT'L & COMP. L. 1, 20–21 (2010) (arguing for the use of factors drawn from LOAC in analyzing the parameters of the battlefield in contemporary conflicts).} Just a few weeks
after the September 11th attacks, President George W. Bush laid
the foundation for the notion of the whole world as a battlefield
when he pronounced that "our war on terror will be much broader
than the battlefields and beachheads of the past. This war will be
fought wherever terrorists hide, or run, or plan."135 When coupled
with statements by other high-ranking administration officials,136
the President's view of a global battlefield, in which the whole
world is a war zone, became clear. The Obama Administration has
not used the same language of a global battlefield, but has actually
significantly expanded the use of drone strikes outside of
Afghanistan.137 The use of armed drones against terrorist
operatives in Yemen and Somalia has driven debate about whether
those areas fall within the boundaries of the armed conflict with al
Qaeda and affiliated terrorist groups, whether any hostilities in
those areas constitute separate armed conflicts, or whether the
conflict against terrorists can indeed be a global one.138 To this
extent, the use of armed drones continues to generate extensive
discussion about where conflict against transnational non-state
actors occurs.

135 President George W. Bush, Radio Address of the President to the Nation,
136 See, e.g., Interview by Tony Snow with Secretary of State Condoleezza Rice
_story/0,3566,69783,00.html. Secretary Rice explained, "We're in a new kind
of war, and we've made very clear that it is important that this new kind of war be
fought on different battlefields." Id. See also Matthew C. Waxman, The Structure
(noting that this view "extend[s] the boundaries of the conflict to take in al-
Qaeda's operations around the world") (quoting Anthony Dworkin, Beyond the
War on Terror: Towards a New Transatlantic Framework for Counterterrorism, 13 EUR.
COUNCIL ON FOREIGN REL., 1 (2009)).
137 See Larisa Epatko, Controversy Surrounds Increased Use of U.S. Drone Strikes,
/rundown/2011/10/drone-strikes-1.html (describing the exponential increase
in the use of drones under the Obama Administration and the accompanying
increase in civilian deaths).
138 See generally, Robert Chesney, Who May Be Killed? Anwar al-Awlaki as a Case
Study in the International Legal Regulation of Lethal Force, 13 Y.B. INT'L
HUMANITARIAN L. 3, 3–6 (2010). See also Charlie Savage, Secret U.S. Memo Made
Legal Case to Kill a Citizen, N.Y. TIMES, Oct. 9, 2011, at A1 (discussing the legal
analysis allegedly conducted by the Obama Administration to determine the
lawfulness of killing Anwar al-Awlaki, and American citizen, on Yemen soil).
2.3. Contemporary Challenges for Proportionality and Precautions

Drones do introduce additional interesting considerations into the proportionality and precautions calculus as well. The very capabilities that make drones an effective weapon with regard to distinction, proportionality, and precautions can also have the effect of actually changing the calculus for assessing a lawful attack. In essence, drones may “raise[] the bar of expectations,” creating a higher standard because of the ability to target more precisely.\(^{139}\) A significant part of any analysis of the legality of an attack relies on the notion of the “reasonable commander” looking at the situation from the perspective of the commander before the attack. If drone capabilities alter what a reasonable commander knows—or is expected to know—then we may see a shift in the actual content of how distinction, proportionality, and precautions are being interpreted in operations and after-the-fact. At first glance, this shift can have positive effects: as parties continue to be more precise and more demanding in their implementation of LOAC, the ability to protect civilians will also increase. However, such heightened standards can raise serious concerns. If using drones means that a party faces different legal standards and obligations than it would in the absence of drones, that party may opt for a less precise weapon in order to avoid such heightened standards. Here, civilians will likely bear the brunt of such decisions, meaning that, overall, the use of drones in a way that maximizes—but does not significantly alter—adherence to the obligations of distinction, proportionality, and precautions is the best way to carry out LOAC’s central goals.

Second, as news reports have documented, the sheer volume and pace of the information gathered by drones can be overwhelming, sometimes to the point of detracting from efficient military operations and decisionmaking.\(^ {140}\) In 2009, “Air Force drones collected nearly three times as much video over

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Afghanistan and Iraq... as in 2007" and are on course to increase that yield exponentially.\textsuperscript{141} Reaper drones, the latest development in drones, will soon be able to record video in over thirty directions at once.\textsuperscript{142} The flood of information raises concerns about the ability of analysts to cull the essential information for operational decisionmaking, particularly in time-sensitive situations. For example, investigations into a February 2010 attack in Afghanistan suggested that information overload was responsible for the mistaken targeting of civilians, including children. In the intelligence gathered from a UAV video feed and other sources:

There were solid reports that the group included children, but the team did not adequately focus on them amid the swirl of data... The team was under intense pressure to protect American forces nearby, and in the end it determined, incorrectly, that the villagers' convoy posed an imminent threat, resulting in one of the worst losses of civilian lives in the war in Afghanistan.\textsuperscript{143}

Although the data that drones can gather is a critical tool for effective proportionality analyses and contributes greatly to LOAC-compliant targeting, it is important to recognize the limits of data analysis as well. As one U.S. military commander explains, "You need somebody who's trained and is accountable in recognizing that that is a woman, that is a child and that is someone who's carrying a weapon... and the best tools for that are still the eyeball and the human brain."\textsuperscript{144} Furthermore, given that proportionality rests on a reasonable commander's determination based on the information available to him at the time of the attack, we must consider whether drones at some point will no longer add to that process but could actually impede that process simply because of the flood of information.

A final development to consider regarding drones and proportionality is whether the use of armed drones and their heightened capabilities is altering the interpretation—and thus

\textsuperscript{141} Id.

\textsuperscript{142} Id.


\textsuperscript{144} Drew, Military is Awash, supra note 140.
implementation—of the principle of proportionality altogether. As noted above, proportionality requires that civilian casualties not be excessive; it does not require that there be no civilian casualties at all. The combination of counterinsurgency strategy and UAV capabilities in Afghanistan has led to a growing perception that any civilian deaths are unlawful. Strategic policy and mission imperatives may well seek to eliminate civilian casualties as much as possible, particularly in counterinsurgency, and drones offer highly precise targeting capabilities. The confluence of these two factors has often seemed to suggest that proportionality in the context of UAV strikes is being, or could soon be, reconfigured, that we are seeing a recalibration of the relationship between military advantage and civilian casualties—away from "excessive" and towards "none." In essence, if the notion of "information reasonably available to the commander" becomes "perfect information," then we would begin to see a trend away from the concept of proportionality as we now know it and toward a more strict liability standard of targeting analysis in which "zero casualties" is the standard.146 Beyond the fact that a zero casualty rate is impossible unless all persons in the combat zone are considered to be legitimate targets (an extraordinarily dangerous conclusion), this change in the proportionality standard raises significant concerns.146 In particular, a military force held to such a zero casualty standard will either disregard the law entirely as unreasonable or will refrain from military operations altogether to avoid legal violations. Both options leave innocent civilians—LOAC's true constituency—unprotected and in danger.

3. CONCLUSION

The novelty and hi-tech nature of unmanned aircraft launching missiles at targets without risk of retaliation has led to extensive moral, philosophical, political, strategic, and legal debates

145 See, e.g., Shane, supra note 10, at A11 (quoting Obama's top counter-terrorism advisor, John O. Brennan, as claiming a zero casualty rate in Pakistan: "there hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities we've been able to develop").

regarding the use of such weapons.\textsuperscript{147} Lauded as highly precise and discriminating weapons, decried as "killer robots,"\textsuperscript{148} drones are at the center of contentious debates about the moral and ethical underpinnings of conflict. These debates go beyond their direct effects—namely, civilian casualties in the course of attacks against terrorist targets—to questions about the psychological effects on the civilian population living with drones buzzing overhead and launching missiles seemingly without warning.\textsuperscript{149} From a legal perspective, drones offer a useful lens through which to view both traditional LOAC principles and questions specifically raised in contemporary conflicts. In particular, they have great potential for heightened implementation of the key principles of distinction, proportionality and precautions in attack. As a recent report by the U.K. Ministry of Defence explains:

[The greater situational awareness provided by the sensors on a persistent unmanned aircraft that observes the battlespace for long, uninterrupted, periods ... enables better decision making and more appropriate use of force. This is enhanced by the fact that the decision-maker is in the relatively stress-free environment of an air-conditioned cabin instead of in a fast jet cockpit.\textsuperscript{150}]

Use of armed drones continues to raise serious questions about the numbers and nature of civilian casualties, but these questions stem primarily from the procedures for selecting targets and approving attacks,\textsuperscript{151} not from the nature and capabilities of drones.

\textsuperscript{147} See generally USING TARGETED KILLING TO FIGHT THE WAR ON TERROR (Claire Finkelstein et al. eds., forthcoming 2012).


\textsuperscript{149} See Smith, supra note 8 (reporting the psychological toll that repeated drone strikes have had on people living in Pakistan's tribal regions). Some might suggest that UAV attacks constitute attacks that spread terror among the civilian population, in violation of Article 51(2) of Additional Protocol I. However, the crime of spreading terror among the civilian population requires specific intent, which is not demonstrated in the case of UAV attacks. See Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 162 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) ("[T]he crime of terror contains the distinct material element of ‘primary purpose of spreading terror.’").

\textsuperscript{150} MINISTRY OF DEF., THE UK APPROACH TO UNMANNED AIRCRAFT SYSTEMS, 2011, J. Doctrine Note 2/11, ¶ 519.

\textsuperscript{151} See supra Part 1.2.
themselves. As with any other weapon, it is essential to ensure that UAV attacks are launched only against legitimate military objectives in accordance with the obligations of proportionality and precautions.

The nature of today's conflicts and the way in which armed drones are employed do introduce some concerns about how drones and their capabilities are affecting the interpretation, implementation, and development of LOAC. News reports show that the U.S. drone program, particularly in Pakistan, involves significant civilian participation, which raises questions regarding the status and privileges of persons launching attacks. Drone campaigns against al Qaeda and other terrorist operatives beyond the borders of Afghanistan and Pakistan have contributed substantially to questions regarding the geographical parameters of armed conflict, particularly conflict with transnational non-state actors and the challenges of understanding who is part of an enemy group for the purposes of targeting and detention.

Finally, notwithstanding the extensive capabilities drones offer in the areas of distinction, proportionality and precautions, current developments demonstrate that drones also pose some potential risks to the development and interpretation of the law in ways that could endanger the central goal of protecting civilians and conducting hostilities in a lawful manner. Counterinsurgency strategy and mission imperatives appropriately seek to eliminate civilian casualties as much as possible in the fight for "hearts and minds." But international law does not require no civilian casualties; indeed, the law accepts that there will be incidental casualties from lawful attacks—a tragic but not criminal consequence of war. The combination of drones' highly precise targeting capabilities and strategic needs to reduce civilian casualties has led to a growing—and mistaken—perception that any civilian deaths are unlawful. It may seem that innocent civilians will be the beneficiaries of this development; in fact, the opposite could well be true. To the extent that drones thus begin to alter interpretations of distinction, proportionality, and precautions, the results may not be as protective for civilians as anticipated. A military force facing such a zero casualty standard will either disregard the law entirely as unreasonable, endangering civilians in the combat zone, or will refrain from military operations altogether to avoid legal violations, leaving its own citizens undefended from attacks. Both options leave innocent civilians unprotected and in danger. As a result, analyzing drones
as a weapon and the nature of drone strikes—from target acquisition to strike—within existing interpretations of LOAC is critical to ensuring and enhancing civilian protections in wartime. Maximizing capabilities and effective decisionmaking is the most straightforward way to carrying out LOAC's key goals and principles.
I. Introduction

In 2003, the International Committee of the Red Cross (ICRC), in cooperation with the T.M.C. Asser Institute, launched a major research effort to explore the concept of “direct participation by civilians in hostilities” (DPH Project). The goal was to provide greater clarity regarding the international humanitarian law (IHL) governing the loss of protection from attack when civilians involve themselves in armed conflict. Approximately forty eminent international law experts, including government attorneys, military officers, representatives of non-governmental organizations (NGOs), and academics, participated in their personal capacity in a series of workshops held throughout 2008. In May 2009, the ICRC published the culmination of this process as the “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”.

* Professor of Public International Law, Durham University Law School
Although the planned output of the project was a consensus document, the proceedings proved highly contentious. As a result, the final product contains the express caveat that it is "an expression solely of the ICRC's views".\(^3\) Aspects of the draft circulated to the experts were so controversial that a significant number of them asked that their names be deleted as participants, lest inclusion be misinterpreted as support for the Interpretive Guidance's propositions. Eventually, the ICRC took the unusual step of publishing the Interpretive Guidance without identifying participants. This author participated throughout the project, including presentation of one of the foundational papers around which discussion centered.\(^4\) He was also one of those who withdrew his name upon reviewing the final draft.

Disagreement with the Interpretive Guidance by dissenters varies in nature and degree. In fairness, there is much to recommend the document. The ICRC and the experts involved worked diligently to find common ground. It is a sophisticated work, reflective of the prodigious expertise resident in the ICRC's Legal Division, and one that clearly advances general understanding of the complex notion of "direct participation". Nevertheless, certain points of contention surfaced during the deliberations and in the debates generated by the final draft. This article examines these fault lines through the author's own views. In doing so, it seeks to engage the broader international law community in the dialogue.

A common theme pervades the criticisms set forth below. International humanitarian law seeks to infuse the violence of war with humanitarian considerations. However, it must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk. As a result, IHL represents a very delicate balance between two principles: military necessity and humanity. This dialectical relationship undergirds virtually all rules of IHL and must be borne in mind in any effort to elucidate them. It is in this regard that the Interpretive Guidance falters. Although it represents an important and valuable contribution to understanding the complex notion of direct participation in hostilities, on repeated occasions its interpretations skew the balance towards humanity. Unfortunately, such deviations from the

\(^3\) *Id.* at 6.

generally accepted balance will likely cause states, which are ultimately responsible for application and enforcement of the law, to view the Interpretive Guidance skeptically.

II. Civilians on the Battlefield

It is useful to understand the context in which the DPH Project emerged. The presence on the battlefield of individuals who are not formally members of the belligerents’ armed forces is by no means a new phenomenon. Examples abound. Over 15,000 Hessian “auxiliaries” fought for Great Britain in the U.S. war of independence. During the French Revolution, the National Convention decreed that, “until such time as its enemies shall have been driven from the soil of the Republic, all Frenchmen are in permanent requisition for the services of the armies.” Within the year, the size of the French forces reached 1.5 million men. The 1949 Geneva Convention on Prisoners of War (POW) later afforded prisoner-of-war treatment to those “who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed unit.” The Convention also granted POW treatment to civilians who “accompany the armed forces without being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, and members of labour units or of services responsible for the welfare of the armed forces.” Civilians enjoyed protection against direct attack; however, it was well accepted by this time.

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5 W. Hays Parks, Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces, Presentation at the Third Meeting of Experts 7 (2005). The article provides an excellent series of examples.

6 Committee of Public Safety, Lease en Masse, August 23, 1793.

7 Convention (III) Relative to the Treatment of Prisoners of War art. 4A(6), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Participants in such actions form a “levee en masse”;

8 Id. art. 4A(4). Such treatment was not new. During the U.S. Civil War, Army General Orders No. 100, also known as the Lieber Code, provided that “[c]itizens who accompany an army for whatever purpose . . . if captured, may be made prisoners of war.” Francis Lieber, Instructions for the Government of Armies of the United States in the Field art. 50 (Gov't Printing Office 1898) (1863) (officially published as U.S. War Dep't, General Orders No. 100 (Apr. 24, 1863)). Hague Convention IV similarly provided that, “[i]ndividuals who follow an army without directly belonging to it, such as . . . contractors, who fall into the enemy’s hands . . . are entitled to be treated as prisoners of war.” Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 13, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227 [hereinafter Hague IV R].
that if they took up arms they rendered themselves targetable. In a memorable event involving such individuals, over one-half of the American defenders at Wake Island were civilian contractors building a U.S. naval base when the Japanese attacked in December 1941. Given the prevalence of resistance movements during the Second World War, the Prisoner of War Convention also extended POW treatment to resistance fighters meeting certain conditions.

Twentieth-century state practice clearly demonstrates the acceptance of various categories of civilians on the battlefield and even, in limited and well-defined circumstances, their involvement in hostilities. The 1990's signalled a sea change in the scope of civilian participation in military operations, as Western militaries took advantage of the perceived “peace dividend” resulting from “victory” in the Cold War to dramatically downsize their militaries. Operations in the Balkans quickly revealed the shortcomings of this policy. Faced with the prospect of long-term stability operations such as IFOR (Implementation Force), SFOR (Stabilization Force), and KFOR (Kosovo Force), intervention forces had to turn to civilian contractors to perform many support and logistic functions.

The twenty-first century conflicts in Iraq and Afghanistan took this trend to unprecedented levels. As hopes for a quick victory faded in both cases, Coalition forces settled in for the long haul. Contractors and civilian government employees flooded the theater of operations. By March 2009, United States Central Command, responsible for both conflicts, contracted for the services of nearly 243,000 civilians. Support for the various U.S. bases constituted 58% of this force, whereas 15% were involved in construction. Another 12% performed security functions. By late 2009,

9 Parks, supra note 5, at 7.
10 GC III, supra note 7, art. 4A(2). See also Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 43–44, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP].
11 See U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMM. ON READINESS AND MGMT. SUPPORT OF THE S. COMM. ON ARMED SERVS., REPORT NO. GAO-03-695 (2003) (discussing the shortfalls in U.S. military capabilities). Note that civilians had historically supported their country's war effort far from the battlefield, for instance by working at ports from which military equipment, supplies, and troops were shipped. However, now civilians are directly supporting armed forces in the theater of operations.
12 Of those troops, 132,000 (down from almost 200,000 at the height of the conflict) were serving in Iraq, 68,000 in Afghanistan, and the remainder were at various other locations throughout the region. DEPT OF DEF, OFF. OF THE DEPUTY UNDER SECY OF DEF. FOR LOGISTICS AND MATERIEL READINESS, CONTRACTOR SUPPORT FOR U.S. OPERATIONS...
security contractors outnumbered all foreign armed forces (support and combat) in Iraq except those of the United States, and in Afghanistan only the United Kingdom and United States fielded more troops. These numbers do not include security contractors working for other states, international organizations, or non-governmental organizations; a report to Congress issued in August 2008 estimated that fifty companies had approximately 30,000 security contractors in Iraq alone.\textsuperscript{13}

That the contractors were present “on the battlefield” is indisputable. Although reliable figures on contractor deaths and injuries are unavailable, as of April 2008, the U.S. Department of Labor had received claims based on the death of 1,292 contractors (including Iraqis), and the wounding of 9,610 more, during the conflicts in Iraq and Afghanistan.\textsuperscript{14} The NGO iCasualties reports that by August 2009, 462 non-Iraqi contractors had been killed in Iraq, including 179 U.S. and 49 British citizens.\textsuperscript{15}

Contractors also have been involved in numerous incidents involving civilian deaths, the most notorious example being the 2007 killing of seventeen Iraqis by Blackwater employees while escorting a U.S. Department of State convoy. U.S. judicial authorities indicted five of the contractors, while a sixth pled guilty.\textsuperscript{16} Contractor participation in military

\textsuperscript{13} JENNIFER ELSEA, KENNON NAKAMURA, & MOSHE SCHWARTZ, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2008). The questionable status of security contractors provided a major impetus for launch of the DPH Project. The key question was whether the various activities they engaged in amounted to direct participation or, indeed, whether they represented, in some cases, organized armed groups operating on behalf of a party to the conflict. These issues are developed infra.

\textsuperscript{14} STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM ON SUPPLEMENTAL INFORMATION ON DEFENSE BASE ACT INSURANCE COSTS 4 (Comm. Print 2008). The figures do not represent the total number killed or wounded, but rather only those, including security contractors, who have filed a claim with the Labor Department under either the Defense Base Act or War Hazard Compensation Act; further, it includes only Iraqis employed by U.S. entities.

\textsuperscript{15} iCasualties.com, Iraq Coalition Casualty Count: Contractors, http://icasualties.org/Iraq/Contractors.aspx. The site cautions that the list is incomplete.

\textsuperscript{16} See Grand Jury Indictment, United States v. Slough, 669 F.Supp. 2d 51 (D.D.C. 2009) (No. 08-0360 (RMU)), 2008 WL 5129244. Charges were dismissed for evidentiary reasons in December 2009, although at the time of this writing there are indications the government will appeal the ruling. See United States v. Slough, No. 08-0360 (RMU), 2009
operations extends beyond providing security. For instance, Blackwater employees have reportedly participated in both CIA-led Predator strikes against al Qaeda operatives and "capture or kill" operations conducted in Iraq and Afghanistan. The precise nature of Blackwater's involvement, however, remains murky.\footnote{See James Risen & Mark Mazzetti, CIA Said to Use Outsiders to Put Bombs on Drones, N.Y. \textsc{Times}, Aug. 21, 2009, at A1; Mark Mazzetti, Outsiders Hired As CIA Planned To Kill Jihadists, N.Y. \textsc{Times}, Aug. 20, 2009, at A1; James Risen & Mark Mazzetti, Blackwater Guards Tied To Secret Raids by CIA, N.Y. \textsc{Times}, Dec. 11, 2009, at A1.}

At the outset of these conflicts, the activities and status of contractors were relatively unregulated in either law or policy.\footnote{The vast majority of security contractors would not qualify as mercenaries because mercenaries must be recruited to take a "direct part" in hostilities (thus raising the question of whether their activities are direct participation) and cannot be nationals of a Party to the conflict. \textsc{AP I, supra note 10, art. 47.2.}} As a result of the public attention drawn by the scale of their presence and repeated incidents of misconduct, some states have endeavored to define the legal status of contractors and to create systems whereby they can be held accountable for abuses they commit.\footnote{See generally Michael Schmitt, \textit{Contractors on the Battlefield: The US Approach}, \textsc{Militair Rechtelijk Tijdschrift} 264 (July-Aug. 2007); Elsea et al., \textit{supra} note 13, at 20–31.} Additionally, states sending and those receiving contractors and civilian employees have negotiated status of forces agreements, which establish jurisdictional prerogatives; the agreement signed between the United States and Iraq in November 2008 is especially notable.\footnote{Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 12, Nov. 17, 2008, available at http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf.} States have also begun to adopt common "best practices" regarding private military companies, as exemplified by the ICRC/Swiss government sponsored 2009 Montreux Document.\footnote{Letter from Peter Maurer, Permanent Representative of Switz. to the U.N., to the Sec'y Gen., U.N., Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict, annex, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008).}

In light of these circumstances, the DPH Project initially focused on contractors—especially private security contractors—and civilian government employees. However, the assembled experts soon turned their attention to groups of "irregular" forces, like those of Hamas, Hezbollah,
and the al Qaeda network. From the perspective of states, consideration of the participation in hostilities of these irregular forces was even more central to the legal issues surrounding the targeting of participants in hostilities than that of contractors and employees. For instance, in Iraq, ongoing hostilities are primarily between the Iraqi armed forces (and their foreign partners) and groups such as external jihadists, Sunni extremists (e.g., the loosely affiliated groups comprising al Qaeda in Iraq), and Shi’a extremists (e.g., Muqtada al-Sadr’s Jaish al-Mahdi and the Iranian funded Kataib Hezbollah).22

III. The Law Regarding Direct Participation

As noted in the Introduction, international humanitarian law seeks reasoned accommodation of both military necessity and humanitarian concerns. The 1868 St. Petersburg Declaration reflected this balance at the outset of the modern era of IHL when, in addressing small explosive projectiles, it “fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity.”23 As only states make international law, through either treaty or practice (customary law), IHL necessarily takes account of states’ military requirements on the battlefield. Indeed, norms that unduly hamper military operations have little hope of emerging.

At the same time, states have an interest in both protecting their populations and property from the carnage of warfare, as well as ensuring their combatants do not suffer unnecessarily. Accordingly, the St. Petersburg Declaration noted that “[t]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”24 These concerns are expressed in two “cardinal” principles of IHL recognized by the International Court of Justice: distinction and the prohibition of unnecessary suffering.25 Only the principle of distinction is of immediate relevance to the issue of “direct participation”. Distinction

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24 Id.
25 Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), Advisory Opinion, 1996 I.C.J. 226 ¶ 78 (July 8). The prohibition of unnecessary suffering addresses the means and methods of warfare used against the enemy and has no bearing on who qualifies as either a member of the armed forces or a direct participant in hostilities.
appears in codified form for international armed conflict in Article 48 of the 1977 Additional Protocol I to the 1949 Geneva Conventions: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Additional Protocol I specifically addresses civilians in Article 51.2 by providing that, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” These provisions undoubtedly replicate customary law and thus bind even states that are not party to the treaty, such as Israel and the United States. Analogous prohibitions, also customary in nature, exist for non-international armed conflict.

The principle of distinction acknowledges the military necessity prong of IHL’s balancing act by suspending the protection to which civilians are entitled when they become intricately involved in a conflict. Article 51.3 of Additional Protocol I conditions the principle of distinction with the caveat that it applies “unless and for such time as [civilians] take a direct part in hostilities.” Article 13.3 of Additional Protocol II sets forth an

26 AP I, supra note 10, art. 48.
27 Id. art. 51.2.
30 AP I, supra note 10, art. 51.3.
identical limitation in the case of non-international armed conflict. The
notion appears elsewhere in IHL instruments and guidelines, including
Common Article 3 to the 1949 Geneva Conventions; the Rome Statute of
the International Criminal Court; and military manuals. That it
constitutes customary international law is beyond dispute.

The combined effect of the aforementioned provisions is threefold.
First, the “direct participation” caveat means that, despite the general
protection from attack that civilians enjoy, those who engage in acts
amounting to direct participation in hostilities may be specifically and
intentionally targeted (although the operations remain subject to all other
IHL requirements). Second, to the extent that civilians may be attacked
under the “direct participation” rule, their death or injury need not be
considered in proportionality assessments. Third, by the same logic, states
need not consider harm to direct participants when taking “constant care”
to “spare” civilians during an attack. This customary law “precautions in
attack requirement”, found in Article 57 of Additional Protocol I, directs

31 AP II, supra note 29, art. 13.3.
32 “Persons taking no active part in the hostilities, including members of armed forces who
have laid down their arms and those placed hors de combat by sickness, wounds, detention, or
any other cause, shall in all circumstances be treated humanely . . . .” Convention (I) for
the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the
Field art. 3.1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I];
Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and
Shipwrecked Members of Armed Forces at Sea art 3.1, Aug. 12, 1949, 6 U.S.T. 3217, 75
U.N.T.S. 85 [hereinafter GC II]; GC III, supra note 7, art. 3.1; Convention (IV) Relative to
the Protection of Civilian Persons in Time of War art. 3.1, Aug. 12, 1949, 6 U.S.T. 3516,
75 U.N.T.S. 287 [hereinafter GC IV]. See also AP I, supra note 10, arts. 47, 67.1 (regarding
the definition of mercenary and dealing with civil defense, respectively).
33 Rome Statute, supra note 28, arts. 8.2(b)(i), 8.2(c)(ii).
34 See, e.g., NWP 1-14M, supra note 28, § 8.2.2; United Kingdom Ministry of Defence, THE
MANUAL ON THE LAW OF ARMED CONFLICT § 5.3.2 (2004) [hereinafter UK Manual].
35 CIHL, supra note 28, rule 6; NIAC Manual, supra note 29, § 2.1.1.2; HCJ 769/02 Public
Comm. Against Torture in Israel v. Gov’t of Israel (Targeted Killings Case) [2006] IsrSC
57(6) 285 ¶ 30.
36 By the customary international law principle of proportionality, reflected in Articles
51.5(b), 57.2(a)(iii), and 57.2(b) of Additional Protocol I, “an attack which may be expected
to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a
combination thereof, which would be excessive in relation to the concrete and direct
military advantage anticipated” is prohibited. AP I, supra note 10. See also CIHL, supra note
28, rule 14; NIAC Manual, supra note 29, § 2.1.1.4; UK Manual, supra note 34, § 5.33;
NWP 1-14M, supra note 28, § 8.3.1.
attackers to examine alternative methods (tactics) and means (weapons) of warfare to minimize incidental loss of civilian life or injury to civilians.37

Despite the ostensible textual clarity of the aforementioned norms, the devil lies in the details. The DPH Project addressed three unresolved issues: 1) Who qualifies as a civilian in the context of direct participation?; 2) What conduct amounts to direct participation?; and 3) When is a civilian directly participating such that he or she is subject to attack? Curiously, the Interpretive Guidance took on a fourth issue that was unnecessary to a direct participation analysis: the rules and principles governing the conduct of attacks against direct participants. Its treatment of this fourth subject has led to what has been perhaps the fiercest criticism of the Guidance.

A. The Concept of “Civilian”

The concept of civilian status is the greatest source of controversy, albeit principally with respect to the IHL governing detention. Reduced to basics, the issue, which surfaces only in international armed conflict, is whether civilians who take up arms qualify for treatment as: 1) prisoners of war under the 1949 Third Geneva Convention; 2) civilians under the 1949 Fourth Geneva Convention; or 3) “unlawful combatants” who enjoy only basic protection, such as that set forth in Common Article 3 to the 1949 Geneva Conventions and Article 75 of Additional Protocol I.38

In light of this debate, the ICRC elected to avoid the quandary by expressly limiting its analysis of civilian status in the Interpretive Guidance to the context of direct participation; it is not meant to have any bearing on the status of direct participants in detention situations. This bifurcated approach is not without risks. Despite the cautionary caveat as to the scope of application, treating direct participants differently than civilians proper seems to support the proposition that they are a separate category and, thus, not entitled to the protections civilians enjoy during detention under the

37 See AP I, supra note 10, art. 57.2(a)(ii); CIHL, supra note 28, at rule 17; NIAC Manual, supra note 29, § 2.1.2; UK Manual, supra, § 5.32.4; NWP 1-14M, supra note 28, § 8.3.1.
Fourth Geneva Convention. At the same time, participants typically lack protection as prisoners of war under the Third Geneva Convention because they fail to comply with Article 4A(2)'s requirements that “members of other militia and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict” be “commanded by a person responsible for his subordinates,” bear a “fixed distinctive sign recognizable at a distance,” carry arms openly, and conduct operations “in accordance with the laws and customs of war.”

The Interpretive Guidance formula for international armed conflict defines civilians negatively as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse.” On its face, the definition is unexceptional. It excludes all those encompassed by Article 1 of the 1907 Hague IV Regulations and Article 4 of the Third Geneva Convention and thus presents a classic understanding of the term “civilian.” It also excludes armed forces as defined in Article 43.1 of Additional Protocol I. The ongoing controversy over Additional Protocol I’s relaxation of the Hague IV and Third Geneva Convention’s standards for combatant status has no bearing on the issue of direct participation, as the experts in the DPH Project agreed that individuals considered armed forces under Article 43.1 of Additional Protocol I should be targetable at all times.

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39 GC III, supra note 7, art. 4A(2)(a)–(d). This provision was based on certain partisan groups in World War II that were not formally part of their countries’ armed forces but that fought on behalf of a party to the conflict (e.g., Tito’s partisans in Yugoslavia). It is not applicable to the modern phenomenon of security contractors.
40 IG, supra note 2, at 26.
41 The Hague IV Regulations refer to armies, militia, and volunteer corps fulfilling the same four conditions echoed in GC III. See Hague IV R, supra note 8, art. 1; GC III, supra note 7, art. 4A(2).
42 “[A]ll organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.” AP I, supra note 10, art. 43.1.
43 Rather, the issues are the combatant privilege of engaging in hostilities and qualification for prisoner of war status. The United States’ objection that Additional Protocol I is “fundamentally and irreconcilably flawed” is based in part on the assertion that it “would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population . . . .” Transmittal from President Ronald Reagan to the U.S. Senate (Jan. 29, 1987), reprinted in Agora: U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims, 81 AM. J. INT’L L. 910 (1987).
Applying this definition, the Interpretive Guidance concludes that the term "armed forces" for direct participation purposes includes both regular armed forces and any organized armed group that belongs to a party to the conflict. So long as these criteria (organized, armed, and belonging) are met, members of the latter category—with an important caveat discussed below—are not civilians and may be attacked at any time. Of particular importance is the fact that the direct participation standard's limitation of attacks to the period during which the targeted individual is engaged in hostilities ("for such time") does not apply to members of the armed forces. In justification of its approach, the Interpretive Guidance correctly points out that "it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war."44

The first two requirements, that the group be organized and armed, met with no opposition in the group of experts. On the contrary, treating an organized armed group as the equivalent of a regular armed force was viewed as a significant compromise on the part of those who wished to limit the notion of direct participation in order to retain protection from attack for as many individuals as possible. The compromise resolved, to some extent, the highly controversial "for such time" aspect of the direct participation rule. Experts concerned with the "for such time" limitation had previously worried about the incongruity that would result from the lack of an analogous temporal limitation for members of the armed forces.45 After all, if irregular forces benefited from the limitation, they would enjoy greater protection from attack than regular forces, which would thereby disrupt the general balance of military necessity and humanity that permeates IHL. The decision to treat organized armed groups as armed forces appeared an appropriate solution.

An alternative approach championed by a number of the experts could also have maintained the requisite balance. By it, members of organized armed groups that did not fully qualify as combatants under the criteria of Article 4 of the Third Geneva Convention would remain civilians. However, insofar as they are members of a group that exists for the very

44 IG, supra note 2, at 22.
purpose of engaging in hostilities, the “for such time” criterion must be interpreted as extending throughout the duration of their membership. Unlike civilians who act on their own, group members do not regain protection during periods in which they abstain from hostile activities (a contentious issue discussed below); instead, members must opt out of group membership in order to enjoy protection from attack. Although it might be difficult to discern when a member has left a group, proponents of this position argued that the direct participant should bear the risk of mistake, not his or her opponents, as IHL does not envision the participation of the former in the first place. For those DPH Project members who wished to preserve, in the context of detention, the characterization of direct participants as “civilians”, this approach had the benefit of maintaining a parallel characterization in the direct participation analysis. At the same time, it met the concerns of others who wished to ensure that direct participants remain targetable as long as they are members of the group, not just when they engage in hostilities.

Consensus founded on the third criterion: that the group in question must “belong to a party to the conflict.” The Interpretive Guidance defines the notion of belonging to a party, which surfaced only at later stages of the DPH Project discussions, “as requiring at least a de facto relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting.”

In support of its position, the Interpretive Guidance cites the nonbinding ICRC Commentary to Article 4 of the Third Geneva Convention. Yet, the allegedly supportive commentary actually accompanies a provision regarding eligibility for POW status. There is complete agreement that members of an organized armed group should not be entitled to POW status unless, inter alia, the group belongs to a party to the conflict; the underlying logic of the POW protection does not fit those who are not entitled under IHL to fight for a state. It may be sensible to shape detention issues by relationship to a belligerent, as states understandably wish to protect those who fight on their behalf. However, in targeting matters, the appropriate relationship logically should be determined by whom the individuals to be attacked are fighting against.

46 IG, supra note 2, at 23.
47 See id. n.20.
This is, after all, the foundational premise of direct participation. As will be seen, the Interpretive Guidance itself defines direct participation by reference to acts "likely to adversely affect the military operations or military capacity of a party to the conflict."48 In other words, direct participants are "the enemy". It is this relationship that should have been employed in defining civilian status—groups that comprise "the enemy" should not benefit from treatment as civilians for targeting purposes, whether in international or non-international armed conflict.

Recall the Interpretive Guidance’s accurate assertion that the logic of the principle of distinction precludes treatment of irregular armed forces under the more protective legal regime afforded civilians because irregular armed forces fail to distinguish themselves from the civilian population, carry their arms openly, or conduct their operations in accord with the laws of war. Precisely the same logic should apply to groups that do not belong to a party to the conflict.

In what was possibly a rebalancing effort, the Interpretive Guidance argues that "organized armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict."49 The "belonging" criterion makes sense in the context of non-international armed conflict, for the essence of such conflicts is fighting between a state and a non-state armed group. Nevertheless, from a practical perspective, it is problematic to treat organized armed groups that do not belong to a party to an international armed conflict as involved in a non-international armed conflict. Having just excluded organized armed groups not belonging to a party from the ambit of armed forces—and thereby shielded them from attack when they do not participate in hostilities—under the law of international armed conflict, the Interpretive Guidance applies the non-international armed conflict standard to treat those who are members of "organized armed groups" as other than civilians. The result of this normative detour is that members of the organized armed group may not be attacked by virtue of membership in the group pursuant to the law of international armed conflict, but they may be attacked pursuant to that of non-international armed conflict. This difference is one certain to be lost on both those being attacked and those mounting attacks.

48 Id. at 46.
49 Id. at 24.
Aside from the practical illogic of the approach, the distinction makes little sense in legal terms. Admittedly, there is no question that international and non-international conflicts can coexist in the same battlespace. The clearest example occurs when a non-international conflict is already underway at the time an international armed conflict breaks out. For instance, a non-international armed conflict between the Taliban-led Afghan government and the Northern Alliance was already underway when the international armed conflict between the United States and Afghanistan (the Taliban) commenced. The latter conflict did not change the character of the pre-existing one. Similarly, if a state sends its military to support rebel forces in a non-international armed conflict, or exerts control over those forces, the conflict between the two states is international in character. In another example, if a state splits into separate states, an ongoing non-international conflict transforms into an international one.

However, the situation envisaged in the Interpretive Guidance differs dramatically from these scenarios. It presumes an ongoing international armed conflict in which irregular forces not belonging to a party to the conflict become involved in the hostilities. The paradigmatic example would be the conflict in Iraq, where irregular forces are engaged in hostilities against the American-led coalition. Some of these forces joined in the conflict for reasons wholly unrelated to support of the Iraqi government.

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51 The International Court of Justice addressed this situation in the Nicaragua Case. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 115 (June 27). Also, in Tadic, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that “for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State. . . . [I]t must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.” Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 120, 131 (July 15, 1999). The ICTY distinguished its holding on this point from that in the Nicaragua Case, where the ICJ had set a higher standard: effective control. If a state assists the government in a non-international armed conflict, even to the point of providing combat troops, the conflict remains non-international in nature.

52 Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶ 162.
Indeed, most Shiite militia and Sunni jihadist groups saw defeat of the secular Iraqi government as a positive event from which they could benefit. But they were nevertheless opposed to the presence of Coalition forces and took advantage of the international armed conflict to attack them.

Seemingly, some support for the Interpretive Guidance's position is to be found in the ICRC's Commentary to Article 4 of the Third Geneva Convention. It provides that "[r]esistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict.'" 53 Careful reading of the ICRC's Commentary to Article 3 reveals, however, that the drafters of the Convention were viewing Article 3 conflicts exclusively in the guise of hostilities conducted against a force's own government. There is no hint that the ICRC envisaged hostilities against governments with which the force's government was fighting in an international armed conflict. On the contrary, the Commentary is crafted in terms of the "Party in revolt against the de jure Government", "rebellion", and "rebel Party". 54

Adopting the organized armed groups approach, and then applying the international armed conflict criterion of "belonging to a Party", flies in the face of both the logic of the principle of distinction and the travaux préparatoires of the underlying black letter law. Moreover, since the Interpretive Guidance permits attack on members of groups not belonging to a party in the supposed non-international armed conflict, the practical effect of this overly legalistic approach is negligible at best. There are but two rational approaches. Either members of an organized armed group should be treated as "armed forces" for targeting purposes regardless of their ties to a belligerent party or they should be treated as direct participants in the hostilities throughout the duration of their membership in the group. 55

53 ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 57 (Jean S. Pictet, ed.) (1960).
54 Id. at 36.
55 The Trial Chamber in Tadie clearly recognized the independent significance of membership when considering whether "acts taken against an individual who cannot be considered a traditional 'non-combatant' because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity." Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 639 (May 7, 1997) (emphasis added).
Complicating matters is an additional criterion that edged its way into the Interpretive Guidance over the series of meetings: the requirement that the members of the organized group in question perform a "continuous combat function" before they qualify as individuals who may be attacked on the basis of membership. According to the Interpretive Guidance, continuous combat function is synonymous with direct participation; that is, group members whose function is to engage in actions that would rise to the level of direct participation (see discussion below) are subject to attack. They need not be engaging in these activities at the time they are attacked; in this sense they resemble soldiers of the regular armed forces. Members not having such functions are considered to be civilians directly participating in hostilities and may be attacked only if, and for such time as, they undertake actions qualifying as direct participation. They are treated precisely as would individuals who participate in hostilities on "a merely spontaneous, sporadic, or unorganized basis." 56 This combat function criterion applies to members of organized armed groups in both international and non-international armed conflicts.

The continuous combat function idea initially surfaced in the context of non-international armed conflict. Some of the DPH Project experts were concerned that members of organized armed groups often fail to distinguish themselves from the civilian population during internal conflicts and thereby heighten the risk of attacks on civilians due to erroneous conclusions that they are also members of an armed group. As noted in the Interpretive Guidance, membership in irregularly constituted groups is not consistently expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to 'membership' within the meaning of IHL... In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State Party to the conflict and its armed forces. 57

56 IG, supra note 2, at 34.
57 Id. at 32-33.
Given these challenges, these experts felt it was useful to limit membership to individuals who were unambiguously members of the organized armed group by virtue of their involvement in combat action. Over the course of the meetings, this criterion slowly bled into international armed conflict; its evolution is reflected in the fact that the Interpretive Guidance discusses the criterion with regard to international armed conflict only in passing and entirely by reference to its application during non-international armed conflict.

Evidence of continuous combat function, according to the Interpretive Guidance, may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.\footnote{Id. at 35.}

Any such determination must be "based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances."\footnote{Id.} The concern about identifications is somewhat counterfactual. Armed units of organized groups are sometimes distinguishable from their political or social wings, as is the case, for example, in certain circumstances with Hamas and Hezbollah. Within mixed groups, membership in the armed faction is often dear-cut: only fighters wear uniforms and carry weapons. Membership in the armed wing may also be established through reliable intelligence, such as captured membership lists or communications intercepts, or by location, such as presence at a remote insurgent camp. The point is that while membership in an organized armed group can be uncertain, it may also be irrefutable.

Furthermore, by the Interpretive Guidance's approach, members of an organized armed group who have a continuous combat function may be attacked at any time, whereas those who do not, but who periodically take up arms, must be treated as civilians directly participating in hostilities and
may only be attacked while doing so. In practice, it will usually be impractical to distinguish between the two categories. For example, if an individual is identified as having engaged in hostilities in a past engagement, how can an attacker possibly know whether the participation was merely periodic when it conducts a subsequent operation against the organized armed group?

Application of the continuous combat function criterion also badly distorts the military necessity-humanitarian balance of IHL. A requirement of continuous combat function precludes attack on members of an organized armed group even in the face of absolute certainty as to membership. In contrast, membership alone in a state's military suffices, even when there is absolute certainty that the individual to be attacked performs no functions that would amount to the equivalent of direct participation. To illustrate, a cook in the regular armed forces may be lawfully attacked at any time; his or her counterpart in an organized armed group may be attacked only if he or she directly participates and then only for such time as the participation occurs.

What the Interpretive Guidance appears to have missed is that international humanitarian law already accounts for situations of doubt as to whether an individual is a civilian. Article 50.1 of Additional Protocol I, a provision generally deemed reflective of customary international law, provides that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Accordingly, it makes little sense to justify the continuous combat function criterion on the basis of concern about an inability to distinguish members of an organized armed group from civilians or civilian affiliates of the armed group, as IHL already deals with doubt through a presumption of civilian status.

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61 Id.

62 See CIHL, supra note 28, at 23–24. The application of the rule has been subject to important qualifications. See, e.g., UK Statement upon Ratification, ¶ (hi), Jan. 28, 1998, available at http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1255402003FB6D2?OpenDocument (noting the obligation of a commander to protect his or her forces); UK Manual, supra note 34, § 5.3.4.

63 AP I, supra note 10, art. 50.1.
Even the Interpretive Guidance's development of the combat function concept displays insensitivity to practical issues. Consider its mention of an identification card as distinguishing regular from irregular armed forces. The purpose of the card is identification in the event of capture. One can only wonder how it might assist an attacker to differentiate combatants from civilians in attack situations. Or consider the wearing of uniforms. When an armed group wears uniforms, the uniforms seldom clearly indicate any particular functions performed by its wearer. Except in cases of attack against isolated individuals who have been identified previously as having a continuous combat function or who are engaging in hostilities at the time of attack (in which case they could nevertheless be attacked as direct participants), the standard is highly impractical. In practice, most attacks will be launched against groups of individuals or in time-sensitive situations in which distinction based on function will prove highly difficult. Simply put, the Interpretive Guidance's solution for avoiding mistaken attacks on civilians by imposing a function criterion for attacks on group members will accomplish little.

Ultimately, the only viable approach to membership in the direct participation context is one that characterizes all members of an organized armed group as members of the armed forces (or as civilians continuously directly participating). It makes no more sense to treat an individual who joins a group that has the express purpose of conducting hostilities as a civilian than it would to distinguish between lawful combatants.

B. The Concept of Direct Participation

Whereas the Interpretive Guidance's treatment of the concept of a civilian is unacceptable due to the "belonging to a Party" and "continuous combat function" criteria, its development of the notion of direct participation is less problematic. The concept is developed from the prohibition on attacking or mistreating "persons taking no active part in the hostilities" found in Common Article 3 of the 1949 Geneva Conventions. It is well accepted in international law that the terms "active" and "direct" are synonymous, whether the concept is applied in non-international or international armed conflict. Unfortunately, the phrase "direct part in

64 GC III, supra note 7, art. 17.
65 Id. art 3.
66 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998); NIAC Manual, supra note 29, § 1.1.2 (discussion). The Rome Statute employs the term "direct"
hostilities” is undefined in IHL.\textsuperscript{67} The need for an agreed upon understanding of the phrase was therefore a primary impetus for the DPH Project.

Simply participating in hostilities does not constitute direct participation such that it would result in a loss of protection from attack. Rather, it is necessary to distinguish “indirect” from “direct” participation.\textsuperscript{68} Doing so has generally been treated as a matter of judgment on the part of those planning, approving, and executing attacks. For instance, the U.K. Manual on the Law of Armed Conflict provides that, “[w]hether civilians are taking a direct part in hostilities is a question of fact.”\textsuperscript{69} Similarly, the U.S. Commander’s Handbook on the Law of Naval Operations states that, “[d]irect participation in hostilities must be judged on a case-by-case basis . . . Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location, attire, and other information at the time.”\textsuperscript{70} In the \textit{Tadic} case, the International Criminal Tribunal for the Former Yugoslavia likewise noted:

\begin{quote}
It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s
\end{quote}

\footnotesize
\begin{itemize}
\item in referring to the concept in both international and non-international armed conflict. \textit{Rome Statute}, supra note 28, arts. 8.2(b)(i), 8.2(e)(i).
\item Thus, as used in treaties, it must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” \textit{Vienna Convention on the Law of Treaties} art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.
\item As noted in the ICRC Commentary to Article 51.3, “There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.” ICRC, \textit{COMMENTS ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949} ¶¶ 1945 (Yves Sandoz et al. eds., 1987) [hereinafter AP Commentary]. \textit{See also id.} ¶ 1679; Prosecutor v. Strugar, Case No. IT-01-42-A, \textit{Appeals Judgment}, ¶¶ 175–76 (July 17, 2008); \textit{Third Report on the Human Rights Situation in Colombia}, \textit{Inter-Am. C.H.R.}, OEA/Ser.L/V/II.102, doc. 9 rev. ¶ 1, Ch. IV, ¶ 56 (1999).
\item UK Manual, supra note 34, § 5.3.3.
\item NWP 1-14M, supra note 28, § 8.2.2.
\end{itemize}
circumstances, that person was actively involved in hostilities at the relevant time.\textsuperscript{71}

The challenge with case-by-case assessments was the absence of an accepted basis for making the direct participation determinations. The non-binding ICRC Commentary explains that direct participation "means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."\textsuperscript{72} The ICRC further defines hostilities as "acts of war which are intended by their nature and purpose to hit specifically the personnel and the material of the armed forces of the adverse Party."\textsuperscript{73} The group of experts struggled to refine the concept of direct participation throughout the course of the DPH Project meetings. Numerous options, including proximity to the battlefront, the extent to which the individual's actions contribute to combat action, the extent of military command and control over the activities, and the degree to which the actor harbors hostile intent, were offered as possible foundational criteria for distinguishing indirect from direct participation. This author proposed a standard centered on the "criticality of the act to the direct application of violence against the enemy."\textsuperscript{74}

From the DPH Project discussions, three common themes emerged that eventually matured into the Interpretive Guidance's "constitutive elements" of direct participation:

1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack \textit{(threshold of harm)};

2) There must be a direct causal link between the act and the harm likely to result either from that act or from a

\textsuperscript{71} Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 616 (May 7, 1997).
\textsuperscript{72} AP Commentary, supra note 68, ¶ 194. See also Prosecutor v. Galic, Case No IT-98-29-T, Judgment, ¶ 48 (Dec. 5, 2003); Sringar, Case No. IT-01-42-A, (Appeals Judgment), ¶ 178.
\textsuperscript{73} AP Commentary, supra note 68, ¶ 1679.
\textsuperscript{74} For instance, gathering strategic intelligence would generally not be direct, whereas collecting tactical intelligence would qualify. Similarly, preparing an aircraft for a particular combat mission would qualify, while performing scheduled depot level maintenance would not. Schmitt, supra note 4, at 534.
coordinated military operation of which that act constitutes 
an integral part (direct causation); and

3) The act must be specifically designed to directly cause the 
required threshold of harm in support of a party to the 
conflict and to the detriment of another (belligerent nexus).73

The elements are cumulative; only satisfaction of all three elements suffices 
to render an act one of direct participation. Although various experts 
entertained specific concerns about particular facets of the constitutive 
elements, most viewed them as, in a very general sense, reflecting the 
group's broad understanding.76

It is useful to highlight several aspects of the criteria. The threshold 
of harm element requires only that the act in question be likely to result in 
the adverse effect in question; it need not eventuate. Such effects must be of 
a military nature. For instance, actions that diminish the morale of the 
civilian population would not qualify. Although they must be military in 
nature, effects need not constitute an "attack", a term of art in IHL.77 As an 
example, clearing mines emplaced by enemy forces or carrying out a 
computer network attack intended to monitor enemy tactical 
communications would qualify. The Interpretive Guidance usefully points 
out that it is not direct participation to refuse to engage in activities that 
might positively affect enemy operations, such as refusal to provide the 
enemy with information on the location of military forces.78

The limited notion of "harm" in the element proved controversial, 
as it would exclude actions by civilians that were designed to enhance a 
party's military operations or capacity. Of course, in warfare, harm and 
benefit are relative concepts; actions that weaken one side in a conflict 
contribute to the wherewithal of the other, and vice versa. But if a 
distinction is to be drawn, it must be recognized that the strengthening of 
enemy capacity may be just as much a concern for commanders in the field 
as the weakening of one's own forces. Consider the development and

75 IG, supra note 2, at 46.
76 See Michael N. Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive 
specifically on the constitutive elements and problems therewith).
77 ""Attacks' means acts of violence against the adversary, whether in offence or in 
defence." AP I, supra note 10, art. 49.1.
78 IG, supra note 2, at 49.
production of simple improvised explosive devices (IEDs) by Iraqi insurgent forces, and their training to use them. Today, IEDs cause the greatest number of casualties in Iraq and Afghanistan, and their fielding has necessitated an enormous investment in counter-technologies. IEDs have affected the morale of troops in the field and domestic attitudes about continued human investment in the two conflicts. Clearly, the element of “harm” should have included both sides of the coin. Interestingly, it does so with respect to actions against civilians and civilian objects, which can meet the threshold test “regardless of any military harm to the opposing party to the conflict.” Why the Interpretive Guidance requires harm in cases not involving civilians and civilian objects is unclear.

The threshold of harm element includes inflicting death, injury, or destruction on civilians, civilian objects, and other protected entities. However, application of the notion of direct participation to attacks against protected persons and objects as well as against enemy forces is not self-evident. Additional Protocol I’s definition of “attacks” as “acts of violence against the adversary, whether in offence or defence”, provides the basis for their inclusion. Relying on travaux préparatoires, the Interpretive Guidance suggests that, because the “phrase ‘against the adversary’ does not specify the target, but the belligerent nexus of an attack”, violence directed against protected persons and objects is encompassed in the characterization of all “attacks” as acts of direct participation. Case law of the International Criminal Tribunal for the Former Yugoslavia, which has held that sniping and bombardment of civilians amount to an attack, is in accord. Although novel, the inclusion of harming protected persons and objects in the threshold of harm element drew minimal objection from the assembled experts. That said, it is a fair question as to why the criterion should be limited to death, injury, or destruction. Would it not, for instance, constitute direct participation to force inhabitants of a particular ethnic group to leave an occupied area during a conflict in which ethnicity factored? A more useful criterion in this regard would distinguish actions directly related to the armed conflict from those that are merely criminal in nature.

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79 IG, supra note 2, at 50.
80 AP I, supra note 10, art. 49.
The second element, direct causation, is rooted in the ICRC Commentary to both Additional Protocols I and II. During the DPH Project proceedings, this author suggested that, based on the Commentary text,

direct participation . . . requires ‘but for’ causation (the consequences would not have occurred but for the act), causal proximity (albeit not direct causation) to the foreseeable consequences of the act, and a mens rea of intent; the civilian must have engaged in an action that he or she knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way.

Eventually, this proposal matured into the less legalistic causation formula set forth in the Interpretive Guidance.

The Interpretive Guidance’s explanation of directness is strict on its face, arguably overly so. It requires that the harm caused by an act “be brought about in one causal step.” The group of experts agreed that the relationship between the action in question and the harm caused should be relatively direct, but at no time did anyone suggest that it had to occur in but a single step. For instance, a civilian who gathers information on the movement of particular forces may report that information to an intelligence fusion center that in turn studies it and passes on the resulting analysis to a mission planning cell. The cell, depending on such factors as risk, value, and availability of attack assets, may decide to continue monitoring those forces and to only attack them once they are confirmed present and determined vulnerable. The causal link would be more than a single step, but the information would be no less critical to the ultimate

83 AP Commentary, supra note 68, ¶ 1679 (noting, in the context of an international armed conflict, that “[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place”); id. ¶ 4787 (explaining in the context of a non-international armed conflict that the notion of direct participation “implies that there is a sufficient causal relationship between the act of participation and its immediate consequences”).
85 IG, supra note 2, at 55.
attack. The initial identification of the forces surely represents direct participation.

As the "one causal step" criterion is not developed to any degree in the Interpretive Guidance, it remains unclear whether it is merely a poorly drafted explanation of the agreed upon need for a clear link between the act and the ensuing harm or whether it reflects an actual, and if so, flawed, requirement. The Interpretive Guidance's discussion would seem to suggest the former, for its examples of indirect participation—imposing economic sanctions, conducting scientific research and design, producing weapons, recruiting forces, and providing general logistics support—are far removed in the causal sense from the harm caused to the enemy.\textsuperscript{86}

The reference to "one causal step" is unfortunate, as the constitutive element itself sets forth the essential requirement that the act must constitute "an integral part" of the operation causing the harm. "Integral" is not to be equated with "necessary". Although a certain action may constitute a critical facet of a military operation, in some cases the operation may nevertheless proceed without it, albeit with reduced likelihood of success. The classic example is again intelligence. While an attack typically has a greater chance of success and poses less risk to the attacker as the degree and reliability of intelligence increases, the absence of particular intelligence may not preclude its execution. The fact that the additional intelligence is not indispensable does not exclude its collection from the ambit of direct participation.

The Interpretive Guidance offers several examples of direct and indirect causation. Experts were particularly divided over the assembly and storage of improvised explosive devices, which the Interpretive Guidance labels as indirect participation. Based on the "one casual step" criterion, it is true that such activities would not qualify, but this illustrates the weakness of the standard. As the conflicts in Afghanistan and Iraq have exemplified, the use of IEDs is an effective tactic against superior forces. IEDs are often assembled and stored in close proximity to the battlefield by members of armed groups. Although the precise location and time at which they will be used may not be known in advance, they will likely be employed soon after their assembly. In this sense, the assembler of an IED is comparable to a "lookout" who reports the movement of enemy forces down a road. The precise attack for which the information will be used may be uncertain.

\textsuperscript{86} Id. at 53.
initially. However, because positional information is of fleeting value, it is likely to be used within a certain time frame and in a particular area; hence the general agreement that serving as a lookout represents direct participation. The Interpretive Guidance went astray by equating assembly of an IED with the production of munitions in a factory far removed from the battlefield, which all the experts agreed is indirect in nature. Like intelligence activities, the production of weapons is case-specific. In some circumstances, IED assembly and storage will constitute direct participation; in others it will not.

Curiously, similar logic undergirds the Interpretive Guidance’s sensible treatment of direct causation in collective operations. The Guidance provides that, “where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly cases such harm.” An excellent example, developed by the experts during the DPH Project meetings, was an unmanned aerial vehicle (UAV) attack that involves a pilot remotely operating the UAV, another person controlling the weapons, a communications specialist maintaining contact with the craft, and a commander in overall control. All are direct participants.

Even greater controversy erupted over the treatment of human shields. All experts agreed that civilians forced to shield a military objective are not direct participants in hostilities. However, there was marked disagreement over the status of those who served as voluntary shields.

The Interpretive Guidance correctly takes the position that “[w]here civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.” For instance, civilians may block a bridge across which military vehicles are advancing. However, the Interpretive Guidance goes on to suggest that “in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective.” The Interpretive

\[87\] Id. at 54–55.
\[88\] Id. at 56.
\[89\] Id. at 57.
Guidance therefore argues that in such a case the shields' voluntary participation does not qualify as direct. As non-participating civilians, the presence of the shields accordingly must be considered when assessing proportionality. In extreme cases, a shield's intentional actions may so alter the proportionality calculation that an attack on the target would cause excessive harm to civilians relative to the anticipated military advantage and thus bar the operation's execution as a matter of law.

Many of the experts, especially those with actual military experience, vehemently opposed this position.\(^{60}\) As with other Interpretive Guidance provisions, the voluntary human shields stance fails to fairly balance military necessity with humanitarian concerns. From an attacker's perspective (the military necessity prong), it does not matter why an attack cannot be mounted. Whether the obstacle is physical or legal, any military advantage that might have accrued from the attack is forfeited. Indeed, the legal obstacle is often the more effective one. A physical obstacle can be removed or otherwise countered in many situations; a legal prohibition is absolute. Few would contest the characterization of actively defending a military objective as direct participation. However, the possibility that images of civilian casualties might be broadcast globally would generally serve as a far greater deterrent to attack than many modern air defense systems employed by nations such as the United States and the United Kingdom. This very fact motivates the voluntary shielding in the first place.\(^{91}\) Finally, one has to query why IHL would distinguish between those who physically protect a military objective from those who intentionally misuse the law's protective

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\(^{91}\) It is common in modern conflict for a party to use "lawfare," the use of law as a "weapon" by creating the impression, correct or not, that an opponent acts lawlessly. On lawfare, see Charles Dunlap Jr., Law and Military Interventions: Preserving Military Values in 21st Century Conflicts (Harvard Univ. Carr Ctr., Working Paper, 2001).
provisions to prevent an otherwise lawful attack. It would seem that the latter poses the greater risk to humanitarian ends by undermining respect for IHL.

Proponents of the Interpretive Guidance’s approach object to the normative consequence that would result if voluntary shields were characterized as direct participants: they may resultantly be directly attacked. While accurate as a matter of law, such concerns reveal unfamiliarity with military doctrine. One of the time-honored “principles of war” is economy of force, which holds that commanders should only use that amount of force necessary to attain the sought-after military advantage. Employing greater force wastes assets that would otherwise be available for employment against other military objectives.\textsuperscript{92} Therefore, those who urge that voluntary human shields should be treated as direct participants embrace the characterization not because they want the shields to be subject to attack, but rather because it will preclude the inclusion of their death or injury in the proportionality calculation and thereby maintain the delicate military necessity-humanitarian considerations balance.

The third constitutive element of direct participation, belligerent nexus, requires that the act in question “not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another.”\textsuperscript{93} There was significant discussion during the meetings of whether the intent of the actor was relevant; that is, whether the actor had to harbor a desire to affect the hostilities before his or her conduct could be deemed direct participation.\textsuperscript{94} Despite protestations by some experts who argued that soldiers on the battlefield are regularly called upon to assess the intent of others (e.g., in situations of self-defense or when

\textsuperscript{92} U.S. joint doctrine defines economy of force as the “judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations to achieve mass elsewhere at the decisive point and time.” JOINT CHIEFS OF STAFF, JOINT OPERATIONS, (JOINT PUBL'N 3-0) A-2 (2008).

\textsuperscript{93} IG, supra note 2, at 58. The criterion of belligerent nexus should not be confused with the requirement of nexus to an armed conflict for the purpose of qualifying as a war crime. See, e.g., Prosecutor v. Kunarac, Case No. IT-96-23 & 231A, Appeal Judgment, ¶ 58 (June 12, 2002); Prosecutor v. Rutaganda, Case No. ICTR-96-3, Appeal Judgment, ¶ 570 (May 26, 2003).

\textsuperscript{94} DPH Project (2005), supra note 84, at 9, 26, 34, 66; DPH Project (2006), supra note 89, at 50; DPH Project (2008), supra note 89, at 66.
maintaining order during a stability operation), the majority agreed that the better approach focused on an act’s objective purpose. Doing so removes such issues as duress or age from the analysis, which is an appropriate consequence, as most experts concurred that, for example, civilians forced to participate in military operations and child soldiers can be direct participants.

Examples of acts that might qualify as direct participation on the basis of the first two elements but fail due to a lack of belligerent nexus include assaults against military personnel for reasons unrelated to the conflict, theft of military equipment in order to sell it, defense of oneself or others against unlawful violence (even when committed by combatants), exercise of police powers by law enforcement authorities, and civil disturbances unrelated to the conflict. The key question is whether the activities are intended to harm one party to the conflict, usually to the benefit of another.

The sole problem with the belligerent nexus criterion is the requirement that the act be “in support of a party to the conflict and to the detriment of another.” As noted in the discussion of the concept of civilian, there is substantial opposition to the requirement that an organized armed group belong to a party to the conflict in order to qualify as an armed force. For those who oppose the requirement, including this author, the belligerent nexus criterion should be framed in the alternative: an act in support or to the detriment of a party. This would account for cases where an armed group might engage in operations against one party without intending to assist its opponent. For example, an armed group might wish to fight an invading force in the hope of situating itself to seize power. Of course, in most cases, direct participation is a zero-sum game. To the extent one side is harmed, the other benefits.

C. Temporal Aspects of Direct Participation

The qualifier “for such time” in the direct participation norm has long been a source of disagreement. In the 2006 Targeted Killings Case, the Israeli government argued that the phrase did not reflect customary international law but rather was simply a treaty restriction that limited only states party to the relevant instruments (principally the Additional Protocols). The Israeli Supreme Court rejected this contention by correctly
noting that the issue was not whether the “for such time” limitation was customary but rather how to interpret it.95

Before exploring the “for such time” notion, it is important to emphasize that this concept does not apply to the actions of organized armed groups. All experts eventually agreed that in international armed conflict timing is a non-issue for organized armed groups that belong to a party to the conflict because their members do not qualify as civilians (at least by the approach taken in the Interpretive Guidance). As to groups that do not belong to a party in an international armed conflict, the better position is that they too cannot qualify as civilians. But even under the narrower approach adopted in the Interpretive Guidance, such groups would be involved as parties in a non-international armed conflict such that the concept of direct participation would be equally inapplicable to them. The net result of both positions is the same: there is no issue of direct participation, and therefore of temporality, for organized armed groups (at least regarding members with a continuous combat function, if one accepts this requirement). Consequently, the only instance in which the “for such time” issue arises is with respect to individuals whose involvement in the hostilities is spontaneous, sporadic, or temporary.

The Interpretive Guidance takes the position that “measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of the act.”96 This formula derives in part from the Commentary to the direct participation articles in Additional Protocols I and II. The former provides that a number of delegations to the Diplomatic Conference viewed direct participation as including “preparations for combat and return from combat” and that “once he ceases to participate, the civilian regains his right to the protection.”97 The latter states that a civilian loses protection “for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.”98

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95 Targeted Killings Case, IsrSC 57(6), at ¶ 38. See also Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, ¶ 157 (July 29, 2004).
96 IG, supra note 2, at 65.
97 AP Commentary, supra note 58, ¶¶ 1943–44.
98 Id. ¶ 4789.
During the DPH Project meetings, the experts failed to achieve consensus over the meaning of this “for such time” standard, other than to generally agree that it was customary in nature. Two issues proved irresolvable. The first surrounds the precise moment at which direct participation begins and ends. According to the Interpretive Guidance, preparatory measures “correspond to what treaty IHL describes as ‘military operation[s] preparatory to an attack’.”99 That phrase, as well as the term “deployment”, is found in Additional Protocol I, Article 44.3, albeit in connection with the question of when combatants are obliged to distinguish themselves from the civilian population.100 However, the reference back to the treaty text proves tautological, for the Commentary offers no indication of those actions that constitute a military operation preparatory to attack. Complicating matters, the Commentary acknowledges that the term deployment “remained the subject of divergent views” at the Diplomatic Conference.101

The Interpretive Guidance takes a restrictive approach to the timing issue by suggesting that preparatory measures “are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.” Actions “aiming to establish the general capacity to carry out unspecified hostile acts do not” rise to this level.102 Deployment “begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation”, whereas “return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation.”103 The key is the extent to which an act that takes place prior to or after a hostile action amounts to a concrete component of an operation.

An alternative view popular among the group of DPH experts looked instead to the chain of causation and argued that the period of participation should extend as far before and after a hostile action as a...
causal connection existed.\textsuperscript{104} The best example is that discussed above: the assembly of improvised explosive devices. Recall that the Interpretive Guidance excludes assembly from direct participation; an individual who acquires the materials and builds an IED that he eventually employs is only directly participating once he begins the final steps necessary to use it. By the alternative approach, the acquisition of the materials necessary to build the device as well as its construction and emplacement comprise preparatory measures qualifying temporally as the period of direct participation.

The second point of controversy regarding the "for such time" standard has become known as the "revolving door" debate. It is popularly symbolized by the farmer who works his fields by day, but becomes a rebel fighter at night. According to the Interpretive Guidance, individuals who participate in hostilities on a recurrent basis regain protection from attack every time they return home and lose it again only upon launching the next attack; hence the revolving door as the farmer passes into and out of the shield of protection from attack.

Although the Interpretive Guidance acknowledges that a revolving door exists, it claims the phenomenon serves as an "integral part, not a malfunction of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat."\textsuperscript{105} There are two holes in this logic. First, the reason civilians lose protection while directly participating in hostilities is because they have chosen to be part of the conflict; it is not because they represent a threat. Indeed, particular acts of direct participation may not pose an immediate threat at all, for even by the restrictive ICRC approach, acts integral to a hostile operation need not be necessary to its execution. Instead, the notion of "threat" is one of self-defense and defense of the unit, which is a different aspect of international law. It is accounted for in operational procedures know as rules of engagement, which are based as much in policy and operational concerns as in legal requirements. To the extent it is based in law, self-defense applies to civilians who are not directly participating in hostilities rather than those who are participating (as they may be attacked without any defensive purpose).


\textsuperscript{105} IG, supra note 2, at 70.
Apart from the structural distortion of the revolving door phenomenon, the approach makes no sense from a military perspective. For instance, in asymmetrical warfare, individual insurgents typically mount surprise attacks; sometimes the attack does not occur until long after the insurgents have departed the area, as with IED or land mine attacks. Without an opportunity to prepare for attack, the best option for countering future attacks is to locate insurgent “hideouts” through human and technical intelligence and to target these hideouts when the insurgents are likely present. Yet, by the Interpretive Guidance’s approach, once the insurgents return from an attack, they are “safe” until such time as they depart to attack again. Again, the Interpretive Guidance has thrown the military necessity-humanitarian considerations balance wildly askew.

The better approach is one whereby a civilian who directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal.\textsuperscript{106} He or she may be attacked between episodes of participation. It may sometimes be difficult to determine when a direct participant no longer intends to engage in further hostilities, but having enjoyed no right to participate in the first place, the direct participant should bear the risk associated with misunderstanding as to status and not combatants who have been previously attacked. This represents a far more appropriate and sensible balancing of military necessity and humanitarian concerns. After all, IHL presupposes a conflict between particular actors who are entitled to use forcible combatants. Charging direct participants, rather than combatants, with the consequences of a mistaken conclusion as to continued involvement in the hostilities maintains this internal logic.

It might be objected that this approach violates the presumption of civilian status in cases of doubt. Most experts agreed that when doubt exists

\textsuperscript{106} The United States District Court for the District of Columbia addressed the question of status as a member of an organized armed group in a 2009 habeas corpus proceeding involving a Guantanamo detainee. See Al Ginco v. Obama, 626 F. Supp. 2d 123 (2009). The district court held that “[t]o determine whether a pre-existing relationship sufficiently existed over a sustained period of time, the Court must, at a minimum, look to the following factors: (1) the nature of the relationship in the first instance; (2) the nature of the intervening events or conduct; and (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody.” Id. at 129. The court found the prior relationship with al Qaeda/Taliban to have been severed. Id. at 15.
as to whether the target is a directly participating civilian or member of the
armed forces (at least doubt sufficient to cause a reasonable combatant to
hesitate to act), an attack may not be mounted or continued. However,
the issue in this case is not doubt but rather mistake of fact: the civilian has
decided to refrain from further participation in hostilities, but an attacker is
unaware—and has no reason to be aware—of that fact. IHL does not
prohibit the making of reasonable factual mistakes on the battlefield.
International criminal law expressly acknowledges the likelihood of
reasonable mistakes in the fog of war. The Rome Statute, for instance,
provides for a mistake-of-fact defense when the mistake negates a mental
element of the crime. In particular, the offense of willfully killing civilians
requires that the perpetrator have been aware of the factual circumstances
that established the protected status. Thus, a reasonable mistake as to the
"for such time" aspect of direct participation would preclude criminal
responsibility for attacking an individual who was no longer a direct
participant.

IHL merely requires that actors take precautions that may prevent
mistakes. With regard to the question at hand, an attacker must take
feasible steps to verify that targets are not protected civilians. If it
becomes apparent that a targeted individual does enjoy such protection, the
attack must be cancelled. In the "for such time" context, the norm
requires an attacker to take reasonable steps to ensure that a potential target
remains subject to attack. However, the risk that an attacker's reasonable
steps might not reveal that a civilian has withdrawn from hostilities can only
logically be borne by the former direct participant.

IV. Restraints on the Use of Force

Possibly the area of the Interpretive Guidance that attracted the
greatest criticism among the experts who participated in the DPH Project

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107 IG, supra note 2, at 74; DPH Project (2005), supra note 84, at 44, 67; DPH Project
(2006), supra note 89, at 70.
108 Rome Statute, supra note 28, art. 32.
PCNJCC/2000/1/Add.2 (2000). For commentary, see generally Knut Dorsmann,
ELEMENTS OF WAR CRIMES UNDER THE STATUTE OF THE INTERNATIONAL CRIMINAL
110 See AP I, supra note 10, art. 57.2(a)(i); CIHL, supra note 28, at rule 16; UK Manual, supra
note 34, § 5.32.2.
111 See AP I, supra note 10, art. 57.2(b); CIHL, supra note 28, at rule 19.
involves "restraints on the use of force in direct attack."\textsuperscript{112} According to the Interpretive Guidance, "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."\textsuperscript{113} The Guidance cites the principles of military necessity and humanity in support of this proposition.\textsuperscript{114}

The U.K. Manual on the Law of Armed Conflict, to which the Interpretive Guidance refers, explains that the principle of necessity allows only that "degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve a legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources."\textsuperscript{115} The latter prohibits "the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."\textsuperscript{116}

In its discussion on restraint of force, the Interpretive Guidance misapplies the principle of necessity, as evidenced by disagreement with its treatment on the part of certain DPH experts who were also responsible for drafting the U.K. Manual. The Manual correctly notes that military necessity is one of four fundamental principles underlying the positive rules of customary and treaty IHL.\textsuperscript{117} Specific customary and treaty rules set forth in IHL have already taken military necessity into account. Illustrative examples abound. For instance, "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."\textsuperscript{118} Similarly, "effective advance warning shall be given of attacks which may affect the civilian

\textsuperscript{112} IG, supra note 2, at 77
\textsuperscript{113} IG, supra note 2, at 77. Use of the term "actually" is problematic for it introduces an objective test that would not account for situations in which such force reasonably appeared necessary in the circumstances, but which later proved unnecessary. However, this point is not developed here because the overall approach taken by the Interpretive Guidance is more generally flawed.
\textsuperscript{114} IG, supra note 2, at 78–82.
\textsuperscript{115} UK Manual, supra note 34, § 2.2.
\textsuperscript{116} Id. § 2.4.
\textsuperscript{117} Id. § 2.1. The others are humanity, distinction, and proportionality.
\textsuperscript{118} AP I, supra note 10, art. 57.3.
population, unless circumstances do not permit.¹¹⁹ Most significantly, the definition of military objective requires that objects to be targeted make an effective contribution to military action and that their partial destruction, capture, or neutralization offer a definite military advantage.¹²⁰ Only when the positive law specifically cites military necessity does it come into play as a factor in itself.¹²¹ No state practice exists to support the assertion that the principle of military necessity applies as a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting an attack. The operation is lawful so long as the target qualifies as a lawful military objective, collateral damage will not be excessive, and all feasible precautions are taken.

The flawed logic vis-à-vis necessity is mirrored in the Interpretive Guidance’s citation to the principle of humanity. Humanity is equally a foundational principle of IHL rather than a positive rule. Thus, as explained in the UK Manual:

[I]f an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.¹²²

In both examples, the principle of humanity is expressed through positive rules and not general application of the principle.¹²³ Again, no state practice supports the application of the principle in the manner suggested by the Interpretive Guidance.

particularly problematic is the Interpretive Guidance’s assertion that “it would defy basic notions of humanity to kill an adversary or to refrain

¹¹⁹ Id. art. 57.2(c).
¹²⁰ Id. art. 52.2 (emphasis added).
¹²¹ As an example, GC IV, supra note 32, art. 53, provides that “[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”
¹²² UK Manual, supra note 34, § 2.4.1.
¹²³ AP I, supra note 10, arts. 41(c), 51.
from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force." IHL already accounts for situations in which an opportunity to capture an enemy exists by prohibiting attacks on an individual who "clearly expresses an intention to surrender." It is this rule, rather than that proposed by the Interpretive Guidance, that reflects the principle of humanity as well as the general balance between military necessity and humanitarian considerations. The crucial issue is not whether the individual in question can feasibly be captured but instead whether he or she has clearly expressed his or her intention to surrender. The claim that an individual who has not surrendered must, when feasible, be captured (or at least not attacked) is purely an invention of the Interpretive Guidance.

A requirement does exist in human rights law to capture rather than kill when possible. It applies primarily during peacetime as well as in certain circumstances when occupying forces are acting to maintain order. The question is whether this human rights norm has any bearing on classic conduct of hostilities situations.

Although it is now well settled that human rights law does apply during armed conflict, its application is conditioned by IHL in both international and non-international armed conflict. In its Advisory Opinion on the use of Nuclear Weapons, the International Court of Justice addressed the issue of the interplay between human rights law and the IHL governing attacks. It held that, while the non-derogable prohibition on arbitrary deprivation of life found in Article 6.1 of the International Covenant on Civil and Political Rights applies in times of war, the "test of what is an arbitrary deprivation of life . . . falls to be determined by the

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124 IG, supra note 2, at 82.
125 AP I, supra note 10, art. 41(b).
126 See McCann v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶ 236 (1995). In McCann, the European Court of Human Rights held that "the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk." See also HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel (Targeted Killings Case) [2006] IsrSC 57(6) 285 ¶ 40 ("[T]he terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed" (citing Mohamed Ali v. Public Prosecutor 1 A.C. 430 [1969])
127 Of course, the treaty or norm in question must be intended to apply to armed conflict.
applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”

The lex specialis dynamic explains the Interpretive Guidance’s circuitous attempt to squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of IHL. The attempt fails because the IHL analysis on which it relies is fundamentally flawed. Of course, military considerations will often augur against attacking an individual who, although not hors de combat, can be captured; this is especially true in counter-insurgency operations, where the rules of engagement are typically restrictive. However, such considerations are grounded in policy and operational concerns and not in international humanitarian law.

Inclusion of the proposed restrictions on attack in the Interpretive Guidance was unfortunate. Quite aside from the substantive weakness of the supporting argument, it was unnecessary to the determination of either the nature of direct participation or its temporal reach. Ultimately, doing so merely provided additional fodder for criticism by many of the experts involved in the DPH Project.

V. Concluding Thoughts

Despite the critical nature of the comments above, there is much to recommend in the Interpretive Guidance. In particular, the constitutive elements of direct participation, although not bereft of flaws, represent a useful step forward in understanding the notion. The Interpretive Guidance’s principal author, Dr. Nils Melzer of the ICRC, is due special commendation for this creative and insightful contribution as well as for the Herculean task of trying to pull together the work of diverse experts over a five-year period. It cannot be denied that the Interpretive Guidance brings

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the issue of direct participation to the forefront of IHL dialogue—a place it
should enjoy in light of the nature of conflict in the twenty-first century.
The work effectively identifies and frames the issues and offers a
sophisticated departure point for further mature analysis.

However, the Interpretive Guidance repeatedly takes positions that
cannot possibly be characterized as an appropriate balance of the military
needs of states with humanitarian concerns. In particular, the Guidance
proposes incompatible legal standards for conflicts between a state's regular
armed forces and non-state armed groups. Counter-intuitively, non-state
actors, who enjoy no combatant privilege, benefit from greater protection
than do their opponents in the regular armed forces. It is similarly
disturbing that individuals who directly participate on a recurring basis
enjoy greater protection than lawful combatants. Finally, the purported
restraints on the use of force find little basis in international humanitarian
law.

In light of these flaws, it is essential to grasp the prescriptive reach of
the Interpretive Guidance. As Dr. Jakob Kellenberger, President of the
ICRC, notes in his foreword to the document, "the Interpretive Guidance is
not and cannot be a text of a legally binding nature. Only State agreements
(treaties) or State practice followed out of a sense of legal obligation on a
certain issue (custom) can produce binding law."130 Unfortunately, the
Interpretive Guidance, the product of tireless efforts on the part of the
ICRC and the experts involved, sets forth a normative paradigm that states
that actually go to war cannot countenance.

130 IG, supra note 2, at 7.
BEYOND THE BATTLEFIELD, BEYOND AL QAEDA:
THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM

Robert M. Chesney

By the end of the first post-9/11 decade, the legal architecture associated with the U.S. government’s use of military detention and lethal force in the counterterrorism setting had come to seem relatively stable, supported by a remarkable degree of cross-branch and cross-party consensus (manifested by legislation, judicial decisions, and consistency of policy across two very different presidential administrations). That stability is certain to collapse during the second post-9/11 decade, however, thanks to the rapid erosion of two factors that have played a critical role in generating the recent appearance of consensus: the existence of an undisputed armed conflict in Afghanistan as to which the law of armed conflict clearly applies, and the existence of a relatively-identifiable enemy in the form of the original al Qaeda organization.

Several long-term trends contribute to the erosion of these stabilizing factors. Most obviously, the overt phase of the war in Afghanistan is ending. At the same time, the U.S. government for a host of reasons places even more emphasis on what we might call the “shadow war” model (i.e., the use of low-visibility or even deniable means to capture, disrupt, or kill terrorism-related targets in an array of locations around the world). The original Al Qaeda organization, meanwhile, is undergoing an extraordinary process of simultaneous decimation, diffusion, and fragmentation, one upshot of which has been the proliferation of loosely-related regional groups that have varying degrees of connection to the remaining core al Qaeda leadership.

These shifts in the strategic posture of both the United States and al Qaeda profoundly disrupt the stability of the current legal architecture upon which military detention and lethal force rest. Specifically, they make it far more difficult (though not impossible) to establish the relevance of the law of armed conflict to U.S. counterterrorism activities, and they raise exceedingly difficult questions regarding just whom these activities lawfully may be directed against. Critically, they also all but guarantee that a new wave of judicial intervention to consider just those questions will occur. Bearing that in mind, I conclude the paper by outlining steps that could be taken now to better align the legal architecture with the trends described above.

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BEYOND THE BATTLEFIELD, BEYOND AL QAEDA: THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM

Robert M. Chesney*

INTRODUCTION

The Gulf of Aden lies like a funnel between the Indian Ocean and the Red Sea, bracketed by Yemen on its north shore and Somalia to the south. On a typical day it is flush with massive tankers and cargo vessels bound to and from the Suez Canal. But the vessel that had the attention of U.S. government officials on April 19, 2011, was a much smaller affair, a mere fisherman’s skiff attempting to slip quietly across the Gulf from Yemen to Somalia.¹

Onboard was a Somali man named Ahmed Abdulkadir Warsame. That name meant nothing to most Americans, at least at the time. But for a small circle of U.S. government and military officials with access to the relevant intelligence, Warsame was a decidedly threatening figure, one who personified troubling changes sweeping through the counterterrorism landscape.

Warsame, you see, was not a member of al Qaeda, nor had he ever been anywhere near the battlefields of Afghanistan. He was, instead, a member of a Somali insurgent group known as Harakat al-Shabaab al-Mujahideen (the “Movement of the Mujahideen Youth”), or simply “al Shabaab.”² Of course, so too were hundreds if not thousands of other young Somali men. What made Warsame different was that he had just spent time in Yemen as a guest of al Qaeda in the Arabian Peninsula (AQAP), receiving advanced training in explosives and working to build ties between the two groups.

Warsame’s activities had set off alarm bells in Washington. AQAP, though very much engaged in a localized effort to seize power in Yemen, had repeatedly demonstrated its interest in carrying out attacks on American targets, consistent with the larger strategic priorities set by the senior leadership of the original al Qaeda network.³ Indeed, U.S. officials by early 2011 had

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* Charles I. Francis Professor in Law, University of Texas School of Law. I thank Kenneth Anderson, Jack Goldsmith, and Matthew Waxman for their comments and criticisms. I also wish to thank those who provided comments after presentations at the U.S. Army Judge Advocate General’s Legal Center and School and at the “Worldwide Detainee Conference” sponsored by U.S. Special Operations Command.


³ Most famously, AQAP dispatched Umar Farouq Abdulmutallab to set off a bomb hidden in his underwear on a flight to Detroit on Christmas Day 2009. The September 2011 death of Anwar al-Alwaki—a U.S. citizen who appeared to spearhead AQAP’s external operations through propaganda, recruitment, and operational planning—
come to see AQAP as the organization most likely to carry out a terrorist attack in America. Al Shabaab, in contrast, had thusfar confined its operations to the east Africa region, and despite much talk of it becoming an al-Qaeda “franchise” its leadership appeared divided on the wisdom of that step. More significantly, perhaps, al Qaeda’s senior leadership also was divided on the al-Shabaab question. Bin Laden in particular appears to have resisted formal ties, despite the arguments of other al-Qaeda leaders. But that does not mean that al Qaeda preferred for al Shabaab to remain focused on Somali affairs alone. Al Qaeda may not have been prepared at that time to establish a formal relationship with al Shabaab, but it could nonetheless encourage al Shabaab to emulate the AQAP model by adopting a dual focus on local insurgency and periodic external operations against American and other western targets. Toward that end, therefore, al Qaeda appears to have asked AQAP’s leadership to do what it could to reorient al Shabaab.

Warsame appeared to be the first fruit of that effort. He was also a case study in the difficulty of describing the metes and bounds of the U.S. government’s authority to use military detention and lethal force in the name of counterterrorism. Could Warsame lawfully be killed outright, should actionable intelligence regarding his location arise? Could he at least be detained militarily without criminal charge, assuming capture was feasible? If the answer to either question was yes, did it follow that the same would be true for all members of al Shabaab? What about other groups or individuals that might be in communication with al Qaeda leaders or sympathetic to al Qaeda’s goals? With the original al Qaeda network seemingly on the decline, and the threat posed by emergent regional groups such as AQAP and perhaps now al Shabaab-waxing, these were increasingly pressing questions.

Ultimately, the Obama administration settled on a compromise approach in Warsame’s case. On one hand, he was eventually placed on a “kill/capture” list maintained by Joint Special Operations Command (“JSOC”), and when he attempted to cross the Gulf the decision was made to attempt a capture. The operation came off in textbook fashion. JSOC operators were watching closely as Warsame proceeded across the Gulf on April 19\(^6\), and eventually they seized the vessel without a shot fired.\(^8\) For the next two months, moreover, Warsame languished in the

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\(^7\) See id. at 1-2.

\(^8\) See Kaidman, *supra* note 1, at 237.

\(^{Id.}\)
brig of the *USS Boxer*—which happened to be on station in the region as part of an anti-piracy task force—undergoing interrogation in military custody. Before the detention became known to the public, however, and before any possibility of judicial intervention that might put the government's claim of authority to the test in a formal manner, the administration switched gears. In a rather bold move, it transferred Warsame to civilian custody, flying him to New York City to face criminal charges.

This solution rendered the question of authority academic as to Warsame, but it did not make the underlying issues disappear. On the contrary, the domestic political backlash against Warsame's transfer to civilian custody in New York may well deter the executive branch from charting that same course, and Congress for its part might eventually act to forbid such transfers by statute in the future (for now it has forbidden such transfers only if the detainee is first held at Guantanamo). Yet the Warsame fact pattern, or something like it, is certain to arise again in the future in light of the strategic trends described below.

The ultimate lesson of the Warsame scenario is not that hard questions about the authority to use military detention or lethal force in such settings can be avoided, then, but rather that they deserve sustained public attention. In the pages that follow, I explain that the second post-9/11 decade will be increasingly characterized by a kind of "shadow war," taking place on an episodic basis in locations far removed from zones of conventional combat operations and involving opponents not readily described as members of al Qaeda as such. The legal architecture that developed to a point of seeming stability over the past decade is not well-adapted to this environment, and as time goes by—as new Warsames emerge—the gaps will become increasingly apparent and problematic.

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Part I below fleshes out my baseline claim that the status quo legal architecture reached a point of apparent stability by the close of the first post-9/11 decade. Political debates still raged, of course, and legal criticism certainly continued in the pages of law reviews and advocacy group briefs. Yet across a range of issues—including the use of military detention at Guantanamo and in Afghanistan, the use of reformed military commissions to prosecute a narrowed set of offenses, and the use of drones to carry out lethal strikes in remote areas—the most striking fact was the emergence of cross-party and cross-branch consensus. The Obama administration famously continued rather than terminated the core elements of various Bush administration counterterrorism programs (not to mention a dramatic expansion of the drone program), and three years' worth of habeas litigation following the Supreme Court's famous decision in *Boumediene v. Bush* served primarily (and quite surprisingly to many) to validate the legal foundation of the detention system. Congress, for its part, first took the lead in reviving the
military commission system, and then in the National Defense Authorization Act for Fiscal Year 2012 reinvigorated the 2001 Authorization for Use of Military Force, providing a fresh statutory foundation at least for detention operations.

In Part II I make the case that this consensus depended in significant part upon the presence of two factors. First, throughout the first post-9/11 decade there has always been a “hot battlefield” in Afghanistan, an area involving high-intensity, large-footprint conventional combat operations as to which there is no serious dispute that the law of armed conflict (LOAC) applies. This has long provided a center of gravity for the legal debate surrounding the law of counterterrorism, ensuring that there is at least some setting in which LOAC authorities relating to detention and lethal force apply. Insofar as a given fact pattern could be linked back to Afghanistan, therefore, it has been possible to avoid thorny questions regarding the geographic scope of LOAC principles. Notably, the dozens of habeas cases of the first post-9/11 decade—which collectively have played an outsized role in the process of establishing the appearance that the law has stabilized—almost entirely involve direct links to Afghanistan (the sole exception being an al Qaeda detainee captured in the US, whose case rather tellingly produced badly-splintered judicial opinions). Second, throughout the same period there also has been at least a working assumption that we can coherently identify the enemy by referring to al Qaeda and the Taliban (along with glancing-but-unelaborated references to the “associated forces” of such groups). Again, the habeas caselaw has played a critical role in cementing this impression of clarity.

In Part III, I demonstrate that both of these stabilizing factors are rapidly eroding in the face of larger strategic trends concerning both al Qaeda and the United States. First, the United States for a host of reasons (fiscal constraints, diplomatic pressure, and a growing sense of policy futility) is accelerating its withdrawal from Afghanistan. Second, the United States simultaneously is shifting to a low-visibility “shadow war” strategy that will rely on Special Operations Forces, CIA paramilitary forces, drones operated by both, proxy forces, and quiet partnerships with foreign security services. Meanwhile, al Qaeda itself has fractured and diffused, both in pursuit of the security that comes from geographic dispersal of personnel into new regions and also in pursuit of a strategic vision that embraces decentralization in the form of relationships with quasi-independent regional organizations that may have independent origins and agendas. As a result, it grows increasingly difficult to speak coherently of “al Qaeda”; the senior leadership of the original network has been decimated, and so-called franchises with

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12 Journalists Daniel Klaidman and David Sanger each published illuminating accounts in the summer of 2012 depicting this ongoing shift from an internal Obama administration perspective. See Klaidman, supra note 1; David E. Sanger, Confront and Conceal: Obama’s Shadow Wars and Surprising Use of American Power (2012) 150 (describing an “Obama doctrine that asserts that adversaries can be effectively confronted through indirect methods—without boots on the ground, without breaking the Treasury, without repeating the mistakes of mission creep”); id. at 243-47 (elaborating on the light footprint strategy theme). See also Kimberly Dozier, et al., Drones, Computers New Weapons of US Shadow Wars, Assoc. Press (June 16, 2012).
uncertain (or no) ties to that leadership not only are proliferating but are rapidly emerging as more significant threats to U.S. national security. The upshot of all this is that there soon will be no undisputed hot battlefield in existence anywhere, while the center of gravity with respect to the use of lethal force will continue to shift to locations like Yemen, Pakistan, and Somalia. Already these unorthodox scenarios are the primary focus for the use of lethal force, and they will similarly be the focus should the United States resume the practice of long-term military detention for new detainees (a distinct possibility in the event of a Romney presidency).

Part III also maps the disruptive legal consequences of these strategic trends. My essential point is that the apparent stability of the post-9/11 legal architecture—the semblance that some sort of sustained institutional settlement has occurred—is an illusion. As the second post-9/11 decade progresses, policies associated with drone strikes and detention unquestionably will face increasing legal friction, casting doubt over the legality of the U.S. government use of detention and lethal force in an array of settings.

In Part IV, I take up the question whether we really ought to care about all of this and, if so, what if anything can and should be done. We should care, for it will not be possible to simply ride out the increasing legal friction. The current climate of judicial passivity—reflected in the Supreme Court’s unwillingness to reengage with the Guantanamo habeas cases,13 the unwillingness of the D.C. Circuit Court of Appeals to adjudicate habeas petitions arising out of Afghanistan,14 and the unwillingness of a district judge to adjudicate a suit challenging the planned use of lethal force against an American citizen15—will not last. For a host of reasons, a fresh wave of detention litigation concentrating on these very issues is all but guaranteed to arise. It is not beyond the realm of possibility that the judiciary will engage as well in connection with the use of lethal force, moreover, though even if it does not its engagement on detention issues will in any event cast a long shadow over practices relating to lethal force. Bearing all this in mind, I conclude by distinguishing those elements of legal uncertainty that are simply unavoidable (given a pluralistic legal environment in which a host of relevant actors simply do not share common ground with respect to which bodies of law are applicable to these questions and what those bodies of law can fairly be said to require) and those that might usefully be addressed by statutory innovation.

I. THE FIRST POST-9/11 DECADE: FROM INSTABILITY TO INSTITUTIONAL SETTLEMENT

What a decade it was for the lawyers. In the wake of the 9/11 attacks, the U.S. government famously adopted a set of counterterrorism policies involving, among other things, the use of military detention without criminal charge or judicial review; prosecution for war crimes in a presidentially-constructed system of military commissions; and coercive interrogation using an array of methods including measures that many perceived to be torture. Each of these was

14 See al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).
fraught with legal questions, both domestic and international, and predictably each duly set off fierce legal disputes. By the middle of the first post-9/11 decade, it was clear that these disputes were not going away, that the underlying policies were evolving in response to them, and that more modifications—imposed both internally and externally—were likely on the way. In due course, however, these changes ran their course, and by the last years of the decade the now-familiar sense of instability had given way to an altogether different narrative.

The net effect of the legal disputes of the first post-9/11 decade was to produce a set of modest policy course-corrections, ultimately legitimizing many aspects of the counterterrorism framework. Indeed, by the close of the first post-9/11 decade, it seemed that an institutional settlement of sorts had arrived. Legal disputes of course continued, but the sense that they heralded a serious prospect of compelled policy change had largely disappeared. The courts appeared to be in retreat, and where they remained engaged they largely endorsed the actions of the elected branches. Congress was if anything eager to entrench this status quo. A new president elected in part on a rule-of-law platform was embracing and defending key elements of the framework as well. And the public appeared largely exhausted with the whole topic. Across parties and branches, the legal architecture appeared to have stabilized.

A. Legal Instability and the Post-9/11 Evolution of Counterterrorism Policy

The U.S. government’s practices relating to military detention, military commissions, and interrogation sparked an extraordinary amount of legal debate in the years following 9/11.\(^{16}\) Over time, it became increasingly apparent that the legal ferment could well boil over, compelling policy changes.

That is more or less what happened, repeatedly, between 2004 and 2008. The Supreme Court ruled against the government in a series of cases that reshaped the military detention process at Guantanamo (specifically, ensuring access to counsel and the right to present fresh evidence to a federal judge in an effort to determine the legal and factual propriety of individual detention decisions).\(^{17}\) The Court also nullified the Bush administration’s attempt to craft a military commission trial system without express legislative authorization, noting along the way that Common Article Three of the Geneva Conventions—with its strong language addressing the interrogation of any persons held in custody—applies to the conflict with al Qaeda.\(^{18}\) Congress, for its part, intervened with legislation attempting to prevent the use of the most abusive interrogation techniques, while also reconstituting the military commissions system with new restraints and requiring the existence of some form of judicial review for Guantanamo detainees.

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\(^{16}\) The literature on this topic is vast. For an insider account of the role of law and lawyers in shaping national security policy during the Bush administration, see Jack L. Goldsmith, The Terror Presidency (2009).


even while attempting to foreclose resort to habeas review in particular. Meanwhile, the executive branch itself undertook to moderate a variety of policies, responding to the prospect of judicial oversight and to mounting domestic political pressure (catalyzed by dramatic media exposes and the related litigation and advocacy efforts of a sprawling network of NGOs, lawyers, scholars, and activists) and no small amount of pressure from within the executive branch itself. The president acknowledged the existence of CIA “black sites,” for example, and ordered the detainees held in them to be removed to Guantanamo. The Defense Department repeatedly moderated the rules governing the emerging military commission system, and with one eye squarely-fixed on the possibility of judicial review of military detention at Guantanamo it also voluntarily adopted a complex system of internal administrative review both of the initial detention decision (the Combatant Status Review Tribunal system) and of the decision to continue to hold specific persons over time (the Administrative Review Board system). It eventually made a similar move in Afghanistan, moreover, with the creation of the Detention Review Board system.

In short, both the legal and policy architectures for counterterrorism evolved in fits and starts throughout this hotly-contested period, generally in the direction of increased constraint. By the final years of the first post-9/11 decade, however, the period of legal and policy ferment was giving way to a period of institutional settlement—a period that would largely track the opening years in office of a new president whose campaign had explicitly emphasized the notion of a return to rule-of-law values in national security affairs.

B. The Appearance of Institutional Settlement

The legal stabilization trend has been most pronounced with respect to military detention policy, thanks to a combination of cross-branch and cross-party developments.

Courts have played a critical role in this process. In the wake of the Supreme Court’s decision in Boumediene, district judges began grappling with the merits of dozens of habeas corpus petitions brought by military detainees held at Guantanamo Bay. When it comes to

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20 On the role of the decentralized network of civil society voices that have pushed back against U.S. government counterterrorism policy, see Jack Goldsmith, Power and Constraint (2012).
23 Defense Department documents establishing the two systems and tracking their progress over time are posted at http://www.defense.gov/news/combatant_tribunalsarchive.html.
25 See Wintes, supra note 11. Jack Goldsmith makes a powerful case regarding the legitimizing impact that the resulting caselaw had with respect to the government’s detention power. See supra note 20, at 194 (observing that the habeas litigation has “empowered the presidency and the military, directly and indirectly, in important ways”).
resolving the factual disputes around which so many of these cases ultimately turn, results have been mixed. It was rough sledding for the government early on, with judges repeatedly taking a dim view of the evidence the government had put forward.26 Over time, the record has evened out considerably.27 Indeed, critics have taken to denouncing the habeas review system as something of a sham, a betrayal of what they took Boudedine to represent.28 But never mind that. The important point is that when it comes to the legal questions raised in these cases, the government has prevailed across the board all along.

It helps to consider that there are two basic questions of law one might ask in connection with military detention, broadly speaking. First, there is the question of whether the government lawfully may use military detention without criminal charge against any category of persons. All the various judges enmeshed in the Guantanamo habeas litigation have answered this question affirmatively, much as the Supreme Court itself did back in 2004 in Hamdi v. Rumsfeld.29 Next, there is the question of how precisely to define the category of eligible persons. In Hamdi the Supreme Court confined itself to addressing solely the scenario before it: an arms-bearing member of the Afghan Taliban, captured on the battlefield in Afghanistan at a time when armed conflict raged, and held in connection with that ongoing conflict. Post-Boudedine, lower court judges encountered an array of distinct fact patterns: persons linked to al Qaeda or other organizations participating in the hostilities in Afghanistan; persons who were captured or arrested outside Afghanistan; and persons whose conduct was considerably more removed from the paradigm of an arms-bearing “soldier.”30 While the judges have not always agreed as to the rationale for approving detention in such cases, the bottom line is that a wide variety of judges, including both Republican and Democratic appointees, have so approved.31 Appellate review of these decisions at the D.C. Circuit Court of Appeals has powerfully reinforced this conclusion, moreover, while also clarifying its doctrinal foundations, and the Supreme Court has made clear in case after case that it is not interested in further engagement with the question.32 In short, the habeas process has proved to be a powerful engine for validating the legal foundations of military detention, to the delight of some and the horror of others.

The courts have not been alone in this project of settlement. Congress, too, has played a significant role, though it is only fair to note that it became engaged on the question of detention authority only after the courts cleared the path for it do so through the spate of rulings noted above. Previously, Congress appeared quite averse to the topic. True, Congress provided the original statutory foundation for detention when it enacted the September 2001 Authorization for Use of Military Force (“AUMF”), which specified that “the President is authorized to use all

26 See Wittes, supra note 11.
27 Id.
29 542 U.S. 507.
30 See Wittes, supra note 11.
31 See id. For a review of the doctrinal disagreements that have characterized these cases, see Robert M. Chesney, Who May Be Held? Military Detention Through the Habeas Lens, 52 B.C. L. Rev. 769 (2011).
32 See Cheherencey, supra note 13.
necessary and appropriate force” against the entity responsible for the 9/11 attacks and anyone harboring that entity. But the AUMF famously did not actually address detention authority, let alone attempt to mark its metes and bounds, which is one reason why so much legal debate on this topic occurred in the years that followed. For years thereafter, moreover, Congress avoided the substance of this topic even while addressing related issues such as habeas jurisdiction. Even after Boudreaux in 2008 made clear that the judiciary was now going to be obliged to develop the substantive law of detention on its own in the absence of legislative intervention, Congress continued to shy away.

Once the period of institutional settlement was well underway in the judiciary, however, Congress joined the party by enacting the National Defense Authorization Act for Fiscal Year 2012 (the “NDAA FY’12”). The NDAA FY’12 is burdened with an array of complicated and problematic detention provisions, including constraints on the ability of the executive branch to release or transfer military detainees once in custody at Guantanamo and a confusing—and ultimately quite ineffectual—attempt to force the executive branch to opt for military detention (instead of civilian criminal prosecution) in certain cases. But when it comes to the fundamental questions of detention law—whether there is authority to detain, and as to whom does such authority apply—the NDAA was the very embodiment of the new climate of institutional settlement. The legislative history of the statute is shot through with statements to the effect that the statute was meant to codify the status quo as developed by the judiciary in the habeas case law. The statute itself speaks explicitly of simply affirming that the AUMF includes detention authority, and that this authority extends to persons who are members or supporters of al Qaeda, the Taliban, or “associated forces” engaged in hostilities against the United States or its coalition partners—i.e., the precise formulation that the government had been advancing, and the courts had been accepting, for many years. The NDAA FY’12 was, at bottom, at least in large part a status quo enactment in this respect, embodying what might be described as an “AUMF good enough” spirit.

The sense that detention law had become settled at last was not just a matter of the judiciary and Congress embracing the executive branch’s position, however. Quite significantly—perhaps

35 Pub. L. No. 112-81.
37 See NDAA FY’12 § 1021. An argument can be made that this was not merely a codification exercise with respect to the portion of the definition encompassing persons who are not members of these groups, but instead “supporters” of them. The district court judges had split on this particular question to some extent, while the Circuit Court had repeatedly endorsed the government’s view but only in dicta. For more on this question, see Mary Lederman and Steve Vladeck, The NDAA: The Good, the Bad, and the Laws of War—Part I, www.lawfareblog.com (Dec. 31, 2011), http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i/.
even most significantly—it also reflected a surprising degree of cross-party consensus. Put more plainly, the perception of an institutional settlement owes a great deal to the fact that the Obama administration substantially embraced the legal architecture of detention as it had developed by the end of the Bush administration.

When the Obama administration came into power in early 2009, many observers wondered whether and to what extent it would retreat from the positions taken by the Bush administration regarding the scope of the government’s detention authority. That question came to a head very quickly, as one of the Guantanamo habeas cases required a filing on this very matter less than two months after the inauguration. Much to the surprise of some, the Obama administration not only continued to assert the legality of using military detention in that case and others, but in doing so it argued for essentially the same substantive scope of authority as had the Bush administration in its later years. That is, Obama like Bush defended the view that it would be lawful to detain both members and non-member supporters of al Qaeda, the Afghan Taliban, and “associated forces engaged in hostilities against the United States or its coalition partners.” Obama differed from Bush in this specific area only in that he abandoned the descriptive label “enemy combatant” (which had come to have quite negative connotations), made clear that he viewed his authority as being subject to (though consistent with) LOAC, and described his authority as flowing from the AUMF rather than flowing both from the AUMF and from his inherent authority under Article II of the Constitution.

This was not just a temporary expedient forced upon the new administration by a fast-moving litigation docket, moreover, though the initial exigency certainly did force the administration’s hand. Later that spring, the President gave a marquee address concerning detention policy and counterterrorism, at the National Archive. The President sounded strong rule of law themes, and made clear his preference for using civilian criminal prosecution when possible in terrorism-related cases. But he also explicitly endorsed the propriety of using military commissions for prosecution in some settings, and of using military detention without criminal charge when necessary. In the months and years since then, moreover, the Obama administration has vigorously defended the legality of detention in a host of Guantanamo habeas

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38 See Klaidman, supra note 1, at 58-59.
40 See id. The Obama administration did not actually disclaim the relevance of Article II in connection with detention authority, interestingly. Nor did it prove shy about invoking Article II authority, standing alone, later in connection with the use of force in Libya. For a detailed account of Bush-Obama continuity, see Goldsmith, supra note 20, passim.
41 See Klaidman, supra note 1, at 58-59. Addressing other security-related policy decisions forced to a head by the press of the litigation schedule, Klaidman quotes President Obama on another occasion venting that “[I]t’s another one of these damn litigation decisions they want to talk about, and I’m tired of it . . . I’m tired of being jammed this way.” Id. at 47.
43 See id.
44 See id.
cases, apparently encountering significant internal discord on the subject only with respect to the relatively narrow question whether it ought to claim detention authority as to persons who are mere supporters—but not members—of AUMF-covered groups when those persons are acting in locations remote from the “hot battlefields.” And in a related vein, it has just as vigorously fought to prevent the extension of judicial review to the use of military detention in Afghanistan (both in cases involving Afghans captured there and in the more difficult category of cases involving non-Afghans captured elsewhere but brought into Afghanistan for detention).

This multi-year pattern of cross-branch and cross-party consensus gives the impression that the legal architecture of detention has stabilized at last. But the settlement phenomenon is not limited to detention policy. The same thing has happened, albeit to a lesser extent, in other areas.

The military commission prosecution system provides a good example. When the Obama administration came into office, it seemed quite possible, indeed likely, that it would shut down the commissions system. Indeed, the new president promptly ordered all commission proceedings suspended pending a policy review. In the end, however, the administration worked with the then Democratic-controlled Congress to pursue a mend-it-don’t-end-it approach culminating in passage of the Military Commissions Act of 2009, which addressed a number of key objections to the statutory framework Congress and the Bush administration had crafted in 2006. In his National Archives address in spring 2009, moreover, President Obama also made clear that he would make use of this system in appropriate cases. He has duly done so, notwithstanding his administration’s doomed attempt to prosecute the so-called “9/11 defendants” (especially Khalid Sheikh Mohamed) in civilian courts. Difficult questions continue to surround the commissions system as to particular issues—such as the propriety of charging “material support” offenses for pre-2006 conduct—but the system as a whole is far more stable today than at any point in the past decade.

There have been strong elements of cross-party continuity between the Bush and Obama administration on an array of other counterterrorism policy questions, including the propriety of using rendition in at least some circumstances and, perhaps most notably, the legality of using lethal force not just in contexts of overt combat deployments but also in areas physically remote from the “hot battlefield.” Indeed, the Obama administration quickly outstripped the Bush

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45 See Witte, supra note 11. The fact that all of this occurred at the same time that the Obama administration has continued to call for the closure of Guantanamo is of no moment; the administration’s plan for closing Guantanamo hinged, after all, on the opening of an alternative facility within the United States, one where some amount of detention would continue to take place.


47 See, e.g., al-Maqaleh, 605 F.3d 84.


49 See supra note 42.


51 Policy changes contributing to the enhanced stability of the system include the appointment of top-tier personnel such as the current Chief Prosecutor, Brigadier General Mark Martins, as well as significant improvements in the transparency of system proceedings and filings.
administration in terms of the quantity and location of its airstrikes outside of Afghanistan, and it also greatly surpassed the Bush administration in its efforts to marshal public defenses of the legality of these actions. What’s more, the Obama administration also succeeded in fending off a lawsuit challenging the legality of the drone strike program (in the specific context of Anwar al-Awlaki, an American citizen and member of AQAP known to be on a list of approved targets for the use of deadly force in Yemen who was in fact killed in a drone strike some months later).

The point of all this is not to claim that legal disputes surrounding these counterterrorism policies have effectively ended. Far from it; a steady drumbeat of criticism persists, especially in relation to the use of lethal force via drones. But by the end of the first post-9/11 decade, this criticism no longer seemed likely to spill over in the form of disruptive judicial rulings, newly-restrictive legislation, or significant spikes in diplomatic or domestic political pressure, as had repeatedly occurred in earlier years. Years of law-conscious policy refinement—and quite possibly some degree of public fatigue or inurement when it comes to legal criticisms—had made possible an extended period of cross-branch and cross-party consensus, and this in turn left the impression that the underlying legal architecture had reached a stage of stability that was good enough for the time being.

II. FOUNDATIONS OF THE APPARENT INSTITUTIONAL SETTLEMENT (AND WHAT THEY OBSCURE)

This perception of institutional settlement is an illusion. It depends on the existence of set of stabilizing factors that have been present since 2001, but are rapidly decaying today. For years these factors have drawn our attention away from a pair of critical and wholly-unresolved legal issues that might best be described as “boundary questions.” These boundary questions, alas, are quickly becoming central to the government’s authority to detain and to kill in the name of counterterrorism.

A. What Are the Boundary Questions?

It is hard to talk sensibly about the legality of using detention or lethal force in a particular case without taking a position, explicitly or otherwise, on the relevance of LOAC to the analysis. And it is equally difficult to do so without some coherent conception of the identity of the “enemy,” at both the individual and organizational levels. Both sets of issues are critical in defining the legal boundaries of the government’s powers. Given the apparent stability of the

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53 Collectively these speeches form what Ken Anderson has called the “Canonical National Security Law Speeches of Obama Administration Senior Officials and General Counsels,” and they are collected at http://www.lawfareblog.com/2012/06/readings-the-canonical-national-security-law-speeches-of-obama-administration-senior-officials-and-general-counsels/.

legal architecture in recent years, one might suppose that both had been largely resolved. Far from it, however.

1. The Boundaries of the LOAC Model

Consider first the LOAC problem. LOAC—also known today as International Humanitarian Law (IHL) and formerly known simply as the law of war—provides an array of rules governing the permissible means and methods of armed conflict (including who may be killed and under what circumstances) and the proper treatment and disposition of persons who fall into the hands of the enemy in such circumstances (including who may be detained for the duration of hostilities without criminal charge). But once we move beyond the paradigm case of two states using their regular armed forces against one another, pinning down the precise circumstances governed by LOAC—LOAC’s “field of application”—proves to be a rather difficult task.

It is not that people disagree about the test for LOAC’s field of application, at least not when stated in abstract terms. When dealing with a situation involving a state party on one side and a non-state actor on the other, there is widespread agreement that the non-state party must possess (at least) some sufficient degree of organizational coherence, and that the violence at issue must rise to some sufficient level of intensity (taking into account factors such as the nature, scale, methods, impact, and duration of the violence). So far so good. But once we move to apply this test to a particular fact pattern, we quickly discover that the room for disagreements is substantial.

First, it is entirely unclear just where the line lies between the level of intensity at which violence remains a matter of civil disorder or criminality and the level beyond which it earns the title “armed conflict.” That is to say, there is no clear consensus as to the metrics to be used in calibrating the elements of the intensity inquiry, no number of deaths or types of weaponry that decisively and objectively tip the scales in one direction or the other. It is a holistic inquiry, with inevitable room for disagreement among reasonable persons in marginal cases. Second, even if the metrics for the test were clearer, disagreement also can arise because of uncertainty regarding which fact patterns are properly made the objects of that inquiry. Consider, from this viewpoint, the circumstances of AQAP in Yemen. The United States has repeatedly used lethal force


\[56\] See, e.g., Nils Melzer, Targeted Killing in International Law (2008) 252-61; Kenneth Anderson, Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War,” in Future Challenges in National Security and Law (Berkowitz, ed., 2011) 5-7. Monica Hakimi points out that the “test for identifying noninternational armed conflict is notoriously deficient,” but also that “[m]ost decisionmakers consider” the same factors at a high level of generality. A Functional Approach to Targeting and Detention, 110 Mich. L. Rev. 1365, 1374 (2012). This is essentially the point I seek to make in the text that follows above: the general outlines of the test appear settled, but the agreement does not extend to the granular level, let alone to the proper application and results in particular cases.
against AQAP targets—at least forty times between 2010 and August 4, 2012, according to one source,57—and AQAP has on a few occasions attempted to set off bombs on US-bound planes.58 AQAP and the Yemeni government have engaged in much more numerous exchanges of fire,59 and of course the United States, other governments, and other elements of the al Qaeda network have had their violent interactions as well. Does all of it count in assessing the intensity factor? If only part of it counts, which parts? And over what time period does the inquiry properly extend? It is not clear that these questions only admit of a single correct answer. Third, there may also be disagreement as to the underlying facts themselves: i.e., who actually carried out which actions, with what intentions or knowledge, and toward what ends and with what consequences.

Assuming that one overcomes these obstacles, a separate boundary issue involving LOAC then arises: are there geographic constraints with respect to where LOAC may apply?60 That is, if we assume the conditions for recognition of an armed conflict are satisfied in, say, Afghanistan, does it follow that LOAC applies not only in Afghanistan but also in other locations around the world, no matter how remote from Afghanistan, so long as the parties to the conflict in Afghanistan encounter one another there? The U.S. government takes the position that LOAC travels with the parties wherever they might roam.61 Others disagree. One viewpoint, for example, holds that LOAC has no application outside the geographic boundaries of the specific state in which events satisfy the threshold-of-intensity criterion; another accepts that LOAC can apply as to persons outside the borders of such a state, but only as to persons whose activities in

57 See U.S. Airstrikes in Yemen, supra note 52.
61 See, e.g., Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, “Strengthening Our Security by Adhering to Our Values and Laws” (Sep. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values.? (“An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. . . . Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the “hot” battlefields.”).
some meaningful sense tie back to the original zone of hostilities (such as by exercising remote command of operations).  

Boundary questions also emerge along the temporal dimension. That is, even if we assume that a state of armed conflict existed in connection with some particular situation of violence in some relevant location, difficult questions can arise as to precisely when that situation achieved this status and for how long thereafter that status remains in play. There is little doubt that the problem of temporal boundaries is particularly vexing in a circumstance in which the precise identity of the opponent is in question. Which leads directly to a separate set of boundary questions.

2. The Organizational Boundaries of the Enemy

Separate from the LOAC boundary issue (though not unrelated) is the question of how precisely to identify the enemy or opponent in whatever conflict (or other paradigm of interactions) is in issue. One would hardly think twice about this in a conventional state-against-state armed conflict, both because of the centrality of visible and discrete armed forces and because the domestic law instruments associated with such conflicts—declarations of war, authorizations for use of military force—typically would provide an express answer to the question. But it is a step that can prove quite complicated in the context of non-international armed conflict, particularly where the operative domestic law instruments do not actually name the enemy. More to the point, with non-state actors it may be exceedingly difficult to say which groups should be understood as jointly comprising a single entity, which are distinct yet mutually engaged in the conflict, and which might be sympathetic with or supportive of a party to the conflict without actually being a party to the conflict. Where the groups involved seek to obscure their location, membership, organizational structure, and activities, of course, all of these inquiries become more difficult.

B. Stabilizing Factors that Obfuscate the Boundary Questions

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How can it be, in light of all these two sets of boundary issues, that in recent years the legal architecture for the U.S. government's use of detention and lethal force has acquired a venire of stability? It is not because these boundary questions have been resolved, nor that they are novel. It is because certain stabilizing factors have spared us the need to focus on them.

1. Undisputed Armed Conflict in Afghanistan

Throughout the post-9/11 era—well, at least since November 2001—there has always been at least one circumstance in which it is essentially undisputed that the United States was engaged in armed conflict. Specifically, the United States has been engaged in large-scale, overt combat operations in Afghanistan at all relevant times (and for a number of years in the midst of this period was similarly engaged in Iraq). There is no serious dispute that circumstances in Afghanistan constitute armed conflict, nor that LOAC applies there as a result. This has long ensured that the U.S. government can argue with great force that it is fighting under color of LOAC at least somewhere against someone.

That would not matter to the larger debate if the use of detention and lethal force in Afghanistan had been largely a sideshow over the years, relative to activities elsewhere. But the opposite has been the case. Afghanistan has dominated perceptions of how and where the United States uses military force in relation to terrorism (though Iraq had its moment as well, of course). And this is especially true when it comes to the handful of occasions on which the government's legal theories have been put to the test in a serious and high-profile way.

One such occasion was the 2004 Supreme Court decision involving the detention of Yaser Hamdi, a man who was captured in Afghanistan and taken to Guantanamo but then brought to America after officials learned he had a plausible claim to U.S. citizenship. The Supreme Court's decision in his case played a central role in legitimating the use of military detention and confirming the relevance of LOAC as part of the governing legal architecture. To be sure, the plurality opinion was at pains to specify that it was solely addressing the facts of his case (an alleged Taliban fighter caught bearing arms with his unit on an Afghan battlefield, and held while the conflict in Afghanistan continues). Indeed, the opinion specifically anticipated the possibility that detention in other circumstances may not warrant application of the traditional legal framework for detention associated with LOAC:

If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.67

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65 542 U.S. 507.
66 See id. at 518 (specifying that the holding concerns "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured").
67 Id. at 520.
Nonetheless, the decision contributed to a larger perception that there is little need to engage with the LOAC boundary question, assisted no doubt by the fact that the Supreme Court has not taken a similar case since then—let alone one presenting a fact pattern lacking ties to Afghanistan.

The work of the lower courts in more recent years has been to similar effect. As noted above in Part I, the decisions emerging from the Guantanamo habeas process have roundly endorsed the government’s viewpoint (i.e., that the detention-facilitating rules of LOAC are applicable and are consistent with U.S. government practices). Just like Hamdi, however, these cases are very much rooted in the comparatively-easy context of Afghanistan. The overwhelming majority of Guantanamo habeas cases concern persons who were captured in Afghanistan, captured fleeing from Afghanistan, or captured in more remote locations where they allegedly were engaged in activities linked to the hostilities in Afghanistan (such as recruiting fighters to go there). And so long as U.S. forces continue to be engaged in overt combat operations in Afghanistan—so long as the condition specified by the Supreme Court in Hamdi continues to obtain—these cases are largely incapable of providing the occasion for testing the outer boundaries of the LOAC model. Even the quite distinct habeas proceedings involving American citizen Jose Padilla—an alleged al Qaeda “sleeper” agent arrested on a jet way in Chicago upon his return to the country from Pakistan—eventually turned on claims about his prior activities in relation to Afghanistan. The sole case that appeared to lack any particular ties to Afghanistan—that involving Ali Salah Kahleh al-Marri, a Qatari citizen arrested in the U.S. and then held in military detention as a suspected al Qaeda agent—made little headway one way or another with respect to the LOAC model, as the various judicial opinions it produced before he was transferred back into civilian criminal custody were badly splintered and the issues in any event were clouded by the peculiar considerations raised by the invocation of military detention authority within the United States proper.

Collectively, this multi-year run of judicial decisions has played an influential role in forming perceptions about the legality of U.S. detention policy, owing to their nearly-unique status as an adversarial and highly-public forum for contesting the government’s legal claims regarding its counterterrorism powers. Again and again, these cases have accepted the applicability of LOAC, and the subsidiary notion that detention authority exists under that rubric. This has played a central role in molding the public’s understanding of the legitimacy of those claims, not to mention impacting Congressional perceptions. Yet it has gone largely unremarked that almost all of these decisions concern the one location in which there has been no

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68 See supra Part I.
69 See Witte, supra note 11, at ch. 3.
disagreement that an armed conflict exists, the one location where the LOAC boundary issues have little significance.

2. Relative Clarity as to the Identity of the Enemy

The perception of legal stability at the close of the first post-9/11 decade also benefited mightily from a second stabilizing factor: relative clarity with respect to the identity of the enemy.

At the outset in 2001, there was no serious dispute that there existed an entity known as al Qaeda, that al Qaeda was responsible for the 9/11 attacks, and that al Qaeda was to be the central object of the use of force that was to follow.\textsuperscript{72} It was equally clear that the Afghan Taliban movement existed, that it controlled the bulk of Afghanistan’s territory, that its leadership tolerated the presence in Afghanistan of a substantial part of al Qaeda (including al Qaeda’s own senior leadership), and that, as a result, the deployment of sustained military force against al Qaeda would likely require the use of force against the Afghan Taliban as well.\textsuperscript{73} What followed was a massive, overt military intervention in Afghanistan, squarely focused on al Qaeda and the Afghan Taliban.\textsuperscript{74} This focus closely tracked the broad outlines of the AUMF Congress enacted in September of 2001 (which spoke of using force \textit{only} against the entity responsible for the 9/11 attacks and anyone harboring that entity).\textsuperscript{75} And though President Bush at the time argued publicly for a far more ambitious and expansive counterterrorism agenda—giving rise to the much-criticized formulation the “global war on terrorism,” entailing the possibility of using force against other terrorist groups of international reach even if unrelated to the 9/11 attacks\textsuperscript{76}—the pushback sparked by this broadening rhetoric if anything underscored the notion that the fight properly encompassed just al Qaeda and the Afghan Taliban.\textsuperscript{77}

Subsequent legal challenges to the use of military detention repeatedly reinforced this framing. The Supreme Court’s 2004 \textit{Hamdi} decision, as noted above, dealt with a man said to be a fighter for the Afghan Taliban.\textsuperscript{78} The government asserted that Jose Padilla was an al Qaeda agent, dispatched to the United States by the al Qaeda senior leadership.\textsuperscript{79} And in a seemingly-endless parade of post-2008 Guantanamo habeas cases, the government almost invariably alleged

\textsuperscript{72} See, \textit{e.g.}, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004), ch. 10.
\textsuperscript{73} See \textit{id.} chapters 4, 6, 8, 10.
\textsuperscript{74} See, \textit{e.g.}, Michael O’Hanlon, \textit{A Flawed Masterpiece: Assessing the Afghan Campaign}, FOREIGN AFFAIRS (May/Jun 2002).
\textsuperscript{75} See \textit{supra} note 33.
\textsuperscript{76} President George W. Bush, Address to Congress (Sep. 20, 2001), transcript available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html/ (“Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).
\textsuperscript{77} Insofar as the war in Iraq launched in 2003 would later be criticized for distracting the United States from Afghanistan, this too advanced the impression that the proper understanding of the post-9/11 conflict was that it concerned al Qaeda and the Afghan Taliban.
\textsuperscript{78} 542 U.S. 507.
\textsuperscript{79} 423 F.3d 386.
that the men were Afghan Taliban members, al Qaeda members, or in many instances both.\footnote{See Wittes, supra note 11, ch. 3.}

Very few of the Guantanamo cases involved any other organizational affiliation. The few that did, moreover, not only drew little attention but could in any event be understood as involving only minor and logical extensions of the hostilities in order to encompass manifestly distinct groups that had nonetheless openly joined in the fighting against American and allied forces on the ground in Afghanistan, such as Gulbuddin Hekmatyar’s Hezb-e Islami Gulbuddin\footnote{See Khan v. Obama, 655 F.3d 20 (D.C. Cir. 2011) (concluding in a brief discussion that HIG qualifies as an “associated force” of al Qaeda).} and the Islamic Movement of Uzbekistan.\footnote{See al Harbi v. Obama, 2010 WL 2398883 (D.D. C. May 13, 2010) (concluding that government lacked evidence linking alleged IMU member to IMU or al Qaeda). Note that the government subsequently obtained an order under Federal Rule of Civil Procedure 60(b) pursuant to which new evidence will now be considered, pending a remand of the appeal the government had filed in the interim. See Raffaela Wakeman, Checking in on the Mingazov Case, Lawfare: Hard National Security Choices (June 21, 2012), http://www.lawfareblog.com/2012/06/checking-in-on-the-mingazov-case/. For an overview of IMU’s origins and evolution, with an emphasis on the varied ways in which IMU has connected to both the Afghan Taliban and al Qaeda, see Christopher Swift, \textit{Militant Pathways: Local Radicalization and Regional Migration in Central Asia}. \textit{Combating Terrorism Center Sentinel} (Nov. 30, 2011), \url{http://www.cic.usma.edu/posts/militant-pathways-local-radicalization-and-regional-migration-in-central-asia}.}

These cases almost never presented serious questions as to the organizational boundaries of al Qaeda itself or the AUMF more broadly, as opposed to endless difficulties surrounding the alleged ties of specific persons to specific groups. The sole exception was \textit{Parhat v. Gates}, a 2008 D.C. Circuit Court of Appeals decision concluding that the government lacked sufficient proof to show that the Chinese Uighur group known as ETIM—the East Turkestan Islamic Movement—was part-and-parcel of the al Qaeda network\footnote{532 F.3d 834.}. This was the exception that proved the rule, however. Far from portending a rash of cases presenting more difficult variations on the organizational boundaries theme, \textit{Parhat} was followed by years’ worth of Guantanamo habeas cases that presented no such issues.

The relative uniformity and simplicity of the Guantanamo cases when it comes to the question of organizational boundaries is not surprising for another reason: The bulk of detainees there were captured relatively early in the post-9/11 era. They hail from a period in the life cycle of al Qaeda and the Afghan Taliban that predates most of the complexities that I will go on to describe below. The caselaw they are capable of producing is bound for the most part to reflect the simpler circumstances that prevailed early in the first post-9/11 decade. Insofar as that caselaw in turn has played an important role in constructing perceptions of legal stability, those perceptions are more than a little artificial.

\section*{III. DISRUPTIVE STRATEGIC CHANGE}
These stabilizing factors will not last. A set of long-term trends involving changes to the strategic posture of both al Qaeda and the United States will profoundly disrupt them. Indeed, that process already is well-underway. Bit by bit, this erosion is unsettling the legal foundation for the U.S. government's use of both military detention and lethal force.

A. Strategic Change and the Evolution of al Qaeda

Who is the enemy against which the United States is fighting in the second post-9/11 decade? That fundamental question has grown ever more difficult to answer in recent years, and the problem is accelerating.

There may have been a time when it would suffice to refer simply to "al Qaeda" and the Afghan Taliban in answer to this question. But this is no longer an adequate response, for two reasons. First, in Afghanistan, the reality is that U.S. forces have for years been engaged in combat with a large number of armed groups that cannot properly be considered part of either al Qaeda or the Afghan Taliban. Second, al Qaeda itself has undergone an extraordinary process of diffusion and fragmentation. One upshot is that, in a number of regions around the world, there are armed groups claiming some degree of association with what remains of al Qaeda's senior leadership. Sometimes this is a matter of an al Qaeda cell growing independent, and sometimes it is a matter of an originally-distinct entity drawing close to al Qaeda's orbit. The important point, at any rate, is that it is difficult to say which if any of these groups are best understood as part-and-parcel of al Qaeda, which are not part-and-parcel of al Qaeda yet nonetheless constitute enemies of the United States, and which are neither. Ahmed Warsame's fact pattern is a case in point. Unfortunately, such scenarios do not fit comfortably within the existing domestic legal architecture embodied in the AUMF, the NDAA FY'12, and the caselaw generated by military detainees.

1. Proliferation and Fragmentation

The proliferation of enemies is most apparent in Afghanistan and Pakistan (though it is not limited to that region, as I will explain below). The point as to proliferation in the Afghanistan-Pakistan region is not simply that it can be hard to describe the organizational boundaries of the Afghan Taliban. Even if we treat the Afghan Taliban as a unified whole (even if, that is, we lump together all commanders loyal to some degree to Mullah Mohamed Omar's Quetta Shura), the fact remains that there are many other armed groups in the field in Afghanistan that cannot fairly be described as a formal part of either the Afghan Taliban or al Qaeda, including the Haqqani Network and Gulbuddin Hekmatyar's Hezb-e Islami.⁶⁴ Each routinely uses force

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⁶⁴ See Seth G. Jones, Counterinsurgency in Afghanistan Volume 4 (RAND 2008) 37 ("The insurgency in Afghanistan included six main insurgent groups: the Taliban, Hezb-i-Islami, the Haqqani network, foreign fighters (mostly Arabs and Central Asians), tribes based in Pakistan and Afghanistan, and criminal networks."); Kimberly Dozier, AP Sources: US Mulls New Covert Raids in Pakistan, ASSOC. PRESS (June 22, 2012) (discussing conflict with the Haqqani
against U.S. and allied forces in Afghanistan (and some but not all direct force against Pakistani forces as well), and U.S. forces routinely target and detain their leaders and members in turn. Because these groups engage in extensive cooperation, it can be exceedingly difficult to parse the organizational boundaries among these groups. As an anonymous American military officer put the point in late 2010:

This is actually a syndicate of related and associated militant groups and networks . . . [t]rying to parse them, as if they have firewalls in between them, is really kind of silly. They cooperate with each other. They franchise work with each other.86

Other officials added that

the loose federation was not managed by a traditional military command-and-control system, but was more akin to a social network of relationships that rose and faded as the groups decided on ways to attack Afghan, Pakistani, American and NATO interests.87

Organizational ambiguity, from this perspective, is not so much a problem of inadequate intelligence (though that certainly could be an issue) as it is simply an organic and irreducible feature of the socio-political landscape within which these groups and networks operate.

Having said all that, the blurred organizational boundaries in the Afghanistan-Pakistan theater are not the biggest reason why the two-party, al Qaeda-Taliban conception of the enemy is problematic. The bigger problem is the fragmentation and diffusion of al Qaeda itself: it has evolved over the past decade in a manner that makes it far more difficult to speak coherently about its organizational boundaries, and the trend appears to be accelerating.88

Al Qaeda has been evolving throughout its existence.89 Born in the waning days of the anti-Soviet jihad in Afghanistan, it began as a rather underspecified collaborative project agreed

Network). Making matters more complicated still, there also are at least some groups that appear to partner with the Afghan Taliban for purposes not directly related to combat operations in the region. See, e.g., Bill Roggio, Turkish Jihadist Group Has Agreement to Train with Afghan Taliban, Long War Journal (Apr. 5, 2012) (describing training camp-focused agreement), http://www.longwarjournal.org/archives/2012/04/turkish_jihadist_lea.php.


87 Id.


to by the leaders of several existing groups and networks, including Osama bin Laden.90 A number of members were soon sworn into the new group,91 and by the time of its days based in the Sudan al Qaeda had become quite institutionalized, possessing bureaucratic structures, job descriptions, payrolls, and other accoutrements of a hierarchical organization with centralized leadership.92

Fast forward a few years to Afghanistan, and the situation was more complex. Al Qaeda now had a center of operations from which its senior leadership could act with relative impunity to recruit and train personnel in large numbers.93 Not all those trainees necessarily were best understood as part of al Qaeda; the bulk of these simply went on to fight, or assist the fighting, in places like Afghanistan, Chechnya, or Bosnia, or else simply returned to live a more peaceful life elsewhere.94 The more promising ones were offered the chance for more advanced training, however, along with more explicit ties to al Qaeda as such.95 This process gradually generated a cadre of personnel more-directly responsive to the direction and control of al Qaeda’s senior leadership.96 This in turn enabled al Qaeda to mount its own operations, as illustrated by the attack on the US embassies in Kenya and Tanzania in 1998, the bombing of the USS Cole in Yemen in 2000, and the 9/11 attacks themselves.97

Even in these years, it would be difficult to map the precise organizational boundaries of al Qaeda. Some key leaders were involved in other organizations as well,98 raising questions as to whether those organizations should be understood as independent or not. And al Qaeda had always been open to the possibility of assisting other groups in conducting operations suiting the interests of al Qaeda’s senior leadership, which further muddied the water.99 Those complications were relatively manageable circa 2001, however. At that time, it was perfectly plausible to speak of al Qaeda writ large as a discrete and identifiable organization, however much factual uncertainty there might be regarding the associational status of particular persons in relation to the group.100

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90 See Wright, supra, at 132-34.
91 See id.
93 See id.
94 See Coll, supra note 87.
97 See id.
98 See Wright, supra note 89.
99 See BRUCE RIEDEL, THE SEARCH FOR AL QAEDA: ITS LEADERSHIP, IDEOLOGY, AND FUTURE (2010). See also Daniel Byman, Breaking the Bonds Between Al-Qa'ida and Its Affiliate Organizations (Brookings 2012) 5 (“Al-Qa’ida has always been both a group with its own agenda and a facilitator of other terrorist groups. This meant that it not only carried out attacks on U.S. targets in Kenya, Tanzania, and Yemen throughout the 1990s, but it helped other jihadist groups with funding, training, and additional logistical essentials.”); Rassler. supra note 5, at 9-10.
100 The 9/11 Commission Report’s depiction of Khalid Sheikh Mohamed’s flirtations with membership provide an excellent cast study of the individual-level uncertainty that could arise in this era. See supra note 72.
Things are different today thanks to the complex ways in which al Qaeda has evolved in response to internal and external pressures. The general thrust of these changes has been to weaken the central organization relative to an emerging set of regional organizations that may share al Qaeda's brand but are not necessarily responsive to its direction and control. The combination is a recipe for uncertainty regarding just what one might mean in referring today to "al Qaeda."

Several factors drive this process of fragmentation. Most obviously, decentralization to some extent is a matter of survival in the face of intensive and sustained efforts by the United States and its allies to capture or kill the leaders and members of the core al Qaeda organization. Such efforts were underway prior to 9/11, with mixed success. The scope and impact of those efforts accelerated dramatically in late 2001, however. A host of new policies—including the invasion of Afghanistan, the use of lethal force in other locations (as demonstrated in Yemen, for example, in 2002), the expanded use of rendition (that is, capturing an individual and transferring them to the custody of another country), pressure on allies both to provide intelligence cooperation and to use their own authorities to capture and either transfer or detain suspects, and the use of both criminal prosecution and non-criminal detention—combined to incapacitate a large number of al Qaeda figures and to drive the remainder much deeper into hiding. The bulk of the leadership apparently sought haven in Pakistan, but the eventual expansion of U.S. kinetic operations to the FATA combined with an array of other efforts to locate them ultimately made it extraordinarily difficult for remaining personnel to communicate, let alone engage in training and operational planning, as illustrated by the extent to which bin Laden was isolated and the frequency with which subordinate leadership figures have been killed. The oppressive operational environment—particularly the constraints on communications that followed from the extraordinary security measures undertaken to hide the location of key leadership figures—ensured that there would be limits to the ability of al Qaeda's leaders in central Asia to stay in

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101 See Clint Watts, What If There Is No Al-Qaeda? Preparing for Future Terrorism, Foreign Policy Research Institute (July 2012), http://www.fpri.org/enotes/2012/201207watts_al-Qaeda.pdf. See also Rassler, supra note 5, at 11-12 (“On the operational front...the affiliates either did not consult with Bin Laden or were not prepared to follow his directives.... [T]he framing of an [al Qaeda central] as an organization in control of regional ‘affiliates’ reflects a conceptual construction by outsiders rather than the messy reality of insiders.”).


105 See Klaidman, supra note 1; Sanger, supra note 12. See also Rassler, supra note 5, at 1 (concluding from documents captured in Abbottabad that “Bin Laden enjoyed little control over either groups affiliated with al-Qa'ida in name... or so-called ‘fellow travelers’...”). On the penchant for al Qaeda's operational leaders to be killed, see Declan Walsh and Eric Schmitt, Drone Strike Killed No. 2 in Al Qaeda, U.S. Officials Say, N.Y. Times (June 5, 2012), http://www.nytimes.com/2012/06/06/world/asia/al-Qaeda-deputy-killed-in-drone-strike-in-pakistan.html?pagewanted=all.
touch with, let alone manage the operations of, operatives and cells located elsewhere (or even in the Afghanistan–Pakistan area).  

It is perhaps inevitable that in such circumstances cells located abroad might develop their own independent agendas, especially as they draw new members from indigenous sources. AQAP provides a case study in this aspect of fragmentation (as distinct from a separate model, discussed below, in which a regional “franchise” originates not as an al Qaeda cell but as an independent, indigenous organization).

AQAP’s story is best understood against the backdrop of operations that the core al Qaeda organization conducted in Yemen in the late 1990s. Al Qaeda by that time had developed a substantial operational capacity in its own right, and had turned its eyes to Yemen with the hope of striking an American military target in an unexpected location; the periodic visits of U.S. warships to the port of Aden provided a golden opportunity. And though an attack on the USS The Sullivans in 1999 failed, the subsequent attack on the USS Cole in 2000 did not. These attacks demonstrated al Qaeda’s capacity to operate in Yemen on an ad hoc basis. But aside from a Yemeni native named Qa’id Salim Talib Sinyan al-Harithi (who would later be killed in a U.S. drone strike), al Qaeda did not appear to maintain a sustained presence in the country in that era. As one observer put the point, the Cole attack “appears to have been more an example of opportunism than a sign of an enduring al-Qa’ida presence in Yemen.”

This began to change after the 9/11 attacks. By 2002, a group of Yemeni men who had been in Afghanistan training with al Qaeda had made it out of the region, returning to Yemen with instructions from al Qaeda to carry out additional attacks when possible. Under the leadership of a Saudi operative named Fawaz Yahya Hasan al-Rabay‘i, this newly-implanted al Qaeda cell ultimately carried out a Cole-style bombing on the French vessel MV Limburg, and then followed with a failed attempt to shoot down a helicopter with an RPG. At this point, however, the cell was crippled by a long string of arrests, resulting in the imprisonment of al-Rabay‘i and dozens of others.

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106 Al Qaeda correspondence captured during the Abbottabad raid reveals a senior leadership unable to exercise effective control over its affiliates. See Combating Terrorism Center, West Point, Letters from Abbottabad: Bin Ladin Sidelined? (2012), at 13. See also Al Qaeda 3.0, supra note 103 (“While a number of senior leaders remain alive ... their main goal appears to be primarily survival. Accordingly, the balance of power between al-Qaeda central and its affiliates has changed, with the affiliates gaining additional power and far greater strategic latitude.”); id. (describing the core of al-Qaeda as “unable to offer effective operational guidance, and weakened by the death of senior leaders”).


108 See id.


110 See id. See also Gregory D. Johnsen, Tracking Yemen’s 23 Escaped Jihadi Operatives – Part 1, 5 Terrorism Monitor (Sep. 2007).

111 See id. See also Gregory D. Johnsen, Tracking Yemen’s 23 Escaped Jihadi Operatives – Part 1, 5 Terrorism Monitor (Sep. 2007).

112 See Johnsen, supra note 111.

113 See id.
There things stood for a number of years, until a dramatic prison break—involving a tunnel dug between the prison and a nearby mosque—resulted in the escape of some two-dozen extremists, including not only al-Rabay'i but also future AQAP leaders Nasir al-Wahayshi and Qasim al-Raymi.\footnote{See id.} Within a year’s time, the escapees proclaimed the formation of a new organization known as “al Qaeda in the Land of Yemen,” which soon carried out a double-suicide bombing targeting an oil facility.\footnote{A False Foundation, supra note 109.} Many more attacks followed, some directed at Western targets in Yemen but many focused on local government officials and Yemen’s security services and military.\footnote{See id.} Over time, it became apparent that the new group was developing substantial indigenous roots, and growing ties with tribal leaders in provincial areas already resistant to central government control.\footnote{See id.} Name changes followed as well, with al Qaeda in the Land of Yemen giving way first to “al Qaeda in the Southern Arabian Peninsula” and then finally—after the addition to its leadership of two Saudis who had formerly been held at Guantanamo—it became “al Qaeda in the Arabian Peninsula,” or simply AQAP.\footnote{See id.}

Today, AQAP appears committed to a two-pronged strategy.\footnote{See Testimony by Dr. Christopher Boucek, “Terrorist Threat to the U.S. Homeland—Al-Qaeda in the Arabian Peninsula (AQAP),” House Committee on Homeland Security, Subcommittee on Counterterrorism and Intelligence (Mar. 2, 2011). See also John Brennan, Speech on U.S. Policy Toward Yemen, Council on Foreign Relations (Aug. 8, 2012), http://www.c-spanvideo.org/program/307492-1.} Most obviously, it is committed to fighting a relatively conventional insurgency against the central government in Yemen, and of late has had considerable success in taking and holding territory toward that end.\footnote{See, e.g., Bill Roggio, AQAP Kills 17 Yemeni Troops in Southern Yemen, The Long War Journal (Mar. 31, 2012), http://www.longwarjournal.org/archives/2012/03/aqap_kills_17_yemeni.php.} At the same time, however, AQAP has repeatedly demonstrated its interest in attacking American and other Western targets, both within Yemen and externally. The failed attempt by the so-called “underwear bomber” to take down a flight to Detroit on Christmas Day 2009 and the failed attempt to set off bombs on two international parcel delivery flights in 2010 both testify to this interest in external operations.\footnote{See supra note 58.}

Bearing all of this in mind, is AQAP best understood to be part-and-parcel of the original al Qaeda organization, or instead a wholly-distinct organization that simply shares historic ties, branding, goals, and enemies? AQAP is widely cited as the franchise of al Qaeda that remains most closely tied to the core leadership,\footnote{See Byman, supra note 99 (describing the current iteration of AQAP as having "close operational relations with the al-Qa’ida core").} and we do know that AQAP’s current emir—al Wahayshi—has publicly pledged bayat to Ayman al Zawahiri, the post-bin Laden leader of al Qaeda, promising “obedience in good and hard times, in ease and difficulty.”\footnote{Al Wahayshi’s statement was translated by the SITE Institute, and reported by Bill Roggio online at the Long War Journal. “AQAP Leader Pledges Oath of Allegiance to Ayman al Zawahiri,” July 26, 2011, http://www.longwarjournal.org/archives/2011/07/aqap_leader_pledges.php.} We know, too,
that Osama bin Laden at one point rejected a request by al Wahayshi to elevate the American-born cleric Anwar al-Awlaki to a more senior leadership position within AQAP. 124 On the other hand, there is little evidence of the al Qaeda senior leadership exercising detailed control over AQAP’s operational activities. 125 Absent agreement with respect to just what conditions suffice to establish that a regional group such as AQAP is part-and-parcel of the core organization, it is hard to say much more than this.

Complicating matters, there is a distinct model whereby regional groups are linked to al Qaeda. Whereas AQAP illustrates the break-away model of al Qaeda’s fragmentation, al Shabaab in Somalia is a case study of a model in which an indigenous, independent group is gradually brought into the al Qaeda orbit.

It is not that al Qaeda was a stranger to east Africa in the pre-9/11 period. On the contrary, its formative years were spent in the Sudan, and even after bin Laden shifted headquarters to Afghanistan the group maintained an operational presence robust enough to carry out the simultaneous bombing of U.S. embassies in both Kenya and Tanzania in 1998. 126 A substantial number of al Qaeda operatives remained in the region thereafter, moreover, and during the first post-9/11 decade other members have moved to the area, fleeing the pressure in Pakistan. 127 Eventually, al Qaeda attempted to invest this regional concentration of operatives with a sense of unity, applying to them the label “al Qaeda in East Africa” (“AQEA”). Yet AQAE has never acquired much in the way of organizational coherence, let alone a substantially-distinct identity ala AQAP. The interesting question in East Africa is not whether AQAE is breaking away from al Qaeda’s senior leadership, but instead whether the indigenous Somali insurgent group known as Harakat al-Shabaab al-Mujahideen (that is, the Mujahideen Youth Movement), or simply “al-Shabaab,” will merge into the al Qaeda network to a meaningful degree.

Al Shabaab originated as the youth wing of a coalition of Somali political factions and extremist groups collected under the label the Islamic Courts Union (“ICU”), which in 2006 seized control across a wide swath of southern Somalia. 128 The ICU’s power was broken that

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126 See Wright, supra note 89.


128 See Rob Wise, AQAM Futures Project Case Study Series: Al Shabaab (July 2011). See also Erin Foster-Bowser and Angelia Sanders, Civil-Military Fusion Centre Mediterranean Basin Team, Security Threats in the Sahel and Beyond: AQIM, Boko Haram and al Shabaab (April 2012), http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3818.pdf. See also Nelly Labaud, Beware of Imitators: Al-Qa’ida Through the Lens of Its Confidential Secretary: Combating Terrorism Center at West Point (June 2012), at 82-84 (drawing on translated autobiography of al Qaeda member Fadil Harun to describe the independent origins of al Shabaab and the fact that it had no ties to al Qaeda prior to 2009), http://www.ctc.usma.edu/wp-content/uploads/2012/06/CTC-Beware-of-Imitators-June2012.pdf.
same year by an Ethiopian invasion, one result of which was al Shabaab’s emergence as a fully-independent organization. In relatively short order, al Shabaab managed to retake much of southern Somalia, mounting a persistent campaign of attacks—including suicide bombings—against Somalia’s transitional government in Mogadishu and the African Union peacekeepers supporting it. Remarkably, the organization even succeeded in recruiting a number of young Somali-American men from the Minneapolis-St. Paul area—including at least one person who went on to carry out a suicide bombing. Whether its aspirations would remain wholly local became much less clear over time, however.

Attention began to focus on the question whether the group had evolved into an al Qaeda regional franchise, especially after al Shabaab pulled off a spectacular double-suicide bombing in Uganda in 2010, killing approximately 74 people including one American. The al Shabaab-al Qaeda tie proved difficult to pin down, however, for a few reasons. First, there has long been some amount of “dual-hatting” pursuant to which AQAE members have, on an individual basis, taken on important roles within al Shabaab’s leadership structure. Saleh Ali Saleh Nabhan, for example, was both an al Qaeda member associated with AQAE and a senior al Shabaab official. Second, quite apart from ad hoc integration of specific al Qaeda members into its leadership, al Shabaab has also long had a substantial number of foreign fighters within its ranks, and at least since 2008 leaders associated with these foreign fighters appear to have distinguished themselves from indigenously-focused al Shabaab leaders by publicly advocating the formal integration of al Shabaab into al Qaeda. Third, al Qaeda’s senior leaders themselves seem to

130 See id.
133 Jeffrey Gettleman and Eric Schmitt, U.S. Kills Top Qaeda Militant in Southern Somalia, N.Y. TIMES (Sep. 14, 2009) (“Mr. Nabhan was one of the handful of Qaeda terrorists hiding out in Somalia for years, taking advantage of the country’s chaos to elude agents pursuing them.... There is increasing evidence that foreign jihadists, like Mr. Nabhan, are leading Somali Shabab and training them in suicide bombs.”), http://www.nytimes.com/2009/09/15/world/africa/15raid.html. See also Bill Roggio, British Shabaab Operative Killed in Airstrike in Somalia, Long War Journal (Jan. 21, 2012) (describing drone strike against Bilal al Berjawi, and depicting al Berjawi as an al Qaeda member who had been second in command of AQAE while also functioning as a leader within al Shabaab), http://www.longwarjournal.org/archives/2012/01/british_shabaab Oper.php; Thomas Joscelyn, Detained UK Suspect Trained by Shabaab, LONG WAR JOURNAL (July 9, 2012) (discussing Fazul Abdullah Mohammed as both an AQAE leader and an al Shabaab commander), http://www.longwarjournal.org/archives/2012/07/detained uk_suspect.php.
134 See Gettleman and Schmitt, supra note 133. On the raid that killed Nabhan, see Kaidanov, supra note 1, at 122-27.
have been divided on the question of ties to al Shabaab.\textsuperscript{136} All that said, there were certainly at least a substantial amount of friendly communication underway, with AQAP leaders apparently playing an important role both as a go-between and as an advocate encouraging al Shabaab to turn its sights outward beyond its own borders.\textsuperscript{137}

The prospect of merger gained considerable ground in February 2012, when a key al Shabaab leader appeared in a video to announce al Shabaab’s formal accession to the al Qaeda network—a video that included a clip of Ayman al Zawahiri himself welcoming al Shabaab aboard.\textsuperscript{138} Whether the video truly spoke for al Shabaab as a whole—and whether the linkage in any event will involve actual subordination of al Shabaab to al Qaeda, or even the sort of cooperative relationship that may exist between AQAP and al Qaeda—remains to be see, however. The pronouncement was made by an al Shabaab figure long associated with al Shabaab’s foreign forces, and similar statements of allegiance to al Qaeda had been made in the past by that wing.\textsuperscript{139} Other al Shabaab leaders in the past have expressed reluctance to become drawn into al Qaeda’s larger global orientation, however, lest they lose focus on their ambitions for Somalia (and lest they draw unwanted attention from western security services).\textsuperscript{140} At the time of this writing, then, the most that can be said is that AQAP appears to be more closely connected to al Qaeda than is al Shabaab, but that the gap may be shrinking.

There are many other examples of al Qaeda’s fragmentation, most of them more akin to the al Shabaab model of an independent group moving into al Qaeda’s orbit to some indeterminate and unstable degree. Al Qaeda has been linked in relatively unspecified ways to a group of Islamist extremists in northern Nigeria known as Boko Haram.\textsuperscript{141} The Algerian extremist group formerly known as the Salafist Group for Call and Combat has embraced the al Qaeda brand more formally, becoming “al Qaeda in the Islamic Maghreb” or “AQIM,” and has recently seized territory in Northern Mali working in close concert with a local named group of extremists known as Ansar Dine (“Defenders of the Faith”).\textsuperscript{142} Multiple al Qaeda-linked groups have

\textsuperscript{136} Compare Rassler, supra note 5 (suggesting division), with Brian Bennett, \textit{Al Qaeda’s Yemen Branch Has Aided Somalia Militants, U.S. Says}, L.A. TIMES (July 18, 2011), http://articles.latimes.com/2011/jul/18/world/la-fg-bin-laden-somalia-20110718 (suggesting interest on the part of al Qaeda’s leadership).

\textsuperscript{137} See Bennett, supra note 136.


\textsuperscript{139} See id.


emerged in the area of the Sinai Peninsula in Egypt, including a group calling itself the Mujahideen Shura Council and another called Ansar al Jihad. Iraq famously became the home of al Qaeda in Iraq in the years following the U.S. invasion, and was famously (and foolishly) reluctant to conform its operations to the dictates of al Qaeda’s senior leadership in Pakistan in its first iteration; after nearly being eliminated a few years ago, it is now enjoying a substantial resurgence. And as the civil war in Syria unfolds, there are claims in the media regarding the presence of “al Qaeda” fighters appearing, though whether this represents an influx of al Qaeda in Iraq members, of homegrown extremists appropriating al Qaeda’s brand, something else, or mere propaganda is far from clear at this time. The point being, each of these groups may differ markedly from one another in terms of their actual degree of connection to al Qaeda itself, their interest in conducting operations targeting American or other western targets outside the confines of the state in which they usually operate, and in terms of their own organizational coherence.

Extreme decentralization receives a further nudge from certain influential theorists of jihad—most notably Abu Musab al-Suri—who advocate pushing this trend toward a radically decentralized model in which there is little or no hierarchy or connectivity amongst participants, but rather simply an inspirational vision that would lead to large numbers of individuals or small groups to form and take action on their own initiative. They would be members of a movement, one might say, but not of any particular organization. This model—familiar in the

147 Cf. Byman, supra note 99. As to that last point, note that some of these groups have internally embraced a relatively-decentralized command structure. Retired General Stanley McChrystal, who commanded JSOC from 2003 to 2008, noted this in a much-discussed 2011 article in which he commented that traditional organizational models failed to account for the decentralized network structure of al Qaeda in Iraq, which amounted to a “constellation of fighters organized not by rank but on the basis of relationships and acquaintances, reputation and fame.” Stanley A. McChrystal, It Takes a Network, FOREIGN POLICY, March/April 2011. available at http://www.foreignpolicy.com/articles/2011/02/23/it_takes_a_network?page=full.
148 See, e.g., JIM LACEY, TERRORIST’S CALL TO GLOBAL JIHAD (2008) (providing an abridged English translation of al-Suri’s Da’wat al-muqawamah al-islamiyyah al-‘alamiyyah, or “Call to Global Islamic Resistance”).
United States as the "leaderless resistance" approach, and popularized in particular by Mark Sageman as the "leaderless jihad" concept—maximizes operational security, as one cannot unravel a network after identifying one or more key nodes when there is no network.\footnote{See Aaron Y. Zelin, Free Radical, FOREIGN POLICY (Feb. 3, 2012), http://www.foreignpolicy.com/articles/2012/02/03/free_radical?page=full; MARC SAGEMAN, LEADERLESS JIHAD (2008). Of course, the model can only work if potential participants are actually exposed to information that would suffice to inspire them to action, as well as to enough expertise (regarding tactical method, creation of explosives, and so forth) to enable them to act effectively; the internet is particularly useful on this dimension, a major reason why the leaderless resistance model is more likely to find traction today than in decades past.}

Notwithstanding these pressures and theories, the drive to decentralize might have amounted to relatively little if not for the fact that there were havens to which at least some al Qaeda personnel could disperse (or remain in place, for those situations where an al Qaeda member already was present), and regions with indigenous, like-minded organizations to which ties might be established. In fact, both were available. Ungoverned areas—or, at least, areas beyond the writ of central governments—turned out to exist not only in the FATA of Pakistan, but also in a number of provinces in Yemen, in wide swaths of Somalia, and in northern Mali.\footnote{See, e.g., Stewart M. Patrick, Are 'Ungoverned' Spaces a Threat?, Council on Foreign Relations Expert Brief (Jan. 11, 2010) (arguing for a nuanced view of the problem posed by ungoverned spaces in general), http://www.cfr.org/somalia/ungoverned-spaces-threat/p21165.} Each of these areas has indigenous populations hostile to some degree to their respective central governments, inclined both theologically and politically to sympathize actively with al Qaeda, or at least to tolerate the presence of group's espousing al Qaeda's viewpoint.\footnote{See id. See also A False Foundation?, supra note 109: Dan Merica. Defense Official: U.S. Needs to 'Accelerate' Effort to Help Mali, www.cnn.com (July 26, 2012), http://www.cnn.com/2012/07/26/us/mali-terror-concerns/index.html.} And in each of these areas there is no shortage of existing armed groups. The emergence of civil war in Syria, moreover, may well be producing a similar opportunity.\footnote{See, e.g., MacFarquhar and Saad, supra note 146.}

In summary, al Qaeda has fragmented along several dimensions. Its core personnel have dispersed geographically to some extent, thus making it more difficult to determine whether a particular individual is in fact best understood to be part of al Qaeda in the first instance. At the same time, it has embraced (willfully or not) a model in which its own regional cells are increasingly independent while at the same time it seeks nominal or loose ties to already-existing independent regional actors. These groups vary widely in terms of the nature of their relationship to al Qaeda's senior leadership, making it exceedingly difficult (particularly without access to the best intelligence) to say which of these groups are best understood to be part-and-parcel of al Qaeda itself, which are independent yet allied in some meaningful fashion to al Qaeda, and which merely are in sympathetic communication with al Qaeda but are not in any real sense subject to its direction and control.

Making matters more complicated still, the original al Qaeda organization may be on the brink of complete collapse in light of the extraordinary success that the United States and its allies have had in killing or capturing its key leadership figures, combined with the body blow to its popularity al Qaeda has suffered as a result of growing public appreciation for the volume of
Muslims killed by its operations and operations conducted by its co-branded affiliates and the alternative pathway to political change in the Sunni Arab world made manifest in the Arab Spring movement and its various component revolutions. At some point, the core may well be gone altogether, in other words, leaving no “al Qaeda” to which the regional groups could be connected. Even if the core survives, however, its decline relative to the operational significance and independence of the “franchises” makes it ever less sensible—ever more dated—to view the overall situation through a core-centric lens.

2. The Legal Consequences of Proliferation and Fragmentation

There proliferation and fragmentation trends described above create a growing disconnect between the conception of the enemy embedded in the existing domestic legal architecture and the facts on the ground.

The 2001 AUMF, though framed in general terms, was relatively straightforward in terms of identifying an enemy. It encompassed al Qaeda in its reference to the organization responsible for the 9/11 attacks, and it encompassed the Afghan Taliban in its reference to those who might harbor the organization responsible for the 9/11 attacks. It said no more and no less, and thus set the stage for a two-party conception of the enemy.

President Bush himself challenged that conception early on in a speech to Congress, proclaiming that the war on terrorism would not be limited to al Qaeda but would extend to all terrorist organizations of global reach threatening America. Such a capacious understanding of the enemy was beyond what Congress had provided in the AUMF, obviously, and thus the speech raised the question whether military force against additional groups might instead by justified domestically (i.e., in terms of the separation of powers) on grounds of inherent presidential power to use force under Article II of the Constitution (either as a matter of national self-defense or on some broader theory of executive discretion to use force to further the national interest). But though subsequent rhetoric often referred to a “global war on terror” rather than

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156 See Memorandum Opinion for the Attorney General, Carline D. Krass, Principal Deputy Assistant Attorney General, Authority to Use Military Force in Libya (Apr. 1, 2011); Memorandum for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23,
a conflict with al Qaeda as such, the matter eventually began to seem rather academic, as it did not appear that the United States actually was detaining or targeting persons outside of the al Qaeda/Afghan Taliban framework.\textsuperscript{157} The emerging detention caselaw powerfully reinforced this perception, moreover, as the vast bulk of the cases involved persons said by the government to be members of al Qaeda or the Afghan Taliban.\textsuperscript{158} The fact that the Obama administration expressly invoked authority only under the AUMF further reinforced the apparent primacy of the two-party conception.\textsuperscript{159}

All of which would be fine from the domestic separation of powers perspective, except that in reaction to the proliferation and fragmentation trends described above the United States eventually did begin using force against members of other groups after all—or at least it began using force in situations which could not be reconciled with the two-party conception without encountering difficult factual questions about the precise nature of the link between a given group and al Qaeda or the Afghan Taliban. This has occurred on a widespread and sustained scale in Afghanistan itself and in Pakistan;\textsuperscript{160} it has occurred on a narrower and more-episodic scale in Yemen in relation to AQAP;\textsuperscript{161} and it may or may not have occurred from time to time in Somalia, depending on whether one thinks that episodic uses of force there have targeted al Shabaab as such or, instead, individuals linked as much or more to the core al Qaeda organization.\textsuperscript{162}

The executive branch has long argued that any such extensions remain justified from a domestic law perspective on the theory that the AUMF implicitly includes authority to use force also against any entities that emerge as co-belligerents of al Qaeda or the Afghan Taliban—a status the executive branch refers to as becoming an “associated force.”\textsuperscript{163} This approach began in the Bush administration, which built the associated forces model into its description of the boundaries of its detention authority in the course of the Guantanamo habeas litigation.\textsuperscript{164} The Obama administration has continued this approach, both in litigation and in its National Strategy for Counterterrorism.\textsuperscript{165}

\textsuperscript{157} See supra Part II. See also John B. Bellinger, III, Address to the London School of Economics, Legal Issues in the War on Terrorism (Oct. 31, 2006), at 8 (“We do not believe that we are in a legal state of war with every terrorist group everywhere in the world. Rather, the United States uses the term ‘global war on terrorism’ to mean that all countries must strongly oppose, and must fight against, terrorism in all its forms, everywhere around the globe.... We do, however, believe that we are in a legal state of armed conflict with al Qaida, for the reasons I have already described.”), http://www2.lse.ac.uk/publicEvents/pdf/20061031_JohnBellinger.pdf.

\textsuperscript{158} See supra Part I.

\textsuperscript{159} See id.

\textsuperscript{160} See supra Part III.A.

\textsuperscript{161} See id.

\textsuperscript{162} See Gettleman and Schmitt, supra note 133; Roggio, supra note 133.

\textsuperscript{163} See Chesney. supra note 31.

\textsuperscript{164} See id.

There are two problems with the associated-forces solution. The first is that some critics deny that the cobelligerency concept has application in this setting, reasoning that cobelligerency is a creature of international law applicable solely in the context of international armed conflict—a circumstance not present here.\textsuperscript{166} Whatever the merits of that criticism in the abstract, however, it became irrelevant to the domestic law separation-of-powers dispute (i.e., the fight as to whether Congress had implicitly authorized the use of force against “associated forces” or if the President might have such power through Article II in the alternative) when Congress in 2011 enacted the NDAA FY’12, and included within it language expressly embracing the executive branch’s detention-authority definition—encompassing not just al Qaeda and the Taliban, but also “associated forces.”\textsuperscript{167} It thus is no longer necessary to argue that such a concept should be read into the AUMF via cobelligerency; Congress has expressly embraced the general idea.

But what exactly counts as an associated force? This is the second problem, and not only does it remain untouched by the NDAA, it is a problem that is growing increasingly serious as the trends described above continue to unfold. Simply put, it is not clear what criteria apply to identify a group as an associated force.

International law is little help, even if we accept the relevance of the co-belligerency concept, given the distance between the organizations and networks currently at issue and the state-centric situations that gave rise to that concept in the past. Congress, for its part, missed the chance to address this issue in the NDAA, choosing to simply codify the “associated forces” concept without defining it. The habeas-derived caselaw from the past decade also has little to offer. As noted above, those cases almost invariably involve persons linked either to the Afghan Taliban or to the core al Qaeda organization (or more specifically, to the training camps and recruiting pipelines operated in the pre-9/11 period by al Qaeda). Such fact patterns spare the courts any need to grapple with the nuances presented in situations like that of Ahmed Warsame (i.e., those that are replete with uncertainty regarding various groups and their ties to al Qaeda).

Here we might add, too, a note on the impact of the sheer passage of time. In some quarters, a tipping point has been reached. Nothing captures this sense better—or more relevantly—than the blunt denunciation issued by Christopher Heyns—designated by a U.N. body to be a “special rapporteur” monitoring the practice of “extrajudicial killing”—at an ACLU-sponsored event in the summer of 2012. According to the account provided by the Guardian,

Heyns ridiculed the US suggestion that targeted UAV strikes on al-Qaida or allied groups were a legitimate response to the 9/11 attacks. "It's difficult to see how any killings carried


out in 2012 can be justified as in response to [events] in 2001," he said. "Some states seem to want to invent new laws to justify new practices." 168

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In his recent depiction of the Obama administration’s counterterrorism policies, journalist Daniel Klaidman offers the following account of the president’s appreciation for the growing legal instability. The President, he observed, was

a lawyer, and he understood that in the shadow wars, far from conventional battlefields, the United States was operating further out on the margins of the law. Ten years after 9/11, the military was taking the fight to terrorist groups that didn’t exist when Congress granted George Bush authority to go to war against al-Qaeda and the Taliban. Complicated questions about which groups and individuals were covered under the [AUMF] were left to the lawyers. Their finely grained distinctions and hair-splitting legal arguments could mean the difference between who would be killed and who would be spared. 169

That passage perfectly captures the legal impact of al Qaeda’s evolution. As it happens, it also turns our attention to a second disruptive strategic shift: that on the part of the U.S. government as it moves away from overt combat deployments and toward discrete, low-visibility uses of force.

B. Strategic Change and the U.S. Government’s Shift to Shadow War

Legal destabilization is not just a matter of al Qaeda’s evolution and consequent uncertainty as to the identity of the enemy. It also flows from a long-term shift in the U.S. government’s approach to the disposition of its own forces, a shift in strategy that Klaidman writes is “firmly in line with Obama’s approach to the war on terror: surgical and discrete.” 170 Specifically, the United States is drawing down in Afghanistan while simultaneously expanding its involvement in what might best be described as “shadow war.” The end result will be something altogether new in our experience: a formally secret yet partially-transparent set of institutions and programs engaged in the use of lethal force and other military-style counterterrorism measures on a

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169 Supra note 1, at 205. Klaidman’s book details several instances in which lawyers and officials engaged in sharp internal debates with respect to whether it would be proper to engage in strikes against targets in Somalia, sometimes turning on points of law, sometimes on points of policy, and sometimes on points of evidentiary assessment. See, e.g., id. at 49-51 (describing rejection of a proposed operation targeting both an unidentified high-value target and an al Shabaab training camp).
170 Id. at 205. See also id. at 120 (describing the CIA’s “operational capabilities” as “well suited to [Obama’s] strategic goal—taking high-ranking al-Qaeda and Taliban operatives off the battlefield while shrinking America’s footprint in the region”); id. at 121 (describing Obama and CIA Director Panetta as viewing “the drone program as a potential strategic game-changer in the war on terror”).
systematic basis (including both direct action on the part of low-visibility U.S. forces and support for operations conducted by other governments), yet wholly delinked from any contemporaneous circumstance of undisputed armed conflict. In that setting, the persistent disagreement as to when and where LOAC governs simply cannot be ignored.

1. Step One: Drawdown in Afghanistan

The United States has maintained a large-scale combat presence in Afghanistan for more than a decade, and as recently as 2009 the main focus of debate in Washington concerned the size of the troop surge that circumstances there warranted. But things are different today. No one speaks of outright victory over the Afghan Taliban and other insurgents, let alone generational commitments to achieve that end. The White House reportedly has embraced considerably more modest goals, embodied by the slogan “Afghanistan good enough.” Drawdown is no longer an abstract possibility, but a policy reality with a specific timeline. The transition of security responsibility to Afghan forces already is well on its way, with the goal of completion in 2014. In sum, large-scale U.S. involvement in the war in Afghanistan is coming to a close, much as occurred in Iraq a few years previously.

There are many reasons for this policy shift. As an initial matter, the U.S. government faces tremendous budget pressure, and likely will for many years to come. There are many reasons for this, such as the long period of recession and stagnation in the U.S. domestic economy following the collapse of the housing bubble; long-running imbalances in the federal budget; an apparent political impasse with respect to serious reform of entitlement spending; and financial and monetary instability abroad (particularly in the Eurozone). Collectively, these circumstances and others create extraordinary pressure to save money where possible, including in the defense and foreign affairs budgets. That is true of the formal recurring defense budget, and certainly as to the kinds of supplemental appropriations as were routinely needed in the past to fund operations in Afghanistan and Iraq. The public’s willingness to support expenditures in Afghanistan is being eroded, moreover, by periodic reports of wasteful expenditures there, such as a recent Inspector General’s report concluding that hundreds of millions of dollars spent on infrastructure

172 Sanger, supra note 12.
174 Hostilities in Afghanistan of course could continue or even worsen after the American drawdown, and it is possible that U.S. forces would continue to participate in more limited ways in that fighting. The important point, however, is that the reduced scale and changed nature of lingering American involvement will likely raise serious questions as to whether the United States remains party to an armed conflict there, very much akin to the questions that exist today in relation to U.S. involvement in hostilities underway in Yemen. Even if the better answer to such questions is that an armed conflict does still exist and the United States is still party to it, there is no question that the matter will be far more disputed than is currently the case.
projects not only have fueled local corruption and led to waste but may actually prove counterproductive.\textsuperscript{175}

Other factors reinforce the fiscal pressure. The American public appears increasingly weary of overseas combat deployments and attendant casualties. Public support for continuing a U.S. troop presence in Afghanistan reached an all-time low in April 2012, according to a Pew Research Center poll, with 59% of "swing voters" (constituting 23% of all registered voters) favoring withdrawal as soon as possible and even 48% of committed Romney voters taking the same view (65% of committed Obama voters took this view as well).\textsuperscript{176} Barring a catalyzing event such as a major terrorist attack on the homeland, there is no reason to expect that trend to reverse in the near term. Diplomatic factors pull in the same direction, as our allies one by one withdraw from the field in the face of their own fiscal and political constraints.\textsuperscript{177} A variety of policy considerations play their part as well. Some might argue, for example, that large-scale combat deployments are ultimately counterproductive in that the presence of U.S. forces for various reasons may give rise to more problems than it solves. Path dependency also matters here, as progress along the path to withdrawal at some point becomes irreversible in practice in the face of mounting diplomatic, financial, and domestic political costs that might follow from a reversal of course; indeed, it may be that relations with the Karzai administration and the various neighboring states upon which the United States depends for transshipment of resources simply preclude a reversal at this stage.\textsuperscript{178} And though there is talk of a continued U.S. military presence there going forward, supported by a strategic partnership agreement that loosely envisions such collaboration, remaining forces are likely to concentrate on a background role involving training and other forms of support to the Afghan government; to the extent U.S. forces do engage in direct action there in the future, it will likely involve the same low-intensity "shadow war" model discussed below.\textsuperscript{179}


\textsuperscript{177} See, e.g., James Kirkup, \textit{NATO Sets 'Irreversible' Roadmap to Withdrawing Troops from Afghanistan}, \textit{THE TELEGRAPH} (May 22, 2012) (noting French plans to withdraw by the end of 2012, and NATO plans to be shifted to a supporting role only by mid-2013, with complete withdrawal scheduled for the end of 2014).

\textsuperscript{178} It is difficult to say how much partisan political calculation also matters in this mix. It is easy to generalize, asserting that the Obama administration has something to gain vis-à-vis its base by withdrawing from Afghanistan (and avoiding large-scale deployments to any new settings), and that a potential Romney administration would have the opposite political incentives. But the reality may be more complicated. A combination of Tea Party-inspired emphasis on fiscal constraint, realist-inspired skepticism about the efficacy of large-scale deployments, and libertarian-inspired concerns about the growth of the national security state and America's role in global affairs has infused Republican politics with cross-currents that make such assessments difficult. Democrats contain multitudes as well, including advocates of armed humanitarian intervention and persons and groups committed to the welfare of Afghans who may suffer post-withdrawal (particularly Afghan women). In an era in which independent voters often hold the balance of power, moreover, it is not obvious that politicians running for national office are best served in the general election by playing to their bases. All of which suggests that political calculations will play out in idiosyncratic ways.

\textsuperscript{179} On the strategic partnership for the future, see Fact Sheet: The U.S.-Afghanistan Strategic Partnership Agreement (May 1, 2012), http://www.whitehouse.gov/the-press-office/2012/05/01/fact-sheet-us-afghanistan.
In sum, it seems unlikely that the United States will continue to engage in large-scale combat operations in Afghanistan beyond 2014. As a consequence, there will soon be no circumstance in which it is undisputed both that there is an armed conflict and that the United States is a party. This state of affairs will have significant legal consequences, but before discussing them it is important to account for a closely-related development: America’s increasing reliance on shadow war.

2. Step Two: Increased Emphasis on Shadow War

At precisely the same time that it is reducing its involvement in large-scale, overt combat operations, the United States is increasingly making use of warlike methods—including the use of lethal force and military detention—in episodic, low-intensity circumstances in which the U.S. role is meant to be secret or at least not formally acknowledged. This is what I mean by the “shadow war” model.

The shadow war approach to counterterrorism is not a novelty. On the contrary, it has roots going back at least to the early 1980s, and has been in use continually in relation to al Qaeda since the 1990s. But it is different today in three respects. It has become far more capable, thanks to robust institutionalization, resourcing, and technological progress. It has become far more central to counterterrorism strategy, thanks to the trends described above (the fragmentation of the enemy and the many pressures cutting against reliance on overt means). And it has become far more exposed to public scrutiny, thanks to the emerging climate of compelled transparency surrounding government action (including the avalanche of purposeful government leaks that help make essays like this possible in the first place).

a. A Thumbnail Sketch of the Origins of the Shadow War

The seminal moment for the shadow war model arguably occurred in 1983.189 A rash of bombings and kidnappings in Lebanon in that period presented the White House with a dilemma. The option of striking back at the responsible parties (or their state sponsors) with overt military force, such as a sustained air strike campaign, faced a host of practical, political, and diplomatic obstacles, not to mention resistance from Pentagon leadership steeped in the notion that Vietnam taught the lesson that there was no such thing as the surgical use of military force. The circumstances favored covert means, then, but whether that could include the use of deadly force generated substantial internal debate. The times did not merely follow Vietnam, after all, but also revelations in the 1970s concerning plots to kill various foreign leaders; the Ford

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administration had responded by adopting an executive order prohibiting assassination, and both Carter and Reagan had followed suit. The General Counsel of the CIA ultimately determined that the use of lethal force for counterterrorism purposes was a different kettle of fish, however, paving the way for President Reagan to issue a finding authorizing the CIA to develop a proxy force of foreign personnel capable of killing terrorism-related targets. Ultimately, the plan foundered due to the apparently-poor quality of the team the CIA recruited, but the underlying authority remained in place, as did the legal framework pursuant to which the use of lethal force against terrorism threats was conceived not to be assassination but, rather, an act of lawful self-defense.

When the emergence of al Qaeda caused terrorism concerns to spike again in the 1990s, the circumstances once more favored reliance on covert and clandestine methods (at least with respect to threats lying beyond the reach of the American criminal justice system). This pressure manifested first in the rendition program undertaken during the Clinton administration, which sought to incapacitate individual terrorists by putting them into the custody of their own governments. Then, as the threat mounted, the Clinton administration turned back to the Reagan model and authorities relating to covert lethal force. As before, the prospect generated intense disagreements, and as a result the precise extent to which covert lethal force was authorized to some extent. Initially it focused once more on the use of proxy forces, though there were hopes early on that technology—in the form of an armed drone—might at last provide the United States with the capacity to kill in denied areas without relying on proxy forces or putting its own personnel into danger

After the East African embassy bombings of 1998, the Clinton Administration broke new ground in the sense that it added an overt military track to the existing shadow war model, embodied in the launch of cruise missiles at al Qaeda-linked targets in Afghanistan and the Sudan (and in the preservation of the same launch option thereafter in the event that actionable intelligence could be obtained). This development in theory could have generated a sustained public debate with respect to what it meant to go to war against a non-state actor, and how the law of war—LOAC—ought to apply in such circumstances. But it did not. The public did not know about the shadow war elements, and the one episode of overt military force proved to be insufficient to spark such a debate; a momentary flash of lethal force compares poorly to the slow boil of military detention when it comes to generating sustained debate, it seems.

After 9/11, things changed. The overt military track was no longer a marginal part of the policy, but the elephant in the room even with the simultaneous expansion of the shadow war; the invasion of Afghanistan and the eventual creation of a long-term military detention system located under the microscope at Guantanamo for understandable reasons draw the vast bulk of attention. The expansion of “shadow war” operations against al Qaeda did draw some attention, particularly in connection with rendition and interrogation. But in the nature of things, the expansion of the shadow war was not nearly so widely appreciated or understood, at least not at
the time. Simply put, the visible and dramatic expansion of the overt military track during the first post-9/11 decade largely eclipsed the simultaneous expansion of the shadow war.

b. Why the Shadow War Is Becoming Dominant

Why is the shadow war aspect of U.S. counterterrorism policy growing again at the very moment when the overt military track is in decline? As an initial matter, as described above, the core al Qaeda organization is giving way, in fits and starts, to a set of regional actors who have no particular ties to the Afghan theater and may well have only the most formal of ties to al Qaeda’s remaining senior leadership. In practical terms, that means that U.S. counterterrorism operations increasingly will focus on places like Yemen and Somalia. At the same time, the decline of overt combat operations in Afghanistan will have the effect of converting that location too into something much more akin to what today obtains in Yemen and Somalia: a venue for shadow war operations. The pressures described above, militating against sustained combat operations, will push counterterrorism policy into the shadows in these locations. The more difficult it is politically to pursue the overt option, the more it becomes comparatively attractive to pursue covert or other secret means; if the latter are more affordable financially, and less abrasive diplomatically, so much the better.

Next, consider the centrality of technological change to all of this. As noted above, the idea of using lethal force covertly once depending on putting specific persons in harm’s way. If we were unwilling to put U.S. persons at risk, this meant that the government had to act through local proxy forces, with all the risk that entailed—including the risk of sheer inefficacy. Technological change has utterly disrupted this calculus, creating unprecedented opportunities for projecting lethal force without reliance on proxies and with relatively little risk to U.S. personnel. Specifically, advances in drone technologies—from armed unmanned aerial vehicles like the MQ-1 Predator and the MQ-9 Reaper, to an array of stealthy surveillance devices—have given the United States an unprecedented capacity to project force into areas where we have no sustained deployments of ground forces.\(^\text{181}\) Projecting force in such areas with reduced personal risk previously required reliance on alternatives such as cruise missiles or manned aircraft sorties (though the latter certainly involved personal risk if the denied area had serious air defense capabilities).\(^\text{182}\) These were not always attractive options for commanders and policymakers because of the long lag time between the decision to strike and the actual moment of impact, as well as concerns about the precision of these platforms in terms of the accuracy of the resulting attack. Manned aircraft, moreover, generally require plausible search-and-rescue capacities that might further deter their use in the first place. The extraordinary expansion of drones in terms of


\(^{182}\) See id.
both capacities and numbers from the pre-9/11 period to the present has a game-changing impact on what can be accomplished on the shadow war track (though it is true, to be sure, that drones are far more effective insofar as they rest on a foundation of intelligence-collection that may require a substantial amount of human intelligence (HUMINT)). The days of depending on long-range Tomahawk missile strikes to carry out lethal operations seem impossibly distant—and impossibly constraining, comparatively speaking.

Another key enabling factor is the extent to which the shadow war model has been institutionalized and thereby entrenched. An array of developments within both the military and intelligence communities have created a sustainable and rather-impressive capacity for conducting a broad spectrum of covert and clandestine operations for counterterrorism purposes. They include a vast expansion of the authorities, budget, manpower, and other resources of Joint Special Operations Command (JSOC), as well as corresponding changes within the CIA (including, for example, a sweeping conversion of the workforce into targeting-related roles and the acquisition of a veritable drone air force). It also includes a remarkable amount of cooperation between the military and the CIA, both in the field and at the back-office level; in some contexts it may be more accurate to speak of JSOC and CIA capacities collectively rather than as wholly independent institutions.

The institutionalization of shadow war capacity also has a proxy-force dimension, albeit one with complicated legal implications. The larger special operations community beyond JSOC participates in a wide array of missions around the world, including especially Foreign Internal Defense ("FID") missions, the essence of which is to provide support to host-state security forces which in turn play the front-line role in attempting to suppress insurgents and other armed groups in their territory. Such missions of course have a force-multiplying effect for the host state.

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184 See Chesney, supra note 180.

itself, but they also can play an important role in advancing the U.S. government’s own counterterrorism efforts, eliminating the need for more overt forms of intervention that might otherwise arise; by definition, the U.S. role in such missions does not entail direct application of lethal force nor U.S.-administered detention. The role of special operations forces in the Philippines, assisting government forces in suppressing the al Qaeda-linked Abu Sayyaf movement, provides a good illustration.\textsuperscript{186} From that perspective, the proxy model if anything appears to be a still-more-discreet alternative to the direct-action focus of the shadow war described above, one that would tend to avoid legal difficulties from a U.S. perspective. The proxy model can also be viewed as part-and-parcel of the shadow war framework, however, insofar as support-oriented missions happen to provide unique opportunities for intelligence collection, building of relationships, access to airports or other facilities, and forward positioning of personnel and equipment that might later be useful for other, more direct, forms of intervention. Recent news accounts of FID or FID-like missions possibly underway in Africa allegedly illustrate this.\textsuperscript{187}

The upshot of all this is an extraordinary expansion in the practical capacity of the U.S. government to use lethal force or carry out captures in denied or otherwise-sensitive locations (whether directly or through the agency of other governments or proxy forces) without having to commit to overt, large-footprint military campaigns that would readily be categorized as armed conflict.\textsuperscript{188} All of which might well go largely unnoticed and hence unanalyzed if the shadow


\textsuperscript{186} For a brief overview, see the primer on Joint Special Operations Task Force – Philippines (JSOTF-P) provided by the website Global Security: http://www.globalsecurity.org/military/agency/dod/isonf-p.htm.


\textsuperscript{188} On the role of foreign government forces acting with substantial U.S. support as an element of shadow war, see Craig Whitlock, U.S. Intensifies Its Proxy Fight Against al-Shabab in Somalia, WASH. POST (Nov. 24,
war model actually entailed a reliable degree of secrecy. But of course it doesn't. Though some operations may remain secret, it will never be clear in advance which ones will manage to run the gauntlet of purposeful leaks, unintentional disclosures, professional investigative reporting, and other means by which many if not most aspects of U.S. government counterterrorism activities end up in the public record these days. In most cases, officials would do well to proceed on the assumption that the shadows in which they operate are neither particularly dark nor sustainable over time.

3. The Legal Consequences of the Shift to Shadow War

The drawdown in Afghanistan, combined with the expansion of the shadow war model, ensures that the legal architecture of counterterrorism will be far more contested—and hence unstable—going forward than it was during the first post-9/11 decade. When U.S. involvement in overt armed conflict in Afghanistan comes to an end, so too will the other key stabilizing factor identified in Part II: the existence of at least one location as to which LOAC indisputably applies, and as to which many cases could be linked.\(^{189}\) The fact patterns that will matter most in the future—i.e., the instances in which the U.S. government will be most likely to wish to use lethal force or military detention—will instead increasingly be rooted in other locations, such as Yemen and Somalia.

It does not follow that LOAC accordingly will be irrelevant to future instances of detention or lethal force. To the extent that the government continues to invoke LOAC, its arguments will be more or less persuasive from case to case. In some contexts, for example, the government can make relatively-conventional arguments to the effect that the level of violence in a given state has risen to a level constituting a non-international armed conflict, quite apart from whether there also exists a borderless armed conflict with al Qaeda or its successors. Where that is the case, and where the level of U.S. participation in those hostilities warrants the conclusion that it is a

\(^{189}\) No one argues today that the United States is still engaged in armed conflict governed by LOAC in Iraq, after all, and Afghanistan seems destined to follow a similar path (albeit one in which the host-state government is relatively less secure and capable).

\[\text{2011}, \text{http://www.washingtonpost.com/world/national-security/us-intensifies-its-proxy-fight-against-al-shabab-in-somalia/2011/11/21/gIQAVLyNlN_story.html. While the CIA is not currently engaged directly in long-term detention as was the case during the Bush administration, this could change going forward. No statute forbids it; the current prohibition stems merely from an executive order issued by President Obama at the outset of his presidency. In the meantime, it is worth noting reports that the CIA remains involved in what some might described as proxy detention via rendition to cooperative local security services. See, e.g., Eli Lake, Somalia's Prisons: The War on Terror's Latest Front, THE DAILY BEAST (June 27, 2012), http://www.thedailybeast.com/articles/2012/06/27/somalia-s-prisons-the-war-on-terror-s-latest-front.html; Jeremy Seaborn, The CIA's Secret Sites in Somalia, THE NATION (July 12, 2011). Finally, note that counterterrorism involving al Qaeda and its successors is not the only context in which the shadow war model may prove appealing; Israel and Iran already engage in what very much appears to be shadow war, and it is possible that U.S. involvement in that setting could become more direct over time. Cf. Scott Shane, Adversaries of Iran Said to Be Stepping Up Covert Actions, N.Y. TIMES (Jan. 13, 2012), http://www.nytimes.com/2012/01/12/world/middleeast/iran-adversaries-of-iran-said-to-be-stepping-up-covert-actions.html?pagewanted=all.}\]
party to such a conflict, LOAC arguments may prove persuasive after all. Yemen currently provides a good example of an area ripe for such an analysis.\footnote{See, e.g., Jens David Ohlin, *How to Count Armed Conflicts*, LieberCode (July 27, 2012), http://www.liebercode.org/2012/07/how-to-count-armed-conflicts.html.}

But even in those cases, the very nature of the shadow war approach is such that there can be no guarantees that such arguments will be accepted, certainly not as was the case during the first post-9/11 decade vis-à-vis Afghanistan. And since not all shadow war contexts will match Yemen in terms of supporting such a conventional analysis, attempts to invoke LOAC in some cases will have to stand or fall instead on the far-broader argument that the United States is engaged in a borderless armed conflict governed by LOAC wherever the parties may be found.

The borderless-conflict position at first blush appears nicely entrenched in the status quo legal architecture. It is supported, after all, by a substantial degree of cross-party consensus (it was endorsed most recently in a series of speeches by Obama administration officials).\footnote{See Anderson, supra note 53.} But it has always been fiercely disputed, including by the ICRC and many of America’s allies. That dispute was not so much resolved over the past decade as persistently avoided; the caselaw of that era almost always involved persons who could be linked in some way back to the undisputed combat zone of Afghanistan. Thanks to the U.S. government’s shift toward shadow war, however, this will not be the situation going forward when new cases arise, as they are sure to do.\footnote{See Part IV. infra. See also Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012) (describing internal administration process for vetting drone strike decisions, emphasizing focus on Yemen and Somalia), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all.}

Making matters worse, the U.S. government’s position on the relevance of LOAC to its use of detention and lethal force may become harder to maintain going forward even without a drawdown in Afghanistan. The reason why has to do with the decline and fragmentation of al Qaeda. The borderless-conflict position does require, after all, identifiable parties on both sides. Even if one accepts that the United States and al Qaeda are engaged in a borderless armed conflict, in other words, organizational ambiguity of the sort described above will increasingly call into question whether specific cases are sufficiently linked to that conflict (or to any other that might be said to exist with respect to specific al Qaeda-linked groups, such as AQAP). Again Warsame’s situation provides a useful illustration, or perhaps more accurately, a cautionary tale.

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Though widely perceived at the time as a period of great legal controversy and uncertainty, the first post-9/11 decade will in retrospect be perceived as a comparatively simple state of affairs during which it was largely undisputed that LOAC applied somewhere and that the central objects of the U.S. government’s use of detention and lethal force were entities one could
coherently describe as al Qaeda and the Afghan Taliban. But that period is ending, and it may be that the second post-9/11 decade will witness far more serious legal disputes as a result.

IV. SHIFTING THE LEGAL FRAMEWORK ONTO FIRMER FOOTING

What if anything ought to be done in response to this looming legal instability? One possibility is to avoid the difficulty altogether by changing policy. That is, the government could abandon the use of military detention (at least in its long-term form) and limit the use of lethal force to circumstances compatible with a human rights law framework (i.e., circumstances involving a strictly imminent threat to human life with no plausible prospect for arrest). Whatever the merits of such a change, however, there is no serious prospect that the U.S. government will pursue it anytime in the near future, and hence I will not explore it further in the few pages that remain below.

At the opposite extreme, the government could instead do nothing additional in response to these issues.\textsuperscript{193} That is, it might carry on with its current approach to detention and lethal force (or even expand their use), reasoning that it will be able to ride out the increasing legal friction described above without encountering resistance of a kind that actually upends policy or practice. Those hopes would likely be dashed, however. I explain why below, and then conclude with a brief discussion of proactive, realistic steps that might be taken instead.

A. The Coming Wave of Judicial Intervention

The government will not be able to simply ride out the legal friction generated by the fragmentation of al Qaeda and the shift toward shadow war. Those trends do not merely shift unsettled questions of substantive law to the forefront of the debate. They also greatly increase the prospects for a new round of judicial intervention focusing on those substantive questions.

1. Military Detention

Consider military detention first. Fresh judicial intervention regarding the substantive law of detention is a virtual certainty. It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held.

a. Existing Guantanamo Detainees

Most of the existing Guantanamo detainees have already had a shot at habeas relief, and many lost on both the facts and the law. But some of them can and will pursue a second shot,

\textsuperscript{193} See Anderson, supra note 53.
should changing conditions call into question the legal foundation for the earlier ruling against them.\textsuperscript{194} Which is where the disruptive trends described above come into play.

The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan, as did the Supreme Court’s 2004 decision in \textit{Hamdi}. Indeed, Justice O’Connor in \textit{Hamdi} was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel.\textsuperscript{195} The declining U.S. role in combat operations in Afghanistan goes directly to that point.

This will open the door to a second wave of Guantanamo litigation, with detainees arguing that neither LOAC nor the relevant statutory authorities continue to apply. This may or may not succeed on the merits. Passage of the NDAA FY’12 at first blush would seem to be a substantial obstacle for the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and “associated forces,”\textsuperscript{196} thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in \textit{Hamdi} itself). But it is not quite so simple. The NDAA in the same section goes on to relink the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely “pending disposition under the law of war.” And though long-term military detention is then listed as a possible disposition option, the statute specifically defines this authority as “[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF].”\textsuperscript{197}

A court confronted with this language might interpret it in a manner consistent with the government’s borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The repeated references to the “law of war” in the statute—i.e., to LOAC—might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown, the results of which might then be read back into the NDAA. I am not saying this is the likely outcome, nor that any such analysis necessarily would reject the government’s borderless-conflict position. I am saying no more and no less than that judges eventually will decide these matters without real guidance from Congress (unless Congress clarifies its intentions in the interim). Note, too, that any such judicial interpretations may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation would cast a long shadow over any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including targeting measures).

Regardless of what occurs in Afghanistan, moreover, the existing Guantanamo population might also find occasion to come back to court should the decline of the core al Qaeda

\textsuperscript{194} An early indication of the next wave appeared in the summer of 2012, when a dispute emerged as to whether detainees who had lost their habeas challenges should have continuing access to counsel. Implicit in the dispute was the idea that such access sooner or later would be needed in order to mount a fresh habeas challenge.

\textsuperscript{195} 542 U.S. at 520.

\textsuperscript{196} Sec. 1021(a), (b).

\textsuperscript{197} Sec. 1021(a), (c)(1).
organization continue to the point where it can be plausibly described as defunct. In such a case, it is likely that at least some current al Qaeda detainees will revive their habeas petitions in order to contend that the demise of the organization means also the demise of detention authority over members of the defunct group. This argument will be particularly likely to come from those held on the ground of membership in al Qaeda who have not also been shown by the government to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct were some of its members to be set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various “franchises,” like AQAP or al Shabaab, suffices to preserve detention authority over al Qaeda members. That is, such a challenge could lead a judge to weigh in on the organizational boundary question.

b. New Detainees

The existing Guantanamo detainees are not the only ones who might draw the attention of judges to the increasingly difficult LOAC and organizational boundary issues. New detainees might do so as well.

As the Warsame situation illustrated, the Obama administration remains loathe to bring new detainees into military custody at Guantanamo. But its hand could be forced, should Congress further extend its growing array of statutory constraints against bringing certain individuals within the United States for purposes of criminal trial, foreclosing the disposition option ultimately employed with Warsame. A Romney administration, meanwhile, almost certainly would not be so reluctant to make use of Guantanamo in the event that it encounters a Warsame-like scenario outside of Afghanistan. In any event, should any new detainees be taken to Guantanamo they will automatically have access to judicial review in accordance with Boumediene. And in light of the trends described above, it seems quite likely that such review would turn in no small part on LOAC and organizational boundary issues.

Might detainees be taken elsewhere besides Guantanamo (or U.S. territory proper), where habeas jurisdiction is not yet established? The only other detention facility currently associated with U.S. forces overseas is the Detention Facility in Parwan, Afghanistan (“DFIP”). But the DFIP is no alternative to Guantanamo, at least not for persons captured outside of Afghanistan. First, though it appears a small number of detainees were imported into Afghanistan from elsewhere relatively early on in the first post-9/11 decade, officials more recently have made clear that the Afghan government has long since forbidden the practice. Second, the United States in any event has agreed to transfer control of the DFIP to the Government of Afghanistan. And though there is lingering debate as to the functional extent of this transfer,

that debate will not likely survive the completion of the drawdown in Afghanistan any more than the identical debate survived completion of the drawdown a few years before in Iraq.\footnote{Cf. Robert M. Chesney, Iraq and the Military Detention Debate, 51 VA. J. INT’L L. 549 (2011).}

Even if the DFIP did remain available, or if some other facility somehow could be brought online abroad, placing new detainees there (other than persons captured and held in Afghanistan while conflict there continues) would almost certainly precipitate an extension of *Boumediene*, resulting in judicial review in any event. True, the D.C. Circuit Court of Appeals in *al Maqaleh v. Gates* rejected an attempt to invoke habeas jurisdiction by a group of DFIP detainees who had been captured abroad and brought into Afghanistan years ago.\footnote{See id. It is also worth noting that on remand in the *al Maqaleh* litigation, the district court has expressed specific concern about the impact of the looming drawdown on the jurisdictional question. See Wells Bennet, Read-Out from Motions Hearing in Al-Maqaileh and Hamidullah, Lawfare: Hard National Security Choices (July 16, 2012), http://www.lawfareblog.com/2012/07/read-out-from-motions-hearing-in-al-maqaileh-and-hamidullah/.} The court was careful in its opinion to emphasize, however, that those transfers occurred prior to *Boumediene* and that there was no other basis for believing the transfers reflected an attempt to avoid habeas jurisdiction.\footnote{The possibility of proxy detention raises an additional set of complications. The idea here is that the United States might prefer, for these and other reasons, to persuade other states to take custody of individuals rather than holding the persons ourselves. A U.S. citizen allegedly held in proxy detention has previously succeeded in convincing a court to entertain a habeas petition. The more interesting question, though, is whether non-citizens could combine that approach with *Boumediene* in order to reach the same outcome. Such cases would of course face tremendously difficult evidentiary hurdles, but it would be a mistake to assume courts would outright refuse to consider them, particularly if the context is one of pure shadow war rather than, say, conventional conflict in Afghanistan.}


2. Lethal Force

Lethal force is a different kettle of fish when it comes to the possibility of judicial review. In theory, courts could become involved in assessing the legality of the use of lethal force in the counterterrorism setting in one of two ways. First, there could be a criminal investigation resulting in a civilian prosecution or a court-martial proceeding turning on the legality of a particular use of force. Incidents in Iraq and Afghanistan involving members of the armed forces and private contractors illustrate how this can occur from time to time, as individuals are prosecuted for allegedly killing civilians or prisoners.\footnote{See *al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).} The typical case of this kind, however, never turns on or otherwise raises questions regarding the relevance of LOAC or the organizational boundaries of the enemy. And there is no prospect that criminal investigators and prosecutors in the United States, whether civilian or military, will take steps to change that by...
opening an investigation into, say, drone strikes in Yemen. If American courts ever do become involved, then, it will be pursuant to the second possibility: civil litigation.

The American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) attempted in 2010 to persuade a federal court to intervene prospectively with respect to Anwar al-Awlaki, an American citizen and member of AQAP who had become notorious for his role in encouraging others to carry out attacks on the United States. Media reports indicated that the government had tried unsuccessfully on a few occasions to kill al-Awlaki in Yemen through drone strikes, and that al-Awlaki had been placed on a specific list of persons as to whom lethal force was pre-authorized.205 On behalf of al-Awlaki’s father, the ACLU and CCR filed a civil suit seeking declaratory and injunctive relief, arguing that killing al-Awlaki without judicial process “far from any field of armed conflict” and without the presence of exigent circumstances involving a strictly imminent threat to life would violate both international law and the Constitution.206

Ultimately, the district court dismissed the suit, on two primary grounds.207 First, he concluded that al-Awlaki’s father had no standing to act on his behalf in this ex ante setting.208 Second, he concluded that the issues presented constituted political question as to which courts should not exercise jurisdiction.209 He also nodded favorably in the direction of a third argument—that the state secrets privilege ultimately would preclude litigation of the claims—without actually relying upon it.210

The ACLU and CCR did not appeal, perhaps mindful that doing so might simply result in a more authoritative and influential but equally hostile ruling from the Court of Appeals. And so the issue appeared to come to rest, with no realistic prospect that judges would ever engage the LOAC and organizational boundary issues in a use-of-force setting. It would not be prudent, however, to assume that this was the last word.

In July 2012, the ACLU and CCR filed a new suit, this time in the form of a wrongful death action in the wake of drone strikes that killed al-Awlaki, his teenage son, and another American citizen involved in AQAP, Samir Khan.211 The standing issue is no longer a serious obstacle in light of the relatively-clear capacity of the relatives to act in this wrongful death-style setting, thus removing one lynchpin of the earlier ruling. The political question and state-secrets obstacles remain as before, though, and hence the prospects for the suit making it to the merits are not strong. But pause to consider what effect might follow from increasing awareness of the destabilizing trends described above in Part III, including both the uncertainties associated with


208 Id.

209 Id.

210 Id.

the organizational boundaries of the enemy and the larger embrace of the shadow war model. These developments do not in any direct way undermine the doctrinal foundations of the political question analysis in the prior suit, nor do they chip away at the state-secrets considerations lurking as the next obstacle for the plaintiffs. And yet. It is not that difficult to imagine that when these issues eventually come before the Court of Appeals or the Supreme Court several years from now, the unfolding of these strategic trends will have had a sufficiently unsettling impact so as to give considerable pause to some judges or justices, potentially enough to tip the scales against continued application of those threshold avoidance doctrines.\textsuperscript{212}

That is, of course, a speculative leap of some distance. But it would be foolish to dismiss the prospect out of hand; similar skepticism once surrounded the efforts of Guantanamo detainees to establish habeas jurisdiction, after all. As our progress toward the shadow war model progresses, it takes us ever farther from the paradigmatic conventional-war model with which maximized judicial deference traditionally has been associated. Insofar as courts grow increasingly attracted to the notion that the legal framework for targeting can and should be closely linked to that for detention, moreover, the existing judicial beachheads relating to the latter could have the effect of making a breakout into targeting jurisdiction conceptually less shocking and implausible.

B. Options for Refining the Legal Architecture

Are there realistic yet useful steps the government could take now, bearing in mind both the legal instability described above and the likelihood that those issues will be litigated? Or would it be wiser to simply stay the course, while continuing to defend the legal merits of current policy through public statements and preparing to do the same if and when litigation requires it?

The Obama administration has been focused on the latter approach. Building on the precedent of public engagement set by State Department Legal Adviser John Bellinger during the Bush administration’s second term,\textsuperscript{213} it has been commendably active in dispatching senior officials to give public speeches defending the legality of its detention and lethal force practices, with at least some emphasis on the elements of geographic and organizational uncertainty described above.\textsuperscript{214} The Obama administration has resisted, in contrast, taking affirmative steps to alter the legal status quo in a direction that might reduce that uncertainty.

To be sure, it did ultimately sign into law the NDAA FY’12, but it did so quite reluctantly insofar as its detention-related measures were concerned. And its reluctance was directly connected to a mistaken sense that the legal architecture had reached a point of stable

\textsuperscript{212} Note, too, that efforts to stop or constrain drone strikes via litigation will not be confined to U.S. courts. See Adam Entous, Evan Perez, and Siobhan Gorman, \textit{Drone Program Attacked by Human-Rights Groups}, WALL. ST. J. (Dec. 9, 2011) (describing plans by human-rights groups to mount "a broad-based campaign that will include legal challenges in courts in Pakistan, Europe and the U.S.").


\textsuperscript{214} See Anderson, \textit{supra} note 56.
equilibrium already. The evidence for this can be found in a Statement of Administration Policy ("SAP") the White House issued in late 2011 while the bill was still pending. Writing with reference to the bill’s detention-related provisions, the SAP stated:

Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. After a decade of settled jurisprudence on detention authority, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.\textsuperscript{215}

The SAP quite properly observes that affirmative steps to alter the status quo carry risks in the nature of unintended consequences (not coincidentally the NDAA FY’12 was in fact stuffed with problematic collateral measures designed to micromanage and constrain the president’s ability to make decisions regarding the disposition of military detainees).\textsuperscript{216} That is a point well-taken, raising the question of whether there is enough to be gained by change to offset such risks. The SAP’s negative answer, alas, depended explicitly on the assumption that the relevant law already has been "settled" thanks to years of detention caselaw and that there was thus nothing to be gained by revisiting the issue in legislation. This is, however, precisely the settlement that is being unraveled by the ongoing fragmentation of al Qaeda, the drawdown in Afghanistan, and the shift toward shadow war.

As we have seen, the NDAA FY’12 in the end did become law, yet did little to amend the legal architecture for detention (let alone for lethal force) to account for looming instability. Could more have been done? I close with a handful of preliminary suggestions, in hopes of informing further debate.\textsuperscript{217}


\textsuperscript{216} See also Spencer Ackerman, Pentagon Isn’t Hot for New Law to Bless Al-Qaeda War, WIRED (Mar. 17, 2011) (reporting that the administration was generally fearful of Congress imposing constraints on its discretion to "use nonmilitary means of confronting al-Qaeda"). http://www.wired.com/dangerroom/2011/03/pentagon-isnt-hot-for-a-new-law-blessing-al-qaeda-war/. Ackerman observed at the time that one cost of this approach was to increase the vulnerability of the detention legal architecture in light of al Qaeda’s evolution and the passage of time. See id. (citing, inter alia, similar concerns expressed by Rep. Mac Thornberry).

\textsuperscript{217} A truly complete answer to that question of course calls for a very broad discussion indeed, one that begins from a well-grounds sense of the strategic goals the United States seeks to advance in its counterterrorism policy, the relation of that policy to other and perhaps larger strategic aims, and so forth. This essay is not the place for such a discussion, however. My narrow aim in the concluding pages instead is outline a handful of steps specifically-responsive to the disruptions described above, in hopes of fueling a larger and more sustained debate, building on earlier contributions by authors including Jennifer Daskal, see supra note 60, Kenneth Anderson, see supra note 56, Benjamin Wittes, see DETENTION AND DENIAL (2011), and Philip Zelikow, see Codes of Conduct for a Twilight War, 49 HOU. L. REV. 1, 44-50 (2012).
1. Clarifying the Enemy

There are two legal dimensions to the problem of increasing organizational uncertainty: disagreement as to the boundaries of al Qaeda as such, and disagreement as to whether the use of force or detention in any event should extend to other groups. The NDAA FY'12 did nothing to address the first issue, as it made no attempt to define al Qaeda. As to the second issue, the NDAA did formally recognize a category of “associated forces,” but it did not actually define that phrase and hence did nothing to advance understanding of its content. The Obama administration, for its part, has indicated that we may flesh out the “associated force” concept by reference to the international law concept of co-belligerency. Unfortunately, this approach on close inspection does not actually yield particularly helpful yardsticks when mapped onto the context of clandestine non-state actors. Nor does it speak at all to the initial question of how to determine whether a particular group is part-and-parcel of al Qaeda to begin with, bearing in mind the fragmentation trend. And it also will be of little use if and when we reach the point that al Qaeda itself can be said to be effectively destroyed, thus removing the predicate for a co-belligerency type of analysis.

More could be done. First, with respect to the problem of al Qaeda's increasingly uncertain organizational boundaries: Congress could specify a statutory standard which the executive branch could then bring to bear in light of the latest intelligence, with frequent reporting to Congress as to the results of its determinations. The trick, of course, is in specifying the proper standard. A functional test turning on whether al Qaeda’s senior leadership in fact exercises direction-and-control over another group’s activities, at least at a high-level of generality? A formal test turning on whether the other group has formally proclaimed obedience to al Qaeda’s senior leadership? It may be that the best approach is to specify both tests, as alternative sufficient conditions. In any event, periodic decisions by the executive branch regarding the application of these tests to particular groups should then be reported in timely fashion to Congress (something the NDAA FY'12 already requires vis-a-vis “associated forces” determinations), along with both detailed classified explanations of the underlying analysis and a corresponding unclassified statement informing the public of the determination and as much of the underlying rationale as is consistent with proper protection of sources and methods.

Second, with respect to the problem of identifying separate organizations (beyond al Qaeda) against whom force or detention might be directed: Congress could abandon the “associated forces” concept altogether in favor of an alternative approach. It could, for example, explicitly name the additional entities against which force is being authorized,\(^\text{218}\) much as the NDAA FY’12 itself actually names al Qaeda and the Afghan Taliban. This has the virtue of maximum clarity and hence improved democratic accountability. It also has the virtue of not artificially attempting to tie all threats back to al Qaeda, the AUFM, and the ever-receding 9/11 attacks.

\(^{218}\) Note, in this respect, that there are some who question the need to take such steps in relation to every entity that may emerge as having ties to al Qaeda. See, e.g., John Mueller, Why Al Qaeda May Never Die, THE NATIONAL INTEREST (May 1, 2012), http://nationalinterest.org/blog/the-skeptics/why-al-qaeda-may-never-die-6873.
themselves. Of course, some might object to this approach, on the ground that fast-paced changes in the field could require Congress to repeatedly return to the task of making such designations, possibly at the cost of slowing or disrupting the executive branch's willingness to act in the interim. One might respond, however, that the executive branch may always fall back on its inherent Article II authority to act in self-defense of the nation when circumstances truly warrant it, at least when it comes to the use of force, and that if instead the matter is a question of long-term detention authority then there will be, by definition, ample time for Congress to act after all. 219

2. Sidestepping the LOAC Dilemma

Can Congress also make a useful contribution in terms of increasing uncertainty regarding the relevance of LOAC? This is a more complicated matter.

The answer is probably no if we are speaking of Congress literally overriding the field-of-application debate by simply asserting that LOAC by its own terms applies across the board in the shadow war context. It is doubtful that a federal court in some future habeas case or other proceeding would feel bound by such a determination (and it certainly would do nothing to quell criticisms from allies and others who take a more restrictive view of LOAC's field of application). That said, there are other ways in which Congress might usefully speak to LOAC-related questions.

Congress could require, as a matter of domestic law, that all relevant uses of force or military detention be subjected to LOAC rules, even if LOAC is not applicable of its own force, and could clarify that it intends to authorize all actions that can be taken compatible with that rubric. This would substantially reduce, if not eliminate, the possibility that a judge at some point would conclude that detention or lethal force was not authorized in a given context solely on the ground that LOAC's field of application test was not satisfied after all. And in the course of doing so, Congress might specifically state that the resulting availability of detention authority does not depend on the continuation of U.S. involvement in conflict in Afghanistan, but rather depends on the continuing existence of hostilities between the United States and the statutorily-identified group as to which a given detainee is linked. 220

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219 Article II arguably confers on the president at least some degree of authority to use lethal force in limited circumstances as a matter of self-defense, even absent conditions of armed conflict formally triggering LOAC. See Kenneth Anderson, Targeted Killing in U.S. Counterterrorism Strategy and Law, http://www.brookings.edu/research/papers/2009/05/11-counterterrorism-anderson. Indeed, it is possible that on some occasions drone strikes may have been quietly predicated on such a theory. Cf. Becker and Shane, supra note 192 (reporting that the internal debate over whether it would be proper to target the leader of Tehrik-i-Taliban (the Pakistani Taliban) ended after a determination that he posed a threat to American personnel in Pakistan). The much harder question is whether Article II self-defense authority can also be cited as the foundation for employing military detention, particularly for detention lasting a long period of time.

Of course, none of that would appeal at all to those who object to the U.S. government's existing practice of claiming LOAC authority to justify detention or lethal force beyond the political borders of specific areas of high-intensity conflict such as Afghanistan; on the contrary, those critics would surely object fiercely, no doubt arguing that such actions by Congress would place the United States in violation of international law. One might reply that the uncertain status quo actually is worse, in that it arguably incentivizes reliance on rendition, detention by other governments, and the use of lethal force in lieu of detention.\footnote{Klaidman, supra note 1. See also Becker and Shane, supra note 192 (describing Congressional concerns along these lines, and also noting the preservation of the rendition option during the Obama administration). Cf. Wittes, supra note 217.} One might add, moreover, that resistance to application of LOAC norms, if successful, will not automatically produce a situation in which the U.S. government accepts that its actions instead are subject to international human rights law instruments such as the International Covenant on Civil and Political Rights ("ICCPR"). The U.S. government currently takes the position that the ICCPR does not apply outside U.S. sovereign territory, after all.\footnote{See, e.g., John Bellinger, Administration Submits ICCPR Report, Puts on Extraterritorial Application, Lawfare (Jan. 19, 2012) (discussing the most recent statement of the U.S. government’s position on the matter).} Successful resistance to the LOAC model, from this perspective, might leave international law entirely on the sidelines, except perhaps for constraints of necessity and proportionality that might follow should the U.S. government be acting under the rubric of self-defense.\footnote{Cf. Robert M. Chesney, Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, 13 YEARBOOK INT’L HUM. LAW 3 (2011).}

Bearing such criticisms in mind nonetheless, however, there are additional steps Congress might take to address rights-oriented concerns. As an initial matter, Congress could clarify that the LOAC rules are binding on all U.S. government entities, including not just the armed forces by also the CIA. Supporters of the status quo should not object to this, for if the recent spate of speeches by Obama administration officials is an accurate guide it would not actually alter current U.S. government practices.\footnote{Cf. Remarks of the Hon. Stephen W. Preston, General Counsel of the Central Intelligence Agency, at Harvard Law School (Apr. 19, 2012), in Anderson, supra note 53 (indicating that CIA uses of force would comport with necessity, proportionality, and other LOAC rules, while remaining arguably uncommitted as to the extent of compliance with non-LOAC international law rules).} Additionally, Congress might entrench in statute the proposition that lethal force will not be used in a given location without the consent of the host government except in circumstances where the host government is unable or unwilling to take reasonable steps to suppress the threat.\footnote{Ashley Deeks, Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L L. 483 (2011).} This too reflects existing U.S. government practice,\footnote{Harold H. Koh, The Obama Administration and International Law, Speech Delivered to the Annual Meeting of the American Society of International Law (Mar. 25, 2010), in Anderson, supra note 53.} yet the absence of a more formal expression of the policy creates space for critics to argue that the United States might soon be conducting drone strikes on the streets of Paris.

Congress might also consider embracing rather than fleeing from the involvement of the judiciary. I have in mind two steps. First, Congress could expressly extend Guantanamo-style habeas jurisdiction to all persons held under color of the authorization described above—no
matter where they are held—with the sole exception being persons captured and held in Afghanistan prior to the end of the drawdown process. As noted above, this is the result that likely will attach in any event, by extension of Boumediene. And one should not forget that after years of government resistance to judicial involvement at Guantanamo, the net result of the habeas process has done more than a little to quell concerns about the legitimacy and legality of detention there (notwithstanding that some critics remain). Second, Congress might also consider judicial involvement in the back-end process of making periodic determinations of whether specific individuals ought to be released notwithstanding their initial eligibility for detention, something that under the NDAA and executive branch practice has thusfar been a purely executive-branch affair.

This brings us to a particularly vexing topic: what if anything should Congress say regarding U.S. persons and about actions undertaken in U.S. territory? The interaction of these questions with constitutional rights is a large topic, well beyond the scope of this paper. At a minimum, however, it would be well for Congress to specify that any force it has authorized does not extend to the use of lethal force within the United States barring exigent circumstances.

It is tempting to continue in this vein, advocating additional measures such as removal of the draconian constraints on detainee transfers and criminal prosecution that have made Guantanamo an undesirable destination even if one is not opposed to using the facility in principle. But my aim in this section is not to provide a comprehensive solution. Rather, I hope to spark a larger conversation that I believe must be had in light of the unfolding dynamics of the second post-9/11 decade. I therefore will end here simply by noting that if Congress were to adopt the arrangements I have described or something like them, it would be well-advised to sunset the whole thing—and to do so using a term of years designed not to fall directly into the teeth of some future election campaign season.

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I intend this article as a wake-up call. The legal architecture relating to detention and lethal force in the counterterrorism setting appears stable today at first blush, the beneficiary of a remarkable amount of cross-branch and cross-party consensus. This pleases some and enrages others. For better or worse, however, the underpinnings of this stability are rapidly eroding in the face of long-term trends involving the strategic posture of both al Qaeda and the United States. Change looms—indeed, the effects can already be felt—and it is past time to recognize precisely how that change will disrupt the status quo and to grapple seriously with the options for refining the legal architecture in response.

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227 Should a new Afghanistan or Iraq-style overt combat deployment occur, of course, Congress can revisit the scope of this exception to avoid judicial intrusion into conventional battlefield settings.

228 Cf. NDAA § 1023.
KEYNOTE ADDRESS:

"NEWFANGLED CHECKS ON EXECUTIVE POWER"

SPEAKER:
PROFESSOR NEAL K. KATYAL
THE YALE LAW JOURNAL

Neal Kumar Katyal

Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within

abstract. The standard conception of separation of powers presumes three branches with equivalent ambitions of maximizing their powers. Today, however, legislative abdication is the reigning modus operandi. Instead of bemoaning this state of affairs, this Essay asks how "separation of powers" can be reflected within the executive branch when that branch, not the legislature, is making much of the law today. The first-best concept of legislature v. executive checks and balances must be updated to contemplate second-best executive v. executive divisions. A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right, bureaucracy serves crucial functions: It creates a civil service not beholden to any particular Administration and a cadre of experts with a long-term institutional worldview. This Essay therefore proposes a set of mechanisms that can create checks and balances within the executive branch in the foreign-affairs area. The apparatus of these restraints is familiar—separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for their workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. The idea is to create a more textured conception of the presidency than either the unitary executivists or their critics espouse.

author. Professor of Law, Georgetown University Law Center
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Introduction

Our political system, and much academic writing about it, is premised on the idea that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." But what if this idea is now bunk?

After all, Publius’s view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet legislative abdication is the reigning modus operandi. It is often remarked that “9/11 changed everything,” a key change was the eclipse of the divided-government presupposition of The Federalist. In the barrage of legal issues regarding the war on terror today, Congress has been absent or content to pass vague, open-ended statutes. The result is an executive that subsumes much of the tripartite structure of government, particularly in foreign policy.

Many commentators have bemoaned this state of affairs. This Essay will not pile onto those complaints. Rather, it begins where others left off: If major decisions are going to be made not by the legislature but instead by the President, then how might “separation of powers” be reflected within the executive branch? The first-best concept of legislature v. executive checks and balances must be updated to contemplate second-best executive v. executive divisions. And this Essay proposes doing so in perhaps the most controversial area, foreign policy. It is widely thought that the President’s power is at its apogee in this arena. This Essay, by explaining the virtues of internal divisions in the realm of foreign policy, sparks conversation around whether internal checks are necessary in other, domestic realms.

That conversation desperately needs to center on how best to structure the ever-expanding modern executive branch. From 608,915 employees working in agencies in 1930, to 2,649,319 individuals in 2004, the growth of the executive has not generated the type of systematic focus on internal checks that it should. We are all fond of analyzing checks on judicial activism in the

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modern post-\textit{Brown}/post-\textit{Roe} era. So too we think of checks on legislatures, from the filibuster to judicial review. But there is a paucity of thought regarding checks on the President beyond the banal wishful thinking about congressional and judicial activity. This Essay aims to fill that gap.

A critical mechanism to promote internal separation of powers is bureaucracy. Much maligned by both the political left and right today, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured, view of agencies as simple anti-change agents. This Essay celebrates the potential of bureaucracy and explains how legal institutions can better tap its powers.

A well-functioning bureaucracy contains a set of agencies with differing missions and objectives that intentionally overlap to create friction. Just as the standard separation of powers paradigms ($\text{legislature v. courts, executive v. courts, legislature v. executive}$) overlap to produce friction, so, too, does its internal variant. When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results. And when there is no neutral decision-maker within the government in cases of disagreement, the system risks breaking down.

In short, the Executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise). A chief aim of this Essay is to allow each to function without undermining the other. This goal can be met without agency competition—overlapping jurisdiction is simply one catalyzing agent. Others deserve consideration, alongside or independently of such competition, such as developing career protections for the civil service modeled more on the Foreign Service.

Executives of all stripes offer the same rationale for forgoing bureaucracy—the notions of executive energy and dispatch reflected in \textit{Federalist} 70.\textsuperscript{5} Yet the Founders assumed that massive changes to the status quo required legislative enactments, not executive decrees. As that concept has broken down, the risks of unchecked executive power have grown. Today, executive dispatch has become a worn-out excuse for anti-democratic activity.

Such claims of executive power are not limited to the current Administration, nor are they limited to politicians. Take, for example, Dean Elena Kagan’s rich celebration of presidential administration.\textsuperscript{6} Kagan, herself a former political appointee, lauds the President’s ability to trump bureaucracy. Echoing the claims of the current Administration, Kagan argues that this “energize[s] regulatory policy” because only “the President has the ability to

\textsuperscript{5} The \textit{Federalist} No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (presidency characterized by “secrecy[] and dispatch”).

effect comprehensive, coherent change in administrative policymaking." Yet it becomes clear that the Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President). Without that checking function, presidential administration can become an engine of concentrated power, particularly when massive deprivations of liberty can take place by presidential decree.

This Essay therefore outlines a set of mechanisms that create checks and balances within the executive branch. The apparatus of these restraints is familiar—separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for their workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts. But that apparatus has been informally laid down and inconsistently applied, and in the wake of September 11 it has been decimated. A general framework statute is needed to codify a set of practices. In many ways, the status quo is the worst of all worlds because it creates the façade of external and internal checks, when both have withered.

These proposals reflect a more textured conception of the presidency than either the unitary executivists or their critics espouse. In contrast to the unitary executivists, I believe that the simple fact that the President should be in control of the executive branch does not answer the question of how institutions should be structured to encourage the most robust flow of advice to the President. Nor does it weigh against modest internal checks that, while subject to presidential override, constrain presidential adventurism on a daily basis. And in contrast to the doubters of the unitary executive, I believe a unitary executive serves important values, particularly in times of crisis. Speed and dispatch are often virtues to be celebrated.

7. Id. at 2341.

8. E.g., Glenn Kessler, Administration Critics Charge at State Dept. Shuffle; Merger Has Brought Appointees Into Conflict with Longtime Workers, Who Say They Are Sidelined, Wash. Post, Feb. 21, 2006, at A4 (describing career officials at State Department who claim to be stifled by political appointees).

9. As such, the motivating ideas in this Essay have been embraced by both liberals and conservatives. For example, when President Clinton used agency processes to accomplish what he could not by legislation, it prompted Senator Chuck Hagel to note the "danger of a president . . . implement[ing] policy by essentially debasing the constitutional structure." Marc Lacey, Blocked by Congress, Clinton Wields a Pen, N.Y. TIMES, July 5, 2000, at A13. [SC2: Get microfilm rather than Lexis] Representative J.C. Watts criticized Clinton for "acting as the king of the world," News hour with Jim Lehrer (PBS television broadcast Jan. 22, 2001), available at http://www.pbs.org/newshour/bb/politics/jan-june01/abortion_1-22.html, and a whole hearing was held on the Separation of Powers Restoration Act to block the President's ability to direct agencies. OFFICE OF REPRESENTATIVE RON PAUL, PAUL BILL ON EXECUTIVE ORDERS GETS HEARING IN HOUSE: CONGRESSMAN TO TESTIFY ON SEPARATION OF POWERS (Oct. 28 1999).
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Instead of doing away with the unitary executive, this Essay proposes designs that force internal checks but that permit temporary departures when the need is great. Of course, the risk of incorporating a presidential override is that its great formal power will eclipse everything else, leading agency officials to fear the President will overrule or fire them. But just as a filibuster does not tremendously constrain presidential action, a modest internal check can work in many cases. Devices can also be employed to make presidential overrides public or available to congressional committees.

Before getting into the argument, a brief word about what this Essay is not. It does not attempt to propose a far-reaching internal checking system on all presidential power, domestic and foreign. Instead, this Essay takes a case study, the war on terror, and uses the collapse of external checks and balances to demonstrate the need for internal ones. In this arena, public accountability is low—not only because decisions are made in secret but also because they routinely only impact people who cannot vote (such as detainees). In addition to these process defects, decisions in this area often have subtle long-term consequences that short-term executivists may underappreciate.10

i. the need for internal separation of powers

The treacherous attacks of September 11 gave Congress and the President a unique opportunity to work together. Within a week, both houses of Congress passed an Authorization for the Use of Military Force Resolution (AUMF); two months later they enacted the USA PATRIOT Act to further expand intelligence and law enforcement powers.11

But Congress did not do more. It passed no laws authorizing or regulating detentions for United States citizens. It did not affirm President Bush’s decision to use military commissions to try unlawful belligerents.12 It stood silent when President Bush took thinly-reasoned legal views of the Geneva Conventions, such as that they did not require Article 5 hearings to determine prisoner-of-war status.13 The Administration was content to rest on vague

10. As such, this Essay is the counterpart to Neal Kumar Katyal, Judges as Advicereivers, 50 Stan. L. Rev. 1709 (1998). That paper developed a view of judges as structurally situated to advise short-term politicians in the long-run. Well-functioning bureaucracies are an alternative to reposing that function in judges and are particularly suited to the foreign affairs context where judicial competence is comparatively lower.
legislation like the AUMF, and Congress was content not to do much else.\textsuperscript{14}

There is much to be said for the violation of separation of powers engendered by these executive decisions, but for purposes of this Essay, I want to concede the executive's claim—that the AUMF gave the President the raw authority to make these decisions. A democratic deficit still exists; the values of divided government and popular accountability are not being preserved. Even if the President had the power to carry out the above acts, it is surely wiser if Congress authorizes them. Congress's imprimatur would have ensured that the people's representatives concurred, aided the government's defense of these actions in courts, and signaled to the world a broader American commitment to these decisions than one man's pen-stroke.

Of course, Congress has not been passing legislation to denounce these Presidential actions either. And here we come to a subtle change in the legal landscape with broad ramifications: the demise of the congressional checking function. The story begins with the collapse of the non-delegation doctrine in the 1930s, which enabled broad areas of policymaking authority to be given to the President and agencies under his control. That collapse, however, was tempered by the legislative veto, meaning, in practical terms, that when Congress did not approve of a particular agency action, the legislature could correct the problem. But after \textit{INS v. Chadha},\textsuperscript{15} which declared the legislative veto unconstitutional, that checking function, too, has disappeared. While Congress has at times engaged in oversight, such as the scandal-driven 1995-2000 period, such oversight is often stymied by structural dynamics.

In most instances today, the only way for Congress to disapprove of a presidential decree, even one chock full of rampant lawmaking, is to pass a bill with a solid enough majority to override a Presidential veto. This transforms the veto into a tool that entrenches presidential decrees, rather than one that blocks congressional misadventures. And because Congress \textit{ex ante} appreciates the supermajority-override rule, its members do not even bother to try to check the President, knowing that a small cadre of loyalists in either House can block such a bill.\textsuperscript{16} For example, when some of the Senate's most powerful Republicans (John McCain, Lindsay Graham, and John Warner) tried to regulate detentions and trials at Guantánamo Bay, they were told that the


\textsuperscript{15} 462 U.S. 919 (1983).

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President would veto their bill or any other attempt to modify the AUMF.\textsuperscript{17} The result is that once a court interprets a congressional act, such as the AUMF, to give the President broad powers, Congress often cannot reverse the interpretation, even if they never intended to give the President those powers in the first place. Members of Congress must not only surmount a supermajority requirement, they must do so in each House. Senator McCain might persuade every one of the other ninety-nine Senators to vote for his bill, but that is of no moment without a supermajority in the House of Representatives as well.\textsuperscript{18}

At the same time, the executive branch has gained power from deference doctrines that induce courts to leave much conduct untouched—particularly in foreign affairs.\textsuperscript{19} The combination of deference and the presidential veto is particularly insidious—it means that a President can interpret a vague statute to give him additional powers, receive deference in that interpretation from courts, and then lock that decision into place via his veto power. This ratchet-and-lock scheme makes it almost impossible to rein in executive power.

This expansion of presidential power is exacerbated by the party system. When the political branches are controlled by the same party, considerations of loyalty, discipline, and self-interest generally preclude inter-branch checking. That general reluctance is exacerbated by the paucity of weapons with which to check the President, with the only ones in existence called "nuclear" ones. In earlier times, it was not difficult to use legislative vetoes as surgical checks. But post-\textit{Chadha}, Congress only has weapons that cause extensive collateral damage. The fear of that damage, of course, becomes yet another reason why Congress is plagued with inertia. And the filibuster, the last big check in periods of single-party government, is useless against the host of problems


\textsuperscript{18} The point explains why the strong theory of stare decisis, that courts should not disturb statutory precedents, Flood v. Kuhn, 407 U.S. 258 (1972), should not apply to court decisions that interpret legislation to confer greater power on the executive. That theory is built on the idea that Congress can override any judicial mistake about a statute, and if they do not, the precedent attains special force. But court decisions that give the President additional powers are different, for they require a bicameral supermajority to override a court interpretation. Congress can therefore find itself stuck with an interpretation of a law that it cannot change—because the President and his party loyalists in Congress will block any attempt to return to the law's original intent.

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where Presidents take expansive views of their powers under existing laws (such as the AUMF). Instead of preserving bicameralism, the rule in Chadha has therefore led to its subversion and “no-cameralism.”

All legislative action is therefore dangerous. Any bill, like Senator McCain’s torture bill, can be derailed through compromise. Even if its text ultimately has teeth, a President will interpret it niggardly, and that interpretation will likely receive deference from a court, and it will then be locked into place due to the veto. A rational legislator, fearing this cascading cycle, is likely to do nothing at all.

A Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President. The President can appeal to the historic sense of checks and balances, even if those checks are entirely compromised by modern political dynamics. With this system in place, it is no surprise that calls for legislative revitalization in the wake of the September 11th attacks have failed. No successful action-forcing mechanisms have been developed; instead we are still in John Hart Ely’s world of giving a “halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority.”[20] Instead of another pep-talk, it is time to consider second-best solutions to bring separation of powers into the executive. Bureaucracy can be reformed and celebrated (instead of purged and maligned), and neutral conflict-decision mechanisms can be introduced. Design choices such as these can help bring our government back in line with the principles envisioned by our Founders—ones that have served our nation and the world so well for so long.[21]


21. This Essay therefore attempts to carry the ideas in HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION (1990) to contemporary circumstances, where Koh’s primary reform—attempts to get Congress and the courts back into the national-security arena—have not been adopted. Unlike most treatments, Koh’s book did suggest a handful of procedures that would produce internal checks: (1) inter-agency review of legal opinions authorizing covert action; (2) making the Attorney General a statutory member of the National Security Council; (3) release of certain legal opinions to congressional intelligence committees; (4) requiring presidents to make “findings” for all covert action; and (5) requiring the National Security Adviser to be a civilian, perhaps even appointing the Vice President to the post. Id. at 162–66. These checks, which centered around covert action, deserve consideration not as part of a package of legislative and judicial revitalization, but as a stand-alone solution because that revitalization has failed. See also M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. PA. L. REV. 603, 612–25, 651–54 (2001) (claiming that the notion of separation of powers is incoherent and that the divided functions of each branch adequately serve as a checking function). Magill concluded, for example, that “the amount and character of that diffusion of state power should be more than sufficient to put to rest concerns about dangerous concentrations of power.” Id. at 654. Time has not been kind to this claim. Perhaps in 2001, at the time of her writing, divided government produced the coalitions necessary to prevent a massive increase in Executive power. The different era ushered in by single-party government, however, suggests a great
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ii. toward better bureaucracy

Assaulted by political forces, the modern agency is a stew of Presidential loyalists and relatively powerless career officials. To this political assault comes an academic one as well, with luminaries such as Elena Kagan celebrating Presidential Administration and unitary executivists explaining why such visions are part of our constitutional design. This vision may work well in eras of divided government, but it fails to control power the rest of the time.

Some academics claim that the unitary executive requires, as a historical and constitutional matter, presidential freedom to structure a branch as he sees fit. But one needs to separate the cult of unitariness from the reality. No one seriously suggests that Congress’s division of the military into four separate services (Army, Navy, Air Force, Marines) is unconstitutional—despite the fact that the 1947 Act was passed because of a fear that a President might consolidate or eliminate one or more of the four.22 Just as free-speech proponents often mask civic responsibility for the consequences of particular speech by hiding behind the Constitution, proponents of a unitary executive mask responsibility for a presidential system that fails to preserve core values of divided government or provide the President with the best information. By squelching bureaucracy, the President guarantees that information given to him is not the product of independent and sober thought but rather data filtered and combed through by loyalists. No decision-maker, be it the President or someone of lower rank, can make up for this deficit.

But hope exists for better bureaucracy, one consistent with the unitary executive and with the historically limited staff of the executive branch.23 This section places the fundamental design question first: What should an agency system look like to foment internal checks and balances? It then takes up the question of who should staff the agencies and how individuals can be induced to exercise their checking function. From there, it considers how agency disagreements should be resolved by both the President and courts. And

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22. See J. ROBERT MOSKIN, THE U.S. MARINE CORPS STORY 434 (3d ed. 1992) (discussing the fear “that otherwise the Corps would be exposed to any future President’s wish to reduce or eliminate it.”).

23. As James Q. Wilson describes it, the White House’s coordination function was so minimal until “well into the administration of Franklin Roosevelt there was no White House staff of any consequence.” JAMES Q. WILSON, BUREAUCRACY 258 (2d ed. 2000). [Sc2: Source needs to be found] Indeed, the commission FDR appointed to study the problem recommended the creation of a senior staff with a limit probably “not exceeding six in number.” PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 5 (1937).
finally, it considers how those disagreements should be publicized outside of
the executive to produce external and internal checks.

Before getting into the substance of the proposals, it is worth taking up a
criticism that might be present off the bat: Aren’t all proposals for bureaucratic
reform bedeviled by the very forces that promote legislative inertia? If
Congress can’t be motivated to regulate any particular aspect of the legal war
on terror, then how can it be expected to regulate anything more far-reaching?
The answer lies in the fact that sometimes broad design choices are easier to
impose by fiat than are specific policies.24

Any given policy proposal can get mired in a competition of special
interests, indeed, that danger leads many to prefer executive action.
Institutional design changes differ from these specific policy proposals because
they cut across a plethora of interest groups and the effects on constituencies
are harder to assess due to the multiplicity of changes. The benefits of faction
attributed to Federalist 51 therefore arise, with multitudes of interest groups
finding things to embrace in the system change. It is therefore not surprising
that at the same time that Congress dropped the ball overseeing the legal war
on terror it enacted the most sweeping set of changes to the executive branch in
a half-century in the form of the Homeland Security Act. Indeed, as we shall
see, that Act provides an object lesson about changes to the modern
bureaucracy. Design matters. And by altering bureaucratic arrangements,
stronger internal checks can emerge.

A. Agency Structure: The Need for Bureaucratic Overlap

Agency design can replicate some functional overlap of responsibilities
amongst the branches. One of the classic divisions of power in the Constitution
concerns war: While Congress declares it, the President is the Commander-in-
Chief.25 That division is structurally inefficient, in the sense that it creates the
possibility of dissension and rivalry, yet its inefficiency is the point.26

Today, the locus of academic concern centers on disputes between whether
and to what extent the President and Congress should control agency decision-
making. These discussions center along the President v. Agency axis. Instead,
legal reform could focus on a lower rung: President v. (Agency1 + Agency2).
Partially overlapping agency jurisdiction could create friction on issues before

24. E.g., James M. Lindsay, Congress, Foreign Policy, and the New Institutionalism, 38 INT’L
26. As Justice Brandeis stated, “The doctrine of the separation of powers was adopted by the
Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary
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you are teed up to the President for decision. Otherwise, the President could easily surround himself with people of a similar worldview who lack expertise.

Redundancy has a pejorative connotation—conjuring up images of inefficiency and waste. In private markets, attacks on redundancy became a dominant component of Taylorism (the early twentieth-century scientific-management theory) and has motivated many recent agency consolidations. But there are a number of positive redundancies—starting with those in the Constitution itself, which creates two houses of Congress and divides functions between two political branches. And reliance on one agency is often risky, for "organizational systems of this sort are a form of administrative brinkmanship. They are extraordinary gambles. When one bulwark breaks, everything goes."28

As the common saying goes, "where you stand is a function of where you sit." By placing individuals in different organizational structures, different viewpoints emerge. Colin Powell as Secretary of State is a different entity than Colin Powell as head of the Joint Chiefs of Staff. And that point goes not simply for leaders but others within an agency as well.29 Bureaucratic overlap allows agencies to function more like laboratories—devising new solutions to new problems. That is one rationale for the division of antitrust authority between the Federal Trade Commission and Department of Justice.30 Moreover, to the extent particular agencies are captured by interest groups, overlapping bureaucratic entities can mitigate capture’s effects.31

27. E.g., Duplication, Overlap, and Fragmentation in Government Programs, Hearing Before the S. Comm. on Gov’t Affairs, 104th Cong. (1995).
29. A person "does not live for months or years in a particular position in an organization, exposed to some streams of communication, shielded from others, without the most profound effects upon what he knows, believes, attends to, hopes, wishes, emphasizes, fears, and proposes." HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR xvi (3d ed. 1976). A related thought undergirds the aphorism "two heads are better than one"—that one "head" situated differently from another will generate different ideas. Systems analysis has shown that a number of individually unreliable units can be put together to produce a system of high reliability. John von Neumann, Probabilistic Logics and the Synthesis of Reliable Organizations from Unreliable Components, 34 ANNALS OF MATHEMATICS STUD. 43 (1956).
31. See Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1684-87 (1975). A classic fear in law enforcement, for example, is that the investigating agency will be corrupted by bribes and political influence. Neal Katyal, Conspiracy Theory, 112 YALE L.J. 1307, 1379 n.266 (2003). As a result, organized-crime investigations are split among state and federal authorities and antitrust ones between DOJ and the FTC. The rationale is that each agency will compete for prosecution. Kovacic, supra note 30. The risk of over-enforcement is tempered by an outside check on abuse—the courts.
The notion of overlapping agency jurisdiction is not unlike the idea of a free market. We do not want one supplier of information to the President; a market better supplies clients than a monopolist. Without bureaucratic overlaps, agencies are not pushed to develop innovative ways of dealing with problems and may ossify.\(^{32}\) It is therefore surprising that market-oriented scholars resist conceptualizing the executive branch in this way. The story of the unitary executive has morphed into a myth of an executive that must have seamless control over all its components. But there is a counter-story to be told, one that emphasizes checks and balances within the Executive Branch, such as those resulting from the 1947 National Security Act.

Just as bicameralism and two political branches produce better decisions, there is powerful evidence that presidents succeed because redundancy generates the information a President needs.\(^{33}\) Perhaps no analysis of a modern presidency so condemns the status quo as Richard Neustadt’s comparison of FDR and Eisenhower. FDR succeeded because he guaranteed a flow of information to him, using his own contacts in agencies.

He would call you in . . . and he’d ask you to get the story on some complicated business, and you’d come back after a couple of days of hard labor and present the juicy morsel you’d uncovered under a stone somewhere, and then you’d find out he knew all about it, along with something else you didn’t know.\(^{34}\)

FDR used bureaucratic overlaps to produce better policy and information: “His favorite technique was to keep grants of authority incomplete, jurisdictions uncertain, charters overlapping.”\(^{35}\) Eisenhower, by contrast, imparted “more superficial symmetry and order to his flow of information . . . . Thereby, he became typically the last man in his office to know tangible details and the last to come to grips with acts of choice.”\(^{36}\)

Of course, speed will be necessary, such as in responding to disaster or sudden invasion. But even in these instances, the need for speed should not

\(^{32}\) The success of the 1975 United States-Soviet Union Grain Agreement, for example, can be attributed to overlap between the Departments of State, Agriculture, and Labor, and the ability of each to weigh in on the matter before the President. See Roger B. Porter, The US-USSR Grain Agreement (1998) (Kennedy School of Government Case Program: CR 15-98-1449.0, on file with the author).


\(^{34}\) Id. at 132.

\(^{35}\) Id. (quoting Arthur M. Schlesinger, Jr., The Age of Roosevelt: The Coming of the New Deal 528 (1959)).

\(^{36}\) Id. at 133.
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preclude ex post examination of the executive’s reaction by agencies sharing jurisdiction. Nor does it preclude some reporting of that analysis to Congress, and sometimes even to the public. The constant flow of information resulting from bureaucratic redundancy may in turn produce better decision-making.

Of course, a strong Executive can stymie two agencies almost as easily as he may one. For this reason, existing overlapping agency jurisdiction (such as that between the Departments of State and Defense) has failed to mitigate the excesses of the legal war on terror. In theory, because each department serves a different core constituency, the overlap should yield payoffs.

But practice can deviate from theory for three reasons. First, because agencies can be cut out of relevant decisions by political actors, formal overlap can be practically irrelevant. Second, even if agencies are consulted, political influence can compromise even a redundant system. Presidential control over the bureaucratic state, along with a culture and legal academy that supports easy intervention into agency decision-making, stymies the independent check of other agencies. Third, redundancy’s benefits collapse when the legal decisionmaker, the Office of Legal Counsel, is structurally compromised (a point discussed later in this Essay). These problems illustrate that overlapping jurisdiction creates only an architecture to enable internal checks. Without more, that structure collapses under the weight of presidential influence.

At a minimum, legislation must ensure that relevant agencies have a voice in significant policy debates within an Administration. A State Department with an International Law Division or an Army Law-of-War unit means little if

37. This was a classic reason for independent agencies. E.g., JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 113-14 (1938).

38. For example, the military commission trial “plan was considered so sensitive that senior White House officials kept its final details hidden from the president’s national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those involved said, that they hardly thought of consulting Congress” and the longstanding “interagency debate” process was discarded. Tim Golden, After Terror, a Secret Rewriting of Military Law, N.Y. TIMES, Oct. 24, 2004, at A1.

it can be kept in the dark about political choices regarding relevant treaties.\textsuperscript{40} Congress funds those units to dispense advice to the President and to agencies. While no legislation can require a President to obey these units, it can mandate consultation before action in circumstances where time permits it. The first reform suggested in this Essay therefore is to bolster existing bureaucratic redundancy with legislation setting out inter-agency consultation requirements. Questions about the implementation and meaning of our most sacred treaties and protections deserve vetting by the State and Defense Departments; they are too important to be left to a circle of loyalists at the White House who do not, and structurally cannot, have the long-term interests of the nation at heart.

B. Agency Composition: Protection and Promotion of Civil Servants

1. The Foreign Service Model

In France, the top graduates of the nation’s top institutions go into the civil service.\textsuperscript{41} America has no comparable pattern. Our top graduates vie for political appointments in agencies, not work in the agencies themselves, where a distrust of career officials can take root. Many long-time agency employees are overcome with resentment at political appointees, demoralized, and unable to exercise any significant control over the path of government.\textsuperscript{42}

At least one American institution, however, works in a different way: the Foreign Service. The Service in many respects is “foreign” to American government; it is our closest analogue to a European model in that it attracts excellent college graduates and retains them for many years. No one would say that the Foreign Service is perfect; the claim is simply that it functions better than the Civil Service. The vitality of the Foreign Service strikingly takes place against a backdrop of historical distrust of a diplomatic corps,\textsuperscript{43} and in an area

\textsuperscript{40} John Barry et al., The Roots of Torture, NEWSWEEK, May 24, 2004, at 26 (“[O]n Jan. 9, 2002, John Yoo of Justice’s Office of Legal Counsel coauthored a sweeping 42-page memo concluding that neither the Geneva Conventions nor any of the laws of war applied to the conflict in Afghanistan. Cut out of the process, as usual, was Colin Powell’s State Department. So were military lawyers for the uniformed services. When State Department lawyers first saw the Yoo memo, ‘we were horrified,’ said one.”).


\textsuperscript{43} The Continental Congress even required diplomats to return from overseas every three years, and the "profound suspicion of diplomacy" continued until the 1924 Rogers Act, which created the Foreign Service. Donald Warwick, A Theory of Public Bureaucracy 13 (1975).
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c onsidered the holy grail by unitary executive foreigners–foreign affairs.

Two factors account for this success. First, the Foreign Service rewards and protects its employees. Employees are encouraged to rotate through new positions and new countries so that jobs do not grow stagnant over time. Second, the Foreign Service has criteria for promotion that reward merit and discourage spoils. For example, it creates extensive opportunities for promotion through its “up or out” system, whereby top management must either be promoted or exit the Service after a term of years.

Consider first one of the most innovative tools in government today, the State Department’s “dissent channel.” This channel gives any officer in any embassy around the world the ability to disagree with the position taken by the ambassador or high-ranking officials, and the power to inform the highest levels of the government about it. Under State Department regulations, all dissent channel messages are sent to the elite office of Policy Planning. The Office then transmits the message to the Secretary of State, the Deputy, and the Undersecretary for Political Affairs, as well as others who are specifically involved in the matter. In most cases, the State Department must acknowledge receipt of a dissent cable within two days and must prepare a substantive reply within two months. Dissent messages can be sent anonymously but many times are not because extensive procedures prevent reprisal for use of the channel.44

Instead of earning their ire, Secretaries of State have repeatedly praised the channel. It was even set up by one, William Rogers in 1971, because he believed he was not receiving contrary views. Secretary of State Warren Christopher similarly stated it “will stimulate new thinking” and is “an established, proven, and effective instrument for ensuring that those alternative views are heard by senior policymakers.”45

Indeed, the dissent channel is such a celebrated function that an award is given out every year to the foreign service officer who makes the best use of it. When the last recipient accepted the award, he signaled how the foreign-service attitude reflects the internal checking function celebrated in this Essay: “[W]e signed on [in the Foreign Service] for a career that has a larger cause, whoever is the occupant of the White House. Frankness is a form of dissent.”46 Unlike other agencies, dissenters are rewarded in the bureaucracy.47

44. 2 FOREIGN AFFAIRS MANUAL 071.1(c), available at http://www.state.gov/s/p/cf/ab/18676.htm.
47. “Every one of the 22 mid-level officers who won the Award from 1968 to 1992... was subsequently promoted into the Senior Foreign Service. Moreover, fully half of them have
It is of course easy to wax on about this channel. The reality is that many employees fear using it, particularly when Department leadership is tightly controlled by the White House. But even with these problems, the dissent channel is worth having, and it is troubling that the other federal agencies lack anything like it. 48 An innovative tool to protect and encourage individuals to come forward with creative ideas and to prevent mistakes has been stuck in the hallways of the State Department. If we want a civil service that looks more like our effective Foreign Service, expansion of the dissent channel is necessary—perhaps permitting employees to dissent outside their agency. 49

Dissent is only one part of the formula for a successful service. The Foreign Service, like every private-sector employer, understands that retention policies and opportunities for advancement are crucial to building a successful cadre of workers. If workers fear being fired unfairly, the most talented individuals will either not join the enterprise ex ante, or ex post they will act with an oversupply of caution that will not redound to the organization’s interests. And if promotions depend on catering to the incumbent leadership de jour, similarly, it will be difficult to attract the most talented employees. Vibrant enterprises have structural protections that permit employees to give candid advice without fear of reprisal. Bureaucracies, in particular, need structures that avoid a sycophantic race to the bottom whereby workers devote their energies to pleasing political appointees.

The Foreign Service Act of 1980 requires that promotion decisions be made strictly according to rankings by impartial selection boards. 50 These boards must include at least two State Department outsiders, thereby reducing the possibility of favoritism. They may evaluate promotions only on the basis of written performance evaluations, and the process is viewed as “one of the Service’s most cherished features.” 51 Moreover, the Service uses a “rank-in-person” system similar to that used in the military, whereby an officer’s rank does not change with the position she happens to occupy at a given time. Because promotions are determined independently of current positions held by

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48. As the American Foreign Service Association put it, “Nothing similar takes place elsewhere, not in the military, quasi-military, or purely civilian agencies; just ours, all alone.” Id. at 32.

49. See infra Part II C (suggesting replacement of the elite Office of Legal Counsel with a Director of Adjudication who might receive such dissents).


51. STEIGMAN, supra note 50, at 41.
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officers, the system rewards merit far more often than the civil service’s "rank-in-job" approach, which requires a qualified employee to find an open position graded at a higher level to advance. The result is to create a Foreign Service with skilled employees who are motivated to do their jobs. Along with these procedures, the Service uses bonuses and perks to bond employees to the organization and to compensate for hardships. It permits officers to be detailed outside of the State Department to work for international organizations, state and local governments, Congress, educational institutions, and even corporations. Individuals need not separate from the Service to try something new. The upshot is that few Foreign Service officers resign, and they fill senior policy positions in far greater numbers than those in other executive departments. Indeed, many high-ranking employees at the State Department come from within the bureaucracy, not from political forces.

The panoply of protections given to the Foreign Service no doubt account for the hostility many Administration officials have to it. As former Judge Laurence Silberman put it:

I ended my ambassadorial stint with less than friendly feelings toward the Foreign Service as a whole. . . . The practice of having Foreign Service officers in senior State Department positions goes back a long way; in the minds of many it has attained the status of an accepted convention. I believe it is time to reject that convention . . . .

While the "Foreign Service does attract, on the whole, the ablest men and women who enter government," Silberman claims that its entrenched bureaucracy frustrates the ability of the President to conduct foreign affairs.

52. Id. at 33
53. Elmer Pleschke, U.S. Department of State: A Reference History 660 (1999). The Foreign Service also routinely creates vacancies in leadership positions. The same selection boards that determine promotion must identify those who are not performing and refer them to another board for possible separation. Steigman, supra note 30, at 42.
54. Id. at 50.
55. Id. at 45.
56. Id. at 6.
58. Laurence H. Silberman, Toward Presidential Control of the State Department, 57 Foreign Aff. 872, 872 (1979).
59. Id. at 883
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However, the flipside is that the entrenched bureaucracy takes a long-term view. The existence, indeed success, of the Foreign Service poses massive challenges to unitary executivists who think that the President should be able to streamline government to issue commands without challenge, and it questions the wisdom of such an approach as well. If internal checks work well in an area as fraught with contemporary presidentialism as diplomacy, they deserve consideration in other areas as well.

2. The Civil Service

At first, the civil service appears to have strong policies that resemble those in the Foreign Service. The Civil Service Reform Act of 1978, following a long tradition since the 1883 Pendleton Act, was “designed to protect career employees against improper political influences or personal favoritism ... and to protect individuals who speak out about government wrongdoing from reprisals.” The Act limits the reasons under which adverse action can be taken against employees and prohibits agencies from taking other actions that undermine an emphasis on merit. It also created a new independent agency, the Merit Systems Protection Board, to hear appeals of personnel actions.

But the 1978 Act does not do nearly enough. For one thing, it ensures only retention; it does not attempt to enliven a position or make promotions possible. The best employees are not as worried about keeping their current jobs as making sure that they will have new and exciting ones down the road. Moreover, the Act exempts some senior employees, those in the Senior Executive Service, from job protection. The 1978 Act also does not create job rotations or permit the same sort of “detailing” arrangements that characterize the Foreign Service, and it does little to encourage a system of long-term bureaucrats who feel that they can challenge political decision-making. The key problem is that advancement is often dependent on political

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61 22 Stat. 403 (1883).
63 H. Manley Case, Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978, 29 How. L.J. 283, 297 (1986). Its members held fixed terms of office and are “removable only for inefficiency, neglect of duty or malfeasance in office.” Id. at 298. Other provisions of the Act bolster the MSPB’s independence. Id.
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actors, who dominate the top layers in most agencies. Thus, even if employees are protected from being fired, they are not protected from career stagnation.

At the same time, the number of political actors in agencies has grown. When the National Security Act of 1947 was written, there were twelve presidential appointees with Senate confirmation in the Department of Defense; in May, 1999, that number stood at forty-five. And those numbers mask the increase in lower-level appointees, the so-called “Schedule C” employees. The Volker Commission found approximately 3000 presidential appointees in 1989, compared with “barely 200” during FDR’s tenure.

The result is rampant agency politicization. Not only must employees fear upsetting a political agenda (and thereby face demotion or stagnation), but politicization also alters hiring. The growth in presidential appointees “year after year inevitably discourage[s] talented men and women from remaining in the career service, or entering in the first place. The ultimate risk is reduced competence among careerists and political appointees alike.” The Volker Commission concluded that “excessive numbers of political appointees serving relatively brief periods may undermine the President’s ability to govern, insulating the Administration from needed dispassionate advice and institutional memory.” And with political control of agencies comes a practical inability to reward dissent.

To create a civil service that resembles our Foreign Service, far more attention must be paid to making exciting employment opportunities available without forcing employees to leave the service. Attention could also be given to developing protections for career advancement (not simple protections limited to termination) with a focus on “rank-in-person” systems, “up-or-out” promotion, and other mechanisms borrowed from the Foreign Service.

Granted, it may be unrealistic to envision additional civil-service protections given contemporary hostility to labor protections, but at least existing protections should not be weakened without attention to their impact on the checking function of bureaucracy. Yet that is what happened in the 2002

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67. VOLKER COMMISSION REPORT, supra note 66, at 18.

68. Id. at 7; see also id. at 18 (“Career bureaucracies need to be leavened with fresh ideas from outside and need to be responsive to presidential leadership. But they can also be a vast resource of knowledge and impartial judgment.”).
Homeland Security Act (HSA), which weakened civil-service protections for approximately 170,000 federal workers.\textsuperscript{69} Prior to the contemplation of the Act, the President had the authority to suspend civil-service protections, such as collective bargaining, if a central mission of the government was threatened.\textsuperscript{70} As the HSA began to take shape, then-Homeland Security Chief Tom Ridge stated that the Administration wanted greater powers to suspend civil-service protections because it was "profoundly important to achieving [the] goal of securing the homeland."\textsuperscript{71}

The congressional and public debate was framed along one axis – national security versus the labor rights of workers, with the Republicans generally taking the view that national security required exemptions from civil service protections, and the Democrats cloaking themselves in the rights of workers. But that debate missed a fundamental point: National security can be enhanced, not diminished, by civil-service protections.

Opponents of the President repeatedly made the defensive case that national security was not weakened by labor protections.\textsuperscript{72} Some claimed that no case in the past fifty years could be cited to show that union membership and collective bargaining had undermined national security.\textsuperscript{73} Others responded that at the time of its creation, the civil service was necessary to create a "professional workforce free from cronyism," but contended that in the twenty-first century the model was outdated due to terrorism.\textsuperscript{74}

In the tens of thousands of words spilled on these questions, one Senator, Joseph Lieberman, offered the affirmative case for civil service protection:

Today, the top echelons of Departments are subject to political appointment, as they should be, to allow a President to select the loyal agency leadership he needs and deserves. But the bulk of public employees are protected against the whims of changing political climates. We now understand that effective Departments are made up of both types of employees, working closely together and depending on

\textsuperscript{70} 5 U.S.C. § 7103(b) (2000).
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one another. Career civil servants who develop expertise, know the ins and outs of Government....

Senator Lieberman then noted that "[t]hose who would dismantle the civil service system make it more likely that the Colleen Rowleys"—the FBI agent who wrote a pre-September 11 memo regarding flight students—"of tomorrow and the Department of Homeland Security would be silenced, not heard."

But no one listened. Instead, the Administration succeeded in claiming that national security required watering down civil service protections.

While the HSA decision is portrayed in terms of protecting national security, an understanding of internal checks suggests that the opposite may be the case. By creating an organizational structure that enables reprisal against employees, the Department of Homeland Security (DHS) cannot effectively encourage the flow of information and challenge entrenched understandings. Were Congress adequately providing the checking function, the need for DHS to perform these tasks would be lessened. But in the absence of an external check, a bureaucratic one must be developed.

This was the genius of the 1883 Pendleton Act, which established civil-service protections. The Pendleton Act was designed so that "[p]ersons in the employ of the government will feel that they are servants of the country and not of a party . . . . They will come to feel that success does not lie wholly in their ability to retain the favor of political leaders who may, for services rendered, desire to put or keep them in office."

We have come far from the Pendleton Act, which was written at a time when agencies were far weaker than they are today. The growth of the executive militates for a stronger, not weaker, set of civil service protections. Yet can we really say that civil servants today view themselves as "servants of the country and not of a party"? Or that their "success does not lie wholly in their ability to retain the favor of political leaders?" While the Foreign Service might be able to answer both of these questions in the affirmative, few

75. Id. at S8739 (daily ed. Sept. 18, 2002) (statement of Sen. Lieberman).
76. Id. at S8740.
78. As Pendleton's Senate Report warned, under the preexisting spoils system "official positions are bought and sold, and the price is political servitude. Because of it honest but mistaken poverty is induced to forego the comforts and independence which rewards honorable toil, and becomes a suppliant for the official crumbs which fall from the table of some political master." S. Rep. No. 47-576, at iv (1882).
79. Id. at xi. [SC2: Bookpuller did not copy enough pages. Must be collected for Sc2]
agencies in our modern government, including the civilians in the Department of Defense, could do the same thing.

C. **Internal Adjudication**

Overlapping bureaucratic mandates and protections for civil servants can only take matters so far. With friction comes the need for a decision-maker. Hopefully, the tumble between two agencies will lead to compromise without external resolution, but, just as in civil litigation, this aspiration is not always met. Again, unitary executive proponents haunt the debate with the claim that the President must be the final decision-maker. But even a unitary executive needs subordinates to resolve conflicts that need not occupy his attention. A central goal of executive-branch management is, after all, conservation of the President’s time and energy. These subordinate decision-makers could have a different skill set and outlook than the President; for example, the neutrality of a subordinate’s decision may inspire confidence, both in the public eye and in the courts, in a way that a political decision cannot.

Any number of examples might be selected to demonstrate this point, and these examples can be expected to proliferate, across Administrations and over time. To take one example, Article 5 of the Third Geneva Convention states:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

And Article 3 provides that, "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, . . . each party" must prohibit "outrages upon personal dignity, in particular, humiliating and degrading treatment" and "afford all the judicial guarantees which are recognized as indispensable by civilized peoples."  

The Administration departed from these longstanding protections. The lawyerly arguments behind these positions were weak, but what really concerns us here is process, not substance. For fifty years, the Executive Branch has taken the position that POW hearings should be given to all who

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assert POW status. Indeed, the matter is so entrenched that the Army gave Viet Cong and guerillas these hearings in Vietnam.

How was this weighty issue resolved in the Administration? An OLC Deputy, John Yoo, wrote a memorandum claiming that the Geneva Conventions did not apply. When the State Department found out about it, its legal adviser, William Taft, disagreed in strong terms. Eventually, the Secretary of State, Colin Powell, complained to the White House about the memo, and the Attorney General defended Yoo’s position. Yoo’s position eventually became the position of the President.

A number of failures characterized this process. For one, the meaning and reach of the Geneva Conventions is, at bottom, a legal question. It involves a close reading of text and history, as well as a consideration of precedent. On this type of question, there are bound to be differences of opinions among agencies. The agencies need somewhere to go to voice those opinions and to adjudicate the matter. The President is of course one outlet, but that solution will not always work. The President is an exceptionally busy official, and there must be ruthless attempts to conserve his energies. Moreover, a presidential decision on such a question is best made, time permitting, after a neutral decision-maker has examined the matter first.

The problem with the Yoo memo lay not with the State Department or other agencies; it lay with the supposedly neutral decision-maker, the OLC. It is perfectly appropriate for agencies within the government, such as the CIA or Department of Defense, to disagree with a particular interpretation of the conventions. One function of agencies is to push the law and avoid ossification, particularly in national-security matters. But when that push is made, there has to be dispassionate analysis from a neutral decision-maker, instead of a pep squad masquerading as a quasi-judge.

A crucial function of OLC is to resolve inter-agency legal disputes. In performing this and other functions, OLC prides itself on its independent judgment and expertise. When its high-ranking officials become advocates,
however, the system breaks down. The decisions of that office begin to look suspect, resembling a courtroom flush with political influence rather than law. Yet the political pressure on OLC officials is unavoidably immense. They are, after all, political appointees themselves—the head of the office and all its deputies are politically appointed.87 They are expected to advise the President, not only adjudicate disputes, and are regularly present at White House meetings. And in this climate, there is simply no way that the aspirational aim of OLC, to be neutral decision-makers, can play out in practice the way one would hope. Simply put, they are lawyers with a client to serve.

OLC’s practice of issuing written opinions is not an office conceit, it reflects the underappreciated fact that in resolving inter-agency disputes, OLC is supposed to function as a court. The client-driven advisory function, however, dominates its other role.88 Just as the trend in the government has been to split the litigation function from the advisory function (so that there is no longer a Solicitor General who both litigates and advises), a new split between the advisory and adjudicatory functions of OLC is necessary.89

Instead of a compromised OLC becoming an advocate for a particular side, OLC should be stripped of its adjudicatory role and permitted to function only as an adviser to the Administration. As counselors, OLC attorneys would help troubleshoot legislation, research discrete areas of law, and provide their best judgment as to legal views. The adjudication function would be transferred to a separate official, a Director of Adjudication, who would resolve inter-agency disputes. Unlike an Article III judge, the Director would not hold tenure for life, but rather for periods of four years that straddle presidential terms, subject only to removal for cause. Her job would be to make the decisions currently handled by OLC. And the four-year term makes it harder for a President to name a “yes-person” to the job, since that individual may later advise a President from the other party.

At this point, the unitary executionists blush. How can such an entity not be under the direct control of the President? Even if direct presidential control of the Director is constitutionally compelled (and there are good reasons to think it is), that would not mean the Director is unconstitutional. It would merely make the Director’s decisions subject to presidential overrule. An overrule


87. Pillard, supra note 86, at 716.
88. Id. at 720 n.135 (quoting analyses that find OLC functions in a client-driven capacity).
89. Indeed, ABA rules have in the past issued different standards for advisers than they do for litigators. See Model Code of Prof’l Responsibility EC 7-3 (1986); see also Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958) (describing a similar distinction).
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might be appropriate because the Director might make a mistake or not be 
attuned to particular foreign-policy consequences, or because his lack of 
political accountability might dispose him toward adventurism.

The downside of incorporating a presidential-overrule mechanism is that it 
may politicize the Director. The Director might fear being overruled and tailor 
opinions to avoid it. But that dark scenario is unlikely to unfold—a rational 
Director would appreciate the myriad reasons why a President’s formal power 
would not be exercised, such as fear of publicity and lack of expertise.90 Yet 
the formality trap looms far larger in executive power debates than it should. 
We don’t clamor for legislation to restrict federal courts from issuing advisory 
opinions simply because they are the only ones to have announced this 
restriction on their jurisdiction. So, too, we don’t clamor for legislation that 
prevents Congress from easily declaring war simply because it could. Instead, 
we rely on a set of obvious internal checks. Here, too, publicity, expertise, and 
good judgment will make it structurally difficult for the Executive to overrule 
the Director in many instances.

Government has confronted a similar problem before. The Independent 
Counsel Act created something akin to a Director of Adjudication, albeit in the 
form of a prosecutor instead of a judge.91 That Counsel lacked accountability 
and was often insensitive to a decision’s long-term cost.92 Congress eventually 
let these powers return to the Justice Department. But the Justice Department 
then issued regulations creating Special Prosecutors removed from the day-to-
day control and influence of political actors.93 Special Prosecutors are free to 
conduct their investigations and, after deciding on particular courses of action, 
must present their proposals to the Attorney General, who retains a veto power.

Supporters of the Independent Counsel Act argued that internal regulations 
would falter because of the Attorney General’s veto power. To respond to that 
criticism, the regulations required the Attorney General to notify a select 
committee in Congress if he interfered with a Special Prosecutor. As a result, 
lines of accountability were preserved, so much that the Attorney General 
could be held responsible for trying to bury an investigation. Thus, the matter 
would receive political, though perhaps not public, oversight.

Similarly, a presidential overruling of the Director of Adjudication could 
trigger reporting to Congress. Congress, though unlikely to begin legislating

90 See Jennifer Lerner & Philip Tedlock, Accounting for the Effects of Accountability, 125 
at 1999 WL 150138.
93. My job at the Department of Justice involved drafting these regulations and the testimony in 
the preceding footnote. Nothing in this paper reflects any private knowledge, the regulations 
and their intended goals have long been matters of public record.
for reasons offered in Part I, could use formal pressures of oversight hearings and informal pressures through the media to demand some accountability. Such executive accountability might not always be to the public, but instead among the branches, but it would nevertheless function as a constraint. Over time, a culture of compliance could emerge, whereby presidents would not second-guess the opinions of the Director, except in extreme instances.

The traditional case against OLC independence is that it leads to less advice rather than more. But there are ways to structure the system to avoid much of this problem. The trick lies in, once again, taking seriously OLC’s function as a “court.” Like courts, rules enable aggrieved parties to bring their disputes to it. Those quasi-“standing” rules could be liberalized to permit more entities to seek the Director’s judgment. Bureaucratic overlap does this by creating more parties who “sue.” A legal dissent channel for employees, not only agencies, to refer legal questions could do even more.

Today OLC often hears only one side of an issue because a single agency presents an issue to it. As a result, it gets a distorted picture, quite unlike a court. Agency overlap creates some of that dual picture. By splitting adjudication from advice, agencies, as well as the judicial branch, will develop trust in the new entity. That is the lesson of the ill-fated War Resources Board, created by FDR in 1939 to manage war mobilization. That Board collapsed after a few months and was replaced by a series of other short-lived boards. The only one to succeed was the Office of War Mobilization (OWM). “To avoid the weakness of cabinet committees and commissions, OWM was a decision maker. To avoid the jealousy and rivalry inspired by the War Production Board, OWM ran no programs, created no czars, and had a minuscule budget . . . OWM was a courtroom, not an agency. It worked.”

For similar reasons, the fact that the Director of Adjudication would not have the President’s ear on a daily basis will encourage more disputes to be brought to it and avoid the jealousy and rivalry of the ill-fated War Production Board. OLC at present must dance delicately around its two functions, not only when it works with the President, but also when it works with impacted agencies.

94. Pillard, supra note 86, at 714 ("because resorting to OLC is purely optional, any agency wary of advance constitutional scrutiny of its conduct, or simply unaware of or inattentive to constitutional implications, may fail to seek advice from OLC.").

95. "Opposing views are usually unavailable to OLC because the programmatic interests of the requesting entities support only one side. Virtually all requests for OLC advice are privileged and confidential, so there is no opportunity for members of the public, academics, advocacy groups, or others to supply the otherwise-missing information or analyses.” Id. at 737.

96. The description throughout this paragraph is taken from Wilson, supra note 23, at 270-71.

97. Pillard’s excellent article implies that OLC can be reformed without drastic measures, such as by “Encourag[ing] Express Presidential Articulation of Commitment to Constitutional
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The executive has some self-interest in developing an insulated adjudicator of legal issues within its own branch. Currently, the Administration's chief argument in federal court against, for example, the applicability of the Geneva Conventions to detainees at Guantánamo is that OLC and the President have determined that the Conventions do not apply. That argument should ring hollow, however, when no neutral system is in place to adjudicate the matter or to tee up for presidential decision the full set of issues and a "lower court" adjudication of the matter. Put differently, courts should not award as much deference (under *Chevron* or an equivalent version of deference to the President in foreign affairs) without prior insulated review. If a neutral process of decision-making exists, courts can defer to it. But the current ad hoc process produces self-serving rationales. This is particularly so when decisions are made in secret. In short, courts could create a penalty default rule: Full *Chevron* deference should not be given without insulated review.

None of this is perfect, by any means. But it is a start toward developing a system of better bureaucracy. A neutral adjudicator can provide agencies with hope that their positions on issues, forged by expertise, will be examined and perhaps adopted. But for this system to work, even more must be done to create the conditions under which better bureaucracy will flourish. Not only must agencies have overlapping mandates and a vibrant civil service (both of which ensure that decisions are adequately teed up to the Director of Adjudication); there must also be mechanisms that operate after the Director's review to further preserve accountability.

D. Creating Other Checks via Institutional Design

Several other changes can create structural incentives that force deliberation by the executive and reduce the current default concentration of power reposed in that branch. This Section briefly sketches three of them: reporting requirements on agency action, minority-party hearings in Congress, and judicial doctrines to prod agency action.

"Rights." Pillard, *supra* note 86, at 745. If one could wave their wand to have that kind of presidential action, then her conclusion would follow. But individual cheering-on in a law review to elect or motivate a certain type of President will have about the same sway as the pep talks to Congress John Hart Ely described. See *supra* text accompanying note 20.

Pillard's other solutions have much to commend them, such as increasing the number of published OLC opinions and encouraging employees to act as constitutional whistleblowers. *Id.* at 751-53. These ideas will work far better with the reforms proposed here. For example, Pillard fears that forcing publication of OLC opinions would lead agencies not to seek their advice. Bureaucratic overlap, and its *de facto* liberalization of "standing," can mitigate that problem by forcing conflicts to the adjudication "court." Constitutional whistleblowers, too, are unlikely to have an impact when OLC is not independent (and therefore unlikely to rule for a whistleblower) and when the employee's agency superiors are themselves politicized.
1. Reporting and Consultation

The reporting requirement is a rich device of American government that has gone without much scholarly analysis. Reporting requirements pop up in any number of places today. For example, in the wake of CIA excesses, Congress required the President to report to Congress “as soon as possible” after approval of, and before initiation of, covert action.98 Moreover, the War Powers Resolution Act requires that the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities ... and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.99

Such reporting and consultation requirements are anathema to unitary executivists. These critics face an uphill battle, for their position requires dismantling vast numbers of requirements throughout the Code.100 Not only does legislation often make reporting to Congress mandatory, it often requires certain documents to be made public--most prominently, the Freedom of Information Act.101 And still other Acts of Congress require the President to

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98. 50 U.S.C. § 413(b)(1) (2000). Such reporting is ordinarily made to the congressional intelligence committees, but if the President determines that it is essential to limit the information further, he can report the action to the majority and minority leader of both Houses. Id. § 413(b)(2) (2000). In that circumstance, the President would still need to fully inform the congressional committee “in a timely fashion” later and explain why it was impossible to inform it earlier. Id. § 413(b)(3)


100. Consider, for example, 22 U.S.C. § 2364(a)(3) (2000) (requiring President to provide Senate Committees with “written justification before providing arms, credits, or guarantees” to foreign governments); 22 U.S.C. § 2799aa-1(a)(2) (2000) (requiring notification to Congress if the President furnishes aid to a country which would otherwise be ineligible under nuclear non-proliferation controls); 8 U.S.C. § 1184(c)(4) (2000) (requiring President to notify Congress and provide Report before asking the Attorney General to increase or waive the number of nonimmigrant workers permitted to enter the United States); 22 U.S.C. § 6442(b)(3) (2000) (notification if President determines a country is violating religious freedom severely); 8 U.S.C.A. § 1721(c) (West Supp. 2005) (USA PATRIOT Act requiring the President to consult with Congress in creating coordination plan among law enforcement and intelligence agencies); 22 U.S.C. § 2022 (2000) (annual reporting to Congress on “activities of the International Atomic Energy Agency and on the participation of the United States therein”); 22 U.S.C. § 2429a-2 (2000) (requiring President to notify Congress within fifteen days if he provides assistance to a non-nuclear power that violated an International Atomic Energy Agency safeguard).

101. 5 U.S.C. § 552(f) (2000) identifies the Executive Office of the President as subject to FOIA.
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consult with particular entities before engaging in action.\textsuperscript{102}

Reporting requirements could thus promote further internal checks and balances irrespective of whether a Director of Adjudication is created. Much the same way as the Solicitor General must notify Congress when he declines to defend the constitutionality of a statute, the President could be required to notify Congress when he decides a particular treaty like the Geneva Conventions is determined inapplicable to a military conflict and to provide Congress with the basis for that determination.\textsuperscript{103} Other reporting requirements can be created—for example notifying Congress (or a select committee) of the number of individuals held in military detention, the conditions of their confinement, the allegations (if any) against them, and their nationalities.

Such reporting requirements not only create an information flow to Congress that promotes external checks, they also eliminate a perverse effect engendered by the bureaucratic emphasis above. The more power a bureaucrat has, the greater the President’s temptation to staff the position with a loyalist. Reporting requirements can help mitigate this problem by guaranteeing that the decisions made by bureaucrats, and their rationales, are later given to Congress. Of course, in a one-party government, Congress may not act even with an abundance of material. But reporting requirements, given the two-year election cycle, will have some effect. And that effect will be strengthened by coupling this reform to others, such as minority hearings.

2. Minority-Party Hearings

Currently, only the majority party in Congress can hold oversight hearings. This cripples Congress’s ability to check the executive. There is no good reason for this “winner-take-all” system. In fact, because voting for national office occurs on a single day, it is not clear that voters can ever vote for a winner-take-all one-party government.

Consider, instead, the following proposal: During periods of single-party government, where both houses of Congress and the Presidency are controlled

\textsuperscript{102} For example, the National Environmental Policy Act of 1969 requires that the President incorporate advice from the Council on Environmental Quality. \textit{42 U.S.C. § 4344} (2000).

The Trade Act of 1974 requires the President to “seek information and advice from representative elements of the private sector” and take that advice under consideration when negotiating trade agreements. \textit{19 U.S.C. § 2155} (2000).

\textsuperscript{103} You might ask whether this requirement is necessary, since the Geneva Convention determinations made by President Bush are now common knowledge. But the President made his determinations on February 7, 2002, and their basis was not publicly revealed for two years (and only then via leak). Richard A. Serrano & Richard B. Schnitt, \textit{Files Show Bush Team Torn Over POW Rules}, \textit{L.A. Times}, June 23, 2004, at A1. Such leaked decisions can be presented as \textit{fait accompli}, where reversing policy would be interpreted as weakness.
by the same political party, the dominant minority party may hold oversight hearings in the Senate. Both political parties have something to gain from this proposal, in that they may one day be in the minority. (To further entice support for the idea, legislation could be passed now, to take effect in 2009.) Because the hearings only create a voice, not a dominant vote, they do not give the minority a weapon so powerful that it can block government actions.

Permitting the minority party in Congress to hold hearings may produce modest constraints on dominating executives, and can work in synergy with reporting requirements and bureaucratic job protections to ensure better information flow. Oddly, there appears to be no academic discussion of the possibility or advantages of minority hearings in our nation’s law reviews. Such hearings might harmfully lead to policy stagnation under the eye of greater accountability, or perhaps the hearings will ultimately prove ineffectual without further powers to alter policy. These results are not obvious, however, and a detailed examination of the approach is worth consideration.

3. Judicial Prodding

Courts can also jump-start the process of creating internal checks and balances. As briefly suggested in the previous section, if courts did not defer to presidential determinations of treaty provisions without internally checked processes, it would quickly spur development of those processes. Yet contemporary law suggests the reverse. For example, in *Hampton v. Mow Sun Wong*, the Court held that the Civil Service Commission’s rule barring aliens from service in the federal government was forbidden. But the Justices suggested that if the President (as opposed to a mere agency) issued the rule, it might be permissible. From the perspective of this Essay, the Court might have it somewhat backwards--agency decision-making might be considerably more evenhanded than presidential decision-making. At the same time, Presidents have accountability advantages. One way to capture the benefits from each decision-maker is to establish a rule requiring a system of internal checks before a President can take advantage of the judicial deference historically afforded to presidential decision-making.

iii. Objections and refinements

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105. "[I]f the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Id.* at 103 (emphasis added).
Internal separation of powers

A. Kagan’s Presidential Administration

Dean Kagan’s recent defense of presidential administration concentrated on domestic policy, but her ideas suggest a criticism of the above proposals. She claims that presidential administration energizes a moribund bureaucracy:

The need for an injection of energy and leadership [by the President] becomes apparent, lest an inert bureaucracy encased in an inert political system grind inflexibly, in the face of new opportunities and challenges, toward (at best) irreverence or (at worst) real harm. . . . This conclusion, of course, would be less sound to the extent that the political and administrative systems fail to impose adequate limits on the President’s exercise of administrative power. Then, the balance between friction and energy would tip toward the opposite extreme—away from the too broad curtailment of regulatory initiative to the too facile assertion of unilateral power. One reason not to fear this outcome relates to the President’s accountability to the public.\(^\text{106}\)

But this view of the presidency, at least in the realm of foreign affairs, is as far a description of contemporary reality as that of Madison’s views reprinted in the first paragraph of this Essay. Consider such claims in light of the facts that (1) there is little public accountability when decisions are secret, (2) agency officials have been excluded from providing input on answers to key legal questions, (3) no neutral subordinate decision-maker exists, and (4) the Administration has itself asserted that the brunt of these questions are beyond the purview of the courts altogether. Indeed, on the few questions as to which courts can exercise any review at all, the Administration asserts that courts are compelled to provide virtually absolute deference to presidential decisions.

A number of other assumptions are built into Kagan’s claim. Kagan was self consciously writing in an era of divided government.\(^\text{107}\) and she was extolling a degree of presidential transparency as well. After all, a chief advantage of presidential administration is its accountability.\(^\text{108}\) But that claim has little applicability to foreign affairs, where presidential interventions are

\(^{106}\) Kagan, supra note 6, at 2345-46. Kagan states that her discussion of the Clinton presidency (which she later calls the ‘centerpiece’ of her article) is about its attempt to use the President’s authority to achieve domestic policy goals. Id. at 2248; see also id. at 2282, 2307, 2245. Also, at a few points, she excludes or distinguishes foreign policy. See id. at 2291, 2313 n.267, 2364 n.444, 2371. As such, none of the above analysis should be taken as a direct criticism of her article but rather of attempts to further her concept in foreign affairs.

\(^{107}\) See id. at 2312 (stating that presidential administration arose as a response to the democratic “tie[s] off control of Congress in the third year of Clinton’s presidency”).

\(^{108}\) Id. at 2337 (“The presidency is by nature a public institution”).
often classified or hidden, and where agency conflicts are often swept under the rug. Accountability can never be a powerful solution here, just as it cannot adequately constrain the criminal prosecution power under the Article II “take care” clause. In both cases, a combination of governmental and private interests ensures that most sensitive decisions will not be sufficiently public to provide a check. Instead, a second-best substitute for accountability is needed. In the prosecution context, that substitute takes the form of a Special Prosecutor and a reporting requirement. In this context, it might take the form of overlapping agency jurisdiction and reporting/consultation requirements.

From where Dean Kagan once sat, in the White House’s Domestic Policy Council, it is not surprising that she lingered over claims that “bureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor.”109 With vivid portraits of necrosis—“agencies inevitably develop ‘arteriosclerosis’”110 and “‘ossification syndrome’”—Kagan paints a picture of agencies resting on their laurels and remaining adverse to change. This is, of course, a common feeling for any high-level political appointee in any Administration, as Kagan herself recognizes.112 And while the views are understandable, they invite the question of whether the vantage-point of an Administration that wants to get things done is the proper one for setting parameters in constitutional and administrative law. There are sometimes good reasons for tradition-bound actors, reasons no doubt underappreciated by political appointees but perhaps wise nonetheless.

Kagan’s defense of presidential administration centers largely on the energy a President gives regulatory agencies. But there are values other than efficiency, values celebrated by our Founders. Indeed, it might be said that a starting point for our government is the evil of government efficiency.113 Pointing to statements from Hamilton about the dangers of a “feeble executive” and the like, Kagan claims that the “countertradition” of strong, Executive vigor outweighs these concerns.114 But that countertradition presumes an active Congress as an overseer of presidential decision-making.

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109. Id. at 2263.
110. Id. at 2264 (quoting Louis Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 HARV. L. REV. 1105, 1109 (1954)).
111. Id. (quoting ANTHONY DOWNS, INSIDE BUREAUCRACY 158 (1967)).
112. Id. at 2272 & n.96.
113. Kagan recognizes this, mentioning in a paragraph the Founding concerns about checks and balances. Id. at 2342.
114. Id. at 2342-43 (quoting THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Krammides ed., 1987). There are many other ways to deal with ossification besides presidential administration, such as constant infusion of new people, rotational service arrangements modeled on the Foreign Service, opportunities for promotion, overlapping agency jurisdiction to stimulate competition, and so on.
Internal separation of powers

When Hamilton feared a feeble executive, he did not mean an executive who had “only” 2.6 million employees and fifteen cabinet secretaries, a President who could commit hundreds of thousands of troops to the field without a declaration of war and who had the military might to decimate entire continents by pushing some buttons; and a President who claimed he had the ability to set aside treaties ratified by a supermajority of the Senate.

Kagan concedes that agencies do have some expertise that will prove relevant. But the advantage of empowering bureaucrats is not limited to their expertise; it also has to do with their time horizons. Presidents suffer from a last-period problem—a problem seen, for example, in President Clinton’s last minute pardons. A chief advantage of bureaucracy is to isolate the long-term view. By articulating the prospective costs, an effective bureaucrat is able to refocus government questions away from the crisis-de-jour.

So, for example, even if a creative reinterpretation of the Geneva Conventions might be in the interest of a President who will soon leave office, it might not be in the long-term interest of the military or the country. The impact on international humanitarian law, and the safety of our own troops, will not manifest itself immediately. Just as presidents face incentives to deficit-spend, they face incentives to maximize well-being in the short-term over the longer one. In our system of government, only courts and bureaucrats have longer time horizons. Courts, as generalists with limited jurisdiction, are not situated to protect all of the nation’s long-term interests; instead, bureaucrats must fulfill that role.

In the end, Kagan is surely right to point out that a President has a “stake” in building an efficient government, but efficiency is not the equivalent of wisdom. Wisdom requires the experience of generations and the realization that generations will follow an incumbent politician. Bureaucracy provides that long-term picture of the consequence of particular government actions.

B. Ackerman’s Political Entrenchment

Others might come at the problem from the other side, claiming that bureaucracy is impossible in America. Bruce Ackerman recently argued, for example, that the checking function of bureaucracy is elusive in a tripartite system of government. For Ackerman, the division of government has undermined a professionalized bureaucracy, in contrast to parliamentary

115. The White House, President Bush's Cabinet, http://www.whitehouse.gov/government/cabinet.html (last visited Apr. 2, 2006); supra note 4
116. Id. 2352.
117. Kagan, supra note 6, at 2355

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systems. His claim is that when American politicians intervene in bureaucratic affairs, they invariably muck them up. Lofty rules of general applicability become contorted to fit a particular politician’s views. And the upshot is to encourage presidents to staff agencies with loyalists who will use the mantra of “central coordination” to control agencies as much as possible.

Ackerman is surely right to say, given the competing political pulls of Congress and the executive, that American bureaucracy cannot function in the European fashion. But there is no reason to think that a modest checking function, akin to the modest check envisioned by the separation of the branches, cannot emerge. After all, such constraints arise in Europe despite the obvious knowledge that whatever position a bureaucrat takes can eventually invite ridicule or praise when a new government comes into power (not to mention immediately inviting these reactions by the opposition, shadow government). To be sure, a Prime Minister need not pressure a bureaucracy as often, since he can accomplish what he needs via legislation without resorting to administrative lawmaking. But limited political capital constrains such action and similarly constrains his ability to overrule bureaucratic decisions.

In both systems, bureaucracies can perform a checking function. Overlapping jurisdiction, civil-service protections and promotion, and the invigoration of the agency bureaucrat as an elite force will produce modest internal checks. This is the lesson from the Foreign Service, which has developed into a well-functioning entity despite being housed in a three-branch government. At the same time, one must be careful not to oversell these reforms. They will not create a French system, for the President will play a far greater role in being able to trump bureaucratic decision-making. But the fact that our system cannot mirror the French is a benefit, too, for our Founders designed a system that values quick presidential action and control in times of crisis. The modest internal checking function created by bureaucratic overlap and civil-service protections, coupled with reporting requirements, moves the balance away from the regime of nearly pure presidential control toward a middle ground that more closely approximates the separation of powers laced into the fabric of our constitutional order.

C. The Divided Government Problem

Perhaps the most intractable problem is to engineer a system that controls the excesses of one-party government without creating so many obstacles that it falls apart during two-party rule. Gridlock, for example, is more common in

119. Id. at 700-03.
Internal separation of powers

divided government, and internal checks can further exacerbate it.

For these reasons, many of the solutions advocated here are modest checks and balances that permit presidential overruling of bureaucratic decisions. They do not envision an insurmountable minority veto at any point. At the same time, they recognize that the current expansion of presidential power requires the development of some internal processes to ensure better decision-making. During periods of one-party government, the minority party holds only a single potent weapon, the filibuster. The filibuster, however, only constrains congressional action, not presidential rulemaking. A President who broadly interprets legislation that has already passed (like the AUMF) is not subject to even the filibuster constraint. For that reason, long-term changes such as civil-service protections are necessary, even if they have the undesirable byproduct at times of frustrating presidential administration.

An alternative to long-term changes is to activate checking mechanisms only during periods of one-party government. This Essay suggested one such mechanism, minority-party oversight hearings, to be triggered only during such periods. This trigger idea could be expanded elsewhere. For example, the minority party in Congress could be permitted to appoint two ombudsmen to each agency during periods of one-party government. Those ombudsmen would serve as clearinghouses for agency whistleblowers—reporting their findings to both houses of Congress and, in appropriate cases, the public.

This model, which builds and supplements the current system of Inspectors General, is another way to utilize existing structures to produce more vibrant internal checks. Currently, fifty-eight Inspectors General have been appointed, and under the Inspectors General Act of 1978, they are insulated from control by agency heads and are required to report their findings biannually to Congress. While these officers no doubt exercise a check on abuse (and are insulated from political control in precisely the way that unitary executive proponents fear), they presently focus on mismanagement and fraud, not the development of sound policy. The Inspector General thus resembles something like the post-Bork confirmation situation, where it takes a scandal before anyone pays attention. Scandal jurisdiction eclipses the far more important

120. Kagan, supra note 6, at 2344.
matters involving the merits of particular issues.\textsuperscript{124} An ombudsmen model could easily redress this problem, dedicating officers to the types of weighty issues that currently occupy the State Department dissent channel.

\textbf{Conclusion}

America faces a choice. It can either take its chances with an executive branch and the incumbent risks that the courts will underreact and overreact at various times, or it can harken back to a tradition of divided government that has served our country well. September 11 did change everything, but it is up to us to figure out how to translate the ideas of divided government into a modern age when presidents must act quickly to avoid calamity.

Courts, of course, are not unaware that a trend toward greater executive power in this time of crisis exists. As a result, one can expect that as the executive becomes more monolithic, courts will function as a sort of check. But court checking is bound to fail. It will often occur too late, if at all. Courts lack expertise in many areas, and they may intervene when they should not and refrain from intervening when they should. For this reason, and the others advanced in this Essay, a set of institutional design choices must be made that permit both claims of Presidential legitimacy, democratic will and expertise, to function simultaneously.

It might be tempting to take the ideas advanced here and implement them in the domestic sphere, reasoning that foreign affairs is the most difficult area in which to curb Presidential powers. However, the area is also replete with civil-liberties concerns that are not properly addressed in the political process due to empathy failure. Moreover, because state governments often exercise a checking function in the domestic sphere,\textsuperscript{125} there may be less need for internal checks. Finally, because many foreign-policy decisions are made in secret, political accountability will not be as much of a constraint as in the domestic context. Political accountability is a central tenet of the unitary executive, but it utterly fails to justify expansive presidential powers deployed in secret and under legal opinions designed to remain secret.

The pendulum today has begun to swing so far toward executive branch vigor that one must fear whether the principles of divided government embraced by our Founders are working. By giving force to traditions that are already part of our subtle constitutional landscape—bureaucratic overlap, civil-service protections, internal adjudication, and reporting requirements—some of


\textsuperscript{125} See \textit{FEDERALIST} NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).
Internal separation of powers

d this movement can be pulled back toward equilibrium.
PANEL VI:

HUMAN RIGHTS AND NATIONAL SECURITY LAW ISSUES

MODERATOR:
STEVEN I. VLADeCK

National Security and Civil Liberties

Kate A. Martin and Joel F. Brenner

In the last 50 years, coinciding with the creation and growth of the Standing Committee, there has been a dramatic expansion in the United States in the role played by law and lawyers on issues of national security and civil liberties. The law of war, of course, is as old as the country. But the application of law to other national security matters, especially secret intelligence activities, both domestic and foreign, is much more recent. Throughout this history, the indelible intertwining of security and liberty remains a dominant theme.

Profound commitments to liberty and human rights have always underpinned national security law. The stated purpose of the United States Constitution is "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The Framers describe these goals as equal in importance and part of a whole. They are not described as goals in tension with one another, where gains in one respect imply losses in another. Four years later the French Constitution of 1793, with its Declaration of the Rights of Man and Citizen,1 was the product of a very different and bloodier revolution but expresses similar yearnings for both liberty and public security—although neither was achieved in the years that immediately followed it.

In the last century, particularly since the end of World War II, the relationship between security, rights, and liberties has become vital to questions about the international ordering of the world and its peoples. In 1948, following the devastation of two World Wars and the slaughter of millions of civilians, the United Nations General Assembly adopted the Universal Declaration of Human Rights,2 which begins with explicit "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world ...."3 Notably, this seminal mid-twentieth century declaration described the ravages of war not in terms of security but as destructive of individual freedom:
ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . .

The desire to protect civil liberties and human rights frequently gives rise to controversy over the necessity and lawfulness of national security powers, even when they are invoked openly for genuine security purposes. The issue is as old as the Republic and is inherent in a democracy. Invariably it comes to the fore at times of national danger. For example, during the Adams Administration, when war between France and Britain threatened to involve the United States (as it eventually did in 1812), James Madison wrote that real or imagined danger from abroad was often the occasion for restrictions on liberty:

The Management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging, and are more under the influence of prejudices on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad. 4

Madison raised another enduring issue, the tension between openness and secrecy. "A popular Government without popular information or the means of acquiring it," Madison explained, "is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives." 5 Secrecy is a form of power. Consequently, to paraphrase Lord Acton's dictum, secrecy corrupts and absolute secrecy corrupts absolutely. Democracies distrust it for good reason. But governments must sometimes keep secrets, especially concerning national security matters and foreign affairs. If a government is to enjoy the trust of its citizens, however, secrecy must justify itself. Citizens must have reason to believe their government follows openly made rules that govern secret behavior, and there must be some trusted mechanism with reasonable power to be effective—even if the mechanism, for example the House and Senate intelligence committees, sometimes operates behind closed doors.