

The Emerging Law of 21st Century War

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It was a great honor to be invited by the Brookings Institution and The Hague Institute for Global Justice to deliver the 2016 lecture named in honor of Justice Stephen Breyer. I bring to this discussion four different perspectives: 35 years as an international law professor, 20 years as a human rights lawyer, 10 years in the U.S. government, and five years as a law school dean.

In each of these capacities, I have had the great honor to study with, work with, and learn from Justice Breyer, without doubt the great transnationalist justice of our age. He carries on a transnational tradition in American jurisprudence that is both strong and enduring. That tradition runs through early Chief Justices John Marshall and John Jay, who arguably wrote as many opinions about international law as about domestic law; through Justice Horace Gray, who wrote the classic cases of *The Paquete Habana*⁵⁶ and *Hilton v. Guyot*,⁵⁷ through Chief Justices Melville Fuller and William Howard Taft, who helped to found the American Society of International Law; through Justice William O. Douglas, who traveled the world to an extent unmatched by any current justice; through Justice William J. Brennan, Jr., the strongest internationalist on the Warren Court and Justice Byron White, who wrote a stirring transnationalist dissent in *Banco Nacional de Cuba v. Sabbatino*,⁵⁸ through Harry A. Blackmun, for whom I had the great privilege of clerking and whose seat Justice Breyer now occupies; to Justices Breyer and Ruth Bader Ginsburg today. It is Justice Breyer who, in his judicial writings and his path breaking recent book *The Court and the World*,⁵⁹ has taken the lead

⁵⁵ This chapter was adapted from the 2016 Justice Stephen Breyer Lecture on International Law, given on April 1, 2016 at the Brookings Institution in Washington, DC.

⁵⁶ *The Paquete Habana*, 175 U.S. 677 (1900).

⁵⁷ *Hilton v. Guyot*, 159 U.S. 113 (1895).

⁵⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁵⁹ Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015).

among the current justices in paying the “decent respect to the opinions of mankind” that our Declaration of Independence called for in 1776.

If there is a core idea that drives this transnationalist jurisprudence, it is that international and domestic law are no longer artificially divided. There is an emerging body of hybrid, “transnational public law,” rooted in shared public norms that have a similar meaning in every national system around the world. There are certain hybrid concepts, like the metric system or the term “dot com,” that are not clearly international or domestic in character. In the same way, the ideas of “cruel, inhuman, or degrading treatment,” “civil society,” the “internally displaced,” and “transborder trafficking” are transnational public law concepts, inasmuch as they have a shared meaning in every domestic legal system.

I discuss here the emerging law of 21st century war, which in many ways stands as the most discussed, but least understood, of these evolving bodies of transnational public law. Here let me pay special tribute to the Brookings Institution’s president, my friend and mentor Strobe Talbott, with whom I had the privilege of working during the Clinton administration on so many pressing issues, not least the Kosovo crisis. After we left government in 2001, we both returned to Yale, where I resumed my teaching at the Law School and he founded our Globalization Center. One of the very first discussions we had after September 11, 2001, was about whether in a time of crisis, law would be abandoned or modified to address a whole range of emerging problems.

It was Strobe’s commitment, which I very much shared—and that we later put into a book that Strobe edited, in which I wrote a chapter⁶⁰—that although the law might change, there still would be law. It was our shared conviction that we should not respond to 9/11 by entering a “law-free zone.” What we’ve seen in the years since is that a whole new range of tools have emerged to address the exigencies of 21st century war: among them cyber conflict, drones, special operations, private security contractors, and in-

⁶⁰ Harold Hongju Koh, “Preserving American Values: The Challenge at Home and Abroad,” in *The Age of Terror: America and the World After September 11*, eds. Strobe Talbott and Nayan Chanda (New York: Basic Books, 2001), 143.

creasingly autonomous and semi-autonomous robots. This lecture asks: what rules govern these 21st century tools? What exactly is the emerging law of this 21st century war?

A new body of law: Two competing approaches

At the outset, let me highlight a struggle between two competing approaches to this question: what I call a “black hole” versus a “translation” approach. Some suggest that the rapid changes in the way we conduct modern war place us in a law-free zone, because there can be no law to apply to military tactics and technologies that did not previously exist. Are places like the Guantanamo Bay detention center or tribunals like military commissions legal “black holes” that do not have to answer to law? Or is there another, better view that has prevailed in the 15 years since 9/11: namely, that we live in a moment where we must translate what Montesquieu called the “spirit of the laws” to the present-day situation?⁶¹ This translation exercise necessarily occurs with many interpreters, because we live at a time when both the domestic and international legislative systems are peculiarly paralyzed or too frequently in stalemate. So if the law to be applied to modern problems is to be updated, it must be law that reflects modern state practice, driven from a sense of legal obligation derived from the spirit of the laws that governed 19th and 20th century conflicts.

It takes only a moment of reflection to see that there is a big difference between a “black hole” and a “translation” exercise with regard to the modern law of war. If we live in a black hole, we are operating outside the law altogether. But if we are engaged in a translation exercise from previously agreed international legal rules, we may debate whether or not any particular translation is correct. There is no doubt, however, that we are generally operating *within* the framework of the law, not denying its application altogether. Thus, the choice of translation over black-hole approaches means choosing the rule

⁶¹ Harold Hongju Koh, “The Spirit of the Laws,” *Harvard International Journal* 43, no. 1 (Winter 2002): 23-39.

of law over rules adopted without regard to legal foundation. This is a profound choice.

What I want to argue today is that in several emerging areas of 21st century war, a new body of law has emerged—much of it developed by U.S. practice and pronouncement—that increasingly is transnationally shared with other developed nations, particularly our NATO allies.

The Obama administration's national security framework

Responding first to a simplistic question sometimes set forward by media: is the Obama administration's approach to 9/11 national security issues the same as the George W. Bush administration's approach? Let me suggest six crucial differences.

First, who is the enemy? The Obama administration does not believe in, or speak of, a “global war on terror.” The United States is not engaged in an amorphous war on “terror” any more than it is engaged in an amorphous war against “drugs” or “poverty.” Instead, the United States currently engages outside of hot battlefields against particular transnationalist terrorist networks in military operations that are constrained by international law principles of state sovereignty, human rights, and humanitarian law.

Second, under domestic law, the United States does not operate based purely on unenumerated constitutional powers of the president, but rather, based on specific congressional authorizations plus constitutional power.

Third, although some U.S. judges may disagree,⁶² it is broadly accepted that as a matter of international law, these domestic authorizations should be informed by the international laws of war.

⁶² For one example, see *Al Bahlul v. United States*, 767 F.3d 1 (DC Circuit 2014) (en banc). The majority decided the case narrowly on plain error review, declining to address Judge Brett Kavanaugh's claim in a separate opinion that “the Declare War Clause and the other Article I war powers clauses *do not refer to international law and are not defined or constrained by international law*” (emphasis added). *Ibid.*, 72-73 (Kavanaugh, J., dissenting in part).

Fourth, the Obama administration applies a hybrid paradigm for counterterrorism. The United States does not use an either/or approach—either war or law enforcement—but rather, combines them into a hybrid approach. So what may be an appropriate warlike response toward a leader of the Islamic State (ISIS) who is found in parts of Syria may change into an appropriate law enforcement approach if that very same ISIS leader were found in a stronger law enforcement environment such as Brussels or Paris.

Fifth, the United States does not simply operate based on labels but relies rather on a fact-based, not label-based, approach toward identifying the enemy. Labeling someone as an “enemy combatant” does not suddenly announce that, against that person, anything goes. Rather, hard cases call for a detailed fact-based inquiry, to help determine whether they may lawfully be subjects of military action: precisely who are these individuals, what are their histories of past hostile activity, what are their exact ranks or positions in the terrorist network chain of command, and what certifiable threat level do they pose?

Sixth and finally, the Obama administration’s approach embodies an absolute commitment to humane treatment in detention, interrogation, and targeting.

These important differences fit into a broader, integrated Obama administration legal approach to targeting and detention, as part of a general national security strategy of smart power. The public has heard repeatedly about “smart power” from this administration’s officials, particularly Secretary of State Hillary Clinton.⁶³ With respect to counterterrorism policy, the bedrock notions of a smart power approach are that to win broader legitimacy in a broader struggle against terrorist networks, (1) targeting should be lawful; (2) detention should be both legally authorized and legally conducted, with the fruits of illegal detention or interrogation never being used in subsequent proceedings; and (3) the basic strategy should be multilateral, meaning law-

⁶³ Hillary Rodham Clinton, “Smart Power Approach to Counterterrorism” (speech, John Jay School of Criminal Justice, New York, September 9, 2011), <http://www.state.gov/secretary/20092013clinton/rm/2011/09/172034.htm>.

ful cooperation with other states who are also at war with international terrorist networks, relying wherever possible on shared law enforcement authorities (such as Eurojust).

International law, domestic law, and armed conflict

Where, exactly, do these legal rules come from? Three sources: (1) international criminal law as it has developed since Nuremberg, particularly as now codified in the International Criminal Court's Rome Statute, which criminalizes genocide, war crimes, crimes against humanity and, after 2017, the crime of aggression;⁶⁴ (2) the law of armed conflict, sometimes known as international humanitarian law; and (3) international human rights law, when it is not ousted by another, more specialized body of law on the same issue (a controlling "*lex specialis*."

Under international law, to engage in armed conflict means that the United States is fighting against an organized armed group in a sustained struggle of a particular nature, intensity, and scope. That armed conflict can either be an international armed conflict (IAC) or a non-international armed conflict (NIAC), as declared by either the state itself or by the International Committee of the Red Cross. These two traditional kinds of armed conflict are familiar. Thus, for example, the United States versus Germany during World War II represented a textbook international armed conflict. A non-international armed conflict has traditionally meant armed struggle of the type seen in Colombia at the end of the 20th century: the government versus a nonstate actor (such as the Revolutionary Armed Forces of Colombia, or FARC) in a civil conflict that does not cross national borders.

The conflict with al-Qaida, however, does not fit neatly within either of these categories; although it does cross borders, it is non-international because it is not an armed conflict between two nation-states. So what we have seen in re-

⁶⁴ Assembly of States Parties Res. RC/Res.6, annex III, "The crime of aggression," (June 11, 2010), <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>.

cent times is the emergence of another kind of non-international armed conflict—namely, between a nation-state and a transnational terrorist network like al-Qaida. Justice Breyer, among other justices in *Hamdan v. Rumsfeld* in 2006, concluded that we have engaged in just this kind of non-international armed conflict since 9/11.⁶⁵

Under this theory, the United States is not at war not with “terror” generally, but with a specific transnational terror network that links al-Qaida, the Taliban, and associated forces. This administration has construed ISIS to be part of these associated forces, as a splinter or offshoot of al-Qaida core, with ISIS now operating as a “co-belligerent” with al-Qaida and the Taliban, in the sense of having entered the fight against the United States alongside these other armed groups in the so-called “hot battlegrounds”—active theaters of battle such as Afghanistan, Iraq, and Syria.⁶⁶ As a matter of international law, until its recent disengagement, Russia said it had been invited to fight in Syria by Bashar Assad’s government. The United States is participating there against ISIS based not on Assad’s consent, but because it acts in collective self-defense of Iraq.

Under traditional laws of war, the United States is obliged to follow both the law of initiating war (*jus ad bellum*) and the law of conducting war (*jus in bello*). Under domestic law, the United States must follow the terms of both the Constitution and the various statutory authorizations for use of military force. Since the second half of the George W. Bush administration, the United States has asserted that (1) it is in a non-international armed conflict with al-Qaida, the Taliban, and associated forces in response to the 9/11 attacks and subsequent attacks, and under international law, (2) it may use force consistent with the laws of war and its inherent right to self-defense, and (3) under domestic law, the president may act according to appropriate and necessary uses of force that have been duly enacted by Congressional statute.

⁶⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁶⁶ For more detailed discussion of the administration’s legal theory for using force against ISIS, see Harold Hongju Koh, “Obama’s ISIL Rollout: Bungled, Clearly. But Illegal? Really?” *Just Security*, September 29, 2014, <https://www.justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really/>.

This claim raises three issues: (1) What constitutes a valid armed conflict, (2) when the United States acts in individual or collective self-defense, and (3) when the state in which the U.S. military action occurs has either consented to the use of force on its territory or demonstrated itself to be unwilling or unable to suppress the threat (the paradigm case being the U.S. raid in Pakistan on Osama bin Laden). In armed conflict, the conduct of armed force is governed by well-established humanitarian rules that require distinction between civilian and military targets, and rules of necessity, proportionality, and humanity in the use of force. So whenever one hears presidential candidates talking about “carpet-bombing” ISIS cities, one should remember that it is plainly illegal. (Not long ago, one 2016 presidential candidate even invoked the oxymoronic notion of selective carpet bombing, “carpet bombing with some limits.”)⁶⁷

Common Article III to the four Geneva Conventions, which is regarded as customary international law, states as a rule of humanity that there should be no violence to life and persons including torture, taking of hostages, outrages on personal dignity, or sentences without due process.⁶⁸ Additional Protocol II amplifies these guarantees and outlaws all forms of violence against those persons who are noncombatants.⁶⁹

For legal purposes, it does not matter that al-Qaida has not signed the Torture Conventions or the Geneva Conventions. I recall one meeting I had about 10 years ago with a senator who said, “Professor, the last time I checked, al-Qaida hadn’t signed either the Torture Convention or the Geneva Conventions.” I responded, “Senator, the last time I checked, the whales hadn’t signed the Whaling Convention either!” My point was that this is not about contract, it is not about a bilateral agreement, it is about the minimal stan-

⁶⁷ Chris Megerian, “Ted Cruz Wants to ‘Carpet Bomb’ Islamic State, But with Some Limits,” *Los Angeles Times*, December 15, 2015, <http://www.latimes.com/politics/la-pol-sac-ted-cruz-carpet-bomb-20151215-htmlstory.html>.

⁶⁸ Geneva Convention Relative to the Treatment of Prisoners of War Article III, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II), adopted June 8, 1977, art. 4(2), 1125 U.N.T.S. 609, 612.

dards of humane treatment that we as a country obey unilaterally, whether or not there exists a written agreement. The norm of humane treatment binds us, as a defining element of our national identity, whether or not others agree to follow it. Senator John McCain put it well when he said, “it’s not about them; it’s about us.”⁷⁰ Geneva Convention, Additional Protocol I, relevant parts of which the United States follows as customary international law, further directs that there shall be no “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”⁷¹ This renders illegal such threats as were recently made on the campaign trail that we will see if we can make “sand glow in the dark” in ISIS-held territory.⁷²

In addition, some presidential candidates have argued that our government should return to waterboarding or “a hell of a lot worse than waterboarding.”⁷³ Again, the short answer to this claim is clear: waterboarding is illegal behavior, and if an elected president has taken an oath to uphold the Constitution and laws of the United States, that is also probably a high crime and misdemeanor, and hence, an impeachable offense.⁷⁴ The Torture Convention expressly says that torture may not be justified by a state of war or a threat of war and that all acts of torture, wherever they can occur, must be criminalized. Senator McCain made the same policy point as well.⁷⁵ So these brash and reckless campaign statements mislead Americans about the true realities and legalities of interrogation.

⁷⁰ Foster Klug, “McCain: Torture Ban Protects U.S. Image,” *Washington Post*, November 14, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/14/AR2005111400247.html>.

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, art. 51(2), 1125 U.N.T.S. 7, 26.

⁷² Katie Glueck, “Cruz Pledges Relentless Bombing to Destroy ISIL,” *Politico*, December 5, 2015, <http://www.politico.com/story/2015/12/cruz-isil-bombing-216454>. Glueck quotes Senator Cruz as saying, “I don’t know if sand can glow in the dark, but we’re going to find out!”

⁷³ Tom McCarthy, “Donald Trump: I’d bring back ‘a hell of a lot worse than waterboarding,’” *Guardian*, February 7, 2016, <https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture>.

⁷⁴ U.S. Constitution, Article 2, § 4, “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

⁷⁵ John McCain, “Statement by Senator John McCain on Inhumane Interrogation Methods,” February 8, 2016, <http://www.mccain.senate.gov/public/index.cfm/2016/2/statement-by-senator-john-mccain-on-inhumane-interrogation-methods>.

If one needs any further convincing, one need only read a recent book, *Why Torture Doesn't Work: The Lessons from Neuroscience*, by Shane O'Mara, a professor of experimental brain research at the University of Dublin.⁷⁶ His neuroscience research makes a very simple point: that at a cellular, neurological level, every single specific tactic used to extract information by torture—sleep deprivation, temperature changes, waterboarding, food restriction—inhibits rather than enhances the victim's ability truthfully to recall and convey accurate memories. In fact, so-called “enhanced” interrogation tactics enhance nothing; in truth, they are impaired interrogation tactics, because they destroy memory and recall. So torture proves to be an utterly pointless act: it achieves the exact opposite of what it is intended to do. And in the end, it harms the torturer as much as the tortured. All of this suggests that we should stop pretending that torture is some kind of means to some nobler end. It achieves nothing but abuse. As Orwell would say, “the object of torture is torture.”⁷⁷

The application of international human rights law

This brings us to the question of how international human rights law applies when armed conflict is in play. This issue was addressed recently by the International Court of Justice in The Hague in the *Advisory Opinion on the Threat or Use of Nuclear Weapons* when it explicitly said that the International Covenant on Civil and Political Rights does not cease in times of war if there has not been a derogation from it.⁷⁸ In the *Palestinian Wall* case, the international court further declared that both international human rights law and international humanitarian law must be taken into account on a provision-by-provision approach. So there are some human rights provisions whose application might prove to be impracticable in a time of war—

⁷⁶ Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Cambridge: Harvard University Press, 2015); see also Harold Hongju Koh, “Pain Versus Gain,” *Just Security*, June 20, 2016, <https://www.justsecurity.org/31544/pain-gain/>.

⁷⁷ George Orwell, *1984* (New York: Penguin, 1949), 227.

⁷⁸ International Court of Justice, “Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,” (The Hague: International Court of Justice, July 8, 1996), 240, para. 35, <http://www.icj-cij.org/docket/files/95/7495.pdf>.

for example, the right to participate in elections. But other provisions, such as the right to worship, can plainly be exercised even in times of war. Other human rights, such as the right to be free of torture and cruel, inhuman, and degrading treatment are non-derogable rights that cannot be dispensed with even in times of war or extreme emergency.⁷⁹

In his new book *Power Wars*, Charlie Savage of *The New York Times* recounts that when I left the State Department, I left behind on my last day as legal adviser a detailed memorandum opinion that explained why I did not believe that it was legally available for policymakers to claim that the Convention against Torture did not apply outside the United States.⁸⁰ Although the internal debate within the administration continued for another two years, in 2015, the Obama administration finally made this point explicit in its presentation before the Committee against Torture in Geneva. Assistant Secretary of State for Democracy, Human Rights, and Labor Tom Malinowski stated that “the torture ban applies in all places at all times with no exceptions,”⁸¹ and my former principal deputy, then Acting Legal Adviser Mary McLeod, echoed the same notion.⁸²

⁷⁹ See Daniel Bethlehem, “The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict,” *Cambridge Journal of International and Comparative Law* 2, no. 2 (2013), 180-195.

⁸⁰ Harold Hongju Koh, “Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict,” (Washington, DC: U.S. Department of State, January 21, 2013), <https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf>; see also Charlie Savage, “U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad,” *New York Times*, March 6, 2014, http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?_r=0; Marko Milanovic, “Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties,” *EJIL: Talk!*, March 7, 2014, <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/>.

⁸¹ Harold Hongju Koh, “Can the President Be Torturer in Chief?” *Indiana Law Journal* 81 (2006).

⁸² Mary E. McLeod, “Acting Legal Adviser Mary McLeod: U.S. Affirms Torture is Prohibited at All Times in All Places” (opening statement before the U.N. Committee Against Torture, United Nations, Geneva, November 12, 2014), <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>.

If that is the law of interrogation, what about detention? As the president made clear in his National Archives speech seven years ago,⁸³ civilian trials are to be preferred, and military commissions must comply with the Constitution after the Supreme Court's invalidation of the first version of the Military Commission Order in the *Hamdan* case. Transfer of detainees from Guantanamo continue. Currently 76 detainees are left (as of early August 2016)⁸⁴ with more releases expected to reduce the number of Guantanamo detainees to 55 or so by the end of the summer of 2016, with a few months still left in this administration.⁸⁵ An executive order on periodic review is being implemented to determine which detainees should continue to be held and which may be released.⁸⁶ And now finally embodied in the most recent National Defense Authorization Act is an absolute statutory guarantee of humane treatment.⁸⁷

The use of drones and robots

I am sometimes asked, “as a human rights lawyer who opposes torture, how can you defend the use of drones?” My answer is quite simple: all torture is illegal and the president cannot be torturer-in-chief—this is an absolute ban under all circumstances.⁸⁸ But, targeted killing in warfare can be lawful or unlawful, depending upon whether it is done according to the laws of war. One may not like targeted killing, but a lawyer in the government addressing

⁸³ White House, Office of the Press Secretary, *Remarks by the President on National Security*, May 21, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09>.

⁸⁴ “The Guantanamo Docket,” *New York Times*, accessed August 11, 2016, <http://projects.nytimes.com/guantanamo>.

⁸⁵ “The Case for Closing—and Keeping Open—Guantanamo,” *NPR*, March 6, 2016, <http://www.npr.org/2016/03/06/469370724/the-case-for-closing-and-keeping-open-guantanamo>. This account projects roughly 55 remaining detainees by the end of summer 2016, based on statements by Lee Wolosky, U.S. Special Envoy for Guantanamo Closure.

⁸⁶ Exec. Order No. 13567, 76 Fed. Reg. 13,277 (March 7, 2011).

⁸⁷ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045, 129 Stat. 726, 977; Marty Lederman, “The President’s NDAA signing statement re: GTMO and anti-torture provisions,” *Just Security*, November 25, 2015, <https://www.justsecurity.org/27939/presidents-ndaa-signing-statement-re-gtmo-anti-torture-provisions/>.

⁸⁸ See Koh, “Torturer in Chief?”

these matters has an inescapable duty to draw the line between those uses of force that are or are not lawful. If the United States is indeed in an armed conflict, it can engage in certain kinds of lawful, lethal warfare. For example, targeted killing can be lawful when conducted against someone not in government custody who poses an imminent threat, as an act of self-defense, or in armed conflict against a combatant who has no immunity under the Geneva Conventions. As President Aharon Barak of the Israeli Supreme Court suggested, targeted killing may in some cases be more consistent with human rights norms than other forms of warfare, because of the lower possibility of collateral damage.⁸⁹

But what is necessary to make targeted killing lawful is that the action is authorized under both domestic and international law, that the targeted person's rights have been adequately considered, and that the sovereignty of the country in which the action occurs has been adequately respected. If all of this is done correctly, targeted killing does not constitute unlawful extra-judicial killing, execution, or assassination, and can be lawfully carried out by drone or special operations, as in the case of Osama bin Laden. There are certainly weapons that are inherently illegal—in my judgment, for example, chemical weapons, antipersonnel land mines, unexploded ordinance, and cluster bombs—but drones do not fall into that category; they may be lawfully used for certain targeted operations that meet carefully defined criteria. It is precisely how they are used that determines whether or not they are lawful.

To see the common sense of this point, consider the following thought experiment. Suppose that shortly after Congress had authorized the use of military force against al-Qaida and the Taliban in 2001, the president had come out and said:

A week ago, we were attacked in the worst attack ever to occur on our soil. More than 3,000 innocent people were killed simply for going to work. This is a gross human rights violation and act of war to which

⁸⁹ High Court of Justice 769/02, *Public Committee Against Torture in Israel v. Government of Israel* (2) IsrLR 459 (2006) (Isr).

we must respond. But in responding, here is what I will not do: I will not torture anyone, I will not open a detention center at our naval base in Guantanamo Bay, I will not invade Iraq, and I will not conduct kidnappings or illegal extraordinary rendition to torture. I will not violate people's rights by instituting overbroad surveillance. I will cooperate with our allies lawfully and multilaterally in a transparent fashion. But if the only place I can find bin Laden and his supporters is in a cave in Tora Bora and the only way I can reach them is by drone, I have no choice but to use that lawful method, in accordance with the laws of war. And I say to our allies and the American people: please support me in this effort.

Obviously, a lot of water has flowed under the dam since that speech was not made. But what it should indicate is that it is not the use of drones that is illegal. It is the way in which other mistaken aspects of U.S. national security policy have been conducted in the years since 2001 that have put a cloud over so much of what the United States has done in response to 9/11.

Upon taking office, President Obama made clear that his goal was to obey the law even in times of armed conflict. He said this in his inaugural speech, in his 2009 National Archives speech, and again in his Nobel Peace Prize acceptance speech in December of that year.⁹⁰ At the National Defense University in May 2013, he emphasized that a smart power approach can include drones as an effective, discriminate tool to help dismantle specific networks that threaten the United States.⁹¹ In that far-ranging speech, he made clear his preference for capture over kill, America's respect for state sovereignty, and its commitment to the notion that self-defense may be invoked to use

⁹⁰ Barack H. Obama, "A Just and Lasting Peace" (speech, Oslo city hall, Oslo, December 10, 2009), https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture.html; Barack H. Obama, "Remarks on National Security" (speech, National Archives, Washington, DC, May 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09>; Barack H. Obama, "Inaugural Address" (speech, Washington, DC, January 21, 2009), <https://www.whitehouse.gov/blog/2009/01/21/president-barack-obamas-inaugural-address>.

⁹¹ Barack H. Obama, "Remarks by the President at the National Defense University" (speech, National Defense University, Washington, DC, May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

force against a continuing imminent threat (based on a necessarily elongated notion of imminence) against senior operational leaders who are clearly determined to strike against the United States, so long as there is a “near-certainty that no civilians will be killed or injured.”⁹² Currently, these are policy rules embedded in recently released (though redacted) Presidential Policy Guidance (PPG)⁹³ summarized in a fact sheet issued alongside the 2013 NDU speech.⁹⁴ Ideally the administration would go one step further and embody these principles in an executive order before President Obama leaves office, to ensure that U.S. practices remain consistent with the laws of war.⁹⁵

To go further, these practices can be translated into codes of conduct, and internalized into private behavior through private contracts as rules that can govern the conduct of private security contractors. This has been done in a public-private arrangement called the Montreux Document,⁹⁶ which has led to the adoption of an International Code of Conduct (ICOC) to govern private security practices.⁹⁷

⁹² *Ibid.*

⁹³ “Procedures for Approving Direct Action against Terrorists Targets Located outside the United States and Areas of Active Hostilities,” American Civil Liberties Union, May 23, 2013, https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf.

⁹⁴ “U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations outside the United States and Areas of Active Hostilities,” White House, May 23, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

⁹⁵ After the 2016 Justice Breyer Lecture was delivered, the president did indeed issue a more limited version of the executive order suggested in text, calling for regular disclosure of civilian casualty statistics. See “Executive Order—United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force,” White House, July 1, 2016, <https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>; see also Charlie Savage & Scott Shane, “U.S. Reveals Death Toll From Airstrikes Outside War Zones,” *New York Times*, July 1, 2016, http://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html?_r=0.

⁹⁶ U.N. General Assembly, Resolution 63/467, “Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts,” October 6, 2008, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/droi_090209_33/droi_090209_33en.pdf.

⁹⁷ “International Code of Conduct for Private Security Service Providers,” International Code of Conduct Association, accessed June 23, 2016, http://www.icoca.ch/en/the_icoc.

What about robots? The law of war does not yet treat autonomous robots as a *per se* illegal instrument. But I believe that fully autonomous robots that do not have a human operator in the loop, insofar as they select and engage targets independently of human interference or supervision—think “The Terminator”—should be treated as *per se* illegal weapons of war. At the same time, semi-autonomous robots that have human beings in the loop can be programmed to operate under the legal principles described above, inasmuch as the human operators of those robots can use the same set of principles as were stated in the president’s NDU speech and PPG to comply with the emerging laws of war.

Cyber conflict

And how about the difficult question of cyber intrusions, a topic that could easily occupy a lecture on its own? These intrusions run a wide gamut of conduct that stretches along a spectrum of activity that runs from (1) cyber monitoring, defense and espionage, and hacking, which can be done by private parties, to (2) computer network exploitation (CNE), which is a form of intelligence, and (3) pernicious forms of consumer network attack (CNA), which can have broader, physical consequences, such as using a computer to open a dam or to shut down a hospital whose physical effects are no different from simply bombing the dam or hospital. These are cyber acts plainly governed by the laws of war.

In 2012 I gave a speech at U.S. Army Cyber Command called “International Law in Cyberspace,”⁹⁸ which stated 10 currently agreed-upon legal rules of cyber conflict. That speech made clear that international law applies in cyberspace; that cyberspace is neither a law-free zone nor a black hole, and that forms of cyber activity can, under certain circumstances, represent a use of force to which the laws of *jus ad bellum* and *jus in bello* apply, with states being responsible for their own actions, as well as the acts of proxy actors.

⁹⁸ Harold Hongju Koh, “International Law in Cyberspace,” *Harvard International Law Journal* 54 (December 2012): 1-12.

A series of legal experts have engaged in an extended exercise resulting in the Tallinn Manual, which has sought to elaborate these emerging rules in considerable detail.⁹⁹ To further legalize cyberconflict, more standard-setting exercises must be promoted through diplomatic negotiation before global fora like the Group of Governmental Experts (GGE),¹⁰⁰ to keep translating the laws of war to rapidly evolving technological capacities and to make it even clearer that cyber conflict is governed by translated law-of-war standards.

The legality of humanitarian interventions

Finally, no discussion of 21st century war can end without discussing Syria, a tragic story that is known all too well: the five-year civil war, the gross violations of human rights and humanitarian law, the armed conflict, the migrant crisis, the border closings, and the growing discrimination against those fleeing refugees who are feared to be from ISIS. The current horrible tally stands at around 250,000-plus dead, 1.9 million injured, 7 million displaced, 4.8 million refugees, 8.4 million children affected by the conflict, 13.5 million in need of humanitarian assistance.¹⁰¹ In his 2016 State of the Union address, President Obama suggested that the best approach to a conflict like Syria is a smart power approach.¹⁰²

One of the legal issues being raised over and over is whether it is lawful for the United States to lead a collective effort to enter Syrian territory to try

⁹⁹ Michael Schmitt, "International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed," *Harvard International Law Journal* 54 (December 2012): 13-37.

¹⁰⁰ Elaine Korzak, "The 2015 GGE Report: What Next for Norms in Cyberspace?" *Lawfare*, September 23, 2015, <https://www.lawfareblog.com/2015-gge-report-what-next-norms-cyberspace>.

¹⁰¹ Lucy Westcott & Stav Ziv, "Syria's Five Years, 60 Months, 1,825 Days or 43,800 Hours of War, by the Numbers," *Newsweek*, March 15, 2016, <http://www.newsweek.com/syrian-conflict-five-year-numbers-436741>.

¹⁰² Barack H. Obama, "State of the Union Speech as Delivered" (speech, Congress, Washington, DC, January 13, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>.

to mitigate the humanitarian disaster. A series of questions has been raised throughout the last five years of the Obama administration: (1) Is it lawful to give humanitarian assistance within Syria? (2) Is it lawful to support Syrian rebels with lethal or nonlethal aid? (3) As Aleppo remains divided and refugees flock to the border between Aleppo and Turkey, is it possible to set up a humanitarian corridor or safe zone to give them some sort of humanitarian protection?¹⁰³

Some claim that Article 2(4) of the U.N. Charter is absolute in such circumstances, and that it is a *per se* illegal violation of state sovereignty to take military action without a U.N. Security Council resolution to prevent or mitigate gross abuses.¹⁰⁴ But if this bright-line rule were in fact true, then any of the permanent five members of the United Nations Security Council could commit genocide against its own citizens, veto all objecting Security Council resolutions, and no one could do anything about it. How is that consistent with the core values of the U.N., which include the promotion and protection of human rights? This is a moment to question that legal claim, as several NATO allies did during the Kosovo intervention in 1998.

Some have called humanitarian intervention of the Kosovo kind “illegal but legitimate.” But as an international commission headed by former Canadian Foreign Minister Lloyd Axworthy pointed out, if the U.N. Security Council

¹⁰³ At this writing, intense debate continues to rage inside and outside the U.S. government over what would constitute the best way to end the Syria crisis. See, e.g., Mark Landler, “51 U.S. Diplomats Urge Strikes Against Assad in Syria,” *New York Times*, June 16, 2016, http://www.nytimes.com/2016/06/17/world/middleeast/syria-assad-obama-airstrikes-diplomats-memo.html?_r=0. Landler describes a dissenting view of State Department diplomats encouraging greater use of force as part of a broader diplomatic solution. See also Robin Wright, “Former Ambassador Robert Ford on the State Department Mutiny in Syria,” *New Yorker*, June 17, 2016, <http://www.newyorker.com/news/news-desk/former-ambassador-robert-ford-on-the-state-department-mutiny-on-syria>; Harold Hongju Koh, “Another Legal View of the Dissent Channel Cable on Syria,” *Just Security*, June 20, 2016, <https://www.justsecurity.org/31571/legal-view-dissent-channel-cable-syria/>; Harold Hongju Koh, “‘Effective’ Policy in Syria: Ambassador Robert Ford’s View,” *Just Security*, June 21, 2016, <https://www.justsecurity.org/31590/effective-policy-syria-ambassador-robert-fords-view/>. See generally Harold Hongju Koh, “The War Powers and Humanitarian Intervention,” *Houston Law Review* 53, 4 (2016): 971, 998-1004, 1028-1033.

¹⁰⁴ Oona A. Hathaway & Scott J. Shapiro, “On Syria, a U.N. Vote Isn’t Optional” *New York Times*, September 3, 2013, <http://nyti.ms/1DMbgki>.

fails to discharge its responsibilities, concerned states will not rule out other means and forms of action in response.¹⁰⁵ In his 2009 Nobel Lecture, President Obama made clear that he believed that use of force for humanitarian grounds as in the Balkans can be justified.¹⁰⁶ Although as a policy matter, he has apparently concluded differently with regard to Syria,¹⁰⁷ he has just as plainly suggested that under some circumstances, he would consider it a lawful option.¹⁰⁸

As I have elsewhere argued at some length, nearly 20 years after Kosovo, the notion that calling Kosovo-style humanitarian intervention “illegal but legitimate” as a desired legal ending point must be questioned.¹⁰⁹ Where else is this done in human rights law? Was same-sex marriage determined to be “illegal but legitimate,” or was collective action taken to make it lawful? Ironically, those who claim that there is a bright-line, black-letter, absolutist rule barring humanitarian intervention absent a Security Council resolution

¹⁰⁵ International Commission on Intervention and State Sovereignty, “The Responsibility to Protect,” (Ottawa: International Development Research Centre, 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

¹⁰⁶ Obama, “A Just and Lasting Peace.” In this lecture, President Obama states that “I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That’s why all responsible nations must embrace the role that militaries with a clear mandate can play *to keep the peace*” (emphasis added).

¹⁰⁷ See Jeffrey Goldberg’s interview with President Obama regarding *inter alia* his policies in Syria, Jeffrey Goldberg, “The Obama Doctrine,” *The Atlantic*, April 2016, <http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>.

¹⁰⁸ Koh, “The War Powers.” 130, recounts how “the [White House] Counsel explained that, while an attack on Syria ‘may not fit under a traditionally recognized legal basis under international law,’ given the novel factors and circumstances, such an action would nevertheless be ‘justified and legitimate under international law’ and so not prohibited.” As a matter of domestic law, the administration also apparently concluded that congressional approval was not required. As *The New York Times* reported, “[A]dministration lawyers decided that it was within Mr. Obama’s constitutional authority to carry out a strike on Syria as well, even without permission from Congress or the Security Council, because of the ‘important national interests’ of limiting regional instability and of enforcing the norm against using chemical weapons[...][The White House Counsel] stated that ‘[t]he President believed that it was important to enhance the legitimacy of any action that would be taken by the executive [...] to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use.’”

¹⁰⁹ See generally Koh, “The War Powers.”

take the kind of narrow, textualist interpretive approach associated far more with the late Justice Antonin Scalia than with Justice Breyer. To simply pronounce that “a rule is a rule is a rule and it has been so since the founding” creates an intolerable bias towards inaction in the face of gross abuses, even after several decades of debate attempting to revise international law to define a narrow Responsibility to Protect in the name of human rights.

To make this argument hardly means that anything goes. As I have recently specified elsewhere, when a state faces a situation of gross violence causing disruptive consequences likely to lead to imminent threats to peace and security, and all other remedies have been exhausted, the humanitarian use of force may be lawful, if limited to necessary and proportionate action.¹¹⁰ If such action is done collectively—as NATO acted in Kosovo—to prevent the use of illegal means, like chemical weapons, for illegal ends such as war crimes, the use of force in these circumstances can be legally justified. One can analogize this situation to the Good Samaritan principle in domestic tort law. Tort law rarely preauthorizes bystanders to use force for humanitarian motives, for fear that they will abuse this license. But if they do act in a careful fashion, for the limited purpose of preventing much worse outcomes, the law will hold them exempt from wrongfulness after the fact. In such cases, we recognize the tension the conduct raises with the letter of the law, but invoke an affirmative defense so as not to render illegal socially desirable conduct. Here too, isn't it the task of international lawyers to develop the law in this area to better serve the cause of human dignity?

Finally, the looming crime of aggression, which will be activated by the International Criminal Court in 2017, should not be forgotten. Again this debate could occupy volumes, but readers should refer to an article I recently published with a co-author in the *American Journal of International Law*.¹¹¹ If Western leaders in NATO, for example, engage in collective humanitari-

¹¹⁰ *Ibid.*, 1011, which states the international legal test for humanitarian intervention.

¹¹¹ Harold Hongju Koh & Todd Buchwald, “The Crime of Aggression: The United States Perspective,” *American Journal of International Law* 109, no. 2 (2015): 257-295; see also Claus Krefß & Stefan Barriga, eds., *The Crime of Aggression: A Commentary*, (forthcoming 2017).

an intervention to prevent a future Rwanda or Kosovo, can they be charged with aggression at the International Criminal Court? And if that were done, wouldn't that have the counterproductive effect of deterring much-needed human rights action? Isn't it perverse to say that the only remedy that we have against crimes against humanity, war crimes, and genocide is episodic, after-the-fact punishment, and that international law permits no *ex ante* remedy that allows *prevention* of such gross violations? Does it make sense to chill humanitarian intervention by criminalizing legitimate efforts to undertake such prevention? Clearly this is a looming problem that demands more thoughtful collective consideration before the crime of aggression is finalized next year. International lawyers need to work together to trigger more thoughtful discussions to determine a better and more stable long-term solution.

Conclusion

This brief exploration has covered a great deal of ground. Every topic addressed here could be discussed in much greater detail. But at a minimum, having this overview should force us to reconsider Cicero's famous saying, "*inter armis enim silent leges*," "in wartime, the laws fall silent." On reflection, that just is not true. In today's armed conflict, the laws are far from silent.

Even though the means of modern warfare are rapidly mutating, there *is* an emerging body of 21st century law of war. That law does not follow verbatim from 20th century law, but it does represent a good faith effort not to treat modern warfare as a legal black hole, but rather, to translate the spirit of those laws to present day circumstances. These laws govern interrogation, detention, drones, special operations, private security contractors, and the Responsibility to Protect. The challenge going forward is how to clarify these rules, and to make them more formal, transparent, and subject to external oversight.

In modern war, the laws do not fall silent, simply because the tools of conflict are evolving. A great deal of emerging law must be developed, applied, codified, and enforced to become the translated law of 21st century war.



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