



The Justice Stephen Breyer Lecture Series on International Law 2014-2016

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The Hague Institute
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About the Lecture

Since 2012, the Brookings Foreign Policy program and The Hague Institute for Global Justice have worked closely with partners to gather experts to tackle some of the greatest challenges facing the international community at the nexus of international law, justice, and policy. This body of work seeks to address both traditional and cutting edge areas of international law where norms are still being tested and shaped. It aims to explore complex and transnational themes such as countering violent extremism, cybersecurity and internet governance, and post-conflict resolution to shape norms, guide jurisprudence, and offer frameworks for concrete policy solutions.

Starting in 2014, Brookings and The Hague Institute, with the support of the office of the Municipality of The Hague and the Embassy of the Netherlands in Washington, began co-hosting an annual lecture series to address critical issues of international law and policy named for U.S. Supreme Court Justice Stephen Breyer. The inaugural Justice Breyer lecture in 2014—offered by Justice Breyer himself—explored the development of U.S. and transnational legal norms in our modern, interconnected, and interdependent world. The second annual lecture in 2015 featured Ambassador Ahmet Üzümcü, director-general of the Organization for the Prohibition of Chemical Weapons, to examine the intersection of security and justice surrounding the elimination of Syria's declared chemical weapons. Ambassador Robert S. Ford, senior fellow at the Middle East Institute, and Mallory Stewart, deputy assistant secretary of state, served as discussants. In 2016, the third annual lecture featured a keynote address from legal scholar Harold Hongju Koh on the emerging law governing 21st century war in response to the rise of violent extremism and the use of new tools of warfare. Michèle Coninsx, president of Eurojust, offered commentary. The fourth annual lecture will address the intersection of technology, accountability, and international law and feature distinguished experts from the law, national security, human rights, and technology communities. Brookings and the The Hague Institute also co-host a companion lecture series on global justice in The Hague named in honor of former Secretary of State Madeleine K. Albright.

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U.S. National Interests in International Law

Ted Piccone

What does the law of nations mean in this new era of resurgent nationalism as narrowly defined by leaders like Donald Trump, Nigel Farage, and Vladimir Putin? To answer that question, it helps to return to some basic definitions and principles that remind us why nation-states have long found it in their interests to cooperate on matters of common concern. Laws based on norms of reciprocity, mutual respect, justice, and peace have regulated international relations since the times of ancient Greece. As trade across boundaries increased, it became increasingly in each state's self-interest to define, and bind others, to common rules and customs, stretching from land to sea to space.

Now, with over 560 major multilateral instruments deposited with the United Nations alone, citizens around the world benefit every day from rules their governments have adopted conjointly with each other. These agreements, as the American Society of International Law has documented, enable worldwide telecommunications and postal networks; universal recognition of time standards; improved weather forecasting; stronger safety standards for automobiles, airplanes, and ships; sharing of information about the origin of our food and other products; protection of software, literary, and artistic works; and preservation of cultural heritage sites and endangered species, to name a few.¹ With the adoption of international human rights treaties after World War II, these rules expanded to protect people from torture and other forms of inhumane treatment; promote equal protection for women and children, including for adopted children and those caught in custody dis-

¹ American Society of International Law, "International Law: 100 Ways it Shapes our Lives" (Washington, DC: American Society of International Law, 2006), https://www.asil.org/sites/default/files/100%20Ways%20Booklet_2011.pdf.

putes; and facilitate pursuit of war criminals, terrorists, human smugglers, and drug traffickers. Agreements to protect the public and the environment from chlorofluorocarbons (CFCs) and other harmful pollutants are among some of the more effective binding instruments of modern international law.

Despite these and many other obvious benefits from international law, the political culture of the United States has turned markedly sour when it comes to ratifying treaties that demonstrably serve its national interests. Two recent examples immediately come to mind: The U.N. Convention on the Rights of Persons with Disabilities, which is modeled on the Americans with Disabilities Act of 1990 and would protect disabled Americans when traveling overseas, was denied Senate ratification in 2012 based on spurious charges it would impinge on home schooling.² Similarly, the U.N. Convention on the Law of the Sea, endorsed by senior U.S. military, defense, business, and environmental leaders as a key instrument for protecting U.S. interests in safe passage for its vessels and in its 200-nautical-mile exclusive economic zone, was blocked by 34 Republican senators in 2012 on grounds it would, *inter alia*, bind the United States to third party arbitration.³ Meanwhile, China and others are shaping the rules and practices of the treaty body that regulates exploitation of seabed resources without Washington having a seat at the table.

Such pro-sovereignty sentiments are now the dominant view in the White House and most of the Republican-controlled Congress. That is likely to spell further trouble for preserving U.S. leadership of an international order which has overwhelmingly served U.S. interests in a coherent system of rules and customs that has given us 70 years free of direct major power conflict and impressive economic prosperity.

The Justice Stephen Breyer Lecture series on international law, formally established in 2014 in partnership with the Netherlands Foreign Ministry, the

² Ted Piccone, "Senate GOP failed on disability rights," CNN, December 8, 2012, <http://www.cnn.com/2012/12/08/opinion/piccone-senate-rights/>.

³ See, e.g., Matt Cover, "GOP Senators Sink Law of the Sea Treaty; 'This Threat to Sovereignty,'" CNSNews.com, July 16, 2012, <http://www.cnsnews.com/news/article/gop-senators-sink-law-sea-treaty-threat-sovereignty>.

mayor of The Hague, and The Hague Institute for Global Justice, was created to help policymakers on both sides of the Atlantic think about new challenges to international law and order. It would be fair to say that when our cooperation on this initiative began in 2013, we did not imagine that the pendulum swing against the underpinnings of the international order would advance as far and as fast as it has in the last year. Core beliefs and lessons learned from the 20th century are up for grabs around the world, including on both sides of the Atlantic, at least judging from current political discourse favoring nationalism over “globalism.” A trans-Atlantic approach, therefore, is particularly timely and relevant.

A trans-Atlantic perspective is also valuable as an intellectual endeavor because Europeans and Americans come from different historical perspectives, a point James Madison made in 1792: “The [U.S.] Constitution is a charter of power granted by liberty,” not, as in Europe, “a charter of liberty... granted by power.”⁴ The Declaration of Independence’s reference to “a decent respect to the opinions of mankind” was an early indication, however, that America’s founding fathers felt an obligation to consider the views of others, even its former colonial masters, in matters of law and justice. Justice Breyer, “the great transnationalist judge of our age,” has taken up that charge in the modern era, following in the tradition of Chief Justices John Marshall and John Jay.⁵

Since then, trans-Atlantic jurisprudence has largely converged around some fundamental principles based on national constitutions, the United Nations Charter, and institutions founded after World War II—“shared public norms with similar meanings in every national system of the world,” as Professor Harold Koh puts it. But meaningful differences remain and often revolve

⁴ James H. Read, *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson* (Charlottesville: University of Virginia Press, 2000), 29 (quoting James Madison writing in the *National Gazette* in 1792), cited in Stephen Breyer, “The Court in the world” in *The Justice Stephen Breyer Lecture Series on International Law 2014-2016*, (Washington, DC: Brookings Institution, 2017), 12.

⁵ Harold Koh, “The emerging law of 21st century war” in *The Justice Stephen Breyer Lecture Series on International Law 2014-2016*, (Washington, DC: Brookings Institution, 2017), 39-40.

around the limits to which citizens and their representatives are prepared to cede traditional sovereignty to an international body. The European Union, for example, is wrestling mightily with both the benefits and costs of “pooled sovereignty.” While the United States may be a laggard when it comes to adopting certain treaties, it is not immune from the judicial and legislative decisions of other countries, as Justice Breyer himself explained so well in his inaugural lecture at Brookings. In a quickly changing world, he said, “we better learn what is going on elsewhere because that affects directly what we do at the Supreme Court. In a word, understanding and referring to what is happening abroad is often the best way to preserve our American values,”⁶ particularly our faith in the rule of law for ourselves and in our relations with others.

Justice Breyer’s analysis of five areas in which the development of law in other parts of the world has a direct effect on U.S. judicial decisionmaking includes matters highly relevant to public debates today, from protecting civil liberties from executive overreach to determining the application of World Trade Organization rules and decisions to U.S. domestic law. Under a Trump White House and Republican-controlled Congress clamoring to put America first, these issues are bound to be fiercely contested in the months ahead.

One area of international law that is not contested, at least not by the United States, is the strict prohibition against the production, stockpiling, and use of chemical weapons and their precursors, as set forth in the U.N. Chemical Weapons Convention (CWC).⁷ Ratified in 1997 by the U.S. Senate after intense debate, the CWC and its implementation arm, the Organization for the Prohibition of Chemical Weapons (OPCW), headquartered in The Hague, is the only legally binding instrument to ban comprehensively an entire class of weapons of mass destruction under international verification. More importantly, it has established a process in which the vast majority of states have declared their chemical weapons stockpiles for the purpose

⁶ Breyer, “The Court in the world,” 12.

⁷ Organization for the Prohibition of Chemical Weapons, “Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,” 1993, https://www.opcw.org/fileadmin/OPCW/CWC/CWC_en.pdf.

of their destruction under international monitoring. The United States and Russia, which hold the largest amount of such weapons, have committed to destroy their holdings completely by December 2020 and September 2023, respectively. The task of ridding the world of these reprehensible weapons will not be complete, however, until states outside the convention, like North Korea, are brought to heel. Even more challenging, as OPCW Director General Ahmet Üzümcü warned in his remarks at Brookings in April 2015, is stopping terrorists and other rogue actors from using chemical weapons to attack U.S. troops and innocent civilians, as seen in Iraq and Syria in 2016.⁸

In addition to the overwhelming international consensus to stop the use of chemical weapons, recent events in Syria have demonstrated the operational value of such binding commitments. After reports of chemical weapons attacks against Syrians were tragically confirmed in August 2013 when an estimated 1,500 people died from a sarin nerve gas attack in Ghouta, the treaty was quickly put to work. In short order, a U.N. investigation confirmed the use of chemical weapons, Syria submitted its instrument of accession to the CWC, and Russia and the United States agreed on a framework for the elimination of the Bashar Assad regime's chemical weapons program. The OPCW then fast-tracked approval of a plan to eliminate the weapons, which the Security Council endorsed the same day.⁹ Three days later, OPCW experts were on the ground in Damascus to help verify Syria's stockpile of approximately 1,300 metric tons of chemical weapons and oversee their destruction. As further elaborated by Director General Üzümcü in his speech at Brookings, a remarkable multilateral response involving contributions from 35 OPCW member states led ultimately to the removal and destruction of all of Syria's declared chemical weapons by January 2016.

Unfortunately, the story does not end there. Reports of new attacks in Syria, this time with chlorine agents, emerged in 2015 and led to further U.N.

⁸ Eric Schmitt, "ISIS Used Chemical Arms at Least 52 Times in Syria and Iraq, Report Says," *The New York Times*, November 21, 2016, https://www.nytimes.com/2016/11/21/world/middleeast/isis-chemical-weapons-syria-iraq-mosul.html?_r=0.

⁹ U.N. Security Council, Resolution 2118, "Middle East," September 27, 2013, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118(2013)).

investigations, spurring additional U.N. Security Council proposals by the United States and others to hold perpetrators accountable. This time, however, U.S.-Russia cooperation had evaporated, leading to a joint Russia-China veto of a U.N. Security Council resolution in February 2017 that would have imposed sanctions under Chapter VII of the U.N. Charter on Syrian government officials and entities linked to chemical weapons attacks; placed an embargo on arms sales and chemicals intended to be used as weapons; and established a mechanism to monitor implementation.¹⁰

The lessons learned from the Syria case about the realities of international law and politics are manifold: (1) establish clear rules of the road and mechanisms for implementation before a crisis hits; (2) move quickly on windows of opportunity when they arise; and (3) fortify the political will among major powers to ensure concrete action.¹¹ The CWC worked well when all three factors were present, and fell short when the third element dried up. Consensus broke down in part because of the demand for punishment of specific government officials and agencies, a step apparently too far for Syria's chief defenders on the Security Council. On balance, the CWC and its quick implementation in the Syria case certainly advanced U.S. national security interests in containing the spread of chemical weapons in a volatile part of the world. But the current lack of accountability for blatant violations raises serious questions about the deterrent value of the instrument.

While chemical weapons were prevalent over a century ago, new forms of warfare are emerging that test the boundaries of national and international laws rooted in core principles of necessity, proportionality, reciprocity, and human rights. The absence of specific rules that govern the use of new technologies like armed drones and offensive cyber weapons requires policymakers and lawyers, in Harold Koh's view, to "translate what Montesquieu called 'the spirit of the laws' to present day situations," at least until paralyzed leg-

¹⁰ See statement by the Global Centre for the Responsibility to Protect, "UN Security Council Vetoes Undermine Accountability for Chemical Weapons Use in Syria," February 28, 2017, <http://www.globalr2p.org/publications/479>.

¹¹ This is a modified version of the lessons learned set forth by Amb. Üzümcüin his 2015 lecture at Brookings.

islatures are able to write new laws.¹² Under the administration of President Obama, decisionmakers looked both to international and U.S. law for proper authority and guidance on how to engage in non-traditional armed conflict between a state and a transnational terrorist network like al-Qaida. These rules included humane treatment of combatants and noncombatants,¹³ as well as the strict prohibition of torture in all places and at all times with no exceptions.¹⁴ Targeted killings were considered permissible if in accordance with international humanitarian law (e.g., in situations of imminent threat, an act of self-defense, or an armed conflict where a combatant has no immunity), if the action was authorized under domestic and international law, and if the target's rights have been considered and sovereignty of the relevant nation respected.

The rules of engagement get murkier the further one moves away from traditional armed conflict. States, however, are slowly adopting voluntary guidelines as a step toward more binding norms. For example, the Montreux Document outlines a code of conduct for private security providers.¹⁵ The Tallinn Manual helps set standards for cyber conflict. But, as Harold Koh explained at his lecture at Brookings in 2016, much more work needs to be done to translate current laws to scenarios like humanitarian intervention in the absence of Security Council authorization, as in the case of Kosovo. The crime of aggression, which recently came into force as part of the Rome Statute, adds further complexity to situations where the international com-

¹² Koh, "The emerging law," 41.

¹³ See, e.g., 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/>.

¹⁴ Mary E. McLeod, "Acting Legal Adviser Mary McLeod: U.S. Affirms Torture is Prohibited at All Times in All Places," U.S. Department of State, (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/>.

¹⁵ Switzerland Department of Foreign Affairs and the International Committee of the Red Cross, "The Montreux Document on Pertinent International Legal Obligations and Practices for States related to Operations of Private Military and Security Companies during Armed Conflict" (Berne: Switzerland Department of Foreign Affairs, 2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

munity must decide whether or not to address gross abuses, as in the case of Syria. The need to clarify rules, and make them more formal, transparent, and subject to external oversight has never been greater, even if the political will to deploy military force for such situations remains scant.

New forms of technology like robots, malware, and hacking raise difficult questions that remain pending on the international law agenda. The open and global nature of the internet has sparked an international revolution in the sharing of information, knowledge, and commerce for the benefit of humankind. It also raises, however, a number of thorny legal and ethical questions concerning malign uses of the web ranging from the theft of private data and pervasive cyber-attacks to the dissemination of extremist views, lies, and propaganda.

The collection of vast amounts of metadata for public and private purposes also poses a number of difficult issues regarding internationally recognized rights to privacy, information, expression, and association. Here, common ground between Europeans and Americans on the boundaries of privacy and control continues to be elusive. Confusion regarding the boundaries between “good” and “bad” uses of the worldwide web is growing as different national authorities intervene to regulate and mediate areas of digital-enabled conflict and competition with little to no normative consensus at the international level. Meanwhile, businesses are adopting their own measures to fill the yawning gaps in laws and regulations governing digital activities by setting limits on what to share with security agencies and establishing other self-policing mechanisms. Regardless, security loopholes are widening, ripe for exploitation by criminal forces.

The fourth annual Justice Stephen Breyer lecture on international law seeks to tackle these questions by convening top experts in the fields of technology, security, human rights, and law for a public discussion on how new technologies both advance and complicate international law and justice. The discussion will focus on two interrelated questions of technology and accountability: (1) what principles and protocols are needed for cross-border sharing of data for investigation and prosecution of crimes; and 2) what are the key technological tools and appropriate evidentiary standards for docu-

mentation and prosecution of violations of international humanitarian, human rights, and criminal law?

The world is changing very fast, and decisionmakers need help to untangle the complex tradeoffs between hard and soft law, policy guidance and political rhetoric, and good corporate practice and unbridled market capitalism. The current political dynamic in the United States, and potentially in Europe, may push us away, however, from the longstanding principles and practices of international law and cooperation needed to do this vital work. Justice Breyer, in his concluding remarks, powerfully warned of the dangers of a path away from the rule of law when he cited a passage from *The Plague* by Albert Camus, a metaphorical tale about the Nazis coming to France. Camus's hero, Dr. Rieux, states that "the germ of the plague [that evil part of all mankind] never dies nor does it ever disappear." Judges, says Justice Breyer, and the rule of law they and others fairly administer, cannot stop all the rats from spreading the plague, but they can be at least one weapon "in the war against that evil part of mankind."



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Piccone served eight years as a senior foreign policy advisor in the Clinton administration, including on the National Security Council staff, at the State Department's Office of Policy Planning and the Office of the Secretary of Defense at the Pentagon. From 2001 to 2008, Piccone was the executive director and co-founder of the Democracy Coalition Project, and was also the Washington office director for the Club of Madrid, an association of over 100 former heads of state and government engaged in efforts to strengthen democracy around the world, and continues as an advisor.

The Court in the World

*Justice Stephen Breyer*¹⁶

Let me start by saying that I am not an expert on international law, and I am not an expert on the law of other countries. But I have spent a certain amount of time working as a judge in our courts, and I will speak from my point of view as a justice on our Supreme Court. I want to explain to people how the work has changed in what some call—it is not a very happy word, but it is all right—transnational law, meaning law of other countries, international law; why that has become part of my life; and how.

Why look to the world?

When we first went off to see courts in Europe, which our court does from time to time—we hear other people and we talk to them—I came back and I thought it was pretty interesting. I was speaking at a university and I said that we had learned a lot of useful things. A professor from Finland asked me to name one thing. I thought for a minute or two and I did come up with something. Well, that would not be so hard to answer today. The number of cases requiring us to take foreign considerations into account has increased substantially. In this piece, I want to tell you what it is like to weigh these foreign considerations and identify a few of the questions that we as justices must answer.

Part of my motive for doing this is that there is a tremendous political issue, one that was best illustrated when, a few years ago, I sat on a panel with a Republican congressman from Virginia. At some point, the congressman strongly criticized the practice of referring to other countries' courts. I said,

¹⁶ This chapter was adapted from the 2014 inaugural Justice Stephen Breyer Lecture on International Law, given on April 3, 2014 at the Brookings Institution in Washington, DC.

“I guess that’s aimed at me,” and he replied that it was. I then explained that foreign court decisions do not normally bind us in the United States. But they have similar problems, they have constitutions that are more and more like ours, and they are trying to protect liberty and democracy. If someone with a job like mine has a problem like mine and a constitution like mine, why wouldn’t I read what his judgment says? I don’t have to follow it, but why not read it? I might learn something.

The congressman agreed that I should read the foreign opinion but felt I should not refer to it in my opinion. I acknowledged his point, although I disagreed, but not knowing when to quit, I said, “Well, look, many of these countries have courts that are newer than ours and they don’t have the same degree of prestige that we do. They refer to our cases, and we sometimes refer to theirs. Then they can go to their legislators and have one more argument for saying, ‘What we do is important, please pay us our salaries this year.’ It helps to provide support for the rule of law.” The congressman thought that was fine but he added that we justices should instead send the foreign court a letter of support, but still not refer to their decisions in our opinion.

I realized that I was not going to win the debate until I figured out what the people who are thinking about this politically are actually concerned about. And those are some of the people to whom I address my most recent book.¹⁷ They see a world that has changed a lot and that concerns them. Indeed, our docket has changed a lot. They think we have something uniquely American. Well, that is not a surprising thought. One can go back and see how Madison described our Constitution and our federal government. He said, “The Constitution is a charter of power granted by liberty,” not, as in Europe, “a charter of liberty...granted by power.”¹⁸ Madison was thinking that the basic condition of Americans is freedom and Americans grant to the federal government a power to do something. If the power is not granted,

¹⁷ Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015).

¹⁸ James H. Read, *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson* (Charlottesville: University of Virginia Press, 2000), 29 (quoting James Madison writing in the *National Gazette* in 1792).

the government cannot do it. That was different than Europe, where Louis XIV controlled the power even if he granted liberty. Whether or not the end result was the same, the starting places were different, and that is often reflected today in the law.

So those who view these matters politically have a point. I see that many Americans are worried. But whether or not we refer to questions that come up abroad or answers that foreign courts give, and what the law is like in some other places, has nothing to do with what they are worried about. It is the world that has changed and our docket that has changed. If we want to preserve our American values, we better learn something about what is going on elsewhere because that affects directly what we do at the Supreme Court. In a word, understanding and referring to what is happening abroad is often the best way to preserve our American values.

Now, of course, nobody who does not already believe that proposition is going to accept it by just hearing it announced, so I want to give a few examples of the types of very serious questions that we face where it is helpful and sometimes necessary to know something about what is happening somewhere else in the world. 20 years ago there were typically two or three cases out of a docket of 80 that raised such questions. The number today is closer to 10 or 15. That is a very high percentage of our cases. I am speaking of cases where we have to know what is going on in another place outside our borders or where knowing that is extremely helpful. Let me describe five kinds of cases of that sort.

The first problem: Civil liberties versus security

Consider a classic problem that has been around for at least 200 years: the conflict between civil liberties (traditionally defined) and security. The Constitution gives to the Congress and the president of the United States the duty as well as the power to worry about our security. It does not give that duty primarily to judges, but it does give to courts, as they have evolved, responsibility to see that the constitutional guarantees of basic individual liberty are not infringed upon.

What happens when civil liberties and security conflict? Let us go back into history. There have been some sorry examples from history that frame the approaches we can take to this question. I shall describe some of them, leading up to the current state of the art.

Look back to the Civil War. Secretary of State William H. Seward told his colleague, the British ambassador, “I can touch a bell on my right hand and order the imprisonment of a citizen of Ohio; I can touch a bell again and order the imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do as much?”¹⁹ One could argue that during the Civil War this was a necessity. But was it?

Cases expressly raising that kind of conflict between civil liberties and security did not come to the Supreme Court until after the Civil War was over. The government argued one of four possible positions on this issue. First, the government argued the position taken by Cicero about 2,000 years ago. Cicero said, “When the guns roar, the laws fall silent.” Now, he did not say exactly that because there were no guns at that time, but he said something like it.²⁰ And that is what the attorney general then argued to the Supreme Court: The military and no one else has the power to arrest people in Indiana, including a civilian man named Milligan, whom the attorney general accused of leading a conspiracy.²¹ The court unanimously held that, if the civilian courts were open, which they were in Indiana, an American citizen could not be tried in the military courts. So the court rejected position one, the position that the courts have no role to play in times of war, but it did not do so until the war was over.

The political question doctrine

A second position was dogma for many years, but in my view, it does not now squarely address the conflict between civil liberties and security. There

¹⁹ William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, 2nd ed. (New York: Vintage Books, 2001), 49.

²⁰ Cicero wrote, “*Silent enim leges inter arma.*”

²¹ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

is something called the “political question” doctrine. It has many forms, but greatly simplified, it cautions judges to avoid involving themselves in cases raising too much of a political question. It is difficult to define a political question, but I had a little experience in a case involving a statute passed in Congress that said that if an American citizen who was born in Jerusalem applied for a passport, the passport office had to print on the passport both the city of Jerusalem and the state of Israel.²² Previously, the passport listed only the city. The president refused to follow Congress’ directive. The person applying for the passport then sued, contending that the statute required the passport to include the state, Israel. The president responded that such a decision was his, not Congress’, to make, as the political status of Jerusalem was a foreign policy matter that implicated the president’s power to recognize states. I thought the court should not get involved in a matter as political as the status of Israel and Palestine. I spelled out my view in a dissenting opinion.²³ How many of the other justices agreed? None (except Justice Sotomayor, who agreed in part).²⁴ What happened to the political question doctrine? Few doctrines ever completely disappear, but one should not conclude that today’s court will avoid security/civil liberties conflicts by labelling them “political questions.”

The president always wins

The third approach to addressing the challenge of reconciling civil liberties with security is to say that the Supreme Court will review what the president does in a security matter where civil liberties are involved, but that nonetheless the president always wins. That is close to what the Supreme Court said in *Curtiss-Wright*, where the court determined that Congress can delegate to the president the power to define a particular crime.²⁵ President Franklin Roosevelt issued a proclamation criminalizing the sale of weapons from the United States to countries fighting in the Chaco territory, a parcel of land between Paraguay and Bolivia. Paraguay and Bolivia went to war for control over the Chaco in the early 20th century, and the U.S. government prosecut-

²² See *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

²³ See *id.* at 1437-1441 (Breyer, J., dissenting).

²⁴ See *id.* at 1431-1437 (Sotomayor, J., concurring in part and concurring in the judgment).

²⁵ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

ed people for selling arms to the belligerents. The defendant argued that the president could not make up criminal laws as he goes along; Congress has to do it in writing, and Congress cannot delegate to the president the power to define crimes. The court rejected the argument, holding that Congress could delegate their power to the president. And it was the anti-New Deal court that did so—a court hostile to delegation of power to the president. But that court held that, in this instance, Congress could make the delegation. Why? Because the president is in charge of foreign affairs; Congress is not.

Later on, during World War II, the U.S. government forced 70,000 United States citizens of Japanese origin to move to internment camps, where they were held against their will. The Supreme Court held that was consistent with the Constitution.²⁶ The majority included liberal justices such as Hugo Black, William O. Douglas, and Felix Frankfurter. Why did they do that? They reasoned that it was 1944, when we were still in the midst of fighting, and somebody must run the war. By the time they decided the suit, there was no danger from the Japanese invasion. But they thought that either Roosevelt runs the war or the court runs it, and because the court cannot, the president must be free to manage the war as he wishes. The court would not overturn the president on a security matter. There was much criticism of that case. I agree that it was a terrible decision.

Limits on presidential power

The fourth approach is illustrated by two cases, one of which was the *Steel Seizure* case, decided during the Korean War.²⁷ President Truman seized a steel mill. Why did he seize it? Because he did not want a strike. Well, why not let the employees strike and instead try to stop the strike once it started? The president was nervous about doing that, afraid that he could not stop the strike after it began. So he decided to seize the mill and give the workers the pay raise they wanted, hoping they would stay at work. The government, indeed, the whole cabinet, warned the Supreme Court justices that, if the president were blocked from seizing the mill, we might lose many soldiers

²⁶ See *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

fighting the Korean War. Winning the war was critically important, but the court nonetheless struck down the seizure.

In his *Steel Seizure* opinion, Justice Robert H. Jackson explained that the president may have had the power to seize the mill had Congress passed a law agreeing with him, and he may have had that power had he acted in the face of congressional silence.²⁸ But he did not have the power to act where Congress had forbidden him to act. The court held that Congress had forbidden him to act here. I have one problem with Jackson's argument: In my view, Congress had not forbidden the president to seize the mill. Rather, I think something else was going on in the court. I think the court was telling the president not to go too far in exercising unilateral power.

Finally, we heard four cases arising out of the detentions at Guantanamo Bay.²⁹ The theme of those cases, every one of which was decided in favor of the detainee and against the president, was captured by Justice Sandra Day O'Connor when she wrote: The Constitution does not write the president a blank check.³⁰

If you compare Jackson and O'Connor's approach to the other three approaches, you might be glad the court has taken such a stance. But the court has been criticized both for interfering in security matters and for the opposite, for not going farther. Should it have refrained from interfering at all as it did in *Korematsu*, the Japanese internment case? And why does it not go farther? Because it does not know all the answers. The biggest problem is that nine human beings constitute the court, not nine computers. They are not experts on security or foreign relations, but they do know that the president and Congress sometimes go too far, and that is what Justice O'Connor wrote.

We now live in a world where security problems are international. We also live in a world where not every country has the same system for dealing with

²⁸ See *id.* 634-655 (Jackson, J., concurring).

²⁹ See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

³⁰ See *Hamdi*, 542 U.S. at 536 (Opinion of O'Connor, J.) (“[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”).

those problems. Maybe we can learn something from one another. Japan decided to put a foreign policy expert on its Supreme Court. England decided that it would not allow certain people suspected of terrorism to talk to a lawyer who has access to security information. Israel fears the suspect might say to his lawyer, “Tell my mother I’m fine,” which actually means, “Blow up the café.” Anyone who thinks that is just a made up problem should put themselves in the position of the Supreme Court of Israel, where they face problems like that. In Israel, they have developed a system in which the government argues *ex parte* to a judge that lawyer-client communication is dangerous.³¹ If the judge agrees, the government can hold the suspect *incommunicado*. The government has to come back a few days later and explain why that is still necessary. Each time the government returns, it bears a heavier burden to prove its case. I am not advocating any of those systems. I am simply trying to show that we are not alone with these problems—and that we can sometimes learn from others what to do or what not to do.

Problem two: Enforcing human rights around the world

We live in a world where human rights are increasingly an international issue. The whole world is against torturers and genocide. But here, in a sense, the United States is out in front because it has a statute called the Alien Tort Statute (ATS), which provides that any person who is harmed or injured by a violation of international norms or international law can recover damages in an American court.³² Our courts have held that, if a victim of torture in Paraguay can find his torturer in the United States, he can sue him and recover damages in New York, even though the victim himself is Paraguayan.³³

Why is the ATS on the books? It was passed in the 1790s to deal with pirates. At that time, if someone found a pirate, he could hang him. If the pirate had any

³¹ See Brief of Amici Curiae Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners at 23-25, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 96-1195, 06-1196).

³² 28 U.S.C. § 1350; *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (interpreting the ATS).

³³ *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

money, he could confiscate it first. Then, any of the pirate's victims could sue and recover the money. The question for us is, how does the ATS apply in a modern context and who are today's pirates? We might interpret the statute to mean that, if a prosecutor proves any kind of serious violation of international law, the plaintiff can recover. Of course, if we take that tack, other nations can do so, too. By that token, if former Secretary of State Henry Kissinger, who was sought for questioning in Spain relating to human rights abuses, were to go abroad, he could be detained.³⁴ And what about Israel, unpopular regimes, and so on? We must figure out how to interpret the statute so that different jurisdictions can apply it without interfering with each other. That is not an easy thing to do. The heart of the problem is that there is no supreme court of the world. Our legal systems must operate accordingly, independently developing systems that avoid conflict.

The word that helps solve the problem is a technical legal word: comity. Its meaning is captured by something Senator Ted Kennedy used to say to me and Ken Feinberg when we worked for him and came up against something we wanted to negotiate with other senators. He would say, "Work it out." We would ask how, and he would laugh and respond, "That's your problem." That is a slightly exaggerated version of the challenge judges face today.

To return to the ATS, it certainly applies to torture and genocide, but how it applies beyond that, and to what extent, is less certain and must be worked out. The comity problem is not limited to the human rights arena. Consider the following example: Does U.S. law allow a company based in Ecuador to sue a Dutch company in New York for antitrust damages? We had such a case.³⁵ To answer that question, we had to know how antitrust law worked in Europe. The European Union filed briefs telling us how. So did France, Germany, Japan, and many other countries. To solve that kind of technical, jurisdictional, statutory problem in the United States, we need know how the relevant world works elsewhere, and adjust accordingly. That is comity.

³⁴ Al Goodman, "Spanish judge seeks Kissinger," CNN, April 18, 2002, <http://edition.cnn.com/2002/WORLD/europe/04/18/spain.kissinger/>.

³⁵ See *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004).

Problem three: Interpreting treaties

How do we interpret treaties? Let us take, for example, the Vienna Convention on Consular Relations, which the United States signed and ratified, but which does not state whether it automatically becomes domestic law in the United States.³⁶ The Vienna Convention requires government authorities to inform arrestees who are citizens of a foreign country (like Mexico, in this case) that they have a right to see their nation's consul. Government officials in Texas arrested a Mexican national, but did not inform him of his right to contact his consul, presumably because they did not know they were required to do so. The defendant was convicted and sentenced to death. He then brought his case to the International Court of Justice (ICJ) in The Hague because another provision of the Vienna Convention gave the ICJ the last word on such questions. The ICJ decided that a court in the United States had to hold a hearing to determine if the defendant was prejudiced by the fact he was not informed of his rights under the Vienna Convention.³⁷ President George W. Bush wrote a letter to Texas directing the state to give the defendant such a hearing. Texas refused.

The question came to us at the Supreme Court—is the Vienna Convention, a treaty, automatically effective as part of U.S. domestic law?³⁸ We split on it. I thought it was, but the majority thought it was not. What interests me here is not the result of the case but how we reasoned through it. I asked my law clerks to look up every case like this one since 1790, and they found quite a few.³⁹ In one case, Chief Justice John Marshall said to read the provision of the treaty. If it seems to address judges—i.e., it is fairly technical—then it automatically becomes domestic law.⁴⁰ On the other hand, if it seems political—e.g., it is about stopping a war, bringing back the troops, or having a military base—then it is addressed to the political branches and is not automatically domestic law. That is an oversimplification of Marshall's rule,

³⁶ Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

³⁷ See *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31).

³⁸ See *Medellin v. Texas*, 552 U.S. 491 (2008).

³⁹ See *id.* at 568-569 (Breyer, J., dissenting).

⁴⁰ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-315 (1829).

but I thought it was a good one, and I said so in my dissent in the Vienna Convention case.

Soon thereafter, I described the case at a meeting. A former foreign minister of the Netherlands responded, “That’s our rule.” It would have helped had a treatise or law review article called that fact to my attention. Given the result in the case, it may be up to our treaty negotiators to say in treaties whether the treaties’ provisions should take effect as domestic law. Regardless, I suspect that treaty negotiators and legislators are not always on the same page. They will have to be if the promises we make in our treaties are to take effect as domestic law.

Problem four: Reconciling new international organizations with our constitutional system

A fourth problem has not directly faced us yet, but it is likely to do so. Treaties today often do not provide clear directives to each signatory party. Rather, they create an international organization, like the World Trade Organization or the World Health Organization, create a bureaucratic structure, and empower the administrators or international civil servants to write rules that will bind the nation. Are those rules effective as domestic law? I have just discussed a case in which the House of Representatives did not pass a law embodying the treaty’s provisions but the Senate did ratify the treaty. Suppose Congress does pass a law giving the international organization the power to write rules that automatically bind Americans as a matter of domestic law. On the one hand, if we say that Congress cannot do that, how are we going to come together and help solve complex global problems like the environment, commerce, and others that Strobe Talbott has identified?⁴¹ On the other hand, if Congress can delegate total power to make laws to international civil servants, what happens to Article I of the Constitution, the article giving Congress, not international administrators, the power to legislate?

⁴¹ Strobe Talbott, *The Great Experiment: The Story of Ancient Empires, Modern States, and the Quest for a Global Nation* (New York: Simon and Schuster, 2008).

The problem is rather like the problem the Supreme Court faced during the New Deal—what was the constitutional status of administrative agencies? In great administrative law opinions like *Crowell v. Benson*, the court, for the first time, came to grips with a very difficult new entity.⁴² It had to figure out a way to integrate that entity into the constitutional system we have, and it did so. We may well have to do the same in the case of international agencies.

Problem five: Understanding the international stakes of our decisions

A copyright case illustrates the fifth problem. In *Kirtsaeng*, a Cornell University student from Thailand discovered that his textbooks were very expensive.⁴³ He remembered that the same textbook in English was on sale in Thailand at a much lower price. He had a great idea. He told his parents: “Send me one.” Then he had a better idea: “Send more and I’ll sell them to my friends.” Does that violate the copyright law? The answer can be found in something called the “first sale” doctrine, which is a technical doctrine written into the U.S. copyright statute. I discovered there were briefs filed in the case from all over the world. Why? It turns out that we could not answer the specific copyright question in the case without knowing something about copyright law in other places and how it all works together. And by the way, we learned from those briefs that \$3 trillion of international commerce was at stake. That is the world in which our American law now operates.

It is important how we answer the five questions I have raised—how do we negotiate conflicts between security and civil liberties, how do we write our treaties, how do we deal with new international administrative entities, how do we get all the information we need? Perhaps the public wants a more of an answer from the Supreme Court than simply saying, “Don’t go too far.” That is a judicial way of saying that we do not yet know the solutions, but the problems are clear and they are in front us.

⁴² 285 U.S. 22 (1932)

⁴³ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

Judges as diplomats and weavers of a global rule of law

There is one other important change that has taken place in the last 20 years. I find that my role is more diplomatic. I am not a diplomat by definition, but judges from different countries do talk to each other. Recently, I talked with several judges in Ouagadougou in Burkina Faso. Whereas 20 years ago we would simply describe the nature of our jobs, we American judges and judges from other countries now have substantive conversations. When we visit the EU in Luxembourg or when the Supreme Court of India spends two days with us, we follow substantive agendas.

Those experiences form part of today's judicial experience. We are all helping to create or to sustain a rule of law. The rule of law simply is the opposite of the arbitrary. The arbitrary is that which is capricious, irrational, tyrannical, despotic, or autocratic. The rule of law is the opposite of that. Judges work on the rule of law together, even when they are not talking to one another. We are not political people. We are technicians. We are professionals helping to weave a legal web. Gradually, we make progress. We weave a cloth that, like Penelope's, unravels at night, But, unlike Penelope, we try to make progress.

The overall objective was well expressed in a passage from *The Plague* by Albert Camus. The story is about a plague coming to an Algerian city, Oran, but it is really about the Nazis coming to France. The people survive the plague, and at the end, Dr. Rieux, the hero, explains why he has told the story. He says that

the germ of the plague [that evil part of all mankind] never dies nor does it ever disappear. It simply goes into remission, perhaps for decades, but all the while lurking: in the furniture, in linen cupboards, in bedrooms, in cellars, in trunks, in handkerchiefs, in file folders, perhaps one day to reawaken its rats, and then, to the misfortune or for the education of mankind, to send them forth once again to die in some once-happy city.⁴⁴

⁴⁴ Albert Camus, *La Peste* (Paris: Les Éditions Gallimard, 1947), 312-313 (translated by the author).

That is why we judges are here. We cannot stop the rats, but more and more countries have seen that a rule of law administered in part through judges, lawyers, and others, is one weapon against the germs those rats would again send into our once-happy city. We are one arm in the war against that evil part of mankind, and we work on carrying out the task together.



Stephen Breyer, born in San Francisco in 1938, is a graduate of Stanford, Oxford, and Harvard Law School. He taught law for many years as a professor at Harvard Law School and at the Kennedy School of Government. He has also worked as a Supreme Court law clerk (for Justice Arthur Goldberg), a Justice Department lawyer (antitrust division), an assistant Watergate special prosecutor, and chief counsel of the Senate Judiciary Committee. In 1980 he was appointed to the United States Court of Appeals for the First Circuit by President Carter, becoming chief judge in 1990. In 1994 he was appointed a Supreme Court justice by President Clinton. He has written books and articles about administrative law, economic regulation, and, “Making Democracy Work: A Judge’s View,” a book about the Constitution. His most recent book is entitled “The Court and the World.” His wife, Joanna, was born in Great Britain and is a retired clinical psychologist. They have three children (Chloe, Nell, and Michael) and five grandchildren.

International Law and Disarmament: The Case of Chemical Weapons

Ahmet Üzümcü⁴⁵

In preparing for the honor of delivering the second Justice Stephen Breyer Lecture at Brookings, I read closely the inspirational inaugural lecture given there in 2014 by the great man whose name and reputation mark this annual event.⁴⁶ Justice Breyer’s account of the U.S. Supreme Court and its role in the world makes for fascinating reading. It highlights the importance of drawing lessons from international events as a means of helping to preserve American values, and better understanding the broader practical and ethical purpose of those values along the way.

I am not myself a lawyer, but my experience at the Organization for the Prohibition of Chemical Weapons (OPCW) has been steeped in applications of international law for helping to achieve a world free of chemical weapons—a goal whose practical and ethical purpose should be clear to all. Our work at the OPCW—the agency created in 1997 to safeguard the implementation of the Chemical Weapons Convention—has compelled us to consider, and react to, some very complex and challenging legal issues, particularly where they intersect with sensitive political realities. Over my tenure at the helm of the OPCW, no single issue has tested our mettle as much as the mission to eliminate Syria’s chemical weapons program.

⁴⁵ This chapter was adapted from the 2015 Justice Stephen Breyer Lecture on International Law, given on April 9, 2015 at the Brookings Institution in Washington, DC.

⁴⁶ Stephen Breyer, “The Court in the World: The First Annual Justice Stephen Breyer Lecture on International Law” (presentation delivered at the Brookings Institution, Washington, DC, April 4, 2014), https://www.brookings.edu/wp-content/uploads/2014/03/20140403_breyer_international_law_transcript.pdf.

It is this experience that I wish to draw on here. In particular, I will focus on how the mission to eliminate Syria's chemical arsenal tested the resilience and flexibility of the Chemical Weapons Convention, as well as the strength of global consensus against these brutal weapons. I will also point to some emerging challenges that require us to adapt and supplement our traditional measures and approaches to preventing the proliferation of chemical weapons—most pressingly, in response to the rising threat of chemical terrorism.

Destruction of Syria's chemical weapons program

We are all only too aware of the intractable nature of the conflict in Syria. Now in its fifth year, the war has emerged as one of the greatest humanitarian crises of our time. An estimated quarter of a million people have lost their lives as a result of the fighting, and some 4.8 million Syrians have sought refuge in neighboring countries, with many more internally displaced. The war has also had a highly adverse impact on regional security, bleeding across the border into Iraq. Countries in the region remain on high alert, having to address new risks to their security, as well as to cope with unprecedented refugee flows.

Yet, although attempts to affect a political settlement have foundered, a glimmer of hope managed to spring from one of the darkest chapters of the war. That chapter began when reports of chemical weapons attacks started to emerge from Syria in late 2012 through 2013. In August 2013, these concerns reached a fever pitch on the eastern edges of Damascus. It was there, in Ghouta, a suburb of Syria's capital, that an estimated 1,500 people died following an attack with the deadly nerve agent sarin. Directly in the wake of that attack, social media conveyed haunting images of suffering and death on the part of innocent civilians, including many children. These images sent shockwaves throughout the world, compounding the cruel violence already being suffered by the people of Syria.

The introduction of a new level of indiscriminate brutality in the Syrian conflict with the use of chemical weapons precipitated what had until then been

almost entirely absent in international efforts to resolve the conflict—namely, a point of firm consensus. This point of consensus related to the need to act swiftly and decisively to remove the threat of chemical weapons from Syria.

Following confirmation of the use of chemical weapons in Ghouta by a U.N. investigation, an extraordinary sequence of events occurred.⁴⁷ On September 14, 2013, Syria submitted its instrument of accession to the Chemical Weapons Convention. That same day in Geneva, Russia and the United States agreed on a framework for the elimination of Syria's chemical weapons program.⁴⁸ Less than two weeks later, on September 27 in The Hague, the OPCW's Executive Council adopted a landmark decision that charted the course for a fast-tracked plan to eliminate Syria's chemical weapons based on the U.S.-Russian agreement. Later that day in New York, the U.N. Security Council passed resolution 2118 endorsing the Executive Council decision.

The OPCW Executive Council decision called for the removal of all chemical weapons from Syria for destruction outside the country, as well as the destruction of all production facilities in Syria. While this undertaking stretched the resources and operational limits of the OPCW, our inspectors and operational planners had been well prepared for just such a contingency. Within three days of the Executive Council decision, a team of OPCW experts was on the ground in Damascus, assisting Syrian officials to prepare an initial declaration covering some 1,300 metric tons of chemical warfare agent, as well as verifying the destruction of chemical weapons production facilities, equipment, and unfilled munitions at various sites around the country. With our U.N. partners in the OPCW-U.N. Joint Mission, established on October 16, we devised plans for accessing production and storage facilities, and overseeing the packaging and removal of Syria's chemical weapons.

⁴⁷ The United Nations Mission to Investigate Alleged Use of Chemical Weapons in the Syrian Arab Republic was established by U.N. Secretary-General Ban Ki-moon on March 21, 2013—initially, to investigate allegations of a chemical attack at Khan al-Assal. Headed by Åke Sellström, the investigation delivered its final report on December 12, 2013, which confirmed the use of sarin in the August 21, 2013 attack in Ghouta.

⁴⁸ The Framework for the Elimination of Syrian Chemical Weapons, signed by U.S. Secretary of State John Kerry and Russian Foreign Minister Sergey Lavrov.

Syria's chemical weapons had to be transported overland to Latakia, often across contested territory, and transferred to ships for delivery to destruction facilities at sea and on land. The most lethal chemicals—about 600 metric tons of sulfur mustard agent and methyl phosphoryl difluoride (DF), a nerve agent precursor—were trans-loaded and neutralized aboard the *Cape Ray* in the eastern Mediterranean.⁴⁹ Resulting effluents from these operations, along with other toxic chemicals from Syria's weapons program, were sent for disposal to various facilities in Finland, Germany, the United Kingdom, and the United States.

A critical factor for our success was the support of no fewer than 35 of the OPCW's member states, who provided valuable in-kind and financial contributions. This included maritime assets, destruction facilities, road vehicles, and packaging materials and training, as well as a trust fund running to over 50 million euros to underwrite operational costs. The results speak for themselves. Within less than a year, the OPCW was able to report that all declared chemical weapons slated for destruction abroad had been removed from Syrian territory, and that 98 percent of these weapons had been destroyed, including all so-called Category 1 chemical weapons—chiefly, sulfur mustard and nerve agent precursors. The remaining 2 percent were destroyed by January 2016 at the Texas-based facility of Veolia, one of two commercial entities contracted by the OPCW to undertake some of the disposal effort. This completed the destruction of all chemical weapons declared by the Syrian Arab Republic.

What all this shows is that, in an all too rare moment of unity over the course of the Syrian conflict, the international community was able to forge an exceptional disarmament agreement. The United States and Russia showed crucial leadership in facilitating it in remarkably short measure. While the agreement was never going to end the conflict, it did deliver a tangible result in removing and destroying a major chemical arsenal.

⁴⁹ Sulfur mustard, a blister agent that was developed and introduced in World War I in 1917, is a unitary chemical weapon. Nerve agents, such as sarin and VX, are binary chemical weapons, comprising two or more precursors that need to be mixed prior to deployment.

Legal challenges for the removal and destruction of chemical weapons, and fact-finding missions

Even with the strong tailwinds of global political will at our back, none of these accomplishments would have been possible without the well-established legal norm of the Chemical Weapons Convention and its application in the framework of Syria's chemical disarmament. All of our work related to Syria—from putting our people on the ground for inspections to removing chemical weapons from Syrian territory, from destroying chemical weapons at sea to negotiating the destruction of some chemicals at commercial facilities—relied on our soundly navigating international legal strictures and political hurdles. At the same time, we needed, on occasion, to bridge critical gaps between existing legal frameworks.

I have already mentioned some of the overlapping legal frameworks we drew on, or had to put in place, to make all this work. There was no need, for example, for a special ad hoc international mandate for dealing with Syria's chemical weapons program. As soon as Syria joined it, the Chemical Weapons Convention provided a crucial baseline under international law for agreeing to a program for eliminating Syria's chemical weapons program, and overseeing its implementation. Details of this program, as agreed by the OPCW Executive Council, were based on elements of another agreement—the U.S.-Russia framework agreement. Implementation of this program—in the challenging and often dangerous circumstances of conflict-riven Syria—required the OPCW to establish a joint mission with the United Nations to obtain the necessary logistical and security support, including for obtaining access to sites in contested territory. To underwrite all of these actions with the requisite political and legal support, the U.N. Security Council provided strong endorsement in the form of resolutions 2118 (2013) and 2209 (2015).

As if these interlocking efforts were not enough, more work still needs to be done to backstop this unprecedented mission, such as working with Syrian authorities to clarify Syria's declaration and completing the destruction of its chemical weapons production facilities. Disturbingly, there have been new allegations that toxic chemicals are being used as weapons in Syria. In April

2014, in response to such allegations, I established an OPCW fact-finding mission. The mission was specifically tasked to gather facts on the ground regarding alleged use of chemical weapons. Among its findings, the mission concluded—with a high degree of confidence—that chlorine had been used regularly and systematically in three villages in northern Syria. Since then, the fact-finding mission has continued, with the full support of the OPCW Executive Council and the U.N. Security Council, to monitor and analyze all credible allegations of the use of chemical weapons and the use of toxic chemicals as weapons, and made every effort to establish the facts surrounding credible allegations; tragically, these activities have further substantiated instances of the use of chemical weapons or toxic chemicals as weapons in Syria.

In response to findings of the fact-finding mission, the Security Council adopted resolution 2235 (2015) in August 2015, establishing the OPCW-U.N. Joint Investigative Mechanism. The mechanism, which is mandated to identify the perpetrators of chemical weapon attacks in Syria, reconfirmed the use of chemical weapons in Syria in its third and fourth reports issued in August and October 2016.

Among these numerous actors and arrangements, one can imagine the many obstacles that our legal team had to negotiate to maintain the forward momentum of the mission. Certainly, these obstacles presented an unprecedented challenge for the OPCW. Typically, the work of chemical disarmament takes place over a period of many years—in some cases, decades—under peaceful circumstances, where agreements with local stakeholders and community groups can take years to develop, and even longer to implement. Let me highlight just a few examples of the legal challenges we faced in relation to Syria’s chemical weapons program and the circumstances in which we did so.

Among other obligations, Article I.1(a) of the Chemical Weapons Convention bars states parties from “transfer[ing], directly or indirectly, chemical weapons to anyone.” As it transpired, this ran counter to the U.S.-Russia framework agreement, which sought the removal of chemical weapons from Syrian territory for accelerated destruction outside the country. Further, the

OPCW's activities in disarmament hinge not on the actual destruction of chemical weapons, but rather, on the verification that these activities have been implemented by the possessor state.⁵⁰ But in the case of Syria, given that the possessor state was not assigned the role of destroying its chemical weapons stockpile, the OPCW and its member states needed to find novel solutions. To this end, U.N. Security Council resolution 2118 endorsed OPCW member states' agreement to allow destruction to occur outside Syria, which was in itself a good example of their willingness to stretch the letter of the law of the Chemical Weapons Convention to better capture its spirit. In short, no one was willing to allow the opportunity of ridding the world of a major chemical arsenal to slip by over too narrow or rigid an interpretation of the Convention.

Many of the legal challenges we faced arose precisely because of the need to find inventive solutions for destruction, including at sea and at commercial facilities. This required addressing relevant international and domestic legal requirements—and the interplay between them—across many different jurisdictions, involving both the private and public sectors. Some of the safety, security, and liability issues associated with the packaging, transportation, storage, destruction, and disposal of chemical weapons in these circumstances entailed an approach that was anything but business as usual.

The fact-finding mission affords an especially interesting case, since provision for such a mechanism was not foreseen by the Chemical Weapons Convention. The legal basis for the fact-finding mission is to be found in the general authority, given to me as Director-General, to ensure the OPCW upholds, at all times, the object and purpose of the convention. This authority was reinforced, in this instance, by the relevant decisions of the OPCW Executive Council and UNSCR U.N. Security Council resolutions 2118 and 2209, as well as endorsement of the fact-finding mission by the Executive Council and its acceptance by Syria, as the state party concerned, through a bilateral exchange of letters.

⁵⁰ Article I.2 reads, “Each State party undertakes to destroy all chemical weapons it owns or possesses [...]”

Chemical disarmament and the terrorist threat

I have often described the Chemical Weapons Convention as the most effective treaty in the history of multilateral disarmament—with good reason. Holding all of its member states to the same commitments, and backed by a strong network of support and mutual assistance, the Convention stands—more than two decades since it was negotiated—as the only legally binding instrument to comprehensively ban an entire class of weapons of mass destruction under international verification.

Among our 190 member states, eight have declared possession of chemical weapons. Three of them have completely destroyed their stockpiles, namely, India, Albania, and a state party that prefers not to be identified. Iraq has finalized a destruction program for remnants of chemical weapons, and Libya has eliminated its chemical weapons, with only a modest amount of indirect precursor chemicals left to be destroyed. In a remarkably short period of time, 98 percent of Syria's chemical weapons have been destroyed. Countries with the lion's share of the world's chemical weapons stockpile—Russia and the United States—have committed to ensuring complete destruction of their stocks by December 2020 and September 2023, respectively. All told, the OPCW has verified the destruction of 87 percent of the world's declared chemical weapons to date. Within the next eight years, we anticipate that all member states' declared chemical weapons stocks will be destroyed.

While six countries remain outside the Chemical Weapons Convention, Myanmar has now ratified the treaty and will soon join as our 191st member state. We anticipate that Angola and South Sudan will follow suit, and we continue to engage Egypt and Israel in the wake of Syria's chemical demilitarization. Given that the convention is an accepted international legal norm, there can be no justification for these countries remaining outside the convention; simply put, chemical weapons are not a strategic option for any country. North Korea remains a particular concern in this regard, given suspicions that it possesses a large stockpile and production capability, as well

as its lack of engagement with the OPCW regarding the issue of chemical weapons.⁵¹

Despite our many accomplishments in global chemical disarmament, I must strike a note of caution. Today, terrorism poses one of the most clear and present threats to a chemically secure future. We are all well attuned to the stated intentions of non-state actors to acquire, and to use, weapons of mass destruction. With the likelihood of chemical weapons use by states increasingly remote, we must not drop our guard in relation to terrorist groups. In March 2016, the government of Iraq shared information with the OPCW Technical Secretariat regarding alleged chemical weapons attacks at three locations in Iraq. The Secretariat deployed a technical assistance visit team to assist Iraqi authorities in the conduct of their investigations. The reports resulting from these investigations confirmed the use of chemical weapons by non-state actors. The OPCW is carefully monitoring allegations of the use of chemical weapons, or toxic chemicals as a weapon, by non-state actors and remains ready to look into any credible information in such cases.

Worth noting is that the threat of chemical weapons use is not confined to a handful of countries in one particular region. Twenty years ago, the Aum Shinrikyo doomsday cult launched two attacks using sarin and hydrogen cyanide in Matsumoto and in the Tokyo subway. These attacks claimed the lives of 20 people and injured thousands. Had the dispersal of these deadly chemical agents been engineered differently, the results could have been far more catastrophic, potentially killing thousands. These attacks were not

⁵¹ Joseph Bermudez, Jr., “North Korea’s Chemical Warfare Capabilities,” *38 North*, October 10, 2013, <http://38north.org/2013/10/jbermudez101013/>; “North Korea,” The Nuclear Threat Initiative, <http://www.nti.org/learn/countries/north-korea/>; “Chemical Weapons Program,” Federation of American Scientists, fas.org/nuke/guide/dprk/cw/ (last updated November 28, 1998); International Crisis Group, “North Korea’s Chemical and Biological Weapons Programs (Asia Report N°16718),” (Brussels: International Crisis Group, 2009); United States Department of Defense, “Military and Security Developments Involving the Democratic People’s Republic of Korea 2012,” (Arlington, VA: United States Department of Defense, 2012), http://www.defense.gov/Portals/1/Documents/pubs/Report_to_Congress_on_Military_and_Security_Developments_Involving_the_DPRK.pdf; Neil Gibson and Emily Chorley (Eds.), *Jane’s Nuclear, Biological and Chemical Defence 2011-2012*, (London: Jane’s Information Group, 2011).

launched by a state at war, nor did they occur in an active conflict zone. They were brought about by a group motivated to maliciously develop and use chemicals to bring about death and provoke terror.

Given terrorists' propensity to exploit vulnerabilities in the global security system, the threat of chemical weapons should be a concern for all states. How we deal with these threats represents our next great challenge, well within our mandate to "exclude completely the possibility of the use of chemical weapons"⁵²—by anyone in any circumstances. To effectively prevent the re-emergence of chemical weapons, we must push beyond current global non-proliferation norms and seek more effective solutions. In the first instance, this means working with our member states to ensure the convention's prohibitions are fully reflected in their domestic laws and that they have the means to enforce them. This means:

- Strengthening the capacity of national jurisdictions that may be too weak to detect and prosecute criminal chemical activity;
- Supporting enactment of legislation to monitor the toxic chemical industry and trade; and
- Strengthening collaboration with relevant international frameworks and organizations to build global capacity to prevent chemical terrorism.

These are not impossible tasks, but they will require collective action and constant vigilance to bring about meaningful contributions to global chemical security.

To better facilitate work in this area, the OPCW hosts regular, focused discussion in its Open-Ended Working Group on Terrorism. We seek to build response and protection capacity in our member states through a broad range of training and assistance activities, in close collaboration with inter-

⁵² The preamble to the Chemical Weapons Convention declares that the states parties to the convention are "Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention [...]".

national and regional organizations such as the African Union, while also enhancing inter-agency coordination through forums such as the United Nations Counter-Terrorism Implementation Task Force comprising 38 entities and Interpol.⁵³

Conclusion: Lessons learned from Syria

Given the ongoing search for international consensus in settling the Syrian conflict and the new and emerging challenges for preventing the future development and use of chemical weapons, it is vital that we draw lessons from the experience of Syria's chemical demilitarization. Let me conclude by singling out three such lessons.

1) *Move quickly on the windows of opportunity.* In terms of any work towards peace and stability, we must capitalize quickly on any, and every, opening that presents itself. Windows of opportunity on complex and contentious arms control actions do not stay open for very long. The politics of security and national interest evolve rapidly, governments change, and conditions on the ground are in constant flux, nowhere more so than in conflict situations.

Without a doubt, the opportunity to remove and destroy Syria's chemical weapons required swift, decisive action. Any delay in that process, or any wavering by any of the principal actors involved, may have undermined that mission's success—and possibly heralded its failure. Within the OPCW, we have factored this experience into our contingency planning—both to ensure we can respond quickly to similar opportunities in the future, and to draw on this experience as a template for how we would conduct any future removal and destruction missions.

⁵³ A full list of these entities can be accessed on the website of the United Nations Counter-Terrorism Implementation Task Force at <https://www.un.org/counterterrorism/ctitf/en/ctitf-office>.

2) *Strengthen international rules of the road.* A second lesson gleaned from the Syria experience speaks to the inviolability of international law and multilateral approaches to disarmament. Without the Chemical Weapons Convention and the implementation muscle provided by the OPCW, there would have been no rules of the road—and no vehicle to arrive at the destruction of Syria’s chemical weapons. We need to keep these rules before us and ensure they can be adapted to different circumstances to obtain the best possible results. This must include making our disarmament gains permanent by denying anyone recourse to chemical weapons, irrespective of whether they try to do so in the name of a state or non-state entity. Though we are trending positively towards complete destruction of chemical arms, the threat posed by terrorists will continue to challenge us in this respect.

3) *Build on success.* This brings me to my third and final point, perhaps best expressed by German pacifist Ludwig Quidde, who won the Nobel Peace Prize in 1927. True to the award criteria set by Alfred Nobel, Quidde wrote, “Every success in limiting armaments is a sign that the will to achieve mutual understanding exists, and every such success thus supports the fight for international law and order.”⁵⁴

The success of the action to eliminate Syria’s chemical weapons program drew on international consensus against these barbarous weapons. It also provided a diplomatic rallying point that has been sadly lacking in efforts to resolve the Syrian crisis. While that rallying point has not, in the end, expanded further, it has nonetheless provided a model and point of departure for new efforts. In particular, it has shown what can be achieved when political will rallies behind a well-established international legal norm. Even if we judge the Syria mission only by the criteria of disarmament history, it must be counted as a remarkable achievement. This achievement is not yet at an end point, but it has already played an important role in activating and consolidating the practical legal force of the Chemical Weapons Convention and set a high benchmark for future disarmament efforts.

⁵⁴ Ludwig Quidde, “Essay based on Nobel Lecture of December 12, 1927,” (Stockholm: Nobel Foundation, 1927), http://www.nobelprize.org/nobel_prizes/peace/laureates/1927/quidde-lecture.html.



Ahmet Üzümcü was appointed director-general of the OPCW in December 2009 and reappointed for a second term in December 2013. Immediately prior to his appointment as OPCW director-general, he served as the permanent representative of the Republic of Turkey to the United Nations Office at Geneva.

Ambassador Üzümcü is a career diplomat with vast experience in multilateral diplomacy. During the past decade he has represented Turkey at the NATO Council, the Conference on Disarmament, the United Nations, and other international organizations in Geneva. Ambassador Üzümcü chaired the Conference on Disarmament for four weeks in March 2008 and attended various disarmament-related meetings and conferences in Geneva, Brussels, and elsewhere.

Previously, Ambassador Üzümcü served as deputy undersecretary of state for bilateral political affairs at the Ministry of Foreign Affairs of Turkey. From June 2002 to August 2004, he was the permanent representative of Turkey to the NATO Council in Brussels. He held the post of ambassador of Turkey to Israel from 1999 to 2002. From 1996 to 1999, he headed the Personnel Department at the Ministry of Foreign Affairs in Ankara. Prior to that, he served in various posts at the Ministry of Foreign Affairs as well as at the Turkish delegation to NATO (1986-1989), the Turkish embassy in Vienna (1979-1982) and as a consul in Aleppo (1982-1984).

The Emerging Law of 21st Century War

Harold Hongju Koh⁵⁵

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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