THE SECOND MAJOR GENERAL JOHN L. FUGH SYMPOSIUM

Introduction

On May 14, 2014, the Center for Law and Military Operations (CLAMO) at the Judge Advocate General's Legal Center and School (TJAGLCS) hosted the second Major General John L. Fugh Symposium on Law and Military Operations. The Symposium honors the memory of Major General John L. Fugh, the Judge Advocate General of the Army from July 26, 1991, to September 30, 1993, and the first Chinese-American to become a general officer in the Army.

The Symposium topic was *Legal Issues Associated with the Use of Force Against Transnational Non-State Actors*. The Symposium consisted of three moderated discussion panels, each consisting of three panelists, and one session of open discussion. Each panel focused on a specific aspect of the overall symposium topic. The fifty-five symposium attendees included judge advocates from the U.S. Army, Navy, and Marines; civilian legal advisors to the Department of the Army and Department of Defense; military legal advisors from Canada, Israel, and the United Kingdom; law professors and academics; and representatives from non-governmental organizations.

The following article is an edited transcript of the panelist presentations and subsequent discussion. The views presented were diverse. Suffice it to say, there was no consensus achieved on many of the issues discussed. No viewpoints or positions put forward during the Symposium are attributable as an official position or opinion of CLAMO, TJAGLCS, the U.S. Army, Office of the Joint Chiefs of Staff, or the U.S. Department of Defense.

Panel 1

Professor Jeffery Kahn; Professor Robert Chesney; Brigadier General Richard Gross, U.S. Army

Question: Is the use of force against al Qaeda and associated forces, globally, justified in the context of a continuing transnational armed conflict? If so, how is this conflict to be characterized—international

armed conflict, non-international armed conflict, or a new category of transnational armed conflict?

I. The Martens Clause[1] and the Tension Between Human Rights and Sovereignty

> *[P]opulations and belligerents remain under the protection and empire of the principles of international law.*

The original Martens Clause contains a peculiar phrase: populations and belligerents remain "under the protection and empire of the principles of international law." Martens undoubtedly meant to emphasize a unity of purpose in that pairing, but there is a tension that speaks to the issue before this panel. It is the tension between human rights (protection) and sovereignty (empire). And it has only become more difficult since the first Hague Convention.

The ordinary rule in a free state governed by law is that whatever has not been prohibited is permitted. This is a way of thinking that is thought to unleash innovation, creativity, and human ingenuity.

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[1] The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) With Respect to the Laws and Customs of War on Land:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

Convention with Respect to the Laws and Customs of War on Land (Hague II), Pmbl., July 29, 1899, 32 Stat. 1803.

The Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the 1899 Hague Peace Conferences. Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. *See* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INT'L REV. OF RED CROSS 125 (1997).

In wartime, that is not always desirable. The Martens Clause reverses this presumption. It rejects the view that because a specific practice or tactic or action is not prohibited, it is therefore permitted. Quite the opposite, it reminds us that an exhaustive accounting of inhumanity is impossible and that, therefore, a general rule must apply to limit the ingenious human cruelty during wartime.[2] Even if no specific provision might protect a particular group of belligerents or suspected belligerents or innocent civilians, the Martens Clause reminds all that these groups "remain under the protection and empire of the principles of international law . . . , the laws of humanity and the requirements of the public conscience."

Many know Martens as Friedrich Fromhold von Martens. But he was also known as Fyodor Fyodorovich Martens. He was the leading international legal scholar of imperial Russia, a classic scholar-diplomat.

As it turns out, just as Martens was at the peak of his career, shortly after having successfully negotiated the inclusion of the Martens Clause, the Russian Empire was being torn apart. Everyone remembers something of the Russian Revolution. But few recall the history of transnational terrorism that preceded 1917 or the futile attempts of the Russian state to stop it. There were so many terrorist organizations—with names like "The People's Will" or "The Black Hundreds" —that it is hard to keep them straight. These were transnational non-state actors if ever there were any. Their leaders could be found in the British Library in London, the boulevards of Paris and Berlin, and, of course, throughout the expanse of the Russian Empire. Terrorist cells were

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[2] Bruno Zimmermann, *Article 1—General Principles and Scope of Application*, *in* COMMENTARY ON THE PROTOCOL ADDITIONAL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 38-39 (Yves Sandoz et al. eds. 1987).

> There were two reasons why it was considered useful to include this clause, yet again, in Protocol I to the 1949 Geneva Conventions. First, despite the considerable increase in the number of subjects covered by the law of armed conflict, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned, regardless of subsequent developments in the types of situations or technology.

Id.

carefully organized for maximum tactical advantage and minimum risk of infiltration. Dostoyevsky has written about this. No cell member knew more than one person from another cell.

By any measure, these terrorists were more successful at their stated goals than Al-Qaeda has been with its objectives. By the time of the Second Hague Peace Conference in mid-1907, these terrorists had succeeded (on the fifth attempt) in assassinating the Tsar.[3] Terrorists also killed his son, the Grand Duke.[4] Further, terrorist attacks took the life of the last Tsar's Education Minister,[5] two Interior Ministers,[6] his Prime Minister,[7] and well over a thousand other government officials.[8] Thousands of civilians were killed or wounded in the course of this campaign.[9] During 1907, this averaged 18 casualties a day.[10] In the two years following the second Hague Peace Conference, from January 1908 to May 1910, 732 government officials and 3,051 citizens were killed and 4,000 wounded in terrorist attacks.[11] Keep in mind that the Russian Revolutions do not even begin until 1917.

A year before the Tsar's death, Russia's special police force—the so-called Third Department—was subsumed into the Ministry of the Interior, and its Gendarmerie placed under the control of the Ministry of War.[12] After the Tsar's death, the so-called temporary regulations were put into place under which military field courts could try civilians for select state crimes in closed proceedings conducted not just under military law, but the military law applicable in time of war (while, at the same time, a soldier or officer would be tried under the military law

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[3] Alexander II was killed by a bomb in 1881. Four attempts occurred immediately prior to this one, to which may also be added a separate attempt in 1866.

[4] The Grand Duke, Sergei Aleksandrovich, was assassinated in February 1905.

[5] The Education Minister, Nikolai Bogolepov, was assassinated in February 1901.

[6] Dmitrii Sipiagin was assassinated in April 1902. Vyachaslav Plehve was assassinated in July 1904.

[7] Prime Minister Stolypin was shot and killed in September 1911.

[8] Between February 1905 and May 1906, Jonathan Daly approximates 1,075 state officials killed or wounded. Jonathan Daly, *Police and Revolutionaries*, in 2 THE CAMBRIDGE HISTORY OF RUSSIA 647 (Dominic Lieven ed. 2006). In 1906, he states that "as many as" 1,126 government officials were killed and 1,506 wounded. *Id.* at 648.

[9] ANNA GEIFMAN, THOU SHALT KILL: REVOLUTIONARY TERRORISM IN RUSSIA, 1894-1917, at 264 n.59 (1993).

[10] *Id.* at 21.

[11] DOUGLAS SMITH, FORMER PEOPLE: THE FINAL DAYS OF THE RUSSIAN ARISTOCRACY 58 (2012).

[12] Daly, *supra* note 8, at 637-39.

applicable in time of peace!).[13] Between July 1906 and April 1907, these courts "were obliged to pass judgment in no more than two days and to carry out the sentence (usually death) within one day." They were responsible for the execution of "as many as 1,000 alleged terrorists."[14]

Now, compare the timeline of F.F. Martens's participation in the First and Second Hague Peace Conferences in 1899 and 1907 with the number of Russian ministers and civilians killed by terrorist bombings. Consider the duration and intensity of these hostilities. Could it be said (however anachronistically) that Russia was in an armed conflict with one or more organized armed groups?

It is anachronistically because if Martens was asked this question, he would think it utterly ridiculous. The concept of sovereignty under international law at that time would have seen no applicability for the Martens Clause or the Hague Conventions in an internal conflict in a state. That is because the concept of sovereignty was at its height, and protection of human rights, or the idea that a certain minimal set of rights are inherent in human existence and not given or taken away at the whim or caprice of the state, would have been impossible for him to comprehend. So, in a sense, this a short tour of a history that did not occur.

But how could Martens write this famous clause while living in and under an empire besieged by transnational terrorists who were granted no quarter by a Tsarist regime that did not hesitate to use military courts and summary executions? This is not unlike Thomas Jefferson writing about the uncivilized cruelty of the British treatment of American prisoners of war in the same letters in which he boasts of the scorched earth annihilation of entire settlements of American Indians.[15]

So now fast forward one hundred years. Imagine the same level of violence occurring with the same regularity, but in 2017. Imagine the same sort of non-state organized groups.

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[13] William C. Fuller Jr., *Civilians in Russian Military Courts, 1881-1904*, 41 RUSS. REV. 288, 292 (1982). Of 73 trials of members of the People's Will terrorist organization conducted in the 1880s, 42 were held in military courts. *Id.* at 293.

[14] Daly, *supra* note 8, at 648. During the period of the use of summary military courts-martial, August 1906 to April 1907, more than 1,000 people were shot or hanged as revolutionaries, terrorists, or expropriators. Geifman, *supra* note 9, at 227.

[15] JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 35 (2012).

It is plausible that an armed conflict of a sufficiently sustained and intense nature sufficient to introduce the provisions of Common Article 3 of the Geneva Conventions[16] could be said to exist. That would imply the existence of a non-international armed conflict (NIAC) against a non-state actor. It is also possible that such a group or groups could obtain sufficient control over set territory to establish the predicates for the application of Additional Protocol II[17] to the conflict. In such a circumstance, customary international law, as well as domestic law (which itself must comply with International Human Rights Law (IHRL)) would govern the use of force, targetability, and detention powers employed by the state.

There is an inherent imbalance in the status of parties to a NIAC. And as customary international law does not change this legal status, there is an inherent imbalance of rights but not of core obligations. There has been a tremendous change from the time of Martens because "protection" and "empire" have shifted in importance. The value of sovereignty has gone down while "protection," the value of human rights, has gone up.

If states came to the aid of the sovereign, the armed conflict would remain a NIAC. No new body of law would be added to the mix. If states came to the aid of the heretofore unprivileged belligerents, the armed conflict may well become an international armed conflict (IAC). Much of the same customary international law would apply, as would the treaty law of IAC, displacing, as *lex specialis*, the domestic law and, where applicable, the IHRL.

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[16] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

[17] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP 2].

It may also be the case that the degree of violence is deemed too sporadic, at too low a level of intensity, to constitute an armed conflict. In such a case, only domestic law and IHRL would apply.

A few concluding words. It may once have been the case that the Law of Armed Conflict (LOAC) was a legal regime mutually exclusive of all others, domestic law as well as IHRL. In the same way, a state's absolute sovereignty—recognized as the core and concrete basis of the law of nations—excluded the intrusive power of any other authority, save that imposed by the overpowering force of arms. But now we recognize that sovereignty is not absolute. We recognize this as a matter of theory; federalism is, at its essence, a repudiation of absolute sovereignty. We recognize this as a matter of principle, as well. The greatest sea change in public international law has been the recognition that individual human beings are not merely objects of international law, but subjects of international law. Absolute sovereignty is incompatible with this notion. Of course, "absolute sovereignty" was redundant to Martens's generation of public international lawyers; it was impossible for sovereignty to be anything other than absolute.

The erosion of state sovereignty is related to the emergence of the individual as an international law subject. This is also both a cause and an effect of the erosion of the notion that the LOAC displaces all other law. In a world in which humans have rights that are neither granted by states, nor removable at their whim, it follows that the LOAC can only be a law that is given priority in case of its conflict with other laws, but that it has no more absolute power than that of the concept of sovereignty.

The concept of transnational armed conflict would go too far for most states—including the United States—with regard to both the state sovereignty and individual rights sides of a necessary balance. A transnational armed conflict pays minimal regard to an inherent right of sovereignty in states; it would seem to be for the State Party to the "transnational armed conflict" to decide if another state is unwilling or unable to pursue the former's non-state adversaries. Likewise, it diminishes the heightened respect for individuals as rights-bearing creatures under international law.

Retaining the IAC/NIAC binary system, a binary system within another binary system of LOAC vs. law enforcement, conforms more to the goals of these legal systems and provides needed flexibility.

Assertion of the existence of a NIAC in one part of the world, against a non-state opponent with sufficient organization and control to be viewed within the lens of an armed conflict, does not exclude the possibility that the same opponent, operating elsewhere in the world, may not have the same level of organization or control there. In fact, such discernment is to be encouraged, not discouraged.

If we look at the sort of conflict that the Russian Empire faced and lost, that sort of discernment and careful analysis maximizes the advantages of a world organized under the concepts of state sovereignty, without minimizing the essential protections of international human rights.

II. Targeting—LOAC and National Self-Defense

During America's first war on terrorism in the 1980s, the Reagan Administration grappled with how best to respond to the threat presented by the network of groups and individuals in Lebanon that eventually coalesced into Hezbollah. In addition to the Marine barracks bombing in Beirut that killed 241 servicemembers, there were numerous other attacks against U.S. interests in the region. Secretary of Defense Caspar Weinberger, reflecting the then-dominant institutional military viewpoint regarding the lessons of Vietnam, argued that there was not (or, at least, should not be) any such thing as the isolated, surgical use of force, and hence opposed Secretary of State George Shultz's recommendation of military action.

A Marine officer serving on the National Security Council, Oliver North, believing that President Ronald Reagan was seeking a suggestion to break this impasse between his cabinet members, proposed a covert action program to target the leadership of the emerging Hezbollah group. The Deputy Director of the CIA reacted strongly to this proposal and invoked the lessons learned by the CIA during the 1970s, when criticism

from the Church Committee investigation[18] led to an executive order banning the use of "assassination" as an instrument of foreign policy.[19]

The Director of the CIA was uncertain as to whether this executive order would apply to the proposal in issue, however, and forwarded the matter to the General Counsel of the CIA, Stanley Sporkin. Mr. Sporkin reportedly concluded that the proposed use of force against terrorists who had previously killed Americans would be in the furtherance of national self-defense, and it would not constitute the form of lethal force, used for foreign policy purposes, that is prohibited by the executive order. The plans that were formulated, following the issuance of this opinion, never came to fruition, however, apparently due to the lack of credible proxy forces necessary to carry out such attacks.

This model of lethal force effectively sat unused until the 1990s, when al Qaeda emerged as a threat to the United States. It is clear from the 9/11 Commission Report that the Clinton Administration wrestled with the same questions the Reagan Administration dealt with in Lebanon. And, though the resulting debate seems never to have been resolved to the complete satisfaction of all involved, the administration did embrace the Sporkin opinion and adapt it to various operations directed toward Osama bin Laden, often making it clear that force was to be used as a last resort. After the 1998 U.S. Embassy bombings in East Africa, moreover, the Clinton Administration explicitly and publicly asserted the right to use lethal military force, launching multiple cruise missiles against al Qaeda targets in Sudan and Afghanistan.

These attacks raised questions concerning the governing legal paradigm. Was the administration claiming the existence of an ongoing armed conflict, and did the LOAC allow for the targeting of al-Qaeda leaders? Were the strikes, instead, somehow governed by International Human Rights Law (IHRL)? Or did these attacks simply represent an exercise of self-defense under Article 51[20] of the U.N. Charter, occurring

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[18] In 1975, the Senate established a committee, chaired by Senator Frank Church, to investigate governmental intelligence activities, including alleged assassination attempts. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-465 (1975).

[19] Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *amended by* Exec. Order No. 13,284 (2003), Exec. Order No. 13,335 (2004), Exec. Order No. 13,470 (2008).

[20] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,

within a legal void in which neither the LOAC nor IHRL applied? Notwithstanding the legitimacy of these questions, however, as these initial strikes were not followed by others, no sustained public debate of these issues ensued.

Substantial analysis of these questions did finally arise after 9/11. The Bush Administration quickly accepted the validity of the LOAC paradigm, arguing the existence of an ongoing armed conflict with al Qaeda. And military action in Afghanistan soon provided the additional complication of large-scale detention operations to the debatable questions concerning lethal targeting.

Issues associated with detainee operations had the effect of forcing sustained legal debate, as the detainees in question brought habeas cases in federal court (normally a venue reluctant to tackle questions of national security). Years of litigation and controversy culminated, eventually, in what appeared, for a time, to be a general consensus as to the legitimacy of the government's position (supported by each branch of the federal government, as well as by presidential administrations of both political parties). The appearance of stability was an illusion, however. The cases concerned involved detainees largely captured in Afghanistan, usually linked either to the Taliban or al Qaeda. Such fact patterns are increasingly distant from the center of gravity with respect to counter-terrorism actions today.

Currently, the United States is facing a growing threat from groups loosely affiliated with al Qaeda, located outside Afghanistan and sometimes lacking direct ties to al Qaeda's senior leadership. The United States increasingly targets these groups' members in locations such as Yemen, Pakistan, and Somalia.

Is there a need for the existence of a "transnational" category of NIAC in order to provide a legal basis for the targeting of these individuals outside Afghanistan? Perhaps not, given the sustained and relatively intense fighting occurring in the relevant areas (Yemen, Pakistan, and Somalia). A NIAC status may attach in each location, even if one rejects the model of a single, global NIAC.

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until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

Another question still remains, however: to what extent does IHRL impact the LOAC in these settings? A recent decision by a court in the United Kingdom,[21] holding that certain human rights laws had a bearing on the detention of captured insurgents in Afghanistan, highlights the possibility that IHRL and the LOAC might be viewed as not mutually exclusive. This, in turn, could lead to interpretations of what is deemed to be the "governing" law that would have aspects of both IHRL and the LOAC apply to any given conflict scenario, when, in fact, it would be most inappropriate to apply IHRL to any number of conventional combat operations. At the same time, this approach may also lead to scenarios in which LOAC considerations might affect the interpretation of human rights law in undesirable ways. For example, consider the current administration's broad definition of "imminence" in conjunction with the determination of the existence of an "imminent threat," a critical human rights law concept that constrains a state's use of lethal force. Blending LOAC and human rights law may well result in a concept of "imminence" that has no real temporal limits, at least as contemplated under IHRL.

III. Post-2014 Legal Landscape

As we plan for a reduction in forces in Afghanistan, beginning in 2014, the question of the future legal state of affairs for the United States in Afghanistan looms large for government lawyers. Military attorneys, as well attorneys from the Department of Justice and National Security Council, among others, are attempting to reach a consensus on the way ahead for the reduced U.S. footprint in Afghanistan in 2015 and beyond.

Three main questions must be answered: What is the law going to look like in Afghanistan moving into 2015? What is the law going to look like outside Afghanistan and the "hot battlefield"? What is the law related to Guantanamo and the detainees still present there?

The future state of affairs in Afghanistan should become apparent soon. Specifically, these matters will be addressed: the number of U.S. and coalition forces that will remain; the nature of the Bilateral Security Agreement between the Afghan government and the United States,

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[21] Serdar Mohammed v. Ministry of Defence, [2014] EWHC (QB) 1369 (Eng.) (holding that detention beyond ISAF's 96-hour detention policy had no legal basis under either Afghan or international law).

which will speak to the operations or missions that will follow; and the Status of Forces Agreement between NATO and the Afghan government. Once these agreements are in place, we will have a better idea of the legal landscape in Afghanistan. This will also help clarify the questions concerning the nature of the law applicable outside Afghanistan, generally, and particularly with regard to Guantanamo and the detainees there.

It may be an oversimplification to view the conflict occurring inside Afghanistan and the conflict with al Qaeda, as a whole, as two separate conflicts, with the implication that as Afghanistan winds down, we might consider that a separate conflict continues to exist with al Qaeda in various other locations around the world. A good counter-argument to this premise is that, as the current conflict began with the Taliban and al Qaeda in Afghanistan at the same time, as the intensity of this conflict fades, we will no longer find ourselves involved in an armed conflict. This would obviously have a dramatic impact on detention operations at Guantanamo, as well as on operations both within and outside Afghanistan's borders.

While this question has yet to be definitively answered, U.S. and coalition operations in Afghanistan, post-2014, will likely not look like combat operations, at least with regard to offensive operations. Counter-terrorism efforts may still exist, however, and some may argue that these are indistinguishable from offensive combat operations.

Beyond that, to what extent will coalition forces attack an imminent threat, rather than wait for the threat to come to them? The potential threats to the Afghan government and the coalition will be well represented by the Haqqani Network, the Tehrik-e Taliban in Pakistan, and the Islamic Movement of Uzbekistan. The U.S. government will have to grapple with how its forces and their Rules of Engagement (ROE) will address the potential threat that these groups represent. This, in turn, will be significantly impacted by the answer to the question of whether a state of armed conflict is said to exist in Afghanistan. The ROE will very much be driven by the language of the agreements between the United States and Afghanistan although some would argue that the concept of national self-defense would potentially override any such agreement if a threat to U.S. forces were to arise.

This is not to say that legal advisors at the highest levels of government are waiting to learn the nature of the mission before

engaging in an analysis of the law that may potentially be applicable to this mission. Ideally, government policy makers and attorneys are working, in tandem, to formulate the mission for U.S. and coalition forces in Afghanistan after 2014.

For actions outside Afghanistan, the 2001 Authorization for the Use of Military Force (AUMF) is the focus of much analysis and debate. At the moment, we have a fairly transparent definition of al-Qaeda, the Taliban, and associated forces. This definition is based on Supreme Court case law, referred to publicly by the Secretary of Homeland Security, Jeh Johnson, and the Attorney General, Eric Holder. It includes groups whose connection to the same al Qaeda that planned 9/11 may not be as clear cut as many would like.

The AUMF needs to be critically assessed and updated before we move into 2015, based on the ongoing debate in Congress concerning whether this law actually still applies to the terrorist groups we now find ourselves targeting in 2014.

In May 2013, President Obama stated:

> The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States.
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> Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbounded powers more suited for traditional armed conflicts between nation states.
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> So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue.

> But this war, like all wars, must end. That's what history advises. That's what our democracy demands.[22]

As of yet, we do not know what will take the place of the AUMF, and the job of a military attorney is to advise on the law "as is," and what a commander may or may not do. There is much ongoing debate within Congress and the Administration. Robert Chesney, Jack Goldsmith, and others recently authored an excellent article[23] on what the next generation AUMF could possibly look like in order to effectively counter evolving terrorist groups. Options include giving it a geographic limitation, a modifiable list of targetable groups, and/or a sunset provision.

It is clear from the President's remarks, however, that his intent is to eventually repeal the AUMF's mandate. There is also the question going forward of whether military forces, rather than law enforcement assets, should be used at all in counter-terrorism operations.

The challenge with the approach used, whether through law enforcement or military action, is that nations approach international law differently. If all coalition partners in Afghanistan were asked their mission, their answers would range from war to nation-building to law enforcement missions, which would then be reflected in their ROE and caveats to the coalition ROE.

This same principle holds true when looking at possible justifications for intervention in other countries' conflicts, such as Syria. Some countries tout humanitarian intervention and a Responsibility to Protect as a justification to intervene despite these "norms" not being recognized as legal bases for such under international law. There is a danger here, as many of the same arguments being espoused by some to justify a military intervention in Syria (against the Asad regime)[24] are similar to those set forth for the Russian intervention in Ukraine. As mentioned previously,

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[22] President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), *available at* https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [hereinafter President Obama NDU Speech].

[23] ROBERT CHESNEY, JACK GOLDSMITH, MATTHEW C. WAXMAN, & BENJAMIN WITTES, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS (2013).

[24] These remarks occurred prior to the current military operations against the Islamic State of Iraq and Syria (ISIS, also known as IS or ISIL), operations based on different legal justifications.

however, this justification for intervention will likely become more common as the value of national sovereignty decreases.

Another critical issue in the use of force analysis is that of maintaining the distinction between law and policy in order to avoid the ever present danger of conflation. There is much public discussion regarding the approach to targeting outside the "hot" battlefield of Afghanistan, and much of this involves policy, rather than law. For example, the focus on reducing civilian casualties in kinetic strikes to zero may result in an incorrect assumption that zero civilian casualties, rather than the LOAC principle of proportionality, constitutes the legal standard. A long-term risk, then, is that policy will translate into state practice and that this will affect customary international law and the LOAC in unintended ways.

The third question regarding post-2014 detention operations at Guantanamo will turn, in part, on whether we are dealing with Taliban or al Qaeda detainees. Administration officials have mentioned, on numerous occasions, the impending end of the armed conflict in Afghanistan, with al Qaeda. In 2012, then Department of Defense General Counsel Jeh Johnson gave a speech at the Oxford Union in which he discussed what he believed to be the inevitable end to armed conflict with al-Qaeda:

> I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.
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> At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military

> assets available in reserve to address continuing and imminent terrorist threats.[25]

One of the traditional principles of the LOAC is the release of detainees, upon termination of the conflict. If the President declares an end to the armed conflict in Afghanistan, we will have to make some decisions regarding the detainees in Guantanamo, but it does not necessarily follow that these detainees will be released immediately.

Jeh Johnson noted in his speech that the end of fighting in World War II did not lead to the immediate release of German detainees; some were held for years following the war's end.[26]

Question: In Jeh Johnson's speech, he said that the end will not be determined by al Qaeda surrendering on the USS Missouri. *What will be the measure of the end of the conflict with al Qaeda?*

There is a frustration at the national level, leading to much debate, with the use of military power as an instrument of national power. High-level military officials have frequently stated that we cannot kill our way out of the problem with terrorist groups. There has to be a concerted, full spectrum effort to address the underlying causes of terrorism, including building up our partner nations' capacities to deal with such threats. It takes all departments and agencies of the government, working together, to construct and execute a cohesive strategy for dealing with terrorism, rather than simply reacting to events after they occur. The AUMF is a great example of a hurried response to a traumatic event. Our response, and the legal basis for it, might well have looked very differently had there been more time to consider an overarching strategy to meet the evident terrorist threat.

The question of detainees leads back to the issue of the bleeding of IHRL into the LOAC, which was raised in the recent United Kingdom

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[25] Jeh Johnson, Gen. Counsel, U.S. Dep't of Def, Remarks at the Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How will it End? (Nov. 30, 2012), *available at* http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

[26] *See* Ludecke v. Watkins, 335 U.S. 160 (1948) (holding that the President's authority to detain German nationals continued for over six years after the fighting with Germany had ended).

court decision regarding an Afghan detainee.[27] Because nations often fight in coalitions, and these nations bring their own body of laws with them, we cannot ignore the impact that these decisions will have on U.S. forces. Adjustments will necessarily have to be made in the manner in which U.S. forces operate in a coalition environment.

Panel 2

Brigadier General (Ret.) Kenneth Watkin, Canada; Major General Den Efrony, Israel Defense Force; Professor Rachel VanLandingham

Question: Assuming there does exist some form of armed conflict with al Qaeda and its associated forces, what LOAC is applicable?

I. To What Extent Does the LOAC Apply to an Armed Conflict with al Qaeda?—Defining Armed Conflict and its Threshold Application

The nature of warfare, regardless of the "type" of war (i.e., international or non-international armed conflict), has not changed. It is still a brutish, violent exercise to destroy one's enemy. This remains true with counter-terrorist[28] and counterinsurgency operations.[29] The most prominent type of warfare has always been against non-state actors. State military forces prefer to fight conventional wars, but reality does not always match this desire.[30] Even in the 1970s and 80s, when terrorism was often thought of almost exclusively in terms of criminal activity, there were operations conducted against non-state actors that did not fit comfortably into this view. For example, *Operation Eagle Claw*,

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[27] *See supra* note 21 and accompanying text.

[28] DEP'T OF DEF, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 55 (15 Mar. 15), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (defining counter-terrorism as "[a]ctions and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear or coerce governments or societies to achieve their goals[,] . . . [a]lso called CT").

[29] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY glossary-4 (15 Dec. 2006) (defining "counterinsurgency" as "[t]hose military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency").

[30] JACK S. LEVY & WILLIAM R. THOMPSON, CAUSES OF WAR 12 (2010) ("There has been a shift in the nature of warfare over time—away from the great powers, away from Europe, and, increasingly, away from state-to-state conflict and toward civil war, insurgency, and other forms of intrastate and trans-state warfare.").

the ill-fated Iran hostage rescue mission to gain the freedom of American diplomats held by Iranian students, was carried out in 1980.

In 1982, Israel invaded Lebanon and expelled the Palestinian Liberation Organization (PLO), a terrorist group that also had conventionally organized units (with tanks and artillery).[31] That invasion led to the creation of Hezbollah, an organized resistance movement that eventually forced the Israel Defense Forces (IDF) to withdraw from Lebanon. The tactics of that non-state group included the 1983 Marine barracks bombing carried out with vehicle-borne, improvised explosive devices. It is this period that also saw the start of the modern concept of suicide bombing, and one that introduced the notion that terrorist groups could use elevated levels of violence associated with armed conflict. It is these uses of explosives that have introduced increased levels of deadly violence, and this has been a game changer in terms of the way states react to these small groups. Special Forces units were created in many state armed forces (particularly in the United States), and these have proven to be exceptionally capable of addressing such threats.

An increasing requirement for states to confront non-state actors in the post 9/11 period has led to the question of whether the resulting NIACs are internal or transnational in character? The answer very much depends on perspective. If the conflict is in one's own country, it is ordinarily seen as internal in nature, often involving a policing response. The default position is that states will favor a human rights based law enforcement response in their own territory. However, if the conflict involves an expeditionary deployment, as is normally the case when North American military forces are involved, the violence is often seen as more transnational in nature. This, in turn, can lead to the view that the operation is governed by armed conflict rules. For example, when the United States sends its armed forces outside its borders, this is often seen as the United States going to "war," rather than participating in law enforcement-based operations.

Given the unique nature of NIAC, a key question that arises is whether Human Rights Law (HRL) applies to any form of armed conflict that might be waged against al Qaeda? However, this would appear to be a given, and the real issue is not whether HRL applies, but how much of the LOAC applies to an armed conflict with al Qaeda. What has

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[31] DANIEL BYMAN, A HIGH PRICE: THE TRIUMPHS & FAILURES OF ISRAELI COUNTERTERRORISM 67 (2011).

historically skewed the discussion concerning the operation of these bodies of law is the question of whether human rights treaties apply extraterritorially. The U.S. position is that they do not.[32] However, from a customary international law perspective, HRL does apply extraterritorially. The extraterritorial applicability of HRL is referred to in the *Restatement of Foreign Relations Law of the United States*.[33] Human rights norms are also found in humanitarian law treaties. This can be seen in Geneva Convention IV,[34] Additional Protocol I, Article 75, and Additional Protocol II, Article 4.[35] Additionally, in terms of acceptance, the *Operational Law Handbook*, produced by the U.S. Army's Judge Advocate General's Legal Center and School, has an entire chapter on human rights, highlighting that operational necessity required the application of HRL as a matter of practice in Iraq and Afghanistan.[36]

So, the question to ask is why, at the upper, strategic levels of the U.S. government, there is an argument about whether human rights treaties apply, when at the ground level, where the warfighters operate, they already apply HRL? Human rights are, in reality, an inherent part of contemporary U.S. operations.

II. The 1995 *Tadić* Decision and Its Impact on the LOAC

The more challenging question is not whether HRL applies to NIAC, but when and how the LOAC applies. Here, a challenge arises, in that states have historically not wanted to apply the LOAC to internal

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[32] U.N. Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, ¶ 4, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

[33] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1986).

[34] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4 (1993) (noting that Geneva Convention IV is referred to as a "bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of the occupied territories").

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP 1]; AP 2, *supra* note 17, art. 4 (requiring Parties to the Protocol to provide humane treatment to anyone not otherwise entitled to greater protection under the Geneva Conventions or the Protocol).

[36] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 45-54 (2013).

conflicts. That is why Common Article 3[37] is so sparse in terms of enumerated treaty rights. Further, as was articulated in the 1995 ICTY *Tadić* decision,[38] the NIAC paradigm does not incorporate all LOAC provisions.[39] Some states, like the United States, adopt a policy approach of applying the principles and spirit of LOAC on all military operations.[40] However, for those lawyers who advocate for an exclusive *lex specialis* approach, the question has to be asked as to how that principle applies when LOAC is being adopted only as a matter of policy? In legal terms, a policy cannot win out over the *lex generalis* of human rights law. Further, if there is no armed conflict, the LOAC cannot apply[41] although some authors suggest it does as a matter of policy.[42] It was during the operationally complicated period of the 1990s that this gap-bridging approach of applying LOAC, as a matter of policy, was adopted due to the uncertainty as to when an armed conflict existed. For example, in 1999, the U.N., struggling with this same issue, developed the *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* to assist in identifying when the LOAC applied in a given situation.[43] There should also be little doubt that HRL continues to apply during armed conflict.[44]

A particular legal challenge is that of defining the legal threshold for the existence of an armed conflict. Ten years ago, the International Committee of the Red Cross (ICRC) argued that Common Article 3 should be applied at the lowest level of violence possible in order to facilitate its application. This was argued from a humanitarian

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[37] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art 3.

[38] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić].

[39] *Id.* ¶¶ 96-127.

[40] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (15 Nov. 2011).

[41] Tadić, *supra* note 38, ¶ 67 ("International humanitarian law governs the conduct of both internal and international armed conflicts . . . for there to be a violation of this body of law, there must be an armed conflict.").

[42] Jordan J. Paust, *Self-Defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANS. L. & POL. 237, 260 (2009-2010) ("Article 51 self-defense actions provide a paradigm that is potentially different than either a *mere* law enforcement or war paradigm. . . .").

[43] BRUCE OSWALD, HELEN DURHAM & ADRIAN BATES, DOCUMENTS ON THE LAW OF UN PEACE OPERATIONS 201-05 (2010).

[44] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports 136 (July 9).

perspective, as governments were refusing to recognize the existence of even intense internal armed conflicts. However, post-9/11, this argument changed, in part, in order to contend that there existed no armed conflict with al Qaeda in third states, and as a result of the *Tadić* decision. The *Tadić* case identifies the intensity of a conflict, as well as the organization of the armed groups involved, as the criteria used to determine the existence of a conflict. This test is often used to suggest that there is now a higher threshold standard for armed conflicts. Unfortunately, this approach does not fully reflect other approaches, such as the *Abella* case, where the conflict was more limited both in time and intensity but where the LOAC was still held to apply.[45]

A key challenge exists when there is an attempt to apply the *Tadić* criteria in the context of a "one off" defensive use of force in responding to a non-state actor attack. Does the LOAC or HRL govern such a use of force? One of the criticisms of attempting to apply *Tadić* to such a situation is the perception that a contractual approach of offer and acceptance is required, meaning that the state has to wait for the enemy to offer up a certain level of violence, and then accept this by responding with force. In brief, an armed conflict would not exist until a response takes place. However, the *Tadić* criteria must be understood in the context in which the decision was rendered.

The *Tadić* case did not arise in a situation involving the use of force in self-defense under Article 51of the U.N. Charter.[46] Rather, it arose in the context of a Euro-centric notion of an insurgent group, with headquarters and uniformed armed forces participating in a much broader conflict. Thus, an armed conflict might be considered to exist at the point at which a defensive response is justified under Article 51 of the United Nations Charter. Reliance on the *Tadić* criteria is also problematic if the requirement to have a hierarchical organization comes to be viewed as absolute in order to demonstrate group organization.

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[45] Juan Carlos Abella v. Argentina, Inter-Am. Ct. H.R. (ser. L.) No. 55, ¶ 1 (Nov. 18, 1997).

[46] U.N. Charter art 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.")

The reality of warfare is that when non-state actors are threatened, they will change to cellular organizations; they will hide. Then as soon as they are able to discover a safe haven or to reconstruct, they will again develop a hierarchical organization. As a result, both cellular and hierarchical organizations can meet the *Tadić* criteria. Indeed, some non-state actors adopt hybrid organizations, combining both hierarchical and cellular structures.

To the extent that there is discussion concerning "voids" in the law, it centers on the application of treaty law. However, this theoretical void is actually filled with customary international law. And increasingly, the perceived void is addressed through a dialogue about the applicability of HRL.

III. Defense of Nationals, Hostage Rescue, and Self-Defense

Contemporary operations are also causing greater discussion about what law applies to hostage rescue operations. These operations are not traditional state-on-state conflicts but do involve the use of force in defense of nationals. While the traditional dialogue about acting in self-defense deals with state versus state conflict, there is a sound, strong body of state practice of conducting such rescues. Importantly, hostage rescues may not involve armed conflict. Some hostage rescues, such as the iconic 1976 Entebbe raid[47] and the 2000 Sierra Leone operation,[48] did occur in the context of an armed conflict. However, the 2012 rescue of U.S. national Jessica Buchanan in Somalia was a law enforcement matter.[49] How is the Buchanan rescue considered law enforcement, but the Entebbe and Sierra Leone operations viewed as occurring within the context of armed conflicts? The question then becomes: What factors distinguish law enforcement activities from armed conflicts? The Somalia operation was of a law enforcement nature, carried out against a criminal gang. That gang had no political motive. In contrast, Entebbe was an IAC, justified under Article 51 or customary international law.

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[47] Operation Entebbe was a counter-terrorist hostage-rescue mission carried out by the Israel Defense Forces (IDF) at Entebbe Airport in Uganda on July 4, 1976.

[48] In September 2010, British Special Air Service soldiers conducted a hostage-rescue mission, *Operation Barras*, against an armed militia, the "West Side Boys," who were holding members of the Royal Irish Regiment.

[49] See JESSICA BUCHANAN, ERIK LANDEMALM & ANTHONY FLACCO, IMPOSSIBLE ODDS: THE KIDNAPPING OF JESSICA BUCHANAN AND HER DRAMATIC RESCUE BY SEAL TEAM SIX (2013).

The first individuals killed during the operation were Ugandan troops who were assisting the terrorists holding the hostages within the airport terminal.[50] This was a situation of state-on-state violence, and it was therefore an IAC although the hostilities lasted only 90 minutes.

This raises the issue of whether a use of force can be justified on the basis of Article 51, or the customary law of defense of nationals, in the context of a law enforcement operation. If an organized group does not have a political agenda (i.e., it is a criminal enterprise), and it is operating in an "ungoverned space," that is, a space with no effective territorial government able to enforce the law, a state has the right to protect its nationals, who may be threatened by such a group. Of course, the ability to conduct such a law enforcement operation will be driven, in part, by geography but also by a state's capability to conduct the operation. These two factors will likely result in military special forces being deployed for such a purpose.

In the contemporary security environment, transnational criminal organizations are non-state actors capable of posing a significant threat. This raises the issue of whether a law enforcement or armed conflict response is appropriate when dealing with these "criminal insurgents." To answer this question, one must look at the non-state actor organization, its political motivation, if any, and the intensity of the violence in issue. It is the political factor that separates warfare from armed conflict. However, such a determination can be difficult. A key factor may well be when a transnational criminal organization (e.g., a drug cartel organization in Mexico) interferes with state governance to the extent that its activities take on the characteristics of an insurgency, as opposed to criminal conduct.

There is also a commonality that exists between hostage rescues carried out in either conflict or law enforcement scenarios. Hostage rescue situations can be characterized as law enforcement even when carried out by military forces. Domestically, the hostage rescue role is often assigned to police forces (e.g., the FBI), but extraterritorially, the military is frequently tasked to perform this function. However, when the military conducts a law enforcement-related rescue, this operation is governed by HRL, rather than the LOAC. In this context, the idea of

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[50] IDDO NETANYAHU, YONI'S LAST BATTLE: THE RESCUE AT ENTEBBE, 1976, at 39 (2002) (noting that the Ugandan army was in control of the building where the hostages were being held and were aiding in guarding them).

protecting nationals, and the threat that non-state actors pose internationally, is changing the dialogue concerning whether HRL or the LOAC is applicable to such military operations.

IV. Case Study—Rescue of Hostages in Sierra Leone: Law Enforcement Action or Armed Conflict?

An example of the complexity of international hostage rescue operations can be seen in the 2000 *Operation Barras*, which was conducted in Sierra Leone. A key question is whether this was carried out in the context of an armed conflict, or as a British-led law enforcement operation conducted in a foreign country. It was an operation involving state armed forces, an organized armed group, and a considerable level of violence. The West Side Boys were an organized armed group of 600 personnel, with a political agenda, operating in Sierra Leone and had originally taken eleven British soldiers and one Sierra Leonean soldier hostage. A four-hour rescue operation by the Special Air Service (SAS)/Special Boat Service (SBS) and elements of the Parachute Regiment was conducted to rescue the six soldiers who had not been released through negotiation. The British ground forces were supported by close air support provided by helicopters, as well as by indirect mortar fire. During the operation, ten percent of the British soldiers involved were wounded, and one was killed. It has been widely reported that twenty-five Sierra Leoneans were killed.[51] However, a South African pilot flying a Sierra Leonean helicopter (the sole contribution by that country to the operation) indicates that he killed approximately fifty to sixty rebels, while the British gunships and main attack force likely killed an additional forty personnel.[52]

Thus, significant military action was carried out within a country, albeit with the consent of the Sierra Leone government. This latter fact, then, raises the issue of whether it was an act of self-defense under Article 51. This is a separate issue, however, from that of whether it constituted an armed conflict. On a *de facto* basis, this military action took on the characteristics of an armed conflict, in terms of the level of force used and the nature of the group holding the hostages. One could

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[51] WILLIAM FOWLER, OPERATION BARRAS, THE SAS RESCUE MISSION: SIERRA LEONE 2000 58 (2005).

[52] AJ VENTER, GUNSHIP ACE: THE WARS OF NEALL ELLIS, HELICOPTER PILOT AND MERCENARY 262 (2011).

argue that the U.K. was rightfully acting to defend its nationals, even though Sierra Leone had consented to the use of force. The British forces were dealing with an organized armed group that was exceedingly dangerous, and there was no other means available to rescue the hostages. While some might argue that this was a law enforcement operation, the better view is that this incident reached the level of an armed conflict, justifying the use of LOAC rules.

V. Strategic Legal Conflict and Human Rights

The reality is that there exists a strategic legal conflict between HRL and LOAC advocates. This has, in fact, become an important issue that impacts how operations are conducted and assessed. However, there is also an increasing recognition that other bodies of law, such as the international law governing self-defense and domestic law, can apply as well. The interaction between these various bodies of law has evolved to the point that military lawyers frequently have to assess how they interface. In effect, lawyers have to deal with various bodies of law when "fighting at the legal boundaries." Examples of domestic law impacting international operations can be seen in the U.K. case of *Serdar Mohammed and Ministry of National Defence*[53] and the U.S. case of *Munaf v. Geren*,[54] both of which dealt with the handling of Afghan detainees. The *Serdar Mohammed* case is unique in that it held that the legal basis for detainees had to be found in Afghan domestic HRL and that there existed no authority to detain Afghans under LOAC treaty law or customary law. Israel also has a body of domestic law that applies to "unlawful combatants." Fighting at the boundaries occurs when these laws come together and overlap and interact.

Contemporary operations also demand that soldiers have a full understanding of the strategic consequences of what they do on the battlefield and, in particular, the use of deadly force. This idea was first introduced as the concept of the "strategic corporal," meaning that decisions made at the lowest level can have strategic effect.[55] Law is the ultimate strategic discipline, and this means that there must be a full

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[53] Serdar Mohammed v. Ministry of Defence, [2014] EWHC (QB) 1369 (Eng.).
[54] Munaf v. Geren, 553 U.S. 674 (2008).
[55] Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINE CORPS GAZETTE, Jan. 1999.

understanding of not only LOAC issues, but the HRL issues that apply in this type of conflict as well.

Finally, human rights and the LOAC are forced to interact, due to the nature of the conflict with al Qaeda. There has been an interesting "narrative" regarding drones that has played out in current events, as the U.S. has withdrawn from Afghanistan. This narrative suggests that al Qaeda is just a small terrorist group, not unlike those that operated in Europe in the 1970s and 1980s. A U.S. government adoption of this approach would mean that once al Qaeda Central is destroyed, the armed conflict is over. For some human rights advocates, the equating of al Qaeda to a criminal organization means that an armed conflict cannot exist, and that, therefore, drones cannot be used to strike al Qaeda targets. However, the reality is that the operational situation is much more complicated than this. The Sunni Salafi jihadists have global aspirations and seek to create a caliphate. They are a diverse group whose philosophy and ideology follow the basic doctrine of communist revolutionary warfare theory.[56] They are insurgents who sometimes engage in terrorist activities, rather than terrorists who sometimes engage in insurgent activities. As an insurgency, this means that the conflict with al Qaeda is, ultimately, a battle of governance, with terrorists operating from an "ungoverned space." Governance is not uniquely about armed conflict. It is about policing and law enforcement—winning by a police-primacy approach. This approach privileges capturing over killing. The strategic goal is one of reaching an end state of normalcy, which ultimately means maintaining order through law enforcement.

VI. Case Study—Israeli Legal Challenges

In an article on the historical evolution of the legal divide between classifying conflicts as either international or non-international armed conflicts, Rogier Bartels stated:

> In the summer of 2006, the world witnessed a situation that undoubtedly reached the threshold of armed conflict. As yet, however, the conflict between Israel

[56] NORMAN CIGAR, AL-QA'DA'S DOCTRINE FOR INSURGENCY 20-22 (2009); MICHAEL W. S. RYAN, DECODING AL-QAEDA'S STRATEGY: THE DEEP BATTLE AGAINST AMERICA 204-30 (2013).

> and Hezbollah (or according to some, the conflict between Israel and Lebanon) has not conclusively been identified as one of the two (existing) types of conflict under international humanitarian law (IHL): as either an international armed conflict (IAC) or a non-international armed conflict (NIAC).[57]

The Second Lebanon War in 2006 was no doubt an armed conflict, but against whom? Was it against the terrorist organizations supported by Iran and located in Lebanon? Was it against the country in which it occurred and in which its government participated? What type of armed conflict was it: IAC, NIAC or a new category?

To better understand the legal complexities arising from Israel's conflicts, a short overview of these operations is necessary. Israel is in an ongoing armed conflict with the Hezbollah terrorist organization, which primarily operates inside Lebanon. Hezbollah is the dominant military and political force in Lebanon, an even stronger one than the Lebanese Army. It functions according to a strict hierarchy, with internal discipline and operational plans. Yet, it is still a terrorist organization, recognized as such by the United States, Australia, and, at least partially, the EU. Hezbollah is also fully financed and supported by Iran, serves in Lebanon's coalition government, in some eight ministries, and provides social and welfare services upon which the South Lebanese population heavily relies.

Hezbollah has always been intent on attacking Israel and its citizens, even following Israel's U.N.-recognized withdrawal from South Lebanon in 2000. The peak of violence occurred in July 2006, when Israel responded to a Hezbollah attack on IDF soldiers inside Israel, kidnapping several soldiers and causing the death of ten others. This triggered the Second Lebanon War, during which Hezbollah fired over 4,000 missiles at Israeli civilians. Today, the hostilities continue, and Hezbollah is re-arming. There are over 100,000 missiles and rockets pointed at Israel, mostly located in densely populated areas. Hezbollah also engages in hostile acts against Israel from locations outside of Lebanon, to include Syria, where it has been a major supporting force to the Assad regime.

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[57] Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts*, INT'L REV. OF THE RED CROSS, Mar. 2009.

This situation raises interesting legal issues. Clearly the organizational structure of Hezbollah and the intensity of its actions against Israel constitute unambiguous evidence of the existence of an armed conflict.

The same is true with regard to the hostilities being waged by Hamas and other terrorist organizations based in the Gaza strip on Israel's southern border. Hamas, too, is a terrorist organization, yet it is also the de facto ruling authority of an area outside Israel's borders. It engages in foreign relations and makes official visits to countries like Russia, Turkey, Qatar, and others. Hamas conducts ongoing rocket strikes at civilian populations in Israel and systematically attacks IDF forces near the border. Since taking power in Gaza in 2006, Hamas has orchestrated intense military operations in 2008, 2012, and 2014. Since November 2012, it has launched regular shelling from the Gaza Strip. Again, this is clearly an armed conflict.[58]

In summary, Israel faces two completely separate armed conflicts on its northern and southern borders. Each one raises its own unique legal issues and challenges. In a geographical sense, one conflict is occurring, primarily, in state territory, while the other occurs in a *sui generis* type of territory, which is not considered a state. In both instances, there are examples of spillover into neighboring territories. The actors in the conflict also have different characteristics. One is a terrorist organization, heavily linked to the governmental mechanisms of the state in which it is located; the other is a terrorist organization and a de facto ruling authority.

If there exists an armed conflict with Lebanon, as well as with Hezbollah, are these two separate armed conflicts, or one and the same? If separate, the conflict with Lebanon would clearly be an IAC. Regarding the conflict with Hezbollah, however, one could argue both ways; it is a cross-border conflict against an organization that has elements reflecting an organized military, but it is not a state versus state conflict.

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[58] For more information, see *The Gaza Operation 2008-2009: Factual and Legal Aspects*, ISR. MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation_in_gaza-factual_and_legal_aspects.aspx.

In 2005, the Israeli Supreme Court issued an opinion in a case involving targeting determinations.[59] The court viewed the conflict with the Palestinian terrorist organizations to be one governed by IAC rules but recognized the difficulty in definitively classifying the nature of the conflict. This determination was not without its problems, and it may need to be revisited given current circumstances.[60] As a matter of policy, Israel generally applies the rules of both IACs and NIACs to its ongoing conflict with the Palestinian terrorist organizations.

Where there are uncertainties, Israel has arrived at solutions that would meet the most stringent legal requirements. With regard to the detention of unlawful combatants, for example, Israel has legislation providing for such detention in a way that meets the standards of both IACs and NIACs.[61]

Moreover, with regard to the conduct of hostilities, there are many similar aspects in both conflicts. In each case, these organizations act as proxies of other states and embed themselves and their operations deep in residential areas. Hezbollah constructs residential buildings in South Lebanon villages and uses these for weapons storage and as launching pads. Embedding weapons and engaging in other operational activity in the heart of a residential neighborhood means that civilian casualties are likely unavoidable, particularly in Lebanon. This results in the fact that the principle of proportionality and the question of human cumulative proportionality are real concerns for Israel.

VII. Targeted Killing of Leaders

The notion of killing individual human beings as a way of tamping down an insurgency is an interesting idea. If the legal community constructs its legal architecture on the assumption that this approach will not succeed, lawyers may find themselves in disagreement with those in the military leadership who view history differently.

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[59] HCJ 769/02, Public Committee against Torture in Israel v. Government of Israel (2) PD 459 [2006] [hereinafter Pub. Comm. v. Israel].

[60] For more information, see *Aerial Strikes Against Terrorists: Some Legal Aspects*, ISR. DEF. FORCE MILITARY ADVOCATE GEN., http://www.law.idf.il/592-6584-en/Patzar.aspx.

[61] For more information, see Dvir Saar & Ben Wahlhaus, Preventive Detention for National Security Purposes—The Israeli Experience (May 2, 2015) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601838.

For example, a recent *Washington Post* article[62] discussed how the killing of two dozen leaders unhinged the Revolutionary Armed Forces of Columbia and degraded its capacity. Is the U.S. legal community making a mistake by being too dismissive of the military reality that killing specific individuals may actually be successful? From a legal perspective, it is permissible to kill the enemy in an armed conflict who is a member of an organized armed group or a civilian taking a direct part in hostilities.

The act of targeting specific individuals should be taken cautiously, as the situation might not improve when other leaders assume command. Those taking up the cause may be even worse than those whom they replace. This goes to the nature and structure of the organization itself. If it is a small group—very individually focused in terms of accomplishments, leadership, or ideology—killing certain leaders may be a way to successfully prosecute the conflict. But the enemy facing the United States is not like this. Al Qaeda is able to generate more and more leaders. Take the Pakistani Taliban, for example. When Baitullah Mehsud, the leader of Tehrik-i-Taliban Pakistan, was killed in 2009, three or four nominees were immediately available to fill his position. Such targeting decisions are group-dependent, but it is ultimately a policy choice, or a command choice.

Some argue that if targeted killing becomes a tool in the commander's toolkit, it should be employed in a manner consistent with the principles of international humanitarian law. There is never a situation to which no law applies. However, there are grey zones, such as transnational NIAC, when Common Article 3 provisions apply. A determination of the customary international law applicable to any given situation is very fact-specific and labor-intensive. Does Article 75 of Protocol I apply?[63] Is there relevant state practice? For example, to how many hours of sunlight is a detainee entitled? These are situations to which the Martens Clause applies. If there is nothing directly on point, look to HRL to discern the governing norms. Each situation requires a very fact-specific and time-consuming analytical process.

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[62] Dana Priest, *Covert action in Colombia: U.S. Intelligence, GPS bomb kits help Latin American nation cripple rebel forces*, WASH. POST, Dec. 21, 2013.

[63] Article 75 sets forth the fundamental humanitarian protections to be afforded all persons who are in the power of a Party to an international armed conflict. AP 1, *supra* note 35, art. 75.

VIII. Continuous Combat Function

A continuous combat function is demonstrated through conclusive behavior—a direct participation in hostilities on a recurring basis. When this occurs, an individual is a de facto member of a non-state armed group. As such, he is targetable under international law. The cook who has been recruited into the armed forces is, at the end of the day, like a lawyer who is commissioned. They are both, in essence, riflemen. If they find themselves in a situation of hostilities, they will employ their rifles. They can be called upon by a commander to advance military goals. Moreover, even if the cook is but a contractor cook, the ICRC and the international community would agree that this contractor is not immune from an attack. He may become a casualty—collateral damage resulting from an attack on a legitimate military target. He is a civilian accompanying the armed force.

This same logic applies to a non-state armed group. If the cook does nothing but cook, he is performing a function that does not constitute a direct participation in hostilities, and he cannot be directly targeted. However, if the cook also functions as a rifleman, he is engaged in a continuous combat function and can be targeted at any time.

IX. War by Principled Analogy

The LOAC lacks exact rules concerning its particular application to non-state armed groups operating transnationally. However, the U.S. self-defense response to 9/11 and other acts of war committed by al Qaeda and its associated forces are sufficiently similar to situations regulated by the existing law to make the extant *jus in bello*, as well as *jus ad bellum* and the law of neutrality.

This application of existing relevant law involves what has been called a process of translation.[64] The United States' armed conflict against al Qaeda and associated forces can also be viewed as a war by principled analogy. The prevalence of analogies in the U.S. approach to

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[64] Harold Hongju Koh, Former Legal Advisor, U.S. Dep't of State, Speech at the Oxford Union: How to End the Forever War? 3 (May 7, 2013), *available at* http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf.

warfare today does not reflect a disregard or manipulation of the law. Rather, it highlights an attempt to, in a principled fashion, apply the law.

The last decade of armed conflict against al Qaeda and its associated groups has been unconventional in many respects, including, but not limited to, the transnational character of the enemies. What makes them unconventional is their decentralized organizational structure, which has been enhanced through the use of modern technology, like the Internet. It is also unconventional due to the enemy's tendency, prompted by its asymmetrical disadvantages, to wage war using the tactic of terror and to otherwise disregard the LOAC. This unconventional nature of al Qaeda and its associated groups makes determining applicable rules exceedingly difficult, but not impossible.

Yet one should not equate unconventional with new. While the coordinated acts of terrorism on September 11, 2001, against the Twin Towers and the Pentagon seemingly resulted in an unprecedented level of death and disruption from any one coordinated terrorist operation, violence at such an extreme scale is, unfortunately, not new. In fact, non-state perpetrators have nefarious parallels in history. While these parallels are not exact, they are sufficient to make reasoned judgments regarding their relevance and may impact how to legally deal with today's enemies.

Going back to the use of analogies: in a January 2014 article in *The New Yorker*, David Remnick asked President Obama about the seeming resurgence of al Qaeda, mentioning the al Qaeda flag flying over Fallujah and an al Qaeda flag being carried by various groups in Syria.[65] President Obama responded with the following statement:

> The analogy we use around here sometimes, and I think is accurate, is if a JV [junior varsity] team puts on Lakers uniforms, that doesn't make them Kobe Bryant. I think there is a distinction between the capacity and reach of a bin Laden and a network that is actively planning major terrorist plots against the homeland, versus jihadists who are engaged in various local power struggles and disputes, often sectarian. Keep in mind, Fallujah is a profoundly conservative Sunni city in a

[65] David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, THE NEW YORKER, Jan. 27, 2014.

> country that, independent of anything we do, is deeply divided along sectarian lines. And how we think about terrorism has to be defined and specific enough that it doesn't lead us to think that any horrible actions that take place around the world that are motivated in part by an extremist Islamic ideology are a direct threat to us or something that we have to wade into.[66]

This analogy raises the legal question of which non-state armed groups constitute "associated forces" with a sufficient enough nexus to make their members lawful targets under the LOAC? To frame the question another way, when would alignment with an existing belligerent (i.e., co-belligerency), plus specific entry into the fight against the United States, make "associated forces" lawful targets under the LOAC?

X. Law of War Principles and Current Events

This debate is currently raging with respect to Boko Haram,[67] and the public outcry to do something about the worsening situation in central Africa. But under what law would the United States deploy military forces?

The Obama administration has recently used the World War II example of U.S. Army Air Forces specifically targeting the plane of Japanese Admiral Yamamoto in the Pacific to legally justify personal targeting, or status-based targeting. Yet, this example may not accurately use a principled analogy and warrants more rigorous review, particularly, if the same legal rationale is going to be used against Boko Haram, ISIS, and others.

In the collection of thirteen major administration speeches on the war against al Qaeda, the term "principle" is used almost 90 times. The prevalence of the word signifies the unconventional nature of this fight,

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[66] *Id.*

[67] A militant Islamic group in Nigeria, which was declared a terrorist organization by the United States in 2013. *See* Press Release, U.S. Dep't of State, Terrorist Designations of Boko Haram and Ansaru (Nov. 13, 2013), *available at* http://www.state.gov/r/pa/prs/ps/2013/11/217509.htm. Boko Haram made headlines in April 2014 when it attacked two boarding schools and kidnapped over 200 schoolgirls in its campaign against Western education, which it believes corrupts the moral values of Muslims, especially women.

the undeveloped nature of international law, and the pragmatic reality of the wide latitude intentionally given to military commanders and national decision makers. Whether this is a positive or negative step is another issue altogether, but it likely is not effective unless it provides for advancing the attainment of national interests. What is important is that, while latitude exists, there are no law-free zones. Even the grey zones are regulated by the principles of the LOAC; yet the rules of translation, with their heavy use of analogies, remain opaque and controversial; this leads to an understandable sense of arbitrariness and ambiguity.

Thus, in all situations regarding the U.S. response to al Qaeda, regardless of whether it is characterized as an IAC, NIAC, or transnational conflict, the fundamental principles of the LOAC apply. There is never an actual gap in the applicable law if it is viewed at an abstract or high enough level, as the principles of distinction, unnecessary suffering, humanity, proportionality, and military necessity unceasingly apply.

The Martens Clause highlights the complementary nature of HRL when the LOAC is silent on an issue. These principles apply to all uses of armed force, not just those wielded by the U.S. military, as the CIA General Counsel and others have acknowledged. In 2012, Stephen Preston, former General Counsel of the CIA, stated that the basic principles of the LOAC apply to the now acknowledged CIA drone operations.[68] This emphasis on LOAC principles, as opposed to rules, does not indicate a reluctance to comply with the LOAC; it is a realistic acknowledgement that the law of war must sometimes be applied in the form of general principles. Applying these customary principles during operations is where the rubber meets the road.

XI. LOAC Principles Direct Participation in Hostilities

The direct participation in hostilities (DPH) controversy is an excellent example for analyzing LOAC principles and the resort to analogy. Applying the distinction principle to members of a non-state armed group who do not wear uniforms requires application by analogy.

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[68] The Honorable Stephen W. Preston, General Counsel, Central Intelligence Agency, Remarks at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), *available at* https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html

Even the ICRC agrees that there exist belligerent individuals who are not civilians nor combatants, but who sporadically directly participate in hostilities. Individuals who are part of a non-state armed group can be targeted at any time even when not engaging in hostilities. This is analogous to the situation in which members of states' armed forces can be targeted, as opposed to civilians, who can never be made objects of lawful targeting unless they directly participate in hostilities.

But this is where the analogy road diverges. The United States takes the faithful path and analogizes to the entire composition of state militaries, understanding that just because a person is a military lawyer, for example, and does not necessarily exhibit a "continuous combat function" (an extra-legal phrase coined by the ICRC),[69] this does not mean that they are not a member of an armed force who can be lawfully targeted. It is one's agency-based membership in the armed forces that allows one to be ordered to take up a weapon, or give such an order to others. It is that willingness to further a group's violent aims that underscores why the LOAC allows status-based or membership targeting. The fact that someone's primary function is as an al Qaeda cook does not automatically equate to placement into the civilian category. This is perhaps where the ICRC approach is too narrow.

Common Article 3 of the 1949 Geneva Conventions applies to NIACs, but it is only a statement of general principles. Armies and armed forces function on regulations and details. Given this fact, where does an army turn to for rules governing the detention of al Qaeda and Taliban fighters in Afghanistan or Guantanamo Bay? A legitimate question arises as to which rules supplement Common Article 3. The conditions for the detention of belligerents can be analogous to Prisoners of War (POWs) for the Third Geneva Convention to rules detailing how to intern civilians under the Fourth Geneva Convention or to the sparse details found in article 5 of Additional Protocol II.[70]

This war by principled analogy is an extremely fact-specific one, and this frustrates efforts to reduce its inherent complexity in order to feed today's appetite for simplistic sound bites. When fighting an organized

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[69] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities, Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 994 (2008).

[70] AP 2, *supra* note 17, art. 5 (providing minimum standards of treatment for persons deprived of their liberty for any reason related to the armed conflict).

enemy that uses armed force to the degree of a nation state, with sufficient intensity and duration, the *lex specialis* of the LOAC applies, as appropriately supplemented by international human rights law.

XII. International Humanitarian Law (IHL) by Analogy and Military Necessity

The application of IHL, by analogy, is often seen in international doctrine and operational production—distinction, proportionality, and military necessity. Distinction and proportionality are different from military necessity in that they directly translate into rules that govern military conduct. Some consider IHL as the delicate balance between military necessity and humanity. Some argue that military necessity is not a standalone principle, as it has already been incorporated within the entire body of customary and treaty-based IHL. Thus, it is argued, it can never be considered due to the danger of it eclipsing all other principles.

Military necessity still has a role to play, especially in NIACs, where the body of specific rules is not as robust. For example, the United States has allowed the ICRC access to detainees at the Bagram Detention Facility in Afghanistan since 2002 based on customary international law and Common Article 3 obligations. Both Geneva Conventions III and IV state that ICRC access can be limited, even denied, for reasons of imperative military necessity. What if, under military necessity, U.S. forces interrogated an individual for a month without any outside influences (including the ICRC) in order to gain actionable intelligence? Could it lawfully deny an ICRC visit after week two, due to military necessity? After week three? This is still a real question without a real answer. What is reasonable in this situation in light of the other principles in issue? What does humanity require? What do humane treatment standards require?

Finally, if military necessity is not a principle applicable in an armed conflict, what are the principles of humanity and proportionality meant to constrain? Why apply the principles of humanity or proportionality if there is no military necessity to be moderated by these principles?

Under the Lieber Code,[71] application of the principle of military necessity was a significant step forward in regulating the violence of armed conflict. It constituted a limitation on what nations and military commanders could do in war. A commander must now articulate the nexus between his military action, the objective of his action, and the strategic and operational end state. Military necessity thus serves as a limitation on conduct on the battlefield, not just as a balancing factor, and remains an important principle in today's war by analogy.

Panel 3

Professor Mary Ellen O'Connell; Professor Jordan Paust; and Professor Rosa Pauks

Question: Absent the existence of an armed conflict, what is the legal basis for the use of force against terrorism; and what law regulates such use of force?

I. Security Advantages of Compliances with Authentic International Law

The United States and its allies are at a significant turning point with respect to national security policy. Momentous changes are coming to Afghanistan; national security issues are emerging that were not even hinted at on 9/11. Consider the issues of Russia and its neighbors; China and its neighbors; Ebola and other health issues; North Korea and Iran; climate change; immigration from Africa to Europe and from Central America to the United States; and cyber security, to name some obvious examples. Yet, international law specialists in the area of the use of force seem to have a single focus on militant groups, arguing for greater rights to attack them with military force. Militant groups are indeed on the list of concerns, but they are not the only—or even the most important—issue.

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[71] The Lieber Code was prepared by Francis Lieber and issued as General Orders No. 100 by President Abraham Lincoln in 1863 at the height of the American Civil War. It was an attempt to codify rules regulating the conduct of military forces during wartime. "Military necessity" is specifically addressed in articles 14-16. President Abraham Lincoln, Gen. Order No. 100, arts. 14-16 (1863), *available at* http://avalon.law.yale.edu/19th_ century/lieber.asp.

As a result of this focus on militant groups, international law specialists seem to be fighting old legal battles that began at the end of the Cold War and in the aftermath of 9/11. These battles consist of asserting expansive rights to use military force regardless of whether the use of force results in actual military success.

President Obama and others have, of course, pointed out that militant groups are not one large, existential threat. Indeed, even Islamic militant groups represent considerable diversity. Boko Haram in Nigeria, for example, may have some association with al Qaeda but requires a very different response than that required for al Shabab or the various groups in Yemen seeking to secede or take over that government. In Iraq, ISIS was banished from al Qaeda but came to control a third of that country by June 2014, as Iraqi Sunnis with military training from the days of Saddam Hussein joined in a defensive alliance against Shi'a and the brutal government of Nouri al-Maliki. The United States had an opportunity to prevent the loss of much territory and many lives but did little to urge respect for Sunni human rights under international law.

The causes behind other militant groups also have little or no connection to al Qaeda. This is true of violent groups in the Congo, Libya, Mali, Lebanon, and Gaza. The nuclear questions at issue in North Korea and Iran are truly existential and unrelated to al Qaeda. Moreover, one of the causes of today's national security crises is global crime. Another is climate change. Droughts, floods, pests, disease, storms, earthquakes, and tsunamis are all linked to warming temperatures. Governments must deal with natural disasters at an unprecedented scale, and conflicts over scarce resources are occurring in Sudan, South Sudan, and other locations.

This is a snapshot of the complex issues on our national security agenda. All of these issues will require the tools of international law. Yet, in the United States, instead of developing international law and enhancing it to better support international cooperation in problem solving, international law has been diminished. It has been disrespected and is now weaker than twenty-five years ago. Notice the argument Russia has put forward with respect to its intervention in Ukraine. It has asserted a right to intervene to protect human rights. The NATO states made this same argument regarding their intervention in Kosovo. Yet, NATO countries now demand that Russia respect the very principles of sovereignty and territorial integrity that they disregarded in Kosovo. The United States insists that Iran agree to more open inspections and limits

on its ability to create nuclear fuel. Yet, the United States vetoes attempts by the Security Council to hold it to its international law obligations evolving from decisions of the ICJ concerning the unlawful use of military force. In reality, the United States requires both the legal instrumentality of the binding treaty and the habit of respect for treaties to deal with nuclear proliferation and numerous issues of similar importance.

And treaties are only one source of international law. Rules of customary international law and the general principles of international law also play a critical role in supporting order and security in the world. Yet, we have seen, since the end of the Cold War, increased suspicion regarding rules of customary international law. As for general principles, these are barely mentioned. It may be that a good number of international lawyers are unaware of these principles. Beyond treaties, customary rules, and general principles, international law also has important processes. Indeed, the enforcement process is essential to the explanation of why international law is law. But, again, many appear to be ignorant of the manner in which international law enforcement works. The international law literature also suggests that, while there is much focus on military force, few are knowledgeable regarding the alternative regime of peaceful countermeasures.

Perhaps the most important fact regarding countermeasures and other peaceful means of enforcement is that they are readily available, while the right to use military force is highly restricted. Despite this, for the United States and for a number of its allies, pursuing military force appears all too tempting, in part because the peaceful alternatives are unknown and unpracticed. Being unaware of, or uninterested in, the alternatives to the use of force also means that we lack the skills to use these alternatives effectively. Thus, when we do use them, they fail and are abandoned. Take the history of attempts to settle the Syrian civil war. The world apparently has no mediator who can succeed. In the past, U.N. Secretary General Perez de Cuellar was able to successfully negotiate the end of civil wars throughout Central America and Africa. Where is his successor? Where is Nelson Mandela's successor? Some of the most talented people are gone, but we do not see others filling the breach even though this is what effective international law requires. Instead of focusing on the critical tools of peaceful settlement and substantive international rules, we continue to concentrate on making arguments for the legal right to use military force, arguments that pre-9/11 would have been wholly rejected.

In this context, we still wish to communicate to Russia that committing aggression in Ukraine is an anathema. For this, however, we require a consensus as to what constitutes "aggression." According to United Nations General Assembly Resolution 3314, aggression is any serious violation of Article 2(4) of the U.N. Charter.[72] In this regard, there are only two express exceptions to the Charter's ban on the use of force. Both are narrow. To use force lawfully, there must be a Security Council authorization to do so. Failing this, in even more exceptional circumstances, there must be a right, under Article 51 of the Charter, to use force in self-defense.[73] We seem prepared to cite this law to Russia, but do not hold ourselves to these same rules.

Interestingly, the one place where the United States is engaged in combat today, Afghanistan, the legality of using force is not based on Charter provisions. Rather, the use of force is based on an invitation of the elected government of Afghanistan to do so. Accordingly, it is an intervention by invitation. This basis may not be as solid as some appear to believe. An excellent article, written in the 1980s, by Louise Doswald-Beck of the International Committee of the Red Cross, questioned whether intervention by invitation is really consistent with fundamental rules.[74] Intervention in a civil war, even with a government's invitation to do so, conflicts with the principle of self-determination. On its face, such an intervention also conflicts with Article 2(4). Note the case of Syria, today, where only that government has the legal right, under international law, to request outside assistance. Yet, while Western governments heavily criticize Iran for its assistance of the government of Syria, under the intervention by invitation argument, Iran's assistance is lawful.

Turning to the argument that seems to dominate discussion: the right of self-defense under the U.N. Charter article 51. Organizers of this panel seemed to have self-defense in mind when they formulated a series of questions filling a page-and-a-half for the speakers to consider. Rather than go through the many hypotheticals among the questions, it

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[72] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2., para. 4.

[73] *See* U.N. Charter art. 51.

[74] Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. YBK. INT'L L. 189 (1989).

will be more efficient to set out the actual rules governing self-defense and to illustrate these using real-world examples. Article 51 provides for the inherent right of self-defense by states, acting alone or collectively, "if an armed attack occurs."

It was the British academic Derek Bowett who first asserted that states could use armed force in self-defense even in the absence of an armed attack. He was defending an unlawful use of force by the British in 1956 when they, along with the French and Israelis, attacked Egypt to regain control of the Suez Canal. Citing the Caroline incident of 1837, Bowett attempted to justify the use of force against Egypt, arguing that states could use force in self-defense in situations of necessity in the absence of an armed attack.[75]

Bowett's argument was seriously flawed; it begged the question of what constitutes a situation of "necessity." Five years after his book appeared, another British academic, Ian Brownlie, published a book responding to Bowett—making it clear that Bowett's interpretation was simply wrong.[76] Brownlie provided a rich and detailed account of the U.N. Charter negotiations, demonstrating that Article 51 was intended to mean precisely what it said. A state may act in individual or collective self-defense if an armed attack occurs, until the Security Council acts. This provision was written by the U.S. delegation, and a member of the delegation, Senator Harold Stassen, is on record confirming that lawful self-defense is triggered by an armed attack.

Twenty years after Brownlie's book, the International Court of Justice (ICJ) explained that, indeed, an armed attack, or its equivalent, did serve as the lawful basis for action in self-defense. Moreover, the reference to the term "inherent right" in Article 51 is to the general principles of law pertaining to "necessity" and "proportionality." Bowett had then, in essence, taken the law back 100 years prior to the Charter being adopted when he posed his interpretation of the right to engage in self-defense. The ICJ has held, in the *Nicaragua*[77] case, that an "armed attack" must be a "significant attack." Moreover, if the state that has been attacked determines to respond with military force in self-defense

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[75] DEREK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958).

[76] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); s*ee also* OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW (2010).

[77] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Reports 14 (June 27) [hereinafter Nicar. v. U.S.].

on the territory of the attacking state, the defending state must undertake an analysis of the law of state responsibility. Under the general principle of "attribution," the defending state may only attack a state responsible for the armed attack. The questionable assertion made after 9/11—that terrorist groups somehow exist beyond borders (apparently in the ether)—is simply incorrect when, in fact, all human beings live in some space associated with a sovereign state. In the case of Afghanistan, Britain produced a White Paper linking al Qaeda to Afghanistan's government, the Taliban. This connection may not have been as solid as this report indicated at the time. Moreover, the ICJ ruled, in the Genocide case, [78] that the test of "attribution" is a state's "control" of those committing the unlawful acts in issue, not its mere "coordination" with such individuals, the standard apparently used by the U.K. in producing its White Paper.

In addition to satisfying the principle of "attribution," a state using force in self-defense must also assess whether the use of such force is required as a last resort and, if so, whether it is likely to succeed in achieving the defensive military objective. These are the elements of "necessity" that apply to any decision to resort to force. In the case of Afghanistan, there exists doubt as to whether the use of force in 2001 was required as a last resort. Even if this was the case, however, following the fall of Kabul, the U.S. decision to continue fighting went beyond that degree of the use of force necessary for its defense. "Last resort" and the "chance of successful self-defense" have come to contemporary international law from the ancient "just war" doctrine. Today, we associate these elements with the general principle of "necessity." (The ICJ refers to the principle of "necessity," restricting resort to war, as a rule of customary international law; it actually exists more in the form of a general principle of law).

This analysis has one more step. The defender, using force, must assess whether the use of force will be "proportionate" in terms of the cost incurred compared with the value of the military objective. In other words, will the value of success be outweighed by the cost in terms of loss of life and property that will inevitably result?

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[78] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 2007 I.C.J. 43 (Feb. 26).

In sum, international law imposes strict rules on states resorting to the use of armed force. While we were asked to discuss the law governing the conduct of a resort to armed force in violation of international law, we should discuss the lawful alternatives available to states facing a national security challenge but which have no right to resort to military force. Many seem to think that states have only two options respecting major security challenges: go to war or do nothing. For years, arguments have been consistently put forward for the expansive interpretation of the law concerning the resort to force. These arguments have, for example, resulted in memos asserting that it is a lawful act of self-defense to fire a missile at an individual, when that person poses an "imminent threat" due solely to the fact that he may one day place a bomb on an airplane. However, not only does the phrase "imminent threat" not appear in Article 51—quite the opposite—defining "imminent" in this way is a complete departure from the obvious meaning of the term.[79]

In fact, international law offers methods short of the use of armed force that can prove highly effective in responding to national security challenges, methods that, at the same time, serve to support respect for the rule of law in the world. Here are three major categories of alternatives to the use of military force—and three case studies where these methods have proven to be successful. The first example is that of law enforcement. Law enforcement cooperation has the best track record of success against terrorism. Second, countermeasures serve as the general-purpose method for bringing pressure to bear against law violators, and third, the positive incentives of economic development, education, criminal justice support, health care support, and disaster relief constitute viable alternatives to the use of force to achieve security goals.

Three case studies demonstrate the power of these approaches: The first is the practice of law enforcement in Yemen following the 2000 attack on the *USS Cole* in the Port of Aden. The FBI worked with Yemeni criminal authorities, who clearly required assistance. With the help of the FBI, most of the individuals connected with the attack on the *Cole* were arrested, tried, and imprisoned. Many later escaped through a

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[79] *See also* U.S. DEP'T OF JUSTICE, WHITE PAPER ON LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A US CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QAIDA OR AN ASSOCIATED FORCE, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (undated white paper).

variety of means, but these incidents coincided with the U.S. invasion of Iraq in 2003, when U.S. efforts in Yemen and elsewhere were largely abandoned.

Second case study: Iraq 2003. The United States and U.K. found no weapons of mass destruction in Iraq. Why? The U.S. military had successfully maintained an embargo from 1990 until 2003—preventing equipment and parts for weapons of mass destruction from reaching Iraq. This is a good model going forward.

The third example is the problem of piracy off the coast of Somalia. This problem has been addressed through the cooperation of NATO, the EU, India, and other countries. The U.S. Navy reported no pirate attacks off the coast of Somalia in 2013, while in 2009, 117 ships had been attacked. This approach to handling the piracy problem—cooperative policing, using naval and other military assets—holds great promise for other national security challenges.

In brief, the security challenges of the future need to be addressed with more sophisticated approaches. The linkages between following the law and having robust rules that command respect must be better understood. Indeed, international law, in general, requires far greater understanding and commitment in order to realize the security advantages inherent in its compliance.

II. Thinking Outside the Box

With respect to use of force, in the future, there may be an increase in authorizations of the use of force by regional organizations, as under Articles 52 and 53 of the U.N. Charter, when the Security Council is veto-deadlocked and cannot act. In the *U.S. Army Field Manual 27-10*, paragraph 8 addresses war under regional authorization,[80] such as the Organization of American States' authorization for the use of limited force and interdiction of Soviet missiles bound for Cuba or NATO's authorization for the use of force in Kosovo.

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[80] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 8 (1956) ("Instances of armed conflict without declaration of war may include…the exercise of armed force pursuant to . . . the performance of enforcement measures through a regional arrangement.").

Article 2, paragraph 4 of the U.N. Charter can also be read as not proscribing all uses of force, but only three specific types, leaving some room for possible uses of force that are not in violation of Article 2.

With respect to the law enforcement paradigm, the caution is that, under international law, to engage in law enforcement in a foreign state, a state must have the consent of the highest level of the government of that state. This is why the self-defense paradigm is very important, as a state does not need the consent of a foreign state to engage in lawful measures of self-defense in that state against non-state actors engaged in armed attacks.

Regarding Article 51 of the U.N. Charter, some disagree with the ICJ conclusion that there is a "gravity" requirement; that is, in order for an armed attack to occur, a substantial use of force must be involved. The current U.S. administration, as well as former State Department legal advisors Harold Koh and William Howard Taft IV, have argued that "gravity" is not such a requirement, but that this consideration does raise the matter of the proportionality of the response to an attack.

For example, if non-state actors launched several missiles across the border from Juarez, Mexico, into El Paso, Texas, killing people at Fort Bliss, the United States does not require the consent of the Mexican government to engage in lawful measures of self-defense. Mexico has previously consented in the U.N. Charter; Article 51 is consent in advance, by treaty, to lawful measures of self-defense.

Looking back at the 1837 *Caroline Case*, the British did not require U.S. consent to attack non-state actors who were directly participating in the rebellion. Lord John Campbell wrote:

> Although the *Caroline* lay on the American side of the river when she was seized, we had a clear right to seize and destroy her. She had been previously engaged in three transits to help the rebels. The rebels had been involved for a long time, already engaging in armed attacks, trying to take over the government of Canada. We had a clear right to seize and destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which had been fired against the Queen's troops in Navy Island.

When the British Canadians engaged in self-defense, they were not at war with the United States; no one believed that the United States and Great Britain were at war or that prior consent was needed to engage in lawful measures of self-defense.

As a rhetorical question, Lord Ashburton wrote to Secretary of State Daniel Webster, "If cannon are moving and setting up in a battery and are actually destroying life and property by their fire, when begins your right to defend yourself?" In fact, there was not necessarily U.S. disagreement regarding the right of self-defense in this case. The concern focused on the method and means of the force used under the principle of "proportionality." The United States felt as if the British could have waited until the vessel was in their territorial waters to launch an attack and that there resulted needless destruction and the death of two people. In brief, the British could have acted in a more proportionate manner under the circumstances.

Further points: Under the U.N. Charter, there is no need to be at war with the state from which attacks emanate; there is no need for consent from the foreign state in which the non-state actor acts; and there is no need for imputation or attribution to the state of the non-state actor attacks.

When addressing state attribution for self-defense, the test is not "effective control"; the test recognized in *Nicaragua v. United States*[81] is one of "substantial involvement" by the state in the non-state actor attacks. A portion of the *Nicaragua* opinion uses the standard of "effective control" when addressing state responsibility with respect to specific Law of War or human rights violations. However, addressing the imputation of non-state actor actions to a state for self-defense, the ICJ quotes the 1974 U.N. General Assembly Declaration on Aggression and the standard of a state's "substantial involvement" with the armed attacks in establishing attribution for self-defense purposes.

In any event, there is no need for attribution to a territorial state in order to engage non-state actors in self-defense. In the example of missiles being fired from Juarez, Mexico, the United States, in responding to non-state actors, would not be attacking Mexico or Mexican territory. A U.S. response would have to be proportionate, however. A disproportionate response that destroys half of Juarez,

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[81] *See supra* note 77.

Mexico, would alter the conclusion that the United States was engaged in a rightful measure of limited use of force in self-defense against non-state actors who were firing the missiles to one that viewed the United States as using force against the State of Mexico itself. This was the situation that was involved in the *Congo* case,[82] where there was no recognition of attribution of the non-state actor attacks to the state, but where there was, nevertheless, a massive, disproportionate, use of force that involved, among other things, the seizing of airports.

The right to engage non-state actors in self-defense needs to be operationalized. Article 51 does not say, "in case an armed attack occurs by a State." International law has recognized for the last 300 years that there may be formal actors, other than a state to which that law applies. International law has never been applied, solely, state to state. The United States has conducted, under international law, war with Indian nations and tribes to which the Law of War applied. The British government has entered into over 500 treaties with African nations and tribes.

In engaging non-state actors in self-defense outside the context of war, there are opportunities to borrow from the Law of War, such as adopting or expanding upon the principle of proportionality or borrowing specific forms of permissible engagement. There are opportunities to think outside the box, or even multiple boxes, in the future development of the law. In operationalizing self-defense concepts, the focus could be on someone who is a direct participant in the armed attack, borrowing from the concept of DPH, identifying a person with a continuous armed attack function, or borrowing from a continuous combat function.

With respect to the applicability of HRL to self-defense use of force actions, the U.N. Charter creates a mandatory obligation, universally applicable under Articles 55(c) and 56, to take joint and separate actions to effectuate human rights. Under Article 103 of the U.N. Charter, Charter-based HRL prevails over any other ordinary law, such as international agreements on the Law of War. So whether one views the Law of War as *lex specialis* or not, under the U.N. Charter, there exists a human rights override, at least in terms of customary human rights, rights infused in Articles 55(c) and 56. The United States is bound to not arbitrarily kill or detain those who have human rights protections,

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[82] Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1 (Dec. 19).

arguably a much lower standard than that imposed by the Law of War. Thus, by adhering to the Law of War, a U.S. commander would meet human rights standards. As a consequence, the existence of HRL in an operational setting poses no problem for this commander. For the British operating under the European Convention on Human Rights, however, this may well not be the case.

In assessing the applicability of HRL, it is important to consider to whom it applies. In General Comment No. 31 regarding the International Covenant on Civil and Political Rights (ICCPR),[83] the U.N. Human Rights Committee recognized that persons who possess human rights outside of both a state's territory and occupied territory are those under the state's effective control or actual power. This does no inhibit the U.S. battlefield commander from engaging individuals who are shooting at U.S. soldiers, as these shooters would not be under the effective control of the United States. And while HRL does protect detainees, these detainees possess basically identical protections under Common Article 3 of the 1949 Geneva Conventions, which applies customary international law protections to all armed conflicts.

Admittedly, the law is full of ambiguity. What is due process or equal protection? However, simply because a particular interpretation is logical or plausible does not mean that it is acceptable as a matter of law. The principal test for the interpretation of treaties is that of "ordinary meaning"; that is, the generally shared meaning of an otherwise ambiguous treaty term or phrase over time. For example, Article 31 of the Vienna Convention on Treaties refers to this general rule of interpretation. The test for the existence of customary international law is whether a principle in issue reflects the general pattern of state practice (not a particular state's practice) and general *opinio juris* (not an argument as to what is logical or plausible in some other sense). Of course, state practice and/or *opinio juris* can expand or contract over time.

With respect to state responsibility and whether or not attribution should attach for self-defense purposes: If a state knowingly allows its territory to be used for armed attacks by a non-state actor, this is considered to constitute aggression—if such attacks have occurred in

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[83] U.N. Human Rights Comm., *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

violation of the U.N. Charter. The test is not control of a non-state actor by a state, but a state's "substantial involvement" with a non-state actor, including knowingly allowing this non-state actor to use its territory for attacks against others.

In terms of when the right of self-defense exists, Article 51 of the U.N. Charter speaks to the inherent right of self-defense and sets forth an express limitation on this right with the use of the phrase, "if an armed attack occurs." Then, there is the matter of what constitutes an "imminent threat." Logically, an imminent "threat" is a not yet realized threat, as opposed to a threat of an imminent "armed attack." And while this latter phrase may find acceptance as a basis for a self-defense use of force by those who would recognize the concept of "anticipatory self-defense" under the Charter, the Charter is the authoritative source on this issue, and its text uses the limiting language of "if an armed attack occurs"—not "if an attack may occur."

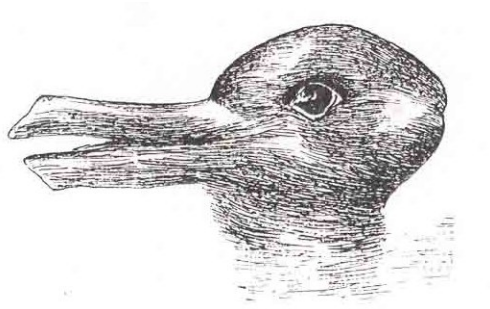
So, the bottom line is: When does an "armed attack" commence? Certainly, not only when weapons have been fired. Determining the existence of an "armed attack" will involve inquiry and choice; it can potentially be a very fluid process.

III. The Duck-Rabbit: Smart Arguments and Unsatisfying Answers

There has been a near total fragmentation of international consensus on the most basic threshold questions: What is an armed conflict? When does an armed conflict start, and when does it stop? Does *any* armed attack automatically create an armed conflict? Who counts as a combatant? What constitutes "direct participation in hostilities"? What are the temporal and spatial boundaries of a given armed conflict? We have been going around in circles on these same questions for a really, really long time.

Formalists can look at the law and make smart arguments, but they do not come up with very satisfying answers. Some, like Harold Koh, reason by analogy or try to conduct principled translation exercises, but they also do not produce satisfying answers. Analogy has limitations. For every analogy or metaphor, a different analogy or metaphor can push us in the other direction. The chain of legal and logical syllogisms can start getting so long that you can start with existing legal paradigms, and come out with almost any result you want. This is an enormous problem.

Consider the following illustration:



Ludwig Wittgenstein famously used the image of a duck-rabbit to introduce his theory of language games,[84] and it emphasizes the point that language cannot be divorced from the social practices in which it is embedded. Thus, he notes that if the picture above is surrounded by other images that are clearly ducks, quacking and walking like ducks, the viewer will surely conclude, "Obviously, the picture is of a duck amongst ducks." On the other hand, if the picture above is surrounded by bunny rabbits, hopping around with big ears and doing rabbity things—walking and talking like a rabbit—the viewer will surely conclude, "It is self-evident that this is a picture of a rabbit." But ultimately, it is indeterminate: the duckness or rabbitness of the figure is entirely dependent on context.[85]

Why introduce the duck-rabbit? Because ultimately, we have no greater ability to find definitive legal answers to the very difficult international law questions we have been addressing today—questions we have been asking for the last decade—than we have had the ability to provide a definitive answer to the question of whether the image above is "really" a duck or "really" a rabbit.

The U.S. executive branch is currently taking a position on what constitutes an armed conflict that has put it increasingly at odds with most U.S. allies and many European and non-Western lawyers, political

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[84] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

[85] *See generally*, Rosa Brooks, *Duck-Rabbits and Drones: Legal Indeterminacy and Targeted Killing*, 25 STAN. L. & POL'Y REV. 301 (2014).

figures, and judges. United States reasoning by analogy has reached its limit.

Certainly, it is accurate to say that we are not in a "law-free zone"; there are buckets and bushels of law. What has been lost is the *rule* of law; at the moment, we do seem to be in a rule of law-free zone.

Consider the definition of rule of law in the Army JAG Corps' *Rule of Law Handbook*, which breaks down the rule of law into seven effects:

- The state monopolizes the use of force in the resolution of disputes.
- Individuals are secure in their persons and property.
- The state is itself bound by law and does not act arbitrarily.
- The law can be readily determined and is stable enough to allow individuals to plan their affairs.
- Individuals have meaningful access to an effective and impartial legal system.
- The state protects basic human rights and fundamental freedoms.
- Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.[86]

With that understanding of the rule of law in mind, consider the issue of targeted killings: the use of lethal force across borders to target specific individuals outside of "hot" battlefields—outside of traditional territorially defined battlefields. On a formalist legal analysis, there are compelling arguments, made by the U.S. government, that these strikes are perfectly lawful: the United States is simply targeting enemy combatants during an armed conflict.

But one can make an equally compelling argument, using similar formalist analysis, to reach the opposite conclusion. One might argue, for instance, that even if there is an armed conflict between the U.S. and al Qaeda (which many states argue is *not* the case today), the armed conflict cannot extend in such an unbounded way to Yemen or Somalia

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[86] CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf.

or to people or groups such as Somalia's Al-Shabaab. If the armed conflict between the United States and al Qaeda cannot extend this far, or if those targeted are not combatants in an associated force of al Qaeda, or combatants at all, nor civilians directly participating in hostilities, U.S. targeted strikes do not constitute the lawful targeting of enemy combatants in wartime. Instead, such strikes are simply an act of murder.

Everything hinges on a series of threshold distinctions: Armed conflict or not? Associated forces or not? Combatants or not? Duck or rabbit? And, at the moment, there is no principled way to answer these questions. There is no answer, except to say, "I'm right, you're wrong; we're the United States, so deal with it." And this is hardly consistent with the rule of law. If there is no principled basis for deciding what is a duck and what is a rabbit, there is no predictability; state action is arbitrary; the state itself is not rule-bound in any meaningful sense, and those wrongly targeted have no recourse whatsoever.[87]

Of particular concern are the precedents set for other states by U.S. targeted strikes. Even with an enormous amount of faith in the U.S. government and military officials making targeting decisions—even if we assume that these decisions are made in a very careful, conscientious, and good faith way and that virtually every single individual who has been targeted and killed deserved his or her fate—it is nevertheless uncomfortable to imagine other states following suit. Say Vladimir Putin is targeting dissidents in eastern Ukraine. While the United States and others would argue that these people are peaceful activists, Putin might claim they are anti-Russian terrorists and that he has a highly refined targeting process, based on intelligence information, which he regrettably cannot share, that indicates that those targeted people are not peaceful dissenters but are, in fact, enemy combatants. Say Putin asks the world to trust him. How would we react to that?

Once set, precedents can come back to bite us. When it comes to targeted killings, the lack of constraint and the lack of clear, principled rules may well come back to bite the United States.

As noted, there is not a principled way to resolve these challenges using formalistic, legalist analysis, nor even through reasoning by

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[87] *See also* Rosa Brooks, *Drones and the International Rule of Law*, 28 J. OF ETHICS & INT'L AFFAIRS 83 (2014).

analogy. For targeted killings, what happens when the person targeted could, with equal plausibility, be said to be either a duck or a rabbit?

Humans are creatures who draw lines and create categories; that is part of what it is to be human. And that is what the law is all about. Humans have always sought to draw lines between war and what is not war. At some point, those lines always stop working, and so new and different lines are drawn. But societies have always sought to draw lines between war and peace. For instance, when Navajo warriors left their own territory and set out on raids, they would literally begin to speak a different dialect, a "twisted language." When the warriors returned from the raid, they would literally draw a line in the desert, face enemy territory, turn around, step over the line, and resume their everyday language.

The 1949 Geneva Conventions are, in some sense, our modern version of this ritualistic attempt to draw lines. But reality always messes it up at a certain point because things change, and the lines previously drawn do not really work anymore. The previous categories stop working.

That is our current situation. Technological and political changes have created a situation in which the traditional lines and categories separating war and "not war" have lost any clarity. But we should remember that God did not draw these lines or create these categories: humans did. States and people drew the lines, and states and people can change them.

The answers to the very difficult questions we have been discussing today will not come through more careful parsing of current law. There is a messy terrain somewhere between traditional state-on-state armed conflict and mere law enforcement, and there needs to be a set of norms that actually work for what states reasonably need to do in this messy middle ground, norms which respect core rule of law and human rights principles.

Nobody particularly wants to engage in a blank slate exercise, but it might be time to shift the discussion from, "How can we use these existing legal paradigms to answer these questions?" to "What if we were starting from scratch? What rules do we want, given our values, and given the threats?" Such an exercise would at least help provide a

standard by which we could judge current small interpretive moves, and incremental proposals for change.

Ultimately, the utility of the current discussion may be exhausted—and although it provides full employment for lawyers, it is not desirable for the same conversation to continue for another ten years.

This is not an argument for discarding the existing body of rules; international law provides perfectly adequate answers in many situations. However, changing technologies and changing threats challenge our ability to meaningfully apply the existing paradigms in the situations we are discussing here today. There are some gaps—and the question is, how will those gaps be filled?

The U.S. policy on detention has evolved in a disaggregated, decentralized kind of way. On the detention side, some would say U.S. policy evolved accidentally and somewhat haphazardly to a hybrid point. Some would also argue that the United States is in the midst of trying to do the same thing on the targeting side, moving toward a middle ground or hybrid position where targeting occurs only under certain conditions involving a near certainty of no civilian casualties or actual threat to U.S. lives, a policy that is far different from that of ordinary status-based targeting.

There has been less development of targeting issues than detention issues because the U.S. policy constraints put forth by President Obama at his National Defense University speech[88] depend, critically, on everyone (1) agreeing that there is an armed conflict, and (2) accepting the "associated forces" idea. The U.S. policy constraints would be workable, if there was a clarity and consensus on who is a civilian, what a threat is, and what "imminent" means. The conversations inside and outside the executive branch are the right conversations in that the United States does not need to alter international law in order to fix the rule of law gaps in U.S. policy. There are some fairly simple and straightforward things that the executive branch could simply choose to do, or that Congress could choose to impose, that would address eighty-five percent of the criticism in terms of improved accountability, oversight mechanisms, and greater transparency.

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[88] President Obama NDU Speech, *supra* note 22.

In regard to rule of law, people can have different understandings about what the underlying purpose of the body of law is, and that different underlying purpose can really push them in different directions as to where they are going with the substantive law.

The Declaration of Independence is a rule of law document. "We hold these truths to be self-evident, that all men are created equal and endowed by their creator with certain unalienable rights, among them life, liberty and the pursuit of happiness." People should not be deprived of their liberty or be killed without any ability to say, "Hold on, wait, I am the wrong guy and you made a mistake!" The United States has done a good job of ensuring the rule of law domestically—we have done a good job of ensuring that the state cannot swoop down and just detain or kill someone. However, as the international system grows more and more interconnected, the ability of one state to reach into another state and do just this to the people residing in that other state is increasing. Such actions would be clearly offensive to the rule of law if done by an individual's own state, and it is hardly less so when done by another powerful state.

The goal of rule of law is to ensure that there exists no zone where people can be killed for reasons that they do not know, based on criteria they do not know, adjudicated in a process that is secret, by people whose identities are secret, with no ability to challenge the process or results, and with no ability to seek recompense for a mistake or abuse. The profound challenge is how to regulate the exercise of raw power and lethal force by those who have it in an interconnected international system in a manner that is still respectful of the fact that states *do* need the flexibility to respond to threats that are real, non-trivial, and changing. Our goal should be to have no "rule of law-free zones," where death can come from the sky without the targeted individual having the ability to know why.

The Israeli Supreme Court decision on targeted killings[89] represents an effort to make targeted killing compliant with core rule of law norms. That decision might not be 100 percent successful from an implementation or doctrinal perspective, but it says that there cannot be a rule of law free zone. People should not just be killed in the abstract. The Israeli Supreme Court declared that there does need to be some kind of accountability, some kind of independent mechanism for review.

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[89] Pub. Comm. v. Israel, *supra* note 59.

The goal is not necessarily to end war. To constrain does not necessarily mean to reduce. To constrain means to ensure that the use of force by states, including powerful states, is rule bound in a way that is meaningful, provides protection against arbitrary uses of lethal force, and ensures accountability and sufficient predictability in order that individuals and other states understand those types of actions that will get them into trouble.

One last metaphor: Tennis. People think tennis has clear and settled rules. There are arguments about whether a ball was in or out, but everyone understands the game being played. But change occurs. One day, somebody comes along with a graphite racquet, instead of a wooden racquet, and everyone asks, "Wait, is this still tennis?" Then rules adapt to reflect the fact that, now, there is a different kind of racquet. Then someone suggests drawing a squiggly line over here, around the service box, instead of a straight line, and so on. At a certain point, there might be so many changes that we would say, "This just isn't tennis anymore; this is now some other game." And if it is some other game, no amount of careful reading of the rules of tennis will help us figure out what to do.

The law is a game, too; a game with lethal consequences because it is linked to the instruments of coercion. Increasingly, there are issues in international law about which we have people saying, "Wait, this just doesn't look like tennis anymore." "This just doesn't look like war anymore." When we reach that point, we can either keep on trying to extrapolate from a set of rules designed for something different, or at some point, we can recognize that this is now a different kind of game that is being played. But we must still ensure that this different game has clear rules, for the stakes are still extremely high.

Conclusion

This Fugh Symposium focused on one of the most perplexing of contemporary subjects: *Legal Issues Associated with the Use of Force Against Transnational Non-State Actors*. Three panels of highly qualified experts wrestled to provide reasoned responses to these three questions:

"Is the use of force against al Qaeda and its 'associated forces,' globally, justified in the context of a continuing transnational armed conflict? If so, how is this conflict to be characterized—international

armed conflict, non-international armed conflict, or an entirely new category of 'transnational armed conflict'?"

"Assuming there does exist some form of armed conflict with al Qaeda and its associated forces, what substantive Law of Armed Conflict is applicable to this conflict?"

"Absent the existence of any form of armed conflict, what is the legal basis for the use of force against terrorism (terrorists), and what law regulates such a use of force?"

As reflected in the preceding pages, the views of the panelists were diverse and far ranging in nature. The three questions noted above were examined in some detail. In the case of each, no consensus was reached; no definitive answers were provided. This is merely a reflection of the uncertainty surrounding the topic of this symposium as a whole. While all can agree that the violent actions of non-state actors pose a threat to the stability of the international community—and must be countered; there exists no agreement with regard to those relevant principles of both *jus ad bellum* and *jus in bello* applicable to state actions taken to deal with non-state, transnational threats.

It is apparent that there is sharp disagreement regarding the U.S. contention that it remains engaged in an ongoing transnational "armed conflict" with al Qaeda and its "associated forces." Indeed, it was repeatedly noted that the majority of states would oppose such a view. Yet, even among those states that would take this position, there is clearly a lack of agreement concerning the necessary legal basis for engaging in the use of force against al Qaeda members, globally, as well as the relevant LOAC or IHRL, if any, applicable to such use of force operations. As noted by one of the panelists, the matter of whether something is deemed a "rabbit" or a "duck" is fully dependent upon the context in which one makes such a determination. That is, the image and actions of al Qaeda—and other similar organizations—are subject to varying state contextual interpretations. It is the result of this fact, then, that it has proven to be impossible to arrive at definitive legal answers to the specific questions dealt with by the Fugh Symposium panelists. One certainty, however, is that there must be a continued effort to do so. These answers might well be found in an evolving consensus concerning the appropriate application of existing international norms. Yet again, there may be a call for the codification of new legal principles, concepts deemed more accurately attuned to the changing nature of conflict itself.

The hope is that the Fugh Symposium deliberations will serve as a substantive contribution to the discussions regarding these matters that are certain to follow.