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## Keynote Address: The Emerging Law of 21st Century War

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**KEYNOTE ADDRESS**  
**THE EMERGING LAW OF 21ST CENTURY WAR**

*Harold Hongju Koh\**

I am honored to deliver this Lecture in honor of Randolph W. Thrower, a lawyer of great distinction and integrity. It is also my pleasure to open this important symposium on redefined national security threats. This symposium explores the tensions, complementarities, and legal implications of three rapidly evolving areas of national security: cybersecurity, new technologies, and cross-border security.

I propose to talk today about the “umbrella issue” that spans all of these topics: the emerging law of twenty-first century war. I bring to this discussion four different perspectives: thirty-five years as an international law professor, twenty years as a human rights lawyer, ten years in the U.S. government, and five years as a law school dean. In each of these roles, I have focused on the process and substance of transnational law, what I will call in shorthand “transnational legal process” and “transnational legal substance.” By “transnational legal process,” I mean the complex process of interaction, interpretation, and norm-internalization by which transnational law is made in the twenty-first century.<sup>1</sup> By “transnational legal substance,” I mean the substantive law that emerges from that complex interactive process.<sup>2</sup>

The core idea that drives this transnationalist jurisprudence is that international law and domestic law are no longer artificially divided. The

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\* Sterling Professor of International Law at Yale Law School; Legal Adviser, U.S. Department of State from 2009–13; Assistant Secretary of State for Democracy, Human Rights, and Labor from 1998–2001. This is a revised and edited version of the 2016 Randolph W. Thrower Lecture, delivered at the 2016 Thrower Symposium at Emory Law School in Atlanta, Georgia, on February 12, 2016. It draws heavily from the third annual Justice Stephen Breyer Lecture delivered at the Brookings Institution in Washington, D.C. on April 1, 2016, and shares thoughts with Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y. L. SCH. L. REV. 31 (2016–17). I am grateful to the editors of the *Emory Law Journal* and the Thrower family for their warm hospitality at the Thrower Symposium, the Symposium panelists, my good friends Dean Robert Schapiro and Vice Dean Robert Ahdieh, who invited, hosted, and welcomed me to Emory, and to Brian Egan, for useful comments. I am particularly grateful to the editors of the *Emory Law Journal* and to Sophia Chua-Rubenfeld and Nathaniel Zelinsky of Yale Law School for their excellent research assistance.

<sup>1</sup> See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

<sup>2</sup> See generally HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 6–9 (2008) (discussing transnational legal substance).

substance that is emerging is a body of hybrid, “transnational public law,” rooted in shared public norms that have a similar meaning in every national system around the world. There are certain hybrid concepts, like the metric system or the term “dot.com,” that are not clearly either international or domestic in character. In the same way, the ideas of “cruel, inhuman, or degrading treatment,” “civil society,” the “internally displaced,” and “transborder trafficking” are now transnational public law concepts, inasmuch as they now have a shared meaning in every domestic legal system.

In many ways, the most discussed, but least understood, of these evolving bodies of transnational public law is the emerging law of armed conflict. This lecture asks: What exactly is the emerging law of the twenty-first century war? That question breaks into three, which organize this lecture. First, what basic rules govern these twenty-first century tools? Second, what principles of law are emerging in particular areas of modern armed conflict, namely, interrogation, detention, special operations, drones, robots, cyber war, and private security contractors? Third, how are these emerging law of war principles implicated by the great crisis of today, Syria, which raises such intertwined issues as mass migration, humanitarian intervention (or Responsibility to Protect “R2P”),<sup>3</sup> and the crime of aggression?

## I. THE BASIC RULES

In recent years, a whole new range of tools have emerged to address the exigencies of twenty-first century war, among them cyber conflict, drones, special operations, private security contractors, and semi-autonomous robots. But to what extent are these modern tools of war governed by law at all? Centuries ago, Cicero famously wrote, “*silent enim leges inter arma*,” namely, in wartime “when arms speak, the laws fall silent.”<sup>4</sup> But is this really true with respect to twenty-first century armed conflict?

After September 11, 2001, many asked a modern variant of Cicero, what I call “the Tina Turner question”: “What’s law got to do with it? What’s law, but a sweet old-fashioned notion?” Because, in one scholar’s ironic words, this was

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<sup>3</sup> See generally INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xii–xiii (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>4</sup> M. TULLIUS CICERO, *Pro Tito Annio Milone ad Iudicem Oratio*, in CICERO: THE SPEECHES 6, 16–17 (N.H. Watts trans., 1931) (52 B.C.E.).

a “war like no other,”<sup>5</sup> some suggested such an existential crisis demanded that law be abandoned. One argument sometimes heard was that the rapid changes in the way we conduct modern war against Al Qaeda and its associated forces—for example, Guantanamo, military commissions, or cyber war—should be evaluated in a black hole, or law-free zone, because there can be no law to apply to military tactics and technologies that never previously existed.

In the early days after 9/11, I rejected this view, arguing that we should not respond this way. Instead, we should treat modern armed conflict as different, but not unique. We should not act as if we had suddenly entered a “law-free zone.”<sup>6</sup> Although the law might change, the emerging issues of armed conflict nevertheless remain issues governed by law.

I contrasted the “black hole” approach with my preferred “translation” approach: an approach that I would argue has in fact carried the day in the fifteen years since 9/11: namely, that we live in a time where we must translate what Montesquieu called the “spirit of the laws”<sup>7</sup> to the present-day situation.<sup>8</sup> This translation exercise necessarily occurs with many interpreters, because at present, both the domestic and international legislative systems are peculiarly slow to respond to current developments. So if the law to be applied to modern problems is to be updated, it must be law that reflects modern, emerging state practice, driven from a sense of legal obligation derived from the spirit of the laws that previously governed nineteenth- and twentieth-century conflicts.

It takes only a moment of reflection to see how big a difference there is between a “black hole” and a “translation” exercise with regard to the modern law of war. If we live in a black hole, we are operating outside the law altogether. But if we are engaged in a translation exercise from previously-agreed international legal rules, we may debate whether or not any particular translation is correct, but there can be no denying that we are generally operating *within* the framework of the law, rather than denying its application. For example, China might welcome the suggestion that cyberspace or the South China Sea should be

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<sup>5</sup> OWEN FISS, *A WAR LIKE NO OTHER: THE CONSTITUTION IN A TIME OF TERROR* (Trevor Sutton ed., 2015).

<sup>6</sup> Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11*, at 143, 153 (Strobe Talbott & Nayan Chanda eds., 2001) (“[W]hich of the available courses of action most closely comports with both the spirit and the letter of the law? If there is such a ‘law-friendly’ course, we should follow it, because doing so will keep the law on our side, keep us on the moral high ground, and preserve the vital support of our allies and international institutions as the crisis proceeds.”).

<sup>7</sup> BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., 1900).

<sup>8</sup> Harold Hongju Koh, *The Spirit of the Laws*, 43 *HARV. INT’L L.J.* 23 (2002).

black holes because, in those zones, China has greater military capabilities that, in Thucydides' words, would allow "the strong [to] do what they can and the weak [to] suffer what they must."<sup>9</sup>

But if instead you translate, you are trying to update the spirit of the laws that were developed for another time to a new and unexpected situation. People can debate whether a text has been correctly translated, but obviously, there is a huge difference between arguing over precisely *where* the line of legality should be drawn when operating within the framework of law, as opposed to *whether* law applies at all. The choice of translation over black hole thus implicates a profound decision: to choose between the rule of law on the one hand, and state practices that have been adopted for expediency's sake, without regard to legal foundation, on the other.

This lecture argues that even amid twenty-first century conflict, with redefined security threats and novel tools of war, the laws are not silent. Even as the practice of conflict has transformed, we can discern an emerging twenty-first century law that governs it. We can also identify significant differences between the legal approach of the Obama Administration and the one that preceded it. For while the current Administration's legal interpretation does not follow verbatim from twentieth-century rules, it derives from good faith efforts to translate the spirit of those laws to modern-day situations.<sup>10</sup> In several emerging areas of twenty-first century war, a new body of law has emerged—much of it developed by U.S. practice and pronouncement—that increasingly is

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<sup>9</sup> THUCYDIDES, *The Melian Dialogue*, in *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 351, 352* (Robert B. Strassler ed., Richard Crawley trans., 1996).

<sup>10</sup> Ten months after this lecture was delivered, the Obama Administration issued a comprehensive report detailing how under President Obama, the United States sought to "ensur[e] that our uses of force overseas are supported by a solid domestic law framework and consistent with an international legal framework predicated on the concepts of sovereignty and self-defense embedded in the United Nations Charter." Barack Obama, *Foreward* to *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS* i (2016) [hereinafter *FRAMEWORKS REPORT*], [https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf). In an effort to "encourage[] future Administrations to build on this report and carry forward the principles of transparency it represents," *id.* at ii, the Report was accompanied by President Obama's last national security speech, President Barack Obama, *Remarks by the President on the Administration's Approach to Counterterrorism* (Dec. 6, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/06/remarks-president-administrations-approach-counterterrorism>, and a Presidential Memorandum asking the National Security Council staff to update the report at least annually. *Presidential Memorandum on Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations* (Dec. 5, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/05/presidential-memorandum-steps-increased-legal-and-policy-transparency>. Going forward, in order to connect the arguments made here to recent United States custom, this Essay cites to points in that report that support the various assertions made here in text.

transnationally shared with other developed nations, particularly our NATO allies. Our challenge going forward is to clarify this body of law, set its contours, make it more transparent, and embody it into international legal instruments.

Let me respond first to a simplistic characterization sometimes seen in the media: that the Obama Administration's approach to 9/11 national-security issues is exactly the same as the George W. Bush Administration's approach. I would argue that in fact, there are six crucial differences.

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

Second, under domestic law, the United States does not operate based purely on the President's unenumerated constitutional powers. Rather, uses of force are based on specific congressional authorizations plus constitutional power.<sup>11</sup> Third, although some U.S. judges may disagree,<sup>12</sup> it is broadly accepted that as a matter of international law, these domestic authorizations should be informed by the international laws of war. Fourth, the Obama Administration has applied a hybrid paradigm for counterterrorism. The United States does not use an either/or approach—either war or law enforcement—but rather combines them into a hybrid approach.<sup>13</sup> So what may be an appropriate warlike response toward an ISIL leader who may be found in an unstable part of Syria may evolve

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<sup>11</sup> FRAMEWORKS REPORT, *supra* note 10, at 3–8.

<sup>12</sup> Compare *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (The "premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. . . . is mistaken"), with *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because . . . the panel's discussion of that question is not necessary to the disposition of the merits."). For further discussion, see Brief of the United States in Response to Petition for Rehearing en banc at 5–6, *Al-Bihani v. Obama*, 590 F.3d 866 (May 13, 2010) (No. 09-5051), <http://www.scotusblog.com/wp-content/uploads/2010/05/US-response-re-rehear-Al-Bihani-5-13-10.pdf> ("The Government agrees that [the majority's] broad statement does not properly reflect the state of the law. *The Government interprets the detention authority permitted under the AUMF, as informed by the laws of war.* That interpretation is consistent with the Supreme Court's decision in *Hamdi* . . . and with longstanding Supreme Court precedent that statutes should be construed as consistent with applicable international law." (emphasis added)).

<sup>13</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

into a more appropriate law enforcement approach, should that very same ISIL leader be located and captured in a stronger law enforcement environment, such as Brussels or Paris.

Fifth, the Obama Administration has taken pains to apply a fact-based, not label-based, approach toward identifying the enemy. To label someone as an “enemy combatant” does not suddenly mean that, against that person, anything goes. Rather, hard cases call for a detailed fact-based inquiry, to help determine whether that particular person may lawfully be the subject of military action. A lawyer must ask: precisely who is this individual, what is his history of past hostile activity, what is his exact rank or position in the terrorist network chain of command, and what certifiable threat level does he pose? Sixth and finally, the Obama approach embodies an absolute commitment to humane treatment in detention, interrogation, and targeting.<sup>14</sup>

These important differences fit into a broader, integrated Obama Administration legal approach to targeting and detention, as part of a general national security strategy of “smart power.” You have heard repeatedly about “smart power” from Obama Administration’s officials, particularly Secretary of State Hillary Clinton.<sup>15</sup> With respect to counterterrorism policy, a smart power approach urges that for the United States to win broader legitimacy in a broader struggle against terrorist networks: (1) its targeting should be lawful; (2) its detentions should be both legally authorized and legally conducted, with the fruits of illegal detention or interrogation never being used in subsequent proceedings; and (3) its basic strategy should be multilateral: lawful cooperation with other states who are also at war, relying wherever possible on shared law enforcement authorities.<sup>16</sup>

These basic legal rules derive from three sources: international criminal law as it has developed since Nuremberg, particularly as now codified in the International Criminal Court’s Rome Statute, which criminalizes genocide, war crimes, crimes against humanity, and, after 2017, the crime of aggression;<sup>17</sup> the

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<sup>14</sup> President Barack Obama, Remarks on National Security at the National Archives (May 21, 2009).

<sup>15</sup> See, e.g., Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at the John Jay School of Criminal Justice: Smart Power Approach to Counterterrorism (Sept. 9, 2011) [hereinafter Clinton, Remarks], <http://www.state.gov/secretary/20092013clinton/rm/2011/09/172034.htm>. See generally HILLARY RODHAM CLINTON, *HARD CHOICES* (2014).

<sup>16</sup> See Clinton, Remarks, *supra* note 15; see also FRAMEWORKS REPORT, *supra* note 10, at 12–14 (describing how the United States works with others in an armed conflict).

<sup>17</sup> Int’l Criminal Court, Res. RC/Res.6, *The Crime of Aggression* annex I–III (June 11, 2010), [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf); see also *infra* text accompanying note 87.

law of armed conflict, sometimes known as international humanitarian law; and international human rights law, when it is not ousted by another, more specialized body of law on the same issue (a controlling *lex specialis*.)

Under international law, to say that the United States is engaged in “armed conflict” means that the United States is fighting against an organized, armed group in a sustained struggle of a particular nature, intensity, and scope. That armed conflict can be one of two traditional kinds of armed conflict: an international armed conflict (IAC) or a non-international armed conflict (NIAC), as declared by either the state itself or by the International Committee of the Red Cross. Thus, for example, when the United States fought Germany during World War II, it represented a textbook international armed conflict. A non-international armed conflict has traditionally meant armed struggle of the type we saw in Colombia at the end of the twentieth-century: the government versus a nonstate actor (such as the FARC) in a civil conflict that does not cross national borders.<sup>18</sup> But the conflict with Al Qaeda fits neatly within neither of these categories. Although the conflict does cross borders, it remains “non-international” because it is not an armed conflict between two nation-states. So what we have seen in recent times is the emergence of another kind of non-international armed conflict—between a nation-state and a transnational terrorist network like Al Qaeda. In *Hamdan v. Rumsfeld*, the Justices of the Supreme Court in 2006 apparently concluded that we have engaged in just this kind of non-international armed conflict since 9/11.<sup>19</sup>

Under this theory, the United States is at war not with “terror” generally, but with a specific transnational terror network that links Al Qaeda, the Taliban, and associated forces. So to be clear: homegrown sympathizers “inspired” by Al Qaeda are not members of Al Qaeda. The Boston Marathon bombers were not members of Al Qaeda, but rather, drew inspiration from that organization. The Obama Administration has construed ISIL or Daesh to be part of these

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<sup>18</sup> Kelly Chen, Natalie Gallón & Rafael Romo, *The Last Armed Conflict in Latin America Is Finally Ending*, CNN (Sept. 26, 2016, 9:59 PM), <http://www.cnn.com/2016/09/26/americas/colombia-farc-peace-deal/>.

<sup>19</sup> 548 U.S. 557 (2006). While there is some controversy over exactly what the Court held with regard to armed conflict in *Hamdan*, everyone agrees that the Justices acknowledged that Common Article 3 of the Geneva Conventions, which governs the minimum humanitarian standard in all armed conflicts, should apply. *See, e.g., id.* at 629 (“[Common Article 3] applies here even if the relevant conflict is not one between signatories.”); *id.* at 641–42, 646 (Kennedy, J., concurring in part) (referring to “our Nation’s armed conflict with Al Qaeda in Afghanistan” and to “our Nation’s armed conflict with the Taliban and Al Qaeda—a conflict that continues as we speak”). *But see* Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld’s Analysis of the Laws of Armed Conflict*, 21 EMORY INT’L L. REV. 601, 616, 618 (2007) (acknowledging the Court’s Common Article 3 holding but suggesting that the Court viewed Common Article 3 as a minimum, rather than as an exhaustive legal regime governing detainee treatment).



associated forces, as a splinter or offshoot of Al Qaeda Core, with Daesh now operating as a “co-belligerent” with Al Qaeda and the Taliban, in the sense of having entered the fight against the United States alongside these armed groups in the so-called “hot battlegrounds”—such active theaters of battle as Afghanistan, Iraq, and Syria.<sup>20</sup> As a matter of international law, until its recent disengagement, Russia said it had been invited to fight in Syria by Assad’s government.<sup>21</sup> The United States is participating there against ISIL based not on Assad’s consent, but because it acts in collective self-defense of Iraq.

Under traditional laws of war, the United States is obliged to follow both the law of initiating war (*jus ad bellum*) and the law of conducting war (*jus in bello*). Under domestic law, the United States must follow the terms of both the Constitution and the various statutory authorizations for use of military force.<sup>22</sup> Since the second half of the George W. Bush Administration, the United States has asserted that: (1) it is in a non-international armed conflict with Al Qaeda, the Taliban, and associated forces in response to the 9/11 attacks and subsequent attacks and under international law, (2) it may use force consistent with the laws of war and its inherent right to self-defense, and (3) under domestic law, the President may engage in appropriate and necessary uses of force that Congress has authorized by statute.<sup>23</sup>

These claims raise three questions: (1) What constitutes a valid armed conflict? (2) When does the United States act in individual or collective self-defense?<sup>24</sup> And (3) When has the state in whose territory the U.S. military action

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<sup>20</sup> For more detailed discussion of the Administration’s legal theory for using force against ISIL, see FRAMEWORKS REPORT, *supra* note 10, at 4, 11; Harold Hongju Koh, *Obama’s ISIL Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY BLOG (Sept. 29, 2014, 8:03 AM), <https://www.justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really/>. A recent lawsuit, *Smith v. Obama*, challenged the domestic legality of that legal theory but was dismissed both for lack of standing and as a political question. See No. 16-843 (D.D.C. Nov. 21, 2016) (mem.); Charlie Savage, *Suit Calling War on ISIS Illegal Is Rejected*, N.Y. TIMES (Nov. 21, 2016), <http://www.nytimes.com/2016/11/21/us/politics/judge-lawsuit-war-isis.html>. But see Marty Lederman, *Judge Kollar-Kotelly Dismisses Captain Smith’s Suit*, JUST SECURITY BLOG (Nov. 22, 2016, 8:05 AM), <https://www.justsecurity.org/34778/judge-kollar-kotelly-dismisses-captain-smiths-suit/> (challenging court’s political question ruling).

<sup>21</sup> Nick Robins-Early, *Russia Says Its Airstrikes in Russia Are Perfectly Legal. Are They?*, HUFFINGTON POST (Oct. 1, 2015, 5:33 PM), [http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law\\_us\\_560d6448e4b0dd85030b0c08](http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08).

<sup>22</sup> See, e.g., Authorization for Use of Military Force, Pub. L. 107-40, § 2(b), 115 Stat. 224, 224 (2001).

<sup>23</sup> FRAMEWORKS REPORT, *supra* note 10, at 8–11.

<sup>24</sup> *Id.* at 9–10. Some commentators have mistakenly construed the Obama Administration’s self-defense arguments as virtually equivalent to the Bush Administration’s controversial doctrine of preemptive self-defense. See, e.g., Jack Goldsmith, *Obama Has Officially Adopted Bush’s Iraq Doctrine*, TIME (Apr. 6, 2016), <http://time.com/4283865/obama-adopted-bushs-iraq-doctrine/>. But more discerning commentators have understood the Obama position not as jettisoning the historical requirement of “imminence” for self-defense,

occurs either consented to the use of force on its territory or demonstrated itself to be unwilling or unable to suppress the threat (the paradigm case being the U.S. raid in Pakistan on Osama bin Laden)? In armed conflict, the conduct of armed force is governed by well-established humanitarian rules that require distinction between civilian and military targets, and rules of necessity, proportionality, and humanity in the use of force. So whenever you hear presidential candidates talking about “carpet-bombing” ISIL cities, remember that that practice would be plainly illegal.<sup>25</sup>

Common Article 3 to the four Geneva Conventions,<sup>26</sup> which is regarded as customary international law, states as a rule of humanity that there should be no violence to life and persons, including no torture, taking of hostages, outrages on personal dignity, or sentences without due process. Additional Protocol II amplifies these guarantees and outlaws all forms of violence against those persons who are noncombatants.<sup>27</sup>

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but as instead requiring a showing of “necessity” or “last clear chance” for a nation to act to defend itself. See Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self Defense*, 107 AM. J. INT’L L. 563, 565 (2013) (“What is really at stake is whether some sort of self-defense action is demonstrably necessary—without any alternative, including later in time—rather than how temporally remote the threat is.”); Daniel Bethlehem, *Not by Any Other Name: A Response to Jack Goldsmith on Obama’s Imminence*, LAWFARE BLOG (Apr. 7, 2016, 1:51 PM), <https://www.lawfareblog.com/not-any-other-name-response-jack-goldsmith-obamas-imminence>; Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and “First Use” in the Jus Ad Bellum*, JUST SECURITY BLOG (Apr. 11, 2016, 8:47 AM), <https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-ad-bellum/>. The British government has recently taken a similar position. See Jeremy Wright, Att’y Gen., U.K., Speech to the International Institute for Strategic Studies: The Modern Law of Self-Defence (Jan. 11, 2017), <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>.

<sup>25</sup> Chris Megerian, *Ted Cruz Wants to “Carpet Bomb” Islamic State, but with Some Limits*, L.A. TIMES (Dec. 15, 2015, 9:25 PM), <http://www.latimes.com/politics/la-pol-sac-ted-cruz-carpet-bomb-20151215-htmlstory.html>.

<sup>26</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316.

<sup>27</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, ¶ 2, June 8, 1977, 1125 U.N.T.S. 609. In March of 2011, President Obama issued a fact sheet, which stated:

The [Obama] Administration urges the Senate to act as soon as practicable on [Additional Protocol II], to which 165 States are a party. An extensive interagency review concluded that United States military practice is already consistent with the Protocol’s provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

OFFICE OF THE PRESS SEC’Y, WHITE HOUSE, FACT SHEET: NEW ACTIONS ON GUANTANAMO AND DETAINEE POLICY (2011). One commentator has argued that:

## II. RULES GOVERNING SPECIFIC PRACTICES

Given this background, we now turn to specific military practices, starting with the law of interrogation.<sup>28</sup> It is worth noting that as regards our legal obligations, it does not matter that Al Qaeda has not signed the Torture Conventions or the Geneva Conventions. I recall one meeting I had about ten years ago with a senator who said, “Professor, the last time I checked, Al Qaeda hadn’t signed either the Torture Convention or the Geneva Conventions.” I replied, “Senator, the last time I checked, the whales hadn’t signed the Whaling Convention either!”<sup>29</sup> My point was that this is not about contract or bilateral agreement, but about the minimal standards of humane treatment that we must obey unilaterally, whether there is a written agreement. The norm of humane treatment to which we have committed ourselves binds us, as a defining element of our national identity, whether others agree to follow it. Senator John McCain put it well when he said, “it’s not about them; it’s about us.”<sup>30</sup> Additional Protocol I of the Geneva Convention, relevant parts of which the United States follows as customary international law, further directs that there shall be no “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population,”<sup>31</sup> rendering illegal such threats—as were recently made on the campaign trail—that in ISIL territory the United States should see if we can make “sand . . . glow in the dark.”<sup>32</sup>

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This statement by the president that U.S. practice is already consistent with the APII’s provisions, combined with the president urging the Senate to ratify “to reaffirm our . . . compliance with legal standards,” provides pretty clear evidence that the United States is applying the provisions of APII as state practice and clearly imply that the United States is doing so out of legal obligation. In other words, President Obama is declaring APII to be CIL and applying its provisions as binding on the United States . . . .”

Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate’s Advice and Consent*, 2015 BYU L. REV. 1525, 1539.

<sup>28</sup> See generally FRAMEWORKS REPORT, *supra* note 10, at 31–35.

<sup>29</sup> I later repeated this point in Senate testimony. See Hamdan v. Rumsfeld: *Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 51 (2006) (statement of Harold Hongju Koh, Dean, Yale Law School) (“Some have said, well, terrorists have not signed Common Article 3. Well, whales have not signed the Whaling Convention. But it is about how we treat them and how we are obliged to treat them.”).

<sup>30</sup> Foster Klug, *McCain: Torture Ban Protects U.S. Image*, WASH. POST (Nov. 14, 2005, 7:10 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/14/AR2005111400247.html>.

<sup>31</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, ¶ 2, June 8, 1977, 1125 U.N.T.S. 3.

<sup>32</sup> Katie Glueck, *Cruz Pledges Relentless Bombing to Destroy ISIL*, POLITICO (Dec. 5, 2015, 6:03 PM), <http://www.politico.com/story/2015/12/cruz-isil-bombing-216454> (quoting Senator Cruz as saying, “I don’t know if sand can glow in the dark, but we’re going to find out!”).

In addition, some presidential candidates recently argued that our government should return to waterboarding or “a hell of a lot worse than waterboarding.”<sup>33</sup> Again, there is a short, clear answer to such bravado: that is illegal behavior, and if ordered by an elected President who has taken an oath to uphold the Constitution and laws of the United States, that is also probably a high crime and misdemeanor, and hence an impeachable offense.<sup>34</sup> The Torture Convention expressly says that torture may not be justified by a state of war or a threat of war, and that all acts of torture, wherever they can occur, must be criminalized.<sup>35</sup> Senator McCain made the same policy point powerfully as well.<sup>36</sup> So these reckless campaign statements mislead Americans about what the realities and legalities of interrogation really are.

If you need any further convincing, you should read a recent book, *Why Torture Doesn't Work: The Neuroscience of Interrogation*, by Shane O'Mara, a professor of experimental brain research at the University of Dublin.<sup>37</sup> His neuroscience research makes a very simple point: that at a cellular, neurological level, every single specific tactic used to extract information by torture—sleep deprivation, temperature changes, waterboarding, food restriction—inhibits rather than enhances the victim's ability truthfully to recall and convey accurate memories.<sup>38</sup> So in fact, so-called “enhanced interrogation tactics” enhance nothing; they should be called “impaired interrogation tactics” precisely because they destroy memory and recall. So torturing prisoners in search of accurate

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<sup>33</sup> Tom McCarthy, *Donald Trump: I'd Bring Back 'A Hell of a Lot Worse than Waterboarding'*, GUARDIAN (Feb. 7, 2016, 6:57 AM), <https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture>.

<sup>34</sup> U.S. CONST. art. 2, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); accord Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1148, 1156 (2006); see also *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 162 (4th Cir. 2016) (Floyd, J., concurring) (“[W]hile executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful. . . . The fact that the President—let alone a significantly inferior executive officer—opines that certain conduct is lawful does not determine the actual lawfulness of that conduct. The determination of specific violations of law is constitutionally committed to the courts, even if that law touches military affairs.”).

<sup>35</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, ¶ 2, art. 4, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>36</sup> See, e.g., Press Release, Senator John McCain, Statement by Senator John McCain on Inhumane Interrogation Methods (Feb. 8, 2016), <http://www.mccain.senate.gov/public/index.cfm/2016/2/statement-by-senator-john-mccain-on-inhumane-interrogation-methods>.

<sup>37</sup> SHANE O'MARA, WHY TORTURE DOESN'T WORK: THE NEUROSCIENCE OF INTERROGATION (2015); see also Harold Hongju Koh, *Pain Versus Gain*, JUST SECURITY BLOG (June 20, 2016, 3:15 PM), <https://www.justsecurity.org/31544/pain-gain/>.

<sup>38</sup> O'MARA, *supra* note 37, at 183.

information proves to be an utterly pointless act: it achieves the exact opposite of what it is intended to do. And in the end, it harms the torturer as much as the tortured. All of this suggests that we should stop pretending that torture is a means to some nobler end.<sup>39</sup> It achieves nothing but abuse. As George Orwell so trenchantly observed, “[t]he object of torture is torture.”<sup>40</sup>

That brings us to the question of how international human rights law applies when armed conflict is in play. This issue was addressed recently by the International Court of Justice in its *Advisory Opinion on the Threat or Use of Nuclear Weapons*, where the court explicitly said that the International Covenant on Civil and Political Rights does not cease in times of war if there has not been a derogation of it.<sup>41</sup> In the Palestinian *Wall* case, the court further declared that we must take account of both international human rights law and international humanitarian law on a provision-by-provision approach. So there are some human rights provisions whose application might prove to be impracticable in a time of war, for example, the right to participate in elections. But other provisions, like the right to worship, can plainly be exercised even in times of war. Other human rights, such as the right to be free of torture and cruel, inhuman, and degrading treatment, are nonderogable rights that cannot be dispensed with even in times of war or extreme emergency.<sup>42</sup>

In his book *Power Wars*, Charlie Savage of the *New York Times* recounts how, on my last day as State Department Legal Adviser, I left behind a detailed memorandum opinion that explained why I did not believe that it was legally available for policymakers to claim that the Convention Against Torture did not apply outside the United States.<sup>43</sup> Although the internal debate within the

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<sup>39</sup> See Douglas Johnson, Alberto Mora & Averell Schmidt, *The Strategic Costs of Torture: How “Enhanced Interrogation” Hurt America*, FOREIGN AFF. (Sept./Oct. 2016), <https://www.foreignaffairs.com/articles/united-states/strategic-costs-torture>; cf. Jenna Johnson, *Trump Says ‘Torture Works,’ Backs Waterboarding and ‘Much Worse’*, WASH. POST (Feb. 17, 2016), [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html).

<sup>40</sup> GEORGE ORWELL, 1984, at 267 (1949).

<sup>41</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).

<sup>42</sup> See Daniel Bethlehem, *The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 2 CAMBRIDGE J. INT’L & COMP. L. 180, 190 (2013).

<sup>43</sup> CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY (2015); Office of the Legal Advisor, U.S. Dep’t of State, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict 5–6 (Jan. 21, 2013); see also Marko Milanovic, *Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, EJIL: TALK! (Mar. 7, 2014), <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties>; Charlie Savage, *U.S. Seems Unlikely to Accept that Rights*

Administration continued for another two years, in 2015, the Obama Administration finally made this point explicit in its presentation before the Committee Against Torture in Geneva, when Assistant Secretary of State for Democracy, Human Rights and Labor Tom Malinowski stated that the torture ban applies “in all places, at all times, with no exceptions,”<sup>44</sup> and my former principal deputy, then-Acting Legal Adviser Mary McLeod, echoed the same notion, now embedded into U.S. law.<sup>45</sup>

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*Treaty Applies to Its Actions Abroad*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html>.

<sup>44</sup> Karen DeYoung, *Obama Administration Endorses Treaty Banning Torture*, WASH. POST (Nov. 12, 2014), [https://www.washingtonpost.com/world/national-security/obama-administration-endorses-treaty-banning-torture/2014/11/12/b6131e68-6a8c-11e4-9fb4-a622dae742a2\\_story.html](https://www.washingtonpost.com/world/national-security/obama-administration-endorses-treaty-banning-torture/2014/11/12/b6131e68-6a8c-11e4-9fb4-a622dae742a2_story.html).

<sup>45</sup> Mary E. McLeod, Acting Legal Adviser, U.S. Dep’t of State, Acting Legal Adviser McLeod: U.S. Affirms Torture Is Prohibited at All Times in All Places (Nov. 12, 2014), <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>. Curiously, toward the end of the Frameworks Report, the Obama Administration repeated a statement made in 2008, seven years *before* its 2015 CAT presentation, stating “that Article 3 of the UNCAT [Convention Against Torture] does not impose any legal obligations on the United States with respect to individuals located outside U.S. sovereign territory, such that the Article is not applicable as a legal matter to transfers occurring from outside U.S. sovereign territory, including in the context of armed conflict. . . . [A]s a matter of policy, the United States applies the UNCAT Article 3 standard to all transfers regardless of location.” FRAMEWORKS REPORT, *supra* note 10, at 42 (emphasis added) (internal citation omitted). The apparent reason why this qualified statement remains is that given, in one commentator’s words, the unequivocal “‘stated policy commitment not to send any person, no matter where located, to a country in which it is more likely than not that the person would be subject to torture,’ it has been unnecessary to revisit the legal question.” Marty Lederman, *President Obama’s Report on the Legal and Policy Frameworks Guiding and Limiting the Use of Military Force [UPDATED]*, JUST SECURITY BLOG (Dec. 5, 2016, 2:45 PM), <https://www.justsecurity.org/35239/president-obamas-report-legal-policy-frameworks-guiding-united-states-military-force-related-national-security-operations/>. Yet this qualified statement would appear to be superseded by the unequivocal U.S. statements made in text before the Committee Against Torture in 2015, as well as by the unqualified declaration elsewhere in the Frameworks Report that “[t]orture and cruel, inhuman, or degrading treatment or punishment (CIDTP) are categorically prohibited under domestic and international law, including international human rights law and the law of armed conflict. These prohibitions exist everywhere and at all times.” FRAMEWORKS REPORT, *supra* note 10, at 32 (emphasis added). In his farewell counterterrorism speech, delivered shortly after the Frameworks Report issued, President Obama similarly declared without qualification, “We prohibited torture, everywhere, at all times—and that includes tactics like waterboarding.” President Barack Obama, Remarks by the President on the Administration’s Approach to Counterterrorism (Dec. 6, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/06/remarks-president-administrations-approach-counterterrorism>. Nor can the claim that a CAT State Party’s obligation not to transfer an individual to torture is territorially limited be squared with customary international law. In 2001, fourteen years before the unequivocal U.S. CAT presentation, a detailed legal opinion provided to the U.N. High Commissioner on Refugees opined that the legal “responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State *wherever these may occur*.” Sir Elihu Lauterpacht & Daniel Bethlehem, U.N. High Commissioner for Refugees, The Scope and Content of the Principle of Non-Refoulement, 82 (June 20, 2001), <http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf> (emphasis added). It is thus hard to see why, even if the policy prohibition cited in the Frameworks Report were to change, the United States would not still be legally required, as a matter of customary international law, to apply the CAT Article 3 standard to all transfers for which it bears state responsibility, regardless of location.

If that is the law of interrogation, what about detention?<sup>46</sup> As the President made clear in his National Archives speech seven years ago, civilian trials are to be preferred, and there is no doubt, after the Supreme Court's invalidation of the first version of the Military Commission order in the *Hamdan* case, that military commissions must comply with the Constitution.<sup>47</sup> Transfer of detainees from Guantanamo continues, so that forty-one detainees were left<sup>48</sup> at the end of the Obama Administration. An executive order on periodic review is being implemented to determine which detainees should continue to be held and which may be released.<sup>49</sup> And now, finally embodied in the most recent National Defense Authorization Act, is an absolute statutory guarantee of humane treatment.<sup>50</sup>

I am sometimes asked: "As a human rights lawyer who opposes torture, how can you defend the use of drones?" My answer is quite simple: all torture is illegal and the President cannot be torturer in chief—this is an absolute ban under all circumstances.<sup>51</sup> But targeted killing in warfare can be lawful or unlawful, depending upon whether it is done according to the laws of war. If we are indeed in an armed conflict, we can lawfully engage in certain kinds of lethal warfare. You may not like targeted killing, but if you are a lawyer in the government addressing these matters, it is your inescapable duty to draw the line between those uses of force that are or are not lawful.

Targeted killing can be lawful when conducted against someone not in government custody who poses an imminent threat, as an act of self-defense, or in armed conflict against a combatant who has no immunity under the Geneva Conventions.<sup>52</sup> As President Aharon Barak of the Israeli Supreme Court suggested, targeted killing may in some cases be more consistent with human rights norms than other forms of warfare because of the lower possibility of

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<sup>46</sup> See FRAMEWORKS REPORT, *supra* note 10, at 28–31 (discussing detention of individuals in armed conflict).

<sup>47</sup> Obama, *supra* note 14; see also FRAMEWORKS REPORT, *supra* note 10, at 36–39 (discussing prosecution of individuals through the criminal justice stem and military commissions).

<sup>48</sup> *The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last updated Jan. 19, 2017).

<sup>49</sup> Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

<sup>50</sup> See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045, 129 Stat. 726, 977 (2015); Marty Lederman, *The President's NDAA Signing Statement re: GTMO and Anti-Torture Provisions*, JUST SECURITY BLOG (Nov. 25, 2015, 9:50 PM), <https://www.justsecurity.org/27939/presidents-ndaa-signing-statement-re-gtmo-anti-torture-provisions/>.

<sup>51</sup> See Koh, *supra* note 34, at 1167.

<sup>52</sup> See generally FRAMEWORKS REPORT, *supra* note 10, at 19–21.

collateral damage.<sup>53</sup> But what is necessary to make targeted killing lawful is first, that the action be duly authorized under both domestic and international law; second, that the targeted person's rights have been adequately considered; and third, that the sovereignty of the country in which the action occurs have been adequately respected. If all of this is done correctly, targeted killing does not constitute unlawful extra-judicial killing, execution, or assassination, and can be lawfully carried out by drone or special operations, as in the case of Osama bin Laden.<sup>54</sup> Certainly, there are weapons that are inherently illegal—in my judgment, for example, chemical weapons, antipersonnel land mines, unexploded ordinance, and cluster bombs—but drones do not fall into that category; they may lawfully be used for certain targeted operations that meet carefully defined criteria. What determines whether they are lawful is precisely *how* they are used.

To grasp this commonsense point, consider the following thought experiment: suppose that shortly after Congress had authorized the use of military force against Al Qaeda and the Taliban in 2001, the President had come out and said:

A week ago, we were attacked in the worst attack ever to occur on our soil. More than three thousand innocent people were killed simply for going to work. This is a gross human rights violation and act of war to which we must respond. But in responding, here is what I will not do: I will not torture anyone, I will not open Guantanamo, I will not invade Iraq, I will not conduct kidnappings or illegal extraordinary rendition to torture. I will not violate people's rights by overbroad surveillance. I will cooperate with our allies lawfully and multilaterally in a transparent fashion. But if the only place I can find bin Laden and his supporters is in a remote cave in Tora Bora, and the only way I can reach them is by drone, I will have no choice but to use that lawful method, in accordance with the laws of war. And I say to our allies and the American people: please support me in this effort.

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

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<sup>53</sup> HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (2) IsrLR 459, 473 (2006) (Isr.).

<sup>54</sup> Harold Hongju Koh, *The Lawfulness of the U.S. Military Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011, 6:00 AM), <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.



Upon taking office, President Obama made clear that his goal was to obey law even in times of armed conflict. He said this in his inauguration speech, in his 2009 National Archives speech, and again in his Nobel Prize speech in December of that year.<sup>55</sup> At the National Defense University in May 2013, he emphasized that a smart power approach can include drones as an effective, discriminate tool to help dismantle specific networks that threaten the United States.<sup>56</sup> In that far-ranging speech, he made clear his preference for capture over kill and America's respect for state sovereignty.<sup>57</sup> He also expressed a commitment to the notion that self-defense may be invoked to use force against a continuing imminent threat (based on a necessarily elongated notion of "imminence")<sup>58</sup> against senior operational leaders who are clearly determined to strike against the United States, so long as there is a "near-certainty that no civilians will be killed or injured."<sup>59</sup> Currently, these are policy rules embedded in a classified Presidential Policy Guidance (PPG)<sup>60</sup> summarized in a Fact Statement issued alongside the 2013 NDU Speech.<sup>61</sup> A redacted version of that PPG was recently declassified.<sup>62</sup> In December 2016, the Obama Administration embodied these principles into a comprehensive "legal and policy frameworks" document issued shortly before President Obama left office, which sought to set forth a detailed explanation of how the various U.S. practices developed during that Administration are consistent with the laws of war.<sup>63</sup>

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<sup>55</sup> See Obama, *supra* note 14; President Barack Obama, Nobel Lecture: A Just and Lasting Peace (Dec. 10, 2009) [hereinafter Obama, Nobel Lecture], [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture.html); President Barack Obama, First Inaugural Address (Jan. 21, 2009), <https://www.whitehouse.gov/blog/2009/01/21/president-barack-obamas-inaugural-address>.

<sup>56</sup> President Barack Obama, Remarks at the National Defense University (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>57</sup> *Id.*

<sup>58</sup> See Wright, *supra* note 24. See generally Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 770–72, 774, 776 (2012).

<sup>59</sup> Obama, *supra* note 57.

<sup>60</sup> *Id.*

<sup>61</sup> OFFICE OF THE PRESS SEC'Y, WHITE HOUSE, U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013), [https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23\\_fact\\_sheet\\_on\\_ppg.pdf](https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf).

<sup>62</sup> See U.S. DEP'T OF JUSTICE, PRESIDENTIAL POLICY GUIDANCE, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013) [hereinafter PPG], [https://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download) (redacted).

<sup>63</sup> See FRAMEWORKS REPORT, *supra* note 10, 24–26. After this lecture was delivered, the President also issued an executive order calling for regular disclosure of civilian casualty statistics. See *id.* at 26–27; Exec. Order No. 13,732, 81 Fed. Reg. 44,485 (July 1, 2016), <https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>; see also Charlie Savage & Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, N.Y. TIMES (July 1, 2016), <http://www>.

To go further, we can translate these practices into codes of conduct and internalize them into private behavior through private contracts as rules that can govern the conduct of private security contractors. This has been done in a public–private arrangement called the Montreux Document,<sup>64</sup> which has led to the adoption of an International Code of Conduct (ICOC) to govern private security practices.<sup>65</sup>

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

Finally, let me touch briefly on the difficult question of cyber intrusions, a topic that could easily occupy an entire lecture of its own. These intrusions run a wide gamut of conduct. We need to distinguish between a spectrum of activity that runs from: (1) cyber monitoring, defense and espionage, and hacking, which can be done by private parties, to (2) computer network exploitation (CNE), which is a form of intelligence, and (3) pernicious forms of consumer network attack (CNA), which can have broader, physical consequences, such as using a computer to open a dam or to shut down a hospital. Given that these physical effects are no different from simply bombing the dam or hospital, such destructive cyber acts should be plainly governed by the laws of war. In 2012, I gave a speech at Cyber Command called “International Law in Cyberspace,”

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nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html. In my view, more steps toward transparency and standard-setting should still be taken. See Harold Hongju Koh, Remarks at the Oxford Union: How to End the Forever War? 14 (May 7, 2013), <http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf> (“[T]he real issue . . . is not drone technology per se, but the need for transparent, agreed-upon domestic and international legal process and standards.” (emphasis omitted)).

<sup>64</sup> U.N. General Assembly Security Council, Annex to the Letter Dated Oct. 2, 2008 from the Permanent Representative of Switzerland to the Secretary-General: Montreux Document on Pertinent International Legal Obligations and Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, U.N. Doc. A/63/467-S/2008/636 (2008).

<sup>65</sup> *The International Code of Conduct for Private Security Service Providers*, INT’L CODE CONDUCT ASS’N, [http://www.icoca.ch/en/the\\_icoc](http://www.icoca.ch/en/the_icoc) (last visited June 23, 2016).

which stated ten currently agreed-upon international rules of cyber conflict.<sup>66</sup> That speech made clear that international law applies in cyberspace, that cyberspace is neither a law-free zone nor a black hole, and that forms of cyber activity can, under certain circumstances, represent a use of force to which the laws of *jus ad bellum* and *jus in bello* apply, with states being responsible for their own actions, as well as the acts of proxy actors. A series of legal experts have engaged in an extended exercise called the Tallinn Manual (which has recently moved to a 2.0 stage), which has sought to elaborate these emerging rules in considerable detail.<sup>67</sup> But to further legalize cyber conflict, we need to promote more official standard-setting exercises through diplomatic negotiation before global fora like the Group of Governmental Experts (GGE),<sup>68</sup> to keep translating the laws of war to rapidly evolving technological capacities, and to make it even clearer that cyber conflict is governed by translated law-of-war standards.

### III. SYRIA

Sadly, we must end with Syria, a tragic story that you all know too well<sup>69</sup>: the five-year civil war, the gross violations of human rights and humanitarian law, the armed conflict, the migrant crisis, the border closings, and the growing discrimination against those refugees fleeing, whom some fear hale in part from ISIL. The current horrible tally stands at over 250,000 dead, over six million displaced, and almost five million refugees, two million of them children.<sup>70</sup> In

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<sup>66</sup> Harold Hongju Koh, *International Law in Cyberspace*, 54 HARV. INT'L. L.J. ONLINE 1, 2–7 (2012). For a recent, illuminating follow-on speech by Brian Egan, my successor as State Department Legal Adviser, see Brian J. Egan, Remarks on International Law and Stability in Cyberspace (Nov. 10, 2016), <https://www.state.gov/s/1/releases/remarks/264303.htm>.

<sup>67</sup> Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT'L. L.J. ONLINE 13 (2012).

<sup>68</sup> See Elaine Korzak, *The 2015 GGE Report: What Next for Norms in Cyberspace?*, LAWFARE BLOG (Sept. 23, 2015, 8:32 AM), <https://www.lawfareblog.com/2015-gge-report-what-next-norms-cyberspace>.

<sup>69</sup> See generally Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 998–1004, 1028–33 (2016) [hereinafter Koh, *War Powers*], which the discussion in text that follows summarizes.

<sup>70</sup> See, e.g., Howard Forman, *Caring for 2 Million Refugee Children*, U.S. NEWS & WORLD REP. (Feb. 2, 2016, 6:00 AM), <http://health.usnews.com/health-news/patient-advice/articles/2016-02-02/caring-for-2-million-refugee-children>; *Syria Crisis: Regional Overview: About the Crisis*, U.N. OFFICE FOR COORDINATION OF HUMANITARIAN AFFAIRS, <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis> (last visited Apr. 16, 2016). For a discussion of the humanitarian crisis, see Michael Ignatieff, *The Refugees and the New War*, N.Y. REV. BOOKS (Dec. 17, 2015), <http://www.nybooks.com/articles/2015/12/17/refugees-and-new-war/>, and Michael Ignatieff & Leon Wieseltier, *Enough Is Enough—U.S. Abdication on Syria Must Come to an End*, WASH. POST (Feb. 9, 2016), [https://www.washingtonpost.com/opinions/the-era-of-us-abdication-on-syria-must-end/2016/02/09/55226716-ce96-11e5-88cd-753e80cd29ad\\_story.html](https://www.washingtonpost.com/opinions/the-era-of-us-abdication-on-syria-must-end/2016/02/09/55226716-ce96-11e5-88cd-753e80cd29ad_story.html).

his last State of the Union Address, President Obama suggested that the best approach to a conflict like Syria is a smart power approach.<sup>71</sup>

One legal issue being raised over and over is whether it is lawful for the United States to lead a collective effort to enter Syrian territory to try to mitigate the humanitarian disaster. A series of questions have been raised throughout the last five years of this Administration: (1) Is it lawful to give humanitarian assistance within Syria? (2) Is it lawful to support Syrian rebels with lethal or nonlethal aid? (3) As Aleppo remains divided and refugees flock to the border between Aleppo and Turkey,<sup>72</sup> is it possible to set up a humanitarian corridor or safe zone to give those refugees some sort of humanitarian protection?

Some claim that the U.N. Charter article 2(4) is absolute under these circumstances, and that it is a per se illegal violation of state sovereignty to take military action without U.N. Security Council resolution to prevent or mitigate gross abuses.<sup>73</sup> But if this bright-line rule were in fact true, then any of the permanent five members of the United Nations could commit genocide against its own citizens and veto all objecting Security Council resolutions, and no one could do anything about it. Maybe somebody can explain to me how that is consistent with the core values of the United Nations, which include the promotion and protection of human rights.<sup>74</sup> This is a moment to question that overbroad legal claim, as several of the NATO allies did during Kosovo itself.

Some have called humanitarian intervention of the Kosovo kind “illegal but legitimate.”<sup>75</sup> But as a distinguished international commission headed by former Canadian Foreign Minister Lloyd Axworthy pointed out, if the U.N. Security Council fails to discharge its responsibilities, concerned states will not rule out other means and forms of action in response.<sup>76</sup> In his 2009 Nobel Prize Lecture, President Obama made clear that he believed that, as in the Balkans, under

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<sup>71</sup> President Barack Obama, State of the Union Address (Jan. 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>.

<sup>72</sup> See Ilgin Yorulmaz, *Turkey Criticizes World Leaders for Lack of Syrian Refugee Response*, HUFFINGTON POST (Sept. 26, 2016), [http://www.huffingtonpost.com/entry/turkey-syria-refugees-united-nations\\_us\\_57e5b325e4b0e28b2b543466](http://www.huffingtonpost.com/entry/turkey-syria-refugees-united-nations_us_57e5b325e4b0e28b2b543466).

<sup>73</sup> See Oona A. Hathaway & Scott J. Shapiro, Opinion, *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES (Sept. 3, 2013), <http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html>.

<sup>74</sup> U.N. Charter pmbl.

<sup>75</sup> INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT 4 (2000), <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>.

<sup>76</sup> INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 3, at xiii.

certain circumstances, use of force for humanitarian purposes can be justified.<sup>77</sup> Although as a policy matter he has apparently concluded not to use force in Syria,<sup>78</sup> he has just as plainly suggested that under some circumstances, he would consider force or the threat of force to be a lawful option.<sup>79</sup>

Elsewhere, I have argued at length that nearly twenty years after Kosovo, we need to question the notion that calling Kosovo-style humanitarian intervention “illegal but legitimate” must be our legal ending point.<sup>80</sup> Where else do we do this in human rights law? Did we say that same-sex marriage was “illegal but legitimate,” or did we take collective action to make it lawful? Ironically, those who claim that there is a bright-line, black-letter, absolutist rule barring humanitarian intervention absent Security Council resolution take the kind of narrow textualist interpretive approach that I associate with the late Justice Scalia. To simply pronounce that “a rule is a rule is a rule and it has been so since the Founding” creates an intolerable bias towards inaction in the face of gross abuses, even after several decades of debate of attempting to revise international law to define a narrow Responsibility to Protect in the name of human rights.

To make this argument need not mean that anything goes. As I have recently specified elsewhere, when a state faces a situation of gross violence causing disruptive consequences likely to lead to imminent threats to peace and security, and all other remedies have been exhausted, the humanitarian use of force may

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<sup>77</sup> See Obama, Nobel Lecture, *supra* note 56 (“I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That’s why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.”).

<sup>78</sup> See Jeffrey Goldberg, *The Obama Doctrine*, THE ATLANTIC (Apr. 2016), <http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/> (interviewing President Obama regarding, *inter alia*, his policies in Syria).

<sup>79</sup> See Koh, *War Powers*, *supra* note 70, at 999–1000 (“[T]he [White House] Counsel explained that, while an attack on Syria ‘may not fit under a traditionally recognized legal basis under international law,’ given the novel factors and circumstances, such an action would nevertheless be ‘justified and legitimate under international law’ and so not prohibited. As a matter of domestic law, the Administration also apparently concluded that congressional approval was not required. As the *New York Times* reported, ‘[A]dministration lawyers decided that it was within Mr. Obama’s constitutional authority to carry out a strike on Syria as well, even without permission from Congress or the Security Council, because of the “important national interests” of limiting regional instability and of enforcing the norm against using chemical weapons . . . .’ The White House Counsel stated that ‘[t]he President believed that it was important to enhance the legitimacy of any action that would be taken by the executive . . . to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use.’”).

<sup>80</sup> See generally *id.*

be lawful if limited to necessary and proportionate action.<sup>81</sup> If such action is done collectively—as NATO acted in Kosovo<sup>82</sup>—to prevent the use of illegal means, like chemical weapons, for illegal ends such as war crimes, the use of force in these circumstances can be legally justified. One can analogize this situation to the Good Samaritan principle in domestic tort law. Tort law rarely preauthorizes bystanders to use force for humanitarian motives, for fear that they will abuse this license. But if those bystanders do act in a careful fashion, for the limited purpose of preventing much worse outcomes, the law will hold them exempt from wrongfulness after the fact. In such cases, we fully recognize the tension the conduct raises with the letter of the law, but invoke an affirmative defense so as not to render socially desirable conduct illegal. Here too, isn't it the task of international lawyers to develop the law in this area to better serve the cause of human dignity?

To say that under the right circumstances, it could be lawful to make a targeted use or threat of force as part of a broader smart power approach is not to call for an unnuanced policy of intervention. As a former human rights policymaker, I have learned to be very cautious about policy arguments for military intervention, which are undeniably often wrong-headed.<sup>83</sup> At the same time, the idea that a noninterventionist position is *legally required* in Syria must be tested against the hard reality that almost everyone under the sun is already intervening in Syria. Thus, under these circumstances, the nonintervention position for the West may not actually be a pro-peace position, but rather a slaughter-tolerating position, in which the Western powers invoke supposedly inflexible legal rules as a reason to do nothing.

More than twenty years ago, I warned that there are times when our failure to take meaningful policy action earlier can lead to what I call “the Haiti Paradigm in human rights policy.”<sup>84</sup> My thesis there was that when a global crisis arises, the world too often under responds to the root causes. As a matter of human rights policy in Syria, for example, the time for more action was

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<sup>81</sup> See *id.* at 1011 (stating international legal test for humanitarian intervention).

<sup>82</sup> INDEP. INT'L COMM'N ON KOSOVO, *supra* note 76, at 4.

<sup>83</sup> As Nicholas Kristof has rightly cautioned: “Let’s be humble enough to acknowledge that we can’t be sure of the answer and that Syria will be bloody whatever we do.” Nicholas Kristof, Opinion, *The Right Questions on Syria*, N.Y. TIMES (Sept. 4, 2013), <http://www.nytimes.com/2013/09/05/opinion/kristof-the-right-questions-on-syria.html>. The shifting balance of power in the civil war, the proliferation of questionable armed groups on both sides, the risk of mission creep, and the uncertainty of follow-on consequences from any military strike all demand caution, particularly if one starts from the premise, “first, do no harm.”

<sup>84</sup> See Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391, 2392 (1994).

probably earlier, not later. But when both the multilateral system and the U.S. government under-responded, the failure to address root causes in a timely fashion led to an overpowering refugee crisis that now swamps Europe, Turkey, Jordan, and Lebanon.<sup>85</sup> The irony is that the bulk of the policy reaction in both Europe and the United States will now likely be directed against the refugees, not the root causes of the refugee crisis. And if that harsh response is legitimated by the courts, we will end up with a perversely upside down human rights policy: one that is too soft on the human rights abusers and too harsh on the innocents who are fleeing from those abusers.

The Haiti Paradigm is recurring in a somewhat different way in Syria because the European Court of Human Rights has largely ruled illegal the option of governments intercepting and returning Syrians on the high seas.<sup>86</sup> Yet once refugees have landed on shore, they have been pushed away by deterrence laws, of the kind being enacted by a number of European states.<sup>87</sup> Because of the scale of the refugee crisis, an even greater danger has emerged: that if the United States does nothing, Europe will quite literally break. As I speak, three essential features of Europe are under intense pressure: the Eurozone,<sup>88</sup> the Schengen Zone of immigration,<sup>89</sup> and the very membership of the European Union, which is being threatened by both British and Greek threats to exit (Brexit and Grexit).<sup>90</sup>

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<sup>85</sup> See Ignatieff & Wieseltier, *supra* note 71.

<sup>86</sup> See, e.g., *Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R. at 37 (2012) (“When [Libyans] were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the [European] Convention [on Human Rights] . . . .”); *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R. (2011); *Medveyev v. France*, App. No. 3394/03, Eur. Ct. H.R. at 27 (2010) (“[T]he special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships’ crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction . . . .”).

<sup>87</sup> See, e.g., Jacques Hartmann & Nikolas Feith Tan, *The Danish Law on Seizing Asylum Seekers’ Assets*, EJIL: TALK! (Jan. 27, 2016), <http://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/> (describing a recent Danish law that gives police broad powers to search and confiscate valuables from people seeking asylum, with the evident goal of trying to deter asylum-seekers from entering the country).

<sup>88</sup> Paul Hannon & Tom Fairless, *Eurozone Prices Fall, Piling Pressure on ECB*, WALL ST. J. (Feb. 29, 2016, 5:14 AM), <http://www.wsj.com/articles/eurozone-prices-fall-piling-pressure-on-ecb-1456740845>.

<sup>89</sup> Ian Traynor, *EU Migration Crisis: Greece Threatened with Schengen Area Expulsion*, GUARDIAN (Jan. 25, 2016, 9:12 AM), <https://www.theguardian.com/world/2016/jan/25/greece-under-growing-pressure-to-stem-flow-of-refugees-and-migrants-into-eu>.

<sup>90</sup> On June 23, 2016, the United Kingdom voted in an historic referendum for Brexit: British exit from the European Union, a decision that has thrown both the British Isles and Europe into turmoil and created myriad legal puzzles going forward. For ongoing coverage of the legal issues arising from Brexit, see ‘Brexit’: Britain’s Decision to Leave the E.U., N.Y. TIMES, <http://www.nytimes.com/news-event/britain-brexit-european-union>

America simply cannot afford to be a bystander while Europe breaks. There are a set of actions that the United States can and must take to prevent the situation from further deteriorating.<sup>91</sup> In my view, the United States must take the lead in reviving negotiations to achieve a peace accord in Geneva. The United States must work with the embattled governments of Turkey and Jordan to help manage refugee flows. The United States must give support to stabilize Germany where Chancellor Angela Merkel heroically has stood almost alone in generating a humanitarian response to the refugee outflows.<sup>92</sup> The United States must take in more refugees itself. To finance these actions, the allies must seek other sources of financing: they may be able to tap into frozen Syrian assets and demand more funding from Saudi Arabia and other allies in the region, so that Turkey's refugee camps can be emptied in an orderly basis into other parts of Europe. President Obama should seek to secure meaningful long-term solutions to this problem at the World Humanitarian Summit and the U.N. meeting on mass migration<sup>93</sup> scheduled to occur before he leaves office.<sup>94</sup> The United States can press for a resolution expanding the mandate of the U.N. High Commissioner on Refugees,<sup>95</sup> mobilize private relief, and help to develop a new regime for international travel visas created under international authority. Finally, the United States should pursue all available mechanisms of accountability against Assad and the other authors of the human rights debacle.

I offer this brief list of policy suggestions not because I think anyone will agree with or adopt all of them, but to respond to the defeatist claim that because Syria is already a lost cause, there is literally nothing anyone can do today to solve the crisis in Syria. At this writing, Aleppo has fallen to Assad's forces, and

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(last visited July 27, 2016), and *Brexit Law*, BRICK COURT CHAMBERS BREXIT LAW BLOG, <https://brexit.law/2016/07/04/welcome-to-the-brick-court-brexit-law-blog/> (last visited July 30, 2016).

<sup>91</sup> Michael Ignatieff and his students have developed a comprehensive integrated plan for Syria that incorporates a number of these elements. See Michael Ignatieff et al., *The United States and the Syrian Refugee Crisis: A Plan of Action*, HARVARD KENNEDY SCH. SHORENSTEIN CTR. ON MEDIA, POLITICS & PUB. POLICY (Jan. 27, 2016, 3:00 PM), <http://shorensteincenter.org/united-states-syrian-refugee-crisis-plan-action/>.

<sup>92</sup> Kate Connolly, *Angela Merkel Defends Germany's Refugee Policy After Attacks*, GUARDIAN (July 28, 2016, 1:41 PM), <https://www.theguardian.com/world/2016/jul/28/merkel-rejects-calls-to-change-germanys-refugee-policy-after-attacks>.

<sup>93</sup> See *World Humanitarian Summit 2016*, INT'L COUNCIL VOLUNTARY AGENCIES, <https://icvnetwork.org/world-humanitarian-summit-0> (last visited July 30, 2016).

<sup>94</sup> See *High-Level Plenary Meeting on Addressing Large Movements of Refugees and Migrants*, INT'L COUNCIL VOLUNTARY AGENCIES, <https://icvnetwork.org/node/7228> (last visited July 30, 2016) (announcing that the meeting will be held on September 19, 2016).

<sup>95</sup> United Nations High Comm'r for Refugees, Note on the Mandate of the High Commissioner for Refugees and His Office (2013), <http://www.unhcr.org/en-us/protection/basic/526a22cb6/mandate-high-commissioner-refugees-office.html>.



debate continues to rage inside and outside the U.S. government over what would constitute the best way to end the Syria crisis.<sup>96</sup> But doing nothing cannot be our only option. Nor can it be that as the crisis escalates, our only option is to bomb ISIL and to leave alone Assad, who is undoubtedly the proximate cause of the refugee crisis. So this is a crisis that will require all of our policy tools. If force is legally available, it may help to protect humanitarian corridors, to deter bad behavior, or to jumpstart diplomacy—as it did at Dayton—by giving incentives for the recalcitrant parties finally to come to the table during a binding cessation of hostilities.<sup>97</sup> To be clear: I am not urging the use of force for its own sake. But in my view, having the smart power option of *diplomatic intervention backed by the lawful threat of limited military intervention* is a better policy option than simply doing nothing, particularly when Assad has made it clear that he has no hesitations about repeated, deliberate large-scale attacks on civilian populations.

One final point: we should not forget the looming crime of aggression, which will be activated by the International Criminal Court in 2017. Again, this debate could occupy volumes, but I point you here simply to a detailed article on the topic recently published in the *American Journal of International Law*.<sup>98</sup> If Western leaders in NATO engage in collective humanitarian intervention to prevent a future Rwanda or Kosovo, for example, can they be charged with aggression at the International Criminal Court? And if that were done, wouldn't that have the counterproductive effect of deterring much-needed human rights action? Isn't it perverse to say that the only remedy that we have against crimes against humanity, war crimes, and genocide is episodic, after-the-fact punishment, because international law permits no *ex ante* remedy that allows us

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<sup>96</sup> See, e.g., Mark Landler, *51 U.S. Diplomats Urge Strikes Against Assad in Syria*, N.Y. TIMES (June 16, 2016), <http://www.nytimes.com/2016/06/17/world/middleeast/syria-assad-obama-airstrikes-diplomats-memo.html> (describing dissenting view of State Department diplomats encouraging greater use of force as part of a broader diplomatic solution); Robin Wright, *Former Ambassador Robert Ford on the State Department Mutiny on Syria*, NEW YORKER (June 17, 2016), <http://www.newyorker.com/news/news-desk/former-ambassador-robert-ford-on-the-state-department-mutiny-on-syria>; Harold Hongju Koh, “Effective” Policy in Syria: Ambassador Robert Ford’s View, JUST SECURITY BLOG (June 21, 2016, 9:50 AM), <https://www.justsecurity.org/31590/effective-policy-syria-ambassador-robert-fords-view/>; Harold Hongju Koh, *Another Legal View of the Dissent Channel Cable on Syria*, JUST SECURITY BLOG (June 20, 2016, 12:55 PM), <https://www.justsecurity.org/31571/legal-view-dissent-channel-cable-syria/>.

<sup>97</sup> Cf. RICHARD HOLBROOKE, *TO END A WAR* (1998) (describing the use of diplomacy backed by force to bring about the Dayton Peace Accords in Bosnia).

<sup>98</sup> Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257 (2015); see also *THE CRIME OF AGGRESSION: A COMMENTARY* (Claus Kreß & Stefan Barriga eds., 2017); Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. (forthcoming 2017).

to *prevent* such gross violations? Does it make sense to chill humanitarian intervention by criminalizing legitimate efforts to undertake such prevention? Clearly, this is a looming problem that demands more thoughtful, collective consideration before the crime of aggression is finalized. As international lawyers, we need to work together to trigger more thoughtful discussions to figure out a better and more stable long-term solution.

## CONCLUSION

Every topic I have addressed in this lecture could obviously be discussed in much greater detail. But at a minimum, having this overview should force us to reconsider whether it remains true today that in wartime, the laws fall silent. On reflection, that just is not true, even if the modalities of modern warfare are rapidly evolving. In today's armed conflict, the laws are far from silent. Even as the means of modern warfare rapidly mutate, there *is* an emerging body of the twenty-first century law of war. That law does not follow verbatim from twentieth century law, but it does represent a good faith effort not to treat modern warfare as a legal black hole, but rather, to translate the spirit of those laws to present-day circumstances. These laws govern interrogation, detention, drones, special operations, private security contractors, and the Responsibility to Protect, and we face special challenges with regard to the ongoing crisis in Syria. Our challenge going forward is how to clarify these rules and to make them more formal, transparent, and subject to external oversight.

If you want to recall this lecture in a single phrase, my message would be: "We do not have to apply the Tina Turner Doctrine," i.e., "What's law got to do with it?" Whatever you may hear, in this area, law simply is not "a sweet old-fashioned notion." Whether you agree with all the particulars that I have discussed, I hope you agree that, like Randolph Thrower, our job as lawyers who serve the law is to better develop nascent norms. That work will help us to deal with the redefined security threats and new tools of armed conflict for the next century and beyond.

Some fear that the incoming Trump administration will jettison or radically modify these rules, but unraveling such a complex set of legal principles is easier said than done. As I have elsewhere argued, "[t]he U.S. government does not turn on a dime, or instantly dance to the tune of its latest elected leader."<sup>99</sup> In

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<sup>99</sup> See Harold Hongju Koh, *The Next Four Years: A Thanksgiving Strategy*, JUST SECURITY BLOG (Nov. 23, 2016, 8:32 AM), <https://www.justsecurity.org/34868/years-thanksgiving-strategy-harold-koh/>; see also Luke Hartig, *Can Trump Unravel Obama's Rules of War?*, JUST SECURITY BLOG (Jan. 5, 2017, 11:12 AM),

modern war, the laws need not fall silent simply because the tools of conflict are evolving. Nor must the emerging rules be abandoned simply because of a change of government. In the years ahead, not just the United States, but all governmental and nongovernmental players within the transnational legal process,<sup>100</sup> will have a great deal of emerging law to develop, apply, codify, and enforce. That law is the translated law of twenty-first century war.

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<https://www.justsecurity.org/36013/trump-unravel-obamas-rules-war/> (“Although Trump himself has chosen his senior national security leadership, those officials will inherit a cadre of career operators, intelligence officials, lawyers, and policy analysts who hold themselves to very high standards not only because Obama directed them to do so, but because they are professionals who have struggled with the ethical and strategic implications of American policies for 15 years. It will take more than an election and tough campaign talk to change all that.”).

<sup>100</sup> See generally sources cited *supra* note 1.