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The Egan speech and the Bush Doctrine: Imminence, necessity, and “first use” in the *jus ad bellum*

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by [Marty Lederman](#)

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Over at Lawfare, [Ashley Deeks](#) has offered some thoughtful reflections on the *ad bellum* “imminence” discussion in [Brian Egan’s recent ASIL speech](#). [Jack Goldsmith](#) followed up with a post suggesting that Egan’s articulation of the law of anticipatory strikes in self-defense was virtually equivalent to the Bush Administration’s “preemption” doctrine. [Sir Daniel Bethlehem](#) took issue with Jack, insisting that there is a big difference; and [Jack responded](#) that the difference appears to be in name only, not in substance. I thought it might be useful, in light of those posts, to unpack the “imminence” question just a bit, and to situate it properly in a broader discussion of at least two important topics in the *jus ad bellum*—necessity and “first use.” (My previous posts on the Egan speech are [here](#) and [here](#).)

Although the Egan speech does correspond to understandings of the *jus ad bellum*, including “anticipatory” strikes, that have been fairly well-established for a long while (going back at least as far as *The Caroline* controversy in the 1830s), there is at least one very significant difference between the Egan speech and the Bush Administration “preemption doctrine” of 2001-2003: The Bush Administration argued that international law permits the United States to engage in a “first use” strike, in a nonconsenting state, against a state or nonstate actor that has not already engaged in an armed attack against the United States, before any threat of attack is “fully formed”—indeed, even where the probability of any such future attack is “relatively low.” The Bush Administration used this very aggressive reading of self-defense to argue that international law would permit the use of force, in nonconsenting states, against all terrorist groups of “global reach,” regardless of whether they had developed, let alone engaged in, attacks against the United States, and, at least in theory, that self-defense would justify an invasion of Iraq, despite virtually no evidence that Iraq was likely to attack the United States. *That’s* what made the Bush “preemption” doctrine so controversial. Neither Brian Egan nor (as far as I know) any other Obama Administration official has endorsed such an untenable understanding of international law.

1. “Imminence.” Before turning to the *jus ad bellum*, a word about “imminence” generally. The term “imminent” or “imminence” is, of course, used in many diverse legal contexts, and it can have subtly different meanings or applications across various doctrines: as the Supreme Court

has recently reminded, it is “concededly a somewhat elastic concept.” Notably — and wholly independent of its use in the *jus ad bellum* — in most contexts “imminent” does not necessarily, or even primarily, mean “immediate” or “very soon.” Rather, it more commonly means “impending.” Webster’s offers: “ready to take place; *especially*: hanging threateningly over one’s head,” while a recent edition of Black’s Law Dictionary defined “imminent” as “[n]ear at hand; mediate *rather than* immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous.”

2. Article 51 and necessity in the law of self-defense. In order to make sense of the dispute about Brian Egan’s speech, it’s essential to understand the context in which “imminence” is relevant to the *jus ad bellum*, in particular. As I [explained last week](#) in discussing the speech, the question Egan was discussing is when, if at all, it is lawful for a state to use force unilaterally — that is, without Security Council authorization — in the territory of a nonconsenting state. As Egan explained, most of the U.S.’s uses of force against al Qaeda and ISIL have been *with* the consent of the host states, and therefore the *ad bellum* question has been inapposite in those cases. But host-state consent has been absent in other cases—most importantly, the 2011 operation against Osama bin Laden in Pakistan, [strikes against the Khorasan Group in Syria in 2014](#), and the ongoing operations in Syria against ISIL. When, if at all, are those uses of force lawful?

Article 2(4) of the U.N. Charter provides that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Article 51, however, clarifies that neither Article 2 nor any other provision of the Charter “shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.” As I noted in my earlier post, Egan confirms the U.S. view — which virtually no other nations dispute — that this “inherent” right of self-defense applies to threats from nonstate actors — such as ISIL today, or the Canadian rebels in the nineteenth century case of *The Caroline* — even in situations where the host state is not complicit in, or responsible for, the nonstate actor’s armed attacks upon the acting state.

The “inherent” right of self-defense against armed attacks, which Article 51 preserves, allows the use of force in a nonconsenting state (such as Syria) *only* if that force satisfies two fundamental conditions: necessity and proportionality. Thus, for example, if the host state is willing and able to eliminate the threat from the nonstate actor on its territory, then the threatened state may not use force within the host nation’s territory, because it would be unnecessary.[\[1\]](#)

The notion of “imminence,” historically, has been used to flesh out what it means to determine whether the threatened state’s use of force in self-defense would be *necessary*. To quote the classic formulation agreed to by both the U.S. and England in the *Caroline* case, the “*necessity of self-defence*” (rather than the threat) must be “instant, overwhelming, leaving no choice of means.” In other words, what must be “imminent,” in the *Caroline* sense, is not the threat of armed attack itself, but the need to use force in another state’s territory to *suppress* that threat. This is where I think many formulations of the “test,” including Egan’s, engender confusion. Egan referred, as many do, to “considering whether an *armed attack* is imminent”; but the relevant consideration is, instead, whether the need *to use force in the territory of the nonconsenting state* is “imminent.”

Thus, wholly apart from the fact (noted above) that the term “imminent” does not necessarily mean “immediate,” the *ad bellum* necessity test does not require proof that the armed attack from the territorial state or (here) from the nonstate actor is just around the corner. As Dapo Akande and Thomas Liefländer have [recently explained](#), “such an independent temporal limitation would mean that where a highly probable and severe threat exists, whose realization is temporally remote, no action could be taken even where no future opportunity will arise to eliminate the threat. The better understanding of the law is that where a threat is sufficiently probable and severe, the mere fact that it is still temporally remote should provide no independent injunction against action where that action is necessary and proportionate.”

This does *not* mean that the “temporal” question with respect to the anticipated armed attack is legally insignificant — to the contrary. The immediacy and certainty of the threat are very important considerations in the assessment of necessity; the more remote or speculative the threat is, the harder it is to demonstrate the necessity of using force in self-defense to prevent it, in large measure because a lot can happen between Time A and Time B that might diminish or eliminate the threat. I can’t put the point much better than Akande and Liefländer have done:

[D]enying the existence of an *independent* temporal limitation does not mean that temporal factors are unimportant. They have a heavy impact on the possibility of making accurate predictions about both the likelihood and the gravity of a threat. The shorter a causal chain is, the easier it becomes to predict what will occur. It will be harder to establish that a threat is sufficiently probable and severe if such a threat is still very far away in a temporal sense. In addition, and more importantly, the temporal dimension affects necessity. As noted, necessity allows using force only where no peaceful alternative is available [or, I would add in this context, where the host state itself is willing and able to suppress the threat]. Thus, where a military option will be available for some time because the threat is temporally remote, other options should be tried first. Other scholars, including those involved in the Chatham House principles, have read the imminence requirement similarly, focusing on the last point in time at which an effective responsive action is possible, rather than temporal proximity [of the threatened attack] **per se**. **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.**

Seen in this context, Brian Egan’s “factors” make perfect sense, because they are exactly the sorts of things one would be required to assess — in addition to the willingness and ability of the host state to deal with the problem — in considering whether the use of force is necessary, namely, “the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.”

I don’t think much of this understanding of the “inherent right of self-defense” is very controversial—not, anyway, amongst states. Moreover, it describes common practice: In the Charter era, there have been very, very few cases of asserted self-defense in a nonconsenting state in situations where the armed attack to be addressed was known to be *immediately*

forthcoming. In almost all such cases, the state invoking self-defense has asserted, or implied, that the attack was certain or almost certain; that it was impossible to assess precisely *when* the attack would occur; and, ultimately, that there was an immediate need to *prevent* the attack with a (proportional) use of force, because all other means had been exhausted, and/or because there was significant reason to doubt there'd be another "window of opportunity." It's almost unheard of, however, for a state to claim that it waited to act until the very moment before the threatened attack.

3. First use and the Bush Doctrine. This brings us to the area of real controversy, and to the major distinction between President Bush's "doctrine of prevention" and the Obama Administration's uses of force in self-defense — namely, **the question of *first use*.**

In a very real respect, virtually all instances of self-defense are "anticipatory," or "preemptive," in the sense that they are designed to prevent *future* (rather than ongoing) armed attacks. As I've explained above, that, in and of itself, is not terribly controversial. Yes, it is common ground between the Bush and Obama Administrations — but it was also fairly well-uncontested internationally for a very long time before 2001. (I'm generally trying to minimize use of the common adjectives "anticipatory," "preemptive" and "preventive" here, because they have been so promiscuously employed and have come to mean very different things to different people. But the type of self-defense I'm describing here is often termed "preemptive," whereas the Bush doctrine, described below, is often characterized as a form of "preventive" self-defense.)

Notably, however, in the Charter era, such uses of force in self-defense against future attacks have almost always occurred *after* the targeted party has already engaged in an armed attack, and thereby demonstrated its design and capability of threatening future attacks: very few, if any, cases of *ad bellum* self-defense in the Charter era have been against states or nonstate actors *before* they have engaged in any armed attacks against the acting state. (The U.S. invasion of Iraq in 2003 is often cited as a counterexample; importantly, however, the United States conspicuously declined to invoke self-defense in justification of that use of force.) That dearth of what we might call "purely" anticipatory self-defense is, in no small measure, a function of international law, because, as I explain below, it is not clear whether and to what extent Article 51 and the "necessity" requirement of the *jus ad bellum* permit *first* use of force, even in self-defense, in the territory of a nonconsenting state.

The Obama Administration has said little, if anything, about such "purely anticipatory" first use of force in self-defense. The two obvious cases in which self-defense has been a necessary predicate of U.S. action during this Administration have been the 2011 operation against bin Laden in Pakistan, and the strikes against the Khorasan Group in Syria in 2014. Bin Laden was the head of al Qaeda and, according to the President, the Khorasan Group consists of "elements of al-Qai'da." Al Qaeda, of course, has already engaged in large-scale attacks on the United States, and is dedicated to as many further such attacks as its capabilities will allow; as David Luban has put the point, al Qaeda has already sent an "unmistakable signal that [it] has crossed the line from diplomacy to force." The U.S. might not have known exactly *when* al Qaeda would next strike (or attempt to do so) — no more than the British knew exactly when the Canadian rebels would next strike when they set fire to *The Caroline*; but in both cases there was virtual certainty that the organized armed group would attack again if afforded the opportunity,

because it had already demonstrated the requisite intent, design and capability, and there was no reason to believe that it had abandoned its campaign against the threatened state.

Of course, the fact that al Qaeda will almost certainly continue to try to attack the United States, in and of itself, does not satisfy the “necessity” test for the U.S.’s use of force in a nonconsenting state — the U.S. still could not have lawfully struck the Khorasan Group in Syria, for instance, unless such intervention were “[necessary to defend the United States and our partners and allies against the threat posed by these \[al Qaeda\] elements](#),” as the President claimed they were. So why were such strikes deemed necessary? A “senior administration official” [explained](#), at the time of the attacks, that the Khorasan Group consisted of “al Qaeda veterans who have established a safe haven in Syria to develop and plan external attacks in addition to construct and test improvised explosive devices and to recruit Westerners for external operations.” The President’s order to strike against them reportedly was based on intelligence that “these senior Syria-based al Qaeda operatives were nearing the execution phase for an attack in Europe or the homeland,” and that “their plotting was reaching an advanced stage.”

The current operations against ISIL in Syria complicates the picture, but only by a bit. Recall that the United States’s [primary and formal justification](#) for using force against that group in Syria is the collective defense of Iraq, a nation that ISIL has repeatedly attacked. Self-defense *of the United States* therefore has not been a necessary justification for our actions in Syria. Even so, Brian Egan indicated that the U.S. believes its own self-defense would be an apparent alternative justification under Article 51, even though in recent years ISIL has not yet engaged in an armed attack specifically against the United States: “[I]n Syria,” said Egan, “U.S. operations against ISIL are conducted *in individual self-defense* and the collective self-defense of Iraq and other States.” Similarly, Great Britain has [formally invoked](#) both collective *and* individual self-defense as justifications for its use of force against ISIL in Syria, even though ISIL has (probably) not yet attacked that nation.[\[2\]](#)

These statements by the U.S. and the U.K. are undoubtedly the most forward-leaning and potentially controversial of those that Western nations have made in connection with the *jus ad bellum* and ISIL, because they at least imply that the U.S. and U.K. could use force in Syria against ISIL even *before* ISIL has operationalized or planned any armed attacks on those two nations. Recall that Article 51 preserves “the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member of the United Nations.” Read literally, this language would appear to exclude all “purely anticipatory” uses of force in self-defense, i.e., any “first uses” of force against actors that have not yet attacked the threatened state — in which case the British and American statements would be in tension with the treaty language.

That has not been the predominant understanding of Article 51, however: virtually all states and commentators acknowledge that a state must be allowed to employ force — even a “first use” — to prevent, at a minimum, a certain and immediately impending attack that it is about to suffer (such as the proverbial case where tanks are massing on its border and planning to attack in the morning). And, in any event, the U.S. and U.K. statements about a hypothetical “first use” of force in self-defense against ISIL are hardly surprising or alarming, because ISIL has already demonstrated, beyond peradventure, that it is ready, willing and able to attack every member of the Western coalition arrayed against it, just as it has already attacked, e.g., France, Egypt, Iraq,

Tunisia, Belgium, etc. Moreover, ISIL has brutally executed U.S. nationals who it has captured, and it killed dozens of British tourists in Tunisia. The primary rationale for limiting the permissibility of “first uses of force” in self-defense is the uncertainty of whether such anticipatory action is necessary: unless and until the nation or group in question has demonstrated a design and capability of making such attacks, it is often difficult to know whether it would actually strike. That concern is virtually absent here: There’s little doubt that, left to its own devices, ISIL would attempt to attack the U.S. and the U.K. Therefore, the British and American suggestions that the Charter would permit “first use” of force against ISIL in Syria, although provocative, are not terribly ground-breaking. (Once again, such “first use” in Syria would only be lawful if it were necessary to prevent the future ISIL attacks, and proportional to that objective. Those assessments remain largely academic, however, because the U.S.’s primary rationale for use of force in Syria — collective defense of Iraq — is compelling.)

Contrast all of this with what was so controversial about the United States’s “doctrine of preemption” in 2001-2003. The Bush Administration not only argued that “first use” strikes in self-defense of the U.S. could be permissible, but also provocatively suggested that such first strikes could be launched against groups or states that had not yet demonstrated that they would, or could, engage in armed attacks against the United States.

This much more robust — and much more controversial — notion of the “inherent right of self-defense” emerged in two very high-profile contexts. First, on September 20, 2001, President Bush famously [declared](#) that “[o]ur war on terror begins with Al Qaeda, but it does not end there. It will not end until **every terrorist group of global reach** has been found, stopped and defeated.” This statement certainly appeared to suggest that the United States could (and would) use force against any terrorist group by virtue of its “global reach,” regardless of whether it had already attacked the United States or had concrete and operational plans to do so.

Then, in September 2002, the President’s [National Security Strategy](#) (NSS) went much further still, indicating a right under international law to strike at state and nonstate actors before they even have the *capability* of attacking the United States (and presumably before they had expressed or operationalized any serious designs to do so): According to the NSS, the United States must “stop rogue states and their terrorist clients *before they are able to threaten or use weapons of mass destruction* against the United States and our allies and friends,” which justifies using force “against such emerging threats *before they are fully formed*.”

Less than five weeks later, the Office of Legal Counsel demonstrated the import and vast breadth of this novel idea: OLC [opined](#) that going to war against Iraq would be a permissible exercise of a so-called “reformulated test for using force in anticipatory self-defense” because Iraq *might* develop chemical and biological weapons and then *might* one day use them against the United States. OLC concluded that the President could legitimately use military force against Iraq even in the absence of “information regarding whether the use of force against Iraq at a particular time would be necessary to take advantage of a window of opportunity to prevent the threat of a WMD attack from materializing,” and, most strikingly of all, “even if the probability that Iraq itself would attack the United States with WMD, or would transfer such weapons to terrorists for their use against the United States, were relatively low.”[\[3\]](#)

As Marko Milanovic has [noted](#), this self-defense analysis by OLC so obviously did not reflect the customary *jus ad bellum*,^[4] and was “so outlandish that it was in the end not formally relied on by the United States [to justify its use of force](#) against Iraq” in 2003. It did, however, reflect the remarkable breadth of the Bush Administration’s efforts to broaden the concept of “necessity” for purposes of anticipatory self-defense under the *jus ad bellum*, beyond what any reasonable reading of customary law would sanction.

Neither Brian Egan’s speech, nor any other statement or action by the Obama Administration, has come anywhere close to suggesting an embrace of this, the most controversial aspect of the Bush doctrine as articulated in the President’s speeches, the 2002 NSS, and the OLC Iraq opinion. Indeed, Egan’s speech — unlike the most controversial instances of the Bush Administration’s invocations of “preemptive use of force” — does not even address question of first use, at least not expressly. And that’s because the Obama Administration has not engaged in any such practice, nor had any occasion to discuss whether and when such first use of force would be lawful.

[1] Fionnuala Ní Aoláin thus is mistaken in [describing](#) the “unable or unwilling” assessment as “random” or as having “more than a hint of ‘legal lego-land’ to it.” There is nothing new or controversial about requiring the threatened state to assess whether the territorial state is unwilling or unable to suppress the threat. That is a simple and straightforward *precondition* to satisfying the requirement of “necessity,” without which the victim state cannot act in self-defense on the territory of the nonconsenting host state. I would be surprised if any state disagrees with this basic requirement. Fionnuala appears to be concerned that “unable and unwilling” would be viewed as a *sufficient* condition for the use of force without the host state’s consent. But that is not correct, and Egan didn’t imply any such thing: Of course, in addition to satisfying the condition of necessity, the threat itself has to be of the sort that justifies the “inherent right of self-defense,” and the use of force must be proportionate to preventing the threatened future armed attacks.

[2] Thirty of the 38 victims of the attack at the Sousse Hotel in Tunisia last year were British tourists; but it is not clear whether that was an ISIL-designed attack on Great Britain, in particular.

[3] That October 2002 OLC opinion also offered broad and unconvincing accounts of the scope of the customary law of self-defense and of the President’s constitutional authority to start a full-scale war without congressional approval. All and all, it might have been the most far-reaching and misguided of all the Bush Administration OLC’s opinions.

[4] OLC made virtually no effort to show that its analysis actually reflected customary international law. Indeed, its historical survey uncovered only one instance in which a single nation relied upon such a theory — Israel invoked it to defend its 1981 attack on the Osirak nuclear reactor under construction in Iraq — and in that case, as OLC conceded, “the international community, *including the United States*, condemned the Israeli attack.” The Security Council unanimously adopted a [resolution](#) “[s]trongly condemn[ing]” the Israeli strikes

as a “clear violation” of the U.N. Charter, and the U.S. Legal Adviser in the first Bush Administration, Abe Sofaer, later confirmed that there was an “absence of any evidence that Iraq had launched or was planning to launch an attack that could justify Israel’s use of force.” “While Israel’s anxiety concerning Iraq’s intentions may have been reasonable,” wrote Sofaer, “the presence in a State of the military capacity to injure or even to destroy another State cannot itself be considered a sufficient basis for the defensive use of force.” 126 Mil. L. Rev. 89, 109 (1989).

Indeed, OLC went far beyond even what Grotius opined would be lawful almost 500 years ago: Grotius reasoned that although “an injury not yet inflicted, which menaces either person[] or property,” can be a justifiable basis for war if it is “immediate and certain, not when it is merely assumed,” it would be “untenable” for a state to attack a “growing power which, if it became too great, may be a source of danger.”

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JUST SECURITY

President Obama's Report on the Legal and Policy Frameworks Guiding and Limiting the Use of Military Force [UPDATED]

<https://www.justsecurity.org/35239/president-obamas-report-legal-policy-frameworks-guiding-united-states-military-force-related-national-security-operations/>

by [Marty Lederman](#)

December 5, 2016

The Administration just released five new documents relating to the use of force, including detention, in counterterrorism operations against nonstate armed groups. The most important of these is [this remarkable report](#), which comprehensively describes the domestic and international legal bases for the United States' ongoing use of military force overseas and some of the key legal and policy frameworks that the law and the Obama Administration have established to govern and limit such uses of force and related national security operations, such as detention, transfer, and interrogation operations. (I'll refer to it here as the "Use of Force Framework Report," or "the Report.")

In addition, the President has issued a [Presidential Memorandum](#) that will—unless a future President rescinds it—require the Executive branch to build upon the Use of Force Framework Report; it directs the national security departments and agencies to prepare such a report annually.

The President also transmitted his final semiannual [War Powers report](#) to Congress, describing the basis for the current and ongoing U.S. use of military force in six nations—an account of current operations that the Use of Force Framework Report explains in much greater detail.

Fourth, the Administration has posted the unclassified portions of the [August 2009 Report](#), issued by the special task force established by Section 5 of [Executive Order 13491](#), to study and evaluate the practices of transferring individuals to other nations.

Finally, the Department of Justice has posted the [2012 report](#) it issued to Congress on "U.S. detention policy, including the legal basis for such a policy, as it applies to current and future terrorism detainees," consistent with the Manager's Statement regarding the 2012 "Minibus" Appropriations Act, Public Law No. 112-55.

In the first part of this post, I summarize some of the most important aspects of the Use of Force Framework Report. In the second part, I identify a small handful of questions that the Report

does not address, and one discrete matter (about a provision of the Convention Against Torture) as to which the Report (in a footnote) errs.

I

The [Use of Force Framework Report](#) does not break any dramatic new ground. It is, instead, a compilation, and summation, of explanations the Obama Administration has provided in more than 40 earlier speeches, releases, briefs, memoranda, etc., published between the President's third day in office and Defense General Counsel O'Connor's speech at NYU last week. The Appendix to the Report lists the vast majority of those other documents, and the Report itself in effect consolidates many of them into a single document, which sets forth the vast majority of the legal and policy frameworks, and limits, that have governed U.S. counterterrorism operations for the past eight years. [For some thoughts on why such a compilation is especially valuable, I highly recommend Ben Wittes' [overview](#). See also the thorough [summary](#) of the Report from Lawfare's Chris Mirasola and Helen Klein Murillo.]

Most importantly, the Report describes how, as the President writes in the Foreword, “the United States complies with all applicable domestic and international law in conducting operations” against its current nonstate enemies, and further “recounts actions my Administration has taken to institutionalize a policy framework to ensure that, in carrying out certain critical operations, the United States not only meets but also in important respects exceeds the safeguards that apply as a matter of law in the course of an armed conflict—particularly in the areas of the preservation of civilian life, transparency, and accountability.”

Before identifying some of the more important components of those legal and policy frameworks, it is important to note at the outset that the Report dispels two overarching, misleading themes that unfortunately are beginning to take hold as the nation transitions to the Trump Administration.

First, many critics allege that the U.S. government's counterterrorism practices and legal limits have been unusually secret, or insufficiently transparent. This indictment is somewhat understandable because several aspects of the government's actions have, indeed, remained unacknowledged (e.g., the extent to which the government has acted in certain nations, and the terms of consent and other diplomatic arrangements with those nations), and because the government has not defended yet other, acknowledged action in granular detail where they have been based upon sensitive sources of intelligence that cannot be disclosed without compromising such sources (human, electronic and otherwise). I have written at length on this blog about the sources and causes of such nonacknowledgement and secrecy, and about how we might begin addressing the serious problems raised by such practices—see, e.g., [this post](#), and [this one](#), and [this one](#). But until such time as those practices dramatically change—not only for the United States, but also for many other nations that regularly insist upon nonacknowledgement as a condition of consent and cooperation—there are, unfortunately, limits on what the government can reveal about its overseas practices. As the President writes in his Foreword, “there remains information about U.S. national security operations that we cannot disclose consistent with national security. Nor does this report address all conceivable legal

aspects or justifications for the use of military force in every context or provide an exhaustive discussion of how the United States wages war.”

Even so, today’s Report undermines the idea that the United States has been especially or unusually secretive about its conduct of war, and the legal and policy frameworks that govern it, over the past eight years. The Report demonstrates, I think, that the United States has been far more forthcoming about such matters than any state has ever been, in any war or armed conflict in history. Nor is it even a very close question: I am unaware of any historical precedents for a Report with this level of description and explanation (not to mention the more than 40 other documents from which the Report is derived)—not even the Lieber Code itself, which the President understandably invokes as a model in the very first sentence of the Report. (I would be happy to be proven wrong about this, if any readers have helpful examples of states offering even greater detail about such matters.)

That is not to say that the Report and its generative documents are sufficient. As I point out below, and in my previous posts, the U.S. should take steps to enable it to offer even greater detail and transparency on the questions the Report addresses, not only to Congress but to the public as well. The President agrees. That’s why, in his [Memorandum](#) today, he has directed national security departments and agencies to “prepare for the President a formal report that describes key legal and policy frameworks that currently guide the United States use of military force and related national security operations, with a view toward the report being released to the public,” and has further directed that, “[o]n no less than an annual basis, the National Security Council staff shall be asked to, as appropriate, coordinate a review and update of th[at] report . . . , provide any updated report to the President, and arrange for the report to be released to the public.”

Whether or not the Administrations of President Trump and his successors make good on that requirement, today’s Report is, I think, a major step forward in terms of describing and making transparent the United States’s legal and policy-based understandings of the frameworks and limits on its uses of force abroad.

Second, the Report belies, and renders fairly untenable, the increasingly articulated meme that President Obama has bequeathing to President Trump a set of virtually unbounded authorities to use force abroad. To be sure, it is possible that President Trump might abandon some of the very important policy constraints that President Obama has insisted upon. But that prospect is something President Obama does not have the authority to prevent. The President has, however, done all that he could—including in this Report itself—to make the case why future Presidents ought to continue, and build upon, the frameworks he has established, which have made the use of force abroad much more discriminating and substantially limited the incidence of civilian casualties, far beyond what the law requires. Moreover, the Report demonstrates that there are numerous *legal* limits on the use of force that are more restrictive than many commentators, and potential Trump officials, have acknowledged.

Now, on to the substance of the Report. What follows are merely some of the highlights. There is much more in the Report itself, which warrants careful reading.

1. Limits on the current armed conflicts—with special attention to ISIL and al Shabaab.

The Report confirms the Administration’s understanding that Congress has *not* authorized the President to conduct a so-called “Global War on Terror,” or (in President Bush’s [words](#)), a “war on terror . . . [with] every terrorist group of global reach”—let alone a “war” against all of “radical Islamic terrorism.” The 2001 AUMF, instead, authorizes the use of necessary and appropriate force only against particular nonstate groups that have actually attacked or (in perhaps some rare cases) planned to attack the United States. And even as to such groups, the war is not “global”—it is, instead, bounded by international law, which would prohibit the use of force in the vast majority of the world’s nations, including in all those states that are able and willing to deal with a threat emerging from within their borders.

As for the particular groups now covered by the AUMF, the Report reiterates that they are few in number: al-Qa’ida (including individuals who are part of al-Qa’ida in Libya and al-Qa’ida in Syria); the Taliban; “certain other terrorist or insurgent groups affiliated with al Qa’ida or the Taliban in Afghanistan”; AQAP; ISIL; and, now, al-Shabaab.

Of these, the only ones covered by the AUMF solely by virtue of being “associated forces” are the (unnamed) terrorist or insurgent groups affiliated with al Qa’ida or the Taliban in Afghanistan, and al-Shabaab. The finding that Shabaab is an “associated force” is something new in the Report. It was also a bit of a surprise when it was reported last week, because until now there has not been (as far as I know) any public information to the effect that Shabaab had actually “entered the fight alongside al-Qa’ida . . . in hostilities against the United States or its coalition partners,” which is what is necessary in order to become an “associated force” under the AUMF. The new Report explains, however, that “[a] determination was made at the most senior levels of the U.S. Government . . . only after a careful and lengthy evaluation of the intelligence concerning each group’s organization, links with al-Qa’ida or the Taliban, and participation in al-Qa’ida or the Taliban’s ongoing hostilities against the United States or its coalition partners,” and that, with respect to Shabaab in particular, “this determination was made recently . . . because, among other things, al-Shabaab has pledged loyalty to al Qa’ida in its public statements; made clear that it considers the United States one of its enemies; **and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa.**” “In short,” the Report explains, “al-Shabaab has entered the fight alongside al-Qa’ida and is a cobelligerent with al-Qa’ida in hostilities against the United States, making it an ‘associated force’ and therefore within the scope of the 2001 AUMF.”

This explanation is very welcome, and important. Ideally, the government will at some point be able to offer the public further evidence that Shabaab has, *as a cobelligerent of al Qaeda*, and in the conflict between the U.S. and al Qaeda, “been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa.” Presumably, such a detailed public account is not yet possible because of the sensitivity of the sources on which the relevant intelligence is based. Even so, this Administration or the next one should do whatever it can to describe such evidence, not only to Congress but also to the public, so that the American people can be informed about how Shabaab is actively engaged in hostilities against the United States in a way that justifies the use of military force against that the members of that terrorist group. It is vitally important to belie the common assumption that the President has statutory (or

constitutional) authority to strike the members of any terrorist organization that he deems potentially threatening, without more.

With respect to ISIL, the Report reiterates the legal theories for the use of force that the government has previously offered under the 2001 and 2002 AUMFs, which I describe in greater detail [here](#). (For what it's worth, I think the 2002 AUMF argument (see note 25 of the Report) is the stronger one, particularly insofar as the U.S. is acting against ISIL in order to prevent that group's attacks on and threats to Iraq.) Importantly, the Report adds a brief factual explanation (p.6) of why the use of force against ISIL is designed not only to protect Iraq against ISIL attacks, but also to protect the United States itself from current ISIL attacks and threats: ISIL “has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel that are now present in Iraq at the invitation of the Iraqi Government.”

As for geography, the Report repeats the government's view that the AUMF is not limited to Afghanistan, but it also studiously avoids any claims of authority to use military force to strike members of the covered armed groups anywhere and everywhere. To the contrary, and as the Administration has explained before, the Report confirms that international law (which governs interpretation of what is “necessary and appropriate” under the AUMF) would prohibit the use of military force across the vast majority of the globe: The Executive does not have “a license to wage war globally or to disregard the borders and territorial integrity of other States.” In particular, the U.S. may use force “on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using the State's territory as a base for attacks and related operations against other States.” (And even as for states that have given consent, the Administration has not asserted that force could be used any enemy forces without limit. In its [al-Aulaqi memorandum](#), for example, OLC went only so far as to say that the armed conflict against AQAP, and AUMF authority, applied “in Yemen, where . . . AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States.”)

2. Basis for Article 51 actions pursuant to “inherent right of individual or collective self-defence” against nonstate actors in nonconsenting states.

As the Report indicates, the United States has rarely used force in the past eight years in the territory of a state that did not consent to it—the principal exceptions being the bin Laden operation in Pakistan (discussed [here](#) and [here](#)) and the recent operations in Syria. Those rare cases raise the question of whether the U.S. is complying with Article 2(4) of the U.N. Charter, which provides that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

Article 51 of the Charter confirms that neither Article 2 nor any other provision of the Charter “shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.” And today's Report restates what State Legal Advisor Brian Egan explained in his [recent speech](#)—namely, that the “inherent right of individual or collective self-defence” can apply to actions taken to address “armed attacks” from nonstate

actors (such as ISIL today, or the Canadian rebels in the nineteenth century case of *The Caroline*) even in situations where the host state is not complicit in, or responsible for, the nonstate actor's armed attacks upon the acting state. The Report correctly states that this view is "widely accepted"—indeed, it is difficult to identify any states that have publicly rejected it. The Report also helpfully reiterates that use of force against such attacks are permissible in self-defense only, at a minimum, when they satisfy the *ad bellum* requirement of "necessity," and that the "unwilling or unable" test is an application of that necessity requirement—a *precondition* on the use of force, not a sufficient justification for it. I discuss all of this, along with questions of "imminence" related to Article 51 self-defense, in much greater detail in [my post](#) about the Egan speech.

3. Additional legal limits on use of force directed at U.S. citizens.

Part I-B-1 of the Report offers a useful summary of the additional legal constraints that apply in the rare cases in which the government decides whether to use lethal force against a U.S. citizen who has joined enemy forces and planned attacks against the United States from abroad. It also states that the U.S. has only made a "specific, targeted strike against an identified U.S. citizen" once—the strike against Anwar al-Aulaqi.

4. Article II authority.

Perhaps because virtually all current military operations are being conducted pursuant to statutory authorities, the Report does not go into a lot of detail about the President's Article II authority to act in the absent of such authority. It does, however, incorporate the OLC analysis in the [2011 opinion on Libya](#), which articulates what [I have called](#) the "third way" view, falling between the "traditional" view that the President's constitutional initiation authority is limited to repelling ongoing or imminent attacks, and the view of the George W. Bush Administration, which was that the President can take the Nation into full-fledged, extended war without congressional approval, as President Truman did in Korea, as long as he does so in order to advance the "national security interests of the United States." The Report further confirms that when the President does act pursuant to his Article II authority, he is subject to the requirements and limits of the War Powers Resolution, including the 60-day clock of section 5(b).

The Report offers one example where the President recently relied on his constitutional authority to direct U.S. military force: the October 2016 strikes against radar facilities in Houthi-controlled territory in Yemen that were designed to protect U.S. forces against Houthi attacks, where the "limited nature, scope, and duration meant that the operation did not rise to the level of 'war' within the meaning of the Declaration of War Clause." Protection of U.S. forces is, indeed, a well-established basis for at least limited exercises of Article II authority. (Today's [War Powers report](#) to Congress indicates that the strikes against al-Shabaab this year on June 21, July 20, July 31, August 31, September 25, and September 28 were all undertaken, at least in part, in defense of U.S. forces against attack, even if they might have occurred before the determination was made that Shabaab is covered under the AUMF as an associated force of al Qaeda.)

The Report does not address two other Article II questions that have arisen in recent years: (i) whether the President’s Article II authority ever includes the power to act in a way that puts the U.S. in breach of its obligations under the U.N. Charter (I argued [here](#) that it probably doesn’t); and (ii) whether and when Article II authorizes the President to use force purely for *humanitarian* purposes, at least in limited circumstances. The President’s September 1, 2014 [War Powers report](#) suggested an affirmative answer to the latter question, with respect to “operations . . . limited in their scope and duration as necessary to address this emerging humanitarian crisis and protect the civilians trapped in Amirli, Iraq,” when that town was “surrounded and besieged by ISIL.” Because we now know, however, that the Administration views the 2001 and 2002 AUMFs as covering ISIL, it is unclear to what extent the September 2014 War Powers report was intended to set an Article II precedent. The question is certainly an important topic for future consideration, and debate, even if it is unlikely that President Trump will often be inclined to use force without congressional authorization for humanitarian purpose.

5. The 2013 PPG.

Part I-C-1 of the Report discusses the critically important policy restraints, both procedural and substantive, in the 2013 Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (PPG). This [recent excellent essay by Luke Hartig](#) explains the practical significance of the PPG—how dramatically it has affected how often the nation uses force, and how successful it has been in reducing the level of civilian casualties.

By its terms, the PPG does not apply—at least not in full—to so-called “areas of active hostilities,” which currently include Afghanistan, Iraq, Syria, and certain portions of Libya. It has been something of a puzzle how and why the Administration determines whether certain locations are, or are not, subject to the PPG. Today’s Report helpfully offers a bit more insight (p.25) on the multiple factors that apparently bear on that question:

The determination as to whether a region constitutes an “area of active hostilities” does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location. Afghanistan, Iraq, Syria, and certain portions of Libya are currently designated as “areas of active hostilities,” such that the PPG does not apply to direct actions taken in those locations. The policy standards and processes contained in the PPG also do not apply to direct action taken when the United States is acting quickly to defend U.S. or partner forces from attack or outside the counterterrorism context, such as the October 12, 2016, U.S. military strikes on radar facilities in Houthi-controlled territory in Yemen.

6. Application of human rights law.

The Report states that “a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations,” and that “[i]nternational human rights treaties, according to their terms, may also be

applicable in armed conflict.” In particular, the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) “continues to apply even when a State is engaged in armed conflict.” [UPDATE: I just recalled that Sarah Cleveland published a [great post](#) on this topic two years ago, when the U.S. delegation appeared in Geneva and “articulated a welcome and substantially refined vision of the relationship between IHL and the CAT, in which the terms of the CAT presumptively apply, except in the quite specific case of a conflict between IHL and a particular CAT provision.”]

The Report further states that “[i]n accordance with the doctrine of *lex specialis*, where [human rights law and the law of armed conflict] conflict, the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims.” There are, however, very few instances in which human rights law actually *conflicts* with IHL. (At the end of this post, I discuss how the one example the Report offers does not actually involve a conflict between these bodies of international law.)

The Report does not specifically discuss one of the most frequently debated questions about the relationship of IHL and IHRL—namely, how Article 6(1) of the International Covenant of Civil and Political Rights (ICCPR), which prohibits the “arbitrary” taking of life, applies with regard to the use of force against enemy forces in an armed conflict. Footnote 37 of the OLC [al-Aulaqi memo](#) does, however, briefly address the U.S.’s views on that question.

7. Limits on aid to allies and partners.

Part IV-A of the Report provides a thorough discussion of the various laws and policies — including not only international law, but, importantly, the “Leahy Laws” and Executive Order 12333 — that limit U.S. provision of aid and assistance, including intelligence, to other states when those other states violate international law or fail to meet other domestic-law standards. The Report also explains (p.13) that when sharing intelligence, the U.S. may not ask a partner to do anything that the U.S. government itself cannot.

8. Urging Consent to Additional Protocol II

The Report reiterates the Administration’s strong support for Senate advice and consent to Additional Protocol II to the Geneva Conventions, which contains detailed humane treatment standards and fair trial guarantees that would apply in the context of non-international armed conflicts. The Report restates that U.S. military practice is already consistent with the Protocol’s provisions. Joining the treaty thus “would not only assist the United States in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also reaffirm the United States’ commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.”

9. Strong preference for criminal (especially Article III) trials.

The Report reiterates the President’s strong preference for Article III trials of terrorism suspects, and his belief that *long-term* military detention should be an option of last resort. (In [this post](#), I discuss the President’s success in virtually ending the practice.) Indeed, the Report notes that

“[i]n practice, *all* of the terrorism suspects apprehended and held by the U.S. Government since January 2009 outside of areas of active hostilities have ultimately been handled by the criminal justice system, as many others were in prior Administrations, or have been transferred to other countries.” The Report further explains that *Miranda v. Arizona* has not resulted in any loss of intelligence from the individuals who are prosecuted within the Article III system. The 2012 [DOJ memo](#) on detention practices, also released today, goes into greater detail on *Miranda* warnings: “Many years of experience have demonstrated that *Miranda* warnings are not a significant impediment to intelligence collection, and that the question whether a terrorist suspect will cooperate depends principally on the individual, the facts and circumstances of the case, and the skill of the interrogators.”

10. Multiple legal and policy-based restrictions on torture and other forms of abuse.

Part III-C-1 of the Report offers a comprehensive assessment of the numerous legal and policy-based limits on the torture and other abuse of detainees—a legal regime that ought to be very difficult, if not impossible, for a future Administration to change or circumvent. (Footnote 205 also stresses, contrary to some incorrect speculations, that Appendix M of Army Field Manual - 22-3 does not authorize or condone the use of sleep manipulation or sensory deprivation, and specifies that “all techniques, including separation, must be applied in a manner consistent with the prohibition on torture and CIDTP.”)

11. “Substantial support”.

Page 30 of the Report restates that the 2001 AUMF authorizes the detention—at least in theory—of some individuals who “substantially support” enemy forces in the course of their hostilities against the United States or its coalition partners. Importantly, however, the Department of Justice’s [March 13, 2009 brief](#), described in the Report, clarifies that this authority extends only to persons “whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.” Thus, as Steve Vladeck and I [have explained](#), it is necessary to look to permissible detention practices that would be “appropriately analogous . . . in a traditional international armed conflict” in order to determine which forms of “support” by individuals who are not part of enemy forces would justify detention in the current noninternational conflicts. Today’s Report repeats the example we offered (which was also mentioned in a DOJ brief in the *Hedges* case): Perhaps substantial supporters of enemy forces who are apprehended while accompanying such forces can be detained on roughly the same terms as the forces themselves, just as “civilian members of military aircraft crews or members of services responsible for the welfare of the armed forces” can be detained in an IAC. *Cf.* Third Geneva Convention, art. 4(4). The Report notes, however, that “[i]n practice, the United States has not relied in court proceedings exclusively on the ‘substantial support’ concept to justify the continued detention of any individual held at Guantanamo Bay.” Furthermore, and importantly, the Report does *not* suggest that “supporters” outside of enemy forces can always be *targeted*. Such a use of force would be permissible only if, and when, the support rises to the level of direct participation in hostilities (a subject the Report does not discuss).

In this final part of the post, I'll identify three topics the Report does not discuss in detail that warrant further consideration, and then one discrete issue, concerning Article 14 of the CAT, on which I think the Report is probably incorrect.

1. Covert Action.

Not surprisingly, the Report does not discuss covert actions. Indeed, the principal topic of today's Report is (as its title indicates) the use of *military* force; and it is unlikely (though not inconceivable) that the military is engaged in covert uses of force. In his Foreword, however, the President does assure, somewhat more categorically, that "the United States complies with all applicable domestic and international law in conducting operations against" its new nonstate enemy forces. Likewise, on page 19 the Report states that "*[t]he U.S. Government* makes extensive efforts to ensure that its targeting efforts comply with all applicable international obligations, domestic laws, and policies."

Covert actions are anything but unregulated as a matter of law. There are both statutory limits and restrictions within the various, sometimes highly reticulated terms of the pertinent presidential notifications, or Memoranda of Understanding (MON), that must be signed in order to authorize covert actions. The Report naturally does not get into these questions, some of which I discuss in [this post](#). And, because the Report does not consider covert actions specifically, it does not address the important and difficult question that might have been raised by the bin Laden operation—namely, whether the President has constitutional or statutory authority to use covert action that breaches Article 2(4) of the United Nations Charter. I offer some tentative views on the question [here](#); as I note in that same post, however, the government probably did not have to resolve the question in the bin Laden case, because it likely concluded that the operation was a permissible action in self-defense under Article 51 of the Charter.

2. Assessing who is "part of" enemy armed forces.

At pages 29-30, the Report includes a rich discussion, derived from Brian Egan's [recent speech](#), concerning how to determine whether an individual is "part of" an enemy force who can be targeted or detained for the duration of hostilities. As the Report explains, it is often impossible to rely upon the usual indicia of integration, such as membership cards or uniforms, to assess membership in nonstate armed forces such as those with which we are currently engaged in armed conflict. Therefore, although in some cases there might be evidence of formal membership, or willingness to be subject to the command structure—namely, a loyalty oath—often it is necessary to look instead to "functional indications" (the Report lists at least a dozen), and the ultimate question "will necessarily turn on the totality of the circumstances." Moreover, as the Report notes, the U.S. Court of Appeals for the D.C. Circuit has clarified that "[e]vidence that an individual operated within al-Qaida's command structure is 'sufficient but is not necessary to show he is 'part of' the organization,'" at least for purposes of detention.

All this is correct, and reflects the recent case law, but neither the Report itself nor the court of appeals has quite come to terms with *how* the totality of the circumstances should be assessed, i.e., what precise question must be answered in cases where there is no evidence of formal "membership" in an enemy force. Identifying that critical question should, in turn, probably

depend on *why* the law permits targeting (and long-term detention) of individuals who are part of the armed forces in the first instance. For example, if that longstanding norm is predicated on the idea that it is permissible to incapacitate individuals who are valuable assets of the enemy because they are subject to its direction and control—who will attack the opposing force when ordered to do so—then whether or not an individual *is* subject to, e.g., al Qaeda’s direction and control ought to be the ultimate question to be asked and answered, even if (as the courts have held) it is not necessary to proffer any express, or direct, evidence of such direction and control, or that the individual was “operating within the command structure.”

This is a very difficult, unresolved topic that warrants further careful study (and possibly further elucidation in habeas litigation).

Moreover, the Report implies that proof of membership in al Qaeda is sufficient to render a person targetable (and detainable). As I’ve explained [elsewhere](#), that might be correct, at least if the government is right that al Qaeda is an organized armed group—a military organization—through and through, with no “civilian” wing, and that therefore membership in al Qaeda is analogous to being enlisted in the U.S. armed forces, making one targetable on that ground alone (except when such persons are *hors de combat* or entitled to special protection due to their particular function).

As I wrote, however, things are more complicated when it comes to ISIL because, unlike al Qaeda — but like, say, Hamas in Gaza — ISIL effectively controls and governs substantial swaths of territory. Presumably, therefore, the “membership” of ISIL includes some officials who have purely civilian, governance functions, who have no duty to follow direction to perform belligerent functions. If there are such civilian ISIL members, the U.S. presumably could not target them unless and until they directly participate in hostilities. (The ISIL situation, in other words, might be more analogous to U.S. targeting of the Taliban in 2001, when it still governed Afghanistan. Likewise, in its 2014 conflict against Hamas in Gaza, Israel considered certain components of Hamas, but not others, as organized armed groups subject to targeting (see paragraphs 264-267 of [this Report](#).)

Today’s Report does not address this question, which might be of increasing importance in operations against ISIL. It, too, warrants further careful attention.

3. Extraterritorial Application of Convention Against Torture Article 3.

Article 3(1) of the U.N. Convention Against Torture provides that “[n]o State Party shall expel, return (“refoul”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” As today’s Report notes, “in 2008, the United States stated that Article 3 of UNCAT 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.” The Report further stresses, however, that “as a matter of policy, the United States applies the UNCAT Article 3 standard to all transfers regardless of location.” Therefore, as the [2009 Task Force Report](#) released today noted, “[i]n light of the United States’ 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.

I hope and trust that this policy commitment will remain in place, and that it will never become necessary for the United States to reconsider the treaty interpretation question; if it ever does so, however, Harold Koh has offered compelling reasons (see [pp. 52-72](#)) why the Bush Administration position is open to serious question. (FWIW, I have not closely studied the question myself.) Moreover, as Koh also wrote, “[t]he denial of the legal obligation invites suspicion and distrust from our audiences, domestic and foreign” and “invites emulation from States less scrupulous about compliance, and thus risks undermining the effectiveness of the global regime of protection the CAT sought to establish.”

4. Whether Article 14 of the CAT applies in armed conflicts.

As I noted above, the Report commendably explains that “a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations.” It further states, however, that where human rights law and IHL “conflict” with one another, “the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims.” Then, in footnote 198, the Report offers the following example of a supposed “conflict” between the two bodies of law:

For example, although Article 14 of the Convention [Against Torture] contemplates an enforceable right to fair and adequate compensation for victims of torture, it would be anomalous under the law of armed conflict to provide individuals detained as enemy belligerents with a judicially enforceable individual right to a claim for monetary compensation against the Detaining Power for alleged unlawful conduct. The Geneva Conventions contemplate that claims related to the treatment of POWs and Protected Persons are to be resolved on a state-to-state level, and war reparations claims have traditionally been, and as a matter of customary international law are, the subject of government-to-government negotiations as opposed to private lawsuits.

I assume this is a correct description of how torture and other “war reparation” claims have “traditionally” been resolved, consistent with IHL, under “traditional” practice between belligerent states in *international* armed conflicts. (Obviously, there is no such state-to-state method of resolution in a NIAC, and therefore the footnote point about Article 14 should be understood to be specific to IACs.) As Sarah Cleveland earlier [wrote](#), however, there’d be nothing “anomalous” about also providing detainees with a judicially enforceable individual right, as Article 14 requires. More to the point, recognizing such an individual right would not *conflict* with IHL—there would simply be complementary potential remedies. Therefore the footnote fails to make the case that Article 14 does not apply in armed conflict, even assuming the “conflict” version of *lex specialis* described in the Report text.

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Why the strikes against Syria probably violate the U.N. Charter and (therefore) the U.S. Constitution

<https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/>

by [Marty Lederman](#)

April 6, 2017

[UPDATED] The Pentagon has issued the following statement about the U.S.'s use of 59 Tomahawk missiles against the Shayrat Airfield in the Homs governorate of Syria this evening:

Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. strike in Syria

At the direction of the president, U.S. forces conducted a cruise missile strike against a Syrian Air Force airfield today at about 8:40 p.m. EDT (4:40 a.m., April 7, in Syria). The strike targeted Shayrat Airfield in Homs governorate, and were in response to the Syrian government's chemical weapons attack April 4 in Khan Sheikhoun, which killed and injured hundreds of innocent Syrian people, including women and children.

The strike was conducted using Tomahawk Land Attack Missiles (TLAMs) launched from the destroyers USS Porter and USS Ross in the Eastern Mediterranean Sea. A total of 59 TLAMs targeted aircraft, hardened aircraft shelters, petroleum and logistical storage, ammunition supply bunkers, air defense systems, and radars. As always, the U.S. took extraordinary measures to avoid civilian casualties and to comply with the Law of Armed Conflict. Every precaution was taken to execute this strike with minimal risk to personnel at the airfield.

The strike was a proportional response to Assad's heinous act. Shayrat Airfield was used to store chemical weapons and Syrian air forces. The U.S. intelligence community assesses that aircraft from Shayrat conducted the chemical weapons attack on April 4. The strike was intended to deter the regime from using chemical weapons again.

Russian forces were notified in advance of the strike using the established deconfliction line. U.S. military planners took precautions to minimize risk to Russian or Syrian personnel located at the airfield.

We are assessing the results of the strike. Initial indications are that this strike has severely damaged or destroyed Syrian aircraft and support infrastructure and equipment at Shayrat Airfield, reducing the Syrian Government's ability to deliver chemical weapons. The use of chemical weapons against innocent people will not be tolerated.

Notice that this statement did not include any argument about why the strikes are legal. Neither did [the President's public statement](#) this evening. There are undoubtedly many questions

associated with the operation that are more immediately significant than the question of whether the President has complied with the law—such as what the possible ramifications might be, and whether the attacks will do anything to deter Assad’s barbaric use of chemical weapons on civilians and others. Yet the legal questions are of profound importance, too, and this is, after all, a law-related blog, so here goes

Let’s begin with international law. As the Pentagon statement indicates (“the U.S. took extraordinary measures to avoid civilian casualties and to comply with the Law of Armed Conflict”), the United States initiated an armed conflict with Syria this evening—and therefore its actions are bound by the international laws of armed conflict. There is no reason—not yet, anyway—to think that the United States has violated those laws.

Nevertheless, the operation raises *jus ad bellum* questions, wholly separate from the *jus in bello*. [Ryan is right](#) that the strikes against Syria — done in the absence of a U.N. Security Council resolution, and without any apparent justification of self-defense (as the Pentagon explained, its function is to “deter the regime from using chemical weapons again,” presumably against Syrian nationals) — violate Article 2(4) of the United Nations Charter, which requires the U.S. and all other signatory states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” [I should note here that our friend and co-blogger Harold Koh has recently argued (see pp. 1004-1015 [here](#)) that certain humanitarian interventions—perhaps, but not necessarily, including President Trump’s actions this evening—would not violate Article 2(4) by virtue of an alleged developing new customary exception. In my view, whatever the merits of such a rule of international law might be (and they are many), it cannot be established by custom in the teeth of a treaty prohibition. The remainder of this post proceeds on the assumption that the strikes violate the Charter; but of course if Harold’s contrary view were correct, then the related constitutional question that I discuss below would, accordingly, become more complicated and uncertain.]

The obligation in Article 2(4) is not only international law, but also a treaty provision to which the U.S. is bound, and thus is the “supreme Law” of the land under Article VI of the U.S. Constitution. It is, that is to say, a “domestic law” constraint, too.

Importantly, this does *not* mean that the Constitution forbids the United States from deliberately breaching a treaty. To be sure, that’s not something the nation does very often, but there are historical examples where Congress has enacted a “later-in-time” statute that supersedes earlier treaty obligations as a matter of domestic law, and the Supreme Court has confirmed its constitutional authority to do so. See, e.g., *Whitney v. Robertson* (1888); *Chae Chan Ping v. U.S.* (1889); *Breard v. Greene* (1998). In such cases, any subsequent U.S. treaty breach may result in international-law sanctions, and also serious diplomatic and other ramifications for the nation—which is why Congress rarely chooses to authorize such breaches. Nevertheless, Congress may decide to incur such costs in order to advance what it views as a more compelling objective.

In this case, however, Congress has *not* authorized the attacks on Syria, or otherwise made the solemn decision that the U.S. should breach the Charter. Therefore, not only has President Trump put the U.S. in breach of its treaty obligations — in violation of his Article II obligation

to take care that the treaty is faithfully executed — but he has also likely violated the constitutional allocation of war powers, too.

As I explained at length in [this post](#) back in 2013 (when President Obama was contemplating similar such strikes in response to Assad’s horrifying use of chemical weapons), there are three major schools of thought on the question of when the President can initiate the use of military force against another sovereign nation “unilaterally” (i.e., without congressional consent):

- (i) almost never (i.e., only to repel actual attacks, and then only as long as Congress is unavailable to deliberate)—what one might call the “classical” position;
- (ii) virtually always, up to and including full-scale, extended war—that was John Yoo’s position, adopted by OLC in the Bush Administration, at least in theory; and
- (iii) only under a set of complex conditions that do not amount to “war in the constitutional sense,” and only in conformity with legal restrictions Congress has imposed (including the War Powers Resolution)—a middle-ground position that I denominated the Clinton/Obama “third way,” and which in effect has, rightly or wrongly, governed U.S. practice for the past several decades.

(I include below the slightly more detailed account I offered in 2013 of these three views of the constitutional framework.)

As I further explained back in 2013, however, *whatever* one’s views might be on the scope of the President’s authority to unilaterally use force abroad—whether you subscribe to the traditional restrictive view, the Bybee/Yoo permissive view, or the Clinton/Obama “third way” (or any variant in between)—there is no obvious justification for a unilateral presidential decision to cause the United States to violate a treaty that is binding as a matter of domestic law unless and until Congress passes a “later in time” statute permitting such a violation. Under what authority can the President deliberately put the U.S. in breach of the U.N. Charter?* (To invoke the register of the Clinton/Obama theory of war powers: Because of its potentially profound impact on the practice of treaty compliance and the development of international law, and its possible severe consequences in terms of U.S. diplomatic relationships in light of the breach, such a use of force should be understood to be of a “nature” (and possibly a “scope” and “duration,” too) that constitutes a “war in the constitutional sense,” and therefore requires congressional authorization.)

This was, I think, the most troubling thing about the 1999 Kosovo operation, which was, at its outset, analogous in some respects to tonight’s missile strikes. The Clinton Administration [virtually conceded](#) that the operation was in breach of the Charter. To be sure, [OLC concluded](#) that Congress effectively authorized the Kosovo operation eight weeks after it began. But why did President Clinton have the authority, without congressional authorization, to order the operation, and to breach Article 2(4), *during* those first eight weeks? Just as Presidents Obama and Clinton were correct to assume that their unilateral uses of force (e.g., in Kosovo and Libya, respectively) were subject to the constraints of the War Powers Resolution, so, too, the President

must act within the constraints of binding treaty obligations, absent congressional authority to do otherwise.

The Clinton Administration never did address this problem in connection with Kosovo; and, [as Deborah Pearlstein explains](#), the use of force against Assad's Syria is potentially even more problematic than the Kosovo campaign, because "it was done with no apparent international support – neither from our allies, nor from other countries in the region." This "glaring distinction from Kosovo" might mean that that Trump's Syria operation will have much less international legitimacy than did the Kosovo operation, which occurred with vigorous NATO support and involvement.

In my view, this distinction ought to be very relevant for purposes of the *constitutional* question, because one of the principal reasons the framers required the assent of *both* political branches for war was to ensure a broad consensus, and solemn, interbranch deliberation, not only when American "blood and treasure" is put at risk, but also when the action in question threatens to undermine the nation's international standing. For that reason, in 2013 I agreed with [my colleague and co-blogger David Cole](#) (now legal director at the ACLU), that that President Obama's decision to ask Congress for authorization for the use of force in Syria—and his decision not to strike Assad when such legislative authorization was not forthcoming—was to be commended, and welcomed, as consistent with the constitutional design.

There is no apparent justification for President Trump not to have asked Congress for such authorization here, and to have held off on the strikes until receiving such authorization. Therefore, this might turn out to be the rare case in which the President simultaneously violates both the Constitution and the Charter.

* * * *

What follows is an excerpt of my very simplified [2013 account](#) of the complex, longstanding constitutional debate about the President's constitutional authority to use military force without congressional authorization, and its application to President Obama's contemplated use of force against Syria in 2013:

In the past two generations, there have been three principal schools of thought on the question of the President's power to initiate the use of force unilaterally, i.e., without congressional authorization:

- a. The traditional view, perhaps best articulated in Chapter One of John Hart Ely's [War and Responsibility](#), is that except in a small category of cases where the President does not have time to wait for Congress before acting to interdict an attack on the United States, the President must *always* obtain *ex ante* congressional authorization, for *any* use of military force abroad. That view has numerous adherents, and a rich historical pedigree. But whatever its merits, it has not carried the day for many decades in terms of U.S. practice.
- b. At the other extreme is the view articulated at pages 7-9 of the October 2003 [OLC opinion on war in Iraq](#), signed by Jay Bybee (which was based upon [earlier memos](#) written by his Deputy,

John Yoo). The Bybee/Yoo position is that there are virtually no limits whatsoever: The President can take the Nation into full-fledged, extended war without congressional approval, as President Truman did in Korea, as long as he does so in order to advance the “national security interests of the United States.” With the possible exception of Korea itself, this theory has never reflected U.S. practice. (Indeed, even before that OLC opinion was issued, President Bush sought and obtained congressional authorization for the war in Iraq.) Notably, it was even rejected by William Rehnquist when he was head of OLC in 1970 (see the opinion beginning at page 321 [here](#)).

c. Between these two categorical views is what I like to call the Clinton/Obama “third way”—a theory that has in effect governed, or at least described, U.S. practice for the past several decades. It is best articulated in Walter Dellinger’s OLC opinions on [Haiti](#) and [Bosnia](#), and in Caroline Krass’s 2011 OLC opinion on [Libya](#). The gist of this middle-ground view (this is my characterization of it) is that the President can act unilaterally if two conditions are met: (i) the use of force must serve significant national interests that have historically supported such unilateral actions—of which self-defense and protection of U.S. nationals have been the most commonly invoked; and (ii) the operation cannot be anticipated to be “sufficiently extensive in ‘nature, scope, and duration’ to constitute a ‘war’ requiring prior specific congressional approval under the Declaration of War Clause,” a standard that generally will be satisfied “only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period” (quoting from the Libya opinion).

Largely for reasons explained by my colleague and Dean, [Bill Treanor](#), I am partial to this “third way,” at least in contrast to the two more categorical views described above. (I do not subscribe to every detail of the Dellinger and Krass opinions—in particular, I’m wary of resort to the interest in “regional stability,” which has never been used as a stand-alone justification for unilateral executive action—but I concur in the broad outlines sketched out above.) Regardless of whether Dean Treanor and I—and Presidents Clinton and Obama—are right or wrong about that, however, what’s important for present purposes is that U.S. practice after World War II (with the possible exception of Korea and Kosovo) reflects, and is consistent with, this “third way” view: When a prolonged campaign has been anticipated, with great risk to U.S. blood and treasure, congressional authorization has been necessary—and has, in fact been secured (think Vietnam, both Gulf Wars, and the conflict with al Qaeda). Otherwise, the President has considered himself free to act unilaterally, in support of important interests that have historically justified such unilateral action—subject, however, to any statutory *limitations*, including the time limits imposed by the War Powers Resolution. See, e.g., Libya (twice, 1986 and 2011), Panama (1989), Somalia (1992), Haiti (twice, 1994 and 2004), and Bosnia (1995).

Assuming this “third way” view is correct—or, in any event, that it establishes the relevant historical baseline against which to measure the case of Syria . . . all of the examples of unilateral presidential use of force since 1986 (with the possible exception of Kosovo, discussed below) have been in the service of significant national interests that have historically supported such unilateral actions—such as self-defense, protection of U.S. nationals, and/or support of U.N. peacekeeping or other Security Council-approved endeavors and mandates (e.g., Bosnia and Libya).

The [contemplated Obama] Syria operation, however, would have had no significant precedent in unilateral executive practice; it would not have been supported by one of those historically sufficient national interests. That's not to say that that operation would not be in the service of a very important national interest. For almost a century the U.S. has worked assiduously, with many other nations, to eliminate the scourge of chemical weapons. If Syria's use of such weapons were to remain unaddressed, that might seriously compromise the international community's hard-won success in establishing the norm that such weapons are categorically forbidden, and should not even be contemplated as instruments of war. As [Max Fisher has written](#), “it's about every war that comes after, about what kind of warfare the world is willing to allow, about preserving the small but crucial gains we've made over the last century in constraining warfare in its most terrible forms.”

Preventing that degradation of the strong international norm against use of chemical weapons is, indeed, an important national (and international) interest of the first order. (To be clear: I am not remotely qualified to opine on whether and to what extent the contemplated action would advance that interest—my point is only that the interest is undoubtedly an important one.) And perhaps that should be enough to justify discrete, unilateral presidential action short of “war in the constitutional sense.” But if so, it would nevertheless be an unprecedented basis for unilateral executive action, and it would open up a whole new category of uses of force that Presidents might order without congressional approval, even where such actions could have profound, longstanding consequences: Most obviously, think, for example, of possible strikes on Iran in order to degrade its nuclear capabilities. . . . At a minimum, it's a profound, and heretofore unresolved, question, one that any President should be wary of raising.

* In 1989, OLC notably (and somewhat notoriously) [concluded](#) that because Article 2(4) of the Charter is non-self-executing, in the sense that it does not establish a rule for court adjudication, it is “not legally binding on the political branches,” and thus “as a matter of domestic law, the Executive has the power to authorize actions inconsistent with Article 2(4) of the U.N. Charter.” 13 Op. O.L.C. 163, 179. In my view, this understanding of the effect of a “non-self-executing” treaty is importantly mistaken: It is simply a non sequitur to reason, as OLC did, that because Article 2(4) is “non-self-executing” in the sense that it does not provide a basis for judicial intervention, the President is therefore free as a matter of domestic law to ignore that provision and deliberately put the U.S. in breach of its treaty obligations. That deeply counterintuitive position does not reflect the views either of the parties to the Charter (every nation in the world), or of the President and the Senate that approved it for the United States in 1945. This is a much broader topic, for another day, however. I am not aware of any indication that the Clinton Administration adopted this position with respect to Kosovo in 1999. If the Trump Administration does so, I might have more to say about it then.