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International Law in Crisis: Challenges Posed by the New Terrorism and the Changing Nature of War

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INTERNATIONAL LAW IN CRISIS: CHALLENGES POSED BY THE NEW TERRORISM AND THE CHANGING NATURE OF WAR

*John F. Murphy**

The theme of this conference is “International Law in Crisis.” Two prime examples of the challenges facing international law and international institutions are the so-called “new terrorism” and the changing nature of war. In contrast to the “old terrorism” the new terrorism, which is religiously inspired, is increasingly willing to kill large numbers of people and to make no distinctions between military and civilian targets. Moreover, as demonstrated most vividly by al-Qaeda, which is reported to operate in a network that spans roughly one hundred countries, the new terrorism has become a global threat rather than a threat located primarily in one country.

Prior to the horrific attacks of September 11, 2001, international terrorism had been treated primarily as a criminal law matter with emphasis placed on preventing the commission of the crime through intelligence or law enforcement means, or, if prevention failed, on the apprehension, prosecution and punishment of the perpetrators. After September 11th, however, the criminal justice approach was de-emphasized and, to a considerable extent, supplanted by the use of military means.

* Professor of Law, Villanova University School of Law. I am grateful for the excellent research assistance of Bernard G. Dennis and Megan E. O'Rourke, both second year students at Villanova University School of Law, on this essay. At the outset of my essay, let me take this opportunity to commend Professor Michael P. Scharf and the other organizers of the 2011 Frederick K. Cox International Law Center Symposium for choosing the topic, “International Law in Crisis.” International law scholars and practitioners have generally been reluctant to recognize that international law and some of the primary international institutions created by the international legal process, such as the United Nations, the North American Treaty Organization (NATO), and the International Court of Justice, are in crisis. On the contrary, a triumphalist sentiment is present among some international law specialists, especially those in the academy. It is possible, however, to paint a considerably less rosy picture. There are disquieting signs that international law and international institutions face a problematic future. Elsewhere, I have focused on five specific topical areas which, in my view, are among the most important and most challenging faced by the international community: the maintenance of international peace and security; the law of armed conflict; arms control, disarmament and non-proliferation; human rights; and international environmental issues. See JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* (2010). For a road map through the book, see the review by David P. Stewart, *Recent Books on International Law*, 104 AM. J. INT'L L. 688 (2010).

This shift to the military model of counter-terrorism has engendered considerable controversy. Supporters of the military model contend that criminal law is "too weak a weapon" and that it was inadequate to stop al-Qaeda from planning and carrying out the attacks of September 11th. Critics argue that it is unnecessary and threatens fundamental human rights. They suggest that normal law enforcement measures can effectively combat the threat of terrorism. Moreover, a decision to employ the military model of counter-terrorism in place of the law enforcement model, or vice-versa, may have serious functional consequences, which are considered in this article.

Use of the U.S. military to kill Osama bin Laden on May 2, 2011, in his heavily fortified Abbottabad compound in Pakistan was sharply criticized by various sources and outraged the Pakistani government and many of its people. It was equally strongly defended by the U.S. government, especially by the Legal Adviser to the U.S. Department of State, Harold Koh, who assessed the killing under the law of armed conflict and not under international human rights law.

As to the changing nature of war and its impact, World War II is a classic example of an international armed conflict between sovereign states, and the United Nations was set up primarily to prevent such a conflict in the future. But international armed conflicts currently constitute a small minority of all conflicts, and have been replaced by internal or non-international armed conflicts in the form of insurgencies, civil wars and terrorist attacks. These non-international armed conflicts are also examples of asymmetric warfare, which features armed hostilities in which one party to the conflict endeavors to compensate for its military or other deficiencies by resorting to the use of means of warfare that clearly violate the law of armed conflict or other rules of public international law. Examples of such means of warfare include the deliberate targeting of civilians, the slaughter of hostages, the embedding of fighters in the civilian population, and the use of human shields, especially civilians. What is particularly disturbing about asymmetric warfare is that violators of the law of armed conflict gain considerable military advantage in many instances by the adoption of such tactics because they can be extremely effective in countering the normally vastly superior capabilities of the other party, including in particular those of the United States.

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I. INTRODUCTION

In this essay, my focus is on two developments which have raised especially difficult challenges for the maintenance of international peace and security and the law of armed conflict. These are the evolution of international terrorism over a number of years to the point where one can speak confidently of a “new terrorism” and the closely related phenomenon of the changing nature of war. In combination, I believe, these two developments have created grave difficulties for the international community in general and for the U.S. in particular. Failure to resolve these difficulties could cause the international legal system to become increasingly dysfunctional with respect to efforts to maintain international peace and security and to develop the law of armed conflict and raise real and growing doubts about its relevance to the conduct of international relations.

II. THE “NEW TERRORISM” AND ITS IMPACT

Although now dated, the trenchant observation of the late Richard Baxter, Professor of Law at Harvard University and Judge on the International Court of Justice, published in 1974, has stood the test of time: “We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.”¹ But above all, the hard school of experience has shown, it has constituted, and continues to constitute, a major barrier to efforts to combat the criminal acts often loosely described as “terrorism.”

In practice, politicians and diplomats have used the terms “terrorism” and “terrorists” as labels to pin on their enemies. The cliché: “One man’s terrorist is another man’s freedom fighter” is a notorious reflection of this game of semantics.² It also reflects a serious conflict of values between

¹ R.R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380, 380 (1974).

² Boaz Ganor, *Is One Man’s Terrorist Another Man’s Freedom Fighter?*, 3 POLICE PRAC. & RES. 287, 287 (2002).

those who believe that the end always justifies the means and those who do not. Thus, in the current environment especially, there are those, apparently increasing dramatically in number, who, in an effort to reach their end or goal, are perfectly willing to engage in the deliberate targeting and massive slaughter of civilians, employ suicide bombers, use children as shields, and behead helpless hostages before a worldwide audience. This clash of fundamental values has been a major factor contributing to the international community's failure to define terrorism as a legal concept. The U.N. and other international fora remain unable to set forth comprehensive anti-terrorism resolutions because they have not defined the term.³

Some countries believe that terrorists' political motivations are relevant to this definitional problem.⁴ For example, the position of some governments has been, "that individual acts of violence can be defined as terrorism only if they are employed solely for personal gain or caprice; acts committed in connection with a political cause, especially against colonialism and for national liberation, fall outside the definition and constitute legitimate measures of self-defense."⁵ Another method to defining terrorism has been to define it as such only when such terror is used by governments, or so-called "state terrorism."⁶

To be sure, attempting to define terrorism has been a favorite activity of academic scholars,⁷ but their efforts have not led to success at the international level.⁸ In his treatise, Wayne McCormack examines a "welter of definitions" and based on this examination, suggests some common features

³ See, e.g., John F. Murphy, *Challenges of the "New Terrorism,"* in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 281, 282 (David Armstrong ed., 2009) (providing examples of why the U.N. has been unable to agree on a definition of terrorism).

⁴ John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM. J. TRANSNAT'L L. 35, 38 (1986).

⁵ *Id.*

⁶ *Id.* For example, the word "terror" was first used in conjunction with the Jacobin "Reign of Terror" during the French Revolution. See ALBERT SOBOUL, *THE FRENCH REVOLUTION 1780-1799*, at 385 (1975).

⁷ For some recent writings on the issue of defining terrorism, see Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander*, 11 CONN. J. INT'L L. 1 (1995) (explaining the diminishing meaning of the word terrorism); Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357 (2003) (outlining approaches to a legal definition of terrorism); Grenville Byford, *The Wrong War*, 81 FOREIGN AFF. 34 (2002) (looking to an appropriate definition of the title "terrorist"); and Reuven Young, *Defining Terrorism: The Evolution of Terrorism in International Law and its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23 (2006) (examining how the definition of terrorism has evolved).

⁸ For extensive discussion of the obstacles to reaching agreement on a definition of terrorism, see John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISR. Y.B. ON HUM. RTS. 13 (1989) (extensively discussing the obstacles to reaching agreement on a definition of terrorism).

found in most of them. Applying these common features, McCormack posits that, “Generally, a terrorist: (1) is a civilian or subnational group who; (2) uses violence; (3) against civilians; (4) for political motivations.”⁹

Despite, or perhaps because of, the international community’s inability to agree on a definition of terrorism, and despite the many practical problems definitions of terrorism pose, national legal systems, including that of the U.S., have adopted a number of definitions for a variety of purposes.¹⁰ For present purposes, one might consider the definition of “international terrorism” that appears in the U.S. federal crime code’s chapter on terrorism.¹¹ According to this definition,

“International terrorism” means activities that -

(A) involve violent acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended -

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States or national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.¹²

With this brief background to some of the definitional problems of terrorism, let us consider some of the salient aspects of the “new terrorism.”

A. *The “New Terrorism”*

Back in the (relatively) halcyon days of the “old terrorism,” the conventional wisdom suggested that terrorists had little interest in killing large numbers of people. The perception was that large-scale killings would undermine their efforts to gain sympathy for their cause, which was usually to overthrow the government of a particular country (e.g., Germany or Ita-

⁹ WAYNE MCCORMACK, *LEGAL RESPONSES TO TERRORISM* 3 (2nd ed. 2009).

¹⁰ See BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 615–21 (2nd ed. 2010) (providing a variety of definitions of terrorism or terrorist acts, drawn from a variety of national and international sources).

¹¹ 18 U.S.C. § 2331(1) (2011).

¹² *Id.*

ly).¹³ An especially disquieting aspect of the new terrorism is the increased willingness of terrorists to kill large numbers of people and to make no distinction between military and civilian targets.¹⁴ A major cause of this radical change in attitude has been aptly pinpointed by Jeffrey D. Simon:

Al Qaeda . . . is representative of the emergence of the religious-inspired terrorist groups that have become the predominant form of terrorism in recent years. One of the key differences between religious-inspired terrorists and politically motivated ones is that the religious-inspired terrorists have fewer constraints in their minds about killing large numbers of people. All nonbelievers are viewed as the enemy, and the religious terrorists are less concerned than political terrorists about a possible backlash from their supporters if they kill large numbers of innocent people. The goal of the religious terrorist is transformation of all society to their religious beliefs, and they believe that killing infidels or nonbelievers will result in their being rewarded in the afterlife. Bin Laden and Al Qaeda's goal was to drive U.S. and Western influences out of the Middle East and help bring to power radical Islamic regimes around the world. In February 1998, bin Laden and allied groups under the name "World Islamic Front for Jihad Against the Jews and the Crusaders" issued a fatwa, which is a Muslim religious order, stating that it was the religious duty of all Muslims to wage a war on U.S. citizens, military and civilian, anywhere in the world.¹⁵

Another facet of the new terrorism is the extraordinary extent to which terrorists have developed global networks. A recent study finds that al-Qaeda operates in a network that spans roughly one hundred countries, including the U.S.¹⁶ While that network has weakened severely in recent years with the assassination or capture of key al-Qaeda leaders such as Osama bin Laden, the organization has simultaneously gained many new militants to its cause through a "terror by franchise" approach.¹⁷ That is, while the Jihadi threat has been suppressed in some countries (e.g., Saudi Arabia and Indonesia) it is increasing in places in North Africa and Lebanon. Groups inspired by al-Qaeda have in turn established links with a new breed of home-grown terrorist. The problem is especially acute in the Unit-

¹³ See MCCORMACK, *supra* note 9, at 6; REX A. HUDSON, FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, *THE SOCIOLOGY AND PSYCHOLOGY OF TERRORISM: WHO BECOMES A TERRORIST AND WHY?* (Marilyn Majeska ed., 1999).

¹⁴ See PETER L. BERGEN, *HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN 20* (2001) (noting that in 1998 Osama bin Laden told ABC News that "he made no distinction between American military and civilian targets, despite the fact that the Koran itself is explicit about the protections offered to civilians.").

¹⁵ Jeffrey D. Simon, *The Global Terrorist Threat*, 82 PHI KAPPA PHI FORUM 10, 11 (2002).

¹⁶ Jayshree Bajoria & Greg Bruno, *al-Qaeda (a.k.a. al-Qaida, al-Qa'ida)*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/publication/9126/> (last updated Aug. 29, 2011).

¹⁷ See e.g., Farhan Bokhari & Stephen Fidler, *Rivalries Rife in Lair of Leaders*, FIN. TIMES (London), July 5, 2007, at 5.

ed Kingdom, where radicalized British Muslims have established links with al-Qaeda- and Taliban-sponsored training camps in Pakistan.¹⁸ In continental Europe, home-grown terrorists have established links with radical cells in North Africa.

Al-Qaeda's current headquarters are believed to be the Federally Administered Tribal Areas ("FATA") of Pakistan.¹⁹ Al-Qaeda has resisted the Pakistani Government's efforts to suppress its activities in the FATA, and a 2006 peace arrangement between the Pakistani Government and the tribal chiefs may have allowed al-Qaeda more freedom to operate.²⁰

Indeed, on July 17, 2007, the White House released a National Intelligence Estimate, which represents the consensus view of all 16 agencies that make up the American intelligence community.²¹ The report concluded that the U.S. was losing ground on a number of fronts in the fight against al-Qaeda, and that the terrorist front had significantly strengthened over the past two years.²² One of the main reasons for al-Qaeda's resurgence, according to intelligence officials and White House aides, was the "hands-off approach toward the tribal areas by Pakistan's [then] president, Gen. Pervez Musharraf."²³ As a result, American officials reportedly met and discussed "an aggressive new strategy, one that would include both public and covert elements" because of "growing concern that pinprick attacks on Qaeda targets were not enough. . . ."²⁴ An aggressive new strategy was adopted, with the result that the U.S. engaged in substantial numbers of drone attacks in the FATA, as well as Special Forces operations, most spectacularly illustrated by the killing of Osama bin Laden by U.S. SEALs.²⁵

¹⁸ See Stephen Fidler, *Radicalising Wave Crosses the Atlantic*, FIN. TIMES (London), July 5, 2007, at 5.

¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-622, COMBATING TERRORISM: THE UNITED STATES LACKS COMPREHENSIVE PLAN TO DESTROY THE TERRORIST THREAT AND CLOSE THE SAFE HAVEN IN PAKISTAN'S FEDERALLY ADMINISTERED TRIBAL AREA (2008), available at <http://www.gao.gov/new.items/d08622.pdf>.

²⁰ See Bill Roggio, *North Waziristan Peace Agreement Allows Al Qaeda to Remain*, LONG WAR J. (June 8, 2008), http://www.longwarjournal.org/archives/2008/06/north_waziristan_pea.php.

²¹ See Mark Mazzetti & David E. Sanger, *Bush Advisers See A Failed Strategy Against Al Qaeda*, N.Y. TIMES, July 18, 2007, at A1, A6.

²² *Id.* at A1.

²³ *Id.*

²⁴ *Id.* at A6.

²⁵ See *Drone Attack in Pakistan: 2005–2011*, S. ASIA TERRORISM PORTAL, <http://www.satp.org/satporgtp/countries/pakistan/database/Droneattack.htm> (last visited Jan. 17, 2012); see also *Osama bin Laden is Dead*, CBS NEWS (May 1, 2011), <http://www.cbsnews.com/stories/2011/05/01/national/main20058777.shtml>.

This aggressive new strategy against al-Qaeda and the Taliban is only one example of the impact of the new terrorism. There are many more, and it is time to turn to an examination of these.

B. Impact of the New Terrorism

Prior to the horrific attacks of September 11, 2001, international terrorism had been treated primarily as a criminal law matter with emphasis placed on preventing the commission of the crime through intelligence or law enforcement means; or, if prevention failed, on the apprehension, prosecution and punishment of the perpetrators. After September 11, however, the criminal justice approach was de-emphasized and to a considerable extent supplanted by the use of military means.²⁶

This shift to the military model of counter-terrorism has engendered considerable controversy. Supporters of the military model contend that criminal law is “too weak a weapon” and that it was inadequate to stop al-Qaeda from planning and carrying out the attacks of September 11, 2001.²⁷ Critics argue that it is unnecessary and threatens fundamental human rights. They suggest that normal law enforcement measures can effectively combat the threat of terrorism.²⁸

A decision to employ the military model of counter-terrorism in place of the law enforcement model, or vice-versa, may have serious functional consequences.²⁹ For example, under the law enforcement model, it is impermissible to pursue and kill a suspected criminal before his capture unless it is necessary to do so as a matter of self-defense.³⁰ The goal is to capture the suspect, subject him to trial in accordance with due process, and impose an appropriate sanction if he is convicted. In some cases, especially under U.S. law, this could include the death penalty. Under the military model, it is permissible to pursue the enemy with the intent to kill.³¹ Capture in place of killing is required only when the enemy has surrendered. If the enemy surrenders and qualifies as a prisoner of war, he will not be subject to sanction unless he has committed a war crime.³² He may, however, be detained until the end of the conflict to prevent him from returning to the

²⁶ See Samantha Power, *Our War on Terror*, N.Y. TIMES BOOK REV., July 29, 2007, at 1.

²⁷ See, e.g., Ruth Wedgwood, *Combatants or Criminals? How Washington Should Handle Terrorists*, 83 FOREIGN AFF. 126, 126 (2004).

²⁸ See, e.g., Kenneth Roth, *The Law of War in the War on Terror*, 83 FOREIGN AFF. 2, 2 (2004).

²⁹ See Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 466 (2002) (providing an especially thoughtful treatment of these distinct consequences).

³⁰ Roth, *supra* note 28, at 2.

³¹ Feldman, *supra* note 29, at 468.

³² *Id.*

battlefield. If the law enforcement model applies, he normally cannot be detained after trial unless he has been convicted of a crime.³³ Under normally applicable criminal law, moreover, conviction may be difficult because of the requirement that the crime be proved “beyond a reasonable doubt” and other barriers posed by criminal procedure and constitutional standards.

The killing of Osama bin Laden on May 2, 2011 raises in sharp relief some of these issues, as well as a host of other important legal and political issues.

C. *The Legality of the Killing of Osama bin Laden*

On May 2, 2011, U.S. Navy SEALs entered Pakistan—without the permission of Pakistan—to capture or kill Osama bin Laden.³⁴ It is undisputed that the SEALs killed bin Laden in his heavily fortified Abbottabad compound, but there are conflicting reports about the circumstances surrounding his death. According to one account, bin Laden’s twelve year-old daughter testified that the SEALs captured him alive but then shot him dead in front of family members.³⁵ If the daughter’s claims are correct, the SEALs may have violated the prohibition in customary international law and in article 23(d) of the 1907 Hague Regulations against denial of quarter.³⁶

According to the U.S. Government’s view, the circumstances surrounding bin Laden’s death were such that it was not feasible to accept bin Laden’s offer of surrender, and indeed according to its version of the facts, there was no such offer of surrender. The U.S. claims that bin Laden resisted the SEALs and appeared to be reaching for a weapon when he was shot and killed.³⁷

Some critics have applied a law enforcement or international human rights perspective to the situation, arguing that the U.S. should have cap-

³³ *Id.*; see also John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 228–29 (2011) (discussing the time constraints set for detainees after the conflict has ended).

³⁴ Stephen M. Pezzi, *The Legality of Killing Osama bin Laden*, HARV. NAT’L SEC. J. (May 16, 2011), available at <http://harvardnsj.com/2011/05/killing-osama-bin-laden-and-the-law/>.

³⁵ Mushtaq Yusufzai, *Bin Laden’s Daughter Confirms her Father Shot Dead by US Special Forces in Pakistan*, AL ARABIYA NEWS (May 4, 2011), <http://english.alarabiya.net/articles/2011/05/04/147782.html>.

³⁶ See Marty Lederman, *The U.S. Perspective on the Legal Basis for the bin Laden Operation*, OPINIO JURIS (May 24, 2011), <http://opiniojuris.org/2011/05/24/the-us-perspective-on-the-legal-basis-for-the-bin-laden-operation/>.

³⁷ See *Differing Accounts Emerge of bin Laden Raid*, MSNBC, http://www.msnbc.msn.com/id/42892575/ns/world_news-death_of_bin_laden/t/differing-accounts-emerge-bin-laden-raid/#.Tm-oAOZK0gt (last updated May 4, 2011).

tered bin Laden and brought him to justice before a court.³⁸ It is worth noting, however, that even under the law enforcement or international human rights model, it is permissible to kill a criminal suspect if it is necessary to do so as a matter of self-defense. Hence, if it is true that bin Laden was resisting arrest and appeared to be reaching for a weapon when he was shot—even though no weapon was found on his body—it would arguably have been permissible for the SEALs to kill him.³⁹

There are two practical considerations that may have played a role in the decision to kill bin Laden, although the U.S. government does not appear to have referenced either in its official reports concerning the incident. First, severe time limitations impacted the SEAL operation. They had to escape from the compound before any Pakistani forces arrived, subduing and capturing bin Laden would have potentially put their entire operation in danger. Second, trying bin Laden before a federal court or a military commission might have created immense political pressure in the face of reflexive terrorist action. One might assume that al-Qaeda forces would have taken a large number of hostages and started to kill them in order to force bin Laden's release. Alternatively, al-Qaeda might have conducted an attack on the court itself.

On May 6, 2011, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, and the U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Schein, issued a statement regarding bin Laden's death.⁴⁰ In pertinent part, the statement read as follows:

In respect of the recent use of deadly force against Osama bin Laden, the United States of America should disclose the supporting facts to allow an assessment in terms of international human rights law standards. For instance, it will be particularly important to know if the planning of the mission allowed an effort to capture Bin Laden.⁴¹

The Legal Adviser to the U.S. Department of State, Harold Koh, however, does not assess the killing of bin Laden in terms of international

³⁸ See, e.g., Goran Slulter, *Bin Laden is Innocent from a Legal Point of View*, RADIO NETH. WORLDWIDE (May 5, 2011), <http://www.rnw.nl/international-justice/article/bin-laden-innocent-a-legal-point-view>.

³⁹ *Bin Laden Appeared to Be 'Reaching for a Weapon' Before Fatal Shot, Official Says*, FOXNEWS.COM (May 3, 2011), <http://www.foxnews.com/politics/2011/05/03/official-guards-bin-laden-compound-time-raid/>.

⁴⁰ *See Osama bin Laden: Statement by the UN Special Rapporteurs on Summary Executions and on Human Rights and Counter-Terrorism*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS (May 6, 2011), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E 519/2011>.

⁴¹ *Id.*

human rights law.⁴² Rather, he assesses the killing under the law of armed conflict because, “the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”⁴³ As to whether the planning of the mission required an effort to capture bin Laden, Koh stated that:

[C]onsistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.⁴⁴

The U.S. carried out the SEAL raid on the bin Laden compound without first informing Pakistan or obtaining its permission to enter the country. The reaction of the Pakistani government was sharp. In response, U.S. officials openly suggested that some Pakistani spies and soldiers may have shielded bin Laden. Pakistani officials warned of “disastrous consequences” should the U.S. attempt similar action against other targets in Pakistan.⁴⁵

A major legal issue which the Obama administration has not directly addressed is whether bin Laden’s assassination infringed upon Pakistani sovereignty in violation of international law. This should come as no surprise, considering the tense relations between the U.S. and Pakistan in the wake of the raid.⁴⁶ However, former U.S. government officials and some academics have defended the proposition that the raid did not violate the

⁴² See Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011), <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.

⁴³ *Id.*

⁴⁴ *Id.* Contrary to this statement, it has been claimed that the Obama administration considered a variety of options before ordering the Navy SEALs into the compound, but that taking bin Laden alive was not one of them. It has also been suggested that the Obama administration has adopted a policy of eliminating individual terrorists rather than attempting to take them alive and interrogate them as the Bush administration had. See, e.g., Yochi J. Dreazen, Aamer Madhani & Marc Ambinder, *For Obama, Killing—Not Capturing—bin Laden was Goal*, NAT’L J. (May 4, 2011), <http://www.nationaljournal.com/for-obama-killing-not-capturing-nobr-bin-laden-nobr-was-goal-20110503>.

⁴⁵ See, e.g., Matthew Rosenberg & Slobhan Gorman, *Pakistan Detains Alleged Informant*, WALL ST. J., June 16, 2011, at A13.

⁴⁶ Lederman, *supra* note 36.

sovereignty of Pakistan contrary to international law.⁴⁷ Assuming that the U.S. suffered armed attacks by al-Qaeda directed by its leader Osama bin Laden, Ashley Deeks notes that:

Absent consent from the territorial state or authorization from the United Nations Security Council, international law traditionally requires the state that suffered the armed attack to assess whether the territorial state is “unwilling or unable” to unilaterally suppress the threat. Only if the territorial state is unwilling or unable to eliminate the threat may the victim state lawfully use force.⁴⁸

Similarly, in a 2006 speech, when he was Legal Adviser of the Department of State, John Bellinger stated that:

I am not suggesting that because we remain in a state of armed conflict with al Qaida, the United States is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter. The U.S. military does not plan to shoot terrorists on the streets of London. As a practical matter, though, a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.⁴⁹

In her article, Ashley Deeks argues that:

[T]he United States appears to have strong arguments that Pakistan was unwilling or unable to strike against Bin Laden. Most importantly, the United States has a reasonable argument that asking the Government of Pakistan to act against Bin Laden could have undermined the mission. The size and location of the compound and its proximity to Pakistani military installations has cast strong doubt on Pakistan’s commitment to defeat al Qaeda. The United States seems to have suspected that certain officials within the Pakistani government were aware of Bin Laden’s presence and might have tipped him off to the imminent U.S. action if they had known about it in advance.⁵⁰

More recently, there has been increased evidence to support the proposition that Pakistan is unwilling or unable to prevent al-Qaeda from using its territory to launch armed attacks against U.S. troops and their al-

⁴⁷ See Ashley S. Deeks, *Pakistan’s Sovereignty and the Killing of Osama Bin Laden*, AM. SOC. INT’L L. INSIGHTS (May 5, 2011), available at <http://www.asil.org/insights110505.cfm> (thoroughly defending the proposition that the raid did not violate Pakistan’s sovereignty); see also Lederman, *supra* note 36.

⁴⁸ Deeks, *supra* note 47.

⁴⁹ John B. Bellinger III, Legal Issues in the War on Terrorism (Oct. 31, 2006) (transcript available at www2.lse.ac.uk/publicEvents/pdf/20061031_JohnBellinger.pdf).

⁵⁰ Deeks, *supra* note 47.

lies.⁵¹ Most damningly, reports by U.S. intelligence officers suggest that Pakistan's Inter Services Intelligence Directorate ("ISI") ordered the killing in May 2011 of Saleem Shahzad, a journalist who had investigated connections between the ISI and militants.⁵² According to a U.S. intelligence official, "[e]very indication is that this was a deliberate, targeted killing that was most likely meant to send shock waves through Pakistan's journalist community and civil society."⁵³

On September 11, 2001, al-Qaeda's attack on the U.S. killed nearly 3,000 persons and constituted the most deadly terrorist attack in history. As R. James Woolsey, former Director of Central Intelligence of the U.S. has noted, in speaking of today's struggle against terror, the "first, and in many ways the dominating, issue with which one is faced is whether we are, predominately, at war or at peace."⁵⁴ He then states, correctly in my view:

Clearly there are some elements of both in our current circumstances. But I would submit that much of our confusion is spawned by a hesitancy to acknowledge that we are in some key ways definitely at war, but not with the kind of enemy we are used to. Our hesitancy seems to me heavily driven by the religiously-rooted nature of our enemy's ideology.⁵⁵

Earlier in this essay, we have noted just how religiously-rooted is the nature of al-Qaeda's ideology and some of the impact this ideology has had on U.S. efforts to combat international terrorism. Woolsey adds an additional insight to the nature of al-Qaeda's ideology when he states:

⁵¹ Marine Lieutenant General John Allen, nominated by President Barack Obama to lead the Afghanistan war, reportedly stated that "Pakistan, as a haven for militants, looms large over the war in Afghanistan. . . . [and] continues to 'hedge' against a precipitous U.S. withdrawal from Afghanistan by supporting anti-American militant groups, including the Haqqani network." Julian E. Barnes, *Nominee Questions Pakistan's Battle Plan*, WALL ST. J., June 29, 2011, at A13.

⁵² Andrew Lebovich, *Daily Brief: U.S. Officials Believe ISI Ordered Journalist Killed*, FOREIGN POL'Y (July 5, 2011), http://afpak.foreignpolicy.com/posts/2011/07/05/daily_brief_us_officials_believe_isi_ordered_journalist_killed.

⁵³ Jane Perlez & Eric Schmitt, *Pakistan's Spies Tied to Slaying of a Journalist*, N.Y. TIMES (July 4, 2011), <http://www.nytimes.com/2011/07/05/world/asia/05pakistan.html?pagewanted=all>. Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, reportedly stated that he believed the government of Pakistan had "sanctioned" the kidnapping, torture and death of Saleem Shahzad. Admiral Mullen was the first American official to publicly accuse Pakistan of the killing. His comments were regarded as especially significant because he is one of the closest American officials to the Pakistani leadership, especially General Ashfaq Parvez Kayani, the chief of the Pakistani Army. See Elizabeth Bumuller, *U.S. Admiral Ties Pakistan to Killing of Journalist*, N.Y. TIMES, July 8, 2011, at A4.

⁵⁴ R. James Woolsey, *Foreword*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR vii, viii (John Norton Moore & Robert F. Turner, eds., 2010).

⁵⁵ *Id.*

Lawrence Wright, in his definitive work, *The Looming Tower*, tells us that with just over ten per cent of the world's Muslims Saudi Arabia controls around 90 per cent of the world's Islamic Institutions. The beliefs espoused and taught by most of those institutions are essentially those of the Wahhabis, Saudi Arabia's dominant sect of Islam—they are views that are somewhere between violent and genocidal with respect to Shi'ites, Jews, homosexuals, and apostates and highly repressive of women and many other groups. Their objective is to replace democratic government with a world-wide Caliphate—a theocratic dictatorship. These views are substantially quite similar to al Qaeda's. The principle [sic] difference between the two is not a matter of substance but the question of tactics and control, a bit like the difference between Stalinists and Trotskyites in the 1920s and the 1930s.⁵⁶

As Woolsey points out, then, when it comes to practitioners of the “new terrorism,” the U.S. is clearly at war with a new type of enemy and is engaged in a distinctly different kind of war.

III. THE CHANGING NATURE OF WAR AND ITS IMPACT

As is well known, the founders of the U.N. intended primarily to create an international institution that would be more effective in maintaining international peace and security than the then-existing League of Nations. In particular, the founders sought to prevent a recurrence of the appalling carnage of World War II. They were willing to suppress by armed force aggression and other threats to or breaches of the peace.⁵⁷

World War II, of course, is a classic example of an international armed conflict between sovereign states. But international armed conflicts or wars⁵⁸ currently constitute a small minority of all conflicts, and they have been in a steady decline for a much longer period.⁵⁹ Wars have been replaced by internal or non-international armed conflicts in the form of insurgencies, civil wars and genocide.

Some would say that the present armed conflict with al-Qaeda is an exception to this development, especially since al-Qaeda reportedly now operates in 100 countries. It is worth noting, however, that in *Hamdan v.*

⁵⁶ *Id.* at ix.

⁵⁷ See generally JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 103–60 (2010).

⁵⁸ For a variety of reasons beyond the scope of this essay, the use of the phrase “law of war” is far less common today. Rather, the primary choice is between “the law of armed conflict” and “international humanitarian law,” or the more neutral Latin phrase, “*jus in bello*.” See *id.* at 161. My own preference is for the law of armed conflict.

⁵⁹ See HUMAN SECURITY CENTRE, *THE HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY* 1 (2005).

Rumsfeld,⁶⁰ the U.S. Supreme Court rejected the assertion by the U.S. government that since al-Qaeda was not a state and had not accepted to be governed by the rules set forth in the Geneva Conventions, its affiliates could not invoke their protections. Rather, the Court held that the so-called “War on Terror” was a non-international armed conflict and that therefore at a minimum Article 3, which is common to all the 1949 Geneva Conventions, applies to the conflict with al-Qaeda. The validity of this holding as a matter of international law is debatable, however, since, as Yoram Dinstein has argued, “from the vantage point of international law . . . a non-international armed conflict cannot possibly assume global dimensions.”⁶¹ Michael Schmitt buttresses this conclusion by noting that Common Article 3 itself defines the conflict to which it applies as “not of an international character occurring in the territory of one of the High Contracting Parties.”⁶²

Even the language Schmitt quotes from Common Article 3, however, has been subject to different interpretations. On the one hand, it can be interpreted as referring only to “internal” armed conflicts, that is, civil wars or insurgencies. This appears to be the interpretation Schmitt favors. On the other hand, it can be interpreted as referring more broadly to any armed conflict that is not between states. This appears to be the interpretation the U.S. Supreme Court in *Hamdan* favors. Under the latter approach, the phrase means occurring in the territory of “at least one of the High Contracting Parties.”⁶³

Regardless of the appropriate classification of the armed conflict with al-Qaeda, the War on Terror is a classic example of asymmetric warfare. Although there are a number of possible definitions of asymmetric warfare,⁶⁴ for present purposes, a definition by Professor Wolf Heinschel von Heinegg may be especially apt. According to Professor von Heinegg:

[T]he term “asymmetric warfare” is to be understood as applying to armed hostilities in which one actor/party endeavors to compensate for its military, economic or other deficiencies by resorting to the use of methods or

⁶⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–32 (2006).

⁶¹ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT* 56 (2d ed. 2010).

⁶² Michael N. Schmitt, *The United States Supreme Court and Detainees in the War on Terror*, 37 *ISRAEL Y.B. ON HUM. RTS.* 33, 68 (2007).

⁶³ See DAVID LUBAN, JULIE R. O’SULLIVAN, & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 1060, 1063 (2010).

⁶⁴ For an excellent and extensive discussion of “asymmetric conflict,” see MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT* (2010).

means of warfare that are not in accordance with the law of armed conflict (or of other rules of public international law).⁶⁵

Examples of such methods or means of warfare would be the deliberate targeting of civilians, the slaughter of hostages, the embedding of fighters in the civilian population, and the use of human shields, especially civilians. What is particularly disturbing about asymmetric warfare is that violators of the law of armed conflict gain considerable military advantage in many instances by the adoption of such tactics because they can be extremely effective in countering the normally vastly superior military capabilities of the other party.

In both Iraq and Afghanistan, the enemy consists of insurgents who embed themselves into the civilian population, a clear violation of the law of armed conflict.⁶⁶ In Iraq, a standard tactic of the insurgents was to use children as human shields in fire fights with U.S. and coalition forces.⁶⁷ In Afghanistan, there have been sharp factual disputes between NATO and local residents over whether NATO air raids have resulted in civilian deaths, as alleged by the local residents, or, as contended by NATO, in the deaths of insurgents who had opened fire on NATO forces before they were killed.⁶⁸ In May 2011, Afghan President Hamid Karzai issued what he called his “last” warning about civilian casualties. He reportedly told NATO

⁶⁵ Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond?*, in 87 INT'L LAW STUDIES: INT'L LAW AND THE CHANGING CHARACTER OF WAR 463, 465–66 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011).

⁶⁶ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. This convention provides that: “The presence of a protected person [civilian] may not be used to render certain points or areas immune from military operations.” See also Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3.

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individuals in order to attempt to shield military operations.

Id.

⁶⁷ Although the 46,000 U.S. troops currently stationed in Iraq are scheduled to leave by year's end under a 2008 withdrawal agreement, and have largely limited their activities to training Iraq forces, they have been subject to heavy attack recently by Shiite militias supported by sophisticated weapons flowing from Iran into Iraq. June 2011, during which fifteen U.S. troops died, constituted the deadliest month for U.S. troops in Iraq in two years. See Lara Jakes, *2 U.S. Soldiers Die in Blast Linked to Iraqi Militias*, PHILA. INQUIRER, July 8, 2011, at A12.

⁶⁸ See Alissa J. Rubin, *More Attacks on Officials and a Protest Over a Deadly NATO Raid*, N.Y. TIMES, Aug. 19, 2010, at A10.

to stop bombing Afghan homes, or it would face “unilateral action” from the Afghan government, and said it risked being viewed as a trespasser and occupying force.⁶⁹

The result of this controversy between NATO and President Karzai is that airstrikes in Afghanistan have been sharply curtailed and may be eliminated entirely. There is sharp debate within the military as to the probable military impact of this limitation on air power.⁷⁰

As discussed above, Pakistan is unable or unwilling to close down al-Qaeda and Taliban bases in its FATA region. Because the bases serve as a jumping off point for attacks against NATO and Afghan forces in Afghanistan, the U.S. has resorted to the use of drone attacks and special operations forces such as Navy SEALs.⁷¹ On June 29, 2011, the Obama administration stated that al-Qaeda and its acolytes—including radicalized Americans—remained the “preeminent security threat to the United States” even after Osama bin Laden’s death.⁷² John Brennan, the president’s chief counterterrorism adviser, reportedly said that the U.S. “seeks nothing less than the utter destruction of this evil that calls itself al Qaeda.”⁷³ In keeping with this goal, the U.S. has reportedly expanded its drone attacks to cover both Somalia and Yemen because of evidence that insurgents in the two countries are forging closer ties and possibly plotting attacks against the U.S.⁷⁴

⁶⁹ See Jack Healy, *NATO Admits to Civilian Deaths*, N.Y. TIMES, July 8, 2011, at A11.

⁷⁰ Charles Dunlap, a retired major general in the U.S. Air Force JAG, regards the decision in Afghanistan to sharply reduce the number of airstrikes as a serious mistake. He contends “it is often overlooked that during the surge [in Iraq], thousands of insurgents were captured or killed by American special operation forces and airstrikes. ‘I do believe, firmly, that the much-derided killing and capturing actually was the key to success.’” Julian E. Barnes, *Battle Centers on Surge*, WALL ST. J., Aug. 27, 2010, at A9. In support of his argument Dunlap adds that “during the Iraq surge, airstrikes increased to five times previous levels in Afghanistan.” *Id.* U.S. military officers in Afghanistan counter these arguments by claiming that “special operations raids since last year have resulted in the deaths of hundreds of militant leaders,” while “the restrictions on airpower have saved Afghan lives and improved relations with the government.” *Id.* Others argue that in Iraq the Iraqis themselves were responsible for the reduction in violence: Sunni insurgents who turned against al-Qaeda, and Shiite militias who embraced a cease-fire with the Sunni. *Id.* For his part, James Dubik, a retired Lieutenant General who oversaw the training of the Iraqi military during the surge, reportedly stated: “The decisiveness of the surge came from an aggregate of factors—more like a thunderstorm than a single cause and effect.” *Id.*

⁷¹ See Eric Schmitt & Mark Mazzetti, *Pakistan Arrests C.I.A. Informants in Bin Laden Raid*, N.Y. TIMES, June 15, 2011, at A1 (providing a recent report on the deterioration of U.S.-Pakistan relations).

⁷² Keith Johnson, *Al Qaeda Remains Top Threat to U.S.*, N.Y. TIMES, June 30, 2011, at A4.

⁷³ *Id.*

⁷⁴ Mark Mazzetti & Eric Schmitt, *U.S. Expands its Drone War into Somalia*, N.Y. TIMES, July 2, 2011, at A1.

Professor Michael L. Gross, in his recent study on asymmetric warfare, has highlighted the same goal of utter destruction of al-Qaeda, and the major concern of the U.S. with the ongoing efforts of terrorists to obtain chemical, biological, and nuclear weapons of mass destruction. As noted by Gross:

Since the attacks on the United States of September 11, 2001, there is a growing understanding that asymmetric warfare includes the war on international terrorism. Unlike CAR conflicts [CAR conflicts are wars of national liberation, defined under Article 1(4) of Additional Protocol I of 1997 as struggles against “colonial domination, alien occupation, and racist regimes”], wars of international terror by such groups as al-Qaeda do not have a nationalist agenda nor are their operations confined to a particular geographic locale. On an immediate level, al-Qaeda and related groups hope to dislodge the United States and its allies from the Middle East and replace moderate Arab states with a fundamentalist Islamic regime. In the long term, they aim to undermine Western interests, destabilize the international order, and thereby lay the foundation for a radical, universal Islam and a revived caliphate.

In this kind of asymmetric conflict, Western and moderate nation-states are arrayed against an international network of interlocking terrorist organizations. Some of these organizations operate freely and independently while others affiliate closely with states that sponsor or support terrorism. Unlike CAR guerrillas, international terrorists do not represent any particular political constituency or territory. Nor is technological asymmetry always as clear and impressive as it is in CAR conflicts. On the contrary, international terror organizations are generally better funded than CAR groups, so that the greater concern of many nations is the ongoing efforts of terrorists to obtain chemical, biological, and nuclear weapons of mass destruction. The war on terror, unlike CAR conflicts, admits of no reasonable political solution or compromise. The war is unremitting and long-term and without obvious signposts of success, whether interim treaties, cease-fires, or territorial accommodations.⁷⁵

Many in the human rights community regard John Brennan’s goal of the “utter destruction” of al-Qaeda, especially through the use of drone attacks, as incompatible with international law. For example, in response to the killing of al-Qaeda leader Haitham al-Yemini with a CIA Predator drone attack in Pakistan in 2005, Amnesty International stated that, assuming the facts as it described them, the “USA has carried out an extrajudicial execution in violation of international law.”⁷⁶ According to Anderson:

⁷⁵ See GROSS, *supra* note 64, at 18–19.

⁷⁶ Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 14 (Brookings Inst., Georgetown Univ. Law Ctr., and the Hoover Inst., Counterterrorism and American Statutory Law Working Paper), available at <http://ssrn.com/abstract=1415070> (quoting Amnesty Int’l, *USA, An Extrajudicial Execution by the CIA?*, AI Index AMR

Amnesty believes that the governments of the “USA and Pakistan should have cooperated to arrest Haitham al-Yemeni rather than kill him.” The fundamental reason it gave was that whether or not this was part of an armed conflict, international human rights law continued to apply to this situation. Amnesty takes the position, in other words, that human rights law—including broad rights against arbitrary killing and guaranteeing due process—should have applied in this instance *irrespective of whether it was an armed conflict or not*. It is hard to see the circumstances in which a targeted killing could be permissible under such a standard, which is precisely Amnesty’s point.⁷⁷

As Anderson points out at some length in his article, the U.S. categorically rejects this standard, on the grounds, among others, that the International Covenant on Civil and Political Rights does not apply extraterritorially and that it does not in any event apply in the setting of armed conflict, which is governed by the law of armed conflict as the *lex specialis*.⁷⁸ The U.S. has steadfastly maintained this controversial position.

Anderson has argued in another forum that the U.S. should not just rely on the law of armed conflict, i.e., the law of a non-international armed conflict, to defend its use of drones to kill individual terrorists.⁷⁹ He warns that “any particular instance of targeted killing will most often aim at minimum violence to kill a particular individual” and therefore not rise to the level of violence required for an armed conflict.⁸⁰ This means that the U.S. might engage in uses of force that would not necessarily be part of an armed conflict in a technical sense. Anderson suggests that such uses of armed

51/079/2005 (May 18, 2005), available at <http://www.amnesty.org/en/library/asset/AMR51/079/2005/en/bafef6a3-d4ea-11dd-8a23-d58a49c0d652/amr510792005en.pdf>.

⁷⁷ *Id.*

⁷⁸ *See id.* at 13–14.

⁷⁹ *See* Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War,’* in *FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW* (Peter Berkowitz ed., 2011), http://media.hoover.org/documents/Future_Challenges_Anderson.pdf.

⁸⁰ *Id.* at 6. Neither the Geneva Conventions nor Additional Protocol I contains a definition of an “armed conflict.” In contrast, Additional Protocol II defines non-international armed conflicts in such a way as to sharply limit the scope of the Protocol. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. Paragraph 1 of Article 1 of Additional Protocol II applies to all armed conflicts not covered by Additional Protocol I and “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.* Paragraph 2 of Article 1 of Additional Protocol II then provides that “[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” *Id.*

force might be called “naked” self-defense.⁸¹ Examples include “self-defense uses of force against nonstate actors, such as individual targets, which do not (yet) rise to the NIAC [non-international armed conflict] threshold.”⁸²

It is deeply ironic that international terrorists such as al-Qaeda have enjoyed considerable success in utilizing “lawfare” as a strategy against the U.S. and its allies, even as they regularly and unapologetically engage in methods of warfare that clearly violate the law of armed conflict. Major General Charles Dunlap of the U.S. Air Force JAG introduced the term “lawfare” in 2001.⁸³ Today, Dunlap defines the term as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”⁸⁴ We have previously seen a prime example of this strategy in the claim by the Taliban and al-Qaeda in Afghanistan that NATO has violated one of the fundamental norms of the law of armed conflict. That is, the requirement that armed forces distinguish between combatants and civilians during airstrikes.⁸⁵ Yoram Dinstein, an eminent authority on the law of armed conflict, has explained how such a claim has no basis in law and constitutes, to the contrary, a misuse of the law:

It is frequently glossed over (especially in the media) that LOAC [law of armed conflict] takes some collateral damage to enemy civilians virtually for granted as an inescapable consequence of attacks against lawful targets. Such damage is the case owing to the simple fact that lawful targets cannot be sterilized: some civilians and civilian objects will almost always be in proximity to combatants and military objectives. Hence a modicum of collateral damage to civilians cannot possibly be avoided unless a battle rages in the middle of the ocean or the desert (where no civilians or civilian objects are within range of the contact zone in which the belligerent parties are conducting attacks against each other).

Far from imposing an all-embracing prohibition on collateral damage to enemy civilians and civilian objects, LOAC expressly permits it as long as (in the words of Additional Protocol I) it is not expected to be “excessive”, compared to the military advantage anticipated. This is the core of the principle of proportionality (the word “proportionality” itself is not mentioned as such in the Protocol). And “excessive”—we have to keep reminding ourselves—is not synonymous with “extensive.” Extensive civil-

⁸¹ Anderson, *supra* note 76, at 8.

⁸² *Id.*

⁸³ See generally Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Ctr. for Human Rights, John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

⁸⁴ Charles J. Dunlap, Jr., *Lawfare Today . . . and Tomorrow*, 87 INT'L LAW STUDIES: INT'L LAW AND THE CHANGING CHARACTER OF WAR 315, 315 (2011).

⁸⁵ See *supra* notes 66–69 and accompanying text.

ian casualties (and damage to civilian objects), even when plainly expected, may be perfectly lawful when reasonably determined to be non-excessive (on the basis of the information at hand at the time of action) once weighed against the military advantage anticipated.⁸⁶

It is worth noting, however, that, in another forum, Dinstein has acknowledged that there has always been a fundamental disconnect in balancing military considerations against civilian losses, because they are “dis-similar considerations.”⁸⁷ Similarly, another experienced practitioner of the law of armed conflict has noted that “[t]he rule is more easily stated than applied in practice.”⁸⁸

If balancing military considerations against civilian losses is difficult to do in combat, it is discouraging to realize, as pointed out by Dale Stephens, that “entirely lawful attacks within a theater of operations can result in popular resentment by those within that battlespace that translates into practical resistance.”⁸⁹ This is currently the situation in Afghanistan. Moreover, as Yoram Dinstein has warned us:

The notion of winning war by lawfare may appear to be far fetched. Yet, we must not underrate the potency of lawfare as a weapon of mass destruction—in this case, a weapon of mass disinformation—attuned to the peculiarities of the era in which we live. Allegations of breaches of LOAC by our troops (usually magnified in propaganda to the scale of ‘atrocities’) tend to drive a wedge between our military community and the civil society. When the public perception is that “atrocities” have been perpetrated by our troops, no victory in the field can repair the psychological damage done to the cause for which we are fighting.⁹⁰

The difficulties of succeeding in asymmetric armed conflicts with al-Qaeda and their ilk raise a temptation to respond with extreme measures such as torture, assassinations, and blackmail, a descent—in other words—into barbarism. This temptation must be resisted. Rather, as Michael Gross has suggested, “[d]rawing the line between the acceptable and the unacceptable, navigating the straits between military necessity and humanitarian

⁸⁶ Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, in 87 INT’L LAW STUDIES: INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 463, 465–66 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011) (citation omitted).

⁸⁷ See DINSTEIN, *supra* note 61, at 122.

⁸⁸ A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 20 (2nd ed. 2004).

⁸⁹ Dale Stephens, *The Age of Lawfare*, in 87 INT’L LAW STUDIES: INT’L LAW AND THE CHANGING CHARACTER OF WAR 327, 332 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011).

⁹⁰ Dinstein, *supra* note 86, at 484.

imperatives while avoiding the pitfall of the slippery slope is the hard work of applied ethics during war.”⁹¹

Another example of the changing nature of war that raises challenges for international law and international institutions is the emergence of the so-called “Responsibility to Protect.” It is to this topic that we turn in the next section of this essay.

A. *The Responsibility to Protect (R2P)*

There has long been a debate, at least in scholarly circles, over whether there is a doctrine of humanitarian intervention that is an exception to U.N. Charter limitations on the use of armed force.⁹² Regardless of which side to this debate has the better argument, it is clear that the responsibility to protect is different from the doctrine of humanitarian intervention. As José E. Alvarez has noted:

The responsibility to protect concept was borne out of frustration with the international community’s repeated failures to intervene in cases of ongoing mass atrocity, in particular in Rwanda and Kosovo. The concept sought to deflect attention from the controverted “right” of some states to intervene, to the duties of all states to protect their own citizens from avoidable catastrophes and for third parties to come to the rescue.⁹³

As also noted by Alvarez, the concept was created and developed in greatest detail in the 2001 Report of the International Commission on Intervention and State Responsibility, which was sponsored by the Canadian government.⁹⁴ Alvarez further explains:

As that Commission conceived it, the virtue of R2P was that it would entice states to engage in humanitarian relief by shifting the emphasis from the politically unattractive right of state interveners to the less threatening idea of “responsibility.” R2P put the focus on the peoples at grave risk of harm rather than on the rights of states. It also stressed that responsibility was shared—as between the primary duty of states to protect their own populations and the secondary duty of the wider community.⁹⁵

⁹¹ GROSS, *supra* note 64, at 252.

⁹² See generally JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 154–67 (2004) (discussing this issue in the context of NATO’s bombing in Kosovo, and for citations to articles taking both the pro and con sides).

⁹³ José E. Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE 275, 275 (Philip Alston & Euan MacDonald eds., 2008).

⁹⁴ See generally INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at www.iciss.ca/pdf/Commission-Report.pdf.

⁹⁵ Alvarez, *supra* note 93.

The Commission's concept of R2P subsequently became part of several proposals for U.N. reform.⁹⁶ Most significantly, the U.N. General Assembly adopted it in its 2005 World Summit Outcome document.⁹⁷ In 2006, the U.N. Security Council "reaffirmed" states' "responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."⁹⁸

Well before the outbreak of the so-called "Arab Spring" and the armed conflict in Libya and the Ivory Coast, Alvarez suggested that:

[T]here must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows, and there is. R2P's normative "legs" result from its not always consistent, various iterations as well as from the lack of clarity as to whether it is a legal or merely political concept. It means too many things to too many different people.⁹⁹

Perhaps the most significant issue arising from the various iterations of R2P is whether, in the absence of Security Council authorization, individual states may invoke the doctrine of humanitarian intervention to protect populations in other states from the enumerated crimes. The report of the High-Level Panel on Threats, Challenges and Change appears—although it is not absolutely clear—to require Security Council authorization for the use of armed force to protect persons from the enumerated crimes.¹⁰⁰ There is little doubt that the International Commission on Intervention and State Sovereignty viewed the Security Council "as the only legal source of authority (self-defense aside) for the use of force"¹⁰¹

It is unclear, however, whether the World Summit Outcome document requires Security Council authorization for the use of armed force under R2P. Paragraph 79 states "that the relevant provisions of the [U.N.]

⁹⁶ See *A More Secure World: Our Shared Responsibility*, Rep. of the High-level Panel on Threats, 59th Sess., ¶¶ 201–03, U.N. Doc. A/59/565 (December 2, 2004). (which refer to an "emerging norm of collective responsibility to protect"); U.N. Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

⁹⁷ 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); see also Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007) (discussing the background to the World Summit Outcome).

⁹⁸ S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

⁹⁹ The "strange bedfellows" referred to by Alvarez were the controversial John Bolton, then the U.S. Permanent Representative to the United Nations, and the Non-Aligned Movement. See Alvarez, *supra* note 93, at 277.

¹⁰⁰ See *A More Secure World: Our Shared Responsibility*, *supra* note 96, ¶ 203; see also Stahn, *supra* note 97, at 105–07 (analyzing the High-level Panel's position).

¹⁰¹ Gareth Evans, foreign minister of Australia from 1988 to 1996, served as co-chair of the International Commission. GARETH EVANS, *THE RESPONSIBILITY TO PROTECT* 64 (2008).

Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security.”¹⁰² Interpreting this language, Frederic L. Kirgis has suggested that the:

leaders appear to be saying that no Charter amendments are needed in order to enable the UN to deal with threats to the peace . . . that were not contemplated when the Charter was drawn up. Possibly, but not clearly, they were also saying that apart from uses of armed force expressly recognized in the Charter (Security Council authorization under Chapter VII or self-defense in case of an armed attack), coercive action to deal with a threat to the peace could not be justified under the Charter.¹⁰³

Similarly, elsewhere in his ASIL Insight, Kirgis quotes paragraph 139 of the Outcome document, where the world leaders stated that they:

are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.¹⁰⁴

He then notes that “[t]he legitimacy of humanitarian intervention without Security Council approval is controversial. Whether the world leaders intended to address it in Paragraph 139 (or in Paragraph 79, discussed above) is unclear.”¹⁰⁵

At the time of this writing, the issue raised by Kirgis has not come up in practice. Instead, the Security Council has struggled with issues arising in connection with the extraordinary phenomenon known colloquially as the “Arab Spring.”

¹⁰² 2005 World Summit Outcome, *supra* note 97, ¶ 79.

¹⁰³ Frederic L. Kirgis, *International Law Aspects of the 2005 World Summit Outcome Document*, AM. SOCIETY INT'L L. (Oct. 4, 2005), available at http://www.asil.org/insights051004.cfm#_edn2.

¹⁰⁴ *Id.*; 2005 World Summit Outcome, *supra* note 97, ¶ 139.

¹⁰⁵ Kirgis, *supra* note 103.

B. The Arab Spring

Although the early 2011's so-called "Arab Spring" was not the first example of a revolution sparked by social media and cell-phone texts,¹⁰⁶ the eruption of demonstrations and revolutionary fervor in the Middle East set off by a Tunisian street vendor setting himself on fire in protest of police harassment is surely the most spectacular. Text messages and pictures of the street vendor's self-immolation spread rapidly throughout the Middle East. Ultimately, the incident led to the removal of the leaders of Egypt and the outbreak of armed conflict in Libya, Yemen, the Ivory Coast and Syria. Demonstrations arose in Bahrain, Jordan and elsewhere. They also led to the Security Council taking action with respect to Libya and the Ivory Coast that, at least arguably, constituted the first exercises of the Responsibility to Protect.

Reacting quickly to the outbreak of armed conflict in Libya and to reports of the use of force by the Libyan government against civilians, the U.N. Security Council unanimously adopted Resolution 1970 on February 26, 2011.¹⁰⁷ In its preamble, Resolution 1970 expressed grave concern at the situation in Libya, condemned the violence and use of force against civilians, considered that these attacks might amount to crimes against humanity, and recalled the Libyan authorities' responsibility to protect its population. Acting under Chapter VII of the U.N. Charter, and taking measures under Article 41 of the Charter,¹⁰⁸ the Council expressed the hope that those responsible for these crimes would be brought before the International Criminal Court ("ICC"). The Council referred the matter to the ICC's Prosecutor and imposed sanctions against Colonel Gadhafi, as well as his ac-

¹⁰⁶ According to Clay Shirky, the first time that social media had helped to force out a national leader was when Philippine President Joseph Estrada was removed from office in 2001. Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 28 (2011). In response to a vote by the Philippine Congress during the impeachment trial of Estrada to set aside key evidence against him, within two hours after the vote, thousands of Filipinos took to the streets in protest. *Id.* Encouraged in part by close to seven million text messages during the week, the crowd grew in several days to over a million people, choking traffic in downtown Manila. *Id.* The Philippine Congress reversed its vote and Estrada was gone. *Id.*

¹⁰⁷ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

¹⁰⁸ Article 41 of the U.N. Charter provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

U.N. Charter art. 41.

complices and members of his family, and imposed an embargo on arms destined for Libya.

It is perhaps surprising that the Security Council unanimously decided to refer the situation in Libya to the Prosecutor of the International Criminal Court, in light of the uproar that broke out in reaction to the Court's issuance of arrest warrants against Omar Hassan Al-Bashir, the President of the Sudan.¹⁰⁹ Indeed, Resolution 1970 is a bit schizophrenic on the referral because in its preamble the resolution recalls, "Article 16 of the Rome Statute [the charter of the ICC] under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect."¹¹⁰ There was an effort after the ICC issued its arrest warrants against Al-Bashir to get the Security Council to take action under Article 16 of the Rome Statute, but the threat of a U.S. and British veto blocked the adoption of any such action.¹¹¹ Despite the ICC's difficulties with respect to the arrest warrants it issued against Al-Bashir, the International Criminal Court's Pre-Trial Chamber I issued arrest warrants against Muammar Gaddafi, Seif al-Slam Gadhafi, his son, and Abdullah Senussi, the chief of military intelligence and Muammar Gaddafi's brother-in-law on June 27, 2011. The warrants pertained to crimes against humanity—murder and persecution—allegedly committed in Libya from February 15, 2011 until at least February 28, 2011.¹¹²

The sanctions against the Libyan government and the threat of action by the ICC failed to halt the Libyan government's attacks on its population, leading the Security Council to adopt Resolution 1973 on March 17, 2011.¹¹³ In that resolution, the Council authorized the use of armed force against the Libyan government and thereby created a major challenge for itself, raising crucial questions regarding the operational viability of the Responsibility to Protect.

Before considering Resolution 1973 in more detail, it is important to note that prior to consideration of the resolution in draft form, the League of Arab States called on the Security Council to establish a no-fly zone in its own resolution on March 12, 2011.¹¹⁴ It is also important to note that de-

¹⁰⁹ For a brief discussion of this reaction, see John F. Murphy, *Gulliver No Longer Quivers: U.S. Views on and the Future of the International Criminal Court*, 44 INT'L L. 1123, 1136–37 (2010).

¹¹⁰ S.C. Res. 1970, *supra* note 107.

¹¹¹ See Murphy, *supra* note 109, at 1137.

¹¹² Bruce Zagaris, *ICC Issues Three Arrest Warrants for Gaddafi and Two Others*, 27 INT'L ENFORCEMENT L. REP. 888, 888 (2011).

¹¹³ S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

¹¹⁴ As noted by Alain Juppé, the Foreign Minister of France, in a statement to the Security Council before the vote on Resolution 1973. See U.N. SCOR, 66th Sess., 6498th mtg., at 2,

spite this unanimous request by the League of Arab States, Resolution 1973 was adopted by the narrowest of margins, with five member states of the Council—Brazil, China, Germany, India, and the Russian Federation—abstaining in the vote.¹¹⁵ In his statement before the vote, Alain Juppé, the French Minister of Foreign Affairs, highlighted the most important provisions of the then draft resolution:

The draft resolution provides the Council with the means to protect the civilian populations in Libya, first by establishing a no-fly zone and by authorizing the members of the Arab League and those Member States [of the U.N.] that so wish to take the measures necessary to implement its provisions. Furthermore, it authorizes these same States to take all measures necessary, over and above the no-fly zone, to protect civilians and territories, including Benghazi, which are under the threat of attack by Colonel Al-Qadhafi's forces. Lastly, it strengthens the sanctions that have been adopted against the regime, including implementing the arms embargo, freezing the assets of authorities in Tripoli and prohibiting flights by Libyan airlines.¹¹⁶

All five of the member states of the Security Council who abstained in the vote on Resolution 1973 made statements in explanation of their abstentions.¹¹⁷ All of their statements indicated that the abstainers had problems with Resolution 1973's authorization of the use of armed force to implement the no-fly zone and especially with the resolution's authorization of "all measures necessary, over and above the no-fly zone, to protect civilians. . . ."¹¹⁸ The representative of the Russian Federation made an especially strong statement against the use of force. Favoring a peaceful settlement of the situation in Libya, the representative noted, "However, the passion of some Council members for methods involving force prevailed. This is most unfortunate and regrettable. Responsibility for the inevitable humanitarian

U.N. Doc. S/PV.6498 (Mar. 17, 2011). Also, in its preamble, Resolution 1973 takes note of "the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya." S.C. Res. 1973, *supra* note 113.

¹¹⁵ See U.N. Doc. S/PV.6498, *supra* note 114, at 3. Member states voting in favor were Bosnia and Herzegovina, Columbia, France, Gabon, Lebanon, Nigeria, Portugal, South Africa, the U.K., and the U.S. *Id.* The ten votes in favor of the resolution were one more than the nine votes, including the concurring votes of all the permanent members, required by Article 27 (3) of the U.N. Charter. U.N. Charter art. 27, para. 3.

¹¹⁶ U.N. Doc. S/PV.6498, *supra* note 114, at 3.

¹¹⁷ *Id.* at 4–6, 8, 10 (Germany, India, Brazil, Russian Federation, China).

¹¹⁸ S.C. Res. 1973, *supra* note 113, ¶ 3.

consequences of the excessive use of outside force in Libya will fall fair and square on the shoulders of those who might undertake such action.”¹¹⁹

At the time of this writing, unknown gunmen have assassinated the Libyan rebels' leader, General Abdul Fattah Younes, along with two colleagues. According to reports, “[n]early every detail of the killings seems to be in dispute.”¹²⁰ In particular, it is unclear whether Younes was killed by agents of Gadhafi or by persons in one of the dozens of armed rebel militias who distrust Younes due to his previous position as a trusted lieutenant of Gadhafi. Relatives and members of Younes' tribe have warned of dire consequences, including violence, if rebel leaders do not move quickly to find his killers.

Younes's killing also has focused more attention on not just whether Gadhafi will be toppled but what will follow him if he is. As stated by two commentators on the current situation:

Libya's fate matters not just for a population estimated before the war at 6.5m and for the credibility of western countries that have backed the rebels. It is also crucial for the future of the Arab spring. This has darkened since the Tunisian and Egyptian presidents were forced from office largely peacefully in January and February, with protracted violence seen since in Libya, Syria and Yemen. Today those opposing Middle East regimes, not least in Syria—where more than 100 people are thought to have died in the past few days alone in a violent government crackdown—will be looking to Libya to see if an armed uprising can work. Repressive governments in Damascus and elsewhere will be examining whether such movements can be resisted.¹²¹

The fate of the Arab Spring is impossible to predict at this point, and is beyond the scope of this essay.¹²² However, it is worthwhile to consider the international community's actions in Libya with respect to R2P. First, it is debatable whether the primary motivation behind the Security Council's adoption of Resolution 1973 was to protect the citizens of Libya. As noted above, the five states that abstained on the resolution, especially China and the Russian Federation, both permanent members of the Security Council, were extremely uncomfortable with Resolution 1973's authorization of a no-fly zone and related measures going beyond a no-fly zone if they were necessary to protect civilians and civilian-populated areas under

¹¹⁹ U.N. Doc. S/PV.6498, *supra* note 114, at 8.

¹²⁰ Kareem Fahim, *Killing of General Vexes Rebels in Libya*, N.Y. TIMES, Aug. 3, 2011, at A6.

¹²¹ Michael Peel & Simeon Kerr, *Uneasy Seat of Power*, FIN. TIMES, Aug. 3, 2011, at 5.

¹²² For a pessimistic analysis of the Arab Spring's fate, see Richard Haass, *The Arab Spring and the Long, Hot Summer*, FIN. TIMES, July 7, 2011, at 9. Richard Haass is currently president of the Council on Foreign Relations and former director of policy planning at the U.S. Department of State (2001–03).

threat of attack.¹²³ It seems highly likely that China and the Russian Federation refrained from blocking the resolution because the Arab League had unanimously called for a no-fly zone and because neither state wished to offend the Arab states because of various important interests in the Middle East. Nonetheless, one should note that Resolution 1973 explicitly excludes “a foreign occupation force of any form on any part of Libyan territory,”¹²⁴ and all states agreed that no foreign ground troops would be called to action in Libya.¹²⁵ As a result, the conflict in Libya is currently at a stalemate despite many air raids by coalition forces. One may doubt that the effort to protect the civilians of Libya from attacks by Gadhafi’s forces has been successful. Further, nothing has been done to protect civilians from rebel attacks, and there are reports of rebel forces committing numerous atrocities against civilians in areas that were previously under the control of Gadhafi forces.¹²⁶

In short, perhaps Richard Haass was correct to suggest that “the most important lessons from the Arab spring remain the simplest. Military intervention should, as a rule, be avoided. It is easier to oust a regime than it is to help put something better in its place. Iraq, Afghanistan and Libya all stand as warnings.”¹²⁷

The situation in the Ivory Coast is, of course, not part of the Arab Spring. It is, however, arguably the only other situation in which the Security Council took action as an exercise of the R2P.

C. *The Ivory Coast and R2P*

As the background to the situation in the Ivory Coast is complex and has been set forth elsewhere, it suffices to merely highlight a few key developments for present purposes.¹²⁸ In particular, one should note that in an effort to end internal armed conflict, Ivorian political forces signed an

¹²³ See U.N. Doc. S/PV.6498, *supra* note 114, at 8–10.

¹²⁴ S.C. Res. 1973, *supra* note 113, ¶ 4.

¹²⁵ See President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), *available at* <http://whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

¹²⁶ Human Rights Watch has reportedly claimed that rebels in the mountains in Libya’s west have looted and damaged four towns seized from the forces of Colonel Gadhafi, as part of a series of abuses and apparent reprisals against suspected loyalists that have chased residents of these towns away. See C.J. Chivers, *Libyan Rebels Accused of Pillage and Beatings in Towns They Captured*, N.Y. TIMES, July 13, 2011, at A11.

¹²⁷ Haass, *supra* note 122, at 10.

¹²⁸ See generally Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect*, 87 INT’L AFF. 825 (2011) (using the case study of Côte d’Ivoire to show changes in the international attitudes towards the responsibility to protect doctrine).

agreement in Linas-Marcoussis on January 24, 2003.¹²⁹ For its part, the Security Council created an international peacekeeping force to oversee the implementation of the agreement: the United Nations Operation in Cote d'Ivoire ("UNOCI").¹³⁰ The mandate of UNOCI included the protection of "civilians under imminent threat of physical violence,"¹³¹ and it was authorized to use "all necessary means to carry out its mandate, within its capabilities and its areas of deployment."¹³² Unfortunately, UNOCI proved to have insufficient capabilities to protect civilians, even though it was supported by several thousand French soldiers stationed in the Ivory Coast prior to the outbreak of armed conflict.¹³³ The crucial phase of the conflict, however, arose after the principal parties disputed the results of the long-postponed presidential election of November 28, 2010. This resulted in renewed armed conflict between the supporters of the incumbent President Laurent Gbagbo and his challenger, Alassane Ouattara. When early election returns suggested Ouattara's victory, Gbagbo's representatives prevented dissemination of the result. "In the meantime, the Constitutional Council [of the Ivory Coast] declared that that there had been massive vote-rigging in the north."¹³⁴ It cancelled 660,000 votes for Ouattara, handing Gbagbo the victory.¹³⁵ Based on a briefing from the Secretary-General's Special Representative for the Ivory Coast, however, who insisted that Ouattara had won, the Security Council adopted a resolution formally supporting this view and urging the parties to accept this result.¹³⁶

The parties did not accept this result, however, and the situation deteriorated further, with an increase in violence. In response, on March 30, 2011, the Security Council unanimously adopted Resolution 1975.¹³⁷ The resolution recognized Ouattara as president, condemned Gbagbo's refusal to negotiate a settlement, and authorized UNOCI to "use all necessary means"

¹²⁹ Linas-Marcoussis Agreement, transmitted by letter dated January 27, 2003 from the Permanent Representative of France to the U.N. addressed to the President of the Security Council, U.N. Doc. S/2003/99 (Jan. 27, 2003).

¹³⁰ See S.C. Res. 1528, ¶ 1, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (establishing UNOCI).

¹³¹ *Id.* ¶ 6(i).

¹³² *Id.* ¶ 8.

¹³³ See Bellamy & Williams, *supra* note 128, at 829.

¹³⁴ *Id.* at 832

¹³⁵ *Id.*

¹³⁶ See S.C. Res. 1962, ¶ 1, U.N. Doc. S/RES/1962, at 2 (Dec. 20, 2010).

¹³⁷ S.C. Res. 1975, U.N. Doc. S/RES/1975, at 1 (Mar. 30, 2011) ("Expressing grave concern about the recent escalation of violence in Côte d'Ivoire and the risk of relapse into civil war and *urging* all parties to show utmost restraint to prevent such outcome and to resolve their differences peacefully.").

to protect civilians, including by “prevent[ing] the use of heavy weapons against the civilian population.”¹³⁸

Although the Security Council unanimously adopted Resolution 1975, members presented sharply different interpretations of the text. For example, the representative of the United Kingdom noted that the resolution reaffirmed the “robust mandate” of UNOCI to use “all necessary means” to protect civilians and recognizes the need to prevent “the use of heavy weapons against civilians.”¹³⁹ By contrast, the representative of China stated that it “always believes that United Nations peacekeeping operations should strictly abide by the principle of neutrality.”¹⁴⁰ India, for its part, contended that U.N. peacekeepers “cannot be made instruments of regime change.”¹⁴¹

Despite these interpretations of Resolution 1975 by the Chinese and Indian representatives, UNOCI, aided by French forces, used military force to engage in regime change.¹⁴² They defeated Gbagbo forces in April 2011. U.N. Peacekeepers arrested him without French assistance.¹⁴³ As noted by Bellamy and Williams:

This use of force by UN peacekeepers and French troops blurred the lines between human protection and regime change and raised questions about the role of the UN in overriding Côte d’Ivoire’s Constitutional Council, about the proper interpretation of Resolution 1975, and about the place of neutrality and impartiality in UN peacekeeping.¹⁴⁴

The Russian Federation and Thabo Mbeki, the former president of South Africa, sharply criticized the UNOCI and French operation.¹⁴⁵ As in the case of Libya and Resolution 1973, it appears that the Security Council would not have adopted Resolution 1975 in the absence of strong support

¹³⁸ *Id.* ¶ 6.

¹³⁹ U.N. SCOR, 66th Sess., 6508th mtg. at 6, U.N. Doc. S/PV.6508 (Mar. 30, 2011).

¹⁴⁰ *Id.* at 7.

¹⁴¹ *Id.* at 3.

¹⁴² Steven Erlanger, *French Colonial past Casts Long Shadow over Policy in Africa*, N.Y. TIMES, Apr. 18, 2011, at A10.

¹⁴³ *Id.*

¹⁴⁴ See Bellamy & Williams, *supra* note 128, at 835.

¹⁴⁵ *Id.* Thabo Mbeki, who argued that the UN had overstepped its authority by overriding the Constitutional Council, that Ban Ki-moon had exceeded his mandate by declaring Ouattara to be the winner of the elections, and that UNOCI had fallen short of its mandate by failing to prevent or stop ceasefire violations by the Forces Nouvelles and then by failing to protect civilians in Duékoué. The source of these failings, he maintained, lay in the abandonment of impartiality by the UN and the undue influence exerted by France. The Russian Foreign Minister Sergei Lavrov also criticized the role played by the UN, arguing that “UN peacekeepers and supporting French forces in Côte d’Ivoire have started military action, taking the side of Ouattara, carrying out air strikes on the positions held by supporters of Gbagbo.” *Id.*

for forceful action from regional organizations, in this case the Economic Community of West African States ("ECOWAS") and the African Union.¹⁴⁶ Once again, it appears that political interests rather than humanitarian concerns were the motivating factors behind the actions of the Security Council.

At the time of this writing, the situations in Libya and the Ivory Coast continue to unfold. Concurrently, the Syrian government has engaged in widespread attacks on protestors against the regime of President Bashar al-Assad, presenting another difficult challenge with respect to R2P for the international community.¹⁴⁷ On August 3, 2011, after months of diplomatic wrangling, the Security Council approved a statement by the President of the Security Council.¹⁴⁸ In the statement, the Council "condemn[ed] the widespread violations of human rights and the use of force against civilians by the Syrian authorities" and called for "an immediate end to all violence and urges all sides to act with utmost restraint, and to refrain from reprisals, including attacks against state institutions."¹⁴⁹ The U.S. and its allies on the Council had reportedly sought a resolution that would create binding obligations on Syria and others. Syria's opposition had lobbied Western nations intensely for a resolution that would refer the situation in Syria to the International Criminal Court. But the Russian Federation made clear it would veto a resolution, which also was opposed by China, Brazil, India and South Africa.¹⁵⁰ How this crisis is resolved will determine the future of Syria and perhaps of R2P as well.

A final emerging change in the nature of armed conflict is the threat of cyber combat. A complete examination of that topic is beyond the scope of this essay, but cyber combat clearly poses challenges to international law and international institutions. The U.S. Department of Defense has concluded that state-sponsored computer sabotage can, under certain circumstances, constitute an act of war, to which the U.S. could respond with traditional

¹⁴⁶ Bellamy and Williams report that "ECOWAS had suspended Côte d'Ivoire's membership, called on Gbagbo to step aside and threatened that it might 'use . . . legitimate military force' if he did not. . . ." *Id.* at 834. But he called their bluff, and "its political leaders were well aware that they were in no position to mount an effective military intervention and instead called for the UN Security Council to take more forceful action." *Id.* Moreover, in its preamble, Resolution 1975 welcomes "the decision of the Peace and Security Council of the African Union . . . which reaffirms all its previous decisions on the rapidly deteriorating post-electoral crisis facing Côte d'Ivoire since the second round of the presidential election, on 28 November 2010, which recognize the election of Mr Alassane Dramane Ouattara as the President of the Republic of Côte d'Ivoire." S.C. Res. 1975, *supra* note 137, at 1.

¹⁴⁷ See Joe Lauria & Nour Malas, *U.N. Condemns Syria as Hama Shelled*, WALL ST. J., Aug. 4, 2011, at A6.

¹⁴⁸ S.C. Pres. Statement 2011/16, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

¹⁴⁹ *Id.*

¹⁵⁰ See Lauria & Malas, *supra* note 147.

military force.¹⁵¹ Although defense officials refuse to discuss potential cyber adversaries, some experts have identified China as condoning these types of attacks.¹⁵² One should note, however, that cyber-attacks might also come from individual terrorists or terrorist organizations, especially in light of the increased technological competence of the new terrorism.¹⁵³ The concept is increasingly becoming the focus of considerable attention.¹⁵⁴

IV. CONCLUSION

It is my hope that the foregoing discussion of the challenges posed by the new terrorism and the changing nature of war or armed conflict has demonstrated that these challenges have indeed created a major crisis for international law and international institutions, especially with respect to efforts to combat international terrorism. Profound changes have occurred with great rapidity over the last decade, and international law and international institutions have struggled, often in vain, to keep up.

A major contributor to this crisis is the inability of the major players—states, NGOs, international organizations, and academics—to agree on the nature of the challenges, or even of their existence, much less on the steps that should be taken to meet them. The debates have been fierce, not only between or among these major players, but also between the decision makers within the major players. For example, there have been major debates within the Obama administration on how to react to the R2P situation.¹⁵⁵ Hillary Clinton, U.S. Secretary of State, has reportedly indicated how difficult she finds the decision making process on this issue:

¹⁵¹ Siobhan Gorman & Julian E. Barnes, *Cyber Combat: Act of War—Pentagon Sets Stage for U.S. to Respond to Computer Sabotage with Military Force*, WALL ST. J., May 31, 2011, at A1.

¹⁵² See, e.g., Richard Clarke, *China's Cyberassault on America*, WALL ST. J., June 15, 2011, at A15.

¹⁵³ See generally John F. Murphy, *Computer Network Attacks by Terrorists: Some Legal Dimensions*, in 76 INT'L LAW STUDIES: COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 323 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (providing an early discussion of this possibility).

¹⁵⁴ See Matthew C. Waxman, *Cyber Attacks as "Force" under UN Charter Article 2(4)*, 87 INT'L LAW STUDIES: INT'L LAW AND THE CHANGING CHARACTER OF WAR 43 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011), Sean Watts, *Low-Intensity Computer Network Attack and Self-Defense*, 87 INT'L LAW STUDIES: INT'L LAW AND THE CHANGING CHARACTER OF WAR 59 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011), and Michael N. Schmitt, *Cyber Operations and the Jus in Bello: Key Issue*, 87 INT'L LAW STUDIES: INT'L LAW AND THE CHANGING CHARACTER OF WAR 89 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011) for recent consideration of the possibility of cyber-attacks from individual terrorists or terrorist organizations.

¹⁵⁵ See Ryan Lizza, *The Consequentialist*, NEW YORKER, May 2, 2011, at 44.

I get up every morning and I look around the world. . . . People are being killed in Cote d'Ivoire, they're being killed in the Eastern Congo, they're being oppressed and abused all over the world by dictators and really unsavory characters. So we could be intervening all over the place. But that is not a—what is the standard? Is the standard . . . a leader who won't leave office in Ivory Coast and is killing his own people? Gee, that sounds familiar. So part of it is having to make tough choices and wanting to help the international community accept responsibility.¹⁵⁶

Helping the international community accept responsibility is not an easy task, however, because, as we have seen previously in this essay, China, the Russian Federation, India, Brazil, and South Africa, to name a few, perceive R2P quite differently than the U.S. and other Western nations. Similarly, sharp disagreements exist as to the steps that should be taken to meet challenges arising in Iraq, Afghanistan, Pakistan, Yemen, and Somalia.

These and other challenges discussed in this essay must be faced, and efforts continued to reach agreement on how to meet them. Otherwise, the current crisis in international law and international institutions will only worsen, with all the serious consequences this will entail.

¹⁵⁶ *Id.* at 55.