# DOD General Counsel Remarks at U.S. Cyber Command Legal Conference

MARCH 2, 2020
Remarks By Hon. Paul C. Ney, Jr.

General Nakasone, Colonel Smawley, distinguished panelists, and guests, thank you for the opportunity to speak with you today. Since its inception in 2012, the U.S. Cyber Command legal conference has provided the Department of Defense (DoD), other U.S. Government agencies, our Allies and partners, and interested members of the academy and the general public, with a unique opportunity to explore some of the complex legal issues facing our military and our Nation in cyberspace.

I have two objectives today. First, I'll offer a snapshot of how we in DoD are integrating cyberspace into our overall national defense strategy. Second, I will summarize the domestic and international law considerations that inform the legal reviews that DoD lawyers conduct as part of the review and approval process for military cyber operations. We at DoD now have considerable practice advising on such operations and are accordingly in a position to begin to speak from experience to some of the challenging legal issues that cyber operations present.

To set the scene, when I talk about "cyberspace," I am referring to "the interdependent network of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers." Physically, and logically, the domain is in a state of perpetual transformation. It enables the transmission of data across international boundaries in nanoseconds—controlled much more by individuals or even machines than by

governments—spreading ideas to disparate audiences and, in some cases, the generating of physical effects in far-flung places.

## 1. Today's Cyber Threat Environment and DoD's Response

As we enter the third decade of the twenty-first century, people are imagining, developing, and creating new technologies and devices at a faster rate than ever before. These new technologies update on a near daily basis—think of the software update that your phone automatically uploaded today.

Sophisticated technologies are now a part of nearly all aspects of military operations, creating opportunities and challenges. A recent Brookings paper makes the point well:

By … building Achilles' heels into everything they operate, modern militaries have created huge opportunities for their potential enemies. The fact that everyone is vulnerable … is no guarantee of protection.

Constantly changing vulnerabilities exist not only within our Armed Forces but also in the private and public sectors, which provide critical support to our operations. This includes contractors that manage networks and other services; the defense industrial base that is the foundation of the United States' military strength; and critical public infrastructure upon which the entire country, including the Armed Forces, relies for water, electricity, and transportation.

From a strategic competition perspective, too, cyberspace is increasingly dynamic and contested, including as a warfighting domain. In the past few years, other nations, in part to make up for gaps in conventional military power vis-à-vis the United States, have developed cyber strategies and organized military forces to conduct operations in cyberspace. China's Strategic Support Force, for example, provides its People's Liberation Army

with cyberwarfare capabilities to "establish information dominance in the early stages of a conflict to constrain [U.S.] actions … by targeting network-based [command and control] … logistics, and commercial activities." Russia consistently uses cyber capabilities for what it calls "information confrontation" during peacetime and war. All of this is unsurprising because cyber is a relatively cheap form of gaining real power, especially for impoverished adversaries like North Korea: a cyber operation can require nothing more than a reasonably skilled operator, a computer, a network connection, and persistence.

A key element of the U.S. military's strategy in the face of these cyber-threats is to "defend forward." Implementing this element of the strategy begins with "continuously engaging and contesting adversaries and causing them uncertainty wherever they maneuver"—which we refer to as "persistent engagement." "Persistent engagement recognizes that cyberspace's structural feature of interconnectedness and its core condition of constant contact creates a strategic necessity to operate continuously in cyberspace." As General Nakasone has said, "[i]f we find ourselves defending inside our own networks, we have lost the initiative and the advantage." In short, the strategy envisions that our military cyber forces will be conducting operations in cyberspace to disrupt and defeat malicious cyber activity that is harmful to U.S. national interests.

Cyber operations are also becoming an integral part of other military operations. As the 2018 National Defense Strategy emphasizes, "[s]uccess no longer goes to the country that develops a new technology first, but rather to the one that better integrates it and adapts its way of fighting." For example, during operations in Iraq in 2017, U.S. forces used cyber and space capabilities to disrupt communications to and from the enemy's primary command post, forcing the enemy to move to previously unknown backup

sites, thereby exposing their entire command-and-control network to U.S. kinetic strikes. Operations like this will become increasingly common.

Because of the complexity and dynamism of the domain and the threat environment, the need for persistent engagement outside U.S. networks, and the critical advantage that cyber operations provide our Armed Forces, DoD must develop, review, and approve military cyber operations at so-called "warp-speed." To this end, the U.S. Government has made meaningful strides. You heard in 2018 that the President had issued National Security Presidential Memorandum-13, *United States Cyber Operations Policy*, or "NSPM-13" for short, which allows for the delegation of well-defined authorities to the Secretary of Defense to conduct time-sensitive military operations in cyberspace. Congress also has clarified that the President has authority to direct military operations in cyberspace to counter adversary cyber operations against our national interests and that such operations, whether they amount to the conduct of hostilities or not, and even when conducted in secret, are to be considered traditional military activities and not covert action, for purposes of the covert action statute.
Even as the United States takes action to secure its vital national interests and to support its Allies and partners in this complex environment, it is a Nation dedicated to the rule of law. Consequently, we must ensure that our efforts are not only effective but also consistent with law and wider U.S. Government efforts to promote stability in cyberspace and adherence to the rules-based international order. DoD lawyers have an important role to play as the Department develops and executes cyber operations to meet these mandates.

Let me turn now to providing you a sense of how DoD lawyers analyze proposed military cyber operations for compliance with domestic and international law.

## 2. Framework for Legal Analysis

To evaluate the legal sufficiency of a proposed military cyber operation, we employ a process similar to the one we use to assess non-cyber operations. We engage our clients to understand the relevant operational details: What is the military objective we seek to achieve? What is the operational scheme of maneuver and how does it contribute to achieving that objective? Where is the target located? Does the operation involve multiple geographic locations? What is the target system used for? How will we access it? What effects—such as loss of access to data—will we generate within that system? How will those effects impact the system's functioning? Which people or processes will be affected by anticipated changes to the system's functioning? Are any of those likely to be impacted civilians or public services? Answers to these questions will drive the legal analysis.

### A. U.S. Domestic Law

Let's take up considerations of U.S. domestic law first. We begin with the foundational question of domestic legal authority to conduct a military cyber operation. The domestic legal authority for the DoD to conduct cyber operations is included in the broader authorities of the President and the Secretary of Defense to conduct military operations in defense of the nation. We assess whether a proposed cyber operation has been properly authorized using the analysis we apply to all other operations, including those that constitute use of force. The President has authority under Article II of the U.S. Constitution to direct the use of the Armed Forces to serve important national interests, and it is the longstanding view of the Executive Branch that this authority may include the use of armed force when the anticipated nature, scope, and duration of the operations do not rise to the level of "war" under the Constitution, triggering Congress's power to declare war. Furthermore, the Supreme Court has long affirmed the President's power to use force in defense of the nation and federal persons, property, and

instrumentalities. Accordingly, the President has constitutional authority to order military cyber operations even if they amount to use of force in defense of the United States. Of course, the vast majority of military operations in cyberspace do not rise to the level of a use of force; but we begin analysis of U.S. domestic law with the same starting point of identifying the legal authority.

In the context of cyber operations, the President does not need to rely solely on his Article II powers because Congress has provided for ample authorization. As I noted earlier, Congress has specifically affirmed the President's authority to direct DoD to conduct military operations in cyberspace. Moreover, cyber operations against specific targets are logically encompassed within broad statutory authorizations to the President to use force, like the 2001 Authorization for the Use of Military Force, which authorizes the President to use "all necessary and appropriate force" against those he determines were involved in the 9/11 attacks or that harbored them. Congress has also expressed support for the conduct of military cyber operations to defend the nation against Russian, Chinese, North Korean, and Iranian "active, systematic, and ongoing campaigns of attacks" against U.S. interests, including attempts to influence U.S. elections.

In addition to questions of legal authority, DoD lawyers advise on the Secretary of Defense's authority to direct the execution of military cyber operations as authorized by the President and statute, "including in response to malicious cyber activity carried out against the United States or a United States person by a foreign power," and to conduct related intelligence activities. Our lawyers ensure that U.S. military cyber operations adhere to the President's specific authorizations as well as the generally applicable NSPM-13.

After concluding that the operation has been properly authorized, DoD lawyers assess whether there are any statutes that may restrict DoD's ability to conduct the proposed cyber operation and whether the operation may be carried out consistent with the protections afforded to the privacy and civil liberties of U.S. persons. To illustrate, I am going to talk about two statutes and the First Amendment as examples of laws that we may consider, depending on the specific cyber operation to be conducted.

First, let's look at federal criminal provisions in Title 18 of the U.S. Code that prohibit accessing certain computers and computer networks "without authorization" or transmitting a "program, information, code, or command" that intentionally causes "any impairment to the integrity or availability" of the computer or data on it—provisions found in the Computer Fraud and Abuse Act or "CFAA," as amended. These provisions contain exceptions for lawfully authorized activities of law enforcement agencies and U.S. intelligence agencies but do not refer to U.S. military cyber operations. Common sense and long-accepted canons of statutory interpretation suggest, however, that the CFAA will not constrain appropriately authorized DoD cyber operations.

The CFAA was enacted to protect U.S. Government computers and critical banking networks against thieves and hackers, not vice versa; it expresses no clear indication of congressional intent to limit the President from directing military actions; and the more recent statutes I mentioned earlier specifically authorize or reaffirm the President's authority to direct DoD to conduct operations in cyberspace. In light of these considerations, it would be unreasonable and counterintuitive to interpret the CFAA as restricting properly authorized military cyber operations abroad against foreign actors.

Second, DoD lawyers typically analyze whether the proposed cyber operation may be conducted as a traditional military activity—or "TMA"—such that it

would be excluded from the approval and oversight requirements applicable to covert action under the Covert Action Statute. Because the statute does not define TMA, we look to the legislative history and a provision in the National Defense Authorization Act for Fiscal Year 2019 that clarifies that in general clandestine military activities in cyberspace constitute TMA for purposes of the Covert Action Statute, and reaffirms established congressional reporting requirements for military cyber operations.

Third, DoD lawyers must assess whether a proposed operation will impact the privacy and civil liberties of U.S. persons. The practical reality of cyberspace today is that U.S. military cyber operations aimed at disrupting an adversary's ability to put information online or to distribute it across the worldwide web have the potential to affect U.S. persons' rights and civil liberties in ways that operations in physical domains do not.

Let me give you a concrete example. A core part of DoD's mission to defend U.S. elections consists of defending against covert foreign government malign influence operations targeting the U.S. electorate. The bulk of DoD's efforts in this area involve information-sharing and support to domestic partners, like the Department of Homeland Security and the Federal Bureau of Investigation. But what about a U.S. military cyber operation to disrupt a foreign government's ability to disseminate covertly information to U.S. audiences via the Internet by pretending that the information has been authored by Americans inside the United States? Can we conduct such an operation in a manner that contributes to the defense of our elections but avoids impermissible interference with the right of free expression under the First Amendment—including the right to *receive* information? The analysis often turns on the specifics of the proposed operation—but, in short, we believe we can.

Few precedents address this issue directly; but, U.S. case law does provide a framework with at least three key strands. First, there are judicial decisions

that stand for the proposition that the U.S. Government, in carrying out certain appropriately authorized activities, may incidentally burden the right to receive information from foreign sources without violating the First Amendment. Second, courts have recognized a compelling government interest in protecting U.S. elections from certain types of foreign influence—especially when that influence is exercised covertly. Third, government action based on the content of the speech will be suspect.

In light of these precedents, DoD lawyers analyzing particular cyber operations for First Amendment compliance will consider a number of factors, including: whether the operation is targeting the foreign actors seeking to influence U.S. elections covertly rather than the information itself; the extent to which the operation may be conducted in a "content neutral" manner; and, the foreign location and foreign government affiliation of the targeted entity.

We at DoD realize that military involvement in protecting U.S. elections is a sensitive mission, even when conducted in compliance with First Amendment protections and consistent with congressional intent. Virtually any military involvement in U.S. elections implicates the bedrock premise of maintaining civilian control of the military and our long tradition of keeping the military out of domestic politics. Accordingly, in assessing proposed operations related to elections, DoD lawyers pay particular attention to whether the proposed operation may be conducted consistent with legal and regulatory limits on the use of official positions to influence or affect the results of U.S. elections or to engage in, *or create the appearance of engaging in*, partisan politics.

**B. International Law**

Those are some highlights of U.S. domestic law considerations that may be implicated by proposed military cyber operations; let me turn now to international law.

We recognize that State practice in cyberspace is evolving. As lawyers operating in this area, we pay close attention to States' explanations of their own practice, how they are applying treaty rules and customary international law to State activities in cyberspace, and how States address matters where the law is unsettled. DoD lawyers, and our clients, engage with our counterparts in other U.S. Government departments and agencies on these issues, and with Allies and partners at every level—from the halls of the United Nations to the floors of combined tactical operations centers—to understand how we each apply international law to operations in cyberspace. Initiatives by non-governmental groups like those that led to the Tallinn Manual can be useful to consider, but they do not create new international law, which only states can make. My intent here is not to lay out a comprehensive set of positions on international law. Rather, as I have done with respect to domestic law, I will tell you how DoD lawyers address some of the international law issues that today's military cyber operations present.

I will start with some basics. It continues to be the view of the United States that existing international law applies to State conduct in cyberspace. Particularly relevant for military operations are the Charter of the United Nations, the law of State responsibility, and the law of war. To determine whether a rule of customary international law has emerged with respect to certain State activities in cyberspace, we look for sufficient State practice over time, coupled with opinio juris—evidence or indications that the practice was undertaken out of a sense that it was legally compelled, not out of a sense of policy prudence or moral obligation.

As I discussed a few minutes ago, our policy leaders assess that the threat environment demands action today—our clients need our advice today on how international legal rules apply when resorting to action to defend our national interests from malicious activity in cyberspace, notwithstanding any

lack of agreement among States on how such rules apply. Consequently, in reviewing particular operations, DoD lawyers provide advice guided by how existing rules apply to activities in other domains, while considering the unique, and frequently changing, aspects of cyberspace.

First, let's discuss the international law applicable to uses of force. Article 2(4) of the Charter of the United Nations provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." At the same time, international law recognizes that there are exceptions to this rule. For example, in the exercise of its inherent right of self-defense a State may use force that is necessary and proportionate to respond to an actual or imminent armed attack. This is true in the cyber context just as in any other context.

Depending on the circumstances, a military cyber operation may constitute a use of force within the meaning of Article 2(4) of the U.N. Charter and customary international law. In assessing whether a particular cyber operation—conducted by or against the United States—constitutes a use of force, DoD lawyers consider whether the operation causes physical injury or damage that would be considered a use of force if caused solely by traditional means like a missile or a mine. Even if a particular cyber operation does not constitute a use of force, it is important to keep in mind that the State or States targeted by the operation may disagree, or at least have a different perception of what the operation entailed.

Second, the international law prohibition on coercively intervening in the core functions of another State (such as the choice of political, economic, or cultural system) applies to State conduct in cyberspace. For example, "a cyber operation by a State that interferes with another country's ability to hold an election" or that tampers with "another country's election results

would be a clear violation of the rule of non-intervention." Other States have indicated that they would view operations that disrupt the fundamental operation of a legislative body or that would destabilize their financial system as prohibited interventions.

There is no international consensus among States on the precise scope or reach of the non-intervention principle, even outside the context of cyber operations. Because States take different views on this question, DoD lawyers examining any proposed cyber operations must tread carefully, even if only a few States have taken the position publicly that the proposed activities would amount to a prohibited intervention.

Some situations compel us to take into consideration whether the States involved have consented to the proposed operation. Because the principle of non-intervention prohibits "actions designed to coerce a State … in contravention of its rights," it does not prohibit actions to which a State voluntarily consents, provided the conduct remains within the limits of the consent given.

Depending on the circumstances, DoD lawyers may also consider whether an operation that does not constitute a use of force could be conducted as a countermeasure. In general, countermeasures are available in response to an internationally wrongful act attributed to a State. In the traditional view, the use of countermeasures must be preceded by notice to the offending State, though we note that there are varying State views on whether notice would be necessary in all cases in the cyber context because of secrecy or urgency. In a particular case it may be unclear whether a particular malicious cyber activity violates international law. And, in other circumstances, it may not be apparent that the act is internationally wrongful and attributable to a State within the timeframe in which the DoD must respond to mitigate the

threat. In these circumstances, which we believe are common, countermeasures would not be available.

For cyber operations that would not constitute a prohibited intervention or use-of-force, the Department believes there is not sufficiently widespread and consistent State practice resulting from a sense of legal obligation to conclude that customary international law generally prohibits such non-consensual cyber operations in another State's territory. This proposition is recognized in the Department's adoption of the "defend forward" strategy: "We will defend forward to disrupt or halt malicious cyber activity at its source, including activity that falls below the level of armed conflict." The Department's commitment to defend forward including to counter foreign cyber activity targeting the United States—comports with our obligations under international law and our commitment to the rules-based international order.

The DoD OGC view, which we have applied in legal reviews of military cyber operations to date, shares similarities with the view expressed by the U.K. Government in 2018. We recognize that there are differences of opinion among States, which suggests that State practice and *opinio juris* are presently not settled on this issue. Indeed, many States' public silence in the face of countless publicly known cyber intrusions into foreign networks precludes a conclusion that States have coalesced around a common view that there is an international prohibition against all such operations (regardless of whatever penalties may be imposed under domestic law).
Traditional espionage may also be a useful analogue to consider. Many of the techniques and even the objectives of intelligence and counterintelligence operations are similar to those used in cyber operations. Of course, most countries, including the United States, have *domestic* laws against espionage, but international law, in our view, does not prohibit espionage *per se* even when it involves some degree of physical or virtual intrusion into foreign

territory. There is no anti-espionage treaty, and there are many concrete examples of States practicing it, indicating the absence of a customary international law norm against it. In examining a proposed military cyber operation, we may therefore consider the extent to which the operation resembles or amounts to the type of intelligence or counterintelligence activity for which there is no *per se* international legal prohibition.
Of course, as with domestic law considerations, establishing that a proposed cyber operation does not violate the prohibitions on the use of force and coercive intervention does not end the inquiry. These cyber operations are subject to a number of other legal and normative considerations.

As a threshold matter, in analyzing proposed cyber operations, DoD lawyers take into account the principle of State sovereignty. States have sovereignty over the information and communications technology infrastructure within their territory. The implications of sovereignty for cyberspace are complex, and we continue to study this issue and how State practice evolves in this area, even if it does not appear that there exists a rule that all infringements on sovereignty in cyberspace necessarily involve violations of international law.

It is also longstanding DoD policy that U.S. forces will comply with the law of war "during all armed conflicts however such conflicts are characterized and *in all other military operations.*" Even if the law of war does not technically apply because the proposed military cyber operation would not take place in the context of armed conflict, DoD nonetheless applies law-of-war principles. This means that the *jus in bello* principles, such as military necessity, proportionality, and distinction, continue to guide the planning and execution of military cyber operations, even outside the context of armed conflict.
DoD lawyers also advise on how a proposed cyber operation may implicate U.S. efforts to promote certain policy norms for responsible State behavior in

cyberspace, such as the norm relating to activities targeting critical infrastructure. These norms are non-binding and identifying the best methods for integrating them into tactical-level operations remains a work in progress. But, they are important political commitments by States that can help to prevent miscalculation and conflict escalation in cyberspace. DoD OGC, along with other DoD leaders, actively supports U.S. State Department-led initiatives to build and promote this framework for responsible State behavior in cyberspace. This includes participation in the UN Group of Governmental Experts and an Open-Ended Working Group on information and communications technologies in the context of international peace and security. These diplomatic engagements are an important part of the United States' overall effort to protect U.S. national interests by promoting stability in cyberspace.

Of course, the real work of analyzing specific military cyber operations in light of the domestic and international legal considerations I have mentioned falls to judge advocates and civilian attorneys at the tactical and operational levels—which is to say, many of you. As one of my predecessors, Jennifer O'Connor, noted in a speech in 2016, military operations—including cyber operations—are subject to a rigorous targeting process that involves both policy and legal reviews to ensure that specific operations are conducted consistent with the relevant authorization, domestic and international law, and any additional restraints imposed by the applicable orders. Particularly in areas like this one, in which not only the law but the domain itself is constantly evolving, I am extremely proud of the legal work many of you do for the Department of Defense and am humbled every day by your dedication to our Nation's defense.

Thank you all for what you do and for the opportunity to speak with you today.

# DoD General Counsel's Remarks at Duke Law's 24th Annual National Security Law Conference

sites.duke.edu/lawfire/2019/02/24/dod-general-counsels-remarks-at-duke-laws-24th-annual-national-security-law-conference/

Charlie Dunlap, J.D. February 24, 2019

*We were extremely pleased to have welcomed the Hon. Paul Ney, the General Counsel of the Department of Defense, as our guest speaker at the conference dinner for the Center on Law, Ethics and National Security's (LENS)'24th Annual National Security Law Conference. He covered a number of topics, including U.S. efforts and initiatives to minimize civilian casualties in armed conflict. Importantly, he also made a call to public service to an audience that included students from more than 17 institutions (as well as many members of the armed forces). Here are his very thoughtful remarks as prepared for delivery Feb 23rd:*

Thank you for inviting me to speak with you tonight. I especially want to thank Major General Dunlap, whose leadership at the LENS Center has brought together extraordinary scholarship, experience, and practice.

The LENS Center's work recognizes and tackles the myriad complex issues related to national security– especially those associated with resort to the use of force—very often lethal force.

Each day the exemplary leaders—and lawyers—of which we find so many in DoD, consider the legal framework, political realities, and moral and ethical consequences of the national security decisions they confront. Former-Secretary Mattis made that clear up and down the chain of command. He expected us to be "ethics sentinels," upholding not just minimum legal standards, but "the highest degree of honor our Nation and our military are known for around the world." Acting Secretary Shanahan continues to amplify that theme in his recent all-hands message emphasizing that ethics principles are the "the foundation upon which we make sound, informed decisions." He asks us to lead by example, and to maintain "the most lethal – and ethical – fighting force in the world."

As the General Counsel of the Department of Defense, I provide legal advice to the Secretary of Defense and other senior Defense Department officials. The lawyers in my office, the Office of General Counsel – or DoD OGC – advise on legal issues that can relate to any aspect of U.S. military operations around the world, including the most urgent and pressing

challenges in national security, foreign policy, and the conduct of nations. These challenges are laden with tough questions about what's legal, what's good policy, what's the right thing to do.

To answer these questions, we work across the U.S. Government – often with other Executive branch lawyers and senior policy officials — to help ensure the United States adheres to all applicable law. To answer these questions, we must also remain true to our oath of office: to "support and defend the Constitution" and "to bear true faith and allegiance to the same."

That is our Prime Directive.

This evening, I will briefly answer a few overarching questions illustrative of the work and responsibilities of the lawyers in my office and our lawyer colleagues throughout the DoD: How do we conduct current operations consistent with law? What can we do better?

An earlier draft of my comments included a third question: What can we expect in the wars and threats of the future? Chine, Russia, Artificial intelligence, unmanned and autonomous vehicles, Space, and cyber operations all pose fascinating legal questions to be tackled for decades to come.

But those questions are more expertly being answered throughout this conference by our esteemed speakers and panel members.

So, I concluded that What I can do better tonight is cut out about 10 minutes of this speech so that we might have time get to get to some questions or share a beverage and conversation together.

**I.**

I'll first address how do we ensure current operations are conducted consistent with law?

As many of you know, U.S. forces, alongside our partners and allies, are currently engaged in counterterrorism operations in Iraq, Afghanistan, and a number of countries throughout the world. For example, for the past four years in the campaign to defeat ISIS in Iraq and Syria, U.S. and Coalition forces have conducted direct action strikes and have provided training, equipment, advice, and enabling assistance to local partners in Iraq and Syria. We have worked "by, with, and through" Iraqi security forces and vetted Syrian local forces to root ISIS out of its once-self-proclaimed territorial caliphate.

In Afghanistan, U.S. forces continue to deny the reemergence of terrorist safe havens, to support the Afghan government and the Afghan military as they confront the Taliban, al-Qa'ida, and ISIS in the field, and to create conditions to support a political process to achieve

a lasting peace. In Yemen, Somalia, and Libya, we are confronting al-Qa'ida in the Arabian Peninsula, al-Shabab, and ISIS and we are supporting regional partner forces.

These asymmetric conflicts have presented unique challenges to lawyers and leaders. We are fighting unconventional enemies– non-State terrorist organizations. But we must apply and adapt established legal principles to these conflicts.

My office and other DoD lawyers help ensure U.S. military operations are conducted consistent with these principles in both domestic and international law.

As a matter of domestic law, U.S. military operations must be authorized under the U.S. Constitution. This means that they must be authorized either by a congressional authorization for the use of force or by the President's Article II constitutional authority to order military action in the national interest.

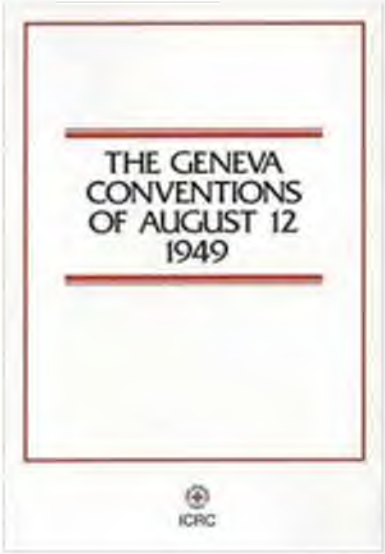
Our current military operations against ISIS, al-Qa'ida, and associated forces are authorized by the 2001 and 2002 congressional Authorizations for Use of Military Force, or AUMFs. And although those AUMFs were signed into law 17 and 18 years ago, they remain valid and provide appropriate authorization for our continued military activities against the Taliban, al-Qa'ida, and associated forces, including against ISIS.

Under international law, we analyze whether military operations abroad are consistent with principles reflected in the UN Charter – that nations may not infringe upon another's sovereignty and enter that nation's territory except in limited circumstances. The United States has accepted several rationales for the resort to force that remain consistent with the UN Charter: host nation consent; authorization by the United Nations Security Council; and self-defense.

We analyze each country in which we conduct operations on a case-by-case basis. For example, in Iraq and Afghanistan, we are conducting counterterrorism operations with the consent and at the invitation of the host government. By contrast, the Syrian government has not consented to our presence in Syrian territory. In Syria, we conduct operations against ISIS and al-Qa'ida in self-defense, consistent with Article 51 of the UN Charter. We address the threat that those groups continue to pose to the United States and our partners and allies because the Syrian government remains unwilling or unable to address those threats effectively itself.

Once we have analyzed whether military operations have a basis in domestic and international law, we also work to ensure that DoD conducts all military operations lawfully.

The heart of the legal framework governing the conduct of military operations is the law of war. It includes abiding by applicable provisions of the 1949 Geneva Conventions and customary international law. It is premised on respecting the fundamental law of war principles of distinction, proportionality, military necessity, humanity, and honor.




Compliance with the law of war requires that we only target our adversaries and not civilians. It prohibits attacks that would cause excessive harm in relation to the anticipated military advantage to be gained. And it requires taking feasible precautions to preserve innocent human life, even when fighting brutal enemies who defy the law as part of their military strategy– enemies who try to use our commitment to following the law against us, by, for example, using civilians as human shields to deter us from taking certain action. Even against these terrorist enemies, we follow the law of war because it reflects our core values and the very principles we are fighting to protect and preserve.

How do we ensure that law of war requirements are implemented during military operations? It requires steadfast vigilance and constant adherence to effective planning and processes. Some of which my office provides, and much of which is provided to the Commanders and their staffs by their military lawyers. Each DoD component is required to have legal advisers available at all levels, up and down the chain of command, to ensure compliance with the law of war during planning and execution of military operations. Military lawyers consider relevant laws of war, rules of engagement, and policy guidance specific to the military operation. These lawyers provide advice and guidance on determining appropriate military objectives and assessing collateral damage estimates prior to taking any strikes. This advice includes input into "weaponeering" – or designing the weapons and munitions that will be used for an attack in a manner that decreases the risk of harm to civilians and civilian infrastructure. It includes ensuring the implementation of and adherence to policies that require DoD personnel to report on and investigate suspected violations of the law of war.

To help inform this advice, my office published the DoD Law of War Manual in 2015, which we updated in 2016. The Manual incorporates experience from recent military operations and legal guidance, including black-letter rules and additional information to help explain and apply those rules. We are continually working to ensure that the Manual is the best resource it can possibly be to support compliance with the law of war. And it is available to the public online.

**II.**

Despite maintaining robust processes and legal advisors at all levels of the chain of command. Mistakes and bad decisions can, and do, occur. As Secretary of Defense Mattis used to say: "we are the good guys, not the perfect guys."

I already mentioned that we have these processes in place to help ensure compliance with law and policy because it reflects the very values we fight to preserve. But following the law is not just what we are required to do; it is also the prudent thing to do.

Take one example – the requirement under the law of war that attacking parties take feasible precautions to reduce the risk of harm to civilians. Reducing the effects of military operations on civilians is not only morally and legally right, it is also good military strategy. Implementing measures to protect civilians, while still accomplishing the mission, can enhance the legitimacy of our military operations at home and, importantly, with the populations we're fighting to help protect.

Which brings me to the second key question: What can we do better?

I know of no military more committed to the protection of civilians in conflicts than your own. Still, we are focused on doing better and answering hard questions about civilian casualties in war and the lessons we've learned.

Recently General Dunford, the Chairman of the Joint Chiefs of Staff, released portions of a study he directed to assess civilian casualties resulting from U.S. strikes in certain operations from 2015 to 2017. The study is one of the most comprehensive efforts to assess lessons learned and examine internal processes that the Department has conducted in some time. The study provides recommendations relating to policy, doctrine, operational planning, and technological investments to help us avoid civilian harm where possible and then to respond more effectively to civilian casualties that result from our operations. The study was conducted in tandem with a number of roundtables with outside groups, hosted by senior Department officials, up to and including the Secretary of Defense. These roundtables brought together military and civilian experts on civilian casualty mitigation efforts, to discuss issues and hear concerns. Allowing us to learn from perspectives outside the military – from NGOs and other civilian agencies – has enhanced our understanding of the challenges and the ways we can continue improving in this facet of war.

Drawing from experience and building upon existing policies and procedures, DoD has established an aggressive schedule to draft a new DoD-wide policy on minimizing civilian casualties and responding to reports of civilian casualties. Drafting this policy is a collaborative process among DoD policymakers and uniformed servicemembers throughout the Department.

The revised policy, born of the chairman's initiative, will help advance the Department in:

–promulgating uniform processes and standards across geographic combatant commands for accurately recording strikes taken by the U.S. military;

–disseminating best practices for reducing the likelihood of civilian casualties resulting from U.S. military operations;

–receiving and responding to reports of civilian casualties; and

–finding ways to develop, acquire, and field new technologies more effectively to minimize our operations' effects on civilians.

The talented lawyers of DoD OGC and our colleagues throughout the DoD, will help shape this effort and provide critical legal advice as it progresses.

**III.**

And so finally– if I may take a few minutes in closing to appeal to all of you– and most especially the students– I come to the reason I am here enthusiastically and gratefully.

I agree with the late-President George H.W. Bush who said it simply, "Any definition of a successful life must include service to others."

And I am aware each day of the immense privilege that I have to serve with and among the thousands of enormously talented and dedicated lawyers in the Department of Defense—the lawyers in my Office. Our military lawyers. And the lawyers of every DoD Department, service, and agency.

I wish for you a similar measure of professional satisfaction, and I hope you will consider working to help answer these and other critical questions facing our military and our nation, and help shape the law under which we will engage the threats to secure our nation, now and in the future.

For those of you with an interest, we have opportunities in my office and throughout the Department. And I am confident that General Dunlap will happily speak with you about service as a Judge Advocate in one of the Military Services.

Do not let the apparent fractious image of Washington dissuade you. Curiously, I think that you might find, as I have, that the clear definition of the mission somehow insulates you from that frenzy, or at least, empowers you to manage it more effectively.

Recall that Teddy Roosevelt famously observed that the success of democratic republics lies in the citizenship of the Nation. He entreated citizens to be those who are "in the arena." To dare to join the efforts to tackle the problems we face.

So, I encourage you and invite you to:

Know great enthusiasm. Show great devotion. Join us in a worthy cause. Join us in the arena.

You will find no more rewarding way to serve as a lawyer. Or as a citizen.

Speech
Speech

# DOD General Counsel Remarks at BYU Law School

March 4, 2020
Remarks entitled "Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani" presented by Hon. Paul C. Ney, Jr., General Counsel of the Department of Defense, at the Brigham Young University Law School in Provo, Utah.

Thank you very much for inviting me to BYU Law School. I am especially grateful to Dean Gordon Smith, Professor Eric Talbot Jensen, and the rest of the BYU law faculty, staff, and students for the gracious hospitality you've shown during my visit to Provo.

Professor Jensen, as most of you know, had a long and distinguished career in the U.S. Army both as a cavalry officer and as a judge advocate. He also served at the Department of Defense as Special Counsel. He has encouraged me to talk to you today about the role of lawyers in national security and international affairs. I understand that more than half of you have spent significant time in foreign countries. Your understanding of other cultures and language mastery are tremendous assets, and I hope that you will consider careers in public service to contribute those assets and the legal skills you are currently learning to the greater good of our Nation. The Department of Defense, or DoD, in particular, has more than 12,000 military and civilian lawyers supporting our warfighters; we would be happy to put your talents and commitment to good use.

The subject of my speech today is something that most of you have probably read a lot about online and in the papers, or otherwise heard about in the media. On January 2, 2020, at the direction of the President of the United States, the U.S. military conducted an air

strike in Iraq targeting Qassem Soleimani, a major general in the Islamic Revolutionary Guard Corps of Iran, and the commander of an expeditionary Revolutionary Guards unit called the Qods Force. Among others also killed in the strike was Abu Mahdi al-Muhandis, the leader of Kata'ib Hizballah, also known as KH, a Qods Force-backed Shia militia in Iraq.

President Trump directed the strike on Soleimani in response to an escalating series of attacks in preceding months by Iran and Iran-backed militias, including KH, against U.S. forces and interests in the Middle East region. The strike was ordered to protect U.S. personnel; to deter Iran from conducting or supporting further attacks on U.S. forces and interests; to degrade Iran's and Qods Force-backed militias' ability to conduct attacks; and to end Iran's strategic escalation of attacks on U.S. interests.

My aim today is to explain the international and domestic law underpinnings of the January 2nd air strike. Much of what I will explain is reflected in publicly available documents that the U.S. Government has already provided to the United Nations Security Council and to Congress. The key legal conclusions are already a matter of record.

In the Pentagon, we always begin with the Bottom Line Up Front or B-L-U-F. Here's the BLUF for my remarks today. First, with respect to international law, the President directed the January 2, 2020, air strike against Soleimani as an exercise of the United States' inherent right to act in self-defense, consistent with Article 51 of the Charter of the United Nations and customary international law. Second, as to U.S. domestic law, the President had legal authority to order the strike against Soleimani pursuant to his Article II constitutional power as Commander-in Chief to use armed force to protect U.S. personnel and property in Iraq and U.S. interests in the Middle East, and also pursuant to statutory authority under the 2002 Authorization for Use of Military Force (AUMF) to "defend the national security of the United States against the continuing threat posed by Iraq."

I hope that by explaining how international law and U.S. domestic law applied to the facts surrounding that operation, you will understand better why the strike on Soleimani was lawful.

To understand the legal conclusions, it is first necessary to know some background information about the situation in Iraq, Qassem Soleimani, the Qods Force, and Iranian and Iran-backed militias' hostile actions before the January 2, 2020 U.S. air strike. Legal analysis isn't that different whether you're a law school student or the DoD General Counsel: you start with the facts. Then, I'll move into discussions about the legal bases for the strike, starting with international law and then proceeding to domestic law.

A. Background

In October 2002, Congress enacted a statute i authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq." The specific concerns at the time included Iraq's support for international terrorist groups and its suspected development of weapons of mass destruction. Acting under this 2002 Authorization for Use of Military Force or "AUMF," President George W. Bush directed combat operations against Iraq in March 2003 that led to Saddam Hussein's downfall.

Although the threat posed by Saddam Hussein's regime was the initial focus of the statute, the United States has relied upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq, even after Saddam Hussein's demise.

Additionally, from 2003 to 2008, as sectarian violence erupted with the fall of the former Ba'athist regime, President Bush directed a campaign against al-Qa'ida in Iraq pursuant to the 2001 Authorization for Use of Military Force or "2001 AUMF," authorizing the use of force

against groups like al-Qa'ida—the "organization" responsible for the terrorist attacks of September 11, 2001. In 2014, al-Qa'ida's Iraq faction split from al-Qa'ida's core leadership and became the Islamic State of Iraq and Syria, or ISIS.

As Iraq became more stable, the United States and Iraq signed a cooperation agreement in November 2008 that included defense and security related commitments and a recognition of the importance of cooperation to "improve and strengthen security and stability in Iraq and the region." The two countries also signed an agreement providing for the withdrawal of U.S. military personnel from Iraq by the end of 2011.

But, after U.S. forces withdrew from Iraq in 2011, sectarian divisions again exploded into violence, and ISIS arose. From late 2013 through mid-2014, ISIS and its allies captured the Iraqi cities of Ramadi, Fallujah, and Mosul—Iraq's second largest city, and reached the outskirts of Baghdad and Erbil. ISIS used extremely brutal tactics—mass executions, kidnapping and raping women and children, displacing hundreds of thousands of Iraqis—raising U.S. and international alarm and outcry about the prospect of ISIS conquest of Iraq. In 2014, President Obama declared ISIS "a threat to the Iraqi people, to the region, and to U.S. interests." Upon the invitation of the Iraqi Government and pursuant to the 2001 AUMF, he directed the deployment of U.S. forces to Iraq as well as air strikes to defeat ISIS.

U.S. forces, Iraqi Security Forces, and forces from countries participating in the Global Coalition to Defeat ISIS (or D-ISIS) together fought to reverse ISIS's conquests in Iraq and helped liberate the Iraqi people from ISIS's brutal control. Today, 100 percent of the territory ISIS once held in Iraq has been returned to Iraqi government control. But despite the defeat of ISIS's control of territory in Iraq, ISIS remains a threat, and so U.S. forces have remained in Iraq to support Iraqi forces and ensure the enduring defeat of ISIS. There are presently more than 5,000 U.S. military personnel in Iraq.

As the United States has sought to establish stability in Iraq and to address terrorist threats in and emanating from Iraq, Iran has remained a malign presence there and throughout the Middle East. According to the Defense Intelligence Agency, Iran remains "implacably opposed" to the United States, the U.S. presence in the Middle East, and U.S. support for certain governments in the region, all of which Iran views as threats to its goals of regime survival and regional dominance.

To achieve these goals, Iran typically uses "unconventional warfare elements and asymmetric capabilities," including "a complex network of State and non-State partners and militant proxies" in the Middle East. The Islamic Revolutionary Guard Corps Qods Force is Iran's "primary tool" for conducting unconventional warfare and providing support to its foreign partners and proxies like Hizballah, Hamas, and the Houthis.

The Qods Force was established as a unit in 1990, shortly after the Iran-Iraq War, and has become Iranian leaders' favored all-purpose expeditionary mission force "to conduct operations outside Iran, provide support for Islamic militants, and collect intelligence against Iran's enemies." The Qods Force funds, trains, supplies, and supports partners and proxies throughout the Middle East, including Shia militia groups operating in Iraq, such as the Badr Organization and KH. According to the Defense Intelligence Agency, "Iran-supported . . . Shia militias remain the primary threat to US personnel" in Iraq. Using Iranian-provided weapons such as improvised explosive devices (or "IEDs"), explosively formed penetrators (or "EFPs"), anti-tank guided missiles, rockets, and unmanned aerial vehicles, Qods Force-backed militias are estimated to have killed more than 600 U.S. personnel serving in Iraq between 2003 and 2011.

Qassem Soleimani had commanded the Qods Force beginning in the late 1990s and orchestrated the group's ascendance. He was the lead architect behind Iran's campaign of terrorism, assassinations, arms-smuggling, and violence throughout the Middle East, including

against U.S. personnel in Iraq. Soleimani's malign activities have not been limited to the Middle East. In 2011, Soleimani supervised a Qods Force plot to assassinate Saudi Arabia's Ambassador to the United States with explosives at a Washington, D.C. restaurant. Secretary of State Pompeo recently summed it up: "There is no terrorist except Usama bin Ladin who has more American blood on his hands than . . . Qassem Soleimani." In April 2019, the United States designated the Islamic Revolutionary Guard Corps, "including the Qods Force," as a foreign terrorist organization, citing, among other things, the Qods Force's support for terrorist groups and plots in the United States, Europe, Africa, and the Middle East.

In the months preceding the January 2nd air strike against Soleimani, Iran and Iran-supported militias had engaged in a series of attacks against U.S. personnel and property in Iraq and against U.S. interests and Allies and partners in the Middle East. In June 2019, an Iranian surface-to-air missile destroyed an unmanned U.S. Navy surveillance aircraft while it was on a routine mission in international airspace monitoring the Strait of Hormuz.

The U.S. response to the attack at that time was measured and muted, but Iran continued its pattern of aggression against U.S. interests in the region. In July 2019, USS Boxer, an amphibious assault ship, came under threat from Iranian unmanned aerial systems while conducting a planned transit of the Strait of Hormuz. Iran has also attacked and seized commercial ships in the area, threatening freedom of navigation. And, Iran-backed Houthi rebels in Yemen shot down two U.S. unmanned surveillance aircraft in Yemeni airspace and conducted multiple missile and other attacks in Saudi Arabia targeting airports and other civilian facilities. Moreover, on September 14, 2019, Iran launched a devastating air attack on a gas plant and an oil refinery in Saudi Arabia.

In the weeks preceding the air strike against Soleimani, provocations against the United States intensified with a series of attacks by Iran-supported militias on U.S. personnel and property in Iraq. KH, the

Qods Force-backed Shia militia group, fired rockets at bases in Iraq where U.S. forces are located. Between November 9 and December 9, 2019, Qods Force-backed militia groups fired rockets at the Qayyarah West Air Base, Al Asad Air Base, and the Baghdad Embassy complex. Then, on December 27, KH attacked the K-1 Air Base in Kirkuk, killing a U.S. contractor and injuring U.S. and Iraqi military personnel. In response, U.S. forces struck a number of KH installations in Iraq and Syria to degrade the group's ability to launch additional attacks. Then, on December 31, KH and other Iran-backed militia groups organized a demonstration that turned violent at the U.S. Embassy in Baghdad, inflicting significant damage to U.S. property and imperiling U.S. lives.

Those are the facts, and that is where events stood at year's end, 2019. Let me turn now to applying the law to these facts to assess the legal bases for the U.S. air strike on Soleimani two days later.

B. International Law

First, let's talk about international law.

The U.N. Charter generally prohibits States from resorting to the use of force against another State without a legal basis. This rule is part of the law governing the resort to force, or, to use the Latin term, jus ad bellum. The United States recognizes three circumstances in which a resort to force in a foreign country is not generally prohibited under international law: (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII of the U.N. Charter; (2) use of force in the exercise of the inherent right of self-defense; and (3) use of force in an otherwise lawful manner with the consent of the territorial State.

The strike targeting Soleimani in Iraq was taken under the second justification I mentioned – in U.S. self-defense – consistent with Article 51 of the U.N. Charter. Article 51 provides in relevant part that:

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

Article 51 thus recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack. In accordance with Article 51, the United States reported the air strike to the UN Security Council on January 8, 2020, in written correspondence from the U.S. Ambassador to the United Nations, Kelly Craft, to the other members of the Security Council, through the President of the Security Council.

The use of force in self-defense is subject to the customary international law requirements of necessity and proportionality.

As the DoD Law of War Manual explains, "[t]he jus ad bellum condition of necessity requires that no reasonable alternative means of redress are available. For example, in exercising the right of self-defense, diplomatic means must be exhausted or provide no reasonable prospect of stopping the armed attack or threat thereof."

Applying this legal standard to the facts which I just described, the United States had been subject to an escalating series of armed attacks by Iran and by Iran-supported militias in the Middle East, including Iraq. This included the threat to USS Boxer by Iranian unmanned aerial systems and an armed attack by an Iranian surface-to-air missile on an unmanned U.S. Navy MQ-4 surveillance aircraft in international airspace in the Persian Gulf region. And the strike against Soleimani occurred in the larger context of continuing armed attacks by Iran that endangered international peace and security, attacks on commercial vessels in the Gulf of Oman, attacks on the territory of Saudi Arabia, and attacks by Qods Force-backed militias against U.S. forces in the previous several months. Although I cannot speak to the classified information that senior leaders reviewed, I hope you can see, based simply on these facts that are publicly known, why our senior leaders and the President were reasonable in believing that

the use of force was necessary. Attacks against U.S. forces and interests were assessed to be highly likely to continue in the absence of a military response in self-defense to restore deterrence.

Moreover, the strike on January 2d was also consistent with the international law requirement that our measures in self-defense be "proportionate to the nature of the threat being addressed." As DoD communicated to the public at the time, "General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region." "He had orchestrated attacks on coalition bases in Iraq over the last several months," and he also approved the demonstration that turned violent at the U.S. Embassy in Baghdad just two days earlier on December 31. Targeting the Iranian commander responsible for orchestrating, planning, and supporting recent attacks against the United States and planning new attacks was a proportionate response to the threat of such attacks.

Some have questioned whether another Iranian armed attack against the United States was "imminent" at the time of the strike targeting Soleimani. This is a red herring, as the saying goes. Under international law, an imminent attack is not a necessary condition for resort to force in self-defense in this circumstance because armed attacks by Iran already had occurred and were expected to occur again.

Of course, although such analysis was not necessary in this case given this recent history of past attacks, the threat of an imminent armed attack can also justify a resort to force under international law. That is, although Article 51 refers explicitly to self-defense only in response to an actual armed attack, the United States maintains that international law also includes the right to use force where an armed attack is imminent. This view of the United States is widely known and also shared by many like-minded states in the international community.

In addition to regulating the resort to force, international law also regulates the conduct of hostilities. The law of war requires, for example, that attacks be directed against military objectives, that precautions be taken to reduce the likelihood of civilian casualties, and that any damage caused be proportionate to the military objective. The law of war does not prohibit targeting specifically identified leaders of adversary militaries—they may be made the object of attack as enemy combatants.

As the leader of the Qods Force, Soleimani was a legitimate military target in Iraq under the international law governing the conduct of hostilities. The others killed in the U.S. strike were the leader and members of KH, an Iran-backed militia. As such, they, too, were "military objectives" who could be made the object of attack under the law of war.

To sum up, the January 2, 2020, air strike against Soleimani in Iraq was lawful as a matter of international law as an exercise of the inherent right of self-defense recognized by Article 51 of the U.N. Charter. An imminent attack is not a necessary condition for use of force in self-defense under Article 51 when an armed attack has already been perpetrated and the response is necessary and proportionate.

C. U.S. Domestic Law

Let me turn now to a discussion of the legal basis for the strike under U.S. domestic law.

The use of military force requires a basis in domestic law. The President may rely on congressional authorizations for the use of force – such as the 2001 AUMF and the 2002 AUMF – and the President may rely on Article II constitutional authority. In the absence of statutory authorization, the President's constitutional authority to direct military action can be distilled into two inquiries. First, whether the President could reasonably determine that the action serves

important national interests. Second, whether the "anticipated nature, scope and duration" of the conflict might rise to the level of a war under the Constitution.

Applying this domestic law framework to the circumstances of the strike targeting Soleimani, the President had a sufficient legal basis both under his constitutional authority and pursuant to the statutory authority of the 2002 AUMF.

First, with respect to the question of the President's constitutional authority to order the strike, the important national interest to prevent or respond to attacks on U.S. personnel and property is at the very heart of his constitutional power as Chief Executive and Commander-in-Chief. Past Presidents have used force specifically in response to attacks on U.S. embassies and personnel, including by State actors abroad. For instance, in April 1986, President Reagan directed air strikes against the Libyan leader Qaddafi and his intelligence services in Libya following terrorist attacks that killed and wounded American soldiers and civilians at a discotheque in Germany. And in June 1993, President Clinton ordered the launch of cruise missiles on Iraqi Intelligence Headquarters based on "compelling evidence" that Iraqi intelligence had tried to assassinate former President George H.W. Bush in Kuwait. President Clinton also ordered air strikes in August 1998 against Usama bin Laden and al-Qa'ida in Afghanistan and Sudan, in response to al-Qa'ida bombings of the U.S. Embassies in Nairobi and Dar es Salaam, which had killed more than 250 persons.

Let's turn now to the second constitutional law inquiry: whether the air strike on Soleimani presented a sufficient risk of broadened conflict with Iran such that pre-approval by Congress may have been required. Although the Constitution vests in the President independent authority to use force, it reserves to Congress the power to "declare War" and the authority to fund military operations. This was a deliberate choice of the Founders. In the Federalist Papers, for example, Alexander Hamilton noted that the President lacks the

authority of the British King, which "extends to the declaring of war and … the raising and regulating of fleets and armies."

For that reason, the President's decision to use armed force cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war. The Department of Justice's Office of Legal Counsel (OLC) has similarly recognized that the President should seek congressional approval prior to initiating military action that would bring the Nation into the kind of protracted conflict that would rise to the level of a "war" in the constitutional sense.

So what does a "war" in the constitutional sense mean? The relevant Department of Justice OLC opinions say that we must engage in a "fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations." Under this standard, military operations may rise to the level of "war" in the constitutional sense when the actions are likely to lead to "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period." Some of the most relevant facts in this analysis would include the numbers of additional forces to be deployed, the quantity of munitions expended, estimates regarding U.S. and enemy casualties, and whether ground forces are to be deployed into a war zone. Making an assessment of the anticipated nature, scope, and duration of planned military operations is one of those judgments that are, as Justice Jackson described, "delicate, complex, and involve large elements of prophecy," which have traditionally been committed to the Executive branch, given its military, diplomatic, and intelligence resources.

The strike against Soleimani did not involve a substantial military engagement, the deployment of additional U.S. forces, or the risk of significant casualties. The operation was circumscribed: it consisted of one targeted air strike in Iraq, executed by an unmanned aerial vehicle, designed to avoid civilian casualties or substantial collateral damage, and intended to prevent future attacks against U.S. persons

and interests in Iraq and throughout the region. It was not "aim[ed] at the conquest or occupation of territory nor . . . at imposing through military means a change in the character of a political régime."

At the same time, there existed risk that the operation could escalate into a broader conflict. Although Soleimani and the Qods Force were not a conventional military formation, the Qods Forces is a part of the military of Iran, which has significant armed forces and military assets that could respond with armed force.

However, the President decided based upon available intelligence that the targeted operation would be unlikely to escalate into a full-scale war, and that, by restoring deterrence of further attacks orchestrated by the Qods Force, the strike could in fact result in a de-escalation of the conflict between the United States and Iran. As the President himself said, the strike on Soleimani was taken to stop a war, not to start one. Indeed, the United States government made clear immediately after the January 2d air strike—as it had planned to do before launching the operation— that the strike reflected a limited engagement and that the United States did not seek a broader war with Iran.

Subsequent events appear to have confirmed the reasonableness of the assessment that the strike would not provoke an uncontrolled escalation. On January 7, 2020, Iran responded to the strike on Soleimani by firing ballistic missiles at U.S. military and coalition forces at two bases in Iraq. But the United States did not itself respond to this new attack with further air strikes, although it took precautions to minimize casualties and damages. Immediately after the missile attacks, Iran's foreign minister, Javad Zarif, asserted that his country "took and concluded proportionate measures" in response to the targeting of Soleimani, adding that Iran "do[es] not seek escalation or war."

In sum, given the narrow scope of the mission, the available intelligence, and the efforts to avoid escalation, it was reasonable for

the President to have determined that the nature, scope, and duration of hostilities directly resulting from the strike against Soleimani in Iraq would not rise to the level of war with Iran for constitutional purposes.

Although the President had constitutional authority under Article II to direct the January 2nd air strike, he also had statutory authority under the 2002 AUMF. Pursuant to the 2002 AUMF, Congress has authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq." As I mentioned earlier, although the threat posed by Saddam Hussein's regime was the initial focus of the 2002 AUMF, the United States has relied consistently upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq under the George W. Bush, Obama, and Trump Administrations. Such uses of force need not only address threats from the Iraqi Government apparatus but may also address threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq. For example, the Obama Administration invoked the 2002 AUMF (along with the 2001 AUMF) as domestic legal authority for conducting military operations against ISIS in Iraq and also operations in Syria to address threats emanating from Iraq.

The air strike against Soleimani in Iraq is consistent with this longstanding interpretation of the President's authority under the 2002 AUMF. The use of force was tailored narrowly to Soleimani's presence in Iraq and his support to – including in some cases the direction of – militias that attacked U.S. personnel and bases in Iraq. U.S. national security officials believed that Soleimani was actively planning additional attacks on U.S. personnel in Iraq and in the region. Soleimani, as the leader of the Qods Force directly orchestrating hostilities against U.S. personnel and property in Iraq, was a necessary and appropriate target for the President to use force against under the 2002 AUMF.

In conclusion, I hope that I've given you a good sense of what it's like to practice national security law in the Department of Defense. The issues we work on are of significant national importance. They are challenging. They routinely land on the front pages of national newspapers. And judge advocates—our uniformed lawyers— do important work like this and many other varieties at all echelons of the U.S. military, often relatively early in their legal careers. I encourage all of you to consider careers in public service, and I heartily commend to you service in the Department of Defense legal community.

Thank you again to Dean Smith and Professor Jensen for your kind invitation.

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# Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective

*Paul C. Ney, Jr.*[*]

Thank you very much for inviting me here today. I am especially grateful to Dean Chris Guthrie, Professor Mike Newton, and Mrs. Sharon Charney, who generously endowed this lecture series in memory of her late husband, Professor Jonathan Charney. Thank you, as well, to all the members of the Charney family for sharing him with the Vanderbilt community. Professor Charney taught at Vanderbilt for forty years and was one of the nation's preeminent scholars and practitioners of international law. He was a member of the U.S. delegation to the Third United Nations Conference on the Law of the Sea, which resulted in the 1982 United Nations Convention on the Law of the Sea.[1] At the time of his untimely passing in 2002, he was also the Co-Editor-in-Chief with Yale Law Professor Michael Reisman of the American Journal of International Law.

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[*] General Counsel, U.S. Department of Defense. B.S. Cornell University, 1980; J.D./M.B.A. Vanderbilt University 1984. This Essay is a revised version of remarks delivered on September 3, 2019, at Vanderbilt University Law School in Nashville, Tennessee, as the 2019 Jonathan I. Charney Distinguished Lecture in International Law. I thank Thomas H. Lee, Charles A. Allen, Karl Chang, Vida Antolin-Jenkins, Guillermo Carranza, Lieutenant Commander Robin Crabtree, Matthew McCormack, Platte Moring, Colonel Jeffrey Palomino, Jack Shaked, Carl Tierney, Catherine Rivkin Visser, Bart Wager, Danielle Zucker, and other members of the DoD General Counsel's office for their inestimable contributions to the conception and preparation of this Essay, and Joshua Minchin and the other student editors of the *Vanderbilt Journal of Transnational Law* for their expertise and editorial support.

[1] *See* Jonathan I. Charney, *The United States and the Law of the Sea after UNCLOS III—The Impact of General International Law*, 46 LAW & CONTEMP. PROBS. 37, 44 (1983).

I feel particularly honored as the first alumnus of Vanderbilt Law School to deliver the Charney Distinguished Lecture in International Law.[2] In a May 27, 2003, Joint Resolution, the Tennessee General Assembly honored Professor Charney for "his manifold professional achievements, his impeccable character, and his stalwart commitment to living the examined life with courage and conviction."[3] His colleague, Professor Jeffrey Schoenblum, drew a more colorful sketch: "Jon could at times, and quite proudly and purposely, be one ornery guy . . . . He was for quality, for demanding performance. He was against sophistry, mintmarks, and other indicia of status not substantiated by tangible intellectual product of unquestionable merit."[4]

In his spirit, I will try to avoid "sophistry" and "mintmarks." My aims are to help you understand how international law affects the U.S. Department of Defense (DoD) in practice and how DoD abides by the rule of law in international security affairs.

I understand that many of you in the audience are first-year law students. You and others may have little idea of what international law is or what international lawyers do. I was in the same boat as a law student, until I participated in the Jessup International Law Moot Court Competition. But even then, I had little understanding of what international law in practice meant.

That has certainly changed in my current position. International law issues come up with some frequency for the civilian and military lawyers I work with at the Department of Defense today. We at DoD work with international law in many different ways. Our military forces on the ground assess and implement applicable laws of war every day. Our sailors navigate according to the law of the sea. We provide a range of assistance to foreign partners, including training, equipment, intelligence sharing, and operational support, and, in doing so, we comply with applicable domestic and international law.[5] This

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[2] Regrettably, I did not have the privilege of having been taught by Professor Charney. My Special Assistant and Vanderbilt Law classmate, Platte Moring, had the great pleasure of having taken several classes with Professor Charney, who also served as his thesis advisor. I was, however, a student of Professor Hal Maier, the other pillar of Vanderbilt's twin towers of international law. Professor Maier came to Vanderbilt in 1965 and established the *Vanderbilt Journal of Transnational Law*. I am grateful to the Journal and its editors for publishing these remarks.

[3] S.J. Res. 0427, 103d Gen. Assemb., Reg. Sess. (Tenn. 2003).

[4] Jeffrey Schoenblum, *Remarks on Jonathan I. Charney*, 36 VAND. J. TRANSNAT'L L. 7, 8 (2003).

[5] For example, Chapter 16 of Title 10 of the U.S. Code §§ 301–386 (2018) addresses DoD security cooperation programs and activities. Section 301 defines "security cooperation programs and activities of the Department of Defense" as "any program, activity (including an exercise), or interaction of the Department of Defense with the security establishment of a foreign country to achieve a purpose as follows: (A) To build and develop allied and friendly security capabilities for self-defense and multinational operations; (B) To provide the armed forces with access to the foreign country during peacetime or a contingency operation; (C) To build relationships that promote specific United States security interests."

includes, for example, ensuring that partner forces receiving U.S. assistance are vetted for credible allegations of gross violations of human rights.[6]

The lawyers in my office also work closely with lawyers from other Departments and Agencies in formulating our advice and in articulating U.S. Government positions on important legal issues. We work with the Department of State in the negotiation of treaties and in its conduct of U.S. foreign relations, especially as related to national and international security matters.[7] We work with the Department of Justice (DOJ) on legal issues relevant to DoD that arise in U.S. courts,[8] typically in matters to which the Department is a party or that implicate DoD's interests. We very recently worked closely with our colleagues in the Department of State and at the National Security Council (NSC) to ensure that my remarks today did not inadvertently endorse positions inconsistent with U.S. Government policies or practices.

A large part of our job is giving legal advice that helps shape and implement defense policy. DoD lawyers play an essential role in ensuring that the planning and execution of U.S. military operations comply with the law, including international law. We advise on relevant treaty terms and customary international law rules. We give our clients—DoD civilian and military leaders—our best advice about how domestic and international law apply to the facts before them. Most of this activity is behind the scenes, and much of it involves classified information. But just because our role is not as public as filing briefs or arguing in front of judges doesn't mean we are any less dedicated to the rule of law.

By way of background, "[i]nternational law consists of a body of rules governing the relations between States."[9] In certain circumstances, international law also prescribes rules for individuals

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6 10 U.S.C. § 362(a)(1) (2018) ("Of the amounts made available to the Department of Defense, none may be used for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights.").

7 "The Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to . . . negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs . . ." 22 U.S.C. § 2656 (2018).

8 "[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (2018).

9 1 DIGEST OF INTERNATIONAL LAW 1 (Green Haywood Hackworth ed., 1940).

or other non-State entities, like non-State armed groups.[10] In general, international law is formed when: 1) States accept rules in treaties (also called "conventions" or "agreements"); or 2) rules develop in unwritten form known as customary international law. Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation or, in Latin, *opinio juris*.[11] General principles of law common to the major legal systems of the world are also a recognized part of international law.[12]

In my view, abiding by the rule of law has two key elements: first, an international law rule must be recognized as established in treaty or customary law, and second, a State must implement and comply with this rule. This means that the rule influences the State's behavior both *ex ante*, by informing available policy choices in advance of any action or decision, and *ex post*, because the State has established meaningful compliance mechanisms or institutions and holds accountable as appropriate those who violate that rule. Both of these aspects of influencing State behavior are critical, and I will address each of them in my remarks today.

My lecture will proceed in two parts. First, I'd like to focus on how international law is formed, especially customary international law, using examples from cyberspace and outer space. In doing so, I must highlight the primacy of State practice. Second, I will discuss what it means to abide by and implement international law. Throughout both segments, I will refer to Professor Charney's path-marking work on the law of the sea and international law theory, and also to real-world implementation. In so doing, it may be worth keeping in mind what Professor Reisman said about Professor Charney: "While he was interested in theory and contributed to it and he had many suggestions to make about improving international law, he was, at heart, an empiricist. He respected the complexity of events."[13]

## I.

There is typically a distinction drawn between the law of permissible grounds for resorting to force—in Latin, *jus ad bellum*—and the law governing the conduct of war, called *jus in bello*. I will refer

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[10] *See, e.g.*, U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 17.2.4 (December 2016) ("The law of war applicable in a non-international armed conflict is binding upon all parties to the armed conflict, including State armed forces and non-State armed groups.").

[11] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

[12] Statute of the International Court of Justice, art. 38, ¶ 1; *see also* LAW OF WAR MANUAL, *supra* note 10, § 2.1.1 (and sources cited within).

[13] W. Michael Reisman, *Jonathan I. Charney: An Appreciation*, 36 VAND. J. TRANSNAT'L L. 23, 24 (2003).

to the two together as the "law of war," which is the term that DoD uses in its official policies and publications.[14]

The United States is a party to the Charter of the United Nations, which generally prohibits "the threat or use of force" in Article 2(4),[15] but also recognizes the *jus ad bellum* right of self-defense in Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member."[16] The United States is also party to a number of *jus in bello* treaties, such as the 1907 Hague Convention on Land Warfare and the 1949 Geneva Conventions.[17]

Most countries are parties to the United Nations Charter and the 1949 Geneva Conventions, but there can be significant differences in how States are bound by and interpret the requirements of international law. States may ratify different treaties, interpret the same treaty provisions differently, and have differing views on what customary international law requires. For example, the United Kingdom for some time has held the view that humanitarian intervention, in certain circumstances, can be an independent justification for a State to use armed force in another State's territory even absent the territorial State's consent, U.N. Security Council authorization, or collective or individual self-defense.[18] Although we recognize that there can be a compelling moral argument for military intervention in mass atrocity or genocide cases, the United States has not recognized a free-standing international law right to use force

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14 *See* LAW OF WAR MANUAL, *supra* note 10, § 1.3.

15 U.N. Charter art. 2(4).

16 *Id.* at art. 51.

17 The U.S. Department of State annually publishes information on treaties and other international agreements to which the United States is a party. U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2019*, https://www.state.gov/wp-content/uploads/2019/05/2019-TIF-Bilaterals-web-version.pdf (last visited Sept. 26, 2019) [https://perma.cc/B5AU-EQ77] (archived Sept. 26, 2019). For a list of law of war treaties to which the United States is a party and other treaties that it has not ratified, *see* LAW OF WAR MANUAL, *supra* note 10, § 19.2.

18 *See* HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, GLOBAL BRITAIN: THE RESPONSIBILITY TO PROTECT AND HUMANITARIAN INTERVENTION: GOVERNMENT RESPONSE TO THE COMMITTEE'S TWELFTH REPORT, 2017-19, HC 1719, at 3–4 (UK) ("The UK's long-standing position on humanitarian intervention is that it is consistent with international law if the following three conditions are met: (i) There is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (ii) It must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (iii) The proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).").

against other States solely on humanitarian grounds.[19] These differences among States are pertinent as they demonstrate that States can and do take different approaches to international law, and that consensus on certain aspects may take time to develop.

As I mentioned, Professor Charney was a world-renowned international maritime law expert[20] and a member of the U.S. delegation to the third U.N. Conference on the Law of the Sea. It took three diplomatic conferences more than three decades to achieve broad consensus on the establishment of a territorial sea out to a maximum breadth of twelve nautical miles and to recognize a 200 nautical-mile exclusive economic zone—in part because many countries, led by the United States, were firmly dedicated to the longstanding principle of freedom of the seas.

But the open-seas norm itself was once an invention. Hugo Grotius conceived of the freedom of seas, which he called by the Latin term *mare liberum*, or "open seas," four centuries ago.[21] At the time, Portuguese-Spanish assertions of "closed seas" (*mare clausum*) posed an alternative view: new seas, like new lands, were viewed as the property of those (that is, those Europeans) who discovered them.[22] Grotius advanced a new understanding of international law that allowed the Netherlands—a Lilliputian State with a Gulliverian navy—to attain astonishing global power.[23] Grotius was so influential that international lawyers today often forget that freedom of the seas was once an untested concept in international law.

Today, the swift pace of technological development presents another occasion for States to reflect on existing international law and to work towards consensus understandings where possible. For DoD, rapid advancements in technology and connectivity through cyberspace present unique national security challenges and opportunities. For example, as a 2019 assessment by the Director of National Intelligence notes, "China has the ability to launch cyber attacks that cause localized, temporary disruptive effects on critical infrastructure . . . in the United States. . . . Moscow is now staging cyber attack assets to allow it to disrupt or damage U.S. civilian and military infrastructure during a crisis . . . "[24]

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19 *See, e.g.*, LAW OF WAR MANUAL, *supra* note 10, § 1.11.4.4.

20 Professor Charney is co-author of the first three volumes of the definitive treatise on the law of international maritime boundaries. *See* 1–3 INTERNATIONAL MARITIME BOUNDARIES (Johnathan I. Charney & Lewis M. Alexander eds., 1993).

21 HUGO GROTIUS, THE FREE SEA 7 (Richard Hakluyt trans., Liberty Fund 2004).

22 WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 129–36 (Michael Byers trans., rev. ed. 2000).

23 *See* ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY: 1660-1783 53, 95–97 (25th ed. 1918) (1890).

24 *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 116th Cong. 5 (2019) (statement of Daniel R. Coats,

When it comes to activity in cyberspace, geographic distance from our adversaries offers no measure of safety. In this area, the United States must "defend forward,"[25] engaging adversaries before their actions can affect intended targets. Attempting to protect from cyber attacks at or near the point of impact or just along international territorial boundary lines is not only artificial and naïve, it is also ineffective and self-defeating. But as we defend forward, and as our allies and adversaries do likewise, we must be conscious of the fact that our actions in cyberspace must comply with existing international law and norms for responsible State behavior in cyberspace.

We know that international law principles apply in cyberspace, but which principles and how they apply are actively being discussed by States. Further discussion, clarification, and cooperation on these issues are necessary. We also recognize that, like the historical law of the sea, customary international law applicable to cyberspace may evolve over time through many rounds, in response to technological developments that may affect State practice and *opinio juris*.

There is, nonetheless, some common understanding today on the applicability of international law principles to cyber operations. An action in cyberspace may, in certain circumstances, constitute a use of force within the meaning of Article 2(4) of the U.N. Charter and customary international law where, for example, a cyber operation causes physical injury or damage that would be considered a use of force if caused by traditional physical means.[26] Likewise, the customary international law prohibition against intervention in the affairs of another State can apply to State conduct in cyberspace.[27] For example, as the United States and other countries have recognized, cyber operations by a State that interfere with another country's ability to hold an election or that manipulate another country's election results would be a clear violation of this prohibition.[28] For further

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Director of National Intelligence), https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf [https://perma.cc/4V4L-FZKH] (archived Sept. 26, 2019).

25 U.S. Dep't of Def., *Summary: Department of Defense Cyber Strategy* 1 (2018), https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER_STRATEGY_SUMMARY_FINAL.PDF [https://perma.cc/5ZJP-X9BP] (archived Sept. 26, 2019) ("We will defend forward to disrupt or halt malicious cyber activity at its source, including activity that falls below the level of armed conflict.").

26 LAW OF WAR MANUAL, *supra* note 10, § 16.3.1.

27 Brian J. Egan, *International Law and Stability in Cyberspace*, 35 BERKELEY J. INT'L L. 169, 175 (2017).

28 *See id.*; U.K. Att'y Gen. Jeremy Wright QC, MP, Address on Cyber and International Law in the 21st Century (May 23, 2018) (transcript available at https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century [https://perma.cc/L5N6-HKX8] (archived Sept. 26, 2019)) (explaining that "the use by a hostile state of cyber operations to manipulate the electoral system to alter the

reading, I commend to you the Department of Defense Law of War Manual addressing the international law applicable to cyber operations.[29]

But there remain many details to be addressed in applying international law principles to cyberspace and cyber operations. One unsettled area is the extent to which rules that apply in the context of territory apply to cyberspace—a unique, manmade domain. Some commentators assert that territorial analogies and precedents should be presumptively valid in cyberspace. The assertion harkens back to the Spanish and Portuguese justifications for the closed-seas norm. If a European power discovers uncharted land, it owns it. If a European power discovers uncharted seas, it owns them, too. Is cyberspace more analogous to the land or the sea? Should the law of cyberspace track the law of the land? Or the law of the sea? Or, perhaps, the law of outer space?

Space may be the final frontier, but it is not a legal vacuum. Law-of-the-sea lore claims genesis in the law of ancient Rhodes.[30] I imagine that ancient mariners staring out at the ocean had the same sense of wonder at the vast possibilities and dangers out there that we have now as we contemplate the expanses of outer space. The challenge of space is no less intriguing for lawyers.

Space law for the United States is anchored by four treaties dating from the 1960s and 1970s.[31] Much has changed in the past fifty years: there are thousands more satellites with vastly greater and more diverse capabilities in orbit. And many more States and private entities are active in space, as illustrated most recently by India's launch of a mission to the Moon. A major role of the outer space lawyer is to apply these treaties to new circumstances, and, if necessary, to advise in the identification and formulation of rules.

Let me give you an example. In 2008, U.S. Government space lawyers were asked about how the 1967 Outer Space Treaty—the framework treaty for space and, in part, an arms-control agreement—would affect a proposed DoD action in a very public setting. A U.S. satellite—USA-193—was in orbit but was malfunctioning and out of

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results of an election in another state . . . must surely be a breach of the prohibition on intervention in the domestic affairs of states").

29 *See* LAW OF WAR MANUAL, *supra* note 10, at 1011.

30 *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 2–5 (Foundation Press 1957).

31 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty]; The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 672 U.N.T.S. 119; The Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187; The Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 1023 U.N.T.S. 15. The United States is not a State Party to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3.

control. U.S. officials feared that it might survive an uncontrolled reentry, crash in a populated area, and release its propellant, the toxic chemical hydrazine. The proposal was to shoot down the satellite at a low point in its orbit to reduce the amount of debris that remained in space while causing the hydrazine to burn up on reentry to the Earth's atmosphere.

Article IX of the Outer Space Treaty provides:

> If a State Party to the Treaty has reason to believe that an activity . . . planned by it . . . in outer space . . . would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space . . . it shall undertake appropriate international consultations before proceeding with any such activity.[32]

Think about some of those phrases, and how they might apply to the proposed take-down of USA-193. What does "reason to believe" mean? Probably more than "reason to suspect" but less than specific knowledge. Or, the phrase "would cause potentially harmful interference"? Assuming that Article IX applies, what does it require? A State party doesn't have to stop the activity; it just needs to "undertake appropriate international consultations before proceeding." But what constitute "international consultations"? And who determines if those consultations are "appropriate"?

In 2008, the Outer Space Treaty had been in force for more than forty years, but no State had previously conducted Article IX consultations. In the end, based in part on advice from DoD lawyers, senior U.S. leaders determined that Article IX consultations were not required prior to engaging the satellite. But, consistent with the international-notification aim of Article IX, U.S. leaders decided to make a public announcement before the event. On February 14, 2008, the NASA Administrator, the Vice Chairman of the Joint Chiefs of Staff, and the Deputy National Security Advisor announced that then-President George W. Bush had decided to shoot down the satellite.[33] Thankfully, USA-193 was successfully shot down a week later on

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[32] Outer Space Treaty, *supra* note 31, at art. IX.

[33] Jim Garamone, *Navy to Shoot Down Malfunctioning Satellite*, ARMED FORCES PRESS SERV. (Feb. 14, 2008), https://archive.defense.gov/news/newsarticle.aspx?id=48974 [https://perma.cc/VEK5-4FQ4] (archived Sept. 26, 2019). The United States also provided "a notification to the [U.N.] Secretary General, the STSC [Scientific and Technical Subcommittee of the Committee on the Peaceful Uses of Outer Space], other UN bodies, and Governments throughout the world the day after the successful engagement." U.S. DEP'T OF STATE, 2008 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 665, 669 https://2009-2017.state.gov/documents/organization/138513.pdf [https://perma.cc/7E5B-ED73] (archived Oct. 14, 2019).

February 20, 2008, stopping it from what would have been an uncontrolled re-entry into the Earth's atmosphere and minimizing the amount of debris that might cause interference with other State Parties' activities in outer space.[34]

Since then, much has happened in the space domain. The President has revived the National Space Council, chaired by the Vice President;[35] reinvigorated the U.S. human space exploration program;[36] directed the streamlining of regulations on commercial use of space;[37] issued a directive on space traffic management;[38] directed the establishment of U.S. Space Command;[39] and ordered the Secretary of Defense to prepare a legislative proposal to establish a U.S. Space Force.[40] These directives to work towards a U.S. Space Force and to establish U.S. Space Command, which was launched on August 29, 2019,[41] have been at the forefront of DoD's recent space law efforts.

Another important development is that U.S. national defense policy has declared space to be a warfighting domain. In 2007, the year prior to the U.S. engagement of USA-193, China conducted a test of an antisatellite (ASAT) system. That test destroyed the targeted satellite and created substantial space debris, much of which remains in orbit. China has deployed a ground-based missile intended to target and destroy satellites in low-Earth orbit and has tested and is pursuing other weapons capable of destroying satellites. Russia also has an ASAT system in development that will likely be operational within the next several years. Russia has already fielded a ground-based laser weapon, which could blind or damage our sensitive space-based optical sensors. More recently, in April 2019, India tested its own ASAT system. In short, space is no longer a safe harbor, and the United States—with DoD in the lead—needs to be prepared to defend its national interests in space.[42]

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[34] U.S. Dep't of Def., *Navy Succeeds in Intercepting Non-Functioning Satellite*, U.S. NAVY (Feb. 20, 2008), https://www.navy.mil/submit/display.asp?story_id=35114 [https://perma.cc/HNE5-5UGE] (archived Sept. 26, 2019).

[35] Exec. Order No. 13,803, 82 Fed. Reg. 31,429 (June 30, 2017).

[36] Space Policy Directive-1, 82 Fed. Reg. 59,501 (Dec. 11, 2017).

[37] Space Policy Directive-2, 83 Fed. Reg. 24,901(May 24, 2018).

[38] Space Policy Directive-3, 83 Fed Reg. 28,969 (June 18, 2018).

[39] Memorandum from the President for the Sec'y of Def. on the Establishment of United States Space Command as a Unified Combatant Command, 83 Fed. Reg. 65,483 (Dec. 18, 2018).

[40] Space Policy Directive-4, 84 Fed. Reg. 6,049 (Feb. 19, 2019).

[41] Press Release, U.S. Dep't of Def., Department of Defense Establishes U.S. Space Command (Aug. 29, 2019), https://www.defense.gov/Newsroom/Releases/Release/Article/1948288/department-of-defense-establishes-us-space-command/ [https://perma.cc/HQ4E-T2L7] (archived Oct. 14, 2019).

[42] *See The Proposal to Establish a United States Space Force: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. 4 (2019) (statement of Patrick M. Shanahan,

Professor Charney, in a 1995 article titled "Universal International Law," proposed a new approach to the customary lawmaking process based on multilateral forums:

> Traditional customary law formation may have sufficed when both the scope of international law and the number of states were limited. Today, however, the subject matter has expanded substantially into areas that were traditionally preserves of states' domestic jurisdiction . . . Rather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law.[43]

Multilateral forums, according to Professor Charney, "include the United Nations General Assembly and Security Council, regional organizations, and standing and ad hoc multilateral diplomatic conferences, as well as international organizations devoted to specialized subjects."[44]

Professor Charney's article reflects an important insight: multilateral forums can play an important role in the clarification and development of customary international law on novel and contentious issues. States can listen to and learn from the views of other States and subject matter experts. Convergence on the meaning of international law may result as participants begin to understand the issues better and reflect on the views of others.

However, in practice, multilateral processes often haven't been very effective in realizing Professor Charney's vision, especially with respect to the law of war. Customary international law results from a general and consistent State practice done out of a sense of legal obligation (*opinio juris*). A statement from, or a resolution adopted by, a multilateral forum is not, as a general matter, State practice or *opinio juris* that directly contributes to the formation of customary

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Acting U.S. Sec'y of Def., & Gen. Joseph F. Dunford, Chairman of the Joint Chiefs of Staff) (transcript available at https://www.armed-services.senate.gov/download/shanahan_dunford_04-11-19 [https://perma.cc/RH4A-4GPQ] (archived Sept. 27, 2019)) ("Rather than attempt to address each issue in isolation, DoD recognizes the need for a paradigm shift based on a new set of assumptions that more closely reflect today's realities: space is not a sanctuary – it is now a warfighting domain, similar to the air, land, and sea domains; space superiority is a condition that must be gained and maintained via a range of options, including resilient architectures, offensive and defensive operations; space doctrine, capabilities, and expertise must be designed to gain and maintain space superiority, and support operations in other domains; and spacepower and airpower doctrine and operating concepts are as distinct from one another as the air domain is from the land, and as the land domain is from the sea.").

[43] Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993).

[44] *Id.* at 543–44.

international law.[45] Statements in multilateral forums can be secondary sources that are useful in assessing customary international law to the extent such statements actually reflect the practice and legal views of States.[46]

Recognizing this issue and the politics that could be associated with multilateral forums, the United States has sought to encourage non-politicized, multilateral discussions on the law of war based on actual State practice. Although bodies like the United Nations Security Council and General Assembly will continue to address law of war issues, there should also be a non-politicized space for substantive law of war discussions.

For example, over the past eight years, the United States, joined by a diverse group of other States, has encouraged some specific practices in processes designed to strengthen respect for the law of war co-facilitated by the Swiss Government and the International Committee of the Red Cross (ICRC).[47] Our recommended practices are intended to help minimize politicization and to enrich discussion.

First, there should be a forum for States to discuss the law of war that isn't simply a forum for States to criticize one another. The law of war requires that warring parties put aside the political context that made them enemies and apply humanitarian protections. International discussions on the law of war of this nature, in our view, can be an important opportunity to improve humanitarian protections in all conflicts.

Second, State representatives should present on their own best practices in the law of war, rather than censure the practices of other States. Such criticism is nearly always perceived as political even if it is offered in good faith.

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45 *See* Letter from John Bellinger III, Legal Adviser, U.S. Dep't of State, and William J. Haynes, Gen. Counsel, U.S. Dep't of Def., to Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), 46 INT'L LEGAL MATERIALS 514, 515 (2007) ("We also are troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.").

46 *See, e.g.*, Memorandum of Law from George Aldrich, Acting Legal Adviser, Dep't of State (Oct. 25, 1974), U.S. DEP'T OF STATE, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (OXFORD UNIV. PRESS & INT'L LAW INST. 1976) ("It may confidently be assumed that, if the issue of whether such activities are proscribed by the principle of non-intervention were to be put to a vote today in the United Nations General Assembly, the vast majority would hold that they are; but whether the practice of those states will come to support that conclusion remains to be seen.").

47 Conference Resolution 2, 32IC/15/R2 (Dec. 8–10, 2015), http://rcrcconference.org/app//uploads/2015/04/32IC-AR-Compliance_EN.pdf [https://perma.cc/J48Z-2S6H] (archived Sept. 27, 2019); Conference Resolution 1, 31IC/R1 (Nov. 28 – Dec. 1, 2011), https://www.icrc.org/en/doc/resources/documents/resolution/31-international-conference-resolution-1-2011.htm [https://perma.cc/CYA8-DY6E] (archived Sept. 27, 2019).

Third, to engage in substantive law of war discussions, States should include military or legal experts who are involved in their State practice, especially in actual operations.

Finally, we have encouraged meetings where each State presents its own views, rather than focusing dialogue on the wording of a common text from the forum, like a resolution. In some circumstances, arguing over the text can divert attention from substantive discussions. Negotiating texts can also hinder clarification of the law because a common approach to achieve consensus is to make language more ambiguous.

The United States has recommended and sought to apply these specific practices in a variety of contexts where clarification or development of the law of war are useful: 1) emerging technologies in the area of lethal autonomous weapons systems; 2) the protection of civilians in armed conflict; and 3) detention in non-international armed conflicts. We believe this approach could be useful in certain other contexts as well.

Another area where States have different international legal obligations is the International Criminal Court (ICC), which is an international forum for prosecuting war crimes and certain other serious violations of international law. Although many States are parties to the Rome Statute—the treaty that created the ICC—and have thereby accepted its jurisdiction, the United States is not a party to the Rome Statute and has not consented to its jurisdiction.[48] The United States respects the decision of those nations that have chosen to join the ICC, and, in turn, we expect that our decision not to join and not to place our citizens under its jurisdiction will also be respected.

The ICC, however, has asserted the right to investigate and prosecute our people without our consent. It purports to evaluate U.S. accountability efforts. The U.S. policy in response to these ICC assertions is very clear and has been stated in remarks by Ambassador Bolton and Secretary Pompeo. The bottom line is that: "we reject such a flagrant violation of our national sovereignty."[49] The U.S. view, as Secretary Pompeo has indicated, is that "the ICC is attacking

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[48] *Statement on Behalf of the United States of America*, 16th Session of the Assembly of States Parties to the Rome Statute (Dec. 8, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf [https://perma.cc/YF98-CXSK] (archived Sept. 27, 2019).

[49] John R. Bolton, *National Security Adviser John Bolton Remarks to Federalist Society*, LAWFARE (Sept. 10, 2018), https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society [https://perma.cc/8ZKL-Q3Z6] (archived Sept. 27, 2019).

America's rule of law."[50] The United States holds our people accountable for their actions, and the United States will take the necessary actions to protect our people from prosecution by the ICC without its consent.

## II.

Indeed, respect for the rule of law is a bedrock commitment of the U.S. Department of Defense. And DoD lawyers, naturally, play an essential role in ensuring that the Department's activities comply with applicable laws.

DoD has more than 12,000 civilian and military lawyers. We have operational lawyers embedded at the brigade, air wing, and naval strike group level in every theater of operations. When our warfighters conduct missions, law of war briefings by military lawyers—Judge Advocate General (JAG) officers—are as routine as briefings by intelligence officers. We have international law JAG elements in every combatant command legal office, with the specific mission to advise on the law of war.[51] What does this say about the U.S. armed forces? The United States takes its obligation to abide by the law of war seriously, and our lawyers on the ground prove it.

Let me give you an example of DoD lawyers in action, one that includes Professor Charney's expertise—the law of the sea. Countries like Iran and China have sought to exert national control over international straits and waters. This is one of the most pressing issues in international security today. For example, Iran seeks to deny navigational rights through the Strait of Hormuz, despite customary international law rules permitting transit passage through straits used for international navigation. Similarly, China makes excessive maritime claims in the South China Sea that impede freedom of navigation and are inconsistent with customary international law.

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[50] Michael R. Pompeo, U.S. Sec'y of State, Remarks to the Press (Mar. 15, 2019) (transcript available at https://www.state.gov/remarks-to-the-press-6/ [https://perma.cc/AF78-35H6] (archived Sept. 27, 2019)).

[51] *See* U.S. Dep't of Def. Directive 2311.01E, Dep't of Def. Law of War Program, ¶ 5.7, ¶ 5.11 (May 9, 2006), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf?ver=2019-04-03-105531-777 [https://perma.cc/4ZTN-6CM9] (archived Sept. 26, 2019) ("The Heads of the DoD Components shall [:] Make qualified legal advisers at all levels of command available to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs to comply with the reporting requirements established in section 6. . . . The Commanders of the Combatant Commands shall [:] Designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war; . . . Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.").

You might recall seeing news stories about challenges to freedom of navigation in key waterways such as the Strait of Hormuz and the South China Sea. Although I can't discuss specific events, I can give you a general look at how the United States would react in international security scenarios like these, consistent with the rule of law, with a specific eye on the role of DoD lawyers.

First, having the facts is always important. The intelligence community works to gain as much information about flashpoint incidents as possible—the who, what, where, why, and how. Second, the National Security Council (NSC) staff at the White House will typically convene an interagency process and start compiling a menu of policy choices for how to respond. They might ask the Department of State for diplomatic options and Treasury for economic options like sanctions, and they might ask DoD for military options. Operational planners at the relevant geographic combatant commands (like U.S. Central Command or U.S. Indo-Pacific Command) and in the office of the Chairman of the Joint Chiefs of Staff (the country's top military advisor to the Secretary of Defense and the President) would draw up those potential military responses. The lawyers in my office work closely with combatant command and Joint Staff lawyers as those options are framed to help ensure they would comply with the law, including by reviewing any targeting options that might be presented.

Let me illustrate this legal team effort with hypothetical examples. Suppose a country or surrogate militia had used armed force—such as an anti-ship missile, armed boarding and/or capture, or a contact mine—against a U.S.-flagged vessel or warship in international waters or during transit passage in an international strait. Or suppose a country or surrogate force had used that kind of force against a foreign-flagged vessel that specifically requested U.S. military assistance in response.

Let's say that the U.N. Security Council has not adopted a resolution pursuant to its authority under Chapter VII of the United Nations Charter authorizing the use of force in response to such aggressive actions.[52] And the United States has not taken the position that a violation of the freedom of navigation is an independent ground for the use of armed force under international law. But nations always maintain the inherent right to exercise self-defense in accordance with

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[52] Article 42 of the U.N. Charter provides: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. Charter art. 42.

international law.[53] Self-defense may be exercised either in a State's own national self-defense, or in the collective self-defense of a partner or ally.

Our analysis of whether military options could be authorized in a legitimate exercise of national or collective self-defense would start with a few key questions: Did the event constitute an armed attack or threat of imminent armed attack such that self-defense could be invoked? What were the flag jurisdictions of any vessels attacked or captured? Does the United States have a mutual defense treaty obligation to the particular State of the foreign-flagged vessel, or has the foreign country in question specifically requested U.S. military assistance to defend it? If the event constituted an armed attack against a foreign-flagged vessel whose flag country requested U.S. military assistance in response, then there could be—depending on the specific facts—a valid international legal basis to support a U.S. military response in the collective self-defense of that flag State, a response that would be followed immediately by Department of State reporting to the U.N. Security Council in accordance with Article 51 of the U.N. Charter.[54]

But use of force in self-defense is also informed by the customary international law requirements of necessity and proportionality. In addition, during such an operation, U.S. military forces would comply with applicable *jus in bello* rules. For example, they would distinguish between lawful military targets and protected objects and persons such as civilians, and they would refrain from attacks expected to cause excessive harm to civilians.[55] Furthermore, when the justification is self-defense, no armed response would be justified under international law if, for example, the precipitating use of force was a one-time accident and thus not likely to recur. So, we'd also ask questions like: Is there any evidence that the precipitating use of force was accidental? What non-force options have we tried? What are the estimated casualties resulting from any of the contemplated force options?

The answers to those questions represent only half of the legal equation. In addition to the questions I just posed related to the international law basis for the use of force in self-defense, we'd also assess any proposed military options for legality under domestic law. Although my focus in this lecture is international law, I'd like to give you a sense of the domestic legal issues involved in situations like

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53 *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations…"); LAW OF WAR MANUAL, *supra* note 10, § 1.11.5.

54 "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. Charter art. 51.

55 *See* LAW OF WAR MANUAL, *supra* note 10, §§ 5.5, 5.10.

these, because they are often intertwined with the international law issues.

What legal authority would the President be invoking if he were to authorize military force? Is there a statute authorizing the military options contemplated? If not, could the President use force nonetheless under his constitutional Article II powers if he identifies significant national interests, and the situation does not amount to "war" in the constitutional sense requiring congressional authorization? What might those qualifying national interests be? What have Presidents done in the past? U.S. Supreme Court decisions regarding presidential use of armed force absent a congressional declaration of war are rare,[56] and so guidance on these vital questions in practice is provided by the legal opinions of the Department of Justice's Office of Legal Counsel (OLC). The most recent ones are instructive, namely OLC's 2011 opinion regarding air strikes in Libya[57] and its 2018 opinion regarding air strikes in Syria.[58]

If you have some time, I urge you to read them—they are public and easily accessible online, along with many other unclassified OLC opinions.[59] One thing that you will see is the remarkable degree of continuity across administrations. For instance, the 1994 Haiti and 1995 Kosovo opinions during the Clinton Administration[60] and the 2011 Libya opinion during the Obama Administration are key underlying opinions for the 2018 Syria opinion during this administration.

Legal analysis is conducted within DoD, with lawyers advising components up and down the chain of command. It is also discussed and debated with lawyers working on the NSC staff and across

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56 *See, e.g.*, The Prize Cases, 67 U.S. 635 (1863) (upholding, by a 5–4 vote, President Lincoln's April 19, 1861, proclamation of a blockade of southern ports one week after the taking of Fort Sumter by Confederate forces while Congress was in recess); Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 64 (2008) ("[B]y proclaiming the blockade in April 1861, Lincoln had committed a belligerent act that was unauthorized by the explicit words of the Constitution and unauthorized by congressional statutes. Nor could the act be grounded in some defensive gloss on his power as Commander in Chief, in light of the patently offensive use of armed force on the private citizens of neutral foreign countries that had neither invaded the United States nor actively aided insurrection.").

57 Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).

58 April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1 (2018).

59 *See* Office of Legal Counsel, *Opinions*, U.S. DEP'T OF JUSTICE, June 5, 2016, https://www.justice.gov/olc/opinions-main [https://perma.cc/Q8XK-MG7B] (archived Sept. 27, 2019).

60 Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995).

relevant departments and agencies—at the State Department, CIA, DOJ, and others. We answer questions. We may gather and provide more facts and analysis. We do what lawyers do in this country every day: we give our best legal advice to clients—here, our nation's leaders—who have to make tough decisions.

Up to this point, I've given you a sense of how international law affects DoD policymaking and the decisions that the U.S. Government makes in the international security realm *ex ante*. I'd like to turn next to some examples of how we demonstrate fidelity to the rule of law by respecting applicable international law *ex post*.

First, consider the differing positions between the United States and China regarding the 1982 Law of the Sea Convention. The United States has not ratified the Convention but accepts its provisions on traditional uses of the seas as customary international law,[61] and thus binding on all States including non-parties to the Convention like the United States. This includes the establishment and maximum extent of maritime zones such as the twelve nautical-mile territorial sea and the 200 nautical-mile exclusive economic zone, as well as the navigational rights and freedoms set forth in the Convention, such as the freedom of navigation and overflight, the right of transit passage through international straits, and the right of innocent passage through the territorial sea.[62]

China, by contrast, has ratified the Convention[63] and abides by it when compliance suits China's national interests. However, China has also engaged in a decades-long campaign to convert a large swath of the South China Sea into its own exclusive preserve, in a way that is clearly inconsistent with international law as reflected in the Convention.[64] The Chinese, in effect, are seeking to revive the sixteenth-century Portuguese closed-seas norm. The juxtaposition of U.S. non-ratification of the Law of the Sea Convention plus U.S. compliance with the provisions it regards as reflecting customary

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61 U.S. Diplomatic Note Responding to Ecuador, U.S. DEP'T OF STATE, 2017 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 531–32, https://www.state.gov/wp-content/uploads/2019/04/2017-Digest-of-United-States-Practice-in-International-Law.pdf [https://perma.cc/LBV7-JPBB] (archived Oct. 14, 2019) ("With regard to the statements contained in Ecuador's declaration on accession to the Convention of September 24, 2012, the United States wishes to recall that, although the United States is not yet a Party to the Convention, it has long regarded the Convention as reflecting customary international law with respect to traditional uses of the ocean. Since 1983, the United States has acted in accordance with the Convention's balance of interests, including with respect to its exercise of navigation and overflight rights and lawful uses of the sea on a worldwide basis.").

62 United Nations Law of the Sea Convention, arts. 3, 38, 45, 57, 87, Dec. 10, 1982, 1833 U.N.T.S. 397.

63 *See id.*

64 *See* U.S. Diplomatic Note to China, U.S. DEP'T OF STATE, 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 520–22, https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-Chapter-12-.pdf [https://perma.cc/Y5PA-9Z6T] (archived Oct. 14, 2019).

international law, with China's ratification and non-compliance, is a good example of what I mean by *ex post* commitment as an essential element to the rule of law. Simply ratifying a treaty is not enough; by the same token, not ratifying a treaty doesn't mean a State is a rule-of-law scofflaw.

My second example of U.S. commitment to the rule of law in international security affairs concerns a relatively obscure feature of United States-Iran relations. The example also gives you a sense of the diverse nature of the work the lawyers in the DoD Office of General Counsel do. In the 1970s, the United States and Iran were close allies, with billions of dollars in bilateral business. And then the Iranian Revolution happened.

Iranian militants stormed the U.S. embassy in Tehran and seized fifty-two U.S. hostages on November 4, 1979. A little more than a year later, on January 19, 1981, the United States and Iran signed the Algiers Accords, an international agreement in which Iran agreed to release the U.S. hostages,[65] which it did the next day. The United States, for its part, agreed:

> To terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[66]

The arbitration was to take place in The Hague before the Iran-United States Claims Tribunal, a nine-member tribunal consisting of three members nominated by Iran and the United States each, who would in turn nominate three other members including the President.[67] The Tribunal could hear claims *en banc* or in three-member panels. The United States committed to collecting and depositing all Iranian assets held by US banks by July 19, 1981, with one billion dollars to be deposited in an escrow account in the Bank of

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65 The Algiers Accords comprised several separate documents, including a General Declaration of the Algerian government, and a Claims Settlement Agreement. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria, at 3, *reprinted in* U.S. Dep't of State Bull. No. 2047 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, at 3, *reprinted in* U.S. Dep't of State Bull. No. 2047 (1981).

66 Declaration of the Government of the Democratic and Popular Republic of Algeria, at 3, *reprinted in* U.S. Dep't. of State Bull. No. 2047 (1981).

67 *Id.* at 10.

England. The U.S. Supreme Court upheld the President's power to make this international agreement in *Dames & Moore v. Regan*.[68]

The Iran-United States Claims Tribunal has been a prime catalyst of the evolution of international arbitration and investment law. Many of the most prominent international arbitrators and practitioners today have been involved with the 3,900 cases the Tribunal has already decided. It was an early adopter of United Nations Commission on International Trade Law's (UNCITRAL's) model arbitration rules promulgated in 1976,[69] which contributed greatly to the Rules' worldwide dissemination and burnished the reputation of UNCITRAL generally.

More than thirty-eight years later, the Tribunal is still active. In fact, on June 14, during heightened tensions with Iran in the Strait of Hormuz and five days before the downing of a U.S. Navy unmanned aircraft in the area, my Deputy General Counsel for International Affairs, Chuck Allen, as a member of the State Department-led team, was making a closing presentation before the Tribunal on the last set of major claims before it. All the claims of U.S. nationals against Iran have already been processed; the only claims left are multibillion-dollar claims alleged against the U.S. Government for contract amounts (with interest) that Iran had in connection with the U.S. Foreign Military Sales Program.

Step back for a moment. What does it say about the United States that, despite the nearly four decades of troubled relations between our two nations, the United States is still honoring the international law commitment to Iran that it undertook in the 1981 Algiers Accords, even when most of the remaining claims are Iran's claims against the United States? Consider this example of U.S. commitment to the rule of law in international security affairs juxtaposed against DoD's two interactions with Iran in mid-June of this year. All are examples of how the United States abides by international law in difficult circumstances with important national interests at stake. Even amidst conditions implicating the potential for the use of force, the United States honored a decades-old international law promise, signifying what it means to be truly dedicated to the international rule of law.

I will close by emphasizing that the rule of law, for the U.S. Department of Defense, isn't just about lawyers and legal rules. The DoD implements and secures the rule of law through the professional values that everyone in the Department seeks to uphold. We all swear an oath to support and defend the Constitution. DoD leaders, including commanders and commissioned and non-commissioned officers throughout the chain of command, recognize the importance of ethics and values, and there is an expectation that each and all will conduct themselves in accord with the highest standards.

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[68] Dames & Moore v. Regan, 453 U.S. 654, 688 (1981).

[69] G.A. Res. 31/98, UNCITRAL Arbitration Rules (Dec. 15, 1976).

Secretary of Defense Esper, in his first message to the Department of Defense in June 2019, underscored the great importance of "a commitment by all—especially Leaders—to those values and behaviors that represent the best of the military profession and mark the character and integrity of the Armed Forces that the American people admire."[70] And, as Chairman of the Joint Chiefs of Staff, General Joe Dunford has said, when we go to war, we "bring our values with us."[71]

Comporting with those standards reinforces our institutional respect for the rule of law. In the DoD Law of War Manual, we emphasize the importance not only of the law but also of honor and other professional military values as means to ensure respect for full compliance with law of war in military operations.[72] The rule of law is in our DNA.

## III.

I hope my remarks have given you a sense of what the Office of General Counsel of the U.S. Department of Defense does, along with some understanding of the Department's commitment to the rule of law in international security affairs. We advise the nation's warfighters and their leaders on issues, challenges, and problems that are complex, consequential, and vital to the security of our country and the world. If this job description interests you, if you aspire to public service, I encourage you to consider joining us in the national security law practice.

Should you take that path, I assure you that there is an additional and immeasurable benefit: the people you will work with are exceptional and will be a constant source of inspiration. Every day, I am thankful for the privilege of serving on this team. Thank you, as well, for the privilege of addressing you in this year's Charney Distinguished Lecture in International Law.

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[70] Memorandum from Mark T. Esper, Acting U.S. Sec'y of Def., to All Department of Defense Employees (June 24, 2019) (on file with U.S. Dep't of Defense).

[71] Gen. Joseph F. Dunford, Jr., Chairman of the Joint Chiefs, Remarks and Q&A at the Center for a New American Security Next Defense Forum (Dec. 14, 2015) (transcript available at https://www.jcs.mil/Media/Speeches/Article/636952/gen-dunfords-remarks-and-qa-at-the-center-for-a-new-american-security-next-defe/ [https://perma.cc/GN7N-QZA9] (archived Sept. 27, 2019)).

[72] LAW OF WAR MANUAL, *supra* note 10, § 2.6.