

ENDING THE EXCESSIVE USE OF FORCE AT HOME AND ABROAD

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In the mid-1980s the American Society of International Law (ASIL) launched an initiative to engage more women and minority members in the Society and international law more generally.¹ Professor Henry Richardson was there, encouraging all of the new aspirants, including me. He is still doing that, and this essay in his honor is an expression of gratitude, admiration, and affection. It develops themes Hank and I have both pursued for decades: human rights, peace and non-violence, and the promotion of international law and ASIL.

Hank was a leader in the anti-apartheid movement in the United States (U.S.).² That movement, among other influences, inspires my efforts toward reversing the false perception that military force is an appropriate tool of change. White South Africans created a militarized society in the attempt to hold on to privilege.³ Black South Africans, including Nelson Mandela for a time, believed they had to literally fight back to create a society of equality.⁴ Mandela came to reject that belief and embraced non-violence as a path to change.⁵ Non-violence succeeded and sets a powerful example for Americans today with respect to policies of change both at home and abroad.

The time is ripe for this essay. Following an all-too-brief pause after losing the Vietnam War, the United States has been involved in almost continuous major combat and covert lethal operations.⁶ This unrelenting violence overseas is increasingly returning home. Our police forces are militarized,⁷ which helps explain the frequent and inexcusable turn to lethal force in responding to situations that do not call for violence. Creative ideas for non-violent methods are lacking. Even international law is impacted. Scholars advocate for novel interpretations of

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1. See generally AMERICAN SOCIETY OF INTERNATIONAL LAW, <https://www.asil.org/> (last visited Feb. 22, 2016) (presenting numerous initiatives started by ASIL).

2. See, e.g., HENRY RICHARDSON III, *THE ORIGIN OF AFRICAN AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008).

3. Gary Kynoch, *Apartheid's Afterlives: Violence, Policing and the South African State*, 42 J. OF SO. AFR. STUD. 65 (2016).

4. NELSON MANDELA, *LONG WALK TO FREEDOM* 96 (1995).

5. *Id.*

6. Alan W. Dowd, *A chronology of U.S. military interventions and the prices paid*, THE AMERICAN LEGION MAGAZINE (May 1, 2015), <http://www.calegion308.org/documents/America%20at%20war.pdf>.

7. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (1st ed. 2013).

the law to weaken and remove legal barriers to the resort to force.⁸ Relatively few seek to support restrictions on force and peaceful resolution of disputes.⁹ Almost no one advocates expanding existing restrictions. In the streets and on social media, however, there is new unrest, not unlike that which forced elected leaders in Washington, D.C. to pull out of Southeast Asia.¹⁰ This unrest signals an opening for new approaches and new opportunities to revive the teaching of non-violence.

In the U.S., the foremost proponent of non-violent change both at home and abroad remains the 1960s civil rights leader, the Reverend Dr. Martin Luther King, Jr. Dr. King adopted non-violent resistance as the way to transform a widely segregated society. He came to non-violence through Christianity and peace advocates such as Mahatma Gandhi. When King received the Nobel Peace Prize in 1964, he said the Prize was “profound recognition that nonviolence is the answer to the crucial political and moral question of our time - the need for man to overcome oppression and violence without resorting to violence and oppression.”¹¹ It is time for the U.S. to once again embrace non-violence in seeking respect for the right to life and other human rights at home and abroad. Non-violent approaches provide effective ways to advance human rights that also respect the international legal presumption of peace, the prohibition on the use of force, and the duty to resolve conflict peacefully.

I. MODERN MILITARISM IN AMERICA¹²

The Vietnam War ended for the U.S. in 1974.¹³ From that year until 1980, the U.S. hewed closely to the international law on the use of force. Indeed, President Carter launched the current era of international human rights law in that period by signing and pursuing ratification of numerous human rights treaties that had languished in the Oval Office until his presidency.¹⁴ President Reagan then returned to an old pattern, by ordering covert paramilitary operations in Central America¹⁵ and invading the Caribbean island of Grenada.¹⁶ President George H.W.

8. See, e.g., Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769 (2012); Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 284 (2011).

9. See, e.g., OLIVIER CORTEN, *THE LAW AGAINST WAR, THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* (2010); see, e.g., CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (3d ed. 2008).

10. See generally *Vietnam War Protest*, HISTORY.COM, <http://www.history.com/topics/vietnam-war/vietnam-war-protests> (last visited Feb. 22, 2016) (providing background information about Vietnam War Protests).

11. Dr. Martin Luther King, Jr., Acceptance Speech for the 1964 the Nobel Peace Prize (Dec. 10, 1964). (transcript available at: https://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance_en.html).

12. Mary Ellen O'Connell, *Good Law Against War*, in DIMENSIONS OF GOODNESS 339–64 (Vittorio Hösle ed. 2013).

13. Michael Ip, *Looking Back: The End of the Vietnam War*, ABC News (Mar. 29, 2013), <http://abcnews.go.com/blogs/headlines/2013/03/looking-back-the-end-of-the-vietnam-war/>.

14. SAMUEL MOYN, *THE LAST UTOPIA* (2010).

15. See, e.g., *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 (June 27).

Bush, Reagan's successor, looked set to continue the unlawful use of force when he ordered another unlawful intervention in the Americas: The U.S. invasion of Panama.¹⁷ When the Cold War ended, however, President Bush saw an opportunity to pivot back to international law. The U.S. role in liberating Kuwait from Iraqi aggression was consistent with international law.¹⁸ After 100 hours of combat, Kuwait was free and President Bush declared a "new world order under the rule of law."¹⁹ The fact that the U.S. engaged in using force lawfully was a major part of the victory, accounting for high morale among coalition troops, low morale among Iraqi forces, and almost universal support to end the occupation. The U.S. actually gained financially—and certainly in stature—on the world stage.²⁰ Tragically, Bush's successors developed foreign policies based not on international law, but on the U.S.' short-lived exceptional moment as the sole superpower. President Bill Clinton, President George W. Bush, President Barack Obama, and President Donald Trump have all pursued American foreign policy using military force unlawfully—following the failed example of Vietnam rather than the successful example of the Persian Gulf.

During the Clinton presidency, the U.S. made only limited attempts to justify resort to force in terms of international law. By contrast, Bush administration lawyers set forth grandiose claims to America's exceptional rights to kill and capture in the name of U.S. security.²¹ President Obama and his officials, perhaps most worrying of all, have provided more sophisticated but still baseless legal arguments for the use of force abroad.²² President Donald Trump has removed the restraints from the Obama policies without restoring respect for the actual law.²³

16. See John Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 U. OF MIAMI INTER-AM. L. REV. 271, 274 (1987) (arguing that the U.S. State Department's justifications for the Grenada invasion misrepresented facts in order to support its claim of legality). See generally CORTEN, *supra* note 9, at 1.

17. See *The Panamanian Revolution: Diplomacy, War and Self-Determination in Panama*, 84 ASIL PROC. 182-89 (1990) (explaining the actions leading up to the U.S. decision to intervene in Panama).

18. Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453 (1991).

19. *Id.* at 456.

20. JANET A. McDONNELL, *AFTER DESERT STORM: THE UNITED STATES ARMY AND THE RECONSTRUCTION OF KUWAIT* 209 (1st ed. 1999).

21. See, e.g., John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004). Professor Yoo is best known as the unapologetic, principal author of a document known as "the torture memo." His work on resort to force is a similar departure from standard legal reasoning with the aim of freeing the U.S. uniquely to go to war at will.

22. See e.g., U.S. DEP'T OF JUSTICE, *LAWFULNESS OF LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE* (2011) <https://fas.org/irp/eprint/doj-lethal.pdf>. The DOJ White Paper, as the document is also known, was written by Judge David Barron, formerly of Harvard Law School, and Professor Martin Lederman of Georgetown University Law Center.

23. Mary Ellen O'Connell, *Mosul Civilian Disaster is Sign of an Even Bigger Problem*, CNN (Apr. 1, 2017) <http://www.cnn.com/2017/03/31/opinions/mosul-civilian-casualty-disaster-occonnell/>.

The constant resort to force regardless of the law has resulted from an overconfidence in military force. This confidence is deeply embedded in the American personality. Yet, so is commitment to the rule of law. Both are deep, if also at times contradictory, strains in American history. From the founding period until the present, these strains are evident. In the stories told and retold of 1776, the Revolutionary War years, the Declaration of Independence—a legal document—and the irregular tactics of the Minute Men feature prominently. The drafters of the Declaration were well versed in international law. They read Grotius and Vattel.²⁴ They wrote of inalienable rights and claimed for Britain's thirteen colonies the right to be independent and equal to every other sovereign state. The most basic right of independent states is the right to be free of intervention from other states. This principle of non-intervention was confirmed in the agreements known as the Peace of Westphalia of 1648 that are considered the founding agreements of international law.²⁵ The Declaration of Independence demonstrates that the American founding story rests on profound concepts of international law, including natural rights.

One side of the founding story, then, is the law. Equally important, however—perhaps more powerful than the example of the Declaration of Independence—is the War of Independence. U.S. citizens continue to pride themselves on having been the underdog in a fight with the leading military power of the day, Great Britain.²⁶ A combination of inspired leadership by individuals such as George Washington, the innovative tactics of backwoods fighters, and assistance from outside—the French and others—account for the victory.²⁷ The U.S. is a country founded in violence and war. Its identity, continued existence, and existential journey unfold in a war story—one that continues to the present day.

The War of 1812, the Indian wars, the Civil War, the Mexican wars, the Spanish-American War of 1898, and the interventions in Central America, all were thought by most Americans to be “good” wars because they aimed at maintaining or expanding the Union, protecting American commercial interests, or ending slavery and Spanish human rights violations.²⁸ Joining European conflicts, the First World War and even the Second World War, might have been more controversial

24. For example, Benjamin Franklin once wrote to a book dealer in The Netherlands to thank him for sending three copies of Vattel's *The Law of Nations* (1758). ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 161 (1958) (quoting Franklin as writing, “the circumstances of a rising state make it necessary frequently to consult the law of nations”); see e.g., MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914* (2004).

25. See generally LEO GROSS, *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION: VOLUME I/II* (1984).

26. O'Connell, *Good Law Against War*, *supra* note 12, at 342.

27. See generally *American Revolution History*, HISTORY.COM, <http://www.history.com/top-ics/american-revolution/american-revolution-history> (last visited Feb. 28, 2017).

28. See David S. Heidler & Jeanne T. Heidler, *Manifest Destiny*, Encyclopedia Britannica (Mar. 9, 2015), <https://www.britannica.com/event/Manifest-Destiny> (explaining how war in America served not only as territorial expansion but also as fulfillment of America's desire for improvement, change, and growth).

than many of America's 19th century wars, but, once committed, most Americans supported those war efforts with passion. We turned them into righteous conflicts in which the end justified the means from gas attacks to atomic weapons.

Americans have struggled from the time of the founding of the nation to put war under the control of law and institutions, even while engaged in armed conflict. The U.S. has had peace movements devoted to changing the law for as long as it has had any kind of armed forces. Significant numbers of Christian pacifists left Europe for the United States. They left to escape war and military service, as well as to practice versions of Christianity that held pacifism and non-violence as central tenets.²⁹ Quakers, Mennonites, Anabaptists, and then a broad array of Protestant denominations provided popular support to politicians in the U.S. willing to resolve disputes using peaceful methods.³⁰

The shocking toll of the Civil War and its chaotic aftermath led many to seek peace through law. Peace organizations attracted their largest memberships in the second half of the nineteenth century.³¹ These organizations were highly critical of the U.S. decision to attack Spain in 1898 and of the post-war decision to acquire colonies.³² Peace movement leaders demanded that peace become the central theme of the Russian Czar's 1899 arms control conference in The Hague.³³ It became "The Hague Peace Conference" and led to the first general treaty-based limitation on resort to war.³⁴ By the end of the Second World War, Franklin Roosevelt put America's huge military and economic power behind a legal document, the United Nations (U.N.) Charter, which outlawed wars of national policy and put in place an institution designed to support the prohibition on force.³⁵ It was not long, however, before the U.S. was involved in wars on the Korean Peninsula, in Southeast Asia, Central America, the Caribbean, the Persian Gulf, the former Yugoslavia, South Asia, the Middle East, and Africa.³⁶

29. Mary Ellen O'Connell, *Arbitration and the Avoidance of War: The 19th Century American Vision* in *THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 30, 30–31 (Cesare Romano ed. 2009).

30. See generally J. Howard Kauffman, *Dilemmas of Christian Pacifism within a Historic Peace Church*, 49 *SOC. ANALYSIS* 368 (1989).

31. DAVID CORTRIGHT, *PEACE: A HISTORY OF MOVEMENTS AND IDEAS* 25 (2008).

32. *Peace Movements, 1898-1945*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/defense/energy-government-and-defense-magazines/peace-movements-1898-1945> (last visited Feb. 27, 2017).

33. *Hague Peace Conferences*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/international-organizations/hague> (last visited Feb. 27, 2017).

34. *Id.*

35. See STEPHEN C. SCHLESINGER, *ACT OF CREATION, THE FOUNDING OF THE UNITED NATIONS, A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD* (2003)(expressing that Roosevelt deserves the greatest credit for the drafting of the U.N. Charter).

36. See generally William Blum, *A Brief History of U.S. Interventions: 1945 to the Present*, *Z Magazine* (June 1999) http://www.thirdworldtraveler.com/Blum/US_Interventions_WBlumZ.html.

Peace organizations basically disappeared in this period. Its leaders were denounced as unpatriotic. Jane Addams, a social worker in Chicago, was a prominent peace leader, speaking to crowds of thousands about the toll of war that she saw daily among the widows and orphans fleeing to America from Europe.³⁷ Addams died in obscurity, in part because of her criticism of President Woodrow Wilson for joining World War I instead of working to end it. Anti-war movements made a brief return during the Vietnam War and again very briefly before the Iraq invasion in March 19, 2003.³⁸ For the most part, however, since the Second World War, American politicians have shown more confidence in war than international law.

This confidence can be attributed in large part to the triumph of political science realism over international law. Realism extols promoting a sense of national power through projecting military power.³⁹ The theory has had a singular influence on U.S. foreign policy. It owes many of its core ideas to Hans Morgenthau, a German-Jewish refugee who fled to the United States during World War II.⁴⁰ Despite his training in international law, Morgenthau preached that it was the duty of the American president to seek military power.⁴¹ His student Kenneth Waltz took this message further, advocating resort to force to send a message of strength.⁴² For many Realists, state sponsored killing beyond the nation's borders may be justified for such signaling. If a terrorist group attacks, proponents of Realism argue that a demonstration of military power must be made to counter any perception of weakness by the victim.⁴³ These two scholars, Hans Morgenthau and Kenneth Waltz, continue to be read by every student of political science or international relations in the U.S. There is likely no other field of intellectual endeavor so dominated by so few for so long.

37. Victoria Bissell Brown, *Jane Addams in WOMEN BUILDING CHICAGO 1790-1990: A BIOGRAPHICAL DICTIONARY* 14 – 22 (Rima Lunin Schultz and Adele Hast eds., Bloomington & Indianapolis: Indiana University Press, 2001).

38. See, e.g., *Vietnam War Protests*, HISTORY.COM, <http://www.history.com/topics/vietnam-war/vietnam-war-protests> (last visited Feb. 28, 2017); Victoria Carty, *The Anti-war Movement Versus the War Against Iraq*, 14 INT'L J. OF PEACE STUD. 17, 21–24 (2009).

39. David A. Baldwin, *Power and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 273, 285 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2013).

40. See generally HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1948).

41. “After half a century, the writings of Hans J. Morgenthau continue to fill the minds, and often the hearts, of students of international politics. During the Cold War, his ‘realist’ approach ran as a leitmotif through political and academic discourse, his *Politics Among Nations* rising to become a classic. Though Kenneth Waltz’s more ‘scientific’ realism has arguably overtaken Morgenthau’s realism among contemporary scholars, he remains widely read in the field and was indeed a formative influence on Waltz himself.” Daniel Philpott, *Moral Realism*, 64 REV. POL. 378, 378 (2002) (reviewing CHRISTOPH FREI, HANS J. MORGENTHAU: AN INTELLECTUAL BIOGRAPHY (2001)). See also RICHARD NED LEBOW, *THE TRAGIC VISION OF POLITICS, ETHICS, INTERESTS AND ORDERS* 216 (2003).

42. See generally KENNETH WALTZ, *MAN, THE STATE, AND WAR* (1959); HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1948).

43. Baldwin, *supra* note 39.

Even in the area of moral philosophy and ethics there has been a decided turn in the U.S. to viewing war as a positive thing. Note the Just War theorists who have come out in favor of all sorts of wars in recent years: Michael Walzer found the Kosovo intervention ‘just’, while Jean Bethke Elshtain and George Waigel found the 2003 Iraq invasion praiseworthy.⁴⁴ By the 1980s, David Hollenbach described how the Just War tradition had evolved from a position presuming that war is sinful to one presuming war is just, so long as it is waged by legitimate authorities.⁴⁵ Hollenbach attempted to re-set the presumption in favor of the view that war is justifiable only in exceptional situations.⁴⁶ Judging by subsequent work of Just War theorists, he did not succeed.

U.S. history, popular myths about that history, the Realist theory in political science, and contemporary ethics have contributed to popular culture and, in turn, have been shaped by it. Theater, film, television, novels, and games are centrally important in understanding the American conception of war as good.⁴⁷ In the U.S., we are simply inundated with entertainment about good guys killing bad guys. A dominant story line promotes the need for the good guys to break the rules in order to kill the bad guys. Breaking the rules should make the good guys bad guys, but being law abiding no longer identifies good guys in America. We judge a good guy by the quality of the person’s heart. Good guys have hearts of gold, so they remain good guys no matter what they do. Jack Bauer of the post-9/11 hit television show, *24*,⁴⁸ has replaced Atticus Finch, who upheld the law despite the cost to him personally in *To Kill a Mockingbird*.⁴⁹ Bauer breaks the law to not only kill but also torture bad guys.

With this history and overwhelming pro-killing culture, it is easy to conflate the means of war with the good ends we seek: independence is good, so the

44. See e.g., JEAN BETHKE ELSHTAIN, JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD 87-88 (2003); MICHAEL WALZER, ARGUING ABOUT WAR (2004); RETHINKING THE JUST WAR TRADITION (Michael W. Brough et al. eds. 2007); Garry Wills, *What is a Just War?* 51 N.Y. REV. OF BOOKS (Nov. 18, 2004).

45. See generally DAVID HOLLENBACH, S.J., NUCLEAR ETHICS, A CHRISTIAN MORAL ARGUMENT (1983).

46. *Id.*

47. See *Guide to the Games of 2017*, PC GAMER, <http://www.pcgamer.com/the-best-games-of-2016-so-far/> (asserting the most popular video games of all time include Mortal Kombat, Grand Theft Auto, Call of Duty, God of War III, Gears of War, and Medal of Honor and the favorite new games of 2016 include a space combat game, Fractured Space, and World of Warcraft).

48. This is a TV series where each season takes place in one 24-hour period. The main character, Jack Bauer, is the Director of Field Ops for the Counter-Terrorist Unit of Los Angeles. Each episode he races to save the U.S. by overthrowing terrorists’ plots. “24”, IMDB, <http://www.imdb.com/title/tt0285331/>.

49. *To Kill A Mockingbird* is a novel about the Finch family. The father, Atticus Finch, is appointed to defend a black man who has been accused of raping a white woman. The black man is innocent but the jury ultimately convicts him. Throughout the trial, despite attacks on his family, Atticus endeavors to uphold the law, to represent his client to the best of his ability, and to teach his young daughter compassion. See generally HARPER LEE, TO KILL A MOCKINGBIRD (1960).

Revolutionary War was a good war; defeating Hitler was good, so the Second World War was good; enforcing the norm against aggression is good, so the Gulf War was good. Kosovo, Iraq, Libya, and Syria are particularly interesting examples of later action for failures to intervene earlier: Kosovo is meant to be redemption for the Srebrenica massacre in Bosnia;⁵⁰ Iraq was punishment for the attempt on the life of President George H.W. Bush;⁵¹ Libya was to remedy the failure to intervene in Rwanda;⁵² and attacking Syria is for Rwanda, Srebrenica, and withdrawing troops from Iraq.⁵³

This confidence in the use of military force is rising today throughout the international legal community. No advance has been made toward expanding the prohibition on resort to war since the adoption of the United Nations Charter in 1945. On the contrary, legal scholars and government lawyers have mostly worked to limit the prohibition on force. They have sought new and novel interpretations of the Charter, customary international law, and general principles to permit greater resort to military force under the color of law. American academics have been in the forefront of a movement to allow major military force beyond the current rules in the form of “pre-emptive self-defense”,⁵⁴ “humanitarian intervention”,⁵⁵ and force against states deemed “unable and unwilling” to confront terrorism.⁵⁶ At the same time that these legal arguments to relax the restrictions on government resort to force have grown, so has global violence. U.S. military force abroad is part of a worldwide trend in which violence has grown steadily in the last decade according to the Global Peace Index.⁵⁷

All of this violence and military engagement has required the United States to possess mountains of surplus military gear and provide hundreds of thousands of people with military training as well as combat experience. In the recent cases of police killings of black citizens and black killings of police, military veterans

50. Duncan Robinson, *Dutch Still Grapple with the Shame of Srebrenica*, FINANCIAL TIMES (July 10, 2015), <https://www.ft.com/content/93a5c67a-26d2-11e5-9c4e-a775d2b173ca>.

51. Norman Kempster & David Lauter, *U.S. Attacks Iraq to Retaliate for Alleged Plot to Kill Bush: Persian Gulf: Cruise Missiles Pound Baghdad Intelligence Headquarters in “Wake-Up Call” to Hussein. He is Blamed for Attempt on Ex-President’s Life during Kuwait Trip*, L. A. TIMES (June 27, 1993), http://articles.latimes.com/1993-06-27/news/mn-7658_1_persian-gulf.

52. Clotilde Asangna, *Quick to Rescue: Humanitarian Intervention in Libya*, E-INT’L REL. STUDENTS (Nov. 9, 2015), <http://www.e-ir.info/2015/11/09/quick-to-the-rescue-humanitarian-intervention-in-libya/>.

53. See Remarks of State Department Legal Adviser, Harold Koh. (2011, March). *Revolution and Intervention in the Middle East*. Remarks given at the Am. Soc’y Int’l L. Annual Meeting, March 26, 2011, Washington, D.C.

54. See, e.g., John Yoo, *supra* note 21, at 751–53.

55. See, e.g., Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF. (2004). (Slaughter was part of foreign policy planning in the Obama administration and a vocal advocate of intervention in Iraq in 2003, Libya in 2011, and Syria at time of writing.)

56. See, e.g., Brian Egan, Legal Advisor, State Dep’t, International Law, Diplomacy, and the Counter-ISIL Campaign, Address at the Am. Soc’y of Int’l Law (Apr. 1, 2016).

57. INSTITUTE FOR ECONOMICS & PEACE, GLOBAL PEACE INDEX 2015: MEASURING PEACE, ITS CAUSES AND ITS ECONOMIC VALUE (2015), http://economicsandpeace.org/wp-content/uploads/2015/06/Global-Peace-Index-Report-2015_0.pdf.

have been prominent among the police accused of excessive use of force.⁵⁸ Veterans are also prominent among the killers of police.⁵⁹ Mass incarceration and police use of lethal force are the analogue of wartime detention and combat. In both cases, the targets are largely impoverished people of color. In 2014, the American Civil Liberties Union confirmed the link between excessive use of force by police in the U.S. and the country's continual involvement in armed conflict abroad.⁶⁰

II. THE HUMAN RIGHT TO LIFE

In South Africa, police killings played a large role in mobilizing people to demand an end to the apartheid regime.⁶¹ The current movement for racial justice in the United States is also being fueled by police killings. The killing of an African-American teenager, Michael Brown, by police in the St. Louis suburb of Ferguson, Missouri in August 2014 has had a major impact.⁶² Two years later, Dallas police used a robot to deploy a bomb to kill an African-American suspect cornered in a parking garage.⁶³ United Nations Special Rapporteur on Extrajudicial Killing, Christof Heyns, a South African, deplored the killing: “Militarised policing - detonating a bomb remotely to kill a sniper rather than alternatives - treats the public as enemies, as in war.”⁶⁴

Militarism stands in stark contrast with the most important principle of international law: the right to life. The International Covenant on Civil and Political Rights, to which the United States is a party, restates the rule in a universally accepted form: “Article 6 -Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his

58. See, e.g., Dave Philipps, *Veterans Worry Baton Rouge and Dallas Shootings Will Spread Stereotypes*, N.Y. TIMES, July 18, 2016, http://www.nytimes.com/2016/07/19/us/military-veterans-shootings-stereotypes.html?_r=0.

59. See, e.g., *id.*

60. WAR COMES HOME, THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING, AMERICAN CIVIL LIBERTIES UNION (June 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

61. See, e.g., Jason Burke, *Soweto Uprising 40 Years On: The Image that Shocked the World*, GUARDIAN, (June 16, 2016), <https://www.theguardian.com/world/2016/jun/16/soweto-uprising-40-years-on-hector-pieterse-image-shocked-the-world>. The image of the title was of an older boy carrying the limp body of 12-year old Hector Pieterse, shot dead by police along with 150–700 others amidst protests by school children over apartheid education practices.

62. See *Ferguson, 1 Year Later: Why Protesters were right to Fight for Mike Brown Jr*, BLACK LIVES MATTER, (Aug. 20, 2016), <http://blacklivesmatter.com/ferguson-1-year-later-why-protesters-were-right-to-fight-for-mike-brown-jr/> (discussing the impact of the police shooting in Ferguson on African American's relationship with police).

63. Faith Karimi, Catherine E. Shoichet & Ralph Ellis, *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016, 1:37 AM), <http://www.cnn.com/2016/07/08/us/ph-ilando-castile-alton-sterling-protests/>.

64. Unlawful Executions (@executions_UNSR), TWITTER, (July 9, 2016, 2:50PM), https://twitter.com/executions_unsr/status/751896445637328896.

right to life.”⁶⁵

The U.S. Constitution lacks an express provision protecting the right to life, but American courts have creatively interpreted the Constitution’s Fourth Amendment protection on “unreasonable searches and seizures” to find restrictions on the use of lethal force by government officials.⁶⁶ These restrictions are widely considered to conform to the international legal standard binding on the U.S.⁶⁷

The right to life is formulated as a protection from arbitrary deprivation. Jurisprudence from a variety of courts establishes two tests of arbitrariness, one for peacetime and one in cases of lawful resort to military force.⁶⁸ Similarly, the United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (U.N. Basic Principles), which are widely adopted by police throughout the world, including in the United States, provide in Article 9:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁶⁹

The second test of arbitrariness applies during lawful resort to military force. It is this second test that the U.S. invokes as the one applicable to its targeted killing operations. In the lawful resort to military force, the meaning of “arbitrary” deprivation of life changes. Members of a state’s armed forces will not be prosecuted for the deaths that they cause so long as they comply with International Humanitarian Law (IHL). IHL permits the intentional targeting of enemy forces during a lawful resort to military force to accomplish the military objective of defeating the enemy.⁷⁰ IHL also tolerates the unintentional killing of persons taking no part in fighting, so long as the numbers are not disproportionate to the military objective.⁷¹

The principal limit on death during armed conflict comes in the form of the rules restricting the resort to military force. The United Nations Charter generally

65. G.A. Res. 2200A (XXI), at art. 6 International Covenant on Civil and Political Rights (Dec. 16, 1966), <http://www2.ohchr.org/english/law/ccpr.htm>.

66. *Tennessee v. Garner*, 471 U.S. 1 (1985).

67. *McCann & Others v. United Kingdom*, no. 324, 21 Eur. Ct. H.R. 97 (ser. A), App no 18984/91 (1995).

68. The division is reflected in many judicial opinions and authoritative texts. *See, e.g.*, Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6, at 3, 54, 85–86 (May 28, 2010).

69. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, at art. 9 (1990). <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.

70. Scott D. MacDonald, *The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law*, 2 J. TERRORISM RES. 126 (2011).

71. *Id.*

prohibits the use of military force between states in Article 2(4).⁷² Only two express exceptions to Article 2(4) exist in the Charter: self-defense and authorization by the UN Security Council.⁷³

Self-defense is the more commonly invoked justification because it may be claimed unilaterally without Security Council scrutiny. Any discussion of the law of self-defense must begin with international law's general prohibition on the use of force.⁷⁴ The right of self-defense exists as an exception to the general prohibition. The prohibition and the exception for self-defense in international law are analogous to the general prohibition on killing and the exception for self-defense found in most national criminal law. In international law, the prohibition on the use of force has its primary source in the United Nations Charter, a binding, multilateral treaty drafted chiefly by the U.S. during World War II and adopted at the end of the war in 1945 in San Francisco.⁷⁵ UN Charter Article 2(4) provides: "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."⁷⁶

States have violated this provision time and again since 1945, leading over the years to a notion promoted by a few international law scholars that Article 2(4) is no longer binding.⁷⁷ The claim that Article 2(4) could devolve from a binding treaty provision to a non-binding one is based on the legal theory of desuetude. Desuetude holds that a treaty or statute may become invalid through long neglect.⁷⁸ Some UN Charter articles have been long neglected and are examples of desuetude.⁷⁹ Article 2(4) is not, however, one of those provisions. While it has been violated, states have certainly not neglected it. The very fact that the right of self-

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

73. Note that Article 2(4) does not impact internal armed conflict or civil war. These have constituted the larger number of actual armed conflicts since 1945. U.N. Charter art. 2(4); *see also* U.N. Charter art. 42 (stating the Security Council authorizes the use necessary force to maintain international peace and security); *see also* U.N. Charter art. 51 (stating that a Member State can use force in self-defense when there is an armed attack against that State).

74. For more on the general prohibition on the use of force, see, OLIVIER CORTEN, *THE LAW AGAINST WAR, THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* (2010).

75. The now classic magisterial account of the drafting of the UN Charter is STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS: A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD* (2003).

76. U.N. Charter, *supra* note 72. For three leading texts on the international law governing resort to force, see YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* (5th ed. 2011); CORTEN, *supra* note 9; CHRISTINE GRAY, *supra* note 9.

77. *See e.g.*, Michael J. Glennon, *How War Left the Law Behind*, *NY TIMES*, Nov. 21, 2002, at A33; *see e.g.*, Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, *WEEKLY STANDARD*, Jan. 28, 2002, at 24.

78. *See, e.g.*, Erik Encarnacion, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 *COLUM. J.L. & SOC. PROBS.* 149 (2005).

79. *See, e.g.*, U.N. Charter art. 45 on military staff.

defense is often invoked as an exception to the prohibition in Article 2(4) provides affirmative evidence of the interest in having a legal basis for the use of force so as not to be judged as having violated Article 2(4).

Article 51 provides for only a narrow exception to the general prohibition in Article 2(4):

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence 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.⁸⁰

In addition to the limits found expressly in Article 51, the International Court of Justice (ICJ), the chief judicial organ of the U.N. and the only global court with jurisdiction over matters of general international law, has held that those terms are to be narrowly construed, as is appropriate for an exception.⁸¹ Moreover, additional limitations on resort to force in self-defense are found outside of the Charter in general principles of international law. The ICJ has found that the Article 51 right of self-defense may only be exercised against a significant attack, and only when the response in self-defense is necessary and proportionate.⁸² Defensive counter-attacks may only aim at the territory of a state responsible for the initial significant attack, or the responsible state's ships, planes, or space vehicles.⁸³ Targeting ships, planes, and other vehicles is prohibited if they are either outside the jurisdiction of states not involved in the fighting or playing no role in the fighting.⁸⁴ In responding in lawful self-defense, the area or assets that may be attacked may also be limited by the general principles of necessity and state responsibility.⁸⁵

The laws of war governing the conduct of armed conflict further restrict defending states. The defending state may only target combatants and military objects of the responsible state to the extent required by military necessity.⁸⁶ Even

80. U.N. Charter art. 51.

81. *Id.*

82. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. USA), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 187–201 (June 27).

83. *Id.*

84. *Id.*

85. See generally JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES (2004); Platforms (Iran v. U.S.), 2003 I.C.J. 161, para. 74, (Nov. 6) (citing Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, para. 194, (June 27)); Christopher Greenwood, *The Relationship Between ius ad bellum and ius in bello*, 9 REV. INT'L STUD. 221, 223 (1983).

86. The commonly cited authority for military necessity in targeting is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, art. 51, 1125 U.N.T.S. 3 (1979).

then, as mentioned above, the defending state may only risk the lives of civilians and the destruction of civilian objects so long as they are not intentionally targeted, and the lives lost and property destroyed is not disproportionate to the value of the military objective. Attacking states must also undertake precautions to spare civilian lives. It is owing to these expanded legal rights to kill that states may use bombs and missiles of the kind deployed by U.S. drones. These rules even apply to the conduct of a state that has resorted to force unlawfully. Bombs and missiles are not permissible under the peacetime rules on lethal force where killing bystanders is not tolerated.

Some states argue that it is lawful to use force on the territory of another state with permission from that state's government.⁸⁷ However, this is not a well-established rule. To the extent it exists, it is heavily circumscribed. States giving consent must be in effective control of the territory and must have their own right to resort to military force.⁸⁸ Generally the right to resort to military force by a government against its people is restricted to situations of armed rebellion by organized fighters.⁸⁹ In any other situation, the government would be using excessive force. In Syria, for example, Bashar al Assad, the country's dictatorial leader, used excessive force in dealing with a largely peaceful democracy movement.⁹⁰ When leaders of that movement turned to violence, Assad had the right to fight back, using force proportional to the level used by the opposition so long as his forces observed basic principles of IHL applicable in civil war. Assad might also have had the right to request assistance from other governments. The anti-Assad forces do not have such a right.

These rules on the use of force are among the most important in international law. They are among the *jus cogens* prohibitions. The Restatement Third of American Foreign Relations Law, of which Louis Henkin was Chief Rapporteur, defines *jus cogens*:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. . .⁹¹

Judge Abner Mikva, in *Committee of U.S. Citizens Living in Nicaragua v.*

87. See e.g., Max Byrne, *Consent and the Use of Force: An Examination of "Intervention by Invitation" As a Basis for US Drone Strikes in Pakistan, Somalia, and Yemen*, 3 J. USE OF FORCE & INT'L L. 97 (2016).

88. *Id.* at 108.

89. *Id.* at 114.

90. See *Protests and Condemnation at Syria Protest Deaths*, Mar. 21, 2011, PRI, <https://www.pri.org/stories/2011-03-21/protests-and-condemnation-syria-protest-deaths-video>.

91. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U. S., §102, cmt. k (1987).

Reagan,⁹² listed the widely recognized *jus cogens* norms as including “the principles of the United Nations Charter prohibiting the use of force.”⁹³ The International Court of Justice recently indicated that the rules of civilian protection during armed conflict are also *jus cogens*. Christof Heyns has written persuasively that the right to life in general should be counted among the highest legal norms as well.⁹⁴

James Green has rightly pointed out that *jus cogens* norms must be strictly construed.⁹⁵ They are not open to interpretations that render them meaningless or favor expansive exceptions. The general prohibition on force has only two narrow exceptions found elsewhere in the Charter. The Security Council may authorize force if necessary in response to a “threat to the peace, breach of the peace, or act of aggression.”⁹⁶ Article 51 permits individual and collective self-defense until the Security Council acts “if an armed attack occurs.”⁹⁷ Regardless of the lawful basis for resort to force, all resort to force must comply with the principles of necessity and proportionality. Necessity has two aspects: Force must be a last resort and have a high likelihood of accomplishing the legitimate military objective.⁹⁸ Meeting the standard of necessity requires an actual armed attack or armed attack equivalent.⁹⁹

As *jus cogens* this law does not change with changing state practice. State practice that is inconsistent with the prohibition on force or right to life violate these principles—it does not add up to a new, more permissive and flexible right to kill. Indeed, many of the arguments being promoted to relax the legal barriers to using lethal force are “openly instrumental” and simply “far-fetched.”¹⁰⁰

III. RESTRICTING MILITARY FORCE TO LEGALLY DEFINED ARMED CONFLICT ZONES

In 2002, CIA agents launched a Hellfire missile from a drone to destroy a

92. 859 F.2d 929 (D.C. Cir. 1988).

93. *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 102 cmt. K, 702 cmt. N (1987)).

94. Christof Heyns & Thomas Probert, *Securing the Right to Life: A Cornerstone of the Human Rights System*, EJIL TALK!, May 11, 2016, <http://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/>.

95. James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215 (2011).

96. U.N. Charter art. 39.

97. U.N. Charter art. 43(a).

98. See Mary Ellen O’Connell, *The Limited Necessity of Resort to Force*, in IMAGINING LAW: ESSAYS IN CONVERSATION WITH JUDITH GARDAM 37, 44-51 (Dale Stephens and Paul Babie, eds. 2016).

99. See *id.* at 14–33 (describing the principle of necessity and various cases in which states may have had lawful cause for resorting to military force when in armed conflict or not in official armed conflict).

100. Jochen von Bernstorff, *Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions*, 5 ESIL REFLECTION 1, 3 (2016), <http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflection%20BERNSTORFF.pdf>.

vehicle in remote Yemen, killing six men, including a 23-year old U.S. citizen from upstate New York.¹⁰¹ The attack was not part of any armed conflict hostilities in Yemen. Yemen was experiencing one of its few periods of relative peace since independence. Following the strike, then National Security Adviser Condoleezza Rice stated, “We’re in a new kind of war, and we’ve made very clear that it is important that this new kind of war be fought on different battlefields.”¹⁰² The Deputy General Counsel of the Department of Defense for International Affairs, Charles Allen, made even clearer how the administration viewed the Yemen killings. He said the U.S. could target “al-Qaeda and other international terrorists around the world, and those who support such terrorists.”¹⁰³ He said suspects could be targeted and killed on the streets of Hamburg. In a Federal court challenge by detainees held at Guantanamo Bay, the breadth of the Bush administration claims to rights to kill with military force became clear. According to the *New York Times*:

The judge, Joyce Hens Green of the Federal District Court in Washington, asked a series of hypothetical questions about who might be detained as an enemy combatant under the government’s definition. What about “a little old lady in Switzerland who writes checks to what she thinks is a charitable organization that helps orphans in Afghanistan but really is a front to finance Al Qaeda activities?” she asked. And what about a resident of Dublin “who teaches English to the son of a person the C.I.A. knows to be a member of Al Qaeda?” And “what about a Wall Street Journal reporter, working in Afghanistan, who knows the exact location of Osama bin Laden but does not reveal it to the United States government in order to protect her source?” [Department of Justice attorney] Boyle said the military had the power to detain all three people as enemy combatants.¹⁰⁴

Persons who are enemy combatants may be detained or killed without warning.

Despite scorning these far-fetched positions of the Bush administration, Barack Obama continued, and indeed substantially increased, drone strikes as well as other forms of targeted killing.¹⁰⁵ In March 2010, administration lawyers began

101. Doyle McManus, *A U.S. License to Kill*, L.A. TIMES (Jan. 11, 2003), <http://articles.latimes.com/2003/jan/11/world/fg-predator11>; Jack Kelley, *U.S. Kills al-Qaeda Suspects in Yemen*, USA TODAY (Nov. 5, 2002), http://usatoday30.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm; John J. Lumpkin, *Administration Says That Bush Has, in Effect: a License to Kill: Anyone Designated by the President as an Enemy Combatant, Including U.S. Citizens, Can Be Killed Outright, Officials Argue*, ST. LOUIS POST-DISP., Dec. 4, 2002.

102. FOX NEWS Sunday with Tony Snow, Nov. 10, 2002, transcript available at LEXIS, News Library, FOXNWS File.

103. Anthony Dworkin, *Law and the Campaign against Terror*, GLOBAL POL’Y F. (Dec. 16, 2002), <http://www.crimesofwar.org/print/onnews/pentagon-print.html>.

104. Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES (Nov. 27, 2005), <http://www.nytimes.com/2005/11/27/us/nationalspecial3/in-terror-cases-administration-sets-own-rules.html>.

105. See Scott Shane, *Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die*, N.Y. TIMES (Apr. 23, 2015), <https://www.nytimes.com/2015/04/24/world/>

to present before audiences of mostly lawyers a variation on the Bush administration's legal justification for killing beyond armed conflict zones.¹⁰⁶ In place of Bush's global war based on self-defense to the 9/11 attacks, the Obama administration attempted to argue that the U.S. had the right to attack individuals and small groups regardless of any link to the 9/11 attacks.¹⁰⁷ This line of reasoning reached its highest level of implausibility in a so-called "White Paper" produced by the U.S. Department of Justice (DOJ). DOJ lawyers sought to justify—before the fact—the assassination of an Al Qaeda propagandist and U.S. citizen living in Yemen, Anwar Al-Awlaki.¹⁰⁸ In its analysis of "imminent," the White Paper noted that "the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. . . ."¹⁰⁹

Eighteen months later, the U.S. attacked in Yemen during the turmoil of the pro-democracy demonstrations.¹¹⁰ The target was Anwar al-Awlaki. The drone attack missed Awlaki but killed two other persons.¹¹¹ The U.S. attacked again in September 2011 and succeeded in killing Awlaki and a number of bystanders.¹¹² A week or so later, the U.S. attacked Yemen again, this time killing Awlaki's sixteen-year-old son, also a U.S. citizen, and his teenage cousin.¹¹³ Awlaki is not known to have participated in any violent attack on a single American, let alone perpetrated anything like the sort of armed attack that could trigger the right of self-defense under Article 51.¹¹⁴ He was a propagandist and in that role he lives on through his recorded sermons. Apparently, he is now more influential as a martyr

asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html?_r=0 (stating that Obama escalated drone strikes in Pakistan and expanded drone strikes to Yemen and Somalia).

106. See, e.g., *John Brennan Delivers Speech on Drone Ethics*, NPR, <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics> (last visited Apr. 20, 2017).

107. See Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS (Feb. 4, 2013), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans (explaining that the Obama administration gave new legal reasoning to back their dramatically increased use of drone strikes).

108. See *id.* (providing link to DOJ white paper).

109. *Id.*

110. Margaret Coker, Adam Entous & Julian E. Barnes, *Drone Targets Yemeni Cleric*, WALL ST. J. (May 7, 2011), <http://online.wsj.com/article/SB10001424052748703992704576307594129219756.html>.

111. *Id.*

112. For detailed accounts of the Awlaki killing, see SCOTT SHANE, *OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE* (2015); JEREMY SCAHILL, *DIRTY WARS: THE WORLD IS A BATTLEFIELD* (2013).

113. *Id.*

114. Mark Mazzetti, Eric Schmitt & Robert Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middle-east/anwar-al-awlaki-is-killed-in-yemen.html>.

than he was in life.¹¹⁵

The International Law Association's Use of Force Committee reported in 2010 on the definition of armed conflict.¹¹⁶ The state practice and *opinio juris* are overwhelming that armed conflict occurs only where there is actual fighting—exchange of attacks—by two or more organized armed groups.¹¹⁷ The logic of the right to life requires that any doubts about the existence of these elements means the situation must be treated as failing to qualify as armed conflict—the presumption of peace is an adjunct of the right to life. Rosa Brooks' argument that the world is in a state of perpetual armed conflict is erroneous as a matter of fact and at odds with the logic of the right to life and prohibition on force.¹¹⁸

Short of Brooks' "war is everywhere" paradigm, the Obama administration has tried to create a new concept where military killing is permissible in zones outside "active armed conflict hostilities" or "hot battlefields".¹¹⁹ In these "beyond" zones, the U.S. kills as if such places were actual zones of armed conflict. The U.S. Director of National Intelligence, Michael Dempsey, has provided statistics of persons killed through targeted killing operations using drones and other means in these "beyond zones".¹²⁰ The statistics distinguish between "civilians" killed and others. Human rights NGOs have reacted to these numbers seriously, often without considering the law that says all persons intentionally killed beyond armed conflict zones have died unlawfully.¹²¹ Doing so provides the illusion of legality to U.S. government conduct by failing to hold it to the actual requirements of the law.

The empirical evidence is overwhelming that adherence to actual law is the

115. Anna Maria Tremonti, *Killing Anwar al-Awlaki Made Him a Better Terrorist Recruiter*, *Says Journalist*, CBC RADIO (Mar. 4, 2016), <http://www.cbc.ca/radio/thecurrent/the-current-for-march-4-2016-1.3475716/killing-anwar-al-awlaki-made-him-a-better-terrorist-recruiter-says-journalist-1.3475770>.

116. See *Anwar al-Awlaki killed in Yemen - as it happened*, THE GUARDIAN (2011), <https://www.theguardian.com/world/blog/2011/sep/30/anwar-al-awlaki-yemen-live> (quoting former U.S. Representative Ron Paul as saying that Awlaki was never charged with any crimes).

117. See INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON THE USE OF FORCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 5 (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>. The present author chaired the committee. Judith Gardam of the University of Adelaide, Australia, was the rapporteur. For background a full list of members, documents, and commentary on the report, see WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11 (Mary Ellen O'Connell ed., 2012).

118. Rosa Brooks, *There is No Such Thing as Peacetime*, FOREIGN POLICY (Mar. 13, 2015), <http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/>; see also ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON (forthcoming 2016).

119. *Use of Force (2005 - 2010)*, INTERNATIONAL LAW ASSOCIATION, <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (last visited Feb. 27, 2017).

120. Sam Moyn made a similar point in a comment on MARK DANNER'S 'SPIRAL: TRAPPED IN THE FOREVER WAR'; Samuel Moyne, *Endless War Watch, Summer 2016*, LAWFARE (June 24, 2016) <https://www.lawfareblog.com/endless-war-watch-summer-2016>.

121. Christian Schaller, *Using Force Against Terrorists 'Outside Areas of Active Hostilities'—The Obama Approach and the Bin Laden Raid Revisited*, 20 OXFORD J. CONFLICT SECURITY L. 195 (2015).

best way international lawyers can help reverse the trend to violence.¹²² Social science data makes it clear that when populations struggle to change their political situation on their own, without outside interference, the success rate is much greater.¹²³ Evidence of the counter-productivity of intervention is plain in the conflicts raging at the time of writing from Congo to Syria, which demonstrate the failure of outside intervention.¹²⁴ The examples of India, South Africa, the Czech Republic, and Northern Ireland demonstrate success.

IV. POLICE BOMBING IN DALLAS¹²⁵

In this context of diminished respect for the right to life as imbedded in the prohibition on the use of force and the legal definition of the battlefield, Micah Xavier Johnson of Dallas went to war in Afghanistan. He served two tours of duty and acquired sniper skills, which later allowed him to kill five white police officers and injure seven while only injuring one bystander during a major, peaceful protest of police violence.¹²⁶ Johnson was a black man bent on revenge for the killing of so many people of color in the U.S. by police. After his shooting spree, police cornered him in a building and when, in the view of the black police chief, negotiations broke down, the chief authorized using a remotely piloted bomb disposal robot to blow up Johnson.

After a few media comments and articles about the novelty of using a bomb disposal robot in this way, mention of the violent death of Micah Johnson quickly

122. See, e.g., *Killing outside the Bounds of Law?*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/drones>; Letta Taylor, *The Truth about the United States Drone Program*, HUMAN RIGHTS WATCH (Mar. 24, 2014), <https://www.hrw.org/news/2014/03/24/truth-about-united-states-drone-program>.

123. See, e.g., MARIA STEPAN & ERICA CHENOWETH, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* (2011); M. STEPHAN CIVILIAN JIHAD: NONVIOLENT STRUGGLE, DEMOCRATIZATION AND GOVERNANCE IN THE MIDDLE EAST (Palgrave MacMillan ed., 2009). Stepan updated the article in remarks at the University of Notre Dame's Kroc Institute for Peace Studies, 25 September 2014. *Why Civil Resistance Still Works*, KROC INSTITUTE (2014), <http://kroc.nd.edu/news-events/events/2014/09/25/1666>; see Goran Peic & Dan Reiter, *Foreign-Imposed Regime Change, State Power and Civil War Onset, 1920-2004* 41(3) BRIT. J. POL. SCI. 453-75 (2011); Andrew J. Enterline & J. Michael Greig, *Beacons of Hope? The Impact of Imposed Democracy on Regional Peace, Democracy, and Prosperity* 67(4) J. POL. 1075-98 (2005); Andrew J. Enterline & J. Michael Greig, *Perfect Storms? Political Instability in Imposed Polities and the Futures of Iraq and Afghanistan.*, 52(6) J. CONFLICT RESOLUT. 880-915 (2008); Alexander B Downes & Jonathan Monten, *Forced to Be Free?: Why Foreign-Imposed Regime Change Rarely Leads to Democratization.*, 37(4) INT'L SECURITY 90-131; Bruce Bueno de Mesquita & George W Downs, *Intervention and Democracy* 60(3) INT'L ORG. 627-649 (2006).

124. Armin Rosen, *Getting Congo Right: Can the West Fix Past Failures?*, WORLD AFFAIRS, <http://www.worldaffairsjournal.org/article/getting-congo-right-can-west-fix-past-failures>; Mohammad Amir Anwar, *UN Security Council's failure stretches from Syria to Crimea*, THE CONVERSATION (Mar. 05, 2014), <http://theconversation.com/un-security-councils-failure-stretches-from-syria-to-crimea-21852>.

125. Mary Ellen O'Connell, *Remote Controlled Killing in Dallas*, EJIL TALK! (July 19, 2016), <http://www.ejiltalk.org/remote-controlled-killing-in-dallas/>.

126. *Id.*

ended. And, Yet, the last time a bomb was used by police in the U.S. was on May 13, 1985.¹²⁷ Philadelphia police dropped a bomb from a helicopter on a row house triggering a fire that destroyed 61 houses and killed eleven people, including five children.¹²⁸ One observer said of that Philadelphia on that day, it was “like Vietnam.”¹²⁹ U.S. police forces have not used bombs with the intention to kill since then for decades afterwards.

What has occurred in the period between Philadelphia and Dallas is the almost continuous engagement by the United States in armed conflict. Since 2010, U.S. officials have openly asserted a right to use military force in non-armed conflict situations.¹³⁰ The U.S. has been carrying out such killings since 2000.¹³¹ Being involved in continuous major combat operations means that the U.S. is running over with surplus war material. Since the police killing of Michael Brown in Ferguson, Missouri in 2014, the on-going national debate has concerned the militarization of the police.¹³² President Nixon’s “war on crime” started the trend, but the turn to military solutions for all manner of problems really kicked off at the end of the Cold War.¹³³ Police are trained to be “warriors”, not guardians. When asked whether the Dallas bombing was justified, a former Los Angeles police captain replied: “This was not a conventional police operation. This was more of a war zone type operation.”¹³⁴ In turn the militarism at home influences foreign and security policy abroad.

The United States Constitution lacks an express provision protecting the right to life. American courts have creatively interpreted the Fourth Amendment protection on “unreasonable searches and seizures” to find restrictions on police use of lethal force.¹³⁵ Thus, instead of assessing lethal force in the context of a fundamental human right, U.S. courts employ a balancing test, weighing up or ^{count-}ing ^{the indicators they find for} a determination

127. *Id.*

128. *Id.*

129. *Id.*

130. *See, e.g.*, Christian Schaller, *Using Force Against Terrorists ‘Outside Areas of Active Hostilities’ — The Obama Approach and the Bin Laden Raid Revisited*, 20 J. CONFLICT SECURITY L. 195 (2015).

131. *Id.*

132. *See* Paul Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS (Aug. 14, 2014), <https://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization> (“The growing militarization of domestic police forces has been a concern at home for years, but has risen to the forefront of national debate this week as shocking footage emerges from Ferguson.”).

133. *See* Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC (Dec. 1998) (arguing that severe prison overcrowding is due, in part, to the militarization of police beginning with President Nixon’s War on Crime).

134. Ken Dilanian, *Experts: Robot Bomb Used Against Dallas Suspect Was ‘Reasonable’*, NBC NEWS (July 8, 2016), <http://www.nbcnews.com/storyline/dallas-police-ambush/police-used-robot-bomb-kill-dallas-suspect-micah-xavier-johnson-n606181> (quoting Gregory Meyer, a former Los Angeles Police Department captain who testifies as an expert on police tactics).

135. *Tennessee v. Garner*, 471 U.S. 1, 19–20 (1985).

whether a deadly use of force by police was reasonable or not¹³⁶ This is done in the context of “built-in measure of deference” to law enforcement.¹³⁷

The open-ended deference to police is also seen in another Texas case involving James Boulware’s killing on June 12, 2015, when after long negotiations, the order was given to shoot to kill.¹³⁸ In the Dallas case, police had Johnson cornered for several hours.¹³⁹ Yet, Police Chief Brown said police “saw no other option but to use our bomb robot” to bomb the gunman.¹⁴⁰ Brown said he was concerned that “at a split second, [Johnson] would charge us and take out many more before we would kill him.”¹⁴¹

European Court of Human Rights in the case of *McCann v. United Kingdom* made clear the separation of peacetime policing from wartime use of force.¹⁴² Beyond armed conflict zones, lethal force may only be used if “absolutely necessary in the defence of persons from unlawful violence.”¹⁴³ After so much violent death in the U.S., American society might finally be ready to renew respect for the right to life in U.S. law and adherence to the important legal line between war and peace.

V. CONCLUSION

International lawyers bear some responsibility for the acceptance of violence as a means of change that has grown over the decades. Furthermore, “Oscar Schachter and Detlev Vagts taught [that] the job of international lawyers, especially those advising governments, is to be as clear, dispassionate, and a-political as possible.”¹⁴⁴ We should be straight about what the law actually says. It is not our role to please politicians who are seeking to please the public. The law we discuss is unlikely to be tested in a court; our answers need to concern how a rule applies globally, not what can be defended in an adversarial process.

Some fear that speaking about law in this way will exclude them from the halls of political power. “Access” often translates into faculty positions, not on the basis of the quality of the advice given but on the basis of to whom it was given. Henry Richardson stands as an example of someone who pursued a career with integrity, in the interest of others. His impact and influence will continue, in contrast to those who shaped their analysis to suit a momentary trend, including the current trend of advising that excessive force at home and abroad is lawful. As that

136. *Lennon v. Miller*, 66 F.3d 416, 425 (2d Cir. 1995).

137. *Mullins v. Cyranek*, 805 F.3d 760, 765–66 (6th Cir. 2015); *Graham v. Connor*, 490 U.S. 386, 388 (1989).

138. Jason Hanna and Joe Sutton, *Dallas police HQ shooting: Suspect James Boulware killed during standoff*, CNN (June 13, 2015), <http://www.cnn.com/2015/06/13/us/dallas-police-headquarters-shooting/>.

139. *Id.*

140. O’Connell, *supra* note 125.

141. *Id.*

142. *McCann & Others v. United Kingdom*, *supra* note 67.

143. *Id.*

144. O’Connell, *supra* note 125.

trend fades, Hank, his students, his colleagues, and his friends will be there with our affirmative message in support of the rule of law, human dignity, and world peace.