

ARTICLE

THE WAR POWERS AND HUMANITARIAN INTERVENTION

*Harold Hongju Koh**

ABSTRACT

Since the Kosovo intervention of the late 1990s, many international lawyers and President Obama himself have argued in support of a “Responsibility to Protect” (R2P), an international law doctrine that would permit collective humanitarian intervention to prevent or mitigate extreme human rights disasters. But even after the Arab Awakening and the ongoing crises in Libya and Syria, there has been no thoroughgoing

* Sterling Professor of International Law, Yale Law School; Legal Adviser, U.S. Department of State, 2009–2013; Assistant Secretary of State for Democracy, Human Rights and Labor, Department of State, 1998–2001. This 20th Frankel Lecture, delivered at the University of Houston Law Center on November 6, 2015, grows out of ideas first developed on the *Just Security* Blog, www.justsecurity.org, and shares thoughts with Harold Hongju Koh, *The Legal Adviser’s Duty to Explain*, 41 YALE J. INT’L L. 189 (2016). The views expressed here are my own and do not necessarily represent the views of any past or present employer. I am grateful to Bob Bauer, Daniel Bethlehem, Sarah Cleveland, Michael Doyle, Bill Eskridge, Robert Ford, Abbe Gluck, Joel Goldstein, Michael Ignatieff, Rebecca Ingber, Ryan Goodman, Gerry Neuman, David Pozen, Charlie Savage, and Phil Spector for their comments on earlier versions, and to Sophia Chua-Rubinfeld and Helen White, both Yale Law School ‘18, for excellent research assistance. I give special thanks to my two outstanding commentators. I had the privilege of working with Ashley Deeks while she was Assistant Legal Adviser for Political/Military Affairs at the State Department, before she began her exciting academic career. Dawn Johnsen has had an extraordinary career in both academia and government, led the Office of Legal Counsel with distinction during the Clinton Administration, and should have led it again during the Obama Administration. Both are extraordinary friends and rare scholars who have succeeded in both governmental and scholarly settings. Finally, I thank the editors of the *Houston Law Review*—particularly Alessandra Grace, Erin Juvenal and Trenton David—for their outstanding work, Dean Leonard Baynes, Professors Michael Olivas and Jordan Paust of the Houston Law Center, and three special Houston friends—Judge Keith Ellison, and attorneys Elizabeth Detweiler and Andrew Golub—for their warm and memorable hospitality during my visit to Houston.

discussion of the circumstances under which such an intervention would be lawful under international and U.S. domestic law. This Frankel Lecture argues that we have reached a moment for thoughtful re-examination of these critical legal issues. It reviews the recent history of the war powers and humanitarian intervention and suggests legal standards that should be applied to govern the initiation and continuation of humanitarian intervention under both international and United States law.

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I am honored to return to this podium, where I delivered the 4th Frankel Lecture seventeen years ago. Back then, when I told my small children that I was going to Houston, they asked, “Why? Do we have a problem?” On reflection, my answer for both Frankel Lectures has been “yes.”

I. THE PROBLEM

In 1998, the topic of my Frankel Lecture was “Bringing International Law Home,” with commentary by Harvard political scientist Bob Keohane and NYU Law Professor Tom Franck.¹ In returning this time, my goal has been to engage again with the *Law Review* students, faculty, and my commentators and friends Ashley Deeks and Dawn Johnsen, in

1. See Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

an effort to solve a different hard problem: the War Powers and Humanitarian Intervention.

I have now spent thirty-five years as an international law professor and scholar, twenty years as a human rights lawyer, ten years in the U.S. government, and five years as a Dean. My topic today grows out of all those experiences, lying particularly at the intersection of three strands of my academic work. In my first Frankel Lecture, I argued that “transnational legal process”—a complex blend of interactions, interpretations, and norm-internalizations—can act as a powerful engine for promoting compliance with international law. Those of you who do not smoke, who recycle plastics, snap in seat belts, or don bicycle helmets all understand intuitively that most compliance with legal rules follows not from compulsion, but obedience,² and that much obedience comes from participating in a legal process that has the effect of internalizing and habituating external norms into your closely held value set.³ In my first Frankel Lecture, I argued that for the same reason, nations obey international law: because this transnational legal process causes those international norms to become internalized, by “bringing international law home” into domestic practice. The lecture asked and answered the question of who are the “agents of internalization”: i.e., the global actors who drive this norm-internalization process?

In a second scholarly strand, I have focused on the role of the United States as a prime shaper of international legal rules, particularly through the much-discussed, too often-pejorative notion of American Exceptionalism.⁴ America’s history reveals both a Jekyll and Hyde face toward global human rights. While a troubling, recurrent U.S. impulse toward negative exceptionalism presses for double standards, with the United States on the lower rung, a more powerful U.S. impulse toward positive exceptionalism acknowledges and effectuates America’s desire to offer unique and exceptional global human rights leadership. Thus, one of our central foreign policy challenges is how best to promote and harness positive U.S. exceptionalism to produce human rights improvements, while keeping negative exceptionalism within “the margin of appreciation.”

2. Cf. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006) (arguing that people obey the law because they believe it is legitimate, not because they fear coercion or punishment).

3. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397 (1999).

4. Harold Hongju Koh, *America’s Jekyll-and-Hyde Exceptionalism*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 111 (Michael Ignatieff ed., 2005); Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003).

Third, under domestic law, my preoccupation for the past quarter-century has been with “The National Security Constitution”: the legal framework within which our foreign and national security policy transpires, based on the Constitution, quasi-constitutional custom, international law, statutes, and judicial and executive decisions.⁵ I believe that our current political system gives the President incentives to overreach, Congress incentives to acquiesce, and the courts incentives to defer. For that reason, throughout our history, the pendulum has swung back and forth between two competing constitutional visions of foreign affairs power—a notion of shared power that I favor, captured by *Youngstown Sheet & Tube Co. v. Sawyer*,⁶ and the counter notion of unilateral executive discretion, fostered by *United States v. Curtiss-Wright Export Corp.*⁷ In balancing those visions, our challenges are multiplied by the fact that we no longer live in a post-Cold War world. Instead, we inhabit a “post-post-Cold War” world, after the fall of both the Berlin Wall and the Twin Towers, characterized by transnational decision-makers and transnational threats: an increasingly “flat” age of globalization with myriad transnational actors—intergovernmental and nongovernment organizations, and individuals armed with computers or weapons of mass destruction. To make matters worse, we are living through a uniquely toxic U.S. domestic political environment, where interbranch cooperation has been almost entirely stalemated. As our external challenges and global responsibilities multiply, straining our internal capacities, how can we sustain in practice our preferred constitutional vision of shared power?

This Lecture on the War Powers and Humanitarian Intervention touches all three themes: transnational legal process, positive American exceptionalism, and the National Security Constitution. While staying true to the National Security Constitution, how can we support the progressive development of international law by promoting a norm of humanitarian intervention that our country can internalize in a way that spurs the positive face of American Exceptionalism? In this Frankel Lecture, I argue that the United States can internalize rigorous international law rules to guide lawful humanitarian intervention, in a way that promotes exceptional American leadership in human

5. See generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

7. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

rights, while adhering to the constitutional ground rules that govern the war powers.

By so saying, I illustrate just one face of a broader academic project, recently laid out in my 2014 Clarendon Law Lectures at Oxford University.⁸ In those lectures, which addressed the broad and multifaceted challenges of law and globalization, I argued for a twenty-first century Global Legal Strategy that I call “International Law as Smart Power.”⁹ Without fully explicating that strategy here, the heart of the approach is *Engage–Translate–Leverage*. I argue that the United States should *Engage* globally around its core values; *Translate*, in the sense of rejecting “legal black holes” and applying the “Spirit of the Laws” from twentieth century laws to meet emerging twenty-first century challenges; and *Leverage*, blending law with other tools—such as military force, diplomacy, development, technology, markets, and international institutions—to achieve superior foreign policy outcomes. During their times in office, President Barack Obama and Secretary of State Hillary Clinton attempted to apply this strategy across a wide range of issue areas, including the Arab Awakening, Human Rights, Cyberconflict, International Criminal Justice, Immunities, Private International Law, Consular Affairs, the Law of Natural Disasters, and most relevant to today’s discussion, Humanitarian Intervention.

In this Lecture, let me illustrate how this “smart power” approach plays out with respect to humanitarian intervention. At the dawn of the post-Cold War era, the international law rules for using force seemed pretty clear. One state could lawfully breach another’s territorial sovereignty only if one or more of three conditions were obtained: response to aggression, self-defense, or an explicit U.N. Security Council resolution. The 1991 Gulf War epitomized all three: The United States led a coalition authorized by a U.N. Security Council resolution to respond to Saddam Hussein’s aggression to come to the defense of Kuwait. But the question lingered: When may force be used to protect human rights or prevent humanitarian disasters without a Security Council resolution (the doctrine of “humanitarian intervention”)?

8. See HAROLD HONGJU KOH, ON LAW AND GLOBALIZATION (forthcoming Oxford Univ. Press 2017) (based on 2014 Oxford University Clarendon Law Lectures).

9. I expanded on these ideas in a series of lectures entitled “International Law as Smart Power.” Those lectures, given during the spring of 2013 at Oxford University as the Visiting Oliver Smithies Lecturer at Balliol College, Oxford, are folded into the book described in *supra* note 8.

In recent decades, the ancient concept of humanitarian intervention—which has been with us at least since Grotius¹⁰—has evolved into an emerging international law notion of “Responsibility to Protect” (R2P). The idea of R2P suggests that under international law, human rights-respecting countries have a legal responsibility to take action, which under certain extreme and limited circumstances can justify their intervening abroad to prevent needless civilian slaughter. This Lecture asks: How can we reconcile the tension between this humanitarian impulse and the legal constraints imposed by current rules of U.S. and international law?

II. THREE CASE STUDIES

Let me review three historical cases—Kosovo, Libya, and Syria—with each of which I was personally involved.

A. *Kosovo*

The first was Kosovo, which I lived through during the Clinton Administration as Assistant Secretary of State for Democracy, Human Rights, and Labor under Secretary of State Madeleine Albright. In 1999, Slobodan Milošević, Serbia’s President, ordered his forces to begin attacking the citizens of the breakaway republic of Kosovo. A Russian veto rendered unobtainable the first-best option, a Security Council resolution. After intense deliberation, nineteen NATO countries chose to use force without Security Council authorization for humanitarian purposes for seventy-eight days to prevent those abuses from occurring. In the end, they succeeded. Milošević was driven back, later deposed, and ended up dying during his trial before the International Criminal Tribunal for the former Yugoslavia in the Hague.¹¹

During Kosovo, I watched as nineteen NATO members accepted the legality of some form of humanitarian intervention without U.N. Security Council approval. In October 1998, the United Kingdom publicly declared the legality of the operation, so long as the proposed use of process is “necessary and proportionate to the [humanitarian] aim” and “is strictly limited in time and

10. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS* 584 (Carnegie ed., Francis W. Kelsey trans., Oxford: Clarendon Press 1925) (1625) (“I may make war upon one who is not one of my people but oppresses his own, . . . a procedure which is often connected with the protection of innocent persons.”).

11. Prosecutor v. Milošević, Case No. IT-01-50-I, Indictment (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2001), http://www.icty.org/x/cases/slobodan_milosevic/ind/en/ind_cro010927.pdf.

scope to this aim.”¹² Seventeen other NATO members individually satisfied themselves of the legality of their participation in the operation.¹³ But curiously, the U.S. government never articulated a clear *legal* justification condoning its NATO actions, instead relying upon an amorphous listing of factors that together justified the intervention as a matter of policy.¹⁴

Some threw up their hands and simply argued that the use of force was “illegal but legitimate.”¹⁵ And then-Secretary-General Kofi Annan captured the United Nations’ ambiguity about a narrowly tailored form of humanitarian intervention in situations of great extremis by issuing a statement recognizing that there might be occasions where force might be necessary to serve humanitarian purposes. By so doing, he helped catalyze the ongoing international legal movement to explore whether there is an international Responsibility to Protect.¹⁶

At the time, I was acting not as a government lawyer, but as a human rights policy official within the U.S. government. I thought it outrageous that the U.S. government would fail to state a legal rationale to justify its use of force. Is there any other circumstance where in seeking social change, we do not try to legalize the conduct in which we think we are allowed to engage? Particularly in human rights situations, don’t we invariably strive to state the rules and principles that make that conduct lawful? If, for example, we think same-sex marriage is appropriate, do we say “it’s illegal but legitimate”? So as early as 1999, it seemed to me that we needed to have a clearer understanding and explanation of the international lawfulness of modern humanitarian intervention.

Under domestic law, questions about the legality of the Kosovo operation reduced to two: a constitutional question

12. UK FOREIGN & COMMONWEALTH OFFICE, FRY/KOSOVO: THE WAY AHEAD; UK VIEW ON THE LEGAL BASE FOR USE OF FORCE (1998), *quoted in* Adam Roberts, *NATO’s ‘Humanitarian War’ over Kosovo*, SURVIVAL, Autumn 1999, at 102, 106.

13. *See, e.g.*, Legality of Use of Force (Serb. v. Belg.), Verbatim Record (May 10, 1999, 3 p.m.), <http://www.icj-cij.org/docket/files/105/4515.pdf> (arguing that NATO’s use of force was lawful). *See generally* Roberts, *supra* note 12, at 104.

14. *See* Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC’Y INT’L L. PROC. 301 (2000).

15. *See* INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 4 (2000), <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>; *see also* Matheson, *supra* note 14, at 301 (Michael J. Matheson, the Acting Legal Adviser to the State Department, described the NATO justification as “a pragmatic . . . basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the Alliance if misused by others”).

16. *See* Chelsea O’Donnell, Note, *The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention*, 24 DUKE J. COMP. & INT’L L. 557, 560–63 (2014).

about the initiation of conflict; and a statutory question about the continuation of conflict. On the constitutional, initiation issue, the question was: “For purposes of Article I of the Constitution, is this ‘war?’” On the statutory, continuation issue, the question was: “For purposes of the War Powers Resolution, are these ‘hostilities?’”

As a constitutional matter, Congress has exclusive power to declare war, but if a use of force entails something less than “war,” the President can initiate it without prior congressional approval. During the Clinton Administration, Walter Dellinger, then-Assistant Attorney General for the Office of Legal Counsel, opined that the President may initiate a lawful use of force if he cites a compelling national interest and indicates that the “nature, scope, and duration” of the action demonstrates that he is not taking the country to a “war” that requires prior congressional approval.¹⁷ As a historical matter, I would argue that Congress has largely acquiesced in this interpretation, which has led us to the position where prior congressional approval is required to initiate large scale foreign conflicts like Iraq in 2003, but not to initiate a more limited intervention of constrained nature, scope, and duration.

Once military intervention has begun, the War Powers Resolution (WPR) moves to the foreground, and the statutory question becomes: “Are we in ‘hostilities?’” Enacted in 1973 over a presidential veto,¹⁸ the WPR imposes consultation and reporting requirements and a sixty-day time limit (extendable under certain conditions) upon the President’s commitment of troops overseas without express congressional authorization.¹⁹ The statute is triggered by the introduction of “United States Armed Forces” into the airspace and territory of a foreign country, but the durational limit applies only if they are in “hostilities or . . . imminent involvement in hostilities is clearly indicated by the circumstances.”²⁰ The question in Kosovo was whether the U.S. government was required to comply with the statutory durational

17. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994) [hereinafter Dellinger Opinion]. In her response in this Symposium, Professor Johnsen reaffirms that she and I “both endorse the constitutional framework used by Presidents Clinton and Obama respecting the initiation of the use of military force, which looks to the ‘nature, scope, and duration’ of a military deployment to determine if congressional authorization is constitutionally required.” Dawn Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOUS. L. REV. 1065, 1073 (2016).

18. See Veto of War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285, 1285–86 (Oct. 24, 1973).

19. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (2012)).

20. 50 U.S.C. § 1543(a).

limit of sixty days (or in case of unavoidable military necessity, ninety days) after the bombing began.

As I recall, in Kosovo, at the sixty-day mark, there was little doubt within the U.S. government that we were in a state of “hostilities.” But the policy determination was: we’re almost there; we’re not going to stop and allow Milošević to regain traction, particularly given that the sixty-day statutory limit had been arbitrarily chosen without this particular scenario in mind some twenty-five years earlier. So the Clinton Administration continued with bombing that seemed clearly to exceed the level of “hostilities.” Shortly before the sixty-day mark, Congress passed a budget bill appropriating money for the military operation; at seventy-eight days Milošević conceded. At the end of 2000, the Justice Department’s Office of Legal Counsel issued a detailed opinion that treated the emergency supplemental appropriation for military operations as “authorization for continuing hostilities after the expiration of sixty days” under the WPR, reasoning that the statute did not bar Congress from authorizing military operations through an appropriations measure, “but instead has the effect of establishing a background principle against which to interpret later Acts of Congress.”²¹ OLC’s 2000 opinion has subsequently been cited as domestic law precedent for how, despite the express language of the War Powers Resolution, the Executive can rely on a “background principle” to justify continuing a humanitarian intervention past sixty days.

Under international law, however, the Clinton Administration never followed the British government in issuing an opinion explaining why its actions complied with international

21. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 339 (2000). The OLC Memo’s conclusion was surprising because the WPR would seem to bar reliance on the emergency supplemental, inasmuch as it expressly states:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.

Id. at 330–31 (quoting 50 U.S.C. §§ 1547(a)(1)). The OLC Memo reasoned, however, that the Congress that enacted the emergency supplemental (1) could not constitutionally be bound by the terms of the earlier statute and (2) that the legislative history of the supplemental sustained the inference that Congress implicitly meant, in appropriating the funds President Clinton had requested, to provide the legal authority for the operation he intended to pursue. *Id.* at 340–58.

law.²² As I have argued elsewhere, I consider the Clinton Administration's failure to articulate a clear international legal rationale for its Kosovo intervention to be a violation of its Duty to Explain, which would come back to haunt the Obama Administration with regard to Syria fourteen years later.²³

Professor Johnsen "agree[s] that the Executive Branch bears a responsibility to provide a public explanation for such controversial and consequential action."²⁴ Yet she disagrees that it is always better to legalize the conduct undertaken, reasoning that the principle will (in Justice Jackson's unforgettable phrase) lie about like a "loaded weapon" ready for the hand of any authority that can bring forward a plausible claim of an urgent need. In the next breath, she argues that "the lack of public explanation . . . greatly undermin[es] any precedential value of this intervention."²⁵ Yet what gives an incident precedential value is that it happened and that the state (here the United States) maintained that it was acting lawfully, thus making it a matter of state practice for international law and a matter of executive practice for domestic law. For that reason, Kosovo is frequently cited as precedent by countries—such as the United Kingdom, Denmark, and Belgium—that have publicly explained their support for the legality of humanitarian intervention.

B. Libya

This brings me to our second case: Libya in 2011. During his first year in office, President Obama won the Nobel Peace Prize. Little noticed in his December 2009 acceptance speech was this unambiguous statement: "I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war."²⁶ By so saying, the President signaled early that, under appropriate circumstances, he was prepared to act to prevent civilian slaughter in a future Kosovo or Rwanda situation.

But suddenly and unexpectedly, starting in 2010, we witnessed an extraordinary, tumultuous region-wide Arab

22. See generally Matheson, *supra* note 14. As Professor Deeks notes, one could extrapolate a legal test from the Kosovo factors that would have both authorized and limited the precedential value of that precedent. See Ashley Deeks, *Multi-Part Tests in the Jus Ad Bellum*, 53 HOUS. L. REV. 1035, 1060 (2016).

23. See generally Harold Hongju Koh, *The Legal Adviser's Duty to Explain*, 41 YALE J. INT'L L. 189 (2016).

24. Johnsen, *supra* note 17, at 1093.

25. *Id.* at 1093–94.

26. Remarks on Accepting the Nobel Peace Prize in Oslo, 2 PUB. PAPERS 1799, 1801 (Dec. 10, 2009), <https://www.gpo.gov/fdsys/pkg/PPP-2009-book2/pdf/PPP-2009-book2-Doc-pg1799.pdf>.

Awakening.²⁷ Across the Arab region, authoritarian governments were collapsing, and popular movements were springing up and communicating with the world on social media. But what happens when Arab Awakening meets Responsibility to Protect? That question hit me hard as Legal Adviser to the State Department when we were advised that Libya's dictator, Muammar Qadhafi, would attack and destroy the stronghold of his opposition, located in Benghazi.

Qadhafi had already graphically demonstrated his ongoing intent to suppress the democratic movement against him by lawlessly attacking Libyan civilians. On February 22, 2011, Qadhafi pledged on Libyan National Television to lead "millions to purge Libya inch by inch, house by house, household by household, alley by alley, and individual by individual until I purify this land."²⁸ He called his opponents "rats" and announced that they would all be executed.²⁹ Less than a month later, in another televised address, Qadhafi promised, "We will come house by house, room by room. . . . We will find you in your closets. And we will have no mercy and no pity."³⁰ We had little doubt that this was not just rhetorical bombast; defecting Qadhafi forces recounted rules of engagement ordering them to "show no mercy" to prisoners, and reports indicated that Qadhafi's forces were using rape as a tool of war.³¹ For all of these reasons, President Obama decided that the United States would engage in military actions with other NATO countries aimed at preventing an imminent humanitarian disaster.

Starting in late March 2011, the United States joined with the Arab League and NATO allies to secure two Security Council resolutions to enforce a no-fly zone and arms embargo, along with asset freezes, diplomatic engagement, a travel ban, and referral for accountability to the International Criminal Court, all with the goal of protecting civilians.³² In late March 2011, President Obama

27. See *Tethered by History*, ECONOMIST (July 5, 2014), <http://www.economist.com/news/briefing/21606286-failures-arab-spring-were-long-time-making-tethered-history>.

28. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7, 11 n.5 (2011) [hereinafter *Koh Libya Testimony*] (Statement of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State).

29. *Id.* at 12 n.5.

30. *Id.*

31. Press Statement, Hillary Rodham Clinton, U.S. Secretary of State, Sexual Violence in Libya, the Middle East and North Africa (June 16, 2011), <http://www.state.gov/secretary/20092013clinton/rm/2011/06/166369.htm>; *This Week Transcript: Hillary Clinton, Robert Gates and Donald Rumsfeld*, ABC NEWS (Mar. 27, 2011), <http://abcnews.go.com/ThisWeek/week-transcript-hillary-clinton-robert-gates-donald-rumsfeld/story?id=13232096>.

32. S.C. Res. 1973 (Mar. 17, 2011); S.C. Res. 1970 (Feb. 26, 2011).

declared, “[W]hen someone like Qadhafi threatens a bloodbath that could destabilize an entire region, and when the international community is prepared to come together to save many thousands of lives, then it’s in our national interest to act. And it’s our responsibility.”³³

By so saying, the United States asserted not just that preventing the slaughter of Libyan civilians was a compelling national interest, but also—in a claim then embedded into two Security Council resolutions—that Qadhafi had forfeited his responsibility to protect Libyan citizens, implicitly inviting the United Nations to act. Applying the Dellinger test, the Office of Legal Counsel stated first orally, then in a written opinion by then-Acting Assistant Attorney General for the Office of Legal Counsel Caroline Krass, that because the use of force contemplated was limited in nature, scope, and duration, it did not constitute a “war” in a constitutional sense, that requires prior congressional approval.³⁴

In the first few weeks after military action began, the United States established a no-fly zone, and neither the House nor the Senate took contrary action. The United States took the lead among the NATO nations in establishing a no-fly zone over Libya, which required extensive bombing at the front end, a task that called upon the United States’ unique military capabilities. But what President Obama made clear from the outset was that once the no-fly zone was established, the United States would shift to a backup role, supporting no-fly zone patrols by other NATO countries primarily through refueling and aerial reconnaissance activities.³⁵

Too often overlooked now, amid the confusion that currently reigns in Libya, is that the joint NATO action succeeded in its goal

33. The President’s Weekly Address, 1 PUB. PAPERS 293, 293 (Mar. 26, 2011), <https://www.gpo.gov/fdsys/pkg/PPP-2011-book1/pdf/PPP-2011-book1-Doc-pg293.pdf>.

34. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011) [hereinafter *Libya OLC Opinion*]. Professor Johnsen mentions “four contested aspects of [OLC’s] Libya opinion that may be particularly relevant to future humanitarian interventions.” First, that the intervention was nonconsensual by Qadhafi (although it was plainly welcomed by the Libyan opposition, who the United States and others had recognized as the legitimate representative of the Libyan people); second, that the Opinion did not rely solely upon a humanitarian interest (although as I have noted above, the Security Council resolution which the United States was enforcing expressly stated that Qadhafi had forfeited *his* responsibility to protect his own citizens); third, that Congress had not acquiesced in Kosovo (even though the 2000 OLC opinion rests on the notion that Congress implicitly *authorized* the action by its appropriation measure before the sixtieth day); and fourth, that the Libya opinion “focuse[d] on the risk only to American troops,” when in fact the entire purpose of the operation was to save the lives of thousands of Libyan civilians from illegal attacks by Qadhafi’s soldiers. Johnsen, *supra* note 17, at 1094–96.

35. Address to the Nation on the Situation in Libya, 1 PUB. PAPERS 306 (Mar. 28, 2011), <https://www.gpo.gov/fdsys/pkg/PPP-2011-book1/pdf/PPP-2011-book1-Doc-pg306.pdf>.

of protecting Libyan civilians. The slaughter of Benghazi was averted; untold thousands of Libyan civilian lives were saved; and although Qadhafi's overthrow was not the stated goal of the joint NATO operation, he vacated office and went into hiding, eventually to be captured and killed.³⁶ All of this was brought home to me not long after Qadhafi fell, when I traveled with Secretary Clinton to a free Libya and visited what had been called "Qadhafi University," now renamed "University of Tripoli." Everywhere in the aftermath you could see drawings and pictures expressing the students' delight about Qadhafi's fall. As we walked through the jubilant campus, I was shocked to see gallows and to learn that during the Qadhafi era, protesting students had been publicly hung on the campus for having protested against the government.

As we approached Day Sixty after the bombing began, an intense debate ensued inside the Beltway. Some suggested that at the Sixty Day mark, we would only have three options. Option One, we could just stop: if so, the widespread prediction was that Qadhafi and his forces would recover, creating a real chance that the slaughter would resume, an option that most in the Administration deemed unacceptable. A second possibility was to ask Congress to pass authorizing legislation, which of course was everybody's first preference. But quiet inquiry revealed that too many members of Congress who had felt politically burned by their votes on the 2003 Iraq War were reluctant to have to vote on war again. Accordingly, the leadership in Congress made clear that they would not pass legislation, expressing in every conceivable way that they wanted no votes.³⁷ Thus Option Two—

36. Mary Beth Sheridan, *Moammar Gaddafi Killed in Rebel Custody as Last Loyalist Holdout in Libya Falls*, WASH. POST (Oct. 20, 2011), https://www.washingtonpost.com/world/middle_east/gaddafis-home-town-overrun-conflicting-reports-on-his-fate/2011/10/20/gIQAMwTBOL_story.html.

37. Charlie Savage of the *New York Times* later reported that around Day Fifty-Seven,

[T]he message came back that there was no political appetite to enact an authorization. . . . McCain and Kerry, seeing that there was no chance of getting a resolution through the House anyway, had shelved their plans to push one in the Senate. . . . [T]here was a widespread understanding within the Obama administration that congressional leaders of both parties in each chamber had separately and privately told the president that they did not think authorization was legally necessary.

CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 641, 643 (2015) [hereinafter SAVAGE, *POWER WARS*]. As I later noted in my Senate testimony,

[F]ew Members of Congress asserted that our participation in the NATO mission would trigger or had triggered the War Powers Resolution's pullout provision. House Speaker [John] Boehner stated on June 1, 2011, that "[l]egally, [the Administration has] met the requirements of the War Powers Act." House

seeking legislation—effectively reduced to Option One: doing nothing, and letting the slaughter of civilians resume. Yet a third option was presented by Senator John McCain and his congressional allies, who argued that the President should simply declare the War Powers Resolution unconstitutional and force a showdown with Congress over that long-contested legal issue.³⁸ But while we were centrally focused on averting civilian slaughter in Benghazi, creating a second, constitutional battleground by forcing an interbranch confrontation over the separation of powers was the last thing anyone wanted to do. We had to ask whether these were really the only available options: stop and permit slaughter or force a constitutional confrontation?³⁹

Minority Leader [Nancy] Pelosi stated on June 16, 2011, that “[t]he limited nature of this engagement allows the President to go forward,” as “the President has the authority he needs.” Senate Majority Leader [Harry] Reid stated on June 17, 2011, that “[t]he War Powers Act has no application to what’s going on in Libya.” Senate Foreign Relations Committee Chairman [John] Kerry stated on June 21, 2011, that “I do not think our limited involvement rises to the level of hostilities defined by the War Powers Resolution,” and on June 23, 2011, that “[w]e have not introduced our armed forces into hostilities. No American is being shot at. No American troop is at risk of being shot down today. That is not what we’re doing. We are refueling. We are supporting NATO.”

Koh Libya Testimony, *supra* note 28, at 13 n.8. Savage reports that the current Senate Majority Leader, Republican Mitch McConnell, also made public comments suggesting that he did not think the Administration was violating the War Powers Resolution. SAVAGE, POWER WARS, *supra*, at 643.

38. Tom Cohen, *Key Senate Republicans Disagree with House GOP on War Powers Debate*, CNN (June 19, 2011, 2:30 PM), <http://www.cnn.com/2011/POLITICS/06/19/war.powers/>. There is a continuing, intense debate over whether and to what extent past presidents have considered the War Powers Resolution’s sixty-day clock to be unconstitutional. In 1980, the Carter Justice Department stated that “[w]e believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution.” See Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185 (1980), https://www.justice.gov/sites/default/files/olc/opinions/1980/02/31/op-olc-v004a-p0185_0.pdf. Republican administrations have tended to take the opposite view, but the precise extent to which they have done so has been debated. See generally Charlie Savage, *Republicans and the Myth that Every President Since Nixon Has Declared the War Powers Resolution’s 60-Day Clock to Be Unconstitutional* (Dec. 15, 2015), <http://www.charliesavage.com/?p=686>; Charlie Savage, *More on My Discussion with Stephen Griffin on Republicans and the Myth that Every President Since Nixon Has Declared the War Powers Resolution’s 60-Day Clock to Be Unconstitutional* (Dec. 21, 2015), http://www.charliesavage.com/?page_id=37.

39. As noted below, Charlie Savage argued that yet another option was to reduce “military activity . . . to a purely supporting role, like refueling allied warplanes and providing surveillance.” Significantly, the U.S. military disfavored that option (although put forward by the Defense Department’s own lawyer) because it would create an unacceptable operational risk: that “[w]ithout the availability of the United States’ unique weapons systems, the risk would go up that pro-Gadhafi forces would shoot down a NATO aircraft” and that NATO would be barred from using its Predator drones to strike at Qadhafi forces seeking to exploit chemical weapons depots. SAVAGE, POWER WARS, *supra* note 37, at 643–44.

This was neither a theoretical nor an academic question. I was Legal Adviser for the State Department, and thousands of lives would be affected by our legal answer. I recalled that when the 1962 Cuban Missile Crisis first broke,⁴⁰ and U.S. overflights observed Soviet missiles inside Cuba, three unpalatable policy options were initially presented for presidential decision: (1) do nothing, (2) undertake a ground invasion (which was both illegal and politically controversial after the disastrous Bay of Pigs fiasco), or (3) launch a unilateral military strike. Through intensive consultation with senior policymakers through the so-called “ExComm process,” then-State Department Legal Adviser and Harvard Law Professor Abram Chayes, his Deputy Leonard Meeker, and Assistant Attorney General for the Office of Legal Counsel Norbert Schlei helped formulate a fourth option: a defensive “quarantine” approved by the Organization of American States (OAS).⁴¹ Significantly, at the time, the defensive quarantine option was roundly excoriated by legal scholars as a shadow “blockade,” which would have required Security Council approval under Article 53 of the U.N. Charter.⁴² But Option Four—defensive quarantine—facilitated a much better policy outcome in the end. That option walked the fine line between doing nothing and avoiding nuclear conflict, while spurring a supportive vote by the OAS and back-channel negotiations that led to the ultimate removal of the Soviet missiles in exchange for removal of American Jupiter missiles in Turkey. After intense retrospective examination over a half-century, Option Four has come to be seen not only as a reasonable domestic and international legal

40. See generally ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974).

41. See *id.* at 14–16 (discussing the legal debate around the “defensive quarantine” concept).

42. See, e.g., Stephen R. Shalom, *International Lawyers & Other Apologists: The Case of the Cuban Missile Crisis*, 12 *POLITY* 83, 87 (1979) (“The quarantine was a blockade in everything but name. The evidence that this was so is overwhelming. White House adviser Arthur Schlesinger, Jr. has written: ‘since a blockade was technically an act of war, it was thought better to refer to it as a quarantine.’”). As a de facto blockade, the quarantine appeared on its face to be an Article 42 measure, and thus an instance of “enforcement action” envisioned by Article 53(1). See U.N. Charter art. 42 (Security Council may “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security[, which] may include demonstrations, *blockade*, and other operations by air, sea, or land forces of Members of the United Nations.” (emphasis added)); John Halderman, *Regional Enforcement Measures and the United Nations*, 52 *GEO. L.J.* 89, 92 (1963) (“The Charter definition of ‘enforcement action’ is believed to be found in articles 1(1), 39, 41 and 42.”); John Quincy Wright, *The Cuban Quarantine*, 57 *AM. J. INT’L L.* 546, 558–59 (1963) (arguing that the Cuban quarantine constituted an unauthorized “enforcement action,” violating the U.N. Charter requirement that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council” (quoting U.N. Charter art. 53)).

interpretation, but also as a legal opinion that facilitated the best available policy outcome.⁴³

Thinking back on the Cuban Missile Crisis, I wondered: Was there a better fourth option in Libya as well? As a legal matter, there seemed to be consensus that the force actually being used was so limited in nature, scope, and duration that it did not constitute a “war” in a constitutional sense. Weren’t we also obligated to investigate whether the force actually being used was so limited in nature, scope, and duration that it did not even constitute “hostilities” in a statutory sense? If such facts existed, couldn’t we lawfully accept the constitutionality of the War Powers Resolution but determine that we were not, in fact, in “hostilities” that would trigger the sixty-day durational limit?

To answer that question required us to explore both a legal question—what Congress intended “hostilities” to mean when it enacted the War Powers Resolution—and a factual question: how much military action was actually transpiring in Libya? With regard to the first question, we discovered that the term “hostilities” is hardly self-defining. As a federal judge had observed, “fixed legal standards were deliberately omitted from this statutory scheme,” as “the very absence of a definitional section in the [War Powers] Resolution [was] coupled with debate suggesting that determinations of ‘hostilities’ were intended to be political decisions made by the President and Congress.”⁴⁴ Almost the only relevant language from the legislative history was found in the House report suggesting that “[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope,” but the report provided no clear direction on what either term was understood to mean.⁴⁵ When the War Powers Resolution was first considered, one of its principal sponsors, Senator Jacob K. Javits, stated that “[t]he bill . . . seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it.”⁴⁶ As another witness testified, “there is peril in trying to be too exact in definitions” as “[s]omething must be left to the judgment, the

43. See generally GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971); ROBERT F. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1969).

44. *Lowry v. Reagan*, 676 F. Supp. 333, 341 n.53 (D.D.C. 1987).

45. H.R. REP. NO. 93-287, at 7 (1973) (emphasis omitted).

46. *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the S. Comm. on Foreign Relations*, 92d Cong. 28 (1971) (statement of Sen. Jacob K. Javits, Member, S. Comm. on Foreign Relations).

intelligence, the wisdom, of those in command of the Congress, and of the President as well.”⁴⁷

As a legal matter, I concluded that with respect to what constitutes “hostilities,” the War Powers Resolution was far less clear than anyone wanted to acknowledge. Far from being black and white, that term had been studied in the past by several legal offices within the U.S. government—including the Justice Department’s Office of Legal Counsel—but none had clarified exactly what it meant. The Dellinger Test had specified a three-factor “nature, scope, and duration” standard for what constitutes “war,” but Executive Branch lawyers had never specified a similar test for what constitutes “hostilities.” Accordingly, with respect to the legal test for “hostilities,” I testified to the Senate Foreign Relations Committee:

[A]s everyone recognizes, the legal trigger for the automatic pullout clock, “hostilities” is an ambiguous term of art that is defined nowhere in the statute. The legislative history . . . makes clear there was no agreed-upon view of exactly what the term “hostilities” would encompass, nor has that standard ever been defined by any court or by Congress itself. From the start, legislators disagreed about the meaning of the term and the scope of the 60-day pullout rule and whether a particular set of facts constitutes hostilities for purposes of the resolution has been determined less by a narrow parsing of dictionary definitions than by interbranch practice. The Members of Congress who drafted the War Powers Resolution understood that this resolution is not like the Internal Revenue Code. Reading the War Powers Resolution should not be a mechanical exercise. The term “hostilities” was vague but they declined to give it more concrete meaning in part to avoid hampering future Presidents by making the resolution a one-size-fits-all straitjacket that would operate mechanically without regard to the facts.⁴⁸

Asked at a House of Representatives hearing whether the term “hostilities” was problematic because of “the susceptibility of it to different interpretations,” making this “a very fuzzy area,” Senator Javits had argued that this ambiguity was in fact a necessary feature of the legislation: “There is no question about that, but that decision would be for the President to make. No one is trying to denude the President of authority.”⁴⁹

47. *Id.* (statement of Henry Steele Commager, Professor, Amherst College).

48. *Koh Libya Testimony*, *supra* note 28, at 8.

49. *War Powers: Hearings Before the Subcomm. on Nat’l Sec. Policy & Sci. Devs. of the H. Comm. on Foreign Affairs*, 93d Cong. 22 (1973) (statement of Sen. Jacob K. Javits, Member, S. Comm. on Foreign Relations).

Thus, successive administrations had invariably started from the premise that the term “hostilities” is “definable in a meaningful way only in the context of an actual set of facts.”⁵⁰ In Libya, we confronted a most unusual confluence of facts. The President had:

framed our military mission narrowly, directing, among other things, that no ground troops would be deployed (except for necessary personnel recovery missions), and that U.S. Armed Forces would transition responsibility for leading and conducting the mission to an integrated NATO command. On April 4, 2011, U.S. forces did just that, shifting to a constrained and supporting role in a multinational civilian protection mission—in an action involving no U.S. ground presence or, to this point, U.S. casualties—authorized by a carefully tailored U.N. Security Council resolution.

.....

By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council resolution tailored to that limited purpose. This is a very unusual set of circumstances, not found in any of the historic situations in which the “hostilities” question was previously debated, from the deployment of U.S. Armed Forces to Lebanon, Grenada, and El Salvador in the early 1980s, to the fighting with Iran in the Persian Gulf in the late 1980s, to the use of ground troops in Somalia in 1993.⁵¹

In comparing Libya to some of the historic situations in which the “hostilities” question had previously been debated, we found that in Lebanon the White House had argued that U.S. armed forces were not in “hostilities,” although there were roughly 1,600 U.S. Marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby; U.S. Marine positions were attacked repeatedly; and four Marines were killed and several dozen wounded in those attacks.⁵² In Grenada, the Reagan

50. See Letter from Monroe Leigh, Legal Adviser, U.S. Dep’t of State, and Martin R. Hoffmann, Gen. Counsel, U.S. Dep’t of Def., to Clement J. Zablocki, Chairman, H. Foreign Affairs Comm. (June 3, 1975), reprinted in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int’l Sec. & Sci. Affairs of the H. Comm. on Int’l Relations*, 94th Cong. 38 (1975) [hereinafter 1975 Leigh-Hoffmann Letter].

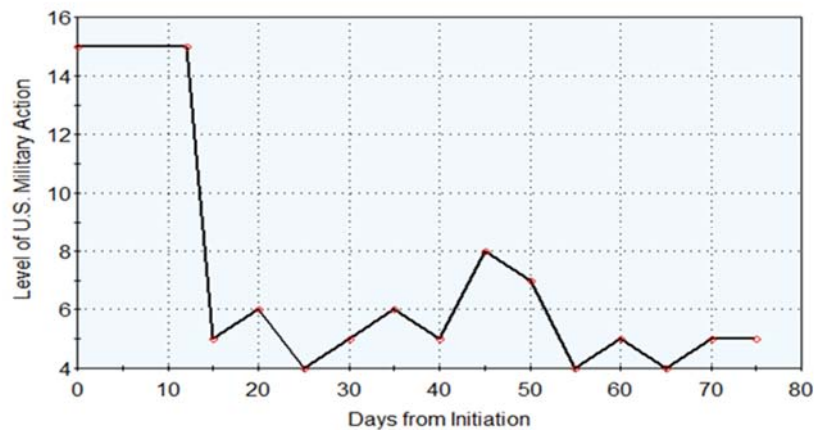
51. *Koh Libya Testimony*, supra note 28, at 12, 14.

52. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 13–15 (2010); John H. Kelly, *Lebanon: 1982–1984*, in U.S. AND RUSSIAN POLICYMAKING WITH RESPECT TO THE USE OF FORCE 85, 96–99 (Jeremy R. Azrael & Emil A. Payin eds., 1996).

Administration did not acknowledge that statutory “hostilities” had begun, even though 1,900 members of the U.S. armed forces had landed on the island, leading to combat that claimed the lives of nearly twenty Americans and wounded nearly 100 more.⁵³ In the Persian Gulf in 1987–1988, the Reagan Administration argued that the War Powers Resolution’s pullout provision was inapplicable to a reflagging program that was preceded by an accidental attack on a U.S. Navy ship that killed thirty-seven crewmen; and that led to repeated instances of active combat with Iranian forces.⁵⁴ And in Somalia, the branches could not agree about when “hostilities” began, even though, as part of Operation Restore Hope, 25,000 troops were initially dispatched by the President, without congressional authorization, and by fall 1993, ground combat had led to the deaths of more than two dozen U.S. soldiers.⁵⁵

Even without accepting any of these past Executive Branch positions as correct, one could conclude from these historical precedents that the *magnitude of the military engagement* should be relevant to determining whether or not the United States was indeed in “hostilities” for purposes of the War Powers Resolution. At that point, seeking the facts on the ground, we asked for a chart showing the amount of bombing that had been going on in Libya since the initiation of the use of force. The graph reproduced below roughly replicates what we saw: it showed, on the x-axis, the number of days from initiation of the use of force, and on the

Libya “Hostilities”



53. See GRIMMETT, *supra* note 52, at 15; Ben Bradlee, Jr., *A Chronology on Grenada*, BOS. GLOBE, Nov. 6, 1983, at 24.

54. See GRIMMETT, *supra* note 52, at 16–18.

55. See *id.* at 27; JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING 112, 124–27 (1995).

y-axis—which measures the *number of U.S. military strikes*—the relatively low level of U.S. bombing thereafter, as necessarily dictated by the limited, supporting nature of the U.S. mission as part of a multinational force in Libya.

As the graph shows, around Day Fifteen, the number of strikes by U.S. forces dramatically dropped and stayed roughly at that level until past Day Forty. But after command and control of Libyan weapons were destroyed in the first ten to twelve days to establish a no-fly zone, Qadhafi's forces replicated command and control by putting laptops on jeeps and mobile platforms, which were then "paired" by computer with standing surface-to-air weapons. Those mobile platforms thus became capable of operating the very same surface-to-air missiles that had been initially immobilized by the first NATO strikes conducted during the initial ten to twelve days of the Libyan operation. Because precision-targeted U.S. drones were the only available weapons that could eliminate those mobile platforms with accuracy, an uptick in the number of U.S. strikes occurred between roughly Day Forty and Day Fifty-five. Even so, as I later testified, "American strikes have been limited on an as-needed basis to the suppression of enemy air defenses to enforce the no-fly zone and limited strikes by Predator unmanned aerial vehicles against discrete targets to support the civilian protection mission."⁵⁶ "[T]he bulk of U.S. contributions has been providing intelligence capabilities and refueling assets to the NATO effort," with 75% of the overall sorties being flown by our coalition partners, and the overwhelming majority of *strike sorties*, 90%, also being flown by our NATO partners.⁵⁷ Perhaps most telling, "[b]y our best estimate, . . . since the handoff to NATO, the total number of United States munitions dropped in Libya has been *less than 1 percent of those dropped in Kosovo*."⁵⁸

In short, the overall magnitude of military strikes in Libya remained moderate. The statutory question was whether that level of strikes, combined with other factors, exceeded the legal standard for "hostilities." In his recent exhaustive account of this period, *Power Wars*, *New York Times* reporter Charlie Savage reported that the General Counsel of the Defense Department

circulated a discussion paper . . . saying that the administration would have a stronger argument that it was complying with the [WPR] if its military activity receded to a purely supporting role, like refueling allied warplanes and

56. *Koh Libya Testimony*, *supra* note 28, at 10.

57. *Id.*

58. *Id.* (emphasis added).

providing surveillance. *That could mean no more American missile strikes at air defenses and returning to the rule that Predator drones were for surveillance only.*⁵⁹

Even if this policy option had not been rejected by the DOD General Counsel's own clients,⁶⁰ my legal question was: "Where could this distinction be found in either the text or legislative history of the War Powers Resolution?" Why, under this reading, did the mere *availability* of missile and drone strikes against revived mobile platforms—no matter what the magnitude of actual strikes might be—suddenly transform the situation into "hostilities," triggering the WPR's sixty-day durational limit? To this day, I have been pointed to no authority that required that legal conclusion.

So in the end, the question became highly fact-specific: If the United States had no boots on the ground, ran no risk of escalation because of the limited nature of the mission, flew almost exclusively support missions, but did some precision bombing to protect civilians—including *making drones available* not just for surveillance, but also for attacking replicated mobile platforms—did the totality of those activities constitute "hostilities" for purposes of the War Powers Resolution? My position was that under these circumstances we had a solid case that this situation did not constitute statutory "hostilities." On this point, the statute's text was not clear, but deliberately ambiguous, from the passage of the War Powers Resolution to the present.

Significantly, the Supreme Court had recently directed that when considering certain issues of statutory construction in foreign affairs, one should focus not just on text, but on the "focus" of congressional concern.⁶¹ Here, it seemed clear that the focus of the War Powers Resolution was as a "No More Vietnams" statute, not a "Let's Have More Rwandas" statute.⁶² Congress's focus was on preventing large-scale creeping wars that build and escalate to involve large numbers of ground troops. Congress's intent was not

59. SAVAGE, POWER WARS, *supra* note 37, at 635–49 (emphasis added).

60. *See supra* note 39.

61. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010).

62. As President Obama later put it,

[W]hen you look at the history of the War Powers resolution, it came up after the Vietnam War in which we had half a million soldiers there, tens of thousands of lives lost, hundreds of billions of dollars spent, and Congress said, you know what, we don't want something like that happening again. So if you're going to start getting us into those kinds of commitments, you've got to consult with Congress beforehand. And I think that such consultation is entirely appropriate.

The President's News Conference, 1 PUB. PAPERS 715, 718–19 (June 29, 2011), <https://www.gpo.gov/fdsys/pkg/PPP-2011-book1/pdf/PPP-2011-book1-Doc-pg715-2.pdf> [hereinafter President Barack Obama, June 29 Press Conference].

to truncate U.N.-authorized humanitarian missions that had been carefully designed to limit U.S. military engagement and prevent both large-scale escalations and civilian slaughter.

This intuition seemed confirmed by a legal opinion issued just two years after the War Powers Resolution was enacted, when Congress had expressly invited the Executive Branch to provide its best understanding of the term “hostilities.” Then-Legal Adviser Monroe Leigh and Defense Department General Counsel Martin Hoffmann drew a distinction between full-scale military encounters and “intermittent military engagements” that did not require withdrawal of forces under the Resolution’s sixty-day rule.⁶³ As a general matter, they suggested the Executive Branch understood “hostilities” “to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.”⁶⁴ Hence, they concluded, the term should not be read to include situations where the nature of the mission is limited and does not “involve the full military engagements with which the Resolution is primarily concerned.”⁶⁵ Nor did “hostilities” contemplate situations where the exposure of U.S. forces and the risk of escalation were limited, for example, situations involving “sporadic military or paramilitary attacks on our armed forces stationed abroad.”⁶⁶

Based on all of this analysis, I advised that under the particular circumstances prevailing in Libya, it was lawful to argue that the United States was not in “hostilities” for purposes of the War Powers Resolution. As I later testified: “In light of this historical practice, a combination of four factors present in Libya suggests that the current situation does not constitute the kind of ‘hostilities’ envisioned by the War Powers Resolution’s sixty-day automatic pullout provision”:

First, the nature of the mission is unusually limited. By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led, multinational civilian protection mission charged with enforcing a Security Council

63. See 1975 Leigh-Hoffman Letter, *supra* note 50, at 38–39; see also Letter from Wendy R. Sherman, Assistant Sec’y of State for Legislative Affairs, to Rep. Benjamin Gilman, Member, H. Comm. on Foreign Affairs (Sept. 28, 1993), *reprinted in* 139 Cong. Rec. 22,752–753 (1993) (“[N]o previous Administration has considered that intermittent military engagements involving U.S. forces overseas, whether or not constituting ‘hostilities,’ would necessitate the withdrawal of such forces pursuant to section 5(b) of the Resolution.”).

64. See 1975 Leigh-Hoffman Letter, *supra* note 50, at 38–39.

65. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 194 (1980), <https://www.justice.gov/olc/opinion/presidential-power-use-armed-forces-abroad-without-statutory-authorization>

66. *Id.*; 1975 Leigh-Hoffman Letter, *supra* note 50, at 38–39.

resolution. . . . *Second, the exposure of our Armed Forces is limited.* From the transition date of March 31 forward, there have been no U.S. casualties, no threat of significant U.S. casualties, no active exchanges of fire with hostile forces, no significant armed confrontation or sustained confrontation of any kind with hostile forces. . . . *Third, the risk of escalation here is limited.* In contrast to the U.N.-authorized Desert Storm operation, which presented over 400,000 troops, the same order of magnitude as Vietnam at its peak, Libya has not involved any significant chance of escalation into a full-fledged conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or an expanding geographic scope. . . . And *fourth and finally, . . . we are using limited military means*, not the kind of full military engagements with which the War Powers Resolution is primarily concerned. . . . The violence U.S. Armed Forces are directly inflicting or facilitating after the handoff to NATO has been modest in terms of its frequency, intensity, and severity.⁶⁷

National Security Adviser Tom Donilon confirmed to Charlie Savage that “the not-hostilities theory ‘was on the table before the decision’ and so was not an after-the-fact rationalization.”⁶⁸ By his own account, White House Counsel Bob Bauer then advised President Obama that this was a reasonable legal interpretation of the WPR and the President himself, a former professor of constitutional law, “decided to go forward with the operation on that basis.”⁶⁹

67. *Koh Libya Testimony*, *supra* note 28, at 9 (emphasis added).

68. See SAVAGE, POWER WARS, *supra* note 37, at 645.

69. *Id.* As former White House Counsel Bauer later wrote to me:

Charlie [Savage] reports someone’s belief that I advised the President that the view you and I shared about the interpretation of hostilities was “available.” . . . That belief is mistaken: I never have used that standard—“availability”—for judging a legal theory. This is a topic—the boundaries of acceptable legal advice under national security pressures—that I have spent time thinking about In arriving at a conclusion much like the one you put forward effectively to the Senate, I believed it to be a reasonable, good faith interpretation, and I recognized that there would be disagreement with it, some of it strong. But I did not use the word “available” and am generally opposed to its use.

E-mail from Bob Bauer to Harold Hongju Koh, Sterling Professor of Int’l Law, Yale Law Sch. (Mar. 4, 2016, 8:07 AM EST) (on file with *Houston Law Review*). Compare CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 644–45 (2015) (ebook) (reporting that Bauer had told the President that this theory was legally “available,” but clarifying that “[h]e may have said ‘credible’ or ‘defensible’”), with Bob Bauer, *Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis*, JUST SECURITY (Nov. 18, 2015, 9:15 AM), <https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis/> (Bauer blogpost clarifying his belief that the legally “available” . . . standard . . . is fatally ambiguous and [one] that someone erroneously

In presenting that position to the Senate shortly thereafter, I took pains to stress the limits of our legal position:

Throughout the Libya episode, the President has never claimed the authority to take the Nation to war without congressional authorization, to violate the War Powers Resolution or any other statute, to violate international law, to use force abroad when doing so would not serve important national interests, or to refuse to consult with Congress on important war powers issues. The Administration recognizes that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting interbranch dialogue and deliberation on these critical matters. The President has expressed his strong desire for congressional support, and we have been working actively with Congress to ensure enactment of appropriate legislation.⁷⁰

A few days later, at a June 29th press conference, President Obama publicly reiterated this legal view as representing both his and the U.S. government's position.⁷¹ Curiously, Professor Johnsen suggests that future presidents should not rely on the legal position expressly adopted by President Obama—himself a constitutional lawyer—in part because the process the Administration followed was “highly unusual.” But as she correctly notes, “In any particular instance, the President clearly possesses the authority to make the final call about which legal analysis seems correct and will inform action”⁷²

In response, Congress was free to reject the Executive Branch interpretation and assert its warmaking prerogatives at any time if it could organize itself to do so. Significantly, it did neither; to

suggested to Charlie Savage that I had embraced”). Throughout her response, Professor Johnsen challenges the use of a lower standard of legality, even though she candidly acknowledges that “President Obama did not act on this view in the Libya situation.” Johnsen, *supra* note 17, at 1077.

70. *Koh Libya Testimony*, *supra* note 28, at 12.

71. President Barack Obama, June 29 Press Conference, *supra* note 62, at 719 (“[D]o I think that our actions in any way violate the War Powers Resolution? The answer is no. So I don’t even have to get to the constitutional question. There may be a time in which there was a serious question as to whether or not the War Powers Resolution act was constitutional. So I don’t have to get to the question.”).

72. Johnsen, *supra* note 17, at 1075 (calling the process “highly unusual” because “typically OLC would be the ultimate source of advice on the legality of a major, questionable use of force such as this (informed though by other lawyers including those at the Departments of Defense and State”). But as Charlie Savage makes clear, Attorney General Holder—to whom OLC reports—never rejected the President’s position or called it “clearly illegal.” Instead, he said that he did not consider this “the best interpretation of the statute in the eyes of the [D]epartment [of Justice], but that was not the same thing as pronouncing the theory unavailable and out-of-bounds.” SAVAGE, POWER WARS, *supra* note 37, at 646.

the contrary, the key congressional leaders—including Speaker John Boehner, former Speaker Nancy Pelosi, Senate Majority Leader Harry Reid, Senate Minority Leader Mitch McConnell, and Senate Foreign Relations Committee Chair John Kerry—all took pains to agree that continuation of U.S. military action in Libya did not violate the War Powers Resolution.⁷³ Thereafter, three different House resolutions were introduced challenging the interpretations, but all three failed to pass.⁷⁴ Thus, as Savage concluded, “The precedent Obama had carved out of the War Powers Resolution stood uncontested by Congress as an institution”⁷⁵

Some academic commentators harshly criticized this approach, making much of the reported disagreement among

73. See SAVAGE, POWER WARS, *supra* note 37, at 643 (“[A]fter the sixty-day deadline passed, all four of them—Boehner, Nancy Pelosi, Harry Reid, and Mitch McConnell—each made public comments that suggested that they did not think the administration was violating the War Powers Resolution.”).

74. H.R. Res. 1212, 112th Cong. (2011); H.R. Res. 6290, 112th Cong. (2011); H.R. Con. Res. 31, 112th Cong. (2011). In addition, Congress continued to fund the Libyan operation. See Kathleen Hennessey, *House Rebukes Obama on Libya, but Won't Cut Funds*, L.A. TIMES (June 24, 2011), <http://articles.latimes.com/2011/jun/24/nation/la-na-congress-libya-20110625>.

75. See SAVAGE, POWER WARS, *supra* note 37, at 649. Professor Johnsen treats OLC's nonconurrence as a reason why “future administrations should not rely on” the Obama legal position as providing a rationale for treating the Libya decision as precedent—even though that position was adopted by the President himself, after careful consideration, based on recommendation by the White House Counsel, after full interagency discussion (including acceptance by the Attorney General). See *supra* note 72; Johnsen, *supra* note 17, at 1074. Like Professor Johnsen, I am a proud alumnus of OLC and have written about its critical role in Executive Branch lawmaking. See Johnsen, *supra* note 17, at 1104–05. But while I have great respect for OLC, I fear that its academic alumni sometimes overstate its governmental role, implying that that Office always has had—and always must have—some kind of monopoly with respect to interpretation of national security or foreign affairs law. To my mind, this is neither a desirable, nor an accurate description of, government legal practice. Nor is it “clear,” as Professor Johnsen suggests, “that a shift in responsibilities away from OLC to other lawyers in the Executive Branch would not appropriately serve the President or promote the rule of law.” *Id.* at 1108. During my four years as Legal Adviser, I attended many meetings on national security legal matters where the Justice Department was represented not by the Office of Legal Counsel, but by other DOJ branches, such as the National Security or Criminal Divisions. And even when it does formally opine, OLC is not always right. Throughout her response here and her other admirable scholarship, Professor Johnsen has pointed to many egregious legal errors made by OLC during the George W. Bush era, which might have been avoided with a more robust interagency legal process. As I have chronicled elsewhere, the State Department has long been an authoritative interpreter of the meaning of treaties and international law. Koh, *supra* note 23. In particular, as my Senate testimony on Libya pointed out, the State Department Legal Adviser's Office has also long construed and presented the government's public interpretations regarding the War Powers Resolution. See *Koh Libya Testimony*, *supra* note 28, at 1, n.1 (citing, inter alia, the 1975 Leigh-Hoffman Letter on the War Powers Resolution, one of several important Executive Branch war powers opinions that did not emanate from OLC). And as Professor Johnsen notes, “on some questions, there is not one correct interpretation, and on occasion, multiple interpretations will be equally legitimate.” Johnsen, *supra* note 17, at 1106.

Obama Administration lawyers.⁷⁶ But other distinguished constitutional commentators, such as Richard Pildes⁷⁷ and Akhil Amar,⁷⁸ supported the Administration's view. Professor Laurence Tribe of Harvard, perhaps our most distinguished living constitutional scholar, originally questioned the position,⁷⁹ but later wrote me in October 2011 to say, "It's true that I was among the people who were unpersuaded by your and the W[hite] H[ouse]'s legal view of what constitute 'hostilities,' and I know hindsight can be 20/20, but in retrospect I have to say that your view of the matter may have been the wiser one."⁸⁰

In her thoughtful article, Professor Johnsen joins those who disagree with the Obama Administration's construction of the War Powers Resolution's term "hostilities." But her response mainly details her objection that the President did not follow OLC's advice. Significantly, she never explains what the statutory standard for "hostilities" should be or why the relatively small amount of force being used by U.S. forces sixty days after initiation (described in the graph above) exceeded the "hostilities" level.⁸¹ Indeed, Professor Johnsen nowhere addresses the main point of my Libya testimony: that even if the U.S. military action may have

76. See, e.g., Bruce Ackerman, Opinion, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <http://nyti.ms/19r2W28>. Although Professor Johnsen suggests that her view was shared at the time by a "consensus" of "most commentators," Johnsen, *supra* note 17, at 1099–1100, no commentary that I have seen—including hers—has adequately grappled with either the factual account of the use of force in Libya or the legal analysis of the statutory term "hostilities" that I have offered here. See *infra* text accompanying notes 81–82.

77. Richard Pildes, *Power Wars Symposium: What Role Should Law Play in Areas of Vital National and International Affairs?*, JUST SECURITY (Nov. 13, 2015, 10:37 AM), <https://www.justsecurity.org/27583/role-should-law-play-areas-vital-national-international-affairs/>.

78. Akhil Reed Amar, *Bomb Away, Mr. President*, SLATE (June 29, 2011, 5:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/bomb_away_mr_president.single.html.

79. Paul Starobin, Opinion, *A Moral Flip-Flop? Defining a War*, N.Y. TIMES (Aug. 6, 2011), <http://nyti.ms/1HFFmt4> (quoting Professor Tribe as initially saying, "I disagree completely with [Harold Koh's] analysis of the War Powers Resolution").

80. E-mail from Laurence H. Tribe, Carl M. Loeb Univ. Professor, Harv. Law Sch., to Harold Hongju Koh, Sterling Professor of Int'l Law, Yale Law Sch. (Oct. 20, 2011, 10:33 PM EST) (on file with *Houston Law Review*).

81. Professor Johnsen acknowledges that my "Senate testimony made a strong and appropriately narrow case" for why "hostilities" were not occurring in Libya on the sixtieth day. Johnsen, *supra* note 17, at 1074. She further concedes that the WPR's text is ambiguous, inasmuch as "[t]he statute does not define" "hostilities," a term she clarifies only to the extent of calling it "more expansive than 'war' in the constitutional sense." *Id.* at 1097–98. But while she embraces the three-part Dellinger test ("nature, scope, and duration") for determining what constitutes "war" in a constitutional sense, *supra* note 17, unlike my testimony, her response offers no similar multi-factor test to clarify what level or nature of military activity would constitute "hostilities" in a statutory sense. Johnsen, *supra* note 17.

exceeded the “hostilities” level at its outset, it had fallen below that level by the sixtieth day and was virtually guaranteed to stay at that lower level because of the limited nature of the mission, violence, exposure, and risk of escalation. Nor does she adequately explain why Congress had not acquiesced in this construction of the word “hostilities,” when as Charlie Savage notes, “after the sixty day deadline passed, all four of them”—the Speaker, former Speaker, Senate Majority and Minority Leaders—“each made public comments that suggested that they did not think the administration was violating the War Powers Resolution.”⁸² Finally, Professor Johnsen has not clarified why, at least as a matter of domestic law, President Obama’s publicly stated legal position on Libya did not set a relevant precedent for how the WPR term “hostilities” will be construed in future cases. As I elaborate further below, future multilateral operations that hew closely to the Libya precedent—with a carefully limited humanitarian mission, limited and low levels of violence, limited casualties and a limited risk of escalation—would not rise to the level of statutory “hostilities” and therefore would not violate the War Powers Resolution if continued for more than sixty days.

Notwithstanding some claims that the Obama Administration’s war powers interpretation in Libya undermined constitutional checks and balances, I continue firmly to believe that it yielded both a better policy and a supportable, sustainable legal precedent. There may have been subsequent tragedies in Libya, but not because of this particular interpretation.⁸³ In the end, the Libyan war powers episode was not about violation of the War Powers Resolution. It was about saving tens of thousands of

82. See *supra* note 73 and accompanying text. Significantly, Professor Johnsen challenges my claim that Congress has acquiesced in the Dellinger approach to initiation of use of force, Johnsen, *supra* note 17, at 1095–96, but says nothing about whether Congress acquiesced in the continuation of use of force in Libya past sixty days on the ground that no violation of the WPR was occurring. With respect to that issue, I rely not just on “mere recitations of operationally similar past uses of force,” *id.* at 1095 (internal quotation and citation omitted), but on public statements by the key congressional leaders indicating that because congressional approval was unnecessary, continuation past sixty days would not violate the WPR. See *supra* notes 37, 73–75. If, as she says, “one Congress may not bind a subsequent Congress,” Johnsen, *supra* note 17, at 1098, it is unclear how the 1973 Congress bound the 2011 Libya Congress *not* to acquiesce in continuation of the use of force in Libya.

83. See Jo Becker & Scott Shane, *A New Libya, with ‘Very Little Time Left’*, N.Y. TIMES (Feb. 27, 2016), <http://nyti.ms/1TGZoLI>; Jo Becker & Scott Shane, *Hillary Clinton, ‘Smart Power’ and a Dictator’s Fall*, N.Y. TIMES (Feb. 27, 2016), <http://nyti.ms/1R1CSWR>; Shadi Hamid, *Everyone Says the Libya Intervention Was a Failure. They’re Wrong.*, VOX (Apr. 5, 2016), <http://www.vox.com/2016/4/5/11363288/libya-intervention-success>; see also Kim Ghattas, *Hillary Clinton Has No Regrets About Libya*, FOREIGN POL’Y (Apr. 14, 2016), <http://foreignpolicy.com/2016/04/14/hillary-clinton-has-no-regrets-about-libya/> (“A European diplomat told me recently the choice was between rivers of blood or a mess.”).

lives through a restrained interpretation of that law, based on its conceptual focus and the actual facts on the ground.

C. Syria

This brings me to the third and final case study, Syria, which at this writing continues to present a horrible humanitarian crisis.⁸⁴ When the civil war first began in Syria, the initial policy challenge for the West was how to combine the diplomatic strategy to achieve a ceasefire, oust Assad, secure chemical weapons, introduce humanitarian aid, and promote accountability. But the soft power tools available were simply not sufficient to achieve those broad objectives.

After Libya, the Russians made it clear that they intended to veto similar Security Council resolutions, making impossible a Security Council-authorized intervention in Syria. Russia refused to vote for essentially the same U.N. Security Council language it had supported in Libya, claiming that force had been overused on that occasion to remove Qadhafi from power. Russia's obstinance placed President Obama's diplomats for many months in the awkward position of offering anodyne draft Security Council resolutions in search of a linguistic formula that the Russians would "abstain to" in the name of stopping the violence in Syria. The implicit (and reasonable) U.S. diplomatic strategy was to get the Russians on board to *something*, and then to escalate to stronger Security Council resolutions if the one the Russians finally let pass did not succeed in stopping the violence. But that key first step never happened, notwithstanding Secretaries Clinton and Kerry's repeated meetings with Foreign Minister Sergey Lavrov and then-U.N. Special Envoy Lakhdar Brahimi in search of a Security Council resolution the Russians would permit.

That brought us to August 20, 2013, when the Obama Administration received unmistakable proof that the Syrian leader Assad had launched a deliberate chemical assault on innocent civilians after President Obama had warned that such an act would cross a "red line."⁸⁵ The Arab League endorsed

84. For a discussion of the Syria case study, see SAVAGE, POWER WARS, *supra* note 37, at 627–54. For a discussion of the humanitarian crisis, see Michael Ignatieff & Leon Wieseltier, *Enough is Enough—U.S. Abdication on Syria Must Come to an End*, WASH. POST. (Feb. 9, 2016), https://www.washingtonpost.com/opinions/the-era-of-us-abdication-on-syria-must-end/2016/02/09/55226716-ce96-11e5-88cd-753e80cd29ad_story.html; and Michael Ignatieff, *The Refugees and the New War*, N.Y. REV. BOOKS (Dec. 17, 2015), <http://www.nybooks.com/articles/2015/12/17/refugees-and-new-war/>. See also *infra* Part III.C.3.

85. The President's News Conference, 2012 DAILY COMP. PRES. DOC. 6 (Aug. 20, 2012), <https://www.gpo.gov/fdsys/pkg/DCPD-201200656/pdf/DCPD-201200656.pdf>.

international action, but shied away from approving “all necessary measures,” making it difficult to invoke the U.N. Charter Article 52 “regional organizations” route to skirting a Russian veto that had been famously deployed during the Cuban Missile Crisis.⁸⁶ The British Attorney General issued a post-Kosovo legal opinion indicating that humanitarian intervention without Security Council resolution could be lawful under international law, but the Prime Minister failed to secure parliamentary support for intervention.⁸⁷

Faced with weak support abroad and at home, President Obama pushed the pause button not once, but twice. On August 30, 2013, he first said that instead of using the previously threatened military force, he would seek prior approval from a distracted and divided Congress, when he plainly had not secured the necessary House votes.⁸⁸ Two weeks later, he postponed indefinitely that congressional vote—which he likely would have lost—in order to pursue diplomatic alternatives that remain ongoing.⁸⁹

To my knowledge, the only public legal position the U.S. government offered on the legality of intervention in Syria was a quote by the White House Counsel to the *New York Times*. The Counsel explained that, while an attack on Syria “may not fit under a traditionally recognized legal basis under international law,” given the novel factors and circumstances, such an action would nevertheless be “justified and legitimate under

86. *Major Powers Hold UN Talks on Syria*, AL JAZEERA AM. (Aug. 28, 2013, 5:52 AM), <http://america.aljazeera.com/articles/2013/8/28/uk-to-ask-securitycounciltoauthorizenecessarymeasuresinsyria.html>.

87. Joshua Rosenberg, *Syria Intervention: It May Not Be Wise, but Using Force May Be Lawful*, GUARDIAN (Aug. 28, 2013), <http://www.theguardian.com/law/2013/aug/28/syria-intervention-force-lawful>. For the U.K. Foreign & Commonwealth Office’s formal legal position to the House of Commons Foreign Affairs Committee on the international lawfulness of humanitarian intervention, see Letter from the Right Hon. Hugh Robertson MP, Minister of State, Foreign & Commonwealth Office, to House of Commons, Foreign Affairs Comm. on Humanitarian Intervention & the Responsibility to Protect (Jan. 14, 2014), <https://www.justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf> (following the Syria crisis in August 2013). The Danish government similarly concluded that use of force would be justifiable under international law under exceptional circumstances for humanitarian purposes. See Memorandum from the Ministry of Foreign Affairs of Den. to the Members of the Foreign Policy Comm. (Aug. 30, 2013), <http://www.ft.dk/samling/20121/almde/uru/bilag/225/1276239/index.htm>.

88. Ernesto Londoño, *Obama Says U.S. Will Take Military Action Against Syria, Pending Congress’s Approval*, WASH. POST (Aug. 31, 2013), <http://wpo.st/t6cT1>.

89. President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <https://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

international law” and so not prohibited.⁹⁰ As a matter of domestic law, the Administration also apparently concluded that congressional approval was not required. As the *New York Times* reported, “[A]dministration lawyers decided that it was within Mr. Obama’s constitutional authority to carry out a strike on Syria as well, even without permission from Congress or the Security Council, because of the ‘important national interests’ of limiting regional instability and of enforcing the norm against using chemical weapons”⁹¹ The White House Counsel stated that

[t]he President believed that it was important to enhance the legitimacy of any action that would be taken by the executive . . . to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use.⁹²

As in Libya, two questions arose under domestic law. At the initiation stage, the constitutional question was: “Is this ‘war?’” At the continuation stage (sixty or ninety days later), the statutory question under the War Powers Resolution would have been: “Is this ‘hostilities?’” On the first question, the White House Counsel was plainly invoking Walter Dellinger’s OLC opinion described above, which Acting Attorney General for OLC Caroline Krass had followed in Libya in 2011. That OLC opinion argued that the President could constitutionally initiate military action without prior congressional approval if: (a) the use of force served significant national interests that have historically supported unilateral actions—here, promoting regional stability and preventing destruction of the near-century-old ban on chemical weapons—and (b) if the operations were not expected—as the President made clear in his September 10th Syria speech⁹³—to be “sufficiently extensive in ‘nature, scope, and duration’ to constitute a ‘war’ requiring prior specific congressional approval under the Declaration of War Clause.”⁹⁴ Under this reasoning, a large-scale offensive of the type initiated in Iraq in 2003 would plainly be “war,” which requires congressional approval. But even though Secretary Kerry mischaracterized the contemplated Syrian assault as “unbelievably small,” he was right to say that

90. Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), <http://nyti.ms/1aX80Jq>.

91. *Id.*

92. *Id.*

93. Remarks by the President in Address to the Nation on Syria, *supra* note 89.

94. Libya OLC Opinion, *supra* note 34.

what was being envisioned was not “war” in a constitutional sense.⁹⁵

The statutory, “continuation” question—are these “hostilities” that should be abated or brought up for congressional approval sixty or ninety days after military action begins—would presumably have been evaluated only if a military action were continuing sixty days after it began. Whether the Obama Administration would have determined at the sixty-day mark that the Syria action constituted “hostilities” for the War Powers Resolution would have depended on evaluation of the statutory test stated in my 2011 Libya testimony: “[T]he unusual confluence of . . . four factors, in an operation that was expressly designed to be limited—limited in mission, exposure of U.S. troops, risk of escalation, and military means employed.” In Libya, those factors “led the President to conclude that the Libya operation did not fall within the War Powers Resolution’s automatic sixty-day pullout rule.”⁹⁶ But depending on how the Syria mission would have been defined, the number and nature of U.S. troops deployed, the risk of escalation (which could well be much higher than in Libya), and the degree of violence used, the same factors might easily have come out differently in Syria.

Thus, under U.S. law, prior congressional approval was probably not legally required for the limited strike that the President proposed. Still, he reasonably deemed it politically prudent, given the intense congressional questioning voiced following the British parliamentary action. Still, President Obama erred, not by announcing a “red line” against the use of chemical weapons, but by failing to lay the political groundwork necessary to successfully enforce it. He failed to make clear earlier that Assad’s deliberate launch of chemical weapons against his own population would cross a near-century-old red line that had been drawn not by Obama alone, but by international law.⁹⁷ And he failed—starting in August 2012 and earlier—to socialize first congressional leaders and then key allies to publicly commit to help enforce that red line if breached.

Had the President seriously intended to use force to discourage a repeat use of chemical weapons, he should have engaged in better sequencing: he should have secured multilateral approval for the

95. Jonathan Karl, *John Kerry Promises “Unbelievably Small” U.S. Strike Against Syria*, ABC NEWS (Sept. 9, 2013), <http://abcnews.go.com/blogs/politics/2013/09/john-kerry-promises-unbelievably-small-u-s-strike-against-syria/>.

96. *Koh Libya Testimony*, *supra* note 28, at 16.

97. *Geneva Protocol*, FED’N AM. SCIENTISTS, <http://fas.org/nuke/control/geneva/intro.htm> (last visited Apr. 16, 2016).

use of force *ex ante* and then sought congressional authorization for the use of military force (AUMF) up to the level of international approval. This was the sequence secured by George H.W. Bush for his military action against Saddam Hussein in 1991 and initially attempted by Obama for his own prior military action in Libya. Instead, President Obama drew a red line without doing the domestic or international politics needed to defend it. That made his abrupt threat of force in late summer of 2013 seem less principled than unilateral, and strikingly inconsistent with his broader—generally successful—first-term “smart power” approach to foreign policy. Most disturbing, it led to the sad spectacle of Vladimir Putin, at the same time as he was engaging in gross violations of sovereignty in Ukraine, ostentatiously taking America to task for violating international law.⁹⁸

Still, Obama’s threat had a catalyzing effect. It extracted Assad’s confession that he had a chemical weapons stockpile and drew the Russians into a long-overdue diplomatic process. In his September 2013 speech before the U.N. General Assembly, Obama wisely hit “reset,” pushed back against Putin’s dismissal of American exceptionalism, and started to do what he should have done diplomatically months earlier. He “re-nested” his Syria policy amid two broader regional objectives: “Iran’s pursuit of nuclear weapons, and the Arab–Israeli conflict.” And he re-sequenced, by calling on U.N. members to support a Security Council resolution on Syria and provide humanitarian assistance, recalling international law to the historic task of meaningfully enforcing a ban against “the brazen use of chemical weapons.”⁹⁹

In effect, by putting the possibility of force back on the table, President Obama and Secretary of State John Kerry were able to reenergize a stalemated diplomatic process that led to the internationally supervised removal of chemical weapons from Syria supervised by the Organisation for the Prohibition of Chemical Weapons (OPCW).¹⁰⁰

98. Vladimir V. Putin, Opinion, *A Plea for Caution from Russia*, N.Y. TIMES (Sept. 11, 2013), <http://nyti.ms/17V0yPh>.

99. Remarks to the United Nations General Assembly in New York City, 2013 DAILY COMP. PRES. DOC. 2, 4 (Sept. 24, 2013), <https://www.gpo.gov/fdsys/pkg/DCPD-201300655/html/DCPD-201300655.htm>. In the end, the U.N. Security Council, including Russia, finally agreed upon a Syria resolution that includes the critical phrase: “*Decides*, in the event of non-compliance with this resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in the Syrian Arab Republic, to impose measures under Chapter VII of the United Nations Charter . . .” S.C. Res. 2118, ¶ 21 (Sept. 27, 2013).

100. Naftali Bendavid, *Removal of Chemical Weapons from Syria Is Completed*, WALL ST. J. (June 23, 2014, 1:39 PM), <http://www.wsj.com/articles/removal-of-chemical-weapons-from-syria-is-completed-1403529356>.

Unfortunately, apart from the newspaper quotes cited above, the Obama Administration never laid out an explanation for why use of force in Syria would have been consistent with international law. Particularly after the conspicuous U.S. silence regarding its legal rationale in Kosovo, a legal opinion of such significance should have been laid out somewhere other than in a newspaper quote. Given the importance of the issue, the Obama Administration failed by not issuing a detailed legal opinion as our British, Danish, and Belgian allies have all done.¹⁰¹ Threatening military action in Syria without stating a public legal rationale creates a dangerous precedent. As Abram Chayes argued after the Cuban Missile Crisis, “Failure to justify in terms of international law warrants and legitimizes *disapproval* and negative responses from the other governments participating directly in the process.”¹⁰² In the future, other less-humanitarian-minded states can cite President Obama’s 2013 threat to put their own broad spin on the legal interpretation, using the murky concepts of humanitarian intervention and R2P for their own self-interested purposes. In both the Kosovo and Syria cases, the President’s lawyers should have explained—not just in lay terms, as President Obama himself did, but in legal language that international lawyers can debate (as the United Kingdom’s Attorney General did in Syria and in Kosovo)—how humanitarian intervention even without a Security Council resolution could be lawful under international law.¹⁰³

Taken together, these three case studies yield a mixed legal scorecard. In Kosovo, the Executive Branch argued that it had initiated force in a manner that under international law some called “illegal but legitimate.” The military action continued after sixty days, but according to the 2000 OLC opinion, was authorized by the enactment of an eleventh-hour appropriation. In Libya, U.N. Security Council resolutions took care of the lawfulness of initiation under international law, and the 2011 Krass OLC opinion supported the claim that the United States was not at “war” for constitutional purposes. The four-factor “no-hostilities” test then supported the claim that the military action had lawfully continued after sixty days. Finally, in Syria, force has been used for humanitarian purposes, but

101. See *supra* notes 13 and 87 and accompanying text.

102. CHAYES, *supra* note 40, at 44.

103. André Nollkaemper, *Intervention in Syria and International Law: Inside or Out?*, OPINIO JURIS (Sept. 1, 2013, 3:00 AM), <http://opiniojuris.org/2013/09/01/syria-insta-symposium-andre-nollkaemper-intervention-syria-international-law-inside>.

only on a very limited basis.¹⁰⁴ At this writing, the United States has yet to articulate either a full domestic or international law rationale that would justify the use of humanitarian force in the absence of an authorizing U.N. Security Council resolution, which does not seem to be forthcoming any time soon.

III. DEVELOPING LEGAL STANDARDS

A. *An International Legal Test for R2P*

If international law is to recognize a responsibility to protect, what should the legal standard be? Obviously, we cannot fully evaluate the lawfulness of any state's use of force until we know the precise factual circumstances under which it chooses to take action. But let's start by distinguishing the *legal* question—is the option of military force available under domestic or international law?—from the *policy* question—would it be wise to use military force in Syria for limited humanitarian purposes? No one denies that the policy question presents a vexing judgment call, even if the intended use of force were very limited. But the prior and distinct legal question is whether the policy option to use military force would *ever* be available under international law. I believe that international law has evolved sufficiently to permit morally legitimate action to prevent atrocities by responding, for example, to the deliberate use of chemical weapons.

Among international legal commentators, the party line seemed to be that President Obama was threatening blatantly illegal military action in Syria, for the simple reason that the Russians were not on board.¹⁰⁵ The conventional argument, put forth by, among others, my Yale friends and colleagues Oona Hathaway and Scott Shapiro, is “per se illegality”: In their view, Article 2(4) of the U.N. Charter permits individual and collective self-defense but bars any and all other forms of intervention without express Security Council authorization.¹⁰⁶ They see the Syrian crisis as a moment to reaffirm that acting without a U.N. Security Council resolution is per se illegal. But is international law really so black and white?

104. See Peter Baker, *Obama, with Reluctance, Returns to Action in Iraq*, N.Y. TIMES (Aug. 7, 2014), <http://nyti.ms/1mrnaIr>; Helene Cooper & Michael D. Shear, *Militants' Siege on Mountain in Iraq Is Over, Pentagon Says*, N.Y. TIMES (Aug. 13, 2014), <http://nyti.ms/1sWQj47> (reporting U.S. air strikes carried out to rescue Yazidi refugees).

105. *Debate Map: Use of Force Against Syria*, OXFORD PUB. INT'L L., http://opil.oup.com/page/debate_map_syria/debate-map-use-of-force-against-syria (last updated Apr. 29, 2014).

106. Oona A. Hathaway & Scott J. Shapiro, Opinion, *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES (Sept. 3, 2013), <http://nyti.ms/1DMbgki>.

I agree instead with former British Legal Adviser Sir Daniel Bethlehem that “[i]n the case of the law on humanitarian intervention, an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the U.N. Charter, and its related principles of non-intervention and sovereignty, is overly simplistic.”¹⁰⁷ It treats a crucial fact that marks the Syrian situation—Russia’s persistent, cynical veto—as an absolute bar to lawful action, not as a sign of a systemic dysfunction that bars the United Nations from achieving its stated goals in Syria: protection of human rights, preservation of peace and security, and a proscription against the deliberate use of banned weapons. A “per se illegal” rule would overlook many other pressing facts of great concern to international law that distinguish Syria from past cases: including the catastrophic humanitarian situation, the likelihood of future atrocities, the grievous nature of already-committed atrocities that amount to crimes against humanity and grave breaches of the Geneva Conventions, the growing likelihood of regional insecurity, and the documented deliberate and indiscriminate use of chemical weapons against civilians in a way that threatens a century-old ban.

On reflection, a “per se illegal” rule is plainly overbroad. If U.N. “procedural standards require the consensus of the five permanent members of the Security Council and at least four of the elected members[, t]his produces a significant danger of underintervention.”¹⁰⁸ If no self-defense considerations arose, such a rule would permanently disable any external collective action, for example, to protect the population of any U.N. permanent member state from genocide. By treating the veto alone as dispositive, the per se position denies any nation, no matter how well-meaning, any lawful way to use even limited and multilateral force to prevent Assad from intentionally gassing a million Syrian children *tomorrow!* In the name of fidelity to the United Nations and this rigid conception of international law, leaders would either have to accept civilian slaughter or break the law because international law offers no lawful alternative to prevent the slaughter. The question not asked is whether preventing that slaughter would further the purposes of international law and the U.N. system far more than a rigid reading of Article 2(4) that

107. Sir Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>.

108. MICHAEL W. DOYLE, *THE QUESTION OF INTERVENTION: JOHN STUART MILL AND THE RESPONSIBILITY TO PROTECT* 204 (2015).

privileges over all others one systemic value—territorial sovereignty.

In his September 2013 speech to the U.N. General Assembly, using lay language, President Obama pointedly challenged the conventional, absolutist view:

Different nations will not agree on the need for action in every instance, and the principle of sovereignty is at the center of our international order. But sovereignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye. While we need to be modest in our belief that we can remedy every evil, while we need to be mindful that the world is full of unintended consequences, *should we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica?* If that's the world that people want to live in, they should say so and reckon with the cold logic of mass graves. . . . I believe we can embrace a different future.¹⁰⁹

What, as a matter of international law, would that future look like? Like Bethlehem, I believe that under certain highly constrained circumstances, a nation could lawfully use or threaten force for genuinely humanitarian purposes, even absent authorization by a U.N. Security Council resolution. This was the path the United States and its NATO allies followed in Kosovo in 1999 and President Obama proposed in Syria in 2013 before the U.S.–Russian diplomatic initiative took center stage.

Under this view, had President Obama proceeded in Syria as he had threatened, the United States would not have been in flagrant breach of international law, but rather, in a legal gray zone. Like its allies, the United States should have treated Syria as a lawmaking moment to crystallize a limited concept of humanitarian intervention, capable of breaking a veto stranglehold in extreme circumstances, to prevent the deliberate use of forbidden weapons to kill civilians.

Chapter I of the U.N. Charter states the broad “Purposes and Principles” that guide the United Nations: including, “To maintain international peace and security, . . . promoting and encouraging respect for human rights,” and (to quote the Charter’s preamble) “to save succeeding generations from the scourge of war,” including, presumably, stopping mass slaughter by use of chemical weapons.¹¹⁰ Read in context, the Charter’s bar on national uses of force should be understood not as the end in itself, but as a means for promoting

109. Remarks to the United Nations General Assembly in New York City, *supra* note 99 (emphasis added).

110. U.N. Charter pmb., art. 1, ¶¶ 1, 3.

the United Nations' broader purposes. Article 2(4) states that "[a]ll 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."¹¹¹ The Article's final clause—"in any *other* manner inconsistent with the Purposes of the United Nations"—leaves open whether Article 2(4) would permit a threat or use of force against the territorial integrity of a state in a case where that threat or action proved *essential* to effectuate the United Nations' purposes. Some have already argued that because *threats* of use of force can serve the United Nations' overriding purposes, they are not currently and should not be seen as per se illegal.¹¹² Nor, as Article 51 makes clear, is Article 2(4)'s ban categorical: the Charter expressly accepts one customary international law exception permitting use of force against another state for purposes of individual and collective self-defense. The issue is whether the Charter accepts another exception that permits the threat or use of force against another state when a persistent Security Council deadlock obstructs the United Nations' capacity to achieve its stated humanitarian, anti-war purposes.

In essence, the "per se illegal" position amounts to saying that international law has not progressed in nearly two decades since Kosovo. But why, as a matter of ethics, political legitimacy, law or history, should we accept that as a given? Since Kosovo, as political scientist Martha Finnemore has documented, within the international legal order, the multilateral use of force for humanitarian ends is perceived as far more legitimate than it was only a few decades ago.¹¹³ Drawing on the writings of John Stuart Mill, political theorist Michael Doyle has recently reviewed at length the evolution in the study of ethics of the Responsibility to Protect as a "newly legitimate moral minimum of global order."¹¹⁴ International law scholar Anne Orford, in a recent detailed historical review of the legal evolution of Responsibility to Protect, explores the widespread and growing global effort to implement the R2P concept.¹¹⁵ These commentators all stress the need to

111. *Id.*, art. 2, ¶ 4.

112. Ryan Goodman, *Humanitarian Intervention and Global Legal Norms*, JUST SECURITY (Oct. 11, 2013, 11:59 AM), <https://www.justsecurity.org/1913/humanitarian-intervention-global-legal-norms/> ("The *threat* to use force for humanitarian intervention essentially gets a legal pass.").

113. *See generally* MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE* (2003).

114. DOYLE, *supra* note 108, at 110.

115. ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* 17–22 (2011).

develop the law and norms of humanitarian intervention to better balance the dangers of overintervention (think Putin in Georgia and Ukraine) against the dangers of underintervention (e.g., Bosnia and Rwanda).

The customary international law concept of humanitarian intervention dates back to Grotius and the seventeenth century.¹¹⁶ Since the birth of the U.N. Charter, examples of state practice often invoked to illustrate humanitarian intervention in action include India's incursion into East Pakistan to help create Bangladesh in 1971¹¹⁷ and Tanzania's intervention into Uganda to help oust Idi Amin in 1978–1979.¹¹⁸ Kosovo catalyzed the international legal movement to explore whether there is an international Responsibility to Protect. Since Kosovo, the R2P concept “has been invoked, explicitly and implicitly, successfully and unsuccessfully, in cases ranging from Myanmar and Kenya in 2008, to Guinea in 2009, and . . . Libya in 2011.”¹¹⁹

The R2P movement pointedly shifted the legal debate from the statist claim that individual nations have an amorphous, discretionary “right of humanitarian intervention” to the collective notion that the international community has a duty or “responsibility to protect” a nation's citizens when the national government has undeniably forfeited that responsibility. As Orford explains:

[R2P] is premised on the notion that authority, to be legitimate, must be effective at guaranteeing protection, and that the failure to protect a population is a factual matter that can be determined by the international community. The responsibility to protect concept thus grounds authority—both of states and of the international community—on the capacity to provide effective protection to populations at risk.¹²⁰

Under R2P reasoning, a national government's blatant failure to protect its own citizens from gross abuses creates a vacuum of protection that other entities may lawfully fill. But which entities?

116. See *supra* note 10; see also SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 43 (1996) (“Grotius maintained that resort to war was lawful, under natural law and the law of nations, when doing so was based on a just cause . . .”). For a historical review of the origins of the concept of humanitarian intervention prior to the U.N. Charter, see generally *id.* at 33–64.

117. See generally GARY J. BASS, THE BLOOD TELEGRAM: NIXON, KISSINGER, AND A FORGOTTEN GENOCIDE (2013); Gary J. Bass, *The Indian Way of Humanitarian Intervention*, 40 YALE J. INT'L L. 227 (2015). The fact that nations like India invoked a nonhumanitarian rationale in the India–Pakistan episode suggests that states have not worked hard enough to state a humanitarian legal principle that better fits those pressing factual circumstances.

118. See, e.g., Daniel G. Acheson-Brown, *The Tanzanian Invasion of Uganda: A Just War?*, 12 INT'L THIRD WORLD STUD. J. & REV. 1 (2001).

119. DOYLE, *supra* note 108, at 110.

120. ORFORD, *supra* note 115, at 16.

In 2001, the government of Canada convened a distinguished International Commission on Intervention and State Sovereignty that supported and delineated the contours of an international law, the Responsibility to Protect.¹²¹ Three years later, the High-Level U.N. Panel on Threats, Challenges and Change “endorse[d] the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort.”¹²² At the 2005 World Summit, member states declared that “we are prepared to take collective action . . . through the Security Council . . . on a case-by-case basis . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹²³ In this way, “[t]he inclusion of the responsibility to protect concept in the World Summit Outcome ‘transformed the principle, from a commission proposal actively supported by a relatively small number of like-minded states’ to a concept ‘endorsed by the entire UN membership.’”¹²⁴ In 2006, the Security Council reaffirmed that conclusion in its Resolution 1674 on the protection of civilians in armed conflict.¹²⁵ And in 2011, the Security Council reiterated “the responsibility of the Libyan authorities to protect the Libyan population” by voting, with Russia abstaining, for all necessary measures to ensure the protection of Libyan civilians.¹²⁶

Left unanswered in this legal evolution was what should happen if both the national government and the Security Council fail to fulfill their responsibility to protect? While the U.N. Charter obviously gives the Security Council first responsibility to act when a state uses chemical weapons to kill its own civilians, Article 2(4) nowhere makes that an exclusive responsibility. So if the Council repeatedly failed to fill that vacuum of protection by discharging that responsibility, could a group of states with genuinely humanitarian motives act collectively and lawfully for the sole purpose of protecting civilians? Anticipating this question,

121. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

122. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, annex I, ¶ 55 (Dec. 2, 2004).

123. G.A. Res. 60/1, 2005 World Summit Outcome ¶ 139 (Oct. 24, 2005).

124. ORFORD, *supra* note 115, at 17 (quoting ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 95 (2009)).

125. Press Release, Security Council, Importance Of Preventing Conflict Through Development, Democracy Stressed, As Security Council Unanimously Adopts Resolution 1674, U.N. Press Release SC/8710 (Apr. 28, 2006).

126. S.C. Res. 1973, *supra* note 32, pmb., ¶ 4.

the International Commission on Intervention and State Sovereignty argued:

[I]f the Security Council fails to discharge its responsibility [to protect] in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations.¹²⁷

Viewed in this light, Syria arguably presented an even stronger case for intervention than Kosovo. A U.N. report concluded unequivocally that chemical weapons were used on a relatively large scale near Damascus on August 21, 2013, causing numerous civilian casualties; U.S. and allied intelligence concluded that only the Assad regime could have carried out such a large-scale chemical weapons attack.¹²⁸ Suppose that in response, a group of nations had sought to fill the vacuum of protection to prevent future chemical releases without invoking either a “legal right of humanitarian intervention” or even a legal claim of R2P (in the sense of claiming an international legal duty to intervene). Suppose further that these states claimed instead an *ex post exemption from legal wrongfulness*. The International Law Commission’s Articles on State Responsibility recognize, for example, that extreme circumstances such as distress and necessity would preclude claims of international wrongfulness against an acting state and permit certain forms of countermeasures to stop illegal acts by others.¹²⁹

Whether the collective action would ultimately be judged internationally lawful would then depend critically on what happened next, particularly if the Security Council condoned the action after the fact. By comparison, in Kosovo NATO took action and the Russians offered a U.N. Security Council resolution of disapproval. Twelve of fifteen Security Council members voted to reject it, including many non-NATO members, effectively agreeing that the NATO intervention could continue. In Resolution 1244, the Security Council later approved the Kosovo settlement, effectively ratifying the NATO action under international law.¹³⁰

So how to embody these considerations in an international legal test? As Professor Deeks ably summarizes in her Symposium

127. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 121, at 55.

128. Erin Pelton, *United Nations Releases Report on the Use of Chemical Weapons in Syria*, WHITE HOUSE: BLOG (Sept. 18, 2013, 2:50 PM), <https://www.whitehouse.gov/blog/2013/09/18/united-nations-releases-report-use-chemical-weapons-syria>.

129. See G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, arts. 24–25 (Jan. 28, 2002).

130. S.C. Res. 1244 (June 10, 1999).

article, several legal interpreters have attempted that task.¹³¹ I would suggest the following test:

(1) If a humanitarian crisis creates *consequences significantly disruptive of international order*—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security—that would likely soon create an *imminent threat* to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under U.N. Charter Article 51);

(2) a Security Council resolution were not available because of persistent veto; and the group of nations that had persistently sought Security Council action had *exhausted* all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used

(3) *limited force for genuinely humanitarian purposes* that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated.

In particular, these nations' claim that their actions were not wrongful would be strengthened if they could demonstrate:

(4) that the action was *collective*, e.g., involving the General Assembly's Uniting for Peace Resolution¹³² or regional arrangements under U.N. Charter Chapter VIII¹³³;

(5) that collective action would prevent the use of a *per se illegal means* by the territorial state, e.g., deployment of banned chemical weapons; or

(6) would help to avoid a *per se illegal end*, e.g., genocide, war crimes, crimes against humanity, or an avertable humanitarian disaster, such as the widespread slaughter of innocent civilians, for example, another Halabja or Srebrenica.

To be credible, the legal analysis of any particular situation would need to substantiate each of these factors with persuasive factual evidence of: (1) Disruptive Consequences likely to lead to Imminent Threat; (2) Exhaustion; (3) Limited, Necessary, Proportionate, and Humanitarian Use of Force; (4) Collective Action; (5) Illegal Means; and (6) Avoidance of Illegal Ends.

131. See generally Deeks, *supra* note 22; *infra* Part III.E.

132. G.A. Res. 377 (V), Uniting for Peace (Nov. 3, 1950).

133. See, e.g., U.N. Charter art. 52, ¶ 1 ("Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.").

Professor Deeks's thoughtful response in this Symposium acknowledges that international law, multi-factor tests of the kind I propose here are commonly used to structure and defend state uses of force. She recognizes that such tests offer opportunities for law specification and development, reduce the likelihood of interstate conflict, and reduce transaction costs for states in articulating a "balance between over- and under-permissiveness of force."¹³⁴ She aptly analogizes such tests to "a grain of sand in an oyster, providing a set of concrete ideas and standards around which states may coalesce and ultimately create customary international law."¹³⁵ In my parlance, they create an occasion for "transnational legal process": "a focal point for state discussions [that] organizes states' arguments, stimulates reactions . . . and facilitates horizontal adoption by other states [while] serv[ing] as the basis for developing new treaty rules."¹³⁶ She also credits legal tests for humanitarian intervention with being "more rule-like than . . . other [multi-part tests for *jus ad bellum*] . . . because they include elements, each of which must be met before action would be lawful, and those elements are both numerous and likely to occur in combination in very few cases," imposing "particularly high thresholds before allowing states to conclude that force would be legal."¹³⁷ While Professor Deeks predicts that my proposed test "may well achieve" "more coherent and thoughtful debates about humanitarian intervention by . . . letting it serve as a focal point for discussion," she also predicts that my proposed test is "likely to encounter continued skepticism, at least in the near term" because "it is an effort to use a [legal test] to create a new exception to the [U.N.] Charter's prohibition on the use of force rather than an effort to interpret or translate existing exceptions."¹³⁸

Even if Professor Deeks's prediction is right, I still think it is worth the effort. My aim is to define the contours of a narrow lawful exception to an overly rigid prohibition: an "affirmative defense" that would render lawful otherwise illegal behavior. This approach has the virtue of forthrightness, inasmuch as affirmative defenses, by their nature, do not deny that a legal rule was disobeyed. Instead, they assert after the fact that the usual legal penalty should not be exacted, because in hindsight we cannot judge the behavior wrongful.

By analogy, in tort law, onlookers generally have no legal responsibility to act as Good Samaritans, and the law does not

134. Deeks, *supra* note 22, at 1046.

135. *Id.* at 1045.

136. *Id.*

137. *Id.* at 1063 (emphasis omitted).

138. *Id.* at 1039, 1064.

either authorize or oblige them to do so *ex ante*. When they do intervene and act prudently and with restraint, however, the law generally excuses them from *ex post* wrongfulness.¹³⁹ In the same way, my proposed test would impose a very high *ex ante* justification that fits a narrow loophole (Professor Deeks's "rule-like" Multi-Part Test), combined with a more forgiving *ex post* exemption from wrongfulness for those interventions that meet the high standards with actual exigent facts.

In my view, such an international legal rule would better balance the risks of under- versus over-intervention than either an absolutist reading of Article 2(4) or an amorphous claim of a responsibility to protect that can be unilaterally invoked without clear legal standards. After Kosovo, my late friend (and prior Frankel commentator) Tom Franck¹⁴⁰ came to a similar conclusion, although he had long been a skeptic on humanitarian intervention. Having argued that nations are more likely to comply with international law rules that they perceive as fair and legitimate,¹⁴¹ Franck evidently concluded that a legal rule forthrightly permitting humanitarian intervention in urgent circumstances would have more "compliance pull" than an absolutist rule exalting state sovereignty over human rights. He summarized the state practice since Kosovo as reflecting

the evolution of a subsidiary adjectival *international law of mitigation*, one that may formally continue to assert the illegality of state recourse to force but which, in ascertainable circumstances, mitigates the consequence of such wrongful acts by imposing no, or only nominal, consequences on states which . . . have demonstrably prevented the occurrence of some greater wrong.¹⁴²

Perhaps this personal story can clarify why this approach makes common sense. On the day our first child was born, my wife

139. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 74.151(a) (West Supp. 2015) ("A person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent . . ."); *McIntyre v. Ramirez*, 109 S.W.3d 741, 742–43 (Tex. 2003) (holding that a Texas physician who voluntarily assisted in the delivery of an infant bore no liability for the infant's injuries due to claimed negligence).

140. See Harold Hongju Koh, *A Toast to "Tom the Frank,"* 35 N.Y.U. J. INT'L L. & POL. 303 (2003); Harold Hongju Koh et al., *The Invisible College of Thomas Franck*, 84 N.Y.U. L. REV. 1389 (2009).

141. See generally THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). See also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2641–45 (1997) (analyzing Franck's scholarly focus).

142. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 139 (2002) (emphasis added).

went into intense labor. We drove urgently to the hospital, and by the time we arrived, it had become very clear that our baby would be coming very soon. As I pulled into the hospital parking space, I saw that it read “One-Hour Parking Zone: *Absolutely No Exceptions.*” I ran upstairs. Fifty-five minutes later, as our child was on her way, I glanced at my watch and wondered whether our car would be towed. But as you can imagine, I did not go out to put money in the meter. Several hours later, I ran downstairs, only to find my car still sitting there, without any ticket. Did I break the law? I certainly didn’t offer to pay for the time I had stayed past one hour. And if I had gotten a ticket, I probably would have fought the ticket, saying that I had a defense of necessity. I was told later that in fact, the hospital rarely, if ever, enforced the one-hour limit. You see, the sign’s ostensibly absolutist wording was designed not to forbid, but to deter: to ensure that people who park in that emergency space move their cars as quickly as possible after a delivery, which we had in fact done. So we had obeyed the spirit, if not the letter, of the legal plan. We had been given no authorization *ex ante*; but neither had we suffered any penalty *ex post*.

You see the parallel: if you do what you think is both right and necessary under exigent circumstances, you incur a risk of an *ex post* determination of wrongfulness. Your keen awareness of that risk both deters imprudent intervention and limits its duration. But the international community can approve after the fact or otherwise make clear that it condones such an intervention, if taken for the right reasons in the heat of the moment. In both cases, the absolutist legal rule should be read to discourage, not to forbid. It should be read as designed to deter imprudent action and to speed emergency action, not to prevent action altogether when the most urgent circumstances demand.

To describe this international legal standard is not to say that Obama’s threatened 2013 use of force in Syria fully met it. We cannot fully evaluate the lawfulness of any nation-state’s claimed humanitarian use of force until we evaluate the precise factual circumstances under which it actually makes that decision. But in my view, developing such a legal standard is far preferable to simply and repeatedly re-swearing fealty to an absolutist and overbroad conception of sovereignty that tolerates gross atrocities.

In sum, the Clinton Administration’s failure to articulate a clear legal rationale for its Kosovo intervention haunts us now. Continuing to threaten military action on humanitarian grounds without ever stating a persuasive public legal rationale creates a dangerous precedent. If modern international law cannot be read to permit such a limited use of force to protect human rights,

international lawyers must begin a debate to help reframe and refurbish those international law rules. We have reached a lawmaking moment, where international lawyers in and out of government need to discuss and define a narrow “affirmative defense” to Article 2(4) of the U.N. Charter that would clarify the contours of an emerging lawful exception to a rigid rule. Reading an implied narrow exception into that rigid rule would better balance the risks of over- and under-action in the most dire situations.

B. U.S. Domestic Law

If the United States were to adopt my proposed international law test for R2P, could it be applied consistently with our domestic law? Under the U.S. legal standards described above,¹⁴³ the initial constitutional question would again be: Is this “war?” If it were a true, carefully crafted multilateral effort to implement an international Responsibility to Protect as a last resort, the answer would probably be no. In most cases, the President could cite the Dellinger and Krass OLC opinions discussed above to explain why the compelling national interest implicated and the limited nature, scope, and duration of the military action anticipated would justify a decision to commit forces initially for humanitarian purposes without prior congressional approval.¹⁴⁴

If that initial commitment were done multilaterally, in a manner similar to the 2011 Libyan operation—with a limited mission, limited and low levels of violence, limited casualties, and a limited risk of escalation—the Libyan precedent would suggest that the action would not rise to the level of statutory “hostilities” and therefore would not violate the War Powers Resolution if continued for more than sixty days. But if those conditions did not obtain, “hostilities” would plainly exist, and the durational limit would apply. One goal of stating the four Libyan “hostilities” factors was to cabin and channel the precedential value of that incident by providing a transparent, contestable argument in an area where past presidents had been coy at best. The Libya test laid down some parameters that would prevent future presidents from ignoring the statute in future unlike cases.

As a political matter, if the President were to decide in good faith that he must intervene militarily to prevent a genuine humanitarian disaster, most members of Congress would probably want to avoid being implicated, and so would give the President

143. See *supra* Part II.A.

144. See Dellinger Opinion, *supra* note 17; Libya OLC Opinion, *supra* note 34.

the initial benefit of the doubt, particularly if he deployed no or few American boots on the ground. So if the intervention were right-sized and succeeded quickly, Congress would likely stay silent; if it foundered, they could criticize the action later on.

I would guess that few humanitarian crises will rise to the level of sustained “hostilities.” This will be particularly true in situations like Libya, where the U.S. role is limited and carefully delimited by the international legal instruments that authorize the use of force and does not involve sustained deployment of American boots on the ground in the territory or airspace of a foreign country. If so, Libya could become the paradigm case for humanitarian intervention, because of the peculiar convergence of conditions, described above. Although Congress plainly didn’t want to act, by adopting a statutory interpretation of “hostilities” that nevertheless seemed consistent with the WPR’s legislative plan, the United States prevented thousands of people from being slaughtered. If Congress disagreed, it was entirely free to reassert that durational limit after the fact. But not only did it fail to do so, key congressional leaders took pains to state that the WPR had *not* been violated. These facts all suggest that the legislature effectively acknowledged and acquiesced in such an interpretation, which creates a situation-specific test for what should constitute “hostilities” for future invocations of the WPR’s durational limit.¹⁴⁵

C. *A Lawmaking Moment?*

To this day, the United States has not articulated its legal tests for R2P under either international or domestic law. In my view, an international lawmaking moment was missed after Kosovo, and a domestic and international lawmaking moment was missed after Syria. In each case, the United States failed to articulate a coherent international legal rationale for Responsibility to Protect, instead relying on the muddy notion that at certain unspecified moments, humanitarian intervention might be “illegal but legitimate.” Similarly, in each case, the difficult constitutional and statutory war powers issues surrounding humanitarian intervention remained unaddressed.

145. I of course agree with Professor Johnsen that the President must respect constitutional congressional action to impose limits on his freedom of action. Where we may disagree, however, is about whether Congress’s recent restrictions on the President’s authority to close Guantanamo are entirely constitutional. *See, e.g.*, Harold Hongju Koh, *A False Choice on Guantanamo Closure*, JUST SECURITY (Nov. 2, 2015, 12:05 PM), <https://www.justsecurity.org/27298/false-choice-guantanamo-closure/>; Harold Hongju Koh, *After the NDAA Veto: Now What?*, JUST SECURITY (Oct. 23, 2015, 11:46 AM), <https://www.justsecurity.org/27028/ndaa-veto-what/>.

1. *International Law.* In 2013, White House Counsel Kathy Ruemmler told the *New York Times* “that while an attack on Syria ‘may not fit under a traditionally recognized legal basis under international law,’ the administration believed that given the novel factors and circumstances, such an action would nevertheless be ‘justified and legitimate under international law’ and so not prohibited.”¹⁴⁶ But no further explanation was ever released. Given the importance of the issue, the U.S. government should have explained in legal language that international lawyers could debate why a limited use of force in extraordinary circumstances was consistent with international law.¹⁴⁷

One need not accept my proposed legal standard to agree that we urgently need the legal debate. If we do not announce and clarify our standards, we can expect less-humanitarian-minded states to interpret the notion of R2P to serve their own, less noble purposes.

The “per se illegal” reading of Article 2(4) relies on interpretive techniques of originalism and textualism that many of us would challenge if, say, Robert Bork or Antonin Scalia were applying them to constitutional law.¹⁴⁸ As I have noted above, the “territorial sovereignty rule” is not nearly so black and white as the absolutists claim, because textual ambiguity in Article 2(4), the broader structural purposes of the U.N. Charter, and some recent significant state practice give far more legal play in the joints than textual absolutists would concede.¹⁴⁹ Like other originalist/textualist interpretations, the absolutist position does not acknowledge that the United Nations has multiple purposes—including protecting human rights, promoting regional security, and ending the scourge of war—instead flattening those purposes to the single goal of protecting sovereignty.

If Article 2(4) were as absolute as the textualists claim, Assad would remain free to use chemical weapons against his own civilian citizens with impunity. And if the absolutists are right, President Obama still could not lawfully threaten force, even in

146. Savage, *supra* note 90.

147. See Nollkaemper, *supra* note 103.

148. For three examples, see Kevin Jon Heller, *Four Thoughts on Koh’s Defense of Unilateral Humanitarian Intervention*, OPINIO JURIS (Oct. 2, 2013, 8:26 PM), <http://opiniojuris.org/2013/10/02/four-thoughts-kohs-defense-unilateral-humanitarian-intervention/>; David Kaye, *Harold Koh’s Case for Humanitarian Intervention*, JUST SECURITY (Oct. 7, 2013, 1:45 PM), <https://www.justsecurity.org/1730/kaye-kohs-case/>; and Carsten Stahn, *On ‘Humanitarian Intervention’, ‘Lawmaking’ Moments and What the ‘Law Ought to Be’—Counseling Caution Against a New ‘Affirmative Defense to Art. 2(4)’ After Syria*, OPINIO JURIS (Oct. 8, 2013, 4:03 PM), <http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-lawmaking-moments-law-counseling-caution-new-affirmative-del/>.

149. See Goodman, *supra* note 112.

the face of Assad's renewed use of chemical weapons and further Russian veto, because modern international law requires accepting the repeated, indefinite, deliberate slaughter of thousands of civilians with a *per se* illegal weapon of war.

"This is a conundrum," one such commentator concedes, "[b]ut it remains the law."¹⁵⁰ But *why should* the *per se* rule "remain the law," particularly if it is so manifestly outmoded and tolerant of gross human rights abuse? Whether or not Clinton's lawyers were correct seventeen years ago not to follow the United Kingdom and state a legal rationale justifying Kosovo, why should that silence continue? Perhaps consolidation of a new "affirmative defense" failed to gain sufficient global support in the process leading up to the adoption of the R2P principle by the 2005 World Summit. But when the Equal Rights Amendment failed to pass, did we just throw in the towel and say "so much for consolidation of legal support for women's rights?" Given the stakes, why, more than a decade later, isn't it again time to revisit this pressing question?

Whether or not one agrees with the international legal rule suggested above, it should be clear that there is a big difference between calling intervention *per se* illegal and treating it as a very tough legal and policy call. If President Obama cannot lawfully threaten force in Syria even if Assad again uses chemical weapons on civilians and the Russians again veto a Security Council resolution, then modern international law requires accepting the repeated, indefinite, deliberate slaughter of thousands of civilians with a *per se* illegal weapon of war. The claim that use of force outside the Security Council is "*per se* illegal" effectively concedes that the international prohibition on the use of chemical weapons cannot be enforced, because the only available enforcement mechanism is Security Council action, which absent U.N. reform will always be subject to Russian, Chinese, or other veto. I fully agree that U.N. Security Council reform is long overdue and that the United States should actively work to make it happen. But in the meantime, accepting the "*per se* illegal" position would make all Kosovos illegal, more Rwandas and Syrias likely, and the erosion of the categorical ban on chemical weapons inevitable.

Some claim that we cannot craft a legal exception to the *per se* rule because it is inherently too malleable, or because human dignity can be adequately protected by calling urgent action "illegal but legitimate."¹⁵¹ This strikes me as a failure of lawyerly responsibility, which we would never accept in other legal

150. Kaye, *supra* note 148.

151. See Michael Ignatieff, *How to Save the Syrians*, N.Y. REV. BOOKS: NYR DAILY (Sept. 13, 2013, 5:48 PM), <http://www.nybooks.com/daily/2013/09/13/how-save-syrians/>.

situations. After all, do courts tell ambulance drivers who ran red lights to prevent deaths that their actions are illegal because they might encourage ambulance *chasers* to do the same thing? Did we tell different-race couples that if they married, they should consider those statuses permanently “illegal but legitimate?” In each of those areas, lawyers did not accept an unfair law, but rather updated the law to better suit human purposes.

If we similarly try to make new law here, some commentators ask: Might we inadvertently craft a rule that others could abuse later? Perhaps. But whether styled as “justification,” “mitigation,” or “exception,” my proposed international law test invites lawyers and policymakers to work together to clarify both the limited contours of their discretion to use force in humanitarian crises, while stating limiting principles to guide and constrain future actors.

2. *Domestic Law.* In much the same way, we plainly need a better system of checks and balances and constitutional governance than the current, “take-no-prior-position, wait-and-see, blame-if-it-fails” attitude that has come to characterize Congress’s approach to the war powers during the second decade of the twenty-first century. Unlike some, I have never been an enthusiast about the War Powers Resolution. A quarter-century ago, I wrote about its most glaring defect:

[T]he resolution’s greatest failing lies in a structural flaw. Its sixty-day automatic withdrawal provision would require the president to remove troops that he has already committed, without Congress ever having made a specific judgment that such a commitment was unwise. . . . *Thus, the resolution does not directly encourage meaningful interbranch dialogue regarding the wisdom of any particular presidential commitment of troops.* It promotes that end only indirectly, by threatening the president and Congress with a sixty-day statutory time limit to force them to engage in such a dialogue. Because . . . the three branches have rendered the sixty-day limit non-self-executing, that deadline has lost its power to push the president toward consultation or Congress toward voting a prompt resolution of ratification or disapproval of the president’s troop commitment. Thus, the resolution has largely failed to promote just the dialogue and cooperation it was designed to produce.¹⁵²

As the twenty-first century proceeds, it seems increasingly likely that our domestic war powers law will become obsolescent

152. KOH, *supra* note 5, at 190–91 (emphasis added).

to deal with modern war powers questions of all kinds, not just humanitarian interventions. Four decades after its enactment, the War Powers Resolution seems largely exhausted. To its credit, it has forced presidents to report—albeit tersely—on foreign deployments and to keep their interventions short. But apart from that, it has done little to bring about what its “required withdrawal deadline” was intended to do—namely, force meaningful interbranch dialogue between the President and Congress about when the United States should engage in sustained uses of force.

As time goes by, large-scale interventions of the Vietnam- or Iraq Desert Storm-kind will become increasingly rare. Whether in humanitarian situations or not, armed conflict will increasingly be conducted not by massive air strike or sustained ground invasion, but rather, by the sporadic use of drones, special operations, and cyberspace. None of these three forms of use of force are clearly regulated by existing U.S. domestic law, whether the “Declare War” Clause of the Constitution or the War Powers Resolution. We should accept the bitter truth that the War Powers Resolution has become increasingly obsolete, and not just in humanitarian crises. Once again, its main regulatory device—a blunt, durational limit of ambiguous applicability—proves too unnuanced to force a thoughtful interbranch dialogue about how to deal sensitively with either the rapidly evolving goals or tools of modern warfare.

If Congress disagrees with any particular proposed humanitarian intervention, it plainly has all the political tools available to make its views clear. If the President were to initiate a particular humanitarian action, and some period of time later, one or more houses of Congress were to vote a simple resolution disapproving any proposed humanitarian intervention, *ex ante* or *ex post*, their action would put the President into Category Three of Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, *i.e.*, at its “lowest ebb.”¹⁵³ That move would place the burden back on the President to decide how critical he believes that intervention is, and how much of it he can credibly execute under his Article II Commander-in-Chief authorities. But such political games of chicken are not the same as meaningful interbranch dialogue. And as a political matter, any kind of bicameral up-or-down vote regarding authorization of the use of force remains something that the current Congress has proven itself most unlikely to do.

153. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

How to fix this situation? Obviously, the best approach would be legislative reform. The first-best option would be general reform of the War Powers Resolution, something that I and others urged more than a quarter-century ago.¹⁵⁴ To address the use of force for humanitarian intervention more specifically, a second possibility would be a statutory amendment of the War Powers Resolution narrowly exempting from the durational limits of the statute the rare case of humanitarian intervention that meets the international law test above.

A third possible reform idea would focus less on substance than on process: as in the trade area,¹⁵⁵ if the President proposed to commit U.S. armed forces in a particular case for humanitarian purposes, he could simultaneously have a bill introduced in Congress under expedited “fast track” legislative procedures that would require Congress to vote a joint resolution of approval or disapproval of the action within, say, ninety days, in effect forcing Congress to approve or disapprove any particular humanitarian intervention by action, not merely by silence. Yet a fourth possibility would be for the President and Congress in effect to resurrect a constitutional, jointly authorized “legislative veto.” The two branches would agree to a joint resolution that amends the War Powers Resolution so that Congress authorizes the President to carry on any particular humanitarian action for, say, one year, but states that that action shall cease upon a concurrent resolution of the House and Senate—i.e., a bicameral vote not subject to presidential veto—that in the joint resolution the President has agreed *ex ante* to abide by.¹⁵⁶

The obvious problem with each of these reform proposals would be that in the current legislative environment, even modest legislative action seems politically unobtainable. At a time when Congress is unwilling to vote even to authorize an expanded war against ISIL that most Members seem to support,¹⁵⁷ there seems

154. See generally KOH, *supra* note 5, at 189–93 (proposing overarching war powers reform as part of a new national security framework statute). For a reform bill currently pending before Congress, see War Powers Consultation Act of 2014, S. 1939, 113th Cong. (2014). For a now-classic proposal as to how Congress could broadly modify the War Powers Resolution to make it more effective, see generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

155. See generally Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992).

156. For a detailed discussion of a similar proposal, see Charles Tiefer, *Can the President and Congress Establish a Legislative Veto Mechanism for Jointly Drawing Down a Long and Controversial War?*, 6 J. NAT'L SECURITY L. & POL'Y 131 (2012).

157. See generally Jennifer Steinhauer, *A Congress That Doesn't Want to Weigh In on War*, N.Y. TIMES (Dec. 9, 2015), <http://nyti.ms/1Q1JMm0>; Editorial, *A Fearful Congress Sits Out the War Against ISIS*, N.Y. TIMES (Dec. 26, 2015), <http://nyti.ms/1OsmmGm>.

to be little or no chance that Congress would ever take up a Humanitarian Intervention War Powers Resolution. Increasingly, Congress sets up statutory schemes that exempt it from having to act affirmatively to address difficult questions—not just the use of force, but legislation on base closings, Medicare-cutting and the like. The proliferation of these legislative structures makes clear that these are issues that Congress simply will not force itself to decide. As Professor Johnsen correctly notes, such “[c]ongressional intransigence . . . may be relevant to prudential norms of interbranch cooperation and weigh in favor of presidents choosing to exercise the full extent of their authorities.”¹⁵⁸

That brings us to the “common law” status quo, under which the Executive Branch seeks to intervene for less than sixty days and tries to keep its intervention at a level below statutory “hostilities.” But suppose Congress stays silent and the mission remains unfinished at Day Sixty? That is the issue the Clinton Administration finessed in Kosovo and Obama’s 2010 intervention in Libya flagged. After Kosovo and Libya, could a presidential administration in good faith take more than sixty days to use a level of force that undeniably exceeds “hostilities” to prevent the mass slaughter of civilians abroad?

Professor Johnsen would say no, based on a strict reading of the WPR’s text. But *King v. Burwell*,¹⁵⁹ the 2015 Obamacare case, suggests otherwise. In *King*, the Court decided that the words “Exchange established by the State” could also, paradoxically, embrace health-care exchanges that had been established by the federal government. In upholding the statute, Chief Justice Roberts chose not to focus solely on the statutory text, but instead directed that “a fair reading of the legislation demands a fair understanding of the legislative plan.”¹⁶⁰ Congress had passed the Affordable Care Act to improve health insurance markets, not to destroy them. So if possible, the Chief Justice suggested, we should construe the legislative enactment in a way that is consistent with that broader legislative plan.¹⁶¹

By the same token, there is nothing in the legislative plan of the War Powers Resolution to suggest that Congress’s goal was to tolerate mass civilian slaughter. Congress’s main focus was to limit creeping, open-ended wars, not to bar all uses of force that

158. Johnsen, *supra* note 17, at 1079.

159. *King v. Burwell*, 135 S. Ct. 2480 (2015).

160. *Id.* at 2496.

161. *Id.* at 2492 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545–46 (1947) (noting that “fair adjudication” requires the Court to try to understand Congress’s plan)).

might prevent humanitarian disasters. To set the bar, Congress placed a durational limit on those uses of American military force that cross the line into “hostilities.” But as I have noted above, Congress deliberately left the precise meaning of “hostilities” ambiguous. Through agreed-upon interbranch practice, that statutory scheme has evolved over forty years to a less rigid understanding of what the President may do and for how long. As the four-part test set out in my Libya testimony suggested, the legislature’s main concerns were curbing open-ended military missions, open-ended exposure of U.S. forces to foreign threats, open-ended escalation of the number of U.S. armed forces placed into harm’s way in a foreign territory, and the uncontrolled use of military means in open-ended armed conflicts.

We need to acknowledge that humanitarian interventions simply were not on Congress’s mind in 1973 when it “passed the War Powers Resolution to prevent future Vietnams, undeclared creeping wars that start and build before Congress or the public are fully aware.”¹⁶² A law that was adopted four decades ago to say “no more Vietnams” does not easily translate into a statute that today says “let’s stop genocides, but only if it takes less than sixty days.” It makes little sense, as the Libya war powers debate showed, simply to focus on one word—“hostilities”—as opposed to assessing the entire legislative plan of the War Powers Resolution.¹⁶³ And it makes even less sense to act as if the legislative term “hostilities” was so clearly defined that it requires stopping even those constrained uses of force for humanitarian purposes that after sixty days may be close to succeeding.

The parallel to the international law debate should be clear. An absolutist would argue that the text of the Resolution—which says that troops must be withdrawn after sixty days (or in certain circumstances ninety days)—admits of absolutely no exceptions whatsoever. But suppose Houston enacted a statute that says unequivocally, “The mayor shall keep school open every day.” Suppose further that a hurricane renders all roads impassable, and the mayor orders all schools closed, reading the statute under these exigent circumstances to mean: “The mayor shall keep

162. KOH, *supra* note 5, at 39.

163. I agree with Professor Johnsen that because “some of the sponsors . . . could not agree, even after the fact, about when hostilities began in Vietnam,” that the WPR’s “drafters . . . may have left the term [“hostilities”] undefined simply because they did not agree about its scope.” Johnsen, *supra* note 17, at 1097–98. It follows, as I argued in my Libya testimony, that interbranch practice should then determine whether “hostilities” were in fact occurring on Day Sixty. In the Libyan case, the Executive Branch said no, and Congress as a whole stayed silent, with its key leaders publicly agreeing that no violation of the WPR had occurred.

school open every day *unless it is physically impossible to do so.*” Is the mayor violating the law? Will the legislature condemn her interpretation? That seems most unlikely.¹⁶⁴ After all, the legislative plan was never to force the executive to open the school even in life-threatening circumstances.¹⁶⁵ In both the school-closing and the war powers examples, evolving factual circumstances reveal a broader, more nuanced legislative plan. In both cases, it seems both possible and wise to read into the text of a statute a flexibility that better reflects the legislature’s broader plan.¹⁶⁶

164. In analyzing *King*, Judge Posner offered a similar example:

[A]n ordinance states “no vehicles in public parks.” An ambulance driver is ticketed for ignoring the ordinance (though its text is clearly posed at the entrance to the park) by driving the ambulance into the park to save a person who has fallen into a pond and is struggling. Has the ambulance driver violated the ordinance? Yes if the ordinance is interpreted literally. But the literal interpretation has absurd consequences. A judge is apt to say: the city council, or other official body, that enacted the ordinance couldn’t have wanted the ordinance interpreted literally. They “meant” there to be an exception to the prohibition of vehicles, but just forgot to write it into the ordinance. So a correct judicial “interpretation” is that “no vehicles in public parks” means “no non-emergency vehicles in public parks.” This is the right result . . . [w]hich is essentially what happened in *King v. Burwell*.

Richard Posner, *Comment On Professor Gluck’s “Imperfect Statutes, Imperfect Courts,”* 129 HARV. L. REV. F. 11, 11–12 (2015), http://cdn.harvardlawreview.org/wp-content/uploads/2015/11/vol129_Posner.pdf.

165. Cf. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531 (2007) (opining that a court need not construe a statute literally if doing so would produce “incongruous results”). Professor Johnsen argues that “[t]here was no hurricane or childbirth in the Libya context that might have provided an impossibility justification” to prevent securing congressional approval for continuation pursuant to the War Powers Resolution. Johnsen, *supra* note 17, at 1102. But what my Senate testimony made clear was the Obama Administration *had already sought* congressional approval for continuation. What made that request pointless was that *Congress adamantly refused to act on it*, in no small part because its leadership preferred an interpretation that the Administration was in fact acting consistently with the War Powers Resolution. See *supra* note 37.

166. Professor Johnsen makes the unpersuasive ‘slippery slope’ argument that my narrow claim that Congress has acquiesced in the near-term completion of several past humanitarian interventions will breed other, much broader exceptions, e.g. a “counterterrorism exception” to the War Powers Resolution. Perhaps the Congress that enacted the WPR did not have 9/11 counterterrorism in mind, Johnsen, *supra* note 17, at 1078, but that Congress was certainly aware of the possible need to use force for counterterrorist purposes. And with respect to counterterrorism, setting aside the political reality that such an exemption might be one of the few exceptions to the WPR that a majority of both Houses of the current Congress might actually support, all of our current counterterrorism operations are authorized by authorizations for the use of military force (AUMFs) voted by Congress. Moreover, to my knowledge, all current operations involve either short-term special operations that plainly do not constitute “war,” can be completed easily within sixty days, or are executed in a fashion that does not meet either the WPR’s required factual triggers or the four-part “hostilities” standard that I specified in my Libya testimony. Nor do I anywhere claim that “the presence or absence of hostilities . . . turn[s] on the reason behind the use of military force,” Johnsen, *supra* note 17, at 1102 (emphasis added). To the contrary, under the four-part Libya test discussed in text, a military mission

While seeking to distinguish *King v. Burwell*,¹⁶⁷ Professor Johnsen does not address the many parallel situations in which Congress, the Executive, or the courts have effectively revised strict statutory terms in light of changing societal contexts,¹⁶⁸ or against the background of common law principles (such as damages rules), constitutional law principles (such as federalism), or principles of international law (such as jus cogens) that may militate in favor of a less rigid textual reading over time.¹⁶⁹ Over time, the accretion of such historical precedents and background norms may support revised constructions even of absolutist statutory text.¹⁷⁰

In future extreme cases, we can expect all three branches to read the legislature's acquiescence in the completion of the Kosovo and Libyan operations—set against the backdrop of emerging international law norms tolerant of genuine humanitarian interventions that meet the strict international law test above—to support relaxation of the War Powers Resolution's strict durational limits for the limited purpose of completing the

that was more open-ended in nature, duration, or scope, or that involved a higher magnitude of strikes, casualties, or risk of escalation plainly would constitute "hostilities" for purposes of the WPR.

167. As Professor Gluck has noted, in providing a more flexible reading of statutory text, the Court's reasoning in *King* was "not radical," but followed dozens of Court precedents. Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 88 (2015) ("The Court frequently invoked the concept of statutory plans in the pre-textualist era. More than 100 opinions did so, often referencing the 'comprehensive' congressional plan . . .").

168. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (effectively revising an apparently absolutist regulatory restriction in the Clean Air Act because interpreting it literally in modern times would be absurd). The Court held that the statutory term "air pollutant" need not always be held to include "greenhouse gases," and should be interpreted in a context-appropriate way, because literal inclusion of the term in all cases would compel regulation of tens of thousands of additional pollution emitters whom Congress presumably did not intend to regulate.

169. Compare the evolving understanding of the Sherman Act in antitrust law. See Charles S. Dameron, Note, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1075 (2016) (describing how "[t]he Supreme Court first purported to strictly construe the Act's prohibition of 'every contract . . . in restraint of trade,' noting that 'no exception or limitation can be added without placing in the act that which has been omitted by Congress,'" but then "later set aside the statute's plain meaning and seized upon the statute's use of common-law language to derive a common-law 'rule of reason' prohibiting only those agreements that 'unreasonably' restrained trade" (internal citations omitted)).

170. Indeed, based on similar reasoning, Professor Johnsen praises as "a model of rigorous analysis" OLC's 2000 reading of an appropriations bill to authorize extended humanitarian intervention in Kosovo—despite express language in the WPR rejecting such bills as statutory approval—because an appropriations measure had "the effect of establishing a background principle against which to interpret later Acts of Congress" with respect to use of force. Johnsen, *supra* note 17, at 1098; *supra* note 21 and accompanying text.

humanitarian mission in question. To be clear, I do not think this narrow claim of authority is either open-ended or constitutionally based.¹⁷¹ Depending on the facts of an extended future intervention, Congress or the courts could fairly conclude that the presidential use of force had become unlawful and must cease.¹⁷² To paraphrase Justice Breyer in *Zadvydas v. Davis*, in deciding whether this is a reasonable statutory interpretation,

“the court must ask whether the [operation] in question exceeds a period reasonably necessary to secure [the intended outcome]. It should measure reasonableness primarily in terms of the statute’s basic purpose Thus, if [completion] is not reasonably foreseeable, the court should hold continued [use of force] unreasonable and no longer authorized by statute.”¹⁷³

Of course, such “common law” statutory interpretations can be later overridden by authoritative legislative or judicial pronouncement.¹⁷⁴ If, as seems likely in the near term, the Executive applies this common-law interpretation, and Congress never formally approves or disapproves it, it remains unclear whether the courts would find it justiciable. Thus, under this “common law” status quo, the key war powers questions will inevitably become predictive: Given the military strategy announced, could the humanitarian intervention be successfully completed within a reasonable time? And if the President continued, would Congress likely bless the President’s decision after the fact in a legally meaningful way? If both questions could be fairly answered “yes,” applying such an interpretation could accommodate congressional and executive interests for the near term.

Still, we should frankly acknowledge that, as a matter of good constitutional governance and checks and balance, this is not a

171. See Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2368–74 (2006) (rejecting the notion of an Article II “completion power” with respect, inter alia, to the use of force abroad).

172. Professor Johnsen significantly overstates in calling my reading of the statute “broad,” “impermissible,” and “sweeping.” Johnsen, *supra* note 17, at 1075, 1088, 1097. She elsewhere better describes my interpretation of the current statute as an effort to address “Congress’s effort to deal with its own tendency toward inaction through the sixty-day clock.” *Id.* at 1088. Absent new legislation or an intervening judicial decision, the narrow result of the interpretation that I have suggested would simply be to affirm the status quo: that Congress has generally allowed the President to lawfully complete humanitarian interventions that have been lawfully initiated under domestic and international law, not to “empower presidents to act unilaterally, and for indefinite periods of time.” *Id.* at 1088.

173. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

174. *Cf. id.* (reading an implicit time frame into a statute whose terms were silent on the limits on detention, finding “nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention”).

healthy long-term solution. As Professor Pildes noted with respect to Libya:

[T]he WPR, while an important effort on Congress'[s] part to reclaim a role for itself over uses of military force, is constructed in an extremely inept way, as a means of making policy over such momentous issues. By design, the WPR makes Congress's silence—its failure to act to take any position one way or the other about matters like the Libya operation—tantamount to a decision by Congress to prohibit the United States from continu[ing] to participate in “hostilities” that the United States has initiated. Thus, *Congress's failure to act has all the consequences, as a practical matter, of an affirmative decision by Congress to cut off the Libya operation, though without Congress actually making such a decision or having to take direct responsibility*, through the act of voting, for such a decision and its ensuing consequences. This policymaking-by-silence should certainly give us pause as a sound structure of decision-making on matters of such significance.¹⁷⁵

For now, Congress may be able to sit on its hands, but there seems little doubt that, left unaddressed, this problem will grow. In future humanitarian crises, Congress will be less and less able to express its views by silence, simply by pointing to the 1973 War Powers Resolution. The three case studies I have reviewed show that there are too many ambiguities in how that statute is to apply in humanitarian intervention cases. As time goes by, Congress will simply have to find a better way to force collective expression of its views regarding humanitarian intervention by considered affirmative action in specific cases, not through deliberately ambiguous inaction.

In sum, sticking with a “common law interpretive approach” instead of genuine legislative reform leaves us in a precarious place for the longer term. It leaves the text of an outmoded War Powers Resolution unchanged, but forces the President to bear the burden of action in particular cases, waiting for Congress to meaningfully object. Most troubling, it leaves the world wondering whether the United States is legally empowered to take the lead in a dire humanitarian crisis.

For the longer term, we should not simply accept an uneasy status quo in which both the domestic and international law rules remain murky. In both the domestic and international spheres, the existing black-letter rules of law create an inappropriate bias toward inaction in the face of the grossest abuses. If we wait, this

175. Pildes, *supra* note 77 (emphasis added).

bi-level bias toward inaction will likely get worse. After a period of “glasnost”—from the late 1980s until 2010, where the Russians were prepared to cooperate on Security Council resolutions as they did in Libya—we have now entered an uncertain period, akin to the Cuban Missile Crisis, where we can expect the Russians to veto resolutions that they do not perceive as serving their global interests. As Syria and Ukraine show, that persistent veto could dictate long-term multilateral paralysis in the face of gross abuses.¹⁷⁶ At the same time, under domestic law, the main difference between now and then is Congress’s willingness and ability to take positive action: to vote legislation and to approve wars instead of just playing politics and avoiding responsibility.

In time, these dysfunctionalities could combine to create a toxic brew: at the domestic level, a dysfunctional Congress and a legalistic presidency with limited tools to motivate the constitutional order to enable American leadership, and at the international level, a dysfunctional Security Council and legalistic liberal nations with limited tools to motivate the international order to head off civilian slaughter. If chronic congressional and Security Council incapacity and passivity can license civilian massacre based on absolutist readings of the U.N. Charter and the War Powers Resolution, the tragic result may be too many unchecked deaths, with the U.S. government left paralyzed on the sidelines.

3. *The Syrian Conundrum.* Nowhere is our need for better law clearer than in our current crisis in Syria, which makes vivid why this debate is both urgent and timely. As I write, the Syrian refugee crisis is escalating. The five-year civil war has killed 250,000, displaced 7 million, and created 5 million refugees, some 2 million of them children.¹⁷⁷ Europe’s capacity to absorb the refugees is at a breaking point; many borders have been closed, and the rise of ISIL, the expansion of the conflict between the allies

176. Indeed, it was precisely to skirt a persistent Russian veto that in the past, U.N. members have acknowledged that the Security Council does not have an exclusive monopoly on the use of force. Instead, U.N. members have claimed the right to take military action outside the Security Council framework by adopting the Uniting for Peace Resolution or—as in the Cuban Missile Crisis—invoking the regional organizations language in Chapter VIII of the Charter. Significantly, at the time of the Cuban Missile Crisis, many international lawyers claimed the U.S. position was flatly illegal. Yet fifty years later, it is widely regarded as a textbook decision-making case study. *See generally* Koh, *supra* note 23.

177. *See* Howard Forman, *Caring for 2 Million Refugee Children*, U.S. NEWS (Feb. 2, 2016), <http://health.usnews.com/health-news/patient-advice/articles/2016-02-02/caring-for-2-million-refugee-children>; *Syria Crisis: Regional Overview: About the Crisis*, U.N. OFF. COORDINATION OF HUM. AFFS., <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis> (last visited Apr. 16, 2016).

and ISIL, and the entry (and abrupt exit) of Russia in Syria have only made the crisis more urgent.¹⁷⁸ The United States has shifted its military focus toward ISIL and away from Assad, even though he remains the root cause of the refugee crisis. As the humanitarian situation grows more dire, the Syrian crisis has become suffused with R2P issues: Can U.N. bodies undertake humanitarian relief inside Syria? May they supply arms to vetted Syrian rebels? Can they prevent Assad's expanded use of barrel bombs (and undiscovered chemical weapons) against civilians from further inflaming the crisis? Perhaps most urgent, even without a Security Council resolution, could the United States and its NATO allies lawfully create a no-fly zone to protect a humanitarian corridor for fleeing refugees near the Syrian-Turkish border north of Aleppo?

While I remain deeply cautious about intervention in Syria,¹⁷⁹ I agree with Michael Ignatieff that any nominally "noninterventionist" position must acknowledge how much the world is already intervening in Syria.¹⁸⁰ The idea that a noninterventionist position is legally required in Syria must be tested against the hard reality that almost everyone under the sun is already intervening in Syria. Under these circumstances, the nonintervention position for the West may not actually be a pro-peace position, but rather a pro-slaughter position in which the Western powers invoke inflexible legal rules as a reason to do nothing.

As a former human rights policymaker, I of course concede that targeted uses of force could backfire. But I still favor having the "smart power" option of *diplomatic intervention backed by the lawful threat of limited military intervention*, over the policy option of doing nothing, even after a deliberate large-scale attack on civilians. The argument above suggests that neither Article 2(4) nor the WPR are so black and white that they clearly forbid the

178. See Matthew Dalton, *Russia's Putin Holds the Cards in Europe's Crises*, WALL ST. J. (Oct. 1, 2015), <http://www.wsj.com/articles/russias-putin-holds-the-cards-in-europes-crises-1443735923>; Larry Elliot & Jill Treanor, *Dutch PM Says Refugee Crisis Could Shut Down Europe's Open Borders for Good*, GUARDIAN (Jan. 21, 2016), <http://www.theguardian.com/world/2016/jan/21/dutch-pm-says-refugee-crisis-could-shut-down-europes-open-borders-for-good>.

179. As Nicholas Kristof has rightly cautioned, "Let's be humble enough to acknowledge that we can't be sure of the answer and that Syria will be bloody whatever we do." Nicholas Kristof, Opinion, *The Right Questions on Syria*, N.Y. TIMES (Sept. 4, 2013), <http://nyti.ms/10iPpfi>. In Syria, for example, the shifting balance of power in the civil war, the proliferation of questionable armed groups on both sides, the risk of mission creep, and the uncertainty of follow-on consequences from any military strike all demand caution, particularly if one starts from the premise, "first, do no harm."

180. See Ignatieff & Wieseltier, *supra* note 84; Ignatieff, *supra* note 151.

President from lawfully backing his diplomacy with a threat of force in the most dire humanitarian crises.¹⁸¹ As cease-fire discussions proceed, diplomatic intervention backed by a credible threat of force seems far more likely to bring peace in Syria than a do-nothing, nominally “pro-peace” noninterventionist position in Syria that effectively licenses continued civilian slaughter and refugee crises.

With respect to humanitarian intervention, the question raised under both domestic and international law is whether ambiguous legal rules should be interpreted to dictate a systemic bias for inaction at a time when far more assertive preventive action may be indicated. A bi-level bias toward inaction can only spawn more cases of what I once called “The Haiti Paradigm in U.S. Human Rights Policy,” of which the Syrian crisis is only the latest example.¹⁸²

Some charge that the Syria crisis presents a binary choice between following law or protecting human rights.¹⁸³ But as the most powerful nation in the international legal order, the United States sometimes acts as a law-taker, sometimes as a law-breaker, and sometimes as a law-maker. I simply suggest that the continuing gravity of the Syria situation calls for the United States

181. As noted above, the threat of force catalyzed the diplomatic removal of Syrian chemical weapons. *See supra* text accompanying notes 99–100. Professor Johnsen and I both agree that “[a]t a time when our daily news includes a global refugee crisis and terrorist threats, the case for meaningful U.S. leadership and engagement is compelling.” Johnsen, *supra* note 17, at 1070. We further agree that “[w]e should take special care not to empower presidents to respond to humanitarian crises with military force without congressional authorization in ways that would diminish the guiding force of the rule of law.” *Id.* at 1103. Where we disagree is that I think we as lawyers can propose better rules of domestic and international law. History suggests that completing a Kosovo-style intervention in more than sixty days need not seriously “harm rule-of-law values.” *Id.* To the contrary, neither Congress nor the Executive have equated the “rule of law” with an inflexible sixty-day clock in cases where the President has sought lawfully to finish what he lawfully started. Of course, if that residual authority is abused, all three branches have the lawful tools available to them to check it.

182. *See* Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994). My thesis there was that when a global crisis arises, the world too often under-responds to the root causes. As a matter of human rights policy in Syria, for example, the time for more action was earlier not later. But when both the multilateral system and the U.S. government under-responded, the failure to address root causes in a timely fashion led to an overpowering refugee crisis that now swamps Europe, Turkey, Jordan, and Lebanon. The irony is that the policy reaction in both Europe and the United States will now likely be directed against the refugees, not the root causes of the refugee crisis. And if Congress and the courts now legalize the harsh response to the refugees, that will lead to a perversely upside-down human rights policy: one that is too soft on the human rights abusers and too harsh on the innocents who are fleeing from those abusers.

183. *See, e.g.*, Kaye, *supra* note 148.

to explore more thoroughly the *third* option.¹⁸⁴ Nor do I agree that my approach focuses too much “on human rights promotion over the ban on force.”¹⁸⁵ These goals can be mutually reinforcing. There is no inevitable battle between human rights and the rule of law. In carefully limited circumstances, carefully drawn legal rules can protect human rights without undermining a robust general prohibition against force.

Surely we must proceed cautiously to ensure that the road to hell is not paved with good intentions. But is the solution never to explore that pathway, or to proceed down that road carefully in hopes that if we do so wisely, we might be able to make things better in the long run? Plainly, intervention does not always (or even often) make things better. But neither does a blanket posture of “nonintervention even in the face of the grossest abuse” always lead to the optimal long-term outcome.

These delicate situations demand a thoughtful examination of all of our lawful policy options. I agree with Professor Johnsen that “[w]e must not allow short-term challenges, even as compelling as humanitarian crises and terrorism, to blind us to the long-term costs of undermining rule-of-law values.”¹⁸⁶ But neither should we pretend that the domestic and international law rules that govern this situation are so determinate that “rule-of-law values” ban the very policy options that may be necessary to spur the preventive diplomacy that might save lives.

IV. CONCLUSION

In closing, the relationship between humanitarian intervention and the war powers presents a tough problem, which is precisely why I have returned to Houston.

This Lecture has reviewed three recent episodes of humanitarian intervention. My broader point is that we should not go through another such searing episode without reexamining the

184. If a customary legal norm “can come into existence (i.e. become authoritative) only by virtue of the necessarily erroneous belief that it is already in existence (i.e. authoritative),” J.M. Finnis, *Authority*, in *AUTHORITY* 174, 180 (Joseph Raz ed., 1990), it is unclear how a new customary norm can ever come into existence under a system of *opinio juris*. Cf. ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 47–56, 66–72 (1971) (discussing this “circularity” concern). Thus, as the Cuban Missile Crisis example shows, an affirmative effort by the United States and its key allies to move R2P from an extralegal to a customary legal norm will almost by necessity require at the outset what to the legal purist will seem an aggressive, forward-leaning claim of legality that, if repeated enough times by enough actors thereafter, will come to seem as more widely accepted and less disruptive to the existing legal order. I am grateful to David Pozen for this observation.

185. Kaye, *supra* note 148.

186. Johnsen, *supra* note 17, at 1112.

law we apply. Everyone who has worked in government knows that arguing for an evolution in the law is a decision with which both policymakers and government lawyers must grapple. Asking policy-makers to make a false choice between action and legality sends them the wrong message: that when the law gets hard, or stands in the way of urgent action, lawyers are incapable of developing sound legal arguments that can achieve better policy results.

By stating a proposed legal test for R2P, this Frankel Lecture has sought to further my overall aims: promoting the progressive development of and internalization of international law, the positive face of American exceptionalism, the use of “international law as smart power,” and the core principles of the National Security Constitution. I believe that we can and must clarify the international and domestic legal rules governing the use of humanitarian intervention. As a matter of international law, we need to clarify when humanitarian intervention is or is not lawful. As a matter of domestic law, we need to develop a war powers approach to humanitarian intervention that is consistent with a “shared power” vision of constitutional checks and balances and makes more explicit what kinds of humanitarian interventions Congress will or will not accept and for how long.

Professor Johnsen calls my approach here “striking for its emphasis on the role of law, not as a vehicle to constrain overreaching presidents who would do harm, but as an impediment to well-meaning presidents who would do good.”¹⁸⁷ But I have always advocated a vision of a “strong presidency *within* a strong constitutional system”¹⁸⁸ that sees—in Professor Johnsen’s words—the “law powerfully affect[ing] presidents and public policy in both of these ways”: constraining and authorizing. What I have argued here follows from my suggestion more than a quarter of a century ago that

what history reveals is that we need a better process for incrementally amending the National Security Constitution that remains faithful to its original concept, yet flexible enough to respond to fast-moving times. . . . Given the difficulties of obtaining formal constitutional amendment, our more modest goal should not be to freeze any particular allocation of institutional power into a statute, but rather, to create a dynamic legal process that will allow our

187. Johnsen, *supra* note 17, at 1068.

188. Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1, 7 (1995).

postimperial National Security Constitution to evolve over time.¹⁸⁹

Here, such a dynamic legal process presents the challenge to do creative lawyering, by which I mean the law must keep responding to human needs. Lawyers have a special responsibility to respond if the law—as it currently stands—does not adequately serve human purposes in the twenty-first century. As both international and domestic lawyers, our responsibility should not be simply to repeat that “a rule is a rule is a rule,” particularly when—as a matter of both domestic and international law—those “rules” are not nearly as absolutist as some might suggest.

U.S. paralysis at both the international and domestic levels impairs America’s capacity for global leadership, or what I earlier called “positive American exceptionalism.” A “smart power” approach to international diplomacy suggests that a limited use or threat of force should be available to back up multilateral diplomacy in those rare situations where the rigorous legal conditions sketched above are met.

The continuing agony of Syria shows vividly that this is not just an academic nor historical debate. While crucial Syrian diplomacy is unfolding in Geneva, we should not consider this matter closed, but rather, should look even harder for better legal answers. Here, a better answer would clearly be one that would give due respect to territorial sovereignty, without enabling the further deliberate slaughter of innocent civilians with illegal weapons. If international law or the War Powers Resolution cannot adequately balance the moral imperatives presented by today’s conflicts, they should be updated.

Others will surely disagree with my tests for both war powers and humanitarian intervention, but my main goal has been to open debate, not to end it. If my tests are not now the law, why shouldn’t they be? As Louis Henkin prophetically wrote shortly after Kosovo, “Is it better [for us] to leave the law alone, . . . turning a blind eye (and a deaf ear) to violations that had . . . moral justification? Or should [these incidents] move us to push the law along, . . . closer to what [it] ought to be?”¹⁹⁰

189. KOH, *supra* note 5, at 227.

190. Louis Henkin, Commentary, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 827 (1999).