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Inter Arma Enim Non Silent Leges

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There is good reason to think that law and war have nothing to do with one another, and this has certainly been so for most of the lifetime of mankind. Cicero's famous observation—silent enim leges inter arma—from which I take my title, was not a novel insight when uttered in 52 B.C. and in any case was not said in the context of war, but of a prosecution for murder in the aftermath of the Roman riots of that era between the partisans of the *populares* and *optimates*. Clausewitz, however, said much the same thing when he decried moderation in warfare, and expressed contempt for legal rules:

> *War is . . . an act of force to compel an enemy to do our will. . . .* [A]ttached to force are certain, self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force—that is, physical force, for moral force has no existence save as expressed in the state and its law—is thus the *means* of war.[3]

This view of law and war as mutually exclusive has prevailed through most of the various periods in the life of the modern state.

The princely states that dominated Europe during the sixteenth century took the view that the practices of war were governed by necessity, and that a war was just if it was fought on just grounds.[4] By contrast, the territorial states that reigned in the eighteenth century recognized that each side usually thought its cause was just. It was an age of cynicism—or realism, if you prefer—and

1. CICERO, PRO MILONE.

2. Herbert Wechsler Professor of Jurisprudence, Columbia Law School; Director of the Center for National Security Law, Columbia Law School; Distinguished Senior Lecturer, University of Texas Law School.

3. CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832).

4. This idea was also associated with Cicero, by the way.

therefore focused instead on evaluating the practices of war themselves. Imperial state-nations, whose hegemony lasted roughly from the American Revolution until the end of the First World War, took yet a different view. Their intense nationalism—let's call it an early form of "exceptionalism"—tended to justify both means and ends, and in so doing, removed from oversight altogether the acts of state once belligerency was begun.

It was from this paradigm that Philip Marshall Brown wrote in 1918 in the pages of the American Journal of International Law:

> War is the abandonment of litigation and argument. It is the negation of law.... On the field of battle there is no compelling voice of authority to prevent or to punish violations of the usages and rules of war. If the victor has been guilty of infractions, he suffers no penalty. If the vanquished has been guilty, his offenses are expiated incidentally in the larger penalty of defeat itself.[5]

This is the voice of the imperial state-nation, and it holds—as did its champion Clausewitz—that "where the law of peace fails to provide an adequate remedy for international wrongs, it concedes the right of nations to resort to measures of 'self-help' .... The true function of international law is not to regulate war, but to regulate the peaceful relations of states."[6] Once war commences, the law ceases to have effect.

But at the time of this observation, during the First World War (a war that would destroy the constitutional order of imperial state-nations), there was already in being another voice, another constitutional order, that would eventually impose its ideas of law and war on the society of states. In Germany and in the United States, a new constitutional order—the industrial nation-state—was emerging and it had radically different ideas of this relationship.

It might appear paradoxical to state that the first statutory code regulating military behavior was consistent with an increasing ferocity of warfare, but that was, in fact, the contribution of this new form of the state. Its author was an extraordinary man for whose life the birth of this new constitutional world of the nation-state was an animating spirit.

Francis Leiber was born in Berlin and joined the Prussian army at age fifteen. He was wounded shortly thereafter at Waterloo. By the time he sought admission to university he was already well-enough known for his anti-monarchical views to be rejected by the University of Berlin. Hastily moving to the University of Jena he completed his dissertation in mathematics in only four months, just before the authorities caught up with him and he was forced to flee to Dresden. He only briefly resumed his studies because he soon

5. Philip Marshall Brown, *War and Law*, 12 AM. J. OF INT'L L. 162, 163 (1918).
6. *Id.*

volunteered to serve in the Greek Revolution of 1821. By 1825 he had gone to London, by 1827 he was in Boston, and by the time of the American Civil War he was ensconced as a professor in the Columbia Law School—just in time for the birth of the constitutional order of the industrial nation-state. It was there that, at President Lincoln's request, he produced the Lieber Code—General Orders Number 100—that is the basis for the first codified laws of war.

The Lieber Code is widely admired as the foundation of the law of armed conflict, and it has been copied by many states. It was the basis of the Hague Conventions of 1899 and 1907, of which the Geneva Conventions of our own day are descendants. Yet rarely commented on is the nature of the warfare that the Code permitted—large scale attacks on civilian populations and the leadership of the state. Leiber himself was in charge of the incriminating documents seized after the Civil War that established a Union plot to assassinate the Confederate president and his cabinet; these documents were destroyed when Leiber handed them over to the Republican secretary of war, but fortunately photographic copies had been made.

Twentieth century nation-states fought wars against nations, that is, against national peoples, and so it was not surprising that the national mobilizations of the First World War also brought about a new vulnerability for civilians. The Germans, who seem to have been more aggressive with these tactics than their adversaries, were the innovators, if that is the right word, and it cost them dearly in public opinion, but *their* model of warfare—not the one that had dominated the Napoleonic Wars—was the model that states copied. Writing in the midst of the First World War, T.J. Lawrence lamented:

> [M]odern developments have put in great jeopardy the time-honoured distinction between combatants and non-combatants . . . .
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> . . . .
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> This is due to many causes, most of which are connected with the modern growth in the power and authority of the State . . . . [War] is not merely a war of governments, but of peoples. . . . Every ounce of strength each side possesses is thrown into the fight; and the world is beginning to realise for the first time what a war of nations, rather than of armies, means. . . .
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> Not only can the modern State, with its practical omnipotence, put the bulk of its able-bodied males into the field, but it can organise the rest for supply services . . . . Its vast armies require artillery and munitions to an extent that was undreamed of even three years ago. To give them what is essential for their operations other armies of engineers, mechanics, and craftsmen of all kinds have to be organised at home . . . . Is the fighting-man a warrior, and the man or woman who supplies him with the means of fighting a peaceful member of society? . . .
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> . . . Yet side by side with [this development] other agencies have been at work, with the direct object of making civilians suffer . . . . Murder, rape, and

> plunder are no new things in warfare. What is new among civilised Powers is the deliberate planning and encouragement of them as a means of striking terror into the general population, and inducing them to clamour for peace. . . .
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> . . . [I]s it not also possible that [these] atrocities may be copied in other quarters? May they not become precedents for future wars? . . .
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> . . . [T]he great difficulty would remain untouched. It does not lie in the deliberate resort to brutalities forbidden by the laws and customs of civilised warfare, but in the very nature of war when waged on a large scale under modern conditions.[7]

Well, we know what happened next. On average, 16,000 persons died every day of the Second World War, and only a small percentage of these were soldiers. Lawrence had identified precisely the change and its cause: it was a change in the nature of warfare that was changing the nature of the state, and once the state was changed it would wage war in the new way.

How had this happened to law and war in a century—and in an international constitutional order—that was more saturated with legal process than any that had gone before?

The answer is that strategy was driving the development of law, and what strategy demanded was that law become de-coupled from warfare. This was true of constitutional law—where the problems of extended nuclear deterrence defied preexisting legal rules about the commencement of hostilities—and of international law—leading the International Court of Justice to conclude in 1996 that

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict . . . [but that] in view of the current state of international law, . . . the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[8]

Now we are about to see a shift in the opposite direction, as the emerging change in the constitutional order from industrial nation-states to informational market-states brings about a revolution in tactics and strategy. Now, the tactics of targeted killings, the use of unmanned armed drones, the search for insurgents that is empowered by electronic surveillance, and the kidnapping of accomplices for interrogation will replace the strategic bombing destruction of civilian centers that characterized warfare in the twentieth century. Now,

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7. T.J. Lawrence, *The Effect of the War on International Law, in Problems of the War*, 2 BRIT. INST. OF INT'L AND COMP. L. 105, 106-10 (1916).

8. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8).

sitting beside the targeter maneuvering his Unmanned Vehicle (UMV), counseling the politician who must sign the death warrant, or even accompanying the rifle platoon into the contested city, we will find a lawyer.

Recently it was announced that the CIA is launching a new campaign of drone strikes in Yemen, modeled on its controversial program in Pakistan. Similar campaigns are being waged by the Pentagon in Iraq and Afghanistan. In both cases, teams of lawyers are on call to give approval before any strikes are actually made.

> [M]ilitary lawyers are required to make sure that an operation—including the kind of weapons to be used and the risk of civilian casualties—meets with three overarching sets of rules: the laws of armed conflict, official (but top secret) rules of engagement for a given conflict and a set of specific instructions (known as "Spins") drawn up by the commanding officers. Until the lawyers sign off on all three, the senior offensive duty officer cannot request permission from the joint force air component commander to fire weapons such as a Hellfire missile from a drone or use close air support from manned aircraft like the A-10 Warthog.[9]

> The Pentagon now has some 7,000 aerial drones, compared with fewer than fifty a decade ago. . . . Already the Air Force is training more remote pilots, 350 this year alone, than fighter and bomber pilots combined.[10]

Changing technology has made this use of law possible and this, in turn, has considerably raised the bar as to when military strikes are authorized, thus lowering the number of civilian casualties.

Why has this happened now?

Each constitutional order achieved hegemony through an epochal war, which proved the new form to be strategically dominant and began a period of imitation by states that wanted to adopt the new, more successful constitutional form. The new form was ultimately recognized as the legitimate order for other states by the peace congress that concluded the epochal war of the period and sorted out the winnings. This was the history of such congresses going back to Augsburg (1555), Westphalia (1648), Utrecht (1713), Vienna (1815), and Versailles (1919).

The convening of these congresses marked more than the end of belligerency; for the treaties they drafted became the new constitutions for the

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9. Pratap Chatterjee, *How Lawyers Sign Off on Drone Attacks*, THE GUARDIAN (June 15, 2001), http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/15/drone-attacks-obama-administration.

10. Elisabeth Bumiller & Thom Shanker, *War Evolves with Drones, Some Tiny as Bugs*, N.Y. TIMES (June 19, 2011), http://www.nytimes.com/2011/06/20/world/20drones.html?pagewanted=all.

society of states recreated by war. By this method, the new, strategically dominant constitutional order enshrined itself in a new international legal order. It should not be surprising that the war aims of different constitutional orders changed in each era.

Broadly speaking, in the long war of the twentieth century—a war that embraced the First World War, the Bolshevik Revolution, the Spanish Civil War, the Second World War, the wars in Viet Nam and Korea, and the Cold War—three forms of the constitutional order of the industrial nation-state collided. Parliamentarianism, fascism, and communism all contended to be the sole legitimate form of the constitutional order of the nation-state.

Nation-states achieved victories when they were able to include the defeated states within their own ideological camp; for parliamentary nation-states, that inevitably led to granting self-determination to nationalities. For fascist states, victory meant inclusion in a military alliance and the division of spoils; for communist states, victory meant inclusion in an international bloc connected by ideological affinity, whose leadership initially fell to the Soviet Union. In every case, the total warfare of the nation-state demanded total constitutional victory: scrapping the Kaiserreich in 1919 and replacing it with the Weimar constitution, stripping the emperor of Japan of his divinity in 1945, absorbing ancient European states of Central Europe into the Soviet system after the Second World War.

Thus the war aim of the parliamentary states was the eventual inclusion of all societies in an international order defined by its commitment to the democratic ideology of parliamentarianism.

A glance back at previous constitutional orders discloses some marked differences in their war aims. To vastly oversimplify, the sixteenth-century princely state sought to protect the personal perquisites of the prince, especially his religion; the seventeenth-century kingly state attempted to enlarge and consolidate the possessions of the ruling dynasty; the eighteenth-century territorial state tried to enrich its country as a whole (and its aristocracy in particular) by acquiring trading monopolies and colonies; the nineteenth-century imperial state-nation united the state with a dominant national people and sought empire; the twentieth-century industrial nation-state strove to establish a single, ideological paradigm for the legitimate state in an international system of like-minded nation-states. To put it in slightly more technical jargon, the war aims sought by these various (and sometimes overlapping) constitutional orders could be characterized as perquisitive (princely state), acquisitive (kingly state), requisitive (colonial territorial state), exclusive (imperial state nation), and inclusive (nation-state).

Now the constitutional order of the nation-state faces several challenges to its legitimacy arising from the vulnerabilities that are the consequence of the Long War of the twentieth century. That war was won by the development of a global system of trading in goods and services, especially financial services; by

the development of weapons of mass destruction; by a creation of a global network of communications; and by the commitment to national self-determination. None of these existed at the outset of that war in 1914, and many of these developments were contested within the alliances that fought the war, but by the war's end there was a consensus among the parliamentary states on the effective strategy to be pursued. It worked.

Yet each of these developments spawned a new and terrifying vulnerability: a free system of trading and relatively stable currencies brought the United States the possibility of a global, systemic collapse triggered by market decisions that states could not control without opting out of that very lucrative system; weapons of mass destruction (WMD) moved from requiring very expensive plants for nuclear and biological weapons to the verge of the commodification of those weapons such that a state like Pakistan, which cannot manufacture durable bicycles, or North Korea, which maintains a degree of impoverishment unique in its region, became nuclear weapons powers while the simple mechanisms available to brew pubs, coupled with a bit of graduate study in molecular biology, enabled small groups to develop biological weapons more versatile than the pathogens cultured by the Soviet Union at its vast, and illegal, laboratories. The internet enabled the aggregation of dissatisfied and malevolent persons into global networks; and small, interpenetrated ethnic groups glimpsed the chance to finally purge their communities of outsiders in swift and violent pogroms that would then be legitimized by ostensibly democratic means.

In every case the chief winners and losers of these developments were civilians, as states that lost the monopolies they had previously enjoyed over financial markets, military weapons, communications, and statehood itself. The victims of warfare at the beginning of the twentieth century had been ninety percent military and ten percent civilian. These figures were reversed by the end of the century.

Now, the governmental operations of the twentieth-century order of industrial nation-states are foreshadowing elements of its successor, the twenty-first-century informational market state, a state that is more decentralized, more global, more networked, and more outsourcing in its operations than its predecessor.

Market states are coming into being for many reasons, but almost all of them have to do with the empowerment of private individuals. Accordingly, the war aim of market states will be the protection of civilians. Such a war aim, which depends upon the evolving military technological context within which civilians are threatened, might be called *preclusive*. That is, this aim seeks to preclude the exploitation of the increasing vulnerability of civilians to mass threats that, once realized, are largely irreversible.

The strategic narrative of the last fifteen years confirms this: contrast the First Gulf War—in which an invaded member-state of the United Nations was

defended—with the actions in Kosovo and Bosnia to protect stateless civilians; or with the intervention against Saddam Hussein in 2003 to prevent his acquisition of nuclear and biological weapons; or the pursuit of al Qaeda and its associated terror groups; and now the belligerency in Libya, which marked the first time the U.N. Security Council has authorized the use of armed force against a state on the sole grounds of protecting the civilians in that state.

We are entering a novel period, so naturally most commentators are busy assuring us that nothing has changed. This has been especially evident in some persons who, like me, urge that law be brought to bear on our strategic and tactical responses to these emerging developments. Unlike me, however, they deny that warfare has any role in the fight against terror, terror perpetuated by al Qaeda and by states like Serbia, Iraq, Libya, and the Afghanistan of the Taliban. Law is sufficient, they tell us, and furthermore, it must remain unreformed because nothing has really changed, except that we are now credulously being frightened into measures that might indeed change the existing legal framework.

Perhaps the most hilarious example of this was an argument by a law professor that we must not call the struggle against terror a war because it makes combatants out of our adversaries and thus they would be protected from prosecution for murderous acts. Apart from the problem of war crimes, which he evidently has not taken into account, the idea that the only measures available to states are conventional prosecutions and incarceration by lawyers reminds me of the efforts of General Peckem in the novel *Catch 22*. You will recall that Peckem was in charge of Special Services in Pianosa—that is, he oversaw the softball games and the USO shows that brought entertainers to the U.S. troops in Italy—but Peckem wished to be in charge of all combat operations in the area. If combat "isn't a special service," said Peckem, "I wonder what in the world is." If the various subjects of a war against terror aren't matters for lawyers, just what is?

Against this view are arrayed those persons who are very much persuaded that things are changing in a threatening direction, but for that reason cannot see any useful role for law. For them, law is simply an obstacle to be surmounted. One consequence of this perspective is that laws have been interpreted in strained and overreaching ways that later had to be repudiated.

In my view, establishing and maintaining the rule of law is a strategic objective that serves the war aim of protecting civilians. In fact, I would define terrorism as the pursuit of political goals through the use of violence against noncombatants in order to dissuade them from doing what they have a *lawful* right to do. The rule of law is the civilian's best bulwark not only against his own government but against those who would hold him hostage to their political objectives by threatening him with violence. It is the standard by which we give the lie to the claim that "one man's terrorist is another man's freedom fighter." But this means, as General Sir Rupert Smith observed, "that

to operate tactically outside the law is to attack one's own war aim."

When the U.S. has operated in defiance of law—as at Guantanamo, or Abu Ghraib—it has suffered costly losses no less bitter than a loss on the battlefield. This feature of contemporary warfare imposes on governments a necessity to make the legal arguments for their operations. Let me give three examples.

What's the difference between the British government sending helicopters from Canada to seize unarmed leaders of the Irish Republican Army (IRA) hiding in Boston after a bombing they have perpetrated in London, and the recent mission by the United States that killed Osama bin Laden? This question has been posed by the former Bishop of Durham, Tom Wright, in *The Guardian*. The only answer he can come up with is "American exceptionalism. America is subject to different rules to the rest of the world. By what right? Who says?"[11]

I imagine many persons may have entertained this thought, so I venture a reply.

The state of armed conflict that exists with al Qaeda and its associated allies was addressed by the U.N. Security Council in Resolution No. 1368, which called "on all States . . . to bring to justice the perpetrators, organizers and sponsors of the [9/11] terrorist attacks" and which, in its preamble, explicitly recognized the U.S. right of self-defense under the U.N. Charter in response to the attacks.[12] It is routinely said by persons who oppose NATO involvement in Afghanistan that this intervention was not "authorized" by the U.N. Security Council, but this is a rather clever half-truth. The U.S. did not seek Chapter 7 authorization—of the kind, for example, that authorizes action against Libya—but rather strongly preferred to rely on its Article 51 right of self-defense. The right to use self-defense can be preempted by the Security Council, but this was not proposed by any member, and indeed Resolution No. 1368 was unanimously adopted.

In a speech the next month by U.N. Secretary General Kofi Annan, following American and British air strikes in Afghanistan, he acknowledged Article 51's provision of a right of self-defense as the basis for military action in pursuit of al Qaeda. An authorization for the use of force against the terrorists who mounted the 9/11 attacks was also affirmed by a joint resolution of U.S. Congress that authorized the use of all "necessary and appropriate force" against those who "planned, authorized, committed, or aided" the September 11th attacks.[13] Such a resolution, signed by the President and adopted by both houses of Congress, has the force of law. This state of affairs, under both under international and constitutional law, did not exist between the

11. Tom Wright, *America's Exceptionalist Justice*, THE GUARDIAN (May 5, 2011), http://www.guardian.co.uk/commentisfree/belief/2011/may/05/america-lone-ranger.

12. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

13. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

UK and the IRA; indeed, the UK government took great pains to resist the claim that it was engaged in a war with the IRA. So I think there is really a better answer to the question "by what right" than the handy formula "American exceptionalism."

As to whether bin Laden was in fact "unarmed" when, as a fugitive, he was found in a heavily fortified compound, was assisted by an aide who fired at the team sent to find him, and was ultimately found in a room in which a fully loaded automatic Kalashnikov was present, I am not persuaded. In light of his many statements that he would not be taken alive, the assumption on the part of the U.S. force that the room might have been wired with explosives or indeed that he himself might have a suicide vest does not seem unreasonable when bin Laden did not immediately surrender. The suggestion that the facts, as we know them, do not support a legal conclusion that the U.S. team acted within the laws of war is extremely strained. Nor is it the case that those persons planning and executing attacks against the United States are entitled to a legal safety zone when they ensconce themselves outside Afghanistan. Indeed, international law is quite clear that if a state is unable or unwilling to arrest such persons, the state against whom the attacks have been directed has a right to use force—including lethal force—in its self-defense.

Here is a second case.

It is commonplace for persons to refer to the invasion of Iraq in 2003 as unlawful. By this they usually mean that Iraq had not attacked the members of the invading coalition—and thus there was no Article 51 justification for armed action—and that the U.N. Security Council had not authorized an armed attack because, owing to opposition by France and other Council members, it failed to adopt a resolution that would have authorized action.

It is certainly true that U.N. Resolution No. 1441 contemplated a return to the Council before an armed action would be undertaken, and it is also true that various representatives of the member-states—including the U.S. ambassador—were anxious to deny that Resolution No. 1441 should be construed to provide an automatic trigger for action should Saddam Hussein fail to comply with its ultimatum.[14] But that does not quite settle the matter. Let's go back to the statement made by the U.S. ambassador at the time of the adoption of 1441, John Negroponte, and see exactly what he said:

> [T]his resolution contains no "hidden triggers" and no "automaticity" with respect to the use of force. If there is a further Iraqi breach, . . . the matter will return to the Council for discussions as required in paragraph 12. The resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And, one way or another, Iraq will be disarmed. *If the Security Council fails to act decisively in the event of further Iraqi violations,*

14. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

> *this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security.*[15]

That is to say that although Resolution No. 1441 did not authorize action—and although a subsequent resolution could have done so with more specificity than was present in earlier resolutions such as Resolution No. 678—there was ample legal basis in the earlier resolution for state action against Iraq.

> That mandate was not only the legal basis for the military action that freed Kuwait in 1991, it remained central to the legal position thereafter, because Resolution 678 was not limited to the liberation of Kuwait but it authorised the coalition states to use force for the broader goal of restoring "international peace and security in the area."
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> To achieve that broader goal, the Council decided that Iraq must rid itself not only of all weapons of mass destruction but of all raw materials and programmes for the development of such weapons and do so under close international supervision. These steps were made conditions of the ceasefire, laid down in Resolution 687, after the liberation of Kuwait. They were legally binding on Iraq and were accepted by Saddam Hussein's Government, although it never honoured them.[16]

What most commentators have overlooked is that whatever states may have had in mind in refusing to endorse a second resolution, they did not have the votes to repeal the earlier one that remained in force. Indeed, Resolution No. 1441 itself made this clear. Importantly, various proposals that would have amended Resolution No. 1441 to require a further decision by the Council were ultimately not included the text.

When it finally considered a second resolution the Council did not reject military action, it was simply unable to agree on next steps. In that situation, the states of the coalition simply fell back on the preexisting Council decision, which had neither been repealed nor modified.

All this was obscured by the fact that so many persons—including some of the leaders of the coalition—neglected to make this legal case for action and instead preferred to pin their legitimacy on Saddam Hussein's presumed possession of WMD. But this was never the legal issue; that issue turned, quite the contrary, on Iraq's obligation to permit inspections that would certify not only that all such weapons had been destroyed, but that there were no framework programs by which new weapons could be created, and this Iraq

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15. U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/PV.4644 (Nov. 8, 2002) (emphasis added).

16. Christopher Greenwood, *Britain's War on Saddam Had the Law on Its Side*, TIMES (London), Oct. 22, 2003, at 22.

resolutely refused to do. As I urged at the time, it was not Saddam Hussein's possession of WMD, but rather his willingness to acquire and use them once sanctions were lifted that was at issue. It was not preemption, but rather preclusion that was sought.

In my final example, let me turn to Kosovo and the persistent constitutional question of whether the U.S. administration acted lawfully when it used force against Serbia to prevent further massacres of civilians, but did not seek a declaration of war or other explicit authority from Congress. The Administration relied upon special congressional appropriations statutes that authorized the expenditure of monies to conduct the Kosovo operations; these, the Administration claimed, amounted to implicit authorizations. But what of the War Powers Resolution, which provides that statutory authorization "shall not be inferred (1) from any provision of law . . . , including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities."[17]

I argued some years ago in the *Michigan Law Review* that, on the contrary, such language could not have lawful effect because it ran afoul of the important constitutional principle that, as the U.S. Supreme Court put it in *Marbury v. Madison*, "legislative acts . . . [are] alterable when the legislature shall please to alter [them]."[18] I wrote:

> If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference—as does . . . the original War Powers Resolution is without legal effect . . . . Imagine, for example, a statute that provided that no appropriations or authorization provision shall exceed a term of six months . . . . [Such] a rule of interpretation, [would] contravene[ ] a valid constitutional power . . . [because it] would amount to a restriction on the ability of a Congress to repeal by inference preexisting law. Such a fresh hurdle to later legislation is nowhere authorized by the Constitution and is inconsistent with the notion of legitimacy derived through the mandate of each new Congress.[19]

And I am pleased to report that the Department of Justice in 2000 officially accepted my view, quoting the language I have just quoted, and concluding: "this argument is compelling."[20] With respect to international law, I would only note that Resolution No. 1244 of the U.N. Security Council authorized a NATO force in Kosovo after the initial fighting, apparently ratifying *nunc pro*

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17. 50 U.S.C. § 1547 (2006).

18. 5 U.S. (1 Cranch) 137, 177 (1803).

19. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1399 (1994).

20. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000) (quoting Bobbitt, *supra* note 19, at 1399), *available at* http://www.justice.gov/olc/final.htm.

tunc the initial NATO action.

All of the examples I have given are controversial; some lawyers and law professors are bound to disagree with them. Does that mean that no legitimacy attaches to a strategic policy when it is supported by legal analysis that is not unanimously endorsed? Or that some legal rationale can always be found for even the most hare-brained policies?

This attack on law—for that is what it is—misunderstands the nature of law and all that we have learned about legal processes in the twentieth century. It is simply not the case that because constitutional lawyers may disagree, *any* proposition of law is supportable. Anyone who believes this should try it out, not on a gullible audience, but on judges and administrators with the power of decision. Rather, it simply means that law is often pluralistic but rarely indeterminable. What is important is that our legal rules are debated, that the grounds for our legal choices are explicit, and that those grounds are evaluated in legal rather than political terms.

In the upcoming months and years we will have to decide what rules to enforce in dealing with the following tactics:

1. Increased surveillance, both optical—with close-circuit television cameras (CCTV)—and digital, scanning e-mails and other internet traffic, a tactic often referred to as data mining;
2. The detention of persons who can be neither released into the public nor tried successfully by conventional criminal methods, or the temporary detention of persons for relatively short periods during which they can be investigated in order to determine whether they should be bound over for trial;
3. Targeted killings, including killing by remotely controlled UMV;
4. Extraordinary rendition;
5. The limits of coercive interrogation;
6. Freezing access to money accounts;
7. Action to prevent the proliferation of WMD for the purpose of compellance rather than deterrence;
8. Actions to prevent genocide and ethnic cleansing, or other attempts at mass killing;
9. Responding to cyber-attacks as acts of war;
10. Medical reporting, quarantine, and forced inoculations to mitigate the consequences of epidemics.

The question I want to press is whether these practices should be abandoned or adopted by the armed forces and intelligence agencies of the democracies without explicit statutory authorization and thus debate in a parliamentary forum.

I have been largely encouraged by the Obama Administration's evident

concern with melding law and strategy. This can be seen quite clearly in the recent decision to overrule the recommendation of the Pentagon that bombers be sent to strike bin Laden's compound, in favor of the much riskier commando operation that was far safer for the civilians in the neighborhood. It is telling, I think, that the Administration sent two of its top lawyers—the legal adviser to the State Department and the White House Counsel—to explain the legal basis for the raid to the public.

There have been disappointments, to be sure—the Administration backed away from its promise to seek statutory authority for detentions though this has now been rectified by Congress, and I would prefer that the United States consider sending terrorists to the International Criminal Court for prosecution—but on the whole, beginning with the reform of the Foreign Intelligence Surveillance Act, the United States has shown an increasing awareness of the importance of laws to strategy.

In my last book, *Terror and Consent*,[21] I made a number of quite specific proposals for the reform of both international law and domestic law. For my long-suffering readers who are not lawyers, these must be among most tedious pages in that book. Therefore, I was a bit surprised when I read a review by a London professor of international relations that claimed there were, in fact, no concrete proposals at all in my book. The only possible contribution of my book to the struggle against terror, my reviewer said, would be if it were dropped on the head of a terrorist. On its face, the claim that there were no specific proposals in *Terror and Consent* baffled me.

The only explanation for this I can think of is that most of my proposals had to do with law reform, the reshaping of law to correspond to changes in the strategic environment. And it may be that a professor of international relations simply cannot imagine that law would have any role in the conduct of international and strategic affairs.

Let me make this point clear: law reform, in itself, does not legitimate a state's strategic and tactical practices and innovations. After all, the Nazis had laws. It is only when this law corresponds to the basic norms of our constitutions and of international human-rights law and the laws of armed conflict that this is achieved. Simply passing a statute cannot legitimize torture or murder or imprisonment without due process. But the failure to pass statutes that do comport with constitutional and international law—and to have the public debate that accompanies lawmaking in a democracy—sacrifices one of the chief sources of legitimacy for our practices.

Strategies of preclusion are especially vulnerable to challenges to their legitimacy, and to conspiratorial explanations of the "true" motives behind them, because they depend upon guesses about the future that, were they

21. PHILIP C. BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008).

successful, will ensure that that future never comes about. As French sociologist Marc Augé lamented, "Everything is happening as though the future could no longer be imagined except as the memory of a disaster which we only have a foreboding of [at present]."

President Clinton has often remarked that the greatest failure of his two terms in office was the failure of the United States to intervene in Rwanda to stop the killing of Tutsis and moderate Hutus in 1994. Suppose the United States had intervened. What would have happened? My own judgment is that the President would have been impeached by the Republican Congress that took office in January 1995, but that can only be a surmise. What we can know for sure is that American lives would have been lost in a conflict for which there was no public support, and that innocent Rwandan civilians would inevitably have been killed even in the most successful circumstances (indeed, the use of drones in Afghanistan, which has doubtlessly lowered drastically the number of civilians casualties there in military operations, is now the source of a potential break in relations with the state we are trying to save).

If President Clinton had attempted to justify a Rwandan intervention by saying that 800,000 lives had been saved—an astounding number—who would have believed him?

Developing legal standards for preclusive actions is an urgent matter for the international community because the war aim of market states is not the acquisition of territory or the forced adoption of any ideology or the rejection of any religion—it is the protection of civilians. The growing threat to civilians posed by groups and states that turn on their neighbors or their own people has given a new urgency to preclusive measures, including theater missile defenses, extended deterrence, and regional denuclearization. It is the threat to civilians that links intervention on humanitarian grounds, intervention to prevent the development and deployment of nuclear and biological weapons, and intervention to deny sanctuaries to terrorists.

It happens that I am now writing a book on Machiavelli, and I would like to leave you with a remark of his taken from *The Discourses*: "Though [extra-legal measures] may do good at the time, the precedent thus established is bad, since it sanctions the usage of dispensing with constitutional methods for a good purpose, and thereby makes it possible, on some plausible pretext, to dispense with them for a bad purpose."[22]

22. NICCOLÒ MACHIAVELLI, THE DISCOURSES 195 (Bernard Crick ed., Pelican Classics 1970) (1513-1517).