

#### “Donald Trump and the Limits of International Law”<sup>1</sup>

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One of the most common words associated with the candidacy and then presidency of Donald Trump has been ‘unprecedented.’ The President himself has even tweeted it, although his spelling (“unpresidented”<sup>2</sup>) occasioned some ridicule. We hear that Trump has an unprecedented amount of billionaires in his cabinet, an unprecedented number of business conflicts of interest, an unprecedentedly long list of unfilled government positions so far into his term, an unprecedentedly high security budget to cover his weekend trips to Mar-a-Lago, and so forth. Commentary on Trump’s approach to international law has been no exception, stressing its unprecedented or at least highly unusual character. Candidate Trump threatened to “cancel” the Paris climate change accord, “break” the North American Free Trade Agreement, and defy international and domestic legal prohibitions on torture “in a heartbeat.”<sup>3</sup>

This essay focuses on the Trump administration’s approach to international law, mainly regarding the use of armed force. Media and professional descriptions of Donald Trump’s attitude toward the laws of war betray the same tendency we observe in other domains. Retired military officers protested when Trump declared in March 2016 that “the problem is we have the Geneva conventions, all sorts of rules and regulations, so the soldiers are afraid to fight.” They “reacted with disgust” and declared him “monumentally unprepared” to

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<sup>1</sup> This essay was written in early May 2017.

<sup>2</sup> Adam Gabbatt, “[‘Unpresidented’: Donald Trump invents the Guardian’s word of the year](#),” *The Guardian*, 19 December 2016.

<sup>3</sup> BBC News, “[Donald Trump would ‘cancel’ Paris climate deal](#),” 27 May 2016; Justin Worland, “[Donald Trump Says He Would Break NAFTA](#),” *Time*, 27 September 2015; Julian Hattem, “[Trump would approve waterboarding ‘in a heartbeat’](#)” *The Hill*, 24 November 2015.

serve as president.<sup>4</sup> Critics denounced Trump's cavalier attitude toward the use of military power. He vowed to "bomb the hell" out of the Islamic State. After offering a seemingly perfunctory rejection of the use of nuclear weapons, candidate Trump alarmed the commentariat by adding that "we have to be prepared. I can't take anything off the table."<sup>5</sup> A month before assuming office he tweeted that the United States must "greatly strengthen and expand its nuclear capability," prompting a solemn warning from the *New York Times* reporters who covered the story of "the potential dangers in setting policy, especially on such grave matters, in Twitter bursts and offhand remarks." Nuclear deterrence, they explained, "is normally a complicated subject debated in academic treatises and negotiated over years by diplomats."<sup>6</sup>

Such reactions provoked Trump's exasperated supporters on the editorial board of the *New York Post* to complain, barely a month into the new administration, that "President Trump practically can't sneeze without critics calling it unprecedented or over the top."<sup>7</sup> They have a point. There are important differences already evident in the way the Trump administration approaches international law relative to his predecessors' record—not only in the President's reliance on Twitter to convey his views. But the consequences of those differences in areas where the law should matter—compliance with the Geneva Conventions, harm to civilians from aerial bombardment, recourse to use of military force, attitudes toward production and deployment of nuclear weapons—are far less evident than the alarmed tone of foreign-policy experts and the establishment media would indicate. This essay focuses in particular on the three lawyers who preceded Donald Trump as president and what their approaches to international law yielded in terms of U.S. compliance with treaties governing weapons and the use of force abroad.

The main body of law on the use of armed force is known as International Humanitarian Law, the term typically preferred by civilian legal experts and the International Committee of the Red Cross, and the Law of Armed Conflict, more often used by military professionals. Key legal concepts draw upon Catholic just war tradition, including *jus ad bellum*, the conditions under which resort to war is justified, and *jus in bello*, the practices considered acceptable during armed conflicts. The main legal instrument governing the first domain is the Charter of the United Nations, with its prohibition on the use of force between states, embodied in Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." The one exception, acknowledged much later in the document, is Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security

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<sup>4</sup> Spencer Ackerman, "[Trump attack on Geneva conventions denounced by ex-officers and advocates](#)," *The Guardian*, 31 March 2017.

<sup>5</sup> Jenna Johnson, "[Donald Trump promises to 'bomb the hell out of ISIS' in new radio ad](#)," *The Washington Post*, 18 November 2015; Rebecca Kheel, "[Dems seek to limit Trump's options for using nuclear weapons](#)," *The Hill*, 24 January 2017,.

<sup>6</sup> Michael D. Shear and James Glanz, "[Trump says the US should expand its nuclear capacity](#)," *New York Times*, 22 December 2016.

<sup>7</sup> "[Please stop calling everything Trump does 'unprecedented'](#)" (editorial), *New York Post*, 7 February 2017.

Council has taken measures necessary to maintain international peace and security.”<sup>8</sup> A literal reading of the inherent right of self-defense permits the use of military force against another state only “if an armed attack occurs.” Because traditionally international law was mainly the law of states, there is no provision in the Charter for dealing with or even defining an “armed attack” by a non-state actor, such as a terrorist group. Thus, state leaders and their legal advisers have devoted considerable efforts to justify military action against nonstate actors under a broad definition of the inherent right to self-defense.

The most prominent bodies of law governing the *jus in bello* of actual combat are the 1949 Geneva Conventions and their two additional protocols from 1977. Originally designed to protect prisoners of war and wounded soldiers and sailors, the Geneva regime has come to encompass what was earlier known as “Hague law” (covering military practices and weapons) and to expand protections for civilians caught up in warfare and under military occupation. Also relevant are international treaties, such as the Genocide Convention (1948), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Rome Statute (1998), which established the International Criminal Court (ICC); as well as treaties limiting particular weapons, such as the Nuclear Nonproliferation Treaty (1968), and conventions banning antipersonnel landmines (1997) and cluster munitions (2008).

To make a long story short, the United States has signed many, but not all, of these treaties, ratified some of them only after decades of delay, and has adhered unevenly to its obligations. This is the record against which to judge the legal compliance of the Trump administration. Perhaps most significantly, previous administrations have been attentive to legal interpretation of U.S. treaty obligations and have typically sought to shape understanding of the law to legitimize U.S. practices, rather than allow others’ interpretations of the law to constrain those practices. It is not yet clear the extent to which the Trump administration will mimic this approach to the law.

Under President Bill Clinton, the United States participated in the negotiations for the Rome Statute. Concerned about several provisions of the treaty, Clinton did not sign it until December 2000, after the Republicans won the presidential election, and he never submitted the treaty to the U.S. Senate for advice and consent on ratification. In fact Clinton recommended that his successor not do so until U.S. concerns were resolved. Nor did he seek ratification of the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT). President George W. Bush went a step beyond Clinton’s cautious approach to the ICC and simply withdrew the U.S. signature, indicating that the United States would not be bound by the treaty. Candidate Bush had campaigned against the CTBT and in favor of building ballistic-missile defenses. He vowed to “back out” out of the 1972 treaty banning antiballistic missiles systems (ABM Treaty) if the Russians did not agree to revise it (to permit what it was intended to ban). They did not and he did: in December 2001, the Bush administration exercised its legal option to abandon the treaty, with the required six months’ notice. In short, presidential ambivalence about international treaty commitments is nothing new, nor are campaign vows to abandon existing treaties, albeit usually expressed in more decorous language than Donald Trump’s.

A key element of U.S. presidents’ approach to international law is their understanding of its relationship to domestic law. For the *jus ad bellum* dimensions, the U.S. Constitution and the War Powers Act of 1973 are

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<sup>8</sup> Charter of the United Nations, Chapter I: Purposes and Principles, <http://www.un.org/en/sections/un-charter/chapter-i/>; Charter of the United Nations, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, <http://www.un.org/en/sections/un-charter/chapter-vii/>.

the relevant instruments, where only Congress has the authority to declare war. For *jus in bello*, the president acts as commander in chief during time of war, but must abide by the law. The Uniform Code of Military Justice, governing the armed forces, incorporates provisions of the Geneva Conventions, as the treaties intended—so a soldier, for example, who deliberately murders a civilian would be tried not for violating international but rather U.S. military law. There are also domestic laws that overlap with international treaties, such as 18 U.S. Code Chapter 113C banning torture and providing penalties up to life imprisonment for conspiracy to commit torture.

What distinguishes Trump in the domain of international law on armed force is familiar from other policy areas: his erratic and attention-seeking personality; factual knowledge that barely extends beyond what he sees on television; a disregard for and willingness to invent facts; and a lack of grounding in any discernable or consistent ideology or policy framework. Trump's two immediate predecessors—George W. Bush and Barack Obama—both embraced recognizable, if not fully developed, philosophies or policy orientations toward presidential use of force and adherence to law. We know about their views on law (better than about Clinton's, for example) because of an explosion of interest in the topic that coincided with a growth in the prominence of legal advice on the use of force in the White House and within the Pentagon. Books by the Pulitzer Prize-winning *New York Times* journalist Charlie Savage and the activist/law professor/Defense Department official Rosa Brooks, for example, have provided detailed accounts of debates over legal issues within the Bush and Obama administrations.<sup>9</sup> Interest in international law regarding war is represented by vibrant discussion in the blogosphere, with contributions by former officials who participated in policy debates, on sites founded within the last dozen years, such as [Opinio Juris](#) (2005), [Intlawgrlls](#) (2007), [EJIL: Talk!](#) (2008), [Lawfare](#) (2010), and [Just Security](#) (2013). What difference has this interest in law had on actual U.S. behavior, and will the Trump administration represent a significant change?

The George W. Bush administration was influenced by a group of legal scholars whom Jens David Ohlin calls the New Realists, people such as Jack Goldsmith, Eric Posner, Adrian Vermeule, and John Yoo.<sup>10</sup> Paradoxically, these critics used legal analysis to demonstrate that in time of war the law is irrelevant (or silent, as Cicero put it). New Realists are a bit like Republican and libertarian politicians who run for office on an anti-government platform. The New Realists make legal arguments to assert that the law—at least international law—does not matter. The legal theory (if it merits that designation) underpinning the New Realists' policy, particularly promoted by Vice President Dick Cheney, was that of the 'unitary executive.' It bestowed upon the President, under his authority as Commander-in-Chief, the right to ignore international legal obligations, such as the ban on torture or the Geneva Conventions.

Although a political scientist, rather than a lawyer, Condoleezza Rice, former National Security Adviser and Secretary of State under G.W. Bush, conveyed the implications of the unitary-executive theory when asked about her well-documented authorization of torture. The *Washington Post* reported her response: "The president instructed us that nothing we would do would be outside of our obligations, legal obligations, under the Convention Against Torture," Rice said at Stanford, before adding: 'And so, by definition, if it was

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<sup>9</sup> Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (New York: Little, Brown & Company, 2015); Rosa Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon* (New York: Simon & Schuster, 2016).

<sup>10</sup> Jens David Ohlin, *The Assault on International Law* (Oxford: Oxford University Press, 2015).

authorized by the president, it did not violate our obligations under the Convention Against Torture.’ Critics said the remark bore echoes of former president Richard M. Nixon’s notorious statement, ‘When the president does it, that means it is not illegal.’”<sup>11</sup>

Barack Obama, the former constitutional law professor, sought to bring his military policies into better compliance with law, at least at the domestic level, by appealing to Congress and its 2001 Authorization for Use of Military Force (AUMF). Under that law, “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [terrorist](#) attacks that occurred on 11 September 2001.”<sup>12</sup> To extend that authorization to include the use of armed force against Yemen, Sudan, Somalia, Syria, and Iraq, not to mention the Islamic State (ISIS), which did not exist in 2001, seemed too much of a stretch for many observers. Obama’s lawyers, led by Harold Hongju Koh, sought to comply with the War Powers Act by declaring that its terms did not apply to Obama’s wars. When the administration left troops in Libya beyond the period by which it was required to seek congressional approval, for example, Koh reinterpreted the statute to make the practice legal. He redefined the term, “hostilities” to include only situations when U.S. forces were in harm’s way.<sup>13</sup> With that redefinition, much use of U.S. military power, if the harm were inflicted disproportionately on the target state without risk to U.S. forces, would escape congressional authority. University of Chicago law professor Eric Posner slyly likened Koh’s legal gymnastics to John Yoo’s redefining torture (in his infamous “torture memos” of 2002) in the service of waterboarding, sleep deprivation, “rectal feeding,” and the other practices that followed.<sup>14</sup>

One may doubt, then, whether growing attention to law by the U.S. government, academia, the media, and the informed public has led to better compliance with the letter or the spirit of laws restraining the use of force. In the domain of air power, for example, Janina Dill has made a compelling case that the legalization of warfare in the Pentagon, even if there is literally “a lawyer behind every targeteer,” has not necessarily led to law-abiding behavior. She finds that U.S. military operations lead to far more harm to civilians than a stricter reading of legal obligations would yield.<sup>15</sup> If we have already reached the limits of what law can achieve in restraining civilian harm in war, how much more damage could the Trump administration do?

The pre-Trump record of U.S. adherence to the laws of war is spotty at best. In the domain of *jus ad bellum*, President George H.W. Bush launched the 1991 Gulf War to expel Iraqi President Saddam Hussein’s armies from Kuwait, with the legal authority of the UN Security Council, as the UN Charter prescribes. President

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<sup>11</sup> Alec MacGillis, “[4<sup>th</sup>-Grader Questions Rice on Waterboarding](#),” *Washington Post*, 4 May 2009.

<sup>12</sup> 107<sup>th</sup> Congress of the United States, 115 Stat. 224, Public Law 107-40 (18 September 2001), <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

<sup>13</sup> Testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State on Libya and War Powers before the Senate Foreign Relations Committee, 28 June 2011.

<sup>14</sup> Eric R. Posner, “[Stop Complaining about Harold Koh’s Interpretation of the War Powers Act](#),” *New Republic*, 1 July 2011.

<sup>15</sup> Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge: Cambridge University Press, 2014).

Bill Clinton embarked on the North Atlantic Treaty Organization's (NATO) first war ever in March 1999 to expel Serbian President Slobodan Milošević's armies from Kosovo without such authority. Given that Kosovo was a province of Serbia, and not, like Kuwait, a sovereign state, NATO could not make the case that it was responding to an invasion by Serbia (even though Serbian forces were attacking Kosovar Albanians); thus its military action violated the legal prohibition on the use of armed force. Proponents of the war justified it with reference to past failures to prevent mass atrocities in Rwanda and Bosnia, and the emerging norm of the 'responsibility to protect,' but that did not change its legal status.

George W. Bush initiated a war in Afghanistan in response to the 9/11 terrorist attacks, with the apparent blessing of the Security Council. By contrast, his administration's advocacy of war against Iraq during the course of 2002—culminating in the invasion of March 2003—faced clear opposition from the Security Council as well as many U.S. allies. Even without the trumped-up evidence of Saddam Hussein's pursuit of weapons of mass destruction, the invasion was illegal, absent an Iraqi attack on the United States or Security Council authorization.

The Bush administration's conduct of what it called the Global War on Terror entailed many more crimes, including kidnapping ('extraordinary rendition') and brutal torture of suspected terrorists at Guantánamo, at Abu Ghraib prison in Iraq, at Bagram air base in Afghanistan, and at CIA 'black sites' throughout the world. It held Guantánamo prisoners in indefinite detention, without putting them on trial; many, in any case, had not committed any crimes and were there by mistake.

Barack Obama and his lawyers sought to put behind them the legacy of Bush administration crimes, by seeking to close the Guantánamo facility and by calling such 'enhanced interrogation techniques' as waterboarding by their true name—torture. But they deliberately refrained from investigating their predecessors' actions, and even helped block lawsuits against John Yoo on grounds of national security. They thereby violated an international legal obligation under the Torture Convention to investigate when there is evidence that the crime has been committed. Even the heavily redacted executive summary of the 2014 report on CIA torture practices by the U.S. Senate Select Committee on Intelligence provided ample details of torture and complicity at the highest levels. By making opposition to torture a matter of policy, rather than law, the Obama administration left open the likelihood that a subsequent administration would resume the practice.

Ironically, the Obama administration's legal arguments against the Bush policies contributed to its own legally dubious practice—the widespread use of 'targeted killings' by armed drones in countries where the United States was not at war. As the *New York Times* reported, "the administration's very success at killing terrorism suspects has been shadowed by a suspicion: that Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive."<sup>16</sup> Drone attacks pose problems for *jus in bello* when the targets are too broadly defined—all males of a certain age in a particular area, for example—and for *jus ad bellum* when they are used against countries where there is no recognized armed conflict in which the

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<sup>16</sup> Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, 29 May 2012.

U.S. is involved. Critics expressed concern that the Obama administration's policies, however well vetted by lawyers, made resort to war too easy.<sup>17</sup>

Within his first hundred days in office Donald Trump made headlines by engaging U.S. military forces against Afghanistan and Syria. Both actions set precedents of a sort, and followed precedents of another sort. The launching of cruise missiles against an air base in Syria in April represented the first major use of U.S. force against the regime of Syrian President Bashar al-Assad, although U.S.-armed forces from Saudi Arabia, Qatar, and Turkey have been actively involved in the war there, and the U.S. has been training and sending weapons to opposition forces since at least 2012. Trump's decision to attack Syria came in the wake of reports of the regime's use of chemical weapons, much as Obama contemplated retaliation in response to the regime's chemical attacks of 2013. Obama hesitated and sought congressional approval before using military force, but Congress was unwilling to grant it. Trump did not consult Congress, but informed it two days after the attack, acting in compliance with the War Powers Act. Thus, both Obama and Trump generally adhered to domestic law governing the use of force. But neither President had the authority to bomb a sovereign country—even one ruled by a brutal dictator in the midst of a civil war—because the United States was not subject to armed attack from Syria. There is no law that gives the U.S. armed forces the authority to enforce the terms of an international treaty (the Chemical Weapons Convention in this case) by launching 59 cruise missiles against violators, as even Bush administration lawyers have acknowledged.<sup>18</sup>

Perhaps more significant than the fact that the Trump administration violated international law by attacking Syria is how little that mattered to the public or punditry. Hillary Clinton, former Secretary of State and Trump's rival in the 2016 presidential campaign, endorsed the attack. Cable news commentators were fulsome in their praise: "I think Donald Trump became president of the United States last night," Fareed Zakaria announced on CNN. "For the first time really as president, he talked about international norms, international rules, about America's role in enforcing justice in the world."<sup>19</sup>

In the attack against Afghanistan, the Trump administration approved use of the GBU-43/B massive ordinance air blast (MOAB) bomb, with 11 tons of explosive force, one of the most powerful non-nuclear weapons in existence. The weapon was developed during previous administrations, with a total program cost of \$314 million, which produced about 20 of the bombs, at a unit cost of about \$13 million. So Trump's was the first administration to use the weapons, but presumably they were built to be used. The target was a cave complex suspected of hiding Islamic State fighters, and the legal justification for targeting a group that did not exist when the Congress passed its 2001 authorization for the use of force in Afghanistan was unclear. The Pentagon set no precedent in its failure to investigate or report on the numbers of civilians killed in the

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<sup>17</sup> Matthew Evangelista, "[Is War Too Easy?](#)" *Perspectives on Politics* 14:1 (March 2016).

<sup>18</sup> John Bellinger, "[What Was the Legal Basis for the U.S. Air Strikes Against Syria?](#)" *Lawfare* (blog), 6 April 2017.

<sup>19</sup> Rob Torno, "[Dan Rather Blasts Journalists Who Called Trump 'Presidential' after Syria Missile Strike.](#)" *Philadelphia Inquirer*, 8 April 2017.



attack (although the Afghan government did): that was closer to standard practice.<sup>20</sup> As we worry about the harm that a Trump administration, oblivious to the requirements of international law, might inflict on innocent civilians worldwide, we should bear in mind that hundreds of thousands of civilians have perished in the wake of the U.S. invasions of Afghanistan and Iraq, regardless of how well-crafted the legal arguments advanced to justify them.<sup>21</sup>

Donald Trump's vow to "bomb the hell" out of U.S. enemies, and refusal to take nuclear weapons "off the table," combined with his mercurial personality, erratic temperament, and poor self-control, understandably give rise to worries that he will use U.S. military force, perhaps even nuclear weapons, indiscriminately. His predecessors have helped set the stage for him to do so. The "mother of all bombs" (MOAB) may have been the biggest non-nuclear weapon launched by the United States, but to call the attack unprecedented obscures the extent of destruction wrought in the ongoing campaign. By May 2016, for example, the U.S. and its allies had dropped 41,697 bombs in their war against ISIS and Obama's Secretary of Defense Ashton Carter planned to ask Congress for \$1.8 billion to buy another 45,000 new ones. The commander of U.S. forces in Korea complained that the "loss of cluster bombs could deplete the U.S. military's stockpile in the Pacific." By "loss," he did not have in mind the removal of these weapons from the arsenal because they violate the Convention on Cluster Munitions, signed by more than a hundred countries (but not the United States). He worried that they were being transferred to the Middle East for use against ISIS and would no longer be available to use in Asia.<sup>22</sup>

Barack Obama, who advocated a world without nuclear weapons in a speech in Prague in 2009, left office after approving a nuclear "modernization" program estimated to cost \$348 billion by 2024. So Donald Trump can claim credit for strengthening U.S. nuclear capability without lifting a finger. The fear, of course, is that he *will* lift a finger and put it on the nuclear button. Here again the Obama administration provided the wherewithal. It approved production of a nuclear weapon called the B61 Model 12 that is touted as more "usable" because of its accuracy and the ability to dial down its explosive yield to 0.3 kilotons or 300 tons.<sup>23</sup> What if Trump's military advisers identify a target that requires more than what the 11-ton MOAB can destroy? What if some of those advisers are the same ones who convinced Obama to approve more "usable" nuclear weapons? In such a situation, the constraints of international law on the use of force—weak during the best of times—will reach their limit, and we will face a genuinely unprecedented catastrophe.

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<sup>20</sup> Peter Beaumont, "[Moab Attack on ISIS Was a Baffling Choice in Cold-blooded Terms of Costs](#)," *The Guardian*, 14 April 2017; Neta C. Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (New York: Oxford University Press, 2013).

<sup>21</sup> Brown University, Watson Institute for International and Public Affairs, The Costs of War Project, <http://watson.brown.edu/costsofwar/>.

<sup>22</sup> Marcus Weisgerber, "The US is Raiding its Global Bomb Stockpiles to Fight ISIS," *Defense One*, 26 May 2016.

<sup>23</sup> Matthew Evangelista, "[Blockbusters, Nukes, and Drones: Trajectories of Change over a Century](#)," *The Asia-Pacific Journal: Japan Focus* 14:23:3 (1 December 2016).



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