FOREWORD

"Projecting Power in the Shadows: Unconventional and Conventional Statecraft After the AUMF":

An Introduction to the Workshop Essays

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Prussian strategist Carl von Clausewitz once wrote that the first duty of the general and the statesman is to understand the nature of the war upon which they are embarking. And it was with that in mind that the American Bar Association Standing Committee on Law and National Security and the Harvard National Security Journal held a workshop at Drexel University's facilities in Washington, D.C. in December 2013.[1] The papers that make up this issue were presented at that workshop. The discussion focused on the United States' response to terrorism and the way it has tethered new technologies to blended legal powers to create unprecedented lethality around the world. Complicating the task has been the conflation of ends, means, ways, technology, and the evolution of international and domestic legal doctrines—the pace of which has been semi-glacial when compared to the rapidly changing battlefield.

The workshop, entitled "Projecting Power in the Shadows: Unconventional and Conventional Statecraft After The AUMF," explored

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the current legal framework that supports U.S. special activities (military operations and intelligence activities) abroad and questioned whether laws should or need to be changed in order to accommodate new technologies and future threats. A key underlying assumption of the discussion was that the United States would need to further its national security interests outside "hot conflict zones" through low-visibility means such as cyber operations, unmanned operations, and other special operations and intelligence activities.

Government lawyers, military and intelligence operators, and members of the academic/think tank community discussed military-intelligence convergence issues (Titles 10, 18, 22, 32, and 50) and the covert or clandestine projection of power in the shadows under two circumstances: under the current Authorization for Use of Military Force ("AUMF") as well as a in hypothetical world with no AUMF. Participants discussed the current legal debates, identified anticipated challenges, and explored new or revised legal structures. The intent was to produce a number of scholarly papers to be published in the Harvard National Security Journal to spark debate and discussion.

Among other things, participants sought to better understand the "convergence among military and intelligence activities, institutions, and authorities" reinforced by an "array of policy, budgetary, institutional, and technological developments."[2] This convergence has produced calls for enhanced accountability within the Executive Branch, more information sharing with Congress, a clearer statement of jurisdiction for Title 50 operations, and, more recently, a clarification of authorization and accountability for cyberspace.[3]

The following questions guided the sessions:

U.S. National Security Law (Article II, Title 10/Title 50): Are there U.S. national security law issues related to the convergence of military—intelligence authorities that need to be reformed (for example, Titles 10 and 50 and, to a lesser degree, Titles 18 and 22)? What are the President's constitutional authorities and responsibilities? What is the role of Congress in setting parameters and exercising oversight? Does the law of armed conflict apply outside of Department of Defense operations? How do we

[2] *See* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 539–40 (2012).
[3] *Id.* at 543–44.

reconcile 50 U.S.C. § 413b with both the new global conflict and emerging technology? What constitutes "traditional military activities" in analyzing that provision? Should there be congressional action similar to Goldwater-Nichols to encourage and/or require interagency task forces for partnership?[4]

International Law and the Use of Force (*jus ad bellum*): Do clandestine or covert operations trigger the same rules under international law? What international legal restrictions apply to assisting insurgent or dissident groups? Is covert action necessarily illegal under international law? What, if anything, is the difference between cyber espionage and the cyber theft of commercial information? Is the Leahy Law applicable to covert action?[5]

International Law and the Use of Force (*jus in bello*): As a matter of domestic or international law, what are the challenges posed by *jus in bello* to special activities? Are the rules adequate to address new technologies and new conflicts or do they need to evolve? Has U.S. policy on the conduct of military operations over the past eleven years—both inside and outside of the declared theater of active armed conflict—shifted how we implement international law in a non-international armed conflict ("NIAC")? How should we characterize activities such as "advance special operations" and "preparation of the environment" in relation to the rules governing *jus in bello*? What rules should and do govern the use of armed naval auxiliaries in international armed conflict ("IAC") and NIAC—as offensive weapons or as screening facilities and LOAC detention facilities? What are permissible roles for civilians (including indigenous surrogates) in NIAC and IAC? Do these roles include civilians' launching and recovering armed/unarmed remotely piloted vehicles (for example, in the air, sea, and undersea) or piloting manned/unmanned intelligence collection platforms (the laser designation of targets)? Does geography or special context impose unique limitations upon remotely piloted intelligence collection platforms?

The recent events in Ukraine and the policy options for response have made the issues covered in these essays even more pertinent and relevant. As discussed by Todd Huntley and Andrew Levitz, Russia's activities highlight the use of "surrogates" in the modern national security environment. In the words of Michael Adams, the essays are exploring the

[4] Goldwater–Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99–433, 100 Stat. 992 (1986).
[5] 22 U.S.C. § 2378d (West 2014).

domestic and international legal justifications for "statecraft in the shadows." Classic doctrines of international law—sovereignty, nonintervention, lawful targets, and state and institutional responsibility—are also explored in the papers. That said, the papers that follow ultimately turn on the idea of legitimacy: when force is projected and when the covert or clandestine actions are revealed or leaked, will third parties be persuaded that the efforts and tactics are legitimate, proportional, and lawful? In essence, is the legal-policy framework responsible and accountable? Not all the issues touched upon in the workshop generated papers. For example, more work on cyber security and the application of the law of armed conflict to this domain clearly needs to be done. But it is our hope that the issues and papers we have produced will encourage more writing and thinking on these and other related questions.

On the issue of how international law interprets "intervention," Michael N. Schmitt and Andru E. Wall in their thoughtful article *The International Law of Unconventional Statecraft* explore the ramifications of unconventional statecraft when it violates international law's prohibition on the use of force.[6] The question they seek to answer is: when does unconventional statecraft constitute an "armed attack" that legitimately triggers the right of self-defense on the part of the target state? The discussion sets the framework for the papers by discussing how unconventional intervention by degree and scope is understood as a *jus ad bellum* issue. To answer this fundamental international law question, the authors characterize the forms of intervention—humanitarian aid, intelligence, training, logistics, weapons, and joint operations—in light of the basic UN Charter principle of sovereignty and the distinction of "use of force" under Article 2(4) and "armed attack" in Article 51.

The essay reviews the International Court of Justice standard set in *Military and Paramilitary Activities in and against Nicaragua.* The Court in this case held that funding, supplying, training, and militarily supporting insurgents in another country amounts to intervention. The United States does not *per se* agree with that interpretation. In fact, it is unclear whether both authors are in total agreement on all aspects of how to analyze the alleged "gap" between "use of force" under Article 2(4) and "armed attack" in Article 51. The table at the end of the article helps characterize the issues for the reader and will be a useful guide for future discussion, particularly in the area of cyber.

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[6] Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 Harv. Nat'l Sec. J. 349 (2014).

Michael Adams builds on the Schmitt and Wall international law discussion in *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*.[7] In the wake of the winding down of the war in Afghanistan, Adams reasons that the United States can continue the fight against terrorism as a "transnational armed conflict" under the existing AUMF. Moreover, as a sovereign right—outside of a conflict or AUMF—the United States could employ intelligence capabilities ("HUMINT" and "SIGINT") under the Article II power, the rules established by Executive Order 12,333, and international law.

For Adams, *jus extra bellum* is the legal basis for national security activities outside of armed conflict—the state's right outside of conflict to defend itself. Adams argues this right is not boundless and should be used for the betterment of the international community. Using historical examples, such as the Cuban Missile Crisis, the Lotus Principle, legal international doctrine (primarily the UN Charter), U.S. domestic law, and judicial review, his argument is built upon the idea of lawful restraint. If and when the war ends, the AUMF is repealed, and we are no longer under international humanitarian law, our counterterrorism policy will follow a set doctrine, he argues, on the use of lethality as a last resort, the criminal law paradigm, domestic detention laws, and the U.S. interpretation of international human rights law. In this new world of *jus extra bellum*, Adams ends his analysis with an emphasis on intelligence—a new paradigm of Identify, Integrate, Implement, Exploit, Analyze ("I3EA") to replace or build a Whole of Government approach on the battlefield methodology : Find, Fix, Finish, Exploit, Analyze ("F3EA"). For Adams, *jus extra bellum* provides a "framework for transforming the tension between security obligations and the desire for peace into smart and proportionate national security activities."[8]

In *Controlling the Use of Power in the Shadows: Challenges in the Application of Jus in Bello to Clandestine and Unconventional Warfare Activities*, Todd C. Huntley and Andrew D. Levitz attempt to provide greater understanding of the challenges in applying *jus in bello* to clandestine and unconventional warfare ("UW") activities.[9] What is the

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[7] Michael J. Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 Harv. Nat'l Sec. J. 377 (2014).
[8] *Id.* at 458–59.
[9] Todd C. Huntley & Andrew D. Levitz, *Controlling the Use of Power in the Shadows: Challenges in the Application of Jus in Bello to Clandestine and Unconventional Warfare Activities*, 5 Harv. Nat'l Sec. J. 461 (2014).

status of surrogates, and how is the principle of "distinction" under *jus in bello* applied? As noted by the authors, the state "is now confronted with an ever increasing number of transnational terrorist and criminal organizations, non-state armed groups, and super-empowered, networked individuals challenging and threatening the national security and foreign policy interests of sovereign states."[10]

The article begins with a skillful and helpful set of definitions for covert action, covert operations, clandestine activities, and special activities—since UW refers "to a broad spectrum of clandestine and/or covert activities and operations conducted by, with, and through surrogate forces, who are sponsored and supported in varying degrees by an external source and directed against opposing state and non-state actors."[11] There has been a long history of traditional military affairs UW—or the use of military advisors in hostile environments to organize, train, equip, and advise armed "irregulars"—including the Native American Scouts hired by the U.S. Army after the Civil War. UW has a classic doctrine with techniques, practices, and a set of seven phases: preparation, initial contact, infiltration, organization, buildup, employment, and transition. The components of the operations are characterized into three groups: guerillas (combatants), underground (intelligence, sabotage, etc.), and auxiliary (support elements).

Even with this typology, all is not clear. Legally, is the use of surrogates permissible under LOAC? For what purposes are they "lawful combatants" particularly in non-armed conflict zones? Can a member of a non-state organized armed group lawfully engage in hostilities? For Francis Lieber, of the Lieber Code, there were two categories: partisans (tied to the government and protected) and guerillas (robbers and pirates who enjoyed no privileges of protection under war). Under the recent Additional Protocol I ("AP I") to the Geneva Conventions, to which the United States is not a party, irregular forces and civilians can be granted combat status. The United States has resisted signing AP I over concerns that "AP I would legitimize terrorist groups who lacked state sponsorship and therefore could not be held accountable for their actions."[12] Moreover, recognition of irregular armed groups during wars of national liberation was problematic due to the issue of identifying the responsible "government" supporting a legitimate armed group, as well as the Soviet Union's perceived practice of

[10] *Id*. at 463.
[11] *Id*. at 469.
[12] *Id*. at 487.

using surrogates to overthrow lawful governments for its own interest. Recent history, for example in the Ukraine, has helped to underscore this concern.

This use of surrogates, terrorist organizations, and revolutionary movements has bedeviled lawful targeting. Given the principle of distinction, when is a civilian a "direct participant in hostilities" ("DPIH") and a lawful target? The legal experts have set out three criteria for DPIH in some Interpretive Guidelines but there has not been universal agreement:

> 1. The act must be likely to adversely affect the military operations or military capacity of a Party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
>
> 2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
>
> 3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[13]

But what of financial supporters? How do we characterize the support chain for deploying improvised explosive devices? Is the purchaser of the detonator not a lawful target, but the warehouse owner is? The article provides an elegant discussion of these legal dilemmas for surrogates and recognizes the vital need to determine and formalize their combatant status so that the legitimate protections they might have under the law of armed conflict can be universally recognized.

Gregory Raymond Bart's *Special Operations Forces and Responsibility for Surrogates' War Crimes* shifts the focus to the tactical level, or to *jus in bello* rules, and explores "whether SOF teams have duties under the law of war—as interpreted by war crimes jurisprudence—to

[13] ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (Nils Melzer ed., 2009), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf.

investigate and to attempt to prevent war crimes by surrogate forces."[14] The article focuses "on the duties of SOF teams in the field—their tactical actions—and not those of higher, strategic, or policy-level decision makers."[15] In short, what are SOF's responsibilities in conducting UW when the surrogates are suspected of, or have committed, war crimes? The legal test Bart sets out for command responsibility to be held accountable for the actions of surrogates requires three elements: (1) a superior/subordinate relationship; (2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate; and (3) failure by the superior to halt, prevent, or punish the subordinate. Relying on analysis of the cases from the International Criminal Tribunal for the former Yugoslavia ("ICTY")—The Prosecutor v. Blaskic, The Celebici Judgment, Delalic, and The Prosecutor v. Kvocka—Bart concludes that SOF might be criminally responsible for surrogates' war crimes if the team had actual knowledge of the surrogates' criminal purpose and intent and provided military assistance to the surrogates in committing the crimes. The analysis is fact-specific to establish legal standards for "effective control," "influence versus effective control," "the duty to investigate war crimes," "the duty to report surrogate's war crimes," and "the duty to intervene." Unless there is effective control or the individual has actual or constructive knowledge and fails to halt, prevent, or punish the surrogate, there is no general legal duty under the law, though Bart recognizes there might be "strong moral, ethical, and even practical motives to do so."[16] He concludes by suggesting four rules of guidance for SOF based on the ICTY cases:

> 1. Report all information to higher authority;
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> 2. Attempt to influence or intervene to prevent the war crime, but only as practicable within the limits of the mission and your own safety;
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> 3. If unsuccessful, separate, detach, and disengage from the surrogates and from providing any further military assistance; and

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[14] Gregory Raymond Bart, *Special Operations Forces and Responsibility for Surrogates' War Crimes*, 5 Harv. Nat'l Sec. J. 513, 515 (2014). The article does not address duties imposed by domestic statutes or regulations. Nor does it address crimes such as "aiding and abetting, joint criminal enterprise, conspiracy, and contribution. Like command responsibility theory, these theories exist on the international level in the ICC Statute and the ICTY Statute and domestically in the Uniform Code of Military Justice." *Id*. at 524.

[15] *Id*. at 515.

[16] *Id*. at 533.

4. Await further guidance from higher authority.[17]

Bart argues that at the end of the day the success or failure of UW may depend more on the moral and practical reactions to war crimes rather than the legal defenses and obligations in the face of them.

As I have noted elsewhere, the United States is not a signatory to the International Criminal Court and AP I, nor does the United States follow the international standard for command responsibility as stipulated by the Protocol.[18] Our domestic legal codes and international conventions set the framework for our views of the rule of law and individual responsibility. On the individual level, take, for example, the contrast between the UCMJ and AP I under the Geneva Conventions when malfeasance takes place in a military command. How do these two regimes institutionally hold military commanders responsible? What is the standard of culpability under the two legal regimes?

This issue is demonstrated when comparing the *mens rea* (guilty mind), *actus rea* (guilty act), and actual knowledge obligations under the UCMJ with AP I, where Articles 86 and 87 represent the codification of the command responsibility doctrine. The combined articles state standard for both failure to act and duty to act:

Article 86. Failure to Act

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was

[17] *Id*.
[18] The next few paragraphs are partially drawn from one of my previous articles. *See* Harvey Rishikof, *Institutional Ethics: Drawing Lines for Militant Democracies*, 54 JOINT FORCE QUARTERLY 48, 49–51 (2009).

> committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
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> *Article 87. Duty of Commanders*
>
> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Understanding that commanders have unique responsibilities to ensure their troops' observance of the law of war, Article 87 sets out in general terms what a commander must do to meet those obligations—this is the "knew or must have known" standard that was used in the Yamashita military tribunal.[19]

After World War II, General Tomoyuki Yamashita was held responsible by the tribunal for the brutal atrocities and crimes of his troops committed in the Philippines, and the judges rejected his claims that he never ordered, gave permission for, or had knowledge or control of the

[19] In re Yamashita, 327 U.S. 1 (1946).

troops' actions. The tribunal concluded that since the acts were not sporadic but methodically supervised by the officers, he had not provided effective control of the troops as was required by the circumstances.[20] The defense of not knowing, or not being directly involved, was not enough.

For the purposes of the concept of institutional ethics, the point is that Congress, by accepting the criminal common law standard and not the Yamashita standard or the international standard of AP I (since the United States is not a signatory), establishes a different set of institutional incentives and obligations for our command structure. This institutional difference becomes particularly acute when we deploy jointly with our allies, who approach the issue of malfeasance under the "knew or should have known" obligation versus the more restrictive "direct knowledge" requirement for U.S. law.

The final paper produced for the workshop, while not on the AUMF, concerns the President's domestic intervention power and how to understand the use of the military, National Guard, and militia in times of federal emergency and crisis. It is a story of how presidents in times of emergency, with the support of U.S. Supreme Court interpretations, have evolved, exercising and sharing power with the participation of the Congress and individual governors. Michael Bahar's *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States* is a wonderfully researched historical essay on the evolution of presidential authority and federalism prior to the ratification of the Constitution and as well as the evolution of the Constitution's Militia Clauses: Article I, Section 8, clauses 15 and 16 and Article IV, Section 4.[21] Starting with the Federalist Papers, Bahar masterfully weaves the critical events of our constitutional history as presidents asserted their federal

[20] As noted by commentators, scholars still debate what the case means for command responsibility. Some have contended that Yamashita created a strict liability standard, while others maintain that the Yamashita standard is that a commander may be held criminally liable if he knew or should have known of the commission of war crimes by his forces. Still other scholars have contended that the Yamashita standard is that liability should attach if the commander knew or must have known of the war crimes. Finally, others argue that the real issue for the tribunal was General Yamashita's total ignorance and complete delegation of authority, which created an unacceptable risk of harm for future crimes. *See* Victor Hansen, *What's Good for the Goose Is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 357–58 (2006–2007).

[21] Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 Harv. Nat'l Sec. J. 537 (2014).

authority to use force against the states, often over taxes and rebellion—from Shay's Rebellion of 1786, the Militia Act of 1792, the Whiskey Rebellion of 1794, the Militia Act of 1795, Fries's Rebellion of 1799, the Insurrection and Enforcement Acts of 1807, the War of 1812, South Carolina's Tariff Nullification Acts of 1832, the Rhode Island Dorr Rebellion of 1842, the Cushing Opinions of 1854, the Civil War of 1860, and the KKK Act of 1871 to the assertion of *posse comitatus* in the aftermath of hurricanes Katrina and Sandy. The story describes critical U.S. Supreme Court cases in their historical context to illustrate how the Court has come to view the President's power in times of emergency—for example, *Martin v. Mott*, *Perpich v. Department of Defense*, *Luther v. Borden*, *In re Debs*, and *In re Neagle*. The Founders feared a "standing army" and wanted to protect state authority while empowering the federal government to act in the defense of the union. Bahar reasons that:

> [T]he Founders struck a compromise between liberty and security, with militias as the lynchpin. They authorized a national army, but they retained the militias, and in those militias would be the sword of the republic and the shield against tyranny. State militias, normally at the command of the state governors and able to be constitutionally called forth only for defensive purposes, became the primary military weapon of the Republic. Over years to come, they successfully served as a foundational feature of federalism, checking presidential power to wage war as well as hindering the President's ability to conduct foreign policy.[22]

In Bahar's reading, Article IV, Section 4 was the *obligation* of the federal government to intervene, with state consent, while the Militia Clauses provide a *means* to do so. Consent was not required from the states for Congress to "execute the laws of the Union, suppress insurrections or repel invasions." As noted in the article, if presidents acted too heavy-handed in asserting authority, elections were a powerful corrective mechanism. For example, after Adam's intervention in the Fries's Rebellion, eastern Pennsylvania went Republican, and as a rejection of Jefferson's role in the Embargo Enforcement Act of 1808, the opposition in the next election picked up twenty-four seats in the Northeast where that exercise of power was most resented. When exercising this presidential authority, martial law need not be declared. Indeed, the use of criminal law in Article III courts suffices. Over time, despite the rocky historical road of the militia, the U.S.

[22] *Id*. at 544.

National Guard has evolved into a powerful presidential tool, whether under Title 32 or Title 10, as President Eisenhower demonstrated during the racial integration of schools in Little Rock, Arkansas. The military has been deployed under *posse comitatus* in national emergencies and insurrections, and the presidency has secured U.S. Supreme Court authority to respond. Bahar's hope is that his article makes clear that:

> [E]ven in the absence of an explicit, statutory list of situations in which the troops can be used to restore public order after a major public emergency, the power is still there. The authority may be found in Title 10, Title 18, Title 32, or in the Constitution itself, but when individual states cannot or will not keep the peace in the face of armed opposition, equitably enforce the law, or preserve public health and safety for all, the power is there.[23]

The essays cover a wide range of issues. It is our hope they engender more light than heat and more scholarship sparked by insightful analysis. I think we all agree more work is needed.

[23] *Id*. at 630.