



*INTERNATIONAL LAW AND
ARMED CONFLICT
IN THE OBAMA
ADMINISTRATION*

Keynote Address
Non-international Armed Conflict in the 21st Century
Naval War College
Newport, Rhode Island

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June 22, 2011



How Has the Obama Administration Followed LOAC?



1. Role of Government Lawyers on NIAC issues
 2. In NIAC—detention, detainability, targeting, bin Laden
 3. In Libya
 4. To Preserve Interoperability
 - ICC
 - Landmines
 - Clusters
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Role of Government Lawyers



- As Part of a Coalition
 - As Part of National Governments
 - As Lawyers for Particular Governmental, Intergovernmental Agencies, or Nongovernmental Entities concerned with the Laws of War
 - The Particular Role of MFA Lawyers, i.e., State Legal (“L”):
 - Counselor
 - Conscience
 - Defender
 - Spokesperson
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POTUS



President Obama : “a new era of engagement has begun,” where respecting the law and “living our values doesn’t make us weaker, it makes us safer and it makes us stronger.”





Secretary Clinton



American foreign policy must “use ‘smart power,’ the full range of tools at our disposal,” including respect for law, to place “diplomacy [at] the vanguard of foreign policy.”



An Emerging “Obama-Clinton Doctrine”



1. Principled Engagement
 2. Diplomacy as a Critical Element of Smart Power
 3. Strategic Multilateralism
 4. Following Rules of Domestic and International Law
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President Obama: Obeying Law in Armed Conflict



National Archives Speech (5/09) “We are indeed at war with al Qaeda and its affiliates. ...To deal with this threat ... [we need] an abiding confidence in the rule of law and due process.”

Nobel Prize Speech (12/09) “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, ... the United States of America must remain a standard bearer in the conduct of war.”



After 9/11: Our Overriding Commitment



The Obama Administration is committed to complying with all applicable law-- including the laws of war, the Constitution and laws of the United States -- in all aspects of the ongoing armed conflicts in Afghanistan, Iraq, and against al Qaeda – in particular, detention operations and targeting.



Detention Operations and International Law



- Under domestic law, we rest our detention authority in the NIAC with Al Qaeda on a statute – the 2001 AUMF – as informed by the principles of the laws of war
 - This Administration expressly acknowledges that international law informs the scope of our detention authority, authorized by Congress in the AUMF.
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Authority to Detain Under International Law



- Common Article 3 and AP II recognize --and U.S. Supreme Court recognized in *Hamdi*--detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of armed conflict.
 - In Afghanistan, we continue to operate in Afghan territory based on self-defense, consent and (for NATO/ISAF operations) a Security Council Resolution that authorizes “all necessary measures”
 - Our general approach of looking at “functional” membership in an armed group is many cases similar to the targeting approach taken in ICRC’s Direct Participation in Hostilities (DPH) study.
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Humane Treatment: This Administration reaffirmed



Once detained, all persons in U.S. custody must be treated humanely as a matter of law, and that the United States does not, and will not, torture

- Instructed the CIA to close any detention facilities and shall not operate such detention facilities in the future.
 - Required that the ICRC be given appropriate notice and access to any individual detained by the US in any armed conflict.
 - Ordered a comprehensive review of all Guantanamo detentions and mandated that GTMO detention conform to all applicable laws governing conditions of confinement, including GC Common Article 3.
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Humane Treatment



- Ordered a review of U.S. transfer policies to ensure that they do not result in the transfer of individuals to face torture or for the purpose or effect of undermining or circumventing U.S. obligations to ensure humane treatment
 - Amended the military commissions law, including to bar the admissibility of any statements taken as a result of cruel, inhuman or degrading treatment.
 - Instructed that interrogations must be conducted in accordance with GC Common Article 3 and the revised Army Field Manual (which had the effect of forbidding, inter alia, waterboarding)
 - Said the U.S. will now seek Advice and Consent to AP II and will comply with AP I, Art. 75 in IACs out of a sense of legal obligation
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U.S. Courts



- DC Circuit has largely accepted our *theory of detainability*: we may detain individuals who have joined with or become “part of” al Qaeda or Taliban forces or associated forces, as demonstrated by relevant evidence of formal or functional membership.
 - *Al-Bihani v. Obama* (D.C.Circuit 2010): En banc D.C. Circuit treated as dicta suggestion by 2 panel members that international law did not inform the scope of our domestic detention authority under AUMF.
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GTMO: National Archives Framework



1. Article III courts
 2. Revised Military Commissions
 3. Transfers
 4. Law of War Detention with Due Process
 5. Humane Treatment
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March 7 Actions on Detainee Policy Reaffirmed the Archives Framework



1. A continued commitment to *civilian trials*
 2. Resumption of *Military Commissions*
 3. Continuing efforts to promote *safe transfer* of Gtmo detainees
 4. Executive Order on *Periodic Review* to ensure that any prolonged detention is carefully evaluated and justified.
 5. Strengthening *humane treatment guarantees* by support of Additional Protocol II and following Article 75 of Additional Protocol I to the 1949 Geneva Conventions in IACs out of sense of legal obligation
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We remain committed to closing GTMO: from 242 to 171



1. 1 detainee (Ghailani) tried, convicted and sentenced in SDNY to life imprisonment for 1998 embassy bombings
2. 67 transferred to 24 different destinations; 59 approved for *transfer* (including 27 Yemenis)
3. 30 more Yemenis approved for *conditional detention*
4. 36 referred for *prosecution* to either Article III courts or military commns
5. 46 designated for continued *law of war detention*.

POTUS: “It’s not for lack of trying. It’s because the politics are difficult.”



Why Haven't We Closed GTMO?



The President cannot close GTMO by himself. We need help from our allies, Congress, and the Courts

Congress has already imposed certain legislative restrictions and is poised to impose more

Terrorism prosecutions in Article III courts are succeeding:
e.g. Reid, al Marri, Padilla, Zazi, Shahzad, Ghailani

Closing Guantanamo consistent with our values will improve our standing in the international community.



Six Important Obama Administration Principles



1. *Domestic Law*: Detainability Based on Legislative, Not Inherent Constitutional Authority
 2. *International Law*: Express Use of Domestic Authorities consistent with the Laws of War (even if courts urge us not to)
 3. *Humane Treatment*: Absolute Ban on Torture and CIDT; commitment to ratify AP II, and to follow API, Art. 75 out of legal obligation
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Six Obama Administration Principles



4. *A Combined Law of War/Law Enforcement Paradigm*
 5. *Geographic Scope of the War on Terror: Not a “GWOT.”* We support only those actions that fall under the AUMF and are consistent with the laws of armed conflict.
 6. *A Fact-Based, not Label-Based Approach to Law of War Analysis:* The Relevant question is not “Enemy Combatant,” but “Do the facts show that this particular person is Part of AQ and Associated Forces”?
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Targeting Practices



- ❑ U.S. targeting practices comply with all applicable law, including the laws of war.
 - ❑ The US is in an *armed conflict* with al-Qaeda, as well as the Taliban and associated forces, and in response to the 9/11 and subsequent attacks, may use force consistent with its *inherent right to self-defense* under international law. As five recent failed efforts show, al-Qaeda has not abandoned its intent to attack, and continues to attack the US.
 - ❑ Under domestic law, *Congress authorized* the use of all necessary and appropriate force through the AUMF.
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Legal Theory re Use of Force



- *Who*: In this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use lethal force, to defend itself, including by *targeting persons such as high-level al-Qaeda leaders who are planning attacks*.
 - *Where*: depends upon such considerations as *imminence* of the threat, *sovereignty* of the other states involved, and *willingness and ability* of those states to suppress the threat
 - *How*: great care is taken to adhere to the laws of war and in particular to ensure that only to ensure that only legitimate military objectives are targeted and that operations in all other respects comply with the principles of proportionality and distinction.
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Four Issues re Targeting: It is *Not* Illegal



1. *To target a particular enemy leader in an armed conflict*
 2. *To use advanced weapons systems, such as *unmanned aerial vehicles*, for lethal operations.*
 3. *Engaging in armed conflict or legitimate self-defense against specific individuals is not *unlawful extrajudicial killing* nor is the state in armed conflict required to provide targets with judicial process*
 4. *Use of lawful weapons systems-- consistent with the applicable laws of war-- for precision targeting of specific high-level belligerent leaders in self-defense or during an armed conflict *does not constitute unlawful "assassination."**
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Bin Laden Operation



- Whether: Bin Laden's unquestioned leadership position within al Qaeda and his clear continuing operational role made him the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda.
 - In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use lethal force against him, a threat that materials seized during the raid have only further documented.
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Bin Laden Operation



- How: the manner in which the U.S. operation was conducted—taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—followed the principles of distinction and proportionality, and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm’s way.
 - Consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.
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Libya: International Law



The U.S. actions were part of a multilateral response to a call for action by the Libyan people, the Arab League, the U.N. Security Council, and NATO. After Qaddafi flouted Resolution 1970, Resolution 1973:

1. Authorized under Chapter VII; situation in Libya threatens international peace and security.
 2. Reiterated the Responsibility of the Libyan authorities to protect the Libyan population.
 3. Authorized “all necessary measures,” inc. use of force to:
 - a. enforce a no-fly zone,
 - b. protect civilians and civilian-populated areas under threat of attack.
 4. Authorized enforcement of an arms embargo.
 5. Expanded the asset freeze that had been instituted under 1970.
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Libya



On March 1, the Senate by unanimous consent supported a No-Fly Zone, and we have been closely consulting Congress regarding the situation in Libya. The President notified Congress, consistent with the War Powers Resolution that U.S. military actions in Libya would be:

1. limited in nature, duration and scope,
 2. conducted in partnership with an international coalition,
 3. aimed at preventing an imminent humanitarian catastrophe,
- and on April 1, OLC opined this did not constitute “war” for constitutional purposes, requiring prior congressional approval
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Our Libya actions are Lawful



1. UNSCR 1973 Reiterated the responsibility of the Libyan authorities to protect the Libyan population.
 2. Under Chapter VII, 1973 Authorized use of force to: (a) enforce a no-fly zone; (b) protect civilians and civilian populated areas under threat of attack; (c) enforce an arms embargo.”
 3. Authorized an expanded asset freeze and affirmed its determination to ensure that assets would be made available to the people of Libya.
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Our Actions Are Consistent with the War Powers Resolution



- The Administration would welcome the support of Congress in Libya, and has indicated its strong support for the bipartisan resolution introduced yesterday by Senators McCain, Kerry, et al.
 - At the same time, our current U.S. military operations in Libya are consistent with the War Powers Resolution because U.S. military operations are distinct from the kind of “hostilities” contemplated by the Resolution’s 60 day termination provision.
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Libya War Powers Factors



1. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo.
2. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces
3. U.S. operations do not involve the presence of U.S. ground troops, U.S. casualties or a serious threat of U.S. casualties, or any significant chance of escalation into a conflict characterized by those factors.

The question now is for Congress.



Three Questions about Interoperability



- Closer U. S. Engagement with the ICC
 - Cluster Munitions: The CCW and Oslo Processes
 - Landmines: the Ottawa Process
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U.S. History with the ICC



- ❑ U.S. Prosecuted War Crimes and Aggression at Nuremberg and Tokyo and Promoted Concept of ICC
- ❑ Clinton 1995 Dodd Center Speech Favors ICC Concept
- ❑ U.S. Did Not Sign Rome Treaty in 1998, but Did Sign 12/00
- ❑ President Bush “Unsigned” in Spring 2003, but Court Came into Force With More than 130 States Parties
- ❑ By 2006, US Did Not Vote Against Sudan Referral, and State/L “U.S. Accepts Reality of the Court”
- ❑ 2010 U.S. is Engaged Participant at Kampala
- ❑ 2011, U.S. Votes for Unanimous Libya Referral

We have shifted the default to greater engagement



2011 Kampala Review Conference



The Kampala Review Conference supported the Court's core work in combating atrocities – genocide, war crimes and crimes against humanity. This agenda for the Court clearly warrants our support.

It also adopted two new crimes (aggression and the Belgian Amendment) but as nonstate parties US persons are not subject to prosecutions, absent US consent.

“Understandings” were adopted to mitigate at least some of our concerns about the definition, and the amendments will be reconsidered in seven years and would not go into effect absent a separate decision of the state parties.



Clusters



Recent GGE sessions at the CCW have been productive and have helped to re-energize the cluster munitions negotiations.

The U.S. is committed to concluding a legally binding protocol within the CCW on cluster munitions, and believes that significant humanitarian benefits would be obtained by bringing the major users and producers of cluster munitions under a legally binding protocol, designed to be complementary rather than contradictory to the Oslo Convention.



Landmines



We initiated a deliberative, in-depth, and comprehensive review of our landmines policies in January 2010.

We have discussed this review with a number of NATO partners and have sent delegations to ask how accession to the Ottawa Convention has affected interoperability issues.



In Closing



- ❑ The U.S. is Deeply Committed to Applying the Laws of War to its NIAC with Al Qaeda, with respect to both Detention and Targeting
 - ❑ We have acted lawfully against Bin Laden and in Libya
 - ❑ We Have tried to square our Emerging National Security Policies with the need for Interoperability, with respect to the ICC, Cluster Munitions & Landmines
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THE END