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Drones and the International Rule of Law

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The international rule of law hinges on the existence of a shared lexicon accepted by states and other actors in the international system. With no independent judicial system capable of determining (and enforcing) the meaning of words and concepts, states must develop shared interpretations of the law and the concepts and terms it relies on, and be willing (mostly) to abide by those shared interpretations. When such shared interpretations exist, key aspects of the rule of law can be present even in the absence of an international judicial system; state behavior can be reasonably predictable, nonarbitrary, and transparent; and accountability can also be possible, albeit mainly through nonjudicial mechanisms.

U.S. drone strikes represent a significant challenge to the international rule of law.[1] This is *not* because recent U.S. drone strikes "violate" international law; ironically, they might be less destabilizing, from a rule-of-law perspective, if they could be easily categorized as blatant instances of rule-breaking. Rather, U.S. drone strikes challenge the international rule of law precisely because they defy straightforward legal categorization. In fact, drone strikes—or, more accurately, the post-9/11 legal theories underlying such strikes—constitute a serious, sustained, and visible assault on the generally accepted *meaning* of certain core legal concepts, including "self-defense," "armed attack," "imminence," "necessity," "proportionality," "combatant," "civilian," "armed conflict," and "hostilities."

At its most fundamental level, the rule of law is concerned with constraining and ordering power and violence. Within the international system, this concern has led states to develop detailed legal rules governing the use of armed force.[2] Like all law, the laws of war have always been somewhat vague and ambiguous; and, to a degree, this can be seen as a virtue rather than a vice in a system that

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lacks a judiciary and a reliable enforcement mechanism. Up to a point, legal vagueness and ambiguity give states face-saving ways to avoid conflict, enabling them to "look the other way" if a particular state occasionally engages in challenging but not manifestly illegal behavior. Vagueness and ambiguity can also sometimes offer an efficient way for consensus-based changes in the law. For instance, amending the language of international treaties might be cumbersome or impossible, but some degree of vagueness and ambiguity in treaty language can permit shared interpretations to be modified over time, thus providing the community of states with a relatively simple "backdoor" means of changing the effect of a treaty.

Beyond a certain point, however, vagueness and ambiguity are crippling. When key international law concepts lose any fixed meaning, consensus breaks down about how to evaluate state behavior; and although legal rules may continue to exist on paper, they no longer ensure that states will behave in a predictable, nonarbitrary fashion. Moreover, even when there is substantial international consensus on the meaning of key concepts, the rule of law can be undermined—as in the case of U.S. drone strikes—if the sole superpower consistently challenges the commonly accepted meaning of concepts vital to the regulation of violence.

When one or more powerful states challenge the generally accepted meaning of core legal concepts, other states face a choice. They can accept the "new" interpretations, in which case (if a sufficient number of states will go along with it) international law will quietly change. Alternatively, they can take the opposite tack, directly confronting those states seeking to reinterpret the law and demanding fidelity to previously shared interpretations. This route is risky: if it succeeds, legal stability is restored, but if it fails, legal disputes can escalate into open conflict. Finally, states dismayed by new interpretations of once-fixed legal concepts can take a middle ground, quietly questioning new interpretations of the law while reaffirming their own interpretations. This route reduces the likelihood of conflict, but by enabling disparate legal interpretations to coexist without any obvious means of reconciling them, it can also prolong or increase legal uncertainty. For the most part, the international community has so far taken this middle path in response to U.S. drone strikes. It remains to be seen whether this path will ultimately lead to a reemergence of international consensus or whether it will permanently undermine the international rule of law.

This essay will proceed in four parts. First, it will briefly discuss the concept of the international rule of law. Second, it will offer a short factual background on

U.S. drone strikes (to the extent that it is possible to provide factual background on a practice so shrouded in secrecy). Third, it will highlight some of the key ways in which post-9/11 U.S. legal theories relating to the use of force challenge previously accepted concepts and seek to redefine previously well-understood terms. Fourth, it will offer brief concluding thoughts on the future of the international rule of law in light of this challenge.

The International Rule of Law

The "rule of law" is a concept capacious enough to mean different things to different people. As a result, surface consensus on the value of the rule of law often masks substantial disagreement about critical details. Scholars debate the question of whether the rule of law should be understood in purely formal terms or in substantive terms,[3] whether it should be viewed as a "thick" or "thin" concept, and whether it is best understood as an end unto itself or merely as a means toward some other end, such as democracy or the realization of human rights.[4] In 2004, UN Secretary-General Kofi Annan described the rule of law on the domestic level as:

> A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[5]

This conception of the rule of law translates only imperfectly onto the international domain. In the most basic sense, the notion of international rule of law implies that states (and other international actors, such as the United Nations itself) should be bound by international law. Beyond this, international rule of law also implies a range of principles and requirements to ensure that the laws are in fact binding and that there is a sense of institutional and procedural fairness. Precisely what this requires is the subject of much debate. At the national level, it is generally taken for granted that a robust rule-of-law society must have a strong, independent judiciary. To state the obvious, this does not (yet) exist at the

international level, despite the proliferation of international and regional adjudicative bodies of varying sorts.

However, the lack of such an international judicial system does not inevitably render state behavior arbitrary and unpredictable. As Louis Henkin famously reminded us, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[6] This suggests that the lack of a strong, independent global judicial system is not necessarily fatal to the realization of the rule of law, insofar as state compliance can often be obtained through other means. These include internal and external reputational pressures, diplomacy, arbitration, concerns about reciprocity and retaliation, ad hoc tribunals, and a range of other dispute-resolution and compliance mechanisms.

Another difficulty relates to how best to translate the concept of "equality before the law" onto the international level. In a strictly formal sense, equality before the law seems to require equality between sovereign states. This, indeed, is how the UN General Assembly appears to interpret the concept of international rule of law. In a September 2012 resolution (adopted without a vote), the General Assembly declared:

> We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law. . . . We rededicate ourselves to support all efforts to uphold the sovereign equality of all States.[7]

This sits somewhat uneasily with the Secretary-General's insistence that the rule of law requires consistency "with international human rights norms and standards."[8] If we ground our conception of the rule of law in human rights, it is not clear that there is anything normatively compelling about the equality of sovereign states; after all, some states are democratic, while others are repressive; some are wealthy and strong, while others are poor and weak; some have tiny populations, while others are vast.[9] Why should states, which are artificial constructs marked by glaring and often arbitrary differences, be treated equally? But most international law is itself premised on sovereign equality; so for the time being, it is difficult to see

how to foster or sustain the international rule of law while jettisoning the principle of sovereign equality.

Of course, as many have pointed out, the UN Charter itself is in this sense difficult to square with rule of law principles. In its creation of the Security Council, the Charter permanently privileges some states over others for reasons that, with the passage of time, seem increasingly arbitrary.[10] If states are formal equals, why, some seven decades after the end of the Second World War, should China, France, Russia, the United Kingdom, and the United States be the only states with veto power over Security Council resolutions?[11]

A final problem relates to the lack of mechanisms for ensuring access to law by individuals. The international system is a creation of states, but as human rights norms have been universalized, states have accepted a range of international legal obligations toward individual human beings. At the moment, however, there are still few means for individuals to vindicate their rights within the international system if they cannot get satisfaction through their own state.

It is not the purpose of this essay to examine competing conceptions of the international rule of law or to exhaustively detail the existing rule-of-law problems inherent in the current international system.[12] For present purposes, it is probably sufficient to say that whatever else it may entail, the international rule of law requires, at a bare minimum, the "avoidance of arbitrariness" and "procedural and legal transparency." Put differently, it requires that international law be, in Simon Chesterman's words, "prospective, accessible, and clear."[13] This is essential for ensuring basic stability: states—and individuals, who act on behalf of states and are acted upon by states—must be able to understand what is expected of them by international law. If it is to have any value at all, international law must provide a reasonably clear basis for predicting state behavior and for holding states to account when their actions do not conform to legal requirements.

This is a fairly formalistic and thin conception of the international rule of law. Nevertheless, even this weak version is undermined when key international law concepts lose any fixed meaning. When an exceptionally powerful state begins to interpret international law in a substantially different way than most other states, it becomes increasingly difficult to predict that state's behavior. And unpredictability can spread: one powerful outlier can pave the way for others, and as more states join the outlier, the foundations of the rule of law begin to crumble.[14]

A state need not clearly "break" the law for the international rule of law to be challenged or (potentially) undermined. As noted above, occasional incidents of

straightforward and blatant rule-breaking may be less threatening than more subtle but continuous challenges to the nature and meaning of international law.[15] This is because blatant rule-breaking is both relatively rare and relatively easy to identify; it is also relatively easy to remedy through traditional dispute resolution mechanisms. To some extent, occasional blatant rule-breaking can even shore up the international rule of law, by inspiring other states to reaffirm their shared understanding of law's meaning and by enabling the system to demonstrate its corrective capacities. By so doing, states reinforce the legitimacy, strength, and even-handedness of the law and legal institutions.

Consider an analogy to the domestic context. The rule of law does not require that there be no rule-breakers; it merely requires that rule-breaking be relatively rare and that most instances of rule-breaking be identified and punished. A robust rule-of-law society has laws prohibiting homicide, for instance. If homicides sometimes occur, this does not in itself threaten the rule of law, as long as such homicides are not excessively widespread, are investigated in an evenhanded fashion, and efforts to investigate and punish them are generally successful. But if the concept of "homicide" loses all clarity—if a significant number of states or courts redefine it by, for instance, adopting extremely permissive and expansive definitions of self-defense—laws against homicide may cease to operate predictably.[16]

When it comes to the rule of law, the introduction of excessive and ongoing uncertainty is thus far more threatening than occasional blatant rule-breaking. Some vagueness and ambiguity is inevitable and even desirable in an international society that lacks a judicial system, but the introduction of excessive uncertainty wholly undermines the possibility of clarity, stability, predictability, and nonarbitrariness.

U.S. Drone Strikes: Known Unknowns

U.S. drone strikes have grown increasingly controversial in the last few years. This is not because there is anything inherently sinister about drones as such; armed drones merely represent the latest in a long line of technological developments designed to enable the delivery of force from a distance. (In their time, the crossbow and the cannon were also condemned as devilish and dishonorable inventions).[17] For political decision-makers, unmanned aerial vehicles have obvious advantages: they are cheaper to produce than manned aircraft with comparable payloads; their use creates no short-term risk to American lives; and, relative to

other weapons-delivery systems, their enhanced surveillance capabilities reduce the likelihood of killing anyone other than the intended target.

As it happens, drone technologies improved dramatically just as the United States, struggling to respond to the threat of transnational terrorism after 9/11, began to perceive an increased need for low-cost, low-risk cross-border uses of force. Terrorist threats can come from anywhere, but it is impractical to use conventional military force everywhere. (The wars in Afghanistan and Iraq were a powerful reminder of this fact.) In certain situations, drone strikes appear to offer a cheaper, easier, and safer means of fighting terrorists.

The first U.S. drone strike is believed to have occurred in 2002, when a Hellfire missile launched by a Predator drone killed four suspected al-Qaeda members in Yemen.[18] Drone strikes remained a rarity until 2008, however, when the Bush administration launched thirty-six strikes in Pakistan.[19] Beginning in 2008, the United States began to make more frequent use of strikes from unmanned aerial vehicles. Most controversially, the United States has greatly increased its reliance on drone strikes outside of traditional, territorially-bounded battlegrounds.[20] In Pakistan, the number of suspected strikes rose from four in 2007 to a peak of 122 in 2010, before declining to forty-eight strikes in 2012.[21] In Yemen, suspected drone strikes rose from three or four in 2010 to an unknown peak in 2012. (There appears to have been at least twenty-six strikes in Yemen in 2012, and possibly as many as eighty-seven.[22]) The United States has also carried out a smaller number of strikes in Somalia, and there are unconfirmed rumors of U.S. drone strikes in Mali[23] and the Philippines as well. All told, U.S. drone strikes have killed an estimated 4,000 people in Pakistan, Yemen, and Somalia.[24] The percentage of civilian deaths is unknown, and existing estimates are controversial.

Almost everything about U.S. drone strikes is shrouded in secrecy. For the most part, the U.S. government does not comment on or acknowledge reported drone strikes that take place outside of "hot" battlefields, and it does not release lists of those targeted or killed. Senior Obama administration officials have offered oblique accounts of the drone strike program, but these have been at an extremely high level of generality, with few factual details or details relating to the administration's legal analysis. Even President Obama's speech on drones, delivered at the National Defense University on May 23, 2013, did not serve to shed much light on the subject.[25] As a result, it is impossible to describe current U.S. practices or internal procedures with any certainty, and also impossible to know exactly what legal constraints U.S. officials believe to exist, and whether and how these

have changed in the last few years. We do know, however, that as a matter of international law the United States believes itself to be in an armed conflict with "al-Qaeda and its associated forces."[26] We know the United States therefore considers "al-Qaeda operatives" to be targetable as "combatants," but we do not know precisely how it identifies or defines al-Qaeda operatives, agents, or members, or how it defines the term "combatants" and applies it in the murky context of transnational terrorism. We also do not know precisely how the United States understands the term "civilian" in the context of terrorism, or the concept of "direct participation in hostilities." Finally, we do not know how the United States defines or identifies "associates" or "co-belligerents" of al-Qaeda.

For example, President Obama's speech on drone warfare—which one might think would contain the most cogent explanation of America's position on the law of drone warfare—only offered the following nugget in support of its legality:

> America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war—a war waged proportionally, in last resort, and in self-defense.[27]

Understanding U.S. legal arguments is made more difficult by the fact that administration spokespersons often appear to oscillate between putting forward a law of armed conflict framework and a self-defense framework when justifying drone strikes. At times, U.S. officials appear to have suggested that the self-defense framework supplements the armed conflict framework.[28] In recent months, however, their language has suggested that the United States has shifted entirely from an armed conflict framework to a self-defense framework.[29] In any case, a self-defense framework possesses as many unknowns as an armed conflict framework: we do not entirely know how the United States understands the terms "armed attack" or "imminent" (though leaked memos offer some disturbing hints), nor do we know how the United States evaluates issues of necessity and proportionality.

With regard to sovereignty issues, U.S. officials have repeatedly stated that they only use force inside the borders of a sovereign state when that state either consents to the use of force or is "unwilling and unable" to take appropriate action to address the threat itself. We do not know, however, how the United States evaluates issues of consent in situations in which consent is ambiguous (such as in the

case of Pakistan, in which the executive branch reportedly gave tacit consent to drone strikes but publicly denied it, and in which the legislative and judicial branches have denied consent). We also do not know precisely what criteria the United States uses to determine whether a state is "unwilling or unable" to take appropriate action.

U.S. Drone Strikes and the International Rule of Law: Core Concepts Lose Their Meaning

That is a lot of unknowns. Nevertheless, if we piece together public statements by U.S. officials, leaked government documents, and the existing evidence about past strikes and their targets, the basic outlines of the United States' legal theory underlying targeted killings become visible. While much remains uncertain, it is clear that recent statements and practices by the United States represent a substantial challenge to international legal rules on the use of armed force with regard to both *jus ad bellum* and *jus in bello* rules.

Let us start with *jus ad bellum* rules, the rules concerning when force may be initiated. Under the UN Charter, states agree to "settle their international disputes in a peaceful manner" and "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." This is generally viewed as a blanket prohibition on the use of force by one state inside the borders of another sovereign state. Chapter VII of the UN Charter outlines just two exceptions to this prohibition. First, if the Security Council identifies "any threat to the peace, breach of the peace, or act of aggression," it may "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[30] For practical purposes, this means that the Security Council can pass a resolution *authorizing* one or more member states to use force to carry out its mandates. The second exception relates to self-defense. In Article 51 the Charter says, "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 Council has taken the measures necessary to maintain international peace and security."

It is difficult to evaluate U.S. drone strikes under these rules. Clearly, the Security Council has not *expressly* authorized the use of force by the United States in Pakistan, Yemen, or Somalia. The Council has, however, expressly

recognized that terrorist attacks can trigger a right to use force in self-defense, and the Council implicitly gave its approval to the November 2001 U.S. military intervention in Afghanistan. In Security Council Resolution 1368, passed one day after the terrorist attacks of 9/11, the Council stated that "such acts, like any act of international terrorism," constitute "a threat to international peace and security."[31] In the same resolution, the Council also reaffirmed "the inherent right of individual or collective self-defence in accordance with the Charter."[32]

This resolution and those that followed[33] were viewed by the United States (and by the international community generally) as sufficient to permit the lawful use of force in Afghanistan by the United States and NATO. Most commentators agreed that the initial U.S./NATO campaign constituted a clear case of individual and collective self-defense after the 9/11 attacks.[34] On December 20, 2001, the Security Council authorized the creation of the International Security Assistance Force for Afghanistan (ISAF),[35] thus bringing the war in Afghanistan under the formal umbrella of Security Council–authorized uses of force. In fact, from a rule-of-law perspective, the process leading to military action in Afghanistan was exemplary: the Security Council noted that an armed attack had occurred and that states had the right to use force in self-defense. The United States and NATO states then took action on their own "until the Security Council [took the] measures necessary to maintain international peace and security" by authorizing an international force.[36]

Subsequent uses of force by the United States for counterterrorism purposes outside Afghanistan pose a more complicated question. Security Council Resolution 1373 acknowledges that any act of international terrorism gives rise to a right to self-defense and calls upon UN member states to "work together to prevent and suppress terrorist acts" and "take the necessary steps to prevent the commission of terrorist acts."[37] The United States appears to regard such generic statements as sufficient international legal basis for discrete, ongoing uses of force against suspected terrorists around the globe.[38] This view is not wholly implausible: if all terrorist acts threaten international peace and security and give rise to a right to self-defense, and if the Security Council has tasked states with taking "necessary steps" to prevent future terrorist acts, this seems like a reasonable basis for concluding, at a minimum, that there is nothing *manifestly* unlawful about U.S. drone strikes against terrorists (assuming drone strikes can plausibly be viewed as "necessary").

From a broader rule-of-law perspective, however, this interpretation presents several difficulties. For one thing, it seems to be an open-ended invitation for states to engage in the unilateral use of force against suspected terrorists. But if it is open-ended, it renders meaningless the UN Charter's proviso that the right to use force in self-defense lasts "*until* the Security Council has taken [the] measures necessary to maintain international peace and security."[39] This is an important implied limitation on the right to use force: the Charter language clearly anticipates that the unilateral use of force in self-defense will be temporary in nature, undertaken as an emergency measure only. Once the emergency is over, the Charter appears to assume either that peace will have been restored or that the state under attack will have dispelled the imminent threat and be in a position to request that the Council take any measures needed to ensure its longer-term safety.

Regardless of whether the Council takes action to address a threat, a state's right to respond to an armed attack is clearly subject to some temporal limitations; it does not last indefinitely.[40] Thus, more than seventy years after the Pearl Harbor attacks, the United States no longer has a legal basis for using force in self-defense against Japan; similarly, from an international law perspective, it is doubtful that the 9/11 attacks alone give rise to an indefinitely continuing right to use force in self-defense. This view is consistent with the traditional understanding of the right to self-defense in international law, which limits the unilateral use of force to situations in which a state is responding to a recent "armed attack" or to an "imminent" threat of future attack. And at least on a superficial level, the United States appears to accept this view: "We act against terrorists who pose a *continuing* and *imminent* threat to the American people," President Obama asserted in a May 2013 speech.

This does not help us determine the legality of U.S. drone strikes, however, because it merely shifts the question to how we define "imminent threat." And here, what we know of U.S. reasoning is not reassuring. Traditionally, there has been substantial consensus among states and international law experts that an imminent threat is one that is concrete and immediate, rather than speculative or remote.[41] But according to a leaked 2011 Justice Department White Paper—the most detailed legal justification that is publicly available—the United States is now taking a radically different approach to defining imminence.[42] According to the White Paper, the requirement that force only be used to prevent an "imminent" threat "does not require the United States to have clear evidence

that a specific attack on U.S. persons and interests will take place in the immediate future."[43] This seems—and is—at odds with the traditional view. The White Paper goes on to assert that "certain members of al-Qa'ida are *continually* plotting attacks . . . [and] *would* engage in such attacks regularly [if they] were *able* to do so, [and] the U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus *cannot be confident that none is about to occur*."[44] As a result, the White Paper concludes that any person deemed to be an operational leader of al-Qaeda or its "associated forces" inherently presents an imminent threat at all times—and as a result, the United States can lawfully target such persons at all times, even in the absence of specific knowledge relating to planned future attacks.

At risk of belaboring the obvious, this understanding of imminence turns the traditional international law interpretation of the concept on its head. Instead of reading the imminence requirement to mean that states must have concrete knowledge (or at least reasonable suspicion) of an actual impending attack in the near future, the United States appears to construe *lack* of knowledge of a future attack as the justification for using force; that is, since the United States "may not be aware of all Al Qa'ida plots . . . and thus cannot be confident that none is about to occur,"[45] force is presumed *always* to be justified against the kinds of people considered likely to "engage in . . . attacks . . . if [they] were able to do so."[46] From a rule-of-law perspective, this is a radical assault on a once-stable concept. If "imminent threat" can mean "lack of evidence of the absence of imminent threat," it is impossible to know, with any clarity, the circumstances under which the United States will in fact decide that the use of military force is lawful.

The rule-of-law conundrums do not end there. Under international law (customary as well as treaty-based), the use of force in self-defense must also be consistent with the principles of necessity and proportionality.[47] The principle of necessity tracks the "just war" requirement that force should be used only as a last resort, and when measures short of force have proved ineffective; the principle of proportionality relates to the amount and nature of the force used. Given the lack of transparency around U.S. drone strikes, it is impossible to say whether any given strike (or the totality of strikes) satisfies these legal and ethical principles.

Are all drone strikes "necessary"? Could nonlethal means of combating terrorism—such as efforts to disrupt terrorist financing and communications—be sufficient to prevent future attacks? Might particular terror suspects be captured rather

than killed? Do drone strikes inspire more terrorists than they kill?[48] Also, to what degree does U.S. drone policy distinguish between terrorist threats of varying gravity? If drone strikes against a dozen targets prevented another attack on the scale of 9/11, few would dispute their appropriateness or legality—but we might judge differently a drone strike against someone unlikely to cause serious harm to the United States. Unfortunately, if U.S. decision-makers generally lack specific knowledge about the nature and timing of future attacks—which the White Paper acknowledges—judgments of necessity and proportionality literally become impossible. How can one decide if lethal force is necessary to prevent a possible future attack about which one knows nothing? How can proportionality be determined? Here again, the U.S. legal theory underlying targeted killing makes it impossible to apply key principles in a meaningful way. Both necessity and proportionality come to be evaluated in the context of purely hypothetical worst-case scenarios (in theory, any terror suspect *might* be about to unleash another catastrophic attack on the scale of 9/11). As a result, these "limitations" on the use of force establish no limits at all.

The problem goes still deeper. On an ontological level, it is extraordinarily difficult to know how to categorize U.S. drone strikes and other targeted killings. Should they be construed as a series of discrete uses of force, each of which must be independently evaluated for adherence to self-defense principles? Or do they constitute, in effect, an ongoing use of force made up of many individual strikes, which should be evaluated collectively?[49] If the latter, can the United States be said to be in an "armed conflict" with militants in Pakistan, suspected al-Qaeda associates in Yemen, members of the al-Shabaab organization in Somalia, and assorted other unknown groups and individuals? The Obama administration, like the Bush administration before it, asserts that the answer is yes. Their position is that an armed conflict can exist between a state and one or more nonstate entities, even if those nonstate entities are not publicly identified, their membership criteria cannot be clearly defined, they lack any hierarchical structure, and their activities are geographically dispersed.

Outside the United States, most others disagree. In Europe, for instance, as a recent European Council on Foreign Relations report by Anthony Dworkin notes, most legal scholars and courts "[reject] the notion of a de-territorialised global armed conflict between the U.S. and al-Qaeda," and believe that a "confrontation between a state and a non-state group only rises to the level of an armed conflict if the non-state group meets a threshold for organization . . . there are

intense hostilities between the two parties . . . [and] fighting [is] concentrated within a specific zone (or zones) of hostilities."[50]

This shifts us from *jus ad bellum* questions to *jus in bello* questions. From a rule-of-law perspective, it is crucial that we be able to determine the existence (or nonexistence) of an armed conflict: if the United States is in an armed conflict, many of the rules relating to the use of force change. In an armed conflict, it is acceptable to target enemy combatants based simply on their status as enemy soldiers. If there is no armed conflict, such status-based targeting ceases to be acceptable, and we are thus back to the requirement that force may only be used to ward off an imminent threat (which, of course, the United States appears to conflate with status).

The international rule of law dilemmas here should be obvious. While the scope of international law rules relating to self-defense and armed conflict have always been somewhat controversial, the irregular but continuing nature of U.S. drone strikes adds additional layers of complexity. In a domestic context, such ontological disputes would not pose an ongoing challenge to the rule of law: although significant legal vagueness and ambiguity might persist for a time, the judiciary would eventually resolve the uncertainty, by selecting one interpretation over the others, or new legislation would be passed to resolve the uncertainties.[51] In the international context, however, there is no referee able to make such vital calls. There is no judicial system and no "legislature." States can enter into multilateral treaties, but there is no set procedure for creating such treaties, and in practice treaties frequently take decades to be negotiated and further decades to enter into force. Furthermore, the structure of the Security Council makes it near impossible to imagine a Council-imposed resolution to any of these questions. Russia and China (and perhaps other Council members as well) would likely block any U.S. effort to gain Council authorization for drone strikes or create some international force empowered to engage in such strikes. At the same time, the seemingly open-ended language of the Council's post-9/11 resolutions cannot be rolled back, since the United States would use its veto to block any such efforts. For the same reason, U.S. actions cannot be criticized by the Council.

At the moment, the United States itself—as the globe's only military superpower—is the sole arbiter of its own actions: with zero transparency, it determines which laws to apply and it comes up with its own interpretation of core concepts. Or, to put it in more familiar terms, the United States is judge, jury, and executioner all rolled into one. It decides how to interpret the law to which it is subject;

it decides what can be counted as evidence and how to evaluate that evidence; and, ultimately, it kills.

It is worth noting one last concept that has been increasingly destabilized by post-9/11 U.S. legal theories. This is the concept of sovereignty itself, long a core building block of the Westphalian international legal order. Admittedly, the absoluteness of sovereignty has always been a legal fiction, and in recent decades globalization has reduced the salience of state borders even as the emergence of human rights law has chipped away at the state's normative standing. Nevertheless, the concept of sovereignty—however frayed and problematic—remains a bulwark against unpredictable international conflict. Recent U.S. pronouncements suggest, however, that this will not remain true for much longer. U.S. officials have repeatedly stated that the United States will only use force on the territory of other sovereign states if that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." While this sounds superficially reasonable, the logic is in fact circular, since the United States is the self-appointed arbiter of whether a state is "unwilling or unable."

Thus, if the United States—using its own malleable definition of "imminent"—decides that an individual in, say, Pakistan poses a threat to the United States and requires killing, sovereignty is a nonissue. Either Pakistan will consent to a U.S. strike inside its territory or it will not consent. And if Pakistan does not consent—on the grounds, perhaps, that it does not agree with the U.S. threat assessment—then Pakistan is, ipso facto, "unwilling or unable to suppress the threat posed by the individual being targeted."[52]

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the UN Charter.[53] After all, if the United States is the sole judge of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives.

Conclusion

The challenges to the rule of law posed by U.S. drone strikes are numerous, making it tempting to assert—as many in the legal and human rights communities have done—that U.S. drone strikes violate international law. Yet such a conclusion

would in some ways be as tendentious as U.S. claims of legality. In the international domain, where there is no authoritative judiciary or legislature capable of rapidly clarifying the law, legality (or illegality) must still be inferred from the responses of other states. And so far, although few states have offered explicit support for U.S. interpretations of international law relating to drone strikes, equally few have stated expressly that they regard such strikes as unlawful. Most states have taken a middle path, either expressing somewhat muted concern about U.S. interpretations of the law or refraining altogether from commenting on their lawfulness.

It goes without saying that the international legal system is anachronistic from a human rights perspective, and arguably quite inadequate from a rule-of-law perspective. Nevertheless, it is—for now, at least—all we have. U.S. drone strikes thus present not an issue of law-breaking, but of law's brokenness. Sustained U.S. assaults on the meaning of core legal concepts have left international law on the use of armed force not merely vague or ambiguous but effectively indeterminate, eroding law's value as a predictor of state conduct and a means of holding states accountable. If there is no agreement on what constitutes an armed conflict, no agreement on who counts as a combatant, and no agreement on what constitutes an imminent threat, the law is no longer a guidepost.

But although the justifications for drone strikes proffered by the United States pose grave challenges to the international rule of law, it would be facile to condemn them out of hand. After all, though these strikes (or, more accurately, the legal theories that underlie them) *challenge* the international rule of law, they also represent an effort to *respond* to gaps and failures in the international system. It is easy to insist that the United States should not use force without explicit Security Council authorization, for instance, but the Security Council is paralyzed by anachronistic membership and voting rules that are themselves arguably inconsistent with rule-of-law norms. Similarly, it is easy to point out the absurdity of the U.S. definition of "imminent threat," but the United States is not wholly wrong to argue that traditional definitions of imminence are inadequate in the context of today's threats. And it is easy to lambast circular U.S. arguments about sovereignty, but here again the United States is not necessarily wrong to argue that when many lives may be at stake, sovereignty surely cannot be an absolute bar to intervention.[54]

However destabilizing U.S. counterterrorism legal theories are to the rule of law, they arose in response to real dilemmas, and it is not inconceivable that their very

destabilizing qualities could ultimately help usher in a process of much-needed legal change.[55] Perhaps, for instance, the international community needs to develop a theory of *jus ad vim* to occupy the space between war and peace: a law and ethics relating to ongoing but discrete smaller-scale uses of force, as Daniel Brunstetter and Megan Braun have argued.[56] Perhaps we need new international institutions capable of refereeing such uses of force.

As I noted in the introductory section of this essay, vagueness and ambiguity in international law sometimes facilitate legal adaptation and evolution. If all or most states come to accept a new interpretation of key terms and concepts relating to the use of force, the international law on the use of force will change. If states cannot agree on how to interpret key concepts, the risk of conflict between states will go up, but the risk of conflict can trigger the creation of new dispute-resolution mechanisms (be they judicial or nonjudicial), which can in turn develop new authoritative interpretations of the law. As it stands today, most states have been unwilling either to denounce or to praise the legal theories put forward by the United States to justify drone strikes. But even such a muted, ambivalent response may lead to a quiet diplomatic effort to articulate common ground or to develop compromise or alternative legal frameworks.

It would not do to be Pollyannaish, of course. From a human rights perspective any changes to the international order sparked by the U.S. war on terror are as likely to be for the worse than for the better. But it would be just as much a mistake to dismiss U.S. counterterrorism policy as the selfish, destructive flailing of an arrogant, damaged superpower. It is those things, but not only those things. The United States is struggling to adapt its legal theories and actions to new threats ushered in by the technological changes of recent decades, and it is not wholly wrong to take the view that traditional interpretations of the international law on the use of force have become inadequate. Strong challenges to accepted interpretations of international law might trigger a new round of international lawmaking and the creation of new, rule-of-law-enhancing institutions and processes. But the international order is a fragile one, and when core norms relating to the use of force are in disarray, accountability and predictability are undermined. Ultimately, there is a substantial risk of fragmentation, conflict, and collapse.

Hegel famously defined tragedy as the conflict between two goods, each overly rigid in its claims.[57] It is not a bad way to conceptualize the legal debates triggered by the war on terror—but the end of this drama is not yet written.

NOTES

[1] Throughout this essay I will use "U.S. drone strikes" or "drone policy" as a shorthand way of referring to the cross-border use of force by the United States outside of traditional, territorially-defined battlefields. Although it is U.S. drone strikes in Pakistan, Yemen, and Somalia that have triggered most controversy over such cross-border uses of force, the arguments in this essay apply equally to cross-border uses of force that do not involve unmanned aerial vehicles, such as raids carried out by U.S. Special Operations Forces or CIA paramilitary personnel. To a significant extent, the arguments in this essay also apply to U.S. detention policy, which presents overlapping issues.

[2] See, e.g., *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), Merits, Judgment, International Court of Justice (ICJ) Reports 1986, 14; "Separate Opinion of President Nagendra Singh," p.153, noting that international law on the use of force is "the very cornerstone of the human effort to promote peace in a world torn by strife."

[3] See, generally, Stéphane Beaulac, "The Rule of Law in International Law Today," in Gianluigi Palombella and Neil Walker, eds., *Relocating the Rule of Law* (Portland, Ore.: Hart, 2009), p. 201 (comparing formal theories, which are "concerned with how the law is made and its essential attributes [clear, prospective]" with substantive theories, "concerned not only with the formal precepts but also with some basic content of the law [justice, morality]").

[4] Compare Simon Chesterman, "An International Rule of Law?" *American Journal of Comparative Law* 56, no. 2 (2008), p. 359 (calling rule of law "a tool with which to protect human rights, promote development, and sustain peace"), with Katharina Pistor, "Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Association November 9–10, 2005," *Berkeley Journal of International Law* 25, no. 1 (2007), p. 41 (calling rule of law a "fundamental aspiration of mankind").

[5] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, (S/2004/616), at daccess-dds ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement

[6] Louis Henkin, *How Nations Behave*, 2nd ed. (New York: Columbia University Press, 1979), p. 47 (emphasis omitted).

[7] UN General Assembly, Resolution 67/1, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels," September 24, 2012, UN document A/RES/67/1, paragraphs 2–3.

[8] UN Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," October 12, 2011, UN document S/2011/634.

[9] Individual humans also vary greatly, of course, but humans, unlike states, are not entirely artificial constructs.

[10] UN Charter, Article 23, para. 1 (creating a Security Council comprised of only 15 member states); and at Article 27, para. 3 (granting a veto power to only five states).

[11] For a different perspective, see David Bosco, "An Elite Security Council Is A More Effective One," *NPR*, September 24, 2009, www.npr.org/templates/story/story.php?storyId=113163910, discussing criticisms of the Security Council as "elitist" and arguing in favor of the current Security Council structure.

[12] These issues have been well-discussed elsewhere. See, generally, Chesterman, "An International Rule of Law?," and Beaulac, "The Rule of Law in International Law Today."

[13] Chesterman, "An International Rule of Law?," p. 342. This is a familiar concept in the U.S. legal system: consider the *ex post facto* clause of Article I, Section 9 of the Constitution, or the court-made "void-for-vagueness" doctrine. See *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) ("[T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.").

[14] Since international law remains, in its current incarnation, a product of state consensus, this process doesn't inevitably doom the rule of law—ultimately, if enough states shift their positions, it may end up creating robust new norms and new law. The rule of law is most threatened when an old consensus breaks down and a new consensus has yet to emerge.

[15] On a related note, Jacob Cogan argues that, in the absence of highly developed international law enforcement mechanisms, "operational noncompliance" is a good thing. Jacob Katz Cogan, "Noncompliance and the International Rule of Law," *Yale Journal of International Law* 31 (2006), p. 209. Operational noncompliance means that states will sometimes take it upon themselves, individually or collectively, to enforce important legal norms—even if doing so means violating legal norms of their own—when the international legal order is otherwise unable to do so (ibid., pp. 195–96). Cogan's view is an outlier; as he concedes, most international legal thinkers support a policy of strict, formal compliance (ibid., pp. 191–92, citing, *inter alia*, Henkin, "International Law: Politics, Values and Functions," *Recueil*

Des Cours 216 (1989), p. 86: "In the words of Louis Henkin, what matters most is the creation of an 'international culture of compliance.'").

[16] Extreme examples include the Trayvon Martin killing and Bernhard Goetz. See Harry Siegel and Filipa Ioannou, "Bernard Goetz on George Zimmerman: 'The Same Thing Is Happening,'" *Daily Beast*, July 12, 2013, www.thedailybeast.com/articles/2013/07/12/bernhard-goetz-on-george-zimmerman-the-same-thing-is-happening.html. When such cases are outliers, there is no crisis; if such cases become commonplace, there is a problem.

[17] Rosa Brooks, "What's *Not* Wrong With Drones?" *Foreign Policy*, September 5, 2012, www.foreignpolicy.com/articles/2012/09/05/whats_not_wrong_with_drones?page=0,0.

[18] "Sources: U.S. Kills Cole Suspect," *CNN*, November 5, 2002, edition.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html?_s=PM:WORLD; "CIA 'Killed al-Qaeda Suspects' in Yemen," *BBC News*, November 5, 2002, http://news.bbc.co.uk/2/hi/2402479.stm.

[19] Amitai Etzioni, "The Great Drone Debate," *Military Review* (March/April 2013), p. 10 (citing: "The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2013," *New America Foundation*, February 4, 2013, counterterrorism.newamerica.net/drones).

[20] Note that although controversy has focused on drone strikes outside of hot battlefields, the majority of U.S. strikes have occurred in "traditional" zones of armed conflict: Iraq, Libya, and, in particular, Afghanistan. See Chris Woods and Alice K. Ross, "Revealed: US and Britain Launched 1,200 Drone Strikes in Recent Wars," *Bureau of Investigative Journalism*, December 4, 2012, www.thebureauinvestigates.com/2012/12/04/revealed-us-and-britain-launched-1200-drone-strikes-in-recent-wars.

[21] Between January 1, 2013 and August 23, 2013, there have been an estimated 16 drone strikes in Pakistan ("The Year of the Drone," *New America Foundation*).

[22] Drones Team, "Yemen strikes visualized," *Bureau of Investigative Journalism*, July 2, 2012, www.thebureauinvestigates.com/2012/07/02/yemen-strikes-visualised/.

[23] Dylan Matthews, "Everything You Need to Know About the Drone Debate, in One FAQ," Wonkblog, *Washington Post*, March 8, 2013, www.washingtonpost.com/blogs/wonkblog/wp/2013/03/08/everything-you-need-to-know-about-the-drone-debate-in-one-faq/.

[24] Ryan J. Reilly, "CIA Drone Strikes Case: Court Finds It Not 'Plausible' That Agency Has No Role," *Huffington Post*, March 15, 2013, www.huffingtonpost.com/2013/03/15/cia-drone-strikes_n_2883727.html.

[25] Barack Obama, "Obama's Speech on Drone Policy," *New York Times*, May 23, 2013, www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all.

[26] President Obama reiterated this belief in his May 2013 speech discussing drone warfare (ibid.).

[27] Obama, "Obama's Speech on Drone Policy."

[28] See statement of Attorney General Eric Holder: "Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war." Eric Holder, "Attorney General Eric Holder Speaks at Northwestern University School of Law," *United States Department of Justice* website, March 5, 2012, www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html; see also John O. Brennan, "Strengthening Our Security by Adhering to Our Values and Laws," (remarks at Harvard Law School, Cambridge, Mass., September 16, 2011), *White House, Office of the Press Secretary*, www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an, in which he says: "we are at war with al-Qa'ida. In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa'ida seeks to attack us again. Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self-defense."

[29] See Harold Hongju Koh, "The Obama Administration and International Law," (speech, Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010), *U.S. Department of State* website, www.state.gov/s/l/releases/remarks/139119.htm, in which he says, "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."

[30] UN Charter, Articles 39 and 42.

[31] UN Security Council, Resolution 1368 (2001), September 12, 2001, UN document S/RES/1368 (2001).

[32] Ibid.

[33] See UN Security Council, Resolution 1373 (2001), September 28, 2001, UN document S/RES/1373 (2001); Resolution 1377 (2001), November 12, 2001, S/RES/1377 (2001); Resolution 1378 (2001),

November 14, 2001, S/RES/1378 (2001); Resolution 1383 (2001), December 6, 2001, S/RES/1383 (2001); and Resolution 1386 (2001), December 20, 2001, S/RES/1386 (2001).

[34] But see John Quigley, "The Afghanistan War and Self-Defense," *Valparaiso University Law Review* 32, no. 2 (2003), pp. 549–50 (arguing that the war in Afghanistan was not a legitimate exercise of self-defense and was not authorized by Security Council resolutions).

[35] See "About ISAF," *International Security Assistance Force* website, last visited August 30, 2013, www.isaf.nato.int/history.html; UN Security Council, Resolution 1386 (2001).

[36] The language of the UN Charter, Article 51.

[37] UN Security Council, Resolution 1373 (2001).

[38] Take, for instance, the Iraq War. In the period leading up to the American invasion of Iraq, President George W. Bush stated that Iraq was part of an "axis of evil" that supported terrorism. George W. Bush, "Text of President Bush's 2002 State of the Union Address," *Washington Post*, January 29, 2002,www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm: "States like these [North Korea, Iran, Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States."

[39] UN Charter, Article 51 (emphasis added).

[40] Tai-Heng Cheng and Eduardas Valaitis, "Shaping an Obama Doctrine of Preemptive Force," *Temple Law Review* 82 (2009), p. 749.

[41] A prime example is the wide acceptance of the principle stemming from the *Caroline* affair: that a state may use preemptive force only where the "necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation." See "British-American Diplomacy: The Caroline Case," *Yale Law School, Avalon Project*, last visited August 30, 2013, www.avalon.law.yale.edu/19th_century/br-1842d.asp; also Kofi Annan, UN Report of the Secretary-General, "In Larger Freedom: Towards Development, Security and Human Rights for All," March 21, 2005, UN document A/59/2005, paragraphs 124–25 (based on para. 188 of the Report of the High-level Panel on Threats, Challenges and Change, December 2, 2004, UN document A/59/565); and Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), ICJ Reports, par. 201, 2005. See www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=116&.

[42] See "Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," *Department of Justice*, released February 4, 2013, www.msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

[43] Ibid., p. 7.

[44] Ibid., p. 8 (emphasis added).

[45] Ibid.

[46] In effect, the concept of "imminence" becomes conflated with status or identity. Under the Justice Department's logic, since any "operational leader" of al-Qaeda or its "associates" is, by definition, *always* presenting an imminent threat, he can always be the lawful target of armed force. This appears to collapse the international law of self-defense, which does not permit status-based targeting, into the law of armed conflict, which does. Also, imagine the consequences if such an interpretation of imminence were imported into domestic criminal law. In most domestic jurisdictions, the use of lethal force in self-defense is permitted only to ward off urgent threats. (As the U.S. Model Penal Code puts it, the force used must be "*immediately* necessary for the purpose of protecting [the actor] against the use of unlawful force by [another] person on *the present occasion*." Model Penal Code § 3.04. Emphasis added.). Imagine the consequences if this shifted to a rule stating that any person who lacks complete confidence in his future safety can use force against anyone he believes might someday do him harm.

[47] See the *Nicaragua* case, para. 176, with discussion of the "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law"; and Judith Gardam, *Necessity, Proportionality and the Use of Force By States* (New York: Cambridge University Press, 2004).

[48] President Obama has stated that "America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute" (Obama, "Obama's Speech on Drone Policy"); but no one outside the U.S. executive branch has any real ability to determine whether the strikes are necessary.

[49] This conundrum has led some commentators to propose a new *jus ad vim*, a set of rules concerning uses of force that fall short of armed conflict. See Daniel Brunstetter and Megan Braun, "From *Jus ad Bellum* to *Jus ad Vim*: Recalibrating Our Understanding of the Moral Use of Force," *Ethics & International Affairs* 27, no. 1 (2013): "While war used to be easily defined as a zone of combat

where lethal force was justified (to be distinguished from a zone of peace, where it was not), the struggle against terrorism has created 'in-between spaces' of moral uncertainty where force is used on a consistent and limited scale, but war is not declared."

[50] Anthony Dworkin, "Drones and Targeted Killing: Defining a European Position," *European Council on Foreign Relations*, July 2013, p. 7, www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

[51] New uncertainties would eventually arise—perhaps even new uncertainties created by judicial language—but these too can be clarified or corrected via subsequent judicial decisions, or via new legislation made in response to judicial decisions.

[52] A Pakistani court has rejected this argument and held that U.S. drone strikes within Pakistan's borders violate international law. See Jonathan Horowitz and Christopher Rogers, "Case Watch: A Court in Pakistan Addresses U.S. Drone Attacks," *Open Society Foundations*, May 28, 2013, www.opensocietyfoundations.org/voices/case-watch-court-pakistan-addresses-us-drone-attacks. The court's decision is available at: www.peshawarhighcourt.gov.pk/images/wp%201551-p%2020212.pdf.

[53] See generally Rosa Brooks, "Be Careful What You Wish For: Changing Doctrines, Changing Technologies, and the Lower Cost of War," *American Society of International Law Proceedings* 106 (2012); Brooks, "Strange Bedfellows: The Convergence of Sovereignty-Limiting Doctrines in Counterterrorist and Human Rights Discourse," *Georgetown Journal of International Affairs* 13, no. 2 (2012).

[54] Cf. Brooks, "Lessons for International Law From the Arab Spring," *American University International Law Review* 28 (2013), pp. 107–12 (discussing the Responsibility to Protect doctrine).

[55] See, e.g., Cogan, "Noncompliance and the International Rule of Law," p. 209 (arguing that a state's unilateral acts of police work—which he calls "operational noncompliance"—can sometimes increase the rule of law when the international community otherwise lacks institutions capable of enforcing the law).

[56] See Brunstetter and Braun, "From *Jus ad Bellum* to *Jus ad Vim*."

[57] See G. W. F. Hegel, *Hegel on Tragedy*, Anne and Henry Paolucci, eds. (Greenwood, Conn.: Greenwood: 1978).