

2019

## Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective

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### Recommended Citation

Paul C. Ney, Jr., Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective, 52 *Vanderbilt Law Review* 773 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol52/iss4/1>

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## Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective

*Paul C. Ney, Jr.\**

Thank you very much for inviting me here today. I am especially grateful to Dean Chris Guthrie, Professor Mike Newton, and Mrs. Sharon Charney, who generously endowed this lecture series in memory of her late husband, Professor Jonathan Charney. Thank you, as well, to all the members of the Charney family for sharing him with the Vanderbilt community. Professor Charney taught at Vanderbilt for forty years and was one of the nation's preeminent scholars and practitioners of international law. He was a member of the U.S. delegation to the Third United Nations Conference on the Law of the Sea, which resulted in the 1982 United Nations Convention on the Law of the Sea.<sup>1</sup> At the time of his untimely passing in 2002, he was also the Co-Editor-in-Chief with Yale Law Professor Michael Reisman of the American Journal of International Law.

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\* General Counsel, U.S. Department of Defense. B.S. Cornell University, 1980; J.D./M.B.A. Vanderbilt University 1984. This Essay is a revised version of remarks delivered on September 3, 2019, at Vanderbilt University Law School in Nashville, Tennessee, as the 2019 Jonathan I. Charney Distinguished Lecture in International Law. I thank Thomas H. Lee, Charles A. Allen, Karl Chang, Vida Antolin-Jenkins, Guillermo Carranza, Lieutenant Commander Robin Crabtree, Matthew McCormack, Platte Moring, Colonel Jeffrey Palomino, Jack Shaked, Carl Tierney, Catherine Rivkin Visser, Bart Wager, Danielle Zucker, and other members of the DoD General Counsel's office for their inestimable contributions to the conception and preparation of this Essay, and Joshua Minchin and the other student editors of the *Vanderbilt Journal of Transnational Law* for their expertise and editorial support.

1. See Jonathan I. Charney, *The United States and the Law of the Sea after UNCLOS III—The Impact of General International Law*, 46 LAW & CONTEMP. PROBS. 37, 44 (1983).

I feel particularly honored as the first alumnus of Vanderbilt Law School to deliver the Charney Distinguished Lecture in International Law.<sup>2</sup> In a May 27, 2003, Joint Resolution, the Tennessee General Assembly honored Professor Charney for “his manifold professional achievements, his impeccable character, and his stalwart commitment to living the examined life with courage and conviction.”<sup>3</sup> His colleague, Professor Jeffrey Schoenblum, drew a more colorful sketch: “Jon could at times, and quite proudly and purposely, be one ornery guy . . . He was for quality, for demanding performance. He was against sophistry, mintmarks, and other indicia of status not substantiated by tangible intellectual product of unquestionable merit.”<sup>4</sup>

In his spirit, I will try to avoid “sophistry” and “mintmarks.” My aims are to help you understand how international law affects the U.S. Department of Defense (DoD) in practice and how DoD abides by the rule of law in international security affairs.

I understand that many of you in the audience are first-year law students. You and others may have little idea of what international law is or what international lawyers do. I was in the same boat as a law student, until I participated in the Jessup International Law Moot Court Competition. But even then, I had little understanding of what international law in practice meant.

That has certainly changed in my current position. International law issues come up with some frequency for the civilian and military lawyers I work with at the Department of Defense today. We at DoD work with international law in many different ways. Our military forces on the ground assess and implement applicable laws of war every day. Our sailors navigate according to the law of the sea. We provide a range of assistance to foreign partners, including training, equipment, intelligence sharing, and operational support, and, in doing so, we comply with applicable domestic and international law.<sup>5</sup> This includes, for example, ensuring that partner forces receiving U.S.

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2. Regrettably, I did not have the privilege of having been taught by Professor Charney. My Special Assistant and Vanderbilt Law classmate, Platte Moring, had the great pleasure of having taken several classes with Professor Charney, who also served as his thesis advisor. I was, however, a student of Professor Hal Maier, the other pillar of Vanderbilt’s twin towers of international law. Professor Maier came to Vanderbilt in 1965 and established the *Vanderbilt Journal of Transnational Law*. I am grateful to the Journal and its editors for publishing these remarks.

3. S.J. Res. 0427, 103d Gen. Assemb., Reg. Sess. (Tenn. 2003).

4. Jeffrey Schoenblum, *Remarks on Jonathan I. Charney*, 36 VAND. J. TRANSNAT’L L. 7, 8 (2003).

5. For example, Chapter 16 of Title 10 of the U.S. Code §§ 301–386 (2018) addresses DoD security cooperation programs and activities. Section 301 defines “security cooperation programs and activities of the Department of Defense” as “any program, activity (including an exercise), or interaction of the Department of Defense with the security establishment of a foreign country to achieve a purpose as follows: (A) To build and develop allied and friendly security capabilities for self-defense and multinational operations; (B) To provide the armed forces with access to the foreign country during peacetime or a contingency operation; (C) To build relationships that promote specific United States security interests.”

assistance are vetted for credible allegations of gross violations of human rights.<sup>6</sup>

The lawyers in my office also work closely with lawyers from other Departments and Agencies in formulating our advice and in articulating U.S. Government positions on important legal issues. We work with the Department of State in the negotiation of treaties and in its conduct of U.S. foreign relations, especially as related to national and international security matters.<sup>7</sup> We work with the Department of Justice (DOJ) on legal issues relevant to DoD that arise in U.S. courts,<sup>8</sup> typically in matters to which the Department is a party or that implicate DoD's interests. We very recently worked closely with our colleagues in the Department of State and at the National Security Council (NSC) to ensure that my remarks today did not inadvertently endorse positions inconsistent with U.S. Government policies or practices.

A large part of our job is giving legal advice that helps shape and implement defense policy. DoD lawyers play an essential role in ensuring that the planning and execution of U.S. military operations comply with the law, including international law. We advise on relevant treaty terms and customary international law rules. We give our clients—DoD civilian and military leaders—our best advice about how domestic and international law apply to the facts before them. Most of this activity is behind the scenes, and much of it involves classified information. But just because our role is not as public as filing briefs or arguing in front of judges doesn't mean we are any less dedicated to the rule of law.

By way of background, “[i]nternational law consists of a body of rules governing the relations between States.”<sup>9</sup> In certain circumstances, international law also prescribes rules for individuals or other non-State entities, like non-State armed groups.<sup>10</sup> In general,

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6. 10 U.S.C. § 362(a)(1) (2018) (“Of the amounts made available to the Department of Defense, none may be used for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights.”).

7. “The Secretary of State shall perform such duties as shall from time to time be enjoined on or entrusted to him by the President relative to . . . negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs . . .” 22 U.S.C. § 2656 (2018).

8. “[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.” 28 U.S.C. § 516 (2018).

9. 1 DIGEST OF INTERNATIONAL LAW 1 (Green Haywood Hackworth ed., 1940).

10. See, e.g., U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 17.2.4 (December 2016) (“The law of war applicable in a non-international armed conflict is

international law is formed when: 1) States accept rules in treaties (also called “conventions” or “agreements”); or 2) rules develop in unwritten form known as customary international law. Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation or, in Latin, *opinio juris*.<sup>11</sup> General principles of law common to the major legal systems of the world are also a recognized part of international law.<sup>12</sup>

In my view, abiding by the rule of law has two key elements: first, an international law rule must be recognized as established in treaty or customary law, and second, a State must implement and comply with this rule. This means that the rule influences the State’s behavior both *ex ante*, by informing available policy choices in advance of any action or decision, and *ex post*, because the State has established meaningful compliance mechanisms or institutions and holds accountable as appropriate those who violate that rule. Both of these aspects of influencing State behavior are critical, and I will address each of them in my remarks today.

My lecture will proceed in two parts. First, I’d like to focus on how international law is formed, especially customary international law, using examples from cyberspace and outer space. In doing so, I must highlight the primacy of State practice. Second, I will discuss what it means to abide by and implement international law. Throughout both segments, I will refer to Professor Charney’s path-marking work on the law of the sea and international law theory, and also to real-world implementation. In so doing, it may be worth keeping in mind what Professor Reisman said about Professor Charney: “While he was interested in theory and contributed to it and he had many suggestions to make about improving international law, he was, at heart, an empiricist. He respected the complexity of events.”<sup>13</sup>

## I.

There is typically a distinction drawn between the law of permissible grounds for resorting to force—in Latin, *jus ad bellum*—and the law governing the conduct of war, called *jus in bello*. I will refer to the two together as the “law of war,” which is the term that DoD uses in its official policies and publications.<sup>14</sup>

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binding upon all parties to the armed conflict, including State armed forces and non-State armed groups.”).

11. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

12. Statute of the International Court of Justice, art. 38, ¶ 1; see also LAW OF WAR MANUAL, *supra* note 10, § 2.1.1 (and sources cited within).

13. W. Michael Reisman, *Jonathan I. Charney: An Appreciation*, 36 VAND. J. TRANSNAT’L L. 23, 24 (2003).

14. See LAW OF WAR MANUAL, *supra* note 10, § 1.3.

The United States is a party to the Charter of the United Nations, which generally prohibits “the threat or use of force” in Article 2(4),<sup>15</sup> but also recognizes the *jus ad bellum* right of self-defense in Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member.”<sup>16</sup> The United States is also party to a number of *jus in bello* treaties, such as the 1907 Hague Convention on Land Warfare and the 1949 Geneva Conventions.<sup>17</sup>

Most countries are parties to the United Nations Charter and the 1949 Geneva Conventions, but there can be significant differences in how States are bound by and interpret the requirements of international law. States may ratify different treaties, interpret the same treaty provisions differently, and have differing views on what customary international law requires. For example, the United Kingdom for some time has held the view that humanitarian intervention, in certain circumstances, can be an independent justification for a State to use armed force in another State’s territory even absent the territorial State’s consent, U.N. Security Council authorization, or collective or individual self-defense.<sup>18</sup> Although we recognize that there can be a compelling moral argument for military intervention in mass atrocity or genocide cases, the United States has not recognized a free-standing international law right to use force against other States solely on humanitarian grounds.<sup>19</sup> These differences among States are pertinent as they demonstrate that States can and do take different approaches to international law, and that consensus on certain aspects may take time to develop.

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15. U.N. Charter art. 2(4).

16. *Id.* at art. 51.

17. The U.S. Department of State annually publishes information on treaties and other international agreements to which the United States is a party. U.S. Dep’t of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2019*, <https://www.state.gov/wp-content/uploads/2019/05/2019-TIF-Bilaterals-web-version.pdf> (last visited Sept. 26, 2019) [<https://perma.cc/B5AU-EQ77>] (archived Sept. 26, 2019). For a list of law of war treaties to which the United States is a party and other treaties that it has not ratified, see LAW OF WAR MANUAL, *supra* note 10, § 19.2.

18. See HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, GLOBAL BRITAIN: THE RESPONSIBILITY TO PROTECT AND HUMANITARIAN INTERVENTION: GOVERNMENT RESPONSE TO THE COMMITTEE’S TWELFTH REPORT, 2017-19, HC 1719, at 3–4 (UK) (“The UK’s long-standing position on humanitarian intervention is that it is consistent with international law if the following three conditions are met: (i) There is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (ii) It must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (iii) The proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).”).

19. See, e.g., LAW OF WAR MANUAL, *supra* note 10, § 1.11.4.4.

As I mentioned, Professor Charney was a world-renowned international maritime law expert<sup>20</sup> and a member of the U.S. delegation to the third U.N. Conference on the Law of the Sea. It took three diplomatic conferences more than three decades to achieve broad consensus on the establishment of a territorial sea out to a maximum breadth of twelve nautical miles and to recognize a 200 nautical-mile exclusive economic zone—in part because many countries, led by the United States, were firmly dedicated to the longstanding principle of freedom of the seas.

But the open-seas norm itself was once an invention. Hugo Grotius conceived of the freedom of seas, which he called by the Latin term *mare liberum*, or “open seas,” four centuries ago.<sup>21</sup> At the time, Portuguese-Spanish assertions of “closed seas” (*mare clausum*) posed an alternative view: new seas, like new lands, were viewed as the property of those (that is, those Europeans) who discovered them.<sup>22</sup> Grotius advanced a new understanding of international law that allowed the Netherlands—a Lilliputian State with a Gulliverian navy—to attain astonishing global power.<sup>23</sup> Grotius was so influential that international lawyers today often forget that freedom of the seas was once an untested concept in international law.

Today, the swift pace of technological development presents another occasion for States to reflect on existing international law and to work towards consensus understandings where possible. For DoD, rapid advancements in technology and connectivity through cyberspace present unique national security challenges and opportunities. For example, as a 2019 assessment by the Director of National Intelligence notes, “China has the ability to launch cyber attacks that cause localized, temporary disruptive effects on critical infrastructure . . . in the United States. . . . Moscow is now staging cyber attack assets to allow it to disrupt or damage U.S. civilian and military infrastructure during a crisis . . . ”<sup>24</sup>

When it comes to activity in cyberspace, geographic distance from our adversaries offers no measure of safety. In this area, the United States must “defend forward,”<sup>25</sup> engaging adversaries before their

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20. Professor Charney is co-author of the first three volumes of the definitive treatise on the law of international maritime boundaries. See 1–3 *INTERNATIONAL MARITIME BOUNDARIES* (Johnathan I. Charney & Lewis M. Alexander eds., 1993).

21. HUGO GROTIUS, *THE FREE SEA* 7 (Richard Hakluyt trans., Liberty Fund 2004).

22. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 129–36 (Michael Byers trans., rev. ed. 2000).

23. See ALFRED THAYER MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY: 1660-1783* 53, 95–97 (25th ed. 1918) (1890).

24. *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 116th Cong. 5 (2019) (statement of Daniel R. Coats, Director of National Intelligence), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf> [<https://perma.cc/4V4L-FZKH>] (archived Sept. 26, 2019).

25. U.S. Dep't of Def., *Summary: Department of Defense Cyber Strategy* 1 (2018), <https://media.defense.gov/2018/Sep/18/2002041658/-1/>.

actions can affect intended targets. Attempting to protect from cyber attacks at or near the point of impact or just along international territorial boundary lines is not only artificial and naïve, it is also ineffective and self-defeating. But as we defend forward, and as our allies and adversaries do likewise, we must be conscious of the fact that our actions in cyberspace must comply with existing international law and norms for responsible State behavior in cyberspace.

We know that international law principles apply in cyberspace, but which principles and how they apply are actively being discussed by States. Further discussion, clarification, and cooperation on these issues are necessary. We also recognize that, like the historical law of the sea, customary international law applicable to cyberspace may evolve over time through many rounds, in response to technological developments that may affect State practice and *opinio juris*.

There is, nonetheless, some common understanding today on the applicability of international law principles to cyber operations. An action in cyberspace may, in certain circumstances, constitute a use of force within the meaning of Article 2(4) of the U.N. Charter and customary international law where, for example, a cyber operation causes physical injury or damage that would be considered a use of force if caused by traditional physical means.<sup>26</sup> Likewise, the customary international law prohibition against intervention in the affairs of another State can apply to State conduct in cyberspace.<sup>27</sup> For example, as the United States and other countries have recognized, cyber operations by a State that interfere with another country's ability to hold an election or that manipulate another country's election results would be a clear violation of this prohibition.<sup>28</sup> For further reading, I commend to you the Department of Defense Law of War Manual addressing the international law applicable to cyber operations.<sup>29</sup>

But there remain many details to be addressed in applying international law principles to cyberspace and cyber operations. One

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1/1/CYBER\_STRATEGY\_SUMMARY\_FINAL.PDF [https://perma.cc/5ZJP-X9BP] (archived Sept. 26, 2019) (“We will defend forward to disrupt or halt malicious cyber activity at its source, including activity that falls below the level of armed conflict.”).

26. LAW OF WAR MANUAL, *supra* note 10, § 16.3.1.

27. Brian J. Egan, *International Law and Stability in Cyberspace*, 35 BERKELEY J. INT'L L. 169, 175 (2017).

28. See *id.*; U.K. Att'y Gen. Jeremy Wright QC, MP, Address on Cyber and International Law in the 21st Century (May 23, 2018) (transcript available at <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> [https://perma.cc/L5N6-HKX8] (archived Sept. 26, 2019)) (explaining that “the use by a hostile state of cyber operations to manipulate the electoral system to alter the results of an election in another state . . . must surely be a breach of the prohibition on intervention in the domestic affairs of states”).

29. See LAW OF WAR MANUAL, *supra* note 10, at 1011.



unsettled area is the extent to which rules that apply in the context of territory apply to cyberspace—a unique, manmade domain. Some commentators assert that territorial analogies and precedents should be presumptively valid in cyberspace. The assertion harkens back to the Spanish and Portuguese justifications for the closed-seas norm. If a European power discovers uncharted land, it owns it. If a European power discovers uncharted seas, it owns them, too. Is cyberspace more analogous to the land or the sea? Should the law of cyberspace track the law of the land? Or the law of the sea? Or, perhaps, the law of outer space?

Space may be the final frontier, but it is not a legal vacuum. Law-of-the-sea lore claims genesis in the law of ancient Rhodes.<sup>30</sup> I imagine that ancient mariners staring out at the ocean had the same sense of wonder at the vast possibilities and dangers out there that we have now as we contemplate the expanses of outer space. The challenge of space is no less intriguing for lawyers.

Space law for the United States is anchored by four treaties dating from the 1960s and 1970s.<sup>31</sup> Much has changed in the past fifty years: there are thousands more satellites with vastly greater and more diverse capabilities in orbit. And many more States and private entities are active in space, as illustrated most recently by India's launch of a mission to the Moon. A major role of the outer space lawyer is to apply these treaties to new circumstances, and, if necessary, to advise in the identification and formulation of rules.

Let me give you an example. In 2008, U.S. Government space lawyers were asked about how the 1967 Outer Space Treaty—the framework treaty for space and, in part, an arms-control agreement—would affect a proposed DoD action in a very public setting. A U.S. satellite—USA-193—was in orbit but was malfunctioning and out of control. U.S. officials feared that it might survive an uncontrolled reentry, crash in a populated area, and release its propellant, the toxic chemical hydrazine. The proposal was to shoot down the satellite at a low point in its orbit to reduce the amount of debris that remained in space while causing the hydrazine to burn up on reentry to the Earth's atmosphere.

Article IX of the Outer Space Treaty provides:

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30. See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 2–5 (Foundation Press 1957).

31. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*]; The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 672 U.N.T.S. 119; The Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187; The Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 1023 U.N.T.S. 15. The United States is not a State Party to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3.

If a State Party to the Treaty has reason to believe that an activity . . . planned by it . . . in outer space . . . would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space . . . it shall undertake appropriate international consultations before proceeding with any such activity.<sup>32</sup>

Think about some of those phrases, and how they might apply to the proposed take-down of USA-193. What does “reason to believe” mean? Probably more than “reason to suspect” but less than specific knowledge. Or, the phrase “would cause potentially harmful interference”? Assuming that Article IX applies, what does it require? A State party doesn’t have to stop the activity; it just needs to “undertake appropriate international consultations before proceeding.” But what constitute “international consultations”? And who determines if those consultations are “appropriate”?

In 2008, the Outer Space Treaty had been in force for more than forty years, but no State had previously conducted Article IX consultations. In the end, based in part on advice from DoD lawyers, senior U.S. leaders determined that Article IX consultations were not required prior to engaging the satellite. But, consistent with the international-notification aim of Article IX, U.S. leaders decided to make a public announcement before the event. On February 14, 2008, the NASA Administrator, the Vice Chairman of the Joint Chiefs of Staff, and the Deputy National Security Advisor announced that then-President George W. Bush had decided to shoot down the satellite.<sup>33</sup> Thankfully, USA-193 was successfully shot down a week later on February 20, 2008, stopping it from what would have been an uncontrolled re-entry into the Earth’s atmosphere and minimizing the amount of debris that might cause interference with other State Parties’ activities in outer space.<sup>34</sup>

Since then, much has happened in the space domain. The President has revived the National Space Council, chaired by the Vice President;<sup>35</sup> reinvigorated the U.S. human space exploration

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32. Outer Space Treaty, *supra* note 31, at art. IX.

33. Jim Garamone, *Navy to Shoot Down Malfunctioning Satellite*, ARMED FORCES PRESS SERV. (Feb. 14, 2008), <https://archive.defense.gov/news/newsarticle.aspx?id=48974> [<https://perma.cc/VEK5-4FQ4>] (archived Sept. 26, 2019). The United States also provided “a notification to the [U.N.] Secretary General, the STSC [Scientific and Technical Subcommittee of the Committee on the Peaceful Uses of Outer Space], other UN bodies, and Governments throughout the world the day after the successful engagement.” U.S. DEPT OF STATE, 2008 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 665, 669 <https://2009-2017.state.gov/documents/organization/138513.pdf> [<https://perma.cc/7E5B-ED73>] (archived Oct. 14, 2019).

34. U.S. Dep’t of Def., *Navy Succeeds in Intercepting Non-Functioning Satellite*, U.S. NAVY (Feb. 20, 2008), [https://www.navy.mil/submit/display.asp?story\\_id=35114](https://www.navy.mil/submit/display.asp?story_id=35114) [<https://perma.cc/HNE5-5UGE>] (archived Sept. 26, 2019).

35. Exec. Order No. 13,803, 82 Fed. Reg. 31,429 (June 30, 2017).

program;<sup>36</sup> directed the streamlining of regulations on commercial use of space;<sup>37</sup> issued a directive on space traffic management;<sup>38</sup> directed the establishment of U.S. Space Command;<sup>39</sup> and ordered the Secretary of Defense to prepare a legislative proposal to establish a U.S. Space Force.<sup>40</sup> These directives to work towards a U.S. Space Force and to establish U.S. Space Command, which was launched on August 29, 2019,<sup>41</sup> have been at the forefront of DoD's recent space law efforts.

Another important development is that U.S. national defense policy has declared space to be a warfighting domain. In 2007, the year prior to the U.S. engagement of USA-193, China conducted a test of an antisatellite (ASAT) system. That test destroyed the targeted satellite and created substantial space debris, much of which remains in orbit. China has deployed a ground-based missile intended to target and destroy satellites in low-Earth orbit and has tested and is pursuing other weapons capable of destroying satellites. Russia also has an ASAT system in development that will likely be operational within the next several years. Russia has already fielded a ground-based laser weapon, which could blind or damage our sensitive space-based optical sensors. More recently, in April 2019, India tested its own ASAT system. In short, space is no longer a safe harbor, and the United States—with DoD in the lead—needs to be prepared to defend its national interests in space.<sup>42</sup>

Professor Charney, in a 1995 article titled "Universal International Law," proposed a new approach to the customary lawmaking process based on multilateral forums:

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36. Space Policy Directive-1, 82 Fed. Reg. 59,501 (Dec. 11, 2017).

37. Space Policy Directive-2, 83 Fed. Reg. 24,901 (May 24, 2018).

38. Space Policy Directive-3, 83 Fed. Reg. 28,969 (June 18, 2018).

39. Memorandum from the President for the Sec'y of Def. on the Establishment of United States Space Command as a Unified Combatant Command, 83 Fed. Reg. 65,483 (Dec. 18, 2018).

40. Space Policy Directive-4, 84 Fed. Reg. 6,049 (Feb. 19, 2019).

41. Press Release, U.S. Dep't of Def., Department of Defense Establishes U.S. Space Command (Aug. 29, 2019), <https://www.defense.gov/Newsroom/Releases/Release/Article/1948288/department-of-defense-establishes-us-space-command/> [<https://perma.cc/HQ4E-T2L7>] (archived Oct. 14, 2019).

42. See *The Proposal to Establish a United States Space Force: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. 4 (2019) (statement of Patrick M. Shanahan, Acting U.S. Sec'y of Def., & Gen. Joseph F. Dunford, Chairman of the Joint Chiefs of Staff) (transcript available at [https://www.armed-services.senate.gov/download/shanahan\\_dunford\\_04-11-19](https://www.armed-services.senate.gov/download/shanahan_dunford_04-11-19) [<https://perma.cc/RH4A-4GPQ>] (archived Sept. 27, 2019)) ("Rather than attempt to address each issue in isolation, DoD recognizes the need for a paradigm shift based on a new set of assumptions that more closely reflect today's realities: space is not a sanctuary – it is now a warfighting domain, similar to the air, land, and sea domains; space superiority is a condition that must be gained and maintained via a range of options, including resilient architectures, offensive and defensive operations; space doctrine, capabilities, and expertise must be designed to gain and maintain space superiority, and support operations in other domains; and spacepower and airpower doctrine and operating concepts are as distinct from one another as the air domain is from the land, and as the land domain is from the sea.").

Traditional customary law formation may have sufficed when both the scope of international law and the number of states were limited. Today, however, the subject matter has expanded substantially into areas that were traditionally preserves of states' domestic jurisdiction . . . Rather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law.<sup>43</sup>

Multilateral forums, according to Professor Charney, "include the United Nations General Assembly and Security Council, regional organizations, and standing and ad hoc multilateral diplomatic conferences, as well as international organizations devoted to specialized subjects."<sup>44</sup>

Professor Charney's article reflects an important insight: multilateral forums can play an important role in the clarification and development of customary international law on novel and contentious issues. States can listen to and learn from the views of other States and subject matter experts. Convergence on the meaning of international law may result as participants begin to understand the issues better and reflect on the views of others.

However, in practice, multilateral processes often haven't been very effective in realizing Professor Charney's vision, especially with respect to the law of war. Customary international law results from a general and consistent State practice done out of a sense of legal obligation (*opinio juris*). A statement from, or a resolution adopted by, a multilateral forum is not, as a general matter, State practice or *opinio juris* that directly contributes to the formation of customary international law.<sup>45</sup> Statements in multilateral forums can be secondary sources that are useful in assessing customary international law to the extent such statements actually reflect the practice and legal views of States.<sup>46</sup>

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43. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993).

44. *Id.* at 543–44.

45. See Letter from John Bellinger III, Legal Adviser, U.S. Dep't of State, and William J. Haynes, Gen. Counsel, U.S. Dep't of Def., to Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), 46 INT'L LEGAL MATERIALS 514, 515 (2007) ("We also are troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.").

46. See, e.g., Memorandum of Law from George Aldrich, Acting Legal Adviser, Dep't of State (Oct. 25, 1974), U.S. DEP'T OF STATE, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (OXFORD UNIV. PRESS & INT'L LAW INST. 1976) ("It may confidently be assumed that, if the issue of whether such activities are proscribed by the principle of non-intervention were to be put to a vote today in the United Nations General Assembly, the vast majority would hold that they are; but whether the practice of those states will come to support that conclusion remains to be seen.").

Recognizing this issue and the politics that could be associated with multilateral forums, the United States has sought to encourage non-politicized, multilateral discussions on the law of war based on actual State practice. Although bodies like the United Nations Security Council and General Assembly will continue to address law of war issues, there should also be a non-politicized space for substantive law of war discussions.

For example, over the past eight years, the United States, joined by a diverse group of other States, has encouraged some specific practices in processes designed to strengthen respect for the law of war co-facilitated by the Swiss Government and the International Committee of the Red Cross (ICRC).<sup>47</sup> Our recommended practices are intended to help minimize politicization and to enrich discussion.

First, there should be a forum for States to discuss the law of war that isn't simply a forum for States to criticize one another. The law of war requires that warring parties put aside the political context that made them enemies and apply humanitarian protections. International discussions on the law of war of this nature, in our view, can be an important opportunity to improve humanitarian protections in all conflicts.

Second, State representatives should present on their own best practices in the law of war, rather than censure the practices of other States. Such criticism is nearly always perceived as political even if it is offered in good faith.

Third, to engage in substantive law of war discussions, States should include military or legal experts who are involved in their State practice, especially in actual operations.

Finally, we have encouraged meetings where each State presents its own views, rather than focusing dialogue on the wording of a common text from the forum, like a resolution. In some circumstances, arguing over the text can divert attention from substantive discussions. Negotiating texts can also hinder clarification of the law because a common approach to achieve consensus is to make language more ambiguous.

The United States has recommended and sought to apply these specific practices in a variety of contexts where clarification or development of the law of war are useful: 1) emerging technologies in the area of lethal autonomous weapons systems; 2) the protection of civilians in armed conflict; and 3) detention in non-international armed conflicts. We believe this approach could be useful in certain other contexts as well.

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47. Conference Resolution 2, 32IC/15/R2 (Dec. 8–10, 2015), [http://rcrcconference.org/app/uploads/2015/04/32IC-AR-Compliance\\_EN.pdf](http://rcrcconference.org/app/uploads/2015/04/32IC-AR-Compliance_EN.pdf) [<https://perma.cc/J48Z-2S6H>] (archived Sept. 27, 2019); Conference Resolution 1, 31IC/R1 (Nov. 28 – Dec. 1, 2011), <https://www.icrc.org/en/doc/resources/documents/resolution/31-international-conference-resolution-1-2011.htm> [<https://perma.cc/CYA8-DY6E>] (archived Sept. 27, 2019).

Another area where States have different international legal obligations is the International Criminal Court (ICC), which is an international forum for prosecuting war crimes and certain other serious violations of international law. Although many States are parties to the Rome Statute—the treaty that created the ICC—and have thereby accepted its jurisdiction, the United States is not a party to the Rome Statute and has not consented to its jurisdiction.<sup>48</sup> The United States respects the decision of those nations that have chosen to join the ICC, and, in turn, we expect that our decision not to join and not to place our citizens under its jurisdiction will also be respected.

The ICC, however, has asserted the right to investigate and prosecute our people without our consent. It purports to evaluate U.S. accountability efforts. The U.S. policy in response to these ICC assertions is very clear and has been stated in remarks by Ambassador Bolton and Secretary Pompeo. The bottom line is that: “we reject such a flagrant violation of our national sovereignty.”<sup>49</sup> The U.S. view, as Secretary Pompeo has indicated, is that “the ICC is attacking America’s rule of law.”<sup>50</sup> The United States holds our people accountable for their actions, and the United States will take the necessary actions to protect our people from prosecution by the ICC without its consent.

## II.

Indeed, respect for the rule of law is a bedrock commitment of the U.S. Department of Defense. And DoD lawyers, naturally, play an essential role in ensuring that the Department’s activities comply with applicable laws.

DoD has more than 12,000 civilian and military lawyers. We have operational lawyers embedded at the brigade, air wing, and naval strike group level in every theater of operations. When our warfighters conduct missions, law of war briefings by military lawyers—Judge Advocate General (JAG) officers—are as routine as briefings by

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48. *Statement on Behalf of the United States of America*, 16th Session of the Assembly of States Parties to the Rome Statute (Dec. 8, 2017), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP16/ASP-16-USA.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf) [<https://perma.cc/YF98-CXSK>] (archived Sept. 27, 2019).

49. John R. Bolton, *National Security Adviser John Bolton Remarks to Federalist Society*, LAWFARE (Sept. 10, 2018), <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society> [<https://perma.cc/8ZKL-Q3Z6>] (archived Sept. 27, 2019).

50. Michael R. Pompeo, U.S. Sec’y of State, Remarks to the Press (Mar. 15, 2019) (transcript available at <https://www.state.gov/remarks-to-the-press-6/> [<https://perma.cc/AF78-35H6>] (archived Sept. 27, 2019)).

intelligence officers. We have international law JAG elements in every combatant command legal office, with the specific mission to advise on the law of war.<sup>51</sup> What does this say about the U.S. armed forces? The United States takes its obligation to abide by the law of war seriously, and our lawyers on the ground prove it.

Let me give you an example of DoD lawyers in action, one that includes Professor Charney's expertise—the law of the sea. Countries like Iran and China have sought to exert national control over international straits and waters. This is one of the most pressing issues in international security today. For example, Iran seeks to deny navigational rights through the Strait of Hormuz, despite customary international law rules permitting transit passage through straits used for international navigation. Similarly, China makes excessive maritime claims in the South China Sea that impede freedom of navigation and are inconsistent with customary international law.

You might recall seeing news stories about challenges to freedom of navigation in key waterways such as the Strait of Hormuz and the South China Sea. Although I can't discuss specific events, I can give you a general look at how the United States would react in international security scenarios like these, consistent with the rule of law, with a specific eye on the role of DoD lawyers.

First, having the facts is always important. The intelligence community works to gain as much information about flashpoint incidents as possible—the who, what, where, why, and how. Second, the National Security Council (NSC) staff at the White House will typically convene an interagency process and start compiling a menu of policy choices for how to respond. They might ask the Department of State for diplomatic options and Treasury for economic options like sanctions, and they might ask DoD for military options. Operational planners at the relevant geographic combatant commands (like U.S. Central Command or U.S. Indo-Pacific Command) and in the office of the Chairman of the Joint Chiefs of Staff (the country's top military advisor to the Secretary of Defense and the President) would draw up those potential military responses. The lawyers in my office work closely with combatant command and Joint Staff lawyers as those

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51. See U.S. Dep't of Def. Directive 2311.01E, Dep't of Def. Law of War Program, ¶ 5.7, ¶ 5.11 (May 9, 2006), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf?ver=2019-04-03-105531-777> [<https://perma.cc/4ZTN-6CM9>] (archived Sept. 26, 2019) (“The Heads of the DoD Components shall [.] Make qualified legal advisers at all levels of command available to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs to comply with the reporting requirements established in section 6. . . . The Commanders of the Combatant Commands shall [.] Designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war; . . . Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.”).

options are framed to help ensure they would comply with the law, including by reviewing any targeting options that might be presented.

Let me illustrate this legal team effort with hypothetical examples. Suppose a country or surrogate militia had used armed force—such as an anti-ship missile, armed boarding and/or capture, or a contact mine—against a U.S.-flagged vessel or warship in international waters or during transit passage in an international strait. Or suppose a country or surrogate force had used that kind of force against a foreign-flagged vessel that specifically requested U.S. military assistance in response.

Let's say that the U.N. Security Council has not adopted a resolution pursuant to its authority under Chapter VII of the United Nations Charter authorizing the use of force in response to such aggressive actions.<sup>52</sup> And the United States has not taken the position that a violation of the freedom of navigation is an independent ground for the use of armed force under international law. But nations always maintain the inherent right to exercise self-defense in accordance with international law.<sup>53</sup> Self-defense may be exercised either in a State's own national self-defense, or in the collective self-defense of a partner or ally.

Our analysis of whether military options could be authorized in a legitimate exercise of national or collective self-defense would start with a few key questions: Did the event constitute an armed attack or threat of imminent armed attack such that self-defense could be invoked? What were the flag jurisdictions of any vessels attacked or captured? Does the United States have a mutual defense treaty obligation to the particular State of the foreign-flagged vessel, or has the foreign country in question specifically requested U.S. military assistance to defend it? If the event constituted an armed attack against a foreign-flagged vessel whose flag country requested U.S. military assistance in response, then there could be—depending on the specific facts—a valid international legal basis to support a U.S. military response in the collective self-defense of that flag State, a response that would be followed immediately by Department of State

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52. Article 42 of the U.N. Charter provides: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. Charter art. 42.

53. See U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations..."); LAW OF WAR MANUAL, *supra* note 10, § 1.11.5.



reporting to the U.N. Security Council in accordance with Article 51 of the U.N. Charter.<sup>54</sup>

But use of force in self-defense is also informed by the customary international law requirements of necessity and proportionality. In addition, during such an operation, U.S. military forces would comply with applicable *jus in bello* rules. For example, they would distinguish between lawful military targets and protected objects and persons such as civilians, and they would refrain from attacks expected to cause excessive harm to civilians.<sup>55</sup> Furthermore, when the justification is self-defense, no armed response would be justified under international law if, for example, the precipitating use of force was a one-time accident and thus not likely to recur. So, we'd also ask questions like: Is there any evidence that the precipitating use of force was accidental? What non-force options have we tried? What are the estimated casualties resulting from any of the contemplated force options?

The answers to those questions represent only half of the legal equation. In addition to the questions I just posed related to the international law basis for the use of force in self-defense, we'd also assess any proposed military options for legality under domestic law. Although my focus in this lecture is international law, I'd like to give you a sense of the domestic legal issues involved in situations like these, because they are often intertwined with the international law issues.

What legal authority would the President be invoking if he were to authorize military force? Is there a statute authorizing the military options contemplated? If not, could the President use force nonetheless under his constitutional Article II powers if he identifies significant national interests, and the situation does not amount to "war" in the constitutional sense requiring congressional authorization? What might those qualifying national interests be? What have Presidents done in the past? U.S. Supreme Court decisions regarding presidential use of armed force absent a congressional declaration of war are rare,<sup>56</sup> and so guidance on these vital questions in practice is provided by the

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54. "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. Charter art. 51.

55. See LAW OF WAR MANUAL, *supra* note 10, §§ 5.5, 5.10.

56. See, e.g., *The Prize Cases*, 67 U.S. 635 (1863) (upholding, by a 5-4 vote, President Lincoln's April 19, 1861, proclamation of a blockade of southern ports one week after the taking of Fort Sumter by Confederate forces while Congress was in recess); Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 64 (2008) ("[B]y proclaiming the blockade in April 1861, Lincoln had committed a belligerent act that was unauthorized by the explicit words of the Constitution and unauthorized by congressional statutes. Nor could the act be grounded in some defensive gloss on his power as Commander in Chief, in light of the patently offensive use of armed force on the private citizens of neutral foreign countries that had neither invaded the United States nor actively aided insurrection.").

legal opinions of the Department of Justice's Office of Legal Counsel (OLC). The most recent ones are instructive, namely OLC's 2011 opinion regarding air strikes in Libya<sup>57</sup> and its 2018 opinion regarding air strikes in Syria.<sup>58</sup>

If you have some time, I urge you to read them—they are public and easily accessible online, along with many other unclassified OLC opinions.<sup>59</sup> One thing that you will see is the remarkable degree of continuity across administrations. For instance, the 1994 Haiti and 1995 Kosovo opinions during the Clinton Administration<sup>60</sup> and the 2011 Libya opinion during the Obama Administration are key underlying opinions for the 2018 Syria opinion during this administration.

Legal analysis is conducted within DoD, with lawyers advising components up and down the chain of command. It is also discussed and debated with lawyers working on the NSC staff and across relevant departments and agencies—at the State Department, CIA, DOJ, and others. We answer questions. We may gather and provide more facts and analysis. We do what lawyers do in this country every day: we give our best legal advice to clients—here, our nation's leaders—who have to make tough decisions.

Up to this point, I've given you a sense of how international law affects DoD policymaking and the decisions that the U.S. Government makes in the international security realm *ex ante*. I'd like to turn next to some examples of how we demonstrate fidelity to the rule of law by respecting applicable international law *ex post*.

First, consider the differing positions between the United States and China regarding the 1982 Law of the Sea Convention. The United States has not ratified the Convention but accepts its provisions on traditional uses of the seas as customary international law,<sup>61</sup> and thus

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57. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).

58. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1 (2018).

59. See Office of Legal Counsel, *Opinions*, U.S. DEP'T OF JUSTICE, June 5, 2016, <https://www.justice.gov/olc/opinions-main> [<https://perma.cc/Q8XK-MG7B>] (archived Sept. 27, 2019).

60. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995).

61. U.S. Diplomatic Note Responding to Ecuador, U.S. DEP'T OF STATE, 2017 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 531–32, <https://www.state.gov/wp-content/uploads/2019/04/2017-Digest-of-United-States-Practice-in-International-Law.pdf> [<https://perma.cc/LBV7-JPBB>] (archived Oct. 14, 2019) ("With regard to the statements contained in Ecuador's declaration on accession to the Convention of September 24, 2012, the United States wishes to recall that, although the United States is not yet a Party to the Convention, it has long regarded the Convention as reflecting customary international law with respect to traditional uses of the ocean. Since 1983, the United States has acted in accordance with the Convention's

binding on all States including non-parties to the Convention like the United States. This includes the establishment and maximum extent of maritime zones such as the twelve nautical-mile territorial sea and the 200 nautical-mile exclusive economic zone, as well as the navigational rights and freedoms set forth in the Convention, such as the freedom of navigation and overflight, the right of transit passage through international straits, and the right of innocent passage through the territorial sea.<sup>62</sup>

China, by contrast, has ratified the Convention<sup>63</sup> and abides by it when compliance suits China's national interests. However, China has also engaged in a decades-long campaign to convert a large swath of the South China Sea into its own exclusive preserve, in a way that is clearly inconsistent with international law as reflected in the Convention.<sup>64</sup> The Chinese, in effect, are seeking to revive the sixteenth-century Portuguese closed-seas norm. The juxtaposition of U.S. non-ratification of the Law of the Sea Convention plus U.S. compliance with the provisions it regards as reflecting customary international law, with China's ratification and non-compliance, is a good example of what I mean by *ex post* commitment as an essential element to the rule of law. Simply ratifying a treaty is not enough; by the same token, not ratifying a treaty doesn't mean a State is a rule-of-law scofflaw.

My second example of U.S. commitment to the rule of law in international security affairs concerns a relatively obscure feature of United States-Iran relations. The example also gives you a sense of the diverse nature of the work the lawyers in the DoD Office of General Counsel do. In the 1970s, the United States and Iran were close allies, with billions of dollars in bilateral business. And then the Iranian Revolution happened.

Iranian militants stormed the U.S. embassy in Tehran and seized fifty-two U.S. hostages on November 4, 1979. A little more than a year later, on January 19, 1981, the United States and Iran signed the Algiers Accords, an international agreement in which Iran agreed to release the U.S. hostages,<sup>65</sup> which it did the next day. The United States, for its part, agreed:

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balance of interests, including with respect to its exercise of navigation and overflight rights and lawful uses of the sea on a worldwide basis.”).

62. United Nations Law of the Sea Convention, arts. 3, 38, 45, 57, 87, Dec. 10, 1982, 1833 U.N.T.S. 397.

63. *See id.*

64. *See* U.S. Diplomatic Note to China, U.S. DEP'T OF STATE, 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 520–22, <https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-Chapter-12-.pdf> [<https://perma.cc/Y5PA-9Z6T>] (archived Oct. 14, 2019).

65. The Algiers Accords comprised several separate documents, including a General Declaration of the Algerian government, and a Claims Settlement Agreement. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria, at 3, *reprinted in* U.S. Dep't of State Bull. No. 2047 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the

To terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.<sup>66</sup>

The arbitration was to take place in The Hague before the Iran-United States Claims Tribunal, a nine-member tribunal consisting of three members nominated by Iran and the United States each, who would in turn nominate three other members including the President.<sup>67</sup> The Tribunal could hear claims *en banc* or in three-member panels. The United States committed to collecting and depositing all Iranian assets held by US banks by July 19, 1981, with one billion dollars to be deposited in an escrow account in the Bank of England. The U.S. Supreme Court upheld the President's power to make this international agreement in *Dames & Moore v. Regan*.<sup>68</sup>

The Iran-United States Claims Tribunal has been a prime catalyst of the evolution of international arbitration and investment law. Many of the most prominent international arbitrators and practitioners today have been involved with the 3,900 cases the Tribunal has already decided. It was an early adopter of United Nations Commission on International Trade Law's (UNCITRAL's) model arbitration rules promulgated in 1976,<sup>69</sup> which contributed greatly to the Rules' worldwide dissemination and burnished the reputation of UNCITRAL generally.

More than thirty-eight years later, the Tribunal is still active. In fact, on June 14, during heightened tensions with Iran in the Strait of Hormuz and five days before the downing of a U.S. Navy unmanned aircraft in the area, my Deputy General Counsel for International Affairs, Chuck Allen, as a member of the State Department-led team, was making a closing presentation before the Tribunal on the last set of major claims before it. All the claims of U.S. nationals against Iran have already been processed; the only claims left are multibillion-dollar claims alleged against the U.S. Government for contract amounts (with interest) that Iran had in connection with the U.S. Foreign Military Sales Program.

Step back for a moment. What does it say about the United States that, despite the nearly four decades of troubled relations between our

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Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, at 3, *reprinted in* U.S. Dep't of State Bull. No. 2047 (1981).

66. Declaration of the Government of the Democratic and Popular Republic of Algeria, at 3, *reprinted in* U.S. Dep't. of State Bull. No. 2047 (1981).

67. *Id.* at 10.

68. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

69. G.A. Res. 31/98, UNCITRAL Arbitration Rules (Dec. 15, 1976).

two nations, the United States is still honoring the international law commitment to Iran that it undertook in the 1981 Algiers Accords, even when most of the remaining claims are Iran's claims against the United States? Consider this example of U.S. commitment to the rule of law in international security affairs juxtaposed against DoD's two interactions with Iran in mid-June of this year. All are examples of how the United States abides by international law in difficult circumstances with important national interests at stake. Even amidst conditions implicating the potential for the use of force, the United States honored a decades-old international law promise, signifying what it means to be truly dedicated to the international rule of law.

I will close by emphasizing that the rule of law, for the U.S. Department of Defense, isn't just about lawyers and legal rules. The DoD implements and secures the rule of law through the professional values that everyone in the Department seeks to uphold. We all swear an oath to support and defend the Constitution. DoD leaders, including commanders and commissioned and non-commissioned officers throughout the chain of command, recognize the importance of ethics and values, and there is an expectation that each and all will conduct themselves in accord with the highest standards.

Secretary of Defense Esper, in his first message to the Department of Defense in June 2019, underscored the great importance of "a commitment by all—especially Leaders—to those values and behaviors that represent the best of the military profession and mark the character and integrity of the Armed Forces that the American people admire."<sup>70</sup> And, as Chairman of the Joint Chiefs of Staff, General Joe Dunford has said, when we go to war, we "bring our values with us."<sup>71</sup>

Comporting with those standards reinforces our institutional respect for the rule of law. In the DoD Law of War Manual, we emphasize the importance not only of the law but also of honor and other professional military values as means to ensure respect for full compliance with law of war in military operations.<sup>72</sup> The rule of law is in our DNA.

### III.

I hope my remarks have given you a sense of what the Office of General Counsel of the U.S. Department of Defense does, along with some understanding of the Department's commitment to the rule of

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70. Memorandum from Mark T. Esper, Acting U.S. Sec'y of Def., to All Department of Defense Employees (June 24, 2019) (on file with U.S. Dep't of Defense).

71. Gen. Joseph F. Dunford, Jr., Chairman of the Joint Chiefs, Remarks and Q&A at the Center for a New American Security Next Defense Forum (Dec. 14, 2015) (transcript available at <https://www.jcs.mil/Media/Speeches/Article/636952/gen-dunfords-remarks-and-qa-at-the-center-for-a-new-american-security-next-defe/> [<https://perma.cc/GN7N-QZA9>] (archived Sept. 27, 2019)).

72. LAW OF WAR MANUAL, *supra* note 10, § 2.6.

law in international security affairs. We advise the nation's warfighters and their leaders on issues, challenges, and problems that are complex, consequential, and vital to the security of our country and the world. If this job description interests you, if you aspire to public service, I encourage you to consider joining us in the national security law practice.

Should you take that path, I assure you that there is an additional and immeasurable benefit: the people you will work with are exceptional and will be a constant source of inspiration. Every day, I am thankful for the privilege of serving on this team. Thank you, as well, for the privilege of addressing you in this year's Charney Distinguished Lecture in International Law.

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