

Resiliency and Fragility—A Crossroads for International Law

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When I was first asked to address this gathering on the topic of recent developments in the field of international law, with a proposed focus on the Law of Armed Conflict and the use of force, my reaction was that the request put me in a bit of a quandary. There are so many developments over the last year, even over the last 6 months, that there was no way to decide what to discuss in my lecture. This is a good and bad problem to have. In

one sense, the intellectual pickings constitute a target-rich environment, because there are so many things to shoot at. On the other hand, the fact that there is an embarrassment of riches reveals just how deeply consequential this moment is for international law, for the law of armed conflict, for the fate of nations, and for the peaceful coexistence of humanity.

I have picked three case studies from the last year that deserve discussion and that will allow me to explore the topic of international law's fragility and resilience in today's challenging environment. The first is military strikes against boats allegedly manned by Venezuelan drug smugglers. The second is the capture and arrest of Nicolás Maduro. The

third is the military strikes against the Iranian nuclear sites and the subsequent armed conflict between the United States, Israel, and Iran.

Before I continue, let me clarify that my comments today reflect my work as a scholar, author, and instructor of international law, as someone who has followed these developments out of scholarly interest. Although I work as dean of Cornell Law School, I am speaking not in my institutional capacity and I am not speaking for Cornell, its students, or its faculty. As the co-chair of Cornell's Task Force on Institutional Voice, which developed our framework of institutional restraint, I am especially mindful to be clear about

my appearance before you today. I am speaking in my scholarly voice.

Now let's start with the boat strikes. As you'll recall, the United States military started intercepting migrant boats in international waters, launching missiles that destroyed the boats and killed their sailors. These strikes continue to this day, although they are less prominently covered in the media than they were initially. For a few weeks and months, the news media played larger attention to the "double tap" nature of these strikes. They were double tap because the strikes sometimes occurred in two waves. A drone or manned aircraft would strike the boat and disable it, and then sometime later, a second strike would

destroy what remained of the boat and its sailors. Some members of the public, and even some politicians, were horrified by the cruelty of the second “tap” strikes, because the sailors, sometimes clinging to the disabled scraps of a boat, appeared defenseless. In newspapers and on television, the discussion turned to the legal analysis of such strikes. Let me present my views.

Under the International Law of Armed Conflict, also known as LOAC, there is a general prohibition on targeting combatants who are *hors de combat*. This is a French phrase that means, literally, outside of combat, but it does not refer to being outside the zone of combat. Rather, it refers to an inability to engage in combat due to extreme

disability caused by injury, sickness, or detention. For example, a combatant who has been injured and is unconscious is *hors de combat*. But a soldier who has been shot in the chest but is still awake and capable of holding and firing their sidearm, is not necessarily *hors de combat*. Even a sleeping soldier in their barracks, at night, in pajamas, is not *hors de combat*. They can get up at any moment and fight. They are targetable.

There is also the rule that prohibits the targeting of combatants who have effectively signaled their surrender, by, for example, putting their hands in the air or waving a white flag. Once an attacking soldier sees this indication, they cannot kill the surrendering combatant, because

the surrendering combatant is *hors de combat* and enjoys a protected status. Incidentally, the declaration that “no quarter will be given” is an extension of the rule that surrendering combatants are protected, because the declaration signals that the enemy should not bother trying to surrender because they will be slaughtered no matter what.

A couple of clarifications are in order. The communication of surrender must be *effective*. In other words, the surrendering signal must be given *and* received. The reception of the signal is important. It is not enough to wave a white flag. Someone has to see it. And there’s no obligation to look for the signal unless it is reasonable to do so. Think about this carefully in the context of aerial

bombardment of a military target. The pilot in a bomber, miles above, isn't prohibited from dropping a bomb on an enemy military base just because someone down below has put up their hands up in a way that the pilot cannot see. If the rule was triggered by giving the signal, rather than someone receiving it, modern aerial bombardment would be effectively outlawed, which it isn't.

So, the question is whether the second tap of these strikes complied with these rules. The answer is that they sometimes did and sometimes didn't, depending on the facts of the matter. The details really matter. Were the sailors injured enough to place themselves *hors de combat*? Did the sailors effectively communicate their surrender?

Unfortunately, though, these debates have obscured a larger and more fundamental question about the legality of these strikes. Why did the media and the public focus so much on the second tap? This framing unfortunately crowded out a deeper legal issue, which is whether the first tap was even legal. And to analyze this issue, you need to understand the background principles regarding the law of armed conflict.

The law of armed conflict triggers a series of background rules that are fundamentally different from peacetime law. In peacetime, lethal force is generally only permitted when an individual is an imminent danger to himself or others, and the default paradigm for all other situations is capture,

arrest, trial, and punishment. Lethal force is the exception, not the rule.

In armed conflict, the presumption is reversed, and lethal force is permitted as the default, if the targeted is a legitimate military target. There is no requirement that attacking forces attempt capture as a first option and only then graduate to lethal force. Attacking forces are entitled to kill as many enemy combatants as they can, as quickly as possible, in order to end the armed conflict. Why allow such unrestrained brutality in warfare? In the famous words of Francis Lieber, the legendary Columbia University professor, President Lincoln confidant, and author of the Civil War-era Lieber Code, “sharp wars are brief.”

But the law does not unleash this orgy of violence on any occasion. It is only triggered by the existence of a bona fide armed conflict, a legal event that grounds the application of the law of armed conflict. For an armed conflict to exist, there must be violent hostilities of sufficient intensity and gravity, and there must also be at least two belligerent parties fighting against each other. The belligerent parties might be two nation-states, as is the case for an international armed conflict, or the parties might be a nation-state and a non-state actor, as is the case of a non-international armed conflict. In the case of a non-state actor, the group must be sufficiently organized that they can engage in the kind of collective action that constitutes an

armed belligerency. This can be satisfied by a terrorist organization with a defined command structure, or by a rebel group fighting a civil war and seeking to dethrone the government of a state.

Herein lays the problem with the boat strikes – the lack of a belligerent party. At various times, the administration has suggested that it is engaged in an armed conflict with narco-traffickers who belong to a gang called Tren de Aragua.

While a drug gang could, in theory, constitute a belligerent party, they would have to be capable of launching armed attacks against the United States, as opposed to merely capable of smuggling drugs. But there is insufficient evidence that the individuals on the boats were members of a drug

gang launching military attacks against the United States, nor is there sufficient evidence that every boat was involved in the smuggling of drugs, but that's another matter. In other legal fora, the United States has also asserted that Tren de Aragua is acting under the direction of the state of Venezuela and is engaged in an armed "invasion" of this country at the southern border. There is no evidence of that either, though even if that were the case, the existence of boats smuggling drugs into the United States would not be enough to trigger the existence of an armed conflict between our country and Venezuela. No armed conflict, no change in the default rules. Drug smuggling is a classic case of transnational law enforcement,

where the default paradigm reigns—arrest, capture, trial, and punishment. In other words, the boat strikes are illegal from the get-go, even before we reach the tricky question of the second tap.

Let me now turn to the second topic, which is the escalation by the United States of the confrontation with Venezuela, ultimately leading to the military incursion that ended with the capture and exfiltration of President Nicolás Maduro. Now let me say before I begin that the operation was a military success. Troops under the command of the United States government performed professionally and captured Maduro without a single loss of American life, though one soldier may have used insider knowledge of the operation to make money

from the prediction markets, which is neither ethical nor professional.

The problem with the operation is that the United States incursion was a violation of Venezuelan sovereignty so severe that it constituted an armed attack. Under the rules regarding the use of force under international law, an attack is only permitted if authorized by the Security Council under its Chapter VII authority to restore international peace and security, or as an exercise of lawful self-defense, recognized by Article 51 of the UN Charter. In this case, though, the US was not acting pursuant to a Security Council authorization (Russia would have vetoed it), and the US had no credible claim of acting in self-

defense, for the same reason noted above—there was no armed invasion happened on the southern border.

The US was not being attacked or threatened with attack by Venezuela, and the flow of drugs coming into the country from Venezuela is not the same thing as a military attack that would trigger a right of self-defense. As a result, the US violated the sovereignty, and arguably the UN Charter, by invading Venezuela, as limited and as quick as the operation was. It was no small incursion, because in addition to the territorial incursion, it violated the political independence of Venezuela by removing its head of state.

Now, I should also add that I have mixed feelings about the Maduro removal, as many probably do. The question of its legality is not the only question on the table, and whether it was a good result all things considered is another matter. By all accounts, Maduro's regime lacked political legitimacy. Most international observers have concluded that Maduro lost the last election, and held on to power through corrupt means, and did not enjoy true democratic support for his rule over the country. He was, in short, an autocratic leader. Champions of democracy cheered his removal from power. And international law, too, cares about democracy, because Maduro's continued rule over the country was not consistent with the collective

right of self-determination of the Venezuelan people. Moreover, democracy, as a principle, is protected by the International Covenant on Civil and Political Rights (ICCPR) and other major human rights conventions. On this score, Maduro's removal from power was a good thing.

That being said, the rules regarding the use of force are restrictive and were not satisfied in this case. No self-defense. No SC authorization. And democratic deficits by themselves are not enough to trigger a right to use military force. The United States could have and should have found other ways to pressure or even coerce Maduro into leaving power, short of an armed incursion to make it happen. The rule of law and democracy are

powerful concepts. If, at the end of the day, Maduro's removal hastens Venezuela's return to the rule of law and democracy (not sure that it will, actually, given the autocratic nature of the regime left in power) we will celebrate this fact, though as lawyers we should also be concerned whether the rule of law was violated along the way. As lawyers, we care about results *but not only* results. We also care about the *means* used to bring about that result.

The final case that I want to address is the bombing of the Iranian nuclear sites, followed by the full-scale armed conflict against Iran weeks later. Again, there is no question that Iran's acquisition of a nuclear weapon is a threatening

and frightening prospect, and the international framework to monitor and constrain its nuclear program was a good thing, and fully consistent with international law. But the question is whether the collapse of that negotiated framework, which was thrown out by the United States, was sufficient to justify an armed attack by either the United States or by Israel. Again, even if Iran violated its agreements, the use of force is only permissible if justified by SC authorization, which never happened, or by self-defense.

Now the self-defense analysis here is somewhat complicated, because the analysis must concede that Israel has faced armed attacks in the last few years from Hamas, Hezbollah, and

Houthis, all partially funded and supported by Iran. Is this funding and support legally sufficient to make the actions of these non-state actors legally attributable to Iran? The answer is no. After the horrific attacks of October 7, Israel was immediately thrown into an armed conflict with Hamas, thus triggering Israel's right of self-defense against Hamas and their legal entitlement to militarily destroy Hamas until they are no longer capable of engaging in acts of belligerency. But based on all available evidence, Hamas was not under the effective control of Iran, though they were supported by them, and therefore Israel was not, on October 7, engaged in an armed conflict with Iran itself. This eventually changed when

active hostilities broke out between Israel and Iran and continued for several weeks.

The United States claimed that its attack against Iranian nuclear facilities was an act of collective self-defense on Israel's behalf. Then, when the United States launched broader strikes starting on February 28, 2026, the US once again asserted individual and collective self-defense.

Presumably, the argument was that the Israel-Iran armed conflict persisted and endured even after the two sides stopped shooting missiles at each other.

Under the UN Charter, every state that claims a right of self-defense, is required to file an "Article 51 letter" with the Security Council, explaining how their action is justified by self-defense. These

letters are important, because they serve to put these questions before the court of world opinion. The idea is that if you are going to claim self-defense under Article 51, who are required to say so, and articulate your evidence.

The US waited quite some time to produce their letter, and for a while it looked like they might just ignore this requirement. They eventually submitted the justification on March 10, 2026, and it was quite unlike prior letters filed by the US government. It was thin on doctrinal analysis, and it almost completely sidestepped the legal questions. Instead, it offered a common-sense recitation of Iran's behavior in the last few years, the danger of its conduct towards Israel (including

the funding of its proxy forces) and the danger of its conduct to the world (for example, its nuclear ambitions). It was well written. It was designed with a domestic and international audience in mind to make one and only one argument. Iran is dangerous. Iran needs to be stopped. We are the ones to do it.

To take just one example, instead of appealing to the formal legal standards regarding effective control, as laid by International Court of Justice judgments and other legal sources, the US letter simply said this: “Gaming the international legal system, the Iranian regime routinely seeks to conceal its unlawful acts and to shield itself from accountability by, among other things, deploying

proxies such as Hamas, Hizballah and the Houthis.” In discussing Iran’s nuclear ambitions, the letter said nothing about the legal standards regarding imminence, and instead simply said this: “Any analysis of the imminence, gravity and scope of the threat posed by the Iranian regime today must account for its decades of consistently malign foreign and domestic conduct and for the dangerous and destabilizing risks of nuclear weapons and ballistic missiles in its hands.”

I urge you to read the document in full and to come to your own conclusions about it. As you read the evidence presented in it, notice the existence of facts powerfully marshalled to support its point, but also notice how the facts are not integrated into

a legal framework with doctrine, standards, and rules. It is a political and diplomatic document, not a legal one.

This is what concerns me as an international lawyer. Some scholars have suggested, falsely, that what is happening now is just the extension of what the US first did under the Bush and Obama Administrations—make creative legal arguments that misapplied or distorted international law in ways that would be categorized, by some critics at least, as *violations* of the law. I don't want to get into a debate, at this point, about whether the Obama administration violated the law during the armed conflict against al-Qaeda, its drone campaign against terrorist forces associated with

al-Qaeda, or the NATO intervention in Libya. I want to focus instead on the fact that in those prior moments, the US was actively engaged in using international law to explain, justify, and frame its behavior on the world stage, whereas today, the US seems more likely to ignore international law.

I submit that ignoring international law is different from violating it. When states violate international law, they often try to justify their behavior using legal arguments, though those arguments are often found wanting by their adversaries. But ignoring the law is something far different. It's the phenomenon of simply declining to offer a meaningful legal argument at all. And the US Article 51 letter is the most extreme

example of this developing dynamic. Perhaps I should not be surprised, as this is simply our post-truth age of political misinformation taken to the world stage.

This is what worries me. International law is a tool for states to structure their conversations and disputes with each other, and even if there is no international sheriff, no international court with coercive powers, the existence of a legalistic language to structure international contestation is a valuable enterprise. It has served the international community well. Ignoring it risks unraveling the international order in ways that could destabilize not just the Westphalian order, but also threaten the stability that the United

States depends on. The United States came to prominence as the world's superpower during this era of international stability and undermining that stability threatens our own position in that world order. You can't build a castle on sand. And this ignoring of international law is a lost opportunity for the United States, because there is plenty of things we could say in our defense, even if the arguments ultimately fail to convince the court of world opinion.

Does this mean that international law is dead? Hardly. While the United States has stepped back from the discursive practices of international legal argumentation, the rest of the world has not. Other states, especially in Europe, continue to use

international law to structure their decision-making. Plenty of states allied with the US declined to participate in the Iran or Venezuelan military operations because they judged them to be legally problematic. That was enough for them to keep the US at arm's length. Other states continue to use the law to pursue statecraft, and we should do that too.

Now you might be disturbed, or concerned, that I have described international law, not just as an objective body of law that demands obedience, but also a body of law that can be used as a tool of statecraft to advance national interests. Isn't this solipsistic? Yes, perhaps, but we are all lawyers, and let's not be naïve about the nature of law. Yes,

the law is objective, but it is also an instrument, and as practicing attorneys we counsel our clients, even in the domestic legal order, how they might use the law in pragmatic ways to advance their interests. That's just effective lawyering, and it does not undermine the sanctity or legitimacy of the law. It simply concedes that the law is a human instrument, designed by humans and used by humans.

The value of this process of legal contestation is the emergence of a global culture of legality that is embodied by the phrase the Rule of Law. I submit that the culture of legality is defined by the existence of legal frameworks as guides for human behavior. That culture of legality is transnational

because the culture is not limited to one single jurisdiction. The culture extends across national boundaries, across continents, and spans both domestic and international legal orders. The culture includes everything from commercial torts and local criminal prosecutions to international disputes over the use of force and military strikes. The culture of legality is holding. But if we lose that culture, the fallout won't just be confined to the international stage—the contamination and corruption might spread to the domestic legal system too. Graft, extortion, and political self-dealing will be elevated over legal rules, standards, and principles. Let's make sure it doesn't happen.

Thank you.

Readings

1. Letter dated 10 March 2026 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (<https://www.justsecurity.org/wp-content/uploads/2026/03/US-Article-51-letter-Iran-11-March-2026.pdf>).
2. An Unserious Justification for an Unnecessary War: Assessing the U.S. “Article 51” Letter to U.N. on Iran War (<https://www.almendron.com/tribuna/an-unserious-justification-for-an-unnecessary-war-assessing-the-u-s-article-51-letter-to-u-n-on-iran-war/>).
3. Jus ad bellum series: self-defence against armed non-state actors in the MENA region (<https://www.tandfonline.com/doi/full/10.1080/20531702.2024.2419762?scroll=top&needAccess=true#d1e655>).
4. The Duty to Capture (<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2001&context=facpub>).
5. Rule 47: Attacks against Persons Hors de Combat (<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule47>).
- 6.

7. Maduro Capture Operation and the President's Duty to Faithfully Execute U.N. Charter (<https://www.justsecurity.org/127962/maduro-capture-operation-and-presidents-duty-to-faithfully-execute-un-charter/>).
8. International Law and the U.S. Military and Law Enforcement Operations in Venezuela (<https://www.justsecurity.org/127981/international-law-venezuela-maduro/>).