

2010

# Responses to the Ten Questions

Mary Ellen O'Connell

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

## Recommended Citation

O'Connell, Mary Ellen (2010) "Responses to the Ten Questions," *William Mitchell Law Review*: Vol. 36: Iss. 5, Article 10.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol36/iss5/10>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## RESPONSES TO THE TEN QUESTIONS

Mary Ellen O'Connell<sup>†</sup>

1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA? ..... 5128
2. WOULD IT BE LEGAL FOR THE OBAMA ADMINISTRATION TO LAUNCH A PREDATOR STRIKE ON OSAMA BIN LADEN IF HE HAS BEEN TRACKED TO A HOUSE ON THE OUTSKIRTS OF KARACHI, PAKISTAN?..... 5130
3. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ADVISING THAT THE GENEVA CONVENTIONS DID NOT APPLY TO AL QAEDA AND THE TALIBAN? ..... 5131
4. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ITS WRITTEN GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS? ..... 5134
5. WHAT STATUTORY CHANGE IS MOST NECESSARY FOR U.S. NATIONAL SECURITY? ..... 5136
6. WHAT CHANGE BY EXECUTIVE ORDER IS MOST NECESSARY FOR AMERICAN NATIONAL SECURITY? ..... 5137
8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES? ..... 5137
9. WHAT SHOULD THE UNITED STATES DO IF IT CONFIRMS THAT IRAN HAS NUCLEAR WEAPONS? ..... 5137
10. WHEN WILL THE UNITED STATES CEASE TO BE THE

---

<sup>†</sup> Robert and Marion Short Chair in Law and Research Professor of International Dispute Resolution—Kroc Institute, University of Notre Dame. The author has also been a senior fellow of the Mershon Center for International Security at The Ohio State University and a Title X Professional Military Educator for the United States Department of Defense at the George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany (1995–1998).

WORLD’S NUMBER-ONE POWER? .....5139

1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A UNITED STATES CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

International human rights law prohibits peacetime preventive detention even with a judge’s supervision for periods as long as six months. A person taking part in the fighting in Afghanistan could be detained in a military brig—preferably in Afghanistan—until the end of the hostilities in that country. As there are no hostilities in Minnesota, peacetime criminal law rules apply and those require that fundamental due process be respected.

All human beings everywhere and at all times enjoy fundamental human rights based on the fact they are human. No government official, whether acting pursuant to a domestic law or not, may take away these rights. Human rights are founded in international law. To deny human rights is to violate international law. No government official has “authority” to violate international law—no government official should wish to do so.<sup>1</sup>

Some people responding to this question might answer by pointing out that Congress could authorize the President to hold a person in detention for six months so long as it was consistent with the Constitution’s provision for the writ of habeas corpus as recently interpreted by the Supreme Court in *Boumediene v. Bush*.<sup>2</sup> Since the time of the Nuremberg Tribunal, however, the international community has not permitted appeals to domestic law as a defense to international law violations. Even if the President and Congress succeeded in developing national law permitting military detention without charge for six months that complied with the Constitution—no easy task—such action could not change international law. International law prohibits long detention without trial except in the case of persons detained during an armed conflict.

Human rights law is clear that no one may be detained without

---

1. For more on international law in general, why it binds and the benefits it provides to the United States and all states, see MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW, INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* (2008).

2. 553 U.S. 723 (2008).

due process, including knowing the grounds for the detention, judicial oversight, and if the detention is to last more than a brief period, the person is entitled to a speedy trial. Only persons detained during an armed conflict may be detained for longer periods without trial, but even then, only until the end of the hostilities in which the person was detained. The Geneva Conventions require outside monitoring of wartime detainees by such qualified monitors as the International Committee of the Red Cross.<sup>3</sup>

Plainly the critical concept in this question is, therefore, whether the detention in Minnesota could be made pursuant to an “armed conflict.” The International Law Association’s Committee on the Use of Force provided an initial report on the definition of armed conflict in 2008. The Report states:

Looking to relevant treaties—in particular IHL treaties—rules of customary international law, general principles of international law, judicial decisions and the writing of scholars, . . . the Committee has found evidence of at least two characteristics with respect to all armed conflict:

- 1.) The existence of organized armed groups
- 2.) Engaged in fighting of some intensity<sup>4</sup>

In Minnesota, at the time of writing, there is no intense armed fighting between organized armed groups. There is no armed conflict being waged in Minnesota or anywhere on the territory of the United States. In only the case of two persons, José Padilla and Ali al-Marri, did the U.S. government purport to recognize an armed conflict on the territory of this country. At the same time, almost 300 million Americans lived under peacetime criminal law. Indeed, both defendants were initially arrested under peacetime criminal law, then transferred to military detention as “unlawful combatants”, then transferred back to the criminal system.<sup>5</sup> The episodes would have

---

3. See Mary Ellen O’Connell, *The American Society of International Law Adopts A Resolution on the Use of Force and Treatment of Detainees*, ASIL INSIGHTS, May 19, 2006, <http://www.asil.org/insights060519.cfm>.

4. INT’L LAW ASS’N, COMM. ON THE USE OF FORCE, INITIAL REPORT ON THE MEANING OF ARMED CONFLICT IN INT’L LAW 1–2 (2008). See also Mary Ellen O’Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393 (2008).

5. Al-Marri’s case was concluded with a plea bargain as a result of which he will face up to 15 years in prison. See Press Release, Dep’t of Justice, Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to al Qaeda (Apr. 30, 2009). Padilla is appealing his criminal conviction at time of writing. See Brian Jackson, *Padilla Lawyers Urge Appeals Court to Overturn Terrorism Conviction*, JURIST, Jan. 13, 2010, <http://jurist.law.pitt.edu/paperchase/2010/01/padilla-lawyers-urge-appeals-court-to.php>.

been comical but for the fact they involved denying human beings their fundamental human rights.

It is plain that the law requires that all persons on the territory of the United States under the conditions that have prevailed since the Civil War be treated as criminal suspects if law enforcement officials have sufficient evidence to charge the individual with a crime. In that case a person may be detained.

The most important source of peacetime human rights protections for detainees in the United States is the International Civil and Political Rights Covenant.<sup>6</sup> The ICCPR allows for derogation from the detention protections found in Article 9 during a national emergency, but formal steps must be taken if derogations are claimed. The United States has not formally derogated from its ICCPR detention obligations. If it did seek to derogate, derogation is permitted only “to the extent strictly required by the exigencies of the situation.” The U.N. Human Rights Committee, charged with implementing the ICCPR, has said, “Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.”<sup>7</sup>

As the criminal courts of the United States are open and functioning, making a case for derogation would appear to be difficult. Nor is it clear what reason could be given in the current circumstances for holding a person for a period longer than a few days to perhaps two weeks without charge.

## 2. WOULD IT BE LEGAL FOR THE OBAMA ADMINISTRATION TO LAUNCH A PREDATOR STRIKE ON OSAMA BIN LADEN IF HE HAS BEEN TRACKED TO A HOUSE ON THE OUTSKIRTS OF KARACHI, PAKISTAN?

Few would wonder about the answer to this question if it read, “Would it be legal to launch a drone attack on an al Qaeda member tracked to a house on the outskirts of Karachi?” Law enforcement measures need to be used in a place like Karachi, which, like Minnesota, experiences crime, but is not the scene of an armed conflict. The choice of military versus police methods depends on the facts of fighting, not the individual being targeted.

Drone attacks involve significant firepower—this is not the force

---

6. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

7. Human Rights Comm., *General Comment 29: States of Emergency (Article 4)*, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 21, 2001).

of the police, but of the military. In law enforcement it must be possible to warn a suspect before using lethal force; in war-fighting this is usually not necessary, making the use of bombs and missiles lawful. Drones carry powerful missiles capable of significant damage.<sup>8</sup>

The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials are widely adopted by police throughout the world. They set out the general rule for the lawful use of lethal force in Article 9:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>9</sup>

It is not possible to give a warning from a drone or to affect an arrest should the suspect surrender. Thus drones, like bomber aircraft, cannot lawfully be used in law enforcement.

It may be difficult for some to keep personal preferences out of their assessment of this question. Yet, as members of a profession, legal scholars, lawyers, and judges must do just that. Regardless of personal animosity toward Osama bin Laden, even in his case the law must prevail if we are not to stoop to the very contempt for law and the value of human life displayed by al Qaeda. The law requires law enforcement methods outside of combat zones.

**3. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ADVISING THAT THE GENEVA CONVENTIONS DID NOT APPLY TO AL QAEDA AND THE TALIBAN?**

**Malpractice depends on state bar association rules or standards**

---

8. For more on the international law governing drones, see Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed.) (forthcoming), available at <http://ssrn.com/abstract=1501144>.

9. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug.–7 Sept. 1990, Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).

enforced by the federal Government's Office of Professional Responsibility. I will let others with specific expertise respecting these standards comment on whether the memo writers violated them in the case of this memo or others that have become known collectively as the "torture memos."<sup>10</sup> I can confirm, however, that the memo on the Geneva Conventions and other torture memos are replete with errors, erroneous reasoning, omissions, and illogic. The only one likely explanation for the shockingly poor quality of the memos, especially given the qualifications of the lawyers involved, is that the authors intended to reach conclusions the law did not support.

The memo on the Geneva Conventions concludes that the Conventions do not apply to members of al Qaeda and the Taliban. Yet, the Conventions could not be more straightforward: *all* persons caught up in armed conflict have the protections of the Geneva Conventions—all persons. There is no exception for persons we do not like.

According to Article 2 common to all four 1949 Geneva Conventions, the Conventions apply during armed conflict on the territory of states party to the Convention. The United States and Afghanistan are parties to the Conventions. (Indeed, today all sovereign states of the world are parties.) The United States and Great Britain launched an armed conflict on the territory of Afghanistan on October 7, 2001. There is no doubt that the Convention protections applied to all persons in Afghanistan whether American, British, or Afghan combatant, or civilian.

The OLC memo on the application of the Geneva Conventions tries to extrapolate from certain restrictive provisions of one convention, the Third Geneva Convention on the Protection of Prisoners of War, to exclude Taliban and al Qaeda members from any protections. The Third Conventions extends certain privileges upon detention to the "regular" members of a state's armed forces and certain militia members, who wear uniforms, are organized under a command and follow the international law regulating the use of force.<sup>11</sup> Afghanistan's Taliban fighters were the regular armed forces of the state and qualified even under the Third Convention for the privileged status of

---

10. This memo and the memo mentioned in Question Four are reproduced in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds. 2005).

11. See generally George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85 INT'L REV. RED CROSS 45 (2003); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195 (2004).

prisoners of war. I do not have sufficient facts to know the category to which al Qaeda fighters would properly have been assigned in 2001. We may never know these facts. Nevertheless, persons who are detained and do not qualify for prisoner of war status, are held under the Fourth Geneva Convention for the Protection of Civilian Persons in Time of Armed Conflict. There are no gaps in the Geneva Conventions for regulating wartime detention.

Moreover, by 2002, the 1949 Conventions had been supplemented by rules of customary international law. In particular, all persons detained in an international armed conflict are protected by the “Fundamental Guarantees” of Article 75 of Additional Protocol I. The United States affirmed during the Reagan administration that the United States recognized the binding nature of Article 75 as customary international law and its obvious application to lawful and unlawful combatants as well as civilians. The OLC memo never mentions customary international law.

The comprehensive application of the Geneva Conventions during armed conflict is law of armed conflict 101. That law was blatantly ignored, even over the protest of the State Department’s Office of Legal Adviser.

We now have evidence as to why such a slipshod memo was produced. As early as November 2001, with the issuance of a Presidential Order on treatment of al Qaeda detainees, it became apparent that the Bush administration wished to claim the right to kill without warning and detain without trial any person suspected of being a member of al Qaeda or other terrorist organizations—wherever found. The administration attempted to justify these claims by asserting that the entire world became a combat zone on 9/11 when President Bush declared a “global war on terror.” But along with the claim to kill and detain, administration leaders apparently had no interest in extending the Geneva Convention protections to the “global war.” Those protections were done away with in a memo that conveniently misread the Conventions and fifty years of scholarship. The memo gave permission to claim wartime rights and skip wartime duties.

Even when wartime protections do not apply, however, as explained in the answers to Question One, peacetime human rights protections apply. Human beings are never without the protection of the law. This fact is never mentioned in any of the memos. President Obama has also referred to the “global war on terror.” All indications so far are that his administration is continuing to apply his predeces-



sor's erroneous interpretation of the law.

4. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ITS WRITTEN GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS?

Again, experts on professional responsibility should assess the case for malpractice. I can comment on the fact the August 2002 memorandum and several subsequent ones on interrogation are replete with errors, misstatements, and omissions. I have read and re-read the 2002 interrogation memo and subsequent ones based upon it. I have found an average of one major error per page. I will just describe three of the more extraordinary errors here. Indeed, these errors are so blatant that they encourage the conclusion the memo is not an attempt in good faith to assess the law but, rather, an attempt to free the way for CIA interrogators to use unlawful techniques of interrogation.<sup>12</sup>

Among the more astounding errors in the 2002 memo: First, in the opening pages of the memo, customary international law is dismissed as not binding on the Federal Government. One of the memo's authors, John Yoo, had promoted this position in his scholarship before joining the Office of Legal Counsel. It was not, however, the law of the land in 2002; it is just as clearly not the law today. The binding Supreme Court precedent on the place of customary in the American legal system is the *Paquete Habana* case.<sup>13</sup> The Supreme Court said "international law is part of our law." The court assessed and applied a rule of customary international law, overturning an action of the United States Navy in conflict with it. In 2004, the Supreme Court reaffirmed *Paquete Habana* in *Sosa v. Alveras-*

---

12. The memo must have been written with CIA and CIA contract interrogators in mind. Military interrogators are governed by the Uniform Code of Military Justice, which implements the Geneva Conventions. These permit no coercive interrogation of any kind—for legal, ethical, and practical reasons. See generally Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005) (discussing the law of interrogation).

FBI interrogators follow the U.S. Constitution and domestic criminal law, which also forbid torture and cruel and degrading treatment of persons being questioned. It should also be noted that on 9/11, the CIA had no interrogator unit and no training in standards of lawful, ethical, and effective interrogation methods—in contrast to the military and FBI.

13. *The Paquete Habana*, 175 U.S. 677 (1900).

*Machain*,<sup>14</sup> saying explicitly that international law is part of Federal common law. There was no contrary Supreme Court ruling in the years between. The great scholars of the place of international law in U.S. law—Philip Jessup and Louis Henkin—confirmed at various points in the Twentieth Century that this is the only position that makes sense based on the drafting history of the Constitution, the words of the Constitution, Supreme Court precedent, and the needs of the United States in the world.

All of this was dismissed in a short paragraph in the 2002 memo saying customary international law was only a concern of the fifty states. Such an outlandish conclusion should have been obvious to anyone reading the memo.

A second example concerns the failure of the memo writers to cite the leading Supreme Court decision on presidential power in wartime. The memo discusses at the president's commander-in-chief. As of 2002, the universally acknowledged Supreme Court case on point concerning presidential powers in wartime was *Youngstown Sheet and Tube Co. v. Sawyer (Steel Seizure)*.<sup>15</sup> *Youngstown* is not cited in the memo. Failure to cite the most important Supreme Court decision on a point of law in a memo providing legal advice is generally considered a *prima facie* example of malpractice.

And a third example: the memo also devotes a good deal of space to the Convention Against Torture to which the United States is a party. There is much attention to the definition of torture. Most people reading the Convention would have no difficulty understanding and applying the definition of torture provided in Article 1. The memo writers, however, purport to find the definition unclear. The Vienna Convention on the Law of Treaties provides the standard rules of treaty interpretation for any case where a treaty's provisions are unclear. The Vienna Convention rules happen to be the same basic rules we use to interpret any legal text—contracts, statutes, regulations, etc. The Vienna Convention requires that a treaty be read in light of its objects and purpose. Where language is unclear, the treaty as a whole should be considered. If that step is not successful, the Vienna Convention provides for resort to the treaty's negotiating history.

The memo writers did not have resort to the purpose of the Convention Against Torture (eliminating torture and cruel, inhuman, and

---

14. 542 U.S. 692 (2004).

15. 343 U.S. 579 (1952).

degrading treatment); they did not have resort to the treaty as a whole (it forbids cruel, inhumane, and degrading treatment, as well as torture—no real need to define torture because governments may not do anything that even gets close to it), nor did the authors consult the negotiating history of the treaty. Rather, they went to a completely unrelated document, a U.S. health care statute, found a provision there they liked, and from this statute, they constructed a definition of torture that limited torture to actions inflicting the pain of “organ failure or death.”

These are only three errors from fifty pages of the main torture memo. It seems hard to understand how any lawyer reading the analysis could have put any reliance on it at all. The errors indicate the memo was intended to give legal cover to interrogators using torture as well as cruel and inhuman methods of interrogation. In court, an interrogator could presumably hold up the thick memo and say he had legal advice from the nation’s top lawyers that anything short of organ failure was permitted.

Twenty of the nation’s most accomplished military interrogators submitted the following statement to Congress on July 31, 2006:

We the undersigned, former active-duty Army Interrogators (97E) and Interrogation Technicians (351E), believe the following two statements to be true:

- Trained and skilled interrogators can accomplish the intelligence gathering mission using only those interrogation techniques found in Army Field Manual 34-52 (1992).
- Prisoner/detainee abuse and torture are to be avoided at all costs, in part because they can degrade the intelligence collection effort by interfering with a skilled interrogator’s efforts to establish rapport with the subject.<sup>16</sup>

##### 5. WHAT STATUTORY CHANGE IS MOST NECESSARY FOR U.S. NATIONAL SECURITY?

We need to repeal the Military Commissions Act of 2006.<sup>17</sup> This Act puts us in violation of our obligations under the Geneva Conven-

---

16. Statement of Interrogation Practices from Donald Marquis et al. to the United States House of Representatives Committee on the Armed Services (July 31, 2006), [http://www.amnestyusa.org/denounce\\_torture/statement\\_on\\_interrogation.pdf](http://www.amnestyusa.org/denounce_torture/statement_on_interrogation.pdf).

17. For more on this point and other legislative changes needed to rectify post-9/11 missteps, see Mary Ellen O’Connell, *The Way Forward: Post-9/11 Principles*, JURIST, Nov. 25, 2008, <http://jurist.law.pitt.edu/forumy/2008/11/way-forward-post-911-principles.php>

tions. Once the Act is repealed, we need to investigate and prosecute all of those complicit in the use of torture and cruel, inhuman and degrading methods of interrogation as required by the Conventions. So long as we are out of step with this fundamental international law, we do not stand strong for the rule of law in the world. The surest way to improve national security is to work to make respect for the rule of law stronger than respect for violence.

6. WHAT CHANGE BY EXECUTIVE ORDER IS MOST NECESSARY FOR AMERICAN NATIONAL SECURITY?

Withdraw any orders authorizing targeted killing, detention, and military commissions in violation of international law. See my previous answer and citation.

8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES?

The Soviet Union posed a true existential threat to the United States. With nuclear weapons, the Soviet Union could have killed every single American. Al Qaeda has no such power. But it has induced us to abandon some of our most important values, especially our commitment to the rule of law. Al Qaeda has induced us to undermine our very identity, and, in so doing, our very existence as the United States of America has been brought into question. This weakening of who we are is a self-inflicted wound that requires urgent and serious attention.

9. WHAT SHOULD THE UNITED STATES DO IF IT CONFIRMS THAT IRAN HAS NUCLEAR WEAPONS?

The United States should do what it did when it discovered North Korea had nuclear weapons, but not what it did when it discovered India, Pakistan, and Israel had nuclear weapons. The United States should pursue a variety of diplomatic and legal strategies to get compliance by Iran and all other states with the Nuclear Non-Proliferation Treaty.<sup>18</sup>

International law generally prohibits the use of force in international relations absent a significant armed attack or Security Council

---

18. See generally, Mary Ellen O'Connell & Maria Alveras-Chen, *The Ban on the Bomb—and Bombing, Iran, the U.S. and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497 (2007).

authorization. Even where there is a right to resort to armed force, every use of force must be necessary and proportional. Those who urge bombing Iranian nuclear research sites have no evidence that such bombing will succeed in accomplishing the military objective or can be done in a way that will not cause disproportionate loss of life and destruction of property.

The U.N. Charter contains an explicit prohibition on the use of force absent an armed attack or Security Council authorization.<sup>19</sup> The Security Council may authorize states to use force in broader circumstances than self-defense to an armed attack.<sup>20</sup> The Council may authorize force against threats to the peace as well as actual breaches of the peace and acts of aggression.<sup>21</sup> The Security Council, along with all other entities resorting to a significant use of armed force, however, must also comply with such general principles of international law as necessity and proportionality. Under these rules, no use of military force can be justified against Iran for carrying out nuclear research. The great legal and moral imperative to preserve the peace requires finding alternative responses short of force in dealing with a situation like the one presented by Iran. The United States, the European Union, Russia, China, and many other states want Iran to comply with Security Council Resolutions demanding that Iran stop enriching uranium and permit verification that it has done so.<sup>22</sup> Iran is obligated under international law to comply with Security Council resolutions.<sup>23</sup> By the same token, those states concerned with Iran's nuclear program must also comply with international law and its prohibition on the use of force and unlawful possession of nuclear weapons.

---

19. U.N. Charter art. 2(4). For a detailed discussion of the law governing the use of force, see MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed. 2009).

20. U.N. Charter arts. 39, 42.

21. *Id.*

22. See S.C. Res. 1696, U.N. Doc S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc S/RES/1737 (Dec. 23, 2006).

23. See U.N. Charter art. 25. See also Press Release, Security Council, Security Council Demands Iran Suspend Uranium Enrichment by 31 August or Face Possible Economic, Diplomatic Sanctions, U.N. Doc. SC/8792 (July 31, 2006). In late 2006, Iran's primary violation of international law with respect to its nuclear program was its failure to comply with S.C. Res. 1696. *Id.*

10. WHEN WILL THE UNITED STATES CEASE TO BE THE WORLD'S  
NUMBER-ONE POWER?

There are many indications that the United States is already perceived as having fallen from the position of “the world’s number-one power.”<sup>24</sup> In my view, this perception began between March 2003 and April 2004. “Power,” “number-one power,” “superpower,” and similar concepts are the product of ideas. “Power” is what we define it to be. We have often included factors such as number of weapons, number of soldiers, GDP, GNP, and the like as part of the calculation of power. Those numbers, however, must be imbued with our understanding that they stand for power. They have never been the whole definition. With the fall of the Soviet Union, simple numbers, especially respecting military factors, are understood as far too limited for a true understanding of power.

On 9/11 the world provided its support to the U.S., outraged at the lawless, violent act of a few men. Despite all we lost that day, we did not lose our standing in the world. But when the United States invaded Iraq in defiance of international law and used arguments that turned out to be false, the perception of our power took a hit. Those perceptions declined even more clearly when the pictures emerged from Abu Ghraib prison and the whole story of torture, abuse, secret prisons, manipulation of law, and cover-ups became public.

Some might agree with these dates as marking our decline but not with the reason offered here. They may prefer to note our military failures in Iraq and Afghanistan. Yes, seven years after the invasion the United States still has tens of thousands of troops in Iraq. No one considers Iraq a success story nor is that likely for some time to come. The situation in Afghanistan may be even worse. The military failure, however, is only part of the story. It is only part of the explanation for why when we discuss power in the world today we include China, the European Union, perhaps India and other states.

Americans may not be universally outraged by either the invasion of Iraq or the violation of international law respecting detainees, but much of the rest of the world is. As a young human rights lawyer from Congo said to me a few years ago, superpowers do not torture. Following the election of Barack Obama, there was much hope in the world that the United States would regain its standing. Yet, for many that hope is dashed by the unlawful drone war in Pakistan, the escalation of the war in Afghanistan, the slow drawdown in Iraq, the

---

24. See, e.g., FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008).

continuation of many questionable Bush administration legal positions, the decision to retain flawed military commissions, the delay in closing Guantanamo Bay, the failure to investigate and prosecute all but three private contractors for torture and abuse of detainees—and more. President Obama was awarded the Nobel Peace Prize, but chose to speak about the necessity of war. The opportunity to change perceptions has been lost—for now. President John Kennedy was given bad advice about a secret attack at the Bay of Pigs in Cuba. He changed direction and has gone down in history as a great president. President Obama could change direction, too, and restore the United States, if not to number one, certainly to the position of a leading and admired nation that others again seek to emulate.