> and experience in international law. An understanding and appreciation of international law is at the core of the Legal Adviser's role; without the previous experience that gives such understanding and appreciation, a Legal Adviser may be less effective in carrying out the special responsibilities of the job. Moreover, a U.S. Legal Adviser without prior experience may be less effective in working with foreign legal advisers, who typically have extensive previous experience in international law.

I am very happy to say that the recommendation of the American Society of International Law in this regard has been honored in the appointments of the distinguished occupants of that office, including those whom we see sitting in the front row today, and certainly the most recently confirmed Legal Adviser and our keynote speaker today meets those qualifications.

Brian Egan was confirmed as the Legal Adviser at the U.S. Department of State on February 12, 2016, and it was worth waiting for. Prior to that, he served for over four years as Deputy Legal Adviser to the National Security Council and then as Legal Adviser to the National Security Council, a position that doubles as Deputy White House Counsel. He is an experienced and able public international lawyer, widely known and respected in the Beltway's national security community, and indeed far beyond. He previously worked at the Justice Department and was a Senior Assistant General Counsel for Enforcement and Intelligence at the Treasury Department. He worked in private practice for five years in D.C., and spent four years at the Legal Adviser's Office, making him one of the few career lawyers in international law to become a Legal Adviser since Green Hackworth, who went on to serve as a U.S. judge on the International Court of Justice.

I hope that you will agree with me that our keynote speaker today indeed satisfies this high standard to which we hold all speakers at our annual meeting, that they be expert in our subject, and we invite you to the podium.

Keynote Address

By Brian Egan[*]

Thank you to Lori, Mark, and ASIL for inviting me. I am truly honored and humbled to be here today.

I am here today to talk about some key international law aspects of the United States' ongoing armed conflict against ISIL. In so doing, I am following in the footsteps of others who have gone to some lengths in recent years to explain our government's positions on key aspects of the law of armed conflict. This includes, most prominently, President Obama in his 2013 speech at the National Defense University and his 2014 remarks at West Point. A number of Administration lawyers have also spoken on these topics, including my predecessor, Harold Hongju Koh; former Attorney General Holder; and former Defense Department General Counsels Jeh Johnson and Stephen Preston. The Defense Department's promulgation of its Law of War Manual last year has also made a significant contribution to the public discourse on these issues.

Some have said, however, that our legal approach to the counter-ISIL conflict has been one of the ''most discussed and least understood'' topics of U.S. practice in recent years.

Thus, at the risk of disappointing you at the outset of this talk, I suspect and hope that much of what I will say today will not be surprising. I also hope, however, that these remarks

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will provide clarity and help you understand better the U.S. international law approach to these important and consequential operations.

International law matters a great deal in how we as a country approach counterterrorism operations. Prior to my confirmation, I served as a Deputy White House Counsel and Legal Adviser to the National Security Council for nearly three years. Based on my experience in that position, I can tell you that the President, a lawyer himself, and his national security team have been guided by international law in setting the strategy for counterterrorism operations against ISIL. I can attest personally that the President cares deeply about these issues, and that he goes to great lengths to be sure that he understands them.

To start from first principles—the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.

I do not mean to suggest that identifying and applying key international law principles to this fight is easy or without controversy. The United States is engaged in an armed conflict with a non-State actor that controls significant territory, in circumstances in which multiple States and non-State actors also have been engaging in military operations against this enemy, other groups, and each other for several years. These conflicts raise novel and difficult questions of international law that the United States is called to address literally on a daily basis in conducting operations.

Of course, international law is also vitally important to other States. And as the President's counterterrorism strategy has prioritized the development of partnerships with those who share our interests, I submit that it is increasingly important for the United States to engage in what I will call legal diplomacy with those countries with which we partner, as well as those with which we may not see eye to eye. Our ability to engage and work with partners can and often does turn on international legal considerations. We want to work with partners who will comply with international law, and our partners expect the same from us. In this way, international law serves as a critical enabler of international cooperation and joint action on a full range of matters, from the mundane to those that hit the front pages, such as the Iran nuclear deal, efforts to promote peace in Syria, maritime claims in the South China Sea, data privacy, and surveillance.

I will address three topics in my remarks. First, I will attempt to explain in greater detail the United States' international legal basis for using force against ISIL, and some of the key rules of the law of armed conflict that apply to our fight against ISIL. Second, I will address how law of armed conflict-related considerations arise in the context of ''partnered'' operations—an area in which legal diplomacy is particularly critical. Third, I will address the interplay between law and policy in the conduct of hostilities by the United States—specifically those undertaken under the Presidential Policy Guidance that the President signed on May 22, 2013, known as the ''PPG.''

Jus ad Bellum

I will begin with the United States' international law justification for resorting to the use of force, or the *jus ad bellum*.

As I mentioned a few minutes ago, the United States' armed conflict with ISIL is taking place in a complicated environment—one in which a non-State actor, ISIL, controls significant

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territory and where multiple States and non-State actors have been engaging in military operations against ISIL, other groups, and each other for several years. Unfortunately, this scenario is not unprecedented in today's world. Iraq and Syria resemble other countries where multiple armed conflicts may be going on simultaneously—countries like Yemen and Libya.In such complex circumstances, States can potentially find themselves in more than one armed conflict or with multiple legal bases for using force. This complexity is why it is all the more important that we are clear and systematic in our thinking through how *jus ad bellum* principles for resorting to force apply to our actions and what uses of force those principles permit.

The U.N. Charter identifies the key international law principles that must guide State behavior when considering whether to resort to the use of force. Article 2(4) of the U.N. Charter provides in relevant part that ''[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.'' Article 51 of the U.N. Charter, on the other hand, specifies that ''[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.'' Thus, the U.N. Charter recognizes the inherent right to resort to force in individual or collective self-defense. Similarly, the Charter does not prohibit an otherwise lawful use of force when undertaken with the consent of the State upon whose territory the force is to be used.

As a matter of international law, the United States has relied on both consent and self-defense in its use of force against ISIL. Let's start with ISIL's ground offensive and capture of Iraqi territory in June 2014 and the resulting decision by the United States and other States to assist with a military response. Beginning in the summer of 2014, the United States' actions in Iraq against ISIL have been premised on Iraq's request for, and consent to, U.S. and coalition military action against ISIL on Iraq's territory in order to help Iraq prosecute the armed conflict against the terrorist group.

Upon commencing air strikes against ISIL in Syria in September 2014, the United States submitted a letter to the U.N. Security Council explaining the international legal basis for our use of force in Syria in accordance with Article 51 of the U.N. Charter. As the letter explained, Iraq had made clear it was facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria and had requested that the United States lead international efforts to strike ISIL in Syria. Consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISIL. The letter also articulated the United States' position that Syria was unable or unwilling to effectively confront the threat that ISIL posed to Iraq, the United States, and our partners and allies.

Thus, although the United States maintains an individual right of self-defense against ISIL, it has not relied solely on that international law basis in taking action against ISIL. In Iraq, U.S. operations against ISIL are conducted with Iraqi consent and in furtherance of Iraq's own armed conflict against the group. And in Syria, U.S. operations against ISIL are conducted in individual self-defense and the collective self-defense of Iraq and other States.

To say a few more words about self-defense: First, the inherent right of individual and collective self-defense recognized in the U.N. Charter is not restricted to threats posed by States. Nor is the right of self-defense on the territory of another State against non-State actors, such as ISIL, something that developed after 9/11. To the contrary, for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As but one example, the oft-cited

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Caroline incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. Although the precise wording of the justification for the exercise of self-defense against non-State actors may have varied, the acceptance of this right has remained the same.

Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have occurred, but also in response to *imminent* ones before they occur.

When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel Bethlehem in the enumeration he set forth in the American Journal of International Law—the ASIL's own in-house publication—in 2012. These factors include the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.

In the view of the United States, once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. Under the PPG, however, the concept of imminence plays an important role as a matter of policy in certain U.S. counterterrorism operations, even when it is not legally required.I'd also like to say a few words on how State sovereignty and consent factor into the international legal analysis when considering the use of force. President Obama has made clear that ''America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.'' This is true of our operations against ISIL as it has been true in our non-international armed conflict against al-Qa'ida and associated forces.

Indeed, under the *jus ad bellum*, the international legal basis for the resort to force in self-defense on another State's territory takes into account State sovereignty. The international law of self-defense requires that such uses of force be necessary to address the threat giving rise to the right to use force in the first place. States therefore must consider whether unilateral actions in self-defense that would impinge on a territorial State's sovereignty are *necessary* or whether it might be possible to secure the territorial State's consent before using force on its territory against a non-State actor. In other words, international law not only requires a State to analyze whether it has a legal basis for the use of force against a particular non-State actor—which I'll call the ''against whom'' question—but also requires a State to analyze whether it has a legal basis to use force against that non-State actor in a particular location—which I'll call the ''where'' question.

It is with respect to this ''where'' question that international law requires that States must either determine that they have the relevant government's consent or, if they must rely on self-defense to use force against a non-State actor on another State's territory, determine

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that the territorial State is ''unable or unwilling'' to address the threat posed by the non-State actor on its territory. In practice, States generally rely on the consent of the relevant government in conducting operations against ISIL or other non-State actors even when they may also have a self-defense basis to use force against those non-State actors, and this consent often takes the form of a request for assistance from a government that is itself engaged in an armed conflict against the relevant group. This is the case with respect to ISIL in Iraq.

Of course, the concept of consent can pose challenges in a world in which governments are rapidly changing, or have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought. The U.S. Government carefully considers these issues when considering the question of consent.

In some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used. In particular, there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State's territory without the territorial State's consent. For example, in the case of ISIL in Syria, as indicated in our Article 51 letter, we could act in self-defense without Syrian consent because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL. This ''unable or unwilling'' standard is, in our view, an important application of the requirement that a State, when relying on self-defense for its use of force in another State's territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.

The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States.

With respect to the ''unable'' prong of the standard, inability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating. This is the case with respect to the situation in Syria. By September 2014, the Syrian government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL's control.

Jus in Bello

In the next few minutes I'd like to shed some light on the *jus in bello*—the legal rules we follow in carrying out the fight against ISIL. As a threshold matter, some of our foreign partners have asked us how we classify the conflict with ISIL and thus what set of rules applies. Because we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC. Therefore, the applicable international legal regime governing our military operations is the law of armed conflict covering

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NIACs, most importantly, Common Article 3 of the 1949 Geneva Conventions and other treaty and customary international law rules governing the conduct of hostilities in non-international armed conflicts.

The rules applicable in NIACs have received close scrutiny since the September 11 attacks within the U.S. Government, in our courts in the context of ongoing litigation concerning detention and military commission prosecutions, and in the expanding and ever more sophisticated treatment that these issues receive in academia.

I would like to clarify briefly some of the rules that the United States is bound to comply with as a matter of international law in the conduct of hostilities during NIACs. In particular, I'd like to spend a few minutes walking through some of the targeting rules that the United States regards as customary international law applicable to all parties in a NIAC:

- First, parties must distinguish between military objectives, including combatants, on the one hand, and civilians and civilian objects on the other. Only military objectives, including combatants, may be made the object of attack.
- Insofar as objects are concerned, military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The United States has interpreted this definition to include objects that make an effective contribution to the enemy's war-fighting or war-sustaining capabilities.
- Feasible precautions must be taken in conducting an attack to reduce the risk of harm to civilians, such as, in certain circumstances, warnings to civilians before bombardments.
- Customary international law also specifically prohibits a number of targeting measures in NIACs. First, attacks directed against civilians or civilian objects as such are prohibited. Additionally, indiscriminate attacks, including but not limited to attacks using inherently indiscriminate weapons, are prohibited.
- Attacks directed against specifically protected objects such as cultural property and hospitals are also prohibited unless their protection has been forfeited.
- Also prohibited are attacks that violate the principle of proportionality – that is, attacks against combatants or other military objectives that are expected to cause incidental harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated.
- Moreover, acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

To elaborate further and correct some possible misunderstandings regarding who the United States targets as an enemy in its ongoing armed conflicts, I'd like to explain how the United States assesses whether a specific individual may be made the object of attack.

In many cases we are dealing with an enemy who does not wear uniforms or otherwise seek to distinguish itself from the civilian population. In these circumstances, we look to all available real-time and historical information to determine whether a potential target would be a lawful object of attack. To emphasize a point that we have made previously, it is not the case that all adult males in the vicinity of a target are deemed combatants. Among other things, the United States may consider certain operational activities, characteristics, and identifiers when determining whether an individual is taking a direct part in hostilities or whether the individual may formally or functionally be considered a member of an organized armed group with which we are engaged in an armed conflict. For example, with respect to membership in an organized armed group, we may examine the extent to which the individual

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performs functions for the benefit of the group that are analogous to those traditionally performed by members of State militaries that are liable to attack; is carrying out or giving orders to others within the group to perform such functions; or has undertaken certain acts that reliably indicate meaningful integration into the group.

Partnerships and Legal Diplomacy

I'd like to turn next to discussing the international coalitions and other partnerships that are critical to the fight against ISIL and the legal diplomacy that helps facilitate and sustain those partnerships. Sixty-six partners are engaged as part of the coalition that is steadily degrading ISIL. In the course of building and maintaining that strong coalition, we have also sought to navigate legal differences and find common legal ground. Some of our allies and partners have different international legal obligations because of the different treaties to which they are party, and others may hold different legal interpretations of our common obligations. Legal diplomacy plays a key role in building and maintaining the counter-ISIL military coalition and fostering interoperability between its members. Legal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State's international obligations or interpretations.

Public explanations of legal positions are an important part of legal diplomacy. The United States is not alone in providing such public explanations. Over the last 18 months, for example, nine of our coalition partners have submitted public Article 51 notifications to the U.N. Security Council explaining and justifying their military actions in Syria against ISIL. Though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extends to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL. Those States' military actions against ISIL in Syria and their public notifications are perhaps the clearest evidence of this understanding of the international law of self-defense.

More frequently, however, it is through private consultations that governments seek to understand each other's legal rationale for military operations. These private discussions help frame the public conversation on some of the central legal issues, and they are crucial to securing the vital cooperation of partners who want to understand our legal basis for acting. For example, there are times when the United States has sought the assistance of key allies in taking direct action against terrorist targets, but before these allies would aid us, the lawyers in their foreign ministries have sought a better understanding of the legal basis for our operations. The prompt, compelling, and – at times – very early morning explanations provided by our attorneys can be crucial to enabling such operations.

These conversations also go the other way. The U.S. commitment to upholding the law of armed conflict also extends to promoting law of armed conflict compliance by our partners. In the campaign against ISIL and beyond, coalitions and partnerships with other States and non-State actors are increasingly prominent features of current U.S. military operations. When others seek our assistance with military operations, we ensure that we understand their legal basis for acting. We also take a variety of measures to help our partners comply with the law of armed conflict and to avoid facilitating violations through our assistance. Examples of such measures include vetting and training recipients of our assistance and monitoring how our assistance is used.

Some have argued that the obligation in Common Article 1 of the Geneva Conventions to ''ensure respect'' for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed

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conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.

Law and Policy

Finally, I'd like to touch on the interplay between law and policy when the United States takes lethal action in armed conflicts and how the United States often applies policy standards that exceed what the law of armed conflict requires.

As a matter of international law, the United States is bound to adhere to the law of armed conflict. In many cases, the United States imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict. For example, the U.S. military may impose an upper limit as a matter of policy on the anticipated number of non-combatant casualties that is much lower than that which would be lawful under the rule that prohibits attacks that are expected to cause excessive incidental harm.

Additionally, although the United States is not a party to the 1977 Additional Protocol II to the 1949 Geneva Conventions and therefore not bound to comply with its provisions as a matter of treaty law, current U.S. practice is already consistent with the Protocol's provisions, which provide rules applicable to States parties in non-international armed conflict. This is a treaty that the Reagan Administration submitted to the Senate for its advice and consent to ratification, and every subsequent Administration has continued that support.

I'd like to focus my comments over the next few minutes on U.S. operations to capture or employ lethal force against terrorist targets outside areas of active hostilities. In addition to the law of armed conflict, these operations are governed by policy guidance issued by the President in 2013. This policy guidance, known as the PPG, reflects this Administration's efforts to strengthen and refine the process for reviewing and approving counterterrorism operations outside of the United States and ''areas of active hostilities.''

The phrase ''areas of active hostilities'' is not a legal term of art—it is a term specific to the PPG. For the purpose of the PPG, the determination that a region is an ''area of active hostilities'' takes into account, among other things, the scope and intensity of the fighting. The Administration currently considers Afghanistan, Iraq, and Syria to be ''areas of active hostilities,'' which means that the PPG does not apply to operations in those States.

Substantively, the PPG imposes certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting. The President has done so out of a belief that implementing such heightened standards outside of hot battlefields is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.

Of course, the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG's heightened policy standards may not be met. But in every case in which the United States takes military action, whether in or outside an area of active hostilities, we are bound to adhere as a matter of international law to the law of armed conflict. This includes, among other things, adherence to the fundamental law of armed conflict principles of distinction, proportionality, necessity, and humanity.

The Administration has already identified a number of the aspects in which the PPG imposes policy standards for the use of lethal force in counterterrorism operations that go

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beyond the requirements of the law of armed conflict. I'd like to focus on one key aspect here. The PPG establishes measures that go beyond the law of armed conflict in order to minimize risks to civilians to the greatest extent possible. In particular, the PPG establishes a threshold of ''near certainty'' that non-combatants will not be injured or killed. This standard is also higher than that imposed by the law of armed conflict, which contemplates that civilians will inevitably and tragically be killed in armed conflict.

In addition, with respect to lethal action, the PPG generally requires an assessment that capture of the targeted individual is not feasible at the time of the operation. The law of armed conflict does not itself impose any such ''least restrictive means'' obligation; instead, combatants may be targeted with lethal force at any time, provided that they are not ''out of the fight'' due to capture, surrender, illness, or injury.

I hope that this discussion of the PPG and other distinctions between law and policy has given you an understanding not only of the difference between the legal and policy constraints on U.S. lethal targeting, but also better appreciation of the lengths this government goes to in order to minimize harm to civilians outside of hot battlefields while also taking the direct action necessary to protect the United States, our partners, and allies.

Conclusion

In closing, I'll speak to a final aspect of legal diplomacy, one which my predecessors have emphasized in their public remarks as well. As Legal Adviser, one of my roles is to serve as a spokesperson for the U.S. Government on the importance and relevance of international law, and how the U.S. Government interprets, applies, and complies with international law. Part of our legal diplomacy is carried out with our foreign counterparts behind closed doors. But public legal diplomacy is a critical aspect of our work as well, as my predecessors—several of whom are in the audience today—have ably demonstrated.

It is not enough that we act lawfully or regard ourselves as being in the right. It is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions. Even if other governments or populations do not agree with our precise legal theories or conclusions, we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law.

I hope that I have succeeded in providing some clarity today on the United States' approach to international law in the counter-ISIL campaign. I am confident, however, that I have not answered all of your questions. We will seek opportunities to provide additional clarity on these issues in the months ahead. In the meantime, I have reserved the remainder of my time for questions. Thank you.

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