

MILITARY LEGITIMACY REVIEW



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BARNES-WALL FOUNDATION OF SOUTH CAROLINA**MILITARY LEGITIMACY REVIEW AWARD 2016 ANNOUNCEMENT**

The Barnes Wall Foundation, through the efforts of the MLR and also from recommendations of service academy, university and law faculty professors, seeks nominations for this award amongst many deserving student-candidates.

The award includes publication in MLR as well as a monetary prize (\$500.00).

This award is not intended to recognize a paper for academic credit in an independent study, but an award for the best paper in a class or group of 3 or more. The topic and paper should relate to legal and moral issues in military operations and/or strategy (e.g. democracy, human rights and the rule of law, and religion/cultural issues), with the winning paper being posted with the author's permission on the Military Legitimacy Review (MLR) website at <http://militarylegitimacyreview.com/>

With this publication, a new cycle for 2016 begins, with submissions solicited for the next year's competition encouraged and accepted through April 7th, 2016. For additional details please contact the Editor in Chief of the MLR, Professor of Law Kevin Govern, via info@militarylegitimacyreview.com and / or khgovern@avemarialaw.edu for additional details.

BARNES-WALL FOUNDATION OF SOUTH CAROLINA**MILITARY SCHOLARSHIP AWARD 2016 ANNOUNCEMENT**

The Barnes Wall Foundation, through the efforts of the MLR and also from recommendations of service academy, university and law faculty professors, sought nominations for this award amongst many deserving student-candidates.

The award includes publication in MLR as well as a monetary prize (\$250.00) given in this third year of competition for military scholars and those pursuing a career in uniformed service for having written the best paper on a topic related to military legitimacy.

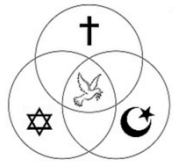
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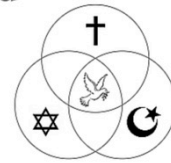
Jesus Meets Muhammad – Featured Online Resource Significant for Military Legitimacy Review Readers



Jesus Meets Muhammad



The three overlapping circles represent Judaism, Christianity and Islam, and the dove represents a *common word of faith* for all three religions--*the greatest commandment to love God and your neighbor as yourself.*



About

Religion is the primary source of those standards of legitimacy that define what we consider to be right and wrong, and in an increasingly pluralistic world in which most people identify as either Christians or Muslims, conflicting standards of legitimacy can lead to religious hatred and violence. (See the Introduction to the [J&M Book](#))

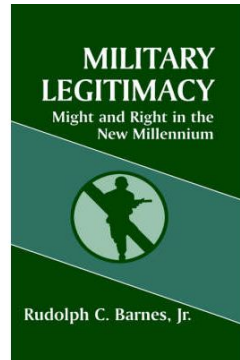
This website, created in December 2014, presents topics for discussion on issues of legitimacy that are related to the teachings of Jesus and Muhammad. But those ancient teachings did not address critical issues of national sovereignty, just war, democracy and fundamental human rights in our time and place. That requires that we apply the moral imperative to love God and our neighbors—even our unbelieving neighbors—as a governing principle of legitimacy. It is a common word of faith for Jews, Christians and Muslims, and when reason is used to apply that principle of faith to contemporary issues of legitimacy it enables us to reconcile our religious differences.

Reason requires that people of faith distinguish between voluntary moral standards and obligatory religious laws that are imposed on others. That is because freedom of religion and expression require that religious standards of belief and behavior be entirely voluntary, in contrast to Islamic regimes that deny freedom with blasphemy and apostasy laws.

This website promotes the premise that both Jesus and Muhammad would support libertarian democracy as a means of loving God and neighbor, and have their followers use reason to conform their ancient holy laws to modern standards of legitimacy, leaving obligatory and coercive laws to elected lawmakers—not to God.

The J&M Book and [other resources on this blog](#) can help Christians and Muslims better understand their differences and find the common ground needed to reconcile religious differences in a world of diverse and conflicting religious beliefs.

Conflicting Concepts of Human Rights and Legitimacy in Rule of Law Operations



Introduction

This paper addresses conflicting concepts of human rights in Islamic cultures that create issues of legitimacy in rule of law operations, and recommends a strategic approach to remedy the problem and provide strategic and operational guidance.

Legitimacy, Human Rights and Shari'a

Legitimacy provides the norms of what is right, and they include both voluntary moral standards and the obligatory and coercive standards of the rule of law. Legitimacy has long been recognized as an operational imperative for Special Operations (SO) and Civil Affairs (CA), which is the military's interface with the civilian population.¹

Military operations must be perceived to be legitimate to gain the public support needed for U.S. political objectives overseas, and it is axiomatic that SO and CA personnel must respect local laws and moral standards to achieve legitimacy. But that is problematic where local laws and standards conflict with fundamental human rights, as in Islamic cultures where Islamic law, or *shari'a*, takes precedence over fundamental human rights. Shari'a includes apostasy and blasphemy laws that conflict with the fundamental freedoms of religion and speech as well as laws that deny women and religious minorities equal protection of the law. The resulting conflict in standards of legitimacy can jeopardize mission success.²

Democracy, human rights and the secular rule of law are universal political ideals that are promoted in U.S. foreign policy. But the rule of law can be a means of tyranny in the hands of a despot, and democracy can produce a tyranny of the majority without human rights to protect minorities—and there is no worse tyranny than a religious tyranny.

Human rights keep democracy and the rule of law in balance and are essential to the legitimacy of any government. Beyond protecting one's life and property, the most fundamental human rights are the protection of the freedoms of religion and speech and the equal protection of the law for women and minorities. Those human rights are international obligations under the International Covenant on Civil and Political Rights (ICCPR),³ but they have little effect in Islamic

cultures where shari'a prohibits the freedoms of religion and speech with apostasy and blasphemy laws and denies women and religious minorities equal treatment under the law.⁴

Promoting human rights in Islamic cultures has become more of a challenge following the democratic upheavals and the overthrow of autocratic rulers since the Arab Spring of 2011. Most new Muslim leaders have embraced concepts of shari'a that degrade the fundamental freedoms of religion and expression and the equal treatment of women and non-Muslims.

Even so, promoting human rights overseas remains a priority of U.S. national security strategy, and that strategy is reflected in The Human Rights Policy for the United States Special Operations Command (USSOCOM). It states that "The Department of State, with support of the Department of Defense (DOD), plays a key role in achieving the foreign policy goal of promoting human rights abroad," and that "...By their nature as 'warrior-diplomats' and 'global scouts' Special Operations Forces (SOF) must fully support the regional programs and plans [of the Geographic Combatant Commands that implement this strategy]."⁵

This command policy is a reminder that CA and other SOF personnel must be diplomat-warriors who can bridge the formidable gap between civilian diplomacy and military operations. When it comes to rule of law operations and training military forces in emerging democracies overseas, SOF, including CA personnel, must promote democracy and human rights and exemplify the role of the military in a democratic society.⁶

Religion and the Rule of Law: Conflicting Concepts of Legitimacy in the West and East

Religion and secular customs and traditions provide the norms of legitimacy and the rule of law. Culture shapes religion just as religion shapes culture, and together they have produced conflicting standards of legitimacy and law in the libertarian democracies of the West and in the tribal Islamic cultures of the East.

Whenever CA and SOF confront local standards of legitimacy and a rule of law that conflict with fundamental human rights in Islamic cultures, they face a strategic dilemma with operational consequences. This dilemma requires strategic guidance to address conflicting standards of legitimacy and the rule of law, and it is especially relevant to CA since the rule of law is the first of six CA functional areas.⁷

The U.N. definition of the rule of law, which is virtually the same as that of the U.S. Army, makes it clear that the rule of law must be consistent with *international human rights norms and standards*, and requires adherence to the principles of *equality before the law*.⁸ And it is equally clear that the ICCPR makes the freedoms of religion and expression under Articles 18, 19 and 20, and equality before the law under Articles 2 and 3, fundamental human rights. While most Islamic nations are parties to the ICCPR, they have a unique standard of human rights shaped by shari'a.⁹

Democracy and libertarian human rights have no precedent in the ancient religions but are modern amalgams of religion, natural law, reason and politics. Since the 17th century the libertarian ideals of the Enlightenment have transformed religion, politics and law in Western democracies, but not in the tribal cultures of the Islamic East, where shari'a is little changed from the 7th century dictates of Muhammad. Shari'a makes no mention of democracy or human rights, while libertarian democracies of the West emphasize individual rights, sometimes to the detriment of providing for the common good.

The ancient scriptures of Judaism, Christianity and Islam emphasize providing for the common good, especially caring for the poor and needy; but Moses, Jesus and Muhammad never mentioned individual rights, perhaps because they had no relevance to their time and place. The Qur'an mandates *no compulsion in religion*, but apostasy and blasphemy laws are a form of compulsion that precludes freedom of religion and speech.¹⁰ History has taught that political legitimacy and the common good require providing the freedoms of religion and speech.

The relevance of religion to democracy and human rights in both the East and West depends upon balancing individual rights with the collective obligation to provide for the common good. That means emphasizing libertarian human rights under shari'a in the Islamic East, while putting more emphasis on providing for the common good in Western democracies.

In Western democracies, secular constitutions enumerate those human or civil rights that protect fundamental freedoms against government encroachment. In Islamic nations shari'a functions much like a constitution and prohibits any conflicting secular laws. Whenever fundamentalist Muslims known as Islamists or Salafists make shari'a an immutable code of laws it conflicts with both libertarian democracy and human rights.¹¹

The constitutions of Egypt, Iraq, Afghanistan, Pakistan and Iran provide that secular laws must be in conformity with shari'a. But unlike Western constitutions, there is no written shari'a to delineate the limits of secular law, so that it often includes and sanctifies tribal customs and traditions along with laws taken from the Qur'an and hadith. Muslim religious jurists define and interpret shari'a rather than secular jurists who are accountable to the public. This makes normal (secular) juridical processes difficult if not impossible.¹²

That anomaly of religious and secular law is illustrated in the Preamble to the 1990 Cairo Declaration of Human Rights that subjects all international law obligations to the provisions of shari'a by asserting that human rights are "...an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them as they are divine commands, which are contained in the Revealed Books of Allah..."¹³

Libertarian democracy, human rights and a dynamic secular rule of law are not compatible with an immutable shari'a that limits the freedoms of religion and speech and the rights of women and non-Muslims. That incompatibility creates conflicts of legitimacy that can make U.S. rule of law operations in Islamic cultures a mission impossible.

In Islam there is no separation of the sacred and secular in law or politics. Shari'a is a considered a perfect and immutable rule of law of God/Allah that requires the complete submission of all Muslims (Islam means *submission*), just as Mosaic Law required the same for ancient Hebrews. By way of contrast, the libertarian political ideals of the Enlightenment of the 17th century liberated Western nations from the oppression of religious law and the divine right to rule with the concepts of democracy, human rights and the secular rule of law.¹⁴

The role of religion in law and politics in Islamic cultures has direct relevance to U.S. national security. *Islamism* is a fundamentalist form of Islam that conflicts with libertarian democracy, and a primary objective of radical Islamist terrorists like those of ISIS, al-Qaeda, Boko Haram and el-Shabab is to establish an oppressive caliphate with a rigid form of shari'a. The freedoms of religion and speech and the equal protection of the law for women and religious

minorities counter the oppressive objectives of radical Islamists and open the door to libertarian democracy in Islamic cultures.

Differing Scholarly Views of Democracy and Human Rights under Shari'a

Turkey and Indonesia provide long-standing examples of how Muslim democracies can blend shari'a with libertarian human rights and the secular rule of law, while Egypt, Syria, Libya, Yemen and other nations in North Africa provide more theocratic and authoritarian models of democracy under shari'a. The jury is out; just how democracy, human rights and secular rule of law will evolve in Muslim nations in the Middle East and Northern Africa is dependent on how shari'a is interpreted, and Muslim scholars are deeply divided on that issue.

Usaf al-Qaradawi, Gudrun Kramer and Seyyed Hossein Nasr represent the traditional Islamist view that shari'a is the immutable law of God and that *God is the only legislator*. While they do not oppose democracy, they oppose man-made laws that conflict with shari'a. Khaled Abou El Fadl, John L. Esposito, M. A. Muqtedar Khan and Abdullaha Ahmed An-Naim are among the more progressive scholars and advocate interpretations of shari'a that are compatible with libertarian democracy, human rights and a secular rule of law.¹⁵

John Esposito shares the views of Abdurrahman Wahid, the first democratically elected president of Indonesia, who saw shari'a governing "...a society where 'a Muslim and a non-Muslim are the same'—a state in which religion and politics are separate....Its cornerstones are free will and the right of all Muslims, both laity and religious scholars (*ulema*), to 'perpetual reinterpretation' (*ijtihad*) of the Qur'an and tradition of the Prophet in light of ever changing human situations."¹⁶ Harkristuti Harkrisnowo is an Indonesian lawyer and human rights official who also shares Wahid's vision, but she has been frustrated with the lack of a written shari'a and with Islamic scholars and jurists interpreting Indonesia's shari'a as its rule of law rather than secular lawyers and judges.¹⁷

Despite the uncertainty of just what shari'a provides, in Indonesia human rights are defined in a constitutional bill of rights. But the freedoms of religion and expression in Indonesia are fundamentally different than those in the US. There is no freedom to believe in any religion, only the freedom to choose from a menu of religions approved by the state. Indonesians are required to believe in one God, understood as encompassing both the Christian Trinity and the Muslim Allah; and because there are laws regulating religion, there are legal disputes involving blasphemy and heresy among different sects of Muslims. It is a mix of politics, law and religion that is common in the Islamic East but not in the libertarian West.¹⁸

The differing views of Islamic scholars echo similar debates in the evolution of Judaism and Christianity in the West, from the days when heresy, blasphemy and apostasy laws prevailed in theocratic and authoritarian regimes, until after the Enlightenment when Judaism and Christianity conformed their religious doctrines to its libertarian values. That cultural transformation of religion and politics made freedom a matter of faith as well as law.

New Strategies for Rule of Law Operations: *De Oppresso Liber*

It is still too early to tell which views of shari'a will prevail; but one thing is certain: any reform of shari'a will have to come from within Islam. For that reason U.S. policy-makers should look to Islamic scholars for direction in developing new strategies for rule of law operations in Islamic cultures. In the meantime U.S. aid and assistance in Islamic cultures should favor moderate

Muslim leaders who support libertarian democracy and human rights. Any U.S. support for Islamic nations that enforce apostasy and blasphemy laws and allow discriminatory treatment of women and religious minorities ultimately benefits radical Islamists.

There are those who argue that democracy, human rights and the secular rule of law are uniquely Western concepts and should not be forced on Islamic cultures. It is true that American exceptionalism—the ideal to reshape the world in the image of America—is an anachronism of foreign policy that should be abandoned.¹⁹ But democracy, human rights and the secular rule of law are not uniquely American ideals. They are universal ideals incorporated in international law that should be promoted in Islamic cultures, even if there is resistance—as there will be.

Strategic guidance on rule of law operations must come from the top, but there seems to be no real commitment to promote democracy and human rights in Islamic cultures. The U.S. supports an Egyptian government that has violated human rights with impunity, and Saudi Arabia and Pakistan are two other U.S. allies in the region that have sanctioned egregious violations of human rights with apostasy and blasphemy laws and discriminatory treatment of women and minorities.²⁰

In U.S. national security policy, the choice for policymakers is between freedom and oppression, and Americans have always considered the defense of liberty as the nation's primary mission. To promote liberty over oppression in Islamic cultures, the U.S. must provide incentives to eliminate apostasy and blasphemy laws and provide equal protection of the law for women and religious minorities. To continue to support Islamic governments that deny those fundamental rights for reasons of political and military expediency is short-sighted. Encouraging Islamic nations to provide fundamental human rights for their people can do more to undermine the legitimacy of radical Islam than military combat operations.

This is obvious in Iraq where vast amounts of American blood and billions of dollars have been expended to combat radical Islam, but those vast investments have dissipated in the shifting sands of the Arabian desert, along with any hope of building a libertarian democracy in the region. The same fate seems to await Afghanistan.

The motto of the U.S. Army Special Forces is *De Oppresso Liber—To liberate from oppression*. That ideal should be at the heart of U.S. national security policy and strategy, but it has been subordinated to misplaced notions of political and military expediency. Promoting democracy, human rights and the secular rule of law should have a higher priority than respecting conflicting provisions of shari'a in Islamic cultures, and that priority should be made clear in U.S. national security strategy and in operational guidance provided to CA and SOF personnel deployed in Islamic cultures.

The Leahy law mandates that SOF trainers and advisors report violations of fundamental human rights, and that mandate should be enforced and extended to rule of law operations. The Obama Administration has sent mixed messages to Congress on human rights compliance, and that ambiguity should be resolved with a firm commitment to define and enforce fundamental human rights in Islamic cultures.²¹

Conclusion

The Rule of Law is a functional area of Civil Affairs, which is the interface of the U.S. military with civilian populations overseas. There is little doubt that rule of law operations will be

conducted in Islamic cultures in the future to promote U.S. national security interests. It is critical that compliance with fundamental human rights be given the strategic and operational priority it deserves to ensure that U.S. military operations in Islamic cultures promote religious and political freedom rather than oppression.

END NOTES:

1. Legitimacy is the first of six Imperatives of LIC (Low Intensity Conflict) and six Principles of OOTW (Operations Other Than War). See Rudolph C. Barnes, Jr., Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London (1996), at pages 60-62, and on pages 54-55 of that text posted at http://militarylegitimacyreview.com/?page_id=206. (hereinafter cited as Military Legitimacy)
2. On how conflicting concepts of human rights can jeopardize military legitimacy and mission success in training and advisory missions in Islamic cultures, see Barnes, *Back to the Future: Human Rights and Legitimacy in the Training and Advisory Mission, Special Warfare*, January-March 2013, page 42, posted in **Resources** at <http://www.jesusmeetsmuhammad.com/>. (hereinafter cited as *Back to the Future*) See generally, Military Legitimacy, chapters 3 and 6, *supra*, note 1.
3. The International Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 17, (ICCPR) was signed by the U.S. in 1977 and ratified in 1992, and most Islamic nations are parties to the treaty. The ICCPR incorporates the articles of the Universal Declaration of Human Rights (1948) into a treaty, making them obligatory for all parties to the ICCPR. Article 2 prohibits unlawful discrimination; Article 3 provides for equal rights for men and women; Article 18 provides for the freedom of thought and religion; Article 19 provides for the freedom of speech/expression; Article 20 provides for the right of peaceful assembly; and Article 26 provides that all persons are equal before the law.
4. The Cairo Declaration on Human Rights in Islam of 1990 has no provisions comparable to Articles 18, 19 and 20 of the Universal Declaration of Human Rights or the International Covenant of Civil and Political Rights (ICCPR, see note 3 *supra*), but following a Preamble that asserts the primacy of Shari'a in defining human rights, the following articles reveal the Islamic perspective of human rights. Article 11 provides in part: *Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High....* Article 22 provides: (a) *Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.* (b) *Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.* (c) *Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.* (d) *It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.* Article 24 provides specifically what the Preamble implies: *All the rights and freedoms stipulated in this Declaration are subject to the*

Islamic Shari'ah. Article 25 provides: *The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.*

5. USSOCOM Human Rights policy background provides: *One goal of US national security strategy is to champion aspirations for human dignity. Coupled with our effort to promote regional stability through democratic reform and our belief that all people are born with certain inalienable rights, our nation has focused efforts to protect the rights of all people throughout the world. And USSOCOM Policies and Procedures provides: Human rights awareness, concepts, reporting requirements, and themes will be an integral part of SOF training with foreign forces. SOF will be prepared to teach and demonstrate by word and deed that the protection of human rights is imperative for military success in any environment, from garrison operations to conduct of war.*

USSOCOM Directive 350-28cc, Training, Human Rights Policy, 11 May 2005, Section I, para 3a, and Section II, para 4d. See *Back to the Future*, *supra* note 2, at pages 44 and 45 and notes 17-21.

6. On the role of SOF and CA personnel as diplomat-warriors who support democracy, human rights, see Military Legitimacy, chapters 4 and 5. (op. cit. note 5, *supra*)

7. See page I-16 in Civil-Military Operations, Joint Publication 3-57, 11 September 2013.

8. The rule of law is defined by the United Nations as follows:

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

9. See note 4, *supra*.

10. The Qur'an provides: *Let there be no compulsion in religion. Truth stands out clear from Error. Whoever rejects Evil and believes in Allah has grasped the most trustworthy hand-hold that never breaks. And Allah hears and knows all things.* (Qur'an, Al Baqara 2:256) Apostasy is defined as abandoning religion or conversion to another religion. Blasphemy is defined as any speech or act disrespectful of God. See Webster's New World Dictionary, 1976. Where apostasy and blasphemy are crimes, there is compulsion in religion; and there are other forms of religious compulsion or discriminatory treatment under shari'a that violate fundamental human rights, such as discrimination against women and non-Muslims.

11. Religious fundamentalism is characterized by a belief one true (exclusivist) religion and in holy scriptures as the source of God's truth, and that all unbelievers are condemned by God to eternal damnation. Jewish and Christian fundamentalist are a minority in their religions, but it appears that most Muslims are fundamentalists. Karen Armstrong has described religious fundamentalism as a rather recent development in Judaism, Christianity and Islam that was a reaction to progress and modernity in The Battle for Legitimacy: A History of Fundamantalism, Random House, 2000.

12. Harkristuti Harkrisnowo is a Muslim lawyer, professor and Director General for Human Rights in the Indonesian Ministry of Justice who has been frustrated by the juridical issues with shari'a. She puts the issue of human rights in practical perspective noting dichotomies between Western

views that emphasize individual rights versus the collective rights favored in the East. In determining whether shari'a is in accord with international human rights standards, Harkrisnowo has been frustrated by the inability to define shari'a. She notes that there are many different Islams or interpretations of Islam in Indonesia, and sees resolving conflicts as a lawyer's dilemma left to theologians to resolve, with little hope of finding consensus: "Some Indonesian Muslims are textualists who embrace the Qur'an very narrowly, in a manner somewhat reminiscent of those Christians who believe in a literal interpretation of the Bible. . . . Others believe Shari'a requires only an ethical basis, which can be satisfied for some by an all-things-considered judgment, and for others by well-considered secular law. Whomever's viewpoint prevails makes a real and practical difference for anyone trying to implement the rule of law in the Islamic world." Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, New York, NY, 2010, pages 189, 190, 195.

13. For references to the Cairo Declaration, see note 4, *supra*.

14. See Barnes, *Religion, Legitimacy and the Law: Shari'a, Democracy and Human Rights*, (hereinafter *Religion, Legitimacy and the Law*) at pages 2, 3 posted in **Resources** at <http://www.jesusmeetsmuhammad.com/>.

15. *Ibid* at pages 10-17 and end notes.

16. *Ibid* at page 12.

17. *Ibid* at page 121 and note 12, *supra*.

18. *Id.*

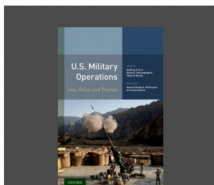
19. *Ibid* at page 8 and citations at note 19.

20. *The 2013 International Religious Freedom Report* of the Bureau of Democracy, Human Rights and Labor of the U.S. Department of State reported increased violations of religious freedom around the world (see <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm>). Of the nine countries identified as engaging in or tolerating particularly severe violations of religious freedom, five are Islamic nations: Iran, Sudan, Saudi Arabia, Turkmenistan and Uzbekistan, with Burma, Eritrea, China and North Korea the exceptions. Pakistan, Afghanistan, Egypt, Iraq, Bangladesh and Indonesia were also mentioned in the report as having serious violations of religious freedom.

21. On the restrictions that govern U.S. security assistance like the Leahy law, see *Back to the Future*, op. cit. note 2, *supra* at page 42 and note 18, and on the lack of an adequate definition of fundamental human rights, see page 45 and note 23. On the military perspective of the Leahy law, see Eric Schmitt, *Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission*, *New York Times*, June 6, 2013; on the need to enforce Leahy standards, see Editorial Board, *U.S. should aid those who fight terror, not abet human rights abuses*, *Washington Post*, July 7, 2014.



Human rights and
security in US
history



<http://blog.oup.com/2015/12/human-rights-and-security-in-us-history/>

BY KEVIN GOVERN DECEMBER 9TH 2015

This Human Rights Day, commemorating the 10 December 1948 proclamation of the Universal Declaration of Human Rights, we embark on a year-long observance of the 50th anniversary of the two International Covenants on Human Rights: the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966. Together these documents form an International Bill of Human Rights, the birthright of all human beings with respect to civil, political, cultural, economic, and social rights.

The United States has drawn world focus on rights and freedoms – freedom of speech, freedom of worship, freedom from want, and freedom from fear – often in the context of preserving and promoting human rights through strong national and homeland security efforts, and requisite defense support to civil authorities, in the wake of natural and man-made disasters threatening each of those rights and freedoms.

Defense support of civil authorities must be considered in light of an evolution, rather than revolution, involving over a century of domestic federal troop deployments and 200-plus years of legal precedent, starting with the US Constitution, Article I, Section 8 as the basis for Federal government support, including Department of Defense assistance, to State and local authorities, as well as the 10th Amendment, inasmuch as “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the States respectively.”

The Insurrection Act of 1807 was one of the first and most important US laws still in force on this subject to limit executive authority to conduct military law enforcement on US soil, and was followed some 71 years later by the Posse Comitatus Act of 1878. Each of those and other civil support laws has evolved over time — consistent with the times and the popular will expressed through Congress.

Amongst the many lessons re-learned or real-world experiences validated, US interagency cooperation demonstrates that after state and local authorities had reached their capacity in dealing with previous disasters, additional federal authorities may have to assist local authorities with response to civil unrest and other challenges. Months after the disastrous effects of the October 2012 Superstorm Sandy, and weeks prior to the devastating 15 April 2013 Boston Marathon bombings, the Summer 2013 El Reno tornado in Oklahoma, and the wildfires in both Arizona and Colorado, the US Department of Defense (DOD) issued a DoD instruction and a strategy document clarifying the rules for the involvement of military forces in civilian law enforcement and DOD support to Federal, State, tribal, and local civilian law enforcement agencies, including responses to civil disturbances. This is especially important in the realm of so-called complex catastrophes that would overwhelm local and state agencies individually and require federal agency involvement with the DOD supporting an overall effort.

Thereafter, during the Spring of 2014, another series of domestic natural disasters included deadly severe storms, tornadoes and flooding; in the aftermath of destruction, National Guard members worked, “in coordinated efforts with civilian agencies ... responding to communities in several states across the south.”

At least 62,000 unaccompanied children from Central America have come across the US-Mexico border from the Fall of 2013 up through the time of this writing; they were believed fleeing gang activity that could threaten to US national security. In defense support to the Department of Health and Human Services (HHS), the unaccompanied children stopped by US Border Patrol are now being cared for by HHS’ Administration for Children and Families (ACF).

Aside from the aforementioned bases for support, Section 1208 of the 1990 National Defense Authorization Act (later titled Section 1033, which subsequently became Section 2576a), has allowed the Secretary of Defense to transfer to Federal and State agencies personal property of the DOD, including small arms and ammunition, suitable for use by such agencies in counter-drug activities and excess to DOD needs. Since its inception, the “1033 program” has transferred more than \$5.1 billion worth of property. Critics of the program, such as the ACLU, claimed “a disturbing range of military gear [is] being transferred to civilian police departments nationwide.” This “1033 program,” coupled with National Guard deployment in Ferguson, MO, became the subject of critical media focus in the wake of police response to riots in August 2014 following the police shooting of crime suspect Mike Brown. Thereafter, President Obama issued the 16 January 2015 Executive Order 13688, which, along with the 18 May 2015 Law Enforcement Working Group Recommendations Pursuant to Executive Order 13688, directs executive departments and agencies to better coordinate their efforts to operate and oversee the provision of controlled equipment and funds for controlled equipment to law enforcement agencies.

The FBI has aptly observed that “[t]here’s no room for failure—when it comes to weapons of mass destruction, even a single incident could be catastrophic.” Former Secretary of Defense Leon Panetta warned the Nation in Fall 2012 of a potential coming “cyber Pearl Harbor; an attack that would cause physical destruction and the loss of life ... [that] would paralyze and shock the nation

and create a new, profound sense of vulnerability.” The policies and legal authorities governing Defense Support to Civil Authorities extend to cyber operations, as they would in any other domain. The Department of Defense works closely with its interagency partners, including the Departments of Justice and Homeland Security, to address threats to the United States from wherever they originate and to protect the rights of its citizens from foreign and domestic threats.

As George C. Marshall, the great soldier-statesman remarked in his 23 September 1948 speech to the United Nations General Assembly, “in the modern world the association of free men within a free state is based upon the obligation of citizens to respect the rights of their fellow citizens. And the association of free nations in a free world is based upon the obligation of all states to respect the rights of other nations.”

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Image credit: Army Spc. Anthony Monte helps a woman displaced by Hurricane Sandy at an emergency shelter at the Werblin Recreation Center in Piscataway Township, N.J., Oct. 29, 2012. Monte is assigned to the 50th Infantry Brigade Combat Team, New Jersey Army National Guard. Department of Defense. Public domain.

– See more at: <http://blog.oup.com/2015/12/human-rights-and-security-in-us-history/-sthash.BNbazJja.dpuf>

A Sino-American Cyber Security Agreement: Crisis Composed of Danger and Opportunity?

Monday 28 September 2015 at 9:20 AM ET edited by [Marisa Rodrigues](#)

JURIST Guest Columnist [Kevin Govern](#) of Ave Maria School of Law discusses the latest cyber security agreement between China and the US...



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It is a longstanding fiction that the Chinese word for "crisis" is composed of elements that signify "danger" and "opportunity." Nevertheless, in the realm of science fiction writing, author William Gibson coined the term "cyberspace" in his short story, "Burning Chrome," before most of the public had a concept of, let alone actual experience with, using networked computer systems. Science fiction has given way to cyber reality, with 42.3 percent of the world's population using the internet on a regular basis, some 741 percent growth between 2000-2014 alone. At the same time, cyber weapons and cyber warfare are among the most dangerous innovations in recent years. Cyber weapons can imperil economic, political and military systems by a single act, or by multifaceted orders of effect, with wide ranging potential consequences. A non-exclusive list of some notable past cyber incidents includes but is not limited to:

- 1994**: Chechen rebels use Internet-enabled propaganda [PDF] in the Russo-Chechen war.
- 1999**: Serbian hackers try to disrupt NATO military operations that clogged NATO's e-mail server with 2,000 messages a day.
- 2007**: Syrian air defense was reportedly disabled by a cyber attack moments before the Israeli Air Force demolished an alleged Syrian nuclear reactor; massive cyber attacks experienced by Estonia, with most of the compromised and attacking computers located within the US but attributed to Russia.
- 2008**: Russo-Georgian war with integrated cyber and conventional operations.
- 2009**: the whole of Kyrgyzstan was knocked offline during a time of domestic political crisis.
- 2010**: Stuxnet worm attacking Iranian nuclear centrifuges identified as most sophisticated state-sponsored malware.
- 2014**: Release of confidential data belonging to Sony Pictures Entertainment, including employee

personal information, e-mails, copies of (previously) unreleased Sony films and other information, via a hack believed to be of North Korean origin, and two major breaches reputedly by China of US government databases exposed sensitive information about at least 22.1 million people, including not only federal employees and contractors but their families and friends. •**2015**: A Chinese attack targeted personal emails of "all top [US] national security" officials just days after a "spear-phishing" attack of suspected Russian origin on the Pentagon's joint staff email system, which exposed some 4,000 civilian and military employees.

The US Director of National Intelligence, James Clapper, recently told the House Intelligence Committee the next phase of escalating online data theft most likely will involve the manipulation of digital information, with a lower likelihood of a "cyber Armageddon" of digitally triggered damage to catastrophically damage physical infrastructure.

On September 25, 2015, during the state visit of Chinese President Xi Jinping, the US and China signed a Memorandum of Understanding [PDF] on a range of global, regional and bilateral subjects. According to a statement from the White House, the two countries now

"agree that neither country's government will conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors."

Many details are left to be determined, though, in the "common effort to further identify and promote appropriate norms of state behavior in cyberspace within the international community," including, but not limited to, which acts in cyberspace would be tantamount to an act of war.

In this era of great cyber danger and opportunity, my colleagues and co-editors Jens Ohlin from Cornell Law School and Claire Finkelstein from the University of Pennsylvania Law School and I had the privilege of contributing to and editing a book that assembles the timely and insightful writings of renowned technical experts, industrial leaders, philosophers, legal scholars and military officers as presented at a Center for Ethics and the Rule of Law roundtable conference entitled *Cyberwar and the Rule of Law*.

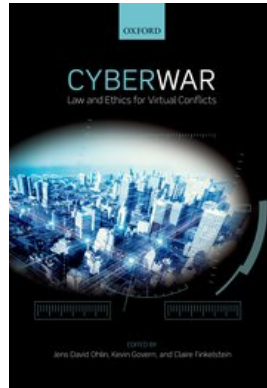
That work, *Cyber War—Law and Ethics for Virtual Conflicts*, explores cyber warfare's moral and legal issues in three categories, pertinent to any cyber security agreement that may be concluded, not just the present Sino-US accord. First, it is critical to address foundational questions regarding cyber attacks. What are they and what does it mean to talk about a cyber war? State sponsored cyber warriors as well as hackers employ ever more sophisticated and persistent means to penetrate government computer systems; in response, governments and industry develop more elaborate and innovative defensive systems. There are valid alternative views concerning whether the laws of war should apply, whether transnational criminal law or some other peacetime framework is more appropriate, or if there is a tipping point that enables the laws of war to be used. Secondly, cyber security challenges traditional conceptualizations of the law of war, or *jus in bello*, in determining

how they might be applied to cyber-conflicts, in particular those of proportionality and necessity. It also investigates the distinction between civilian and combatant in this context and studies the level of causation necessary to elicit a response, looking at the notion of a "proximate cause." Finally, it is essential to analyze the specific operational realities implicated by cyber warfare technology employed and deployed under existing and potential future regulatory regimes.

On the national and foreign policy front, individual freedom of expression and privacy considerations must be balanced against national sovereignty and security concerns in the enforcement of the Convention on Cybercrime, just as they should be for any future Cyber Weapons Convention or cyber security agreements that China, the US, or any other nations conclude. From a technical perspective, the prospect of increased cyber oversight, regulation and protection appears increasingly challenging but more imperative than any prior time in history, yet as the Brookings Institute has aptly observed [PDF], improved engagement between China and the US on cyber security will likely have a positive impact in establishing global cyber security norms and implementing mechanisms, as well as other shared concerns, like global finance and the environment. For the above reasons and more, any cyber security agreement concluded will be indispensable to prescribing limits, if not proscribing, cyber warfare, and will have dramatic significance to national and homeland security and foreign affairs of each nation.

Professor Govern began his legal career as an Army Judge Advocate, serving 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. In addition to currently teaching at Ave Maria School of Law he has also served as an Assistant Professor of Law at the US Military Academy and teaches at California University of Pennsylvania and John Jay College. He is an coeditor of and contributing author to Cyber War—Law and Ethics for Virtual Conflicts (Oxford University Press, 2015). Unless otherwise attributed, the conclusions and opinions expressed are solely those of the author and do not reflect the official position of the US Government, Department of Defense, or Ave Maria School of Law.

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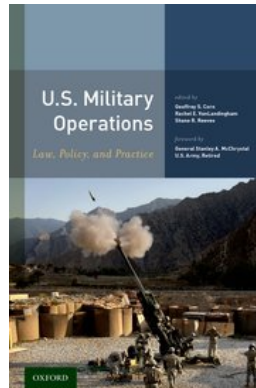
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