

THE TWENTY-THIRD ANNUAL FRANKEL LECTURE

INTRODUCTION

*Emily Berman**

Professor Gabriella Blum delivered the twenty-third annual Frankel Lecture, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, on October 19, 2018. Just seventeen months earlier, when Donald J. Trump was inaugurated as the 45th President of the United States, one might have predicted that Professor Blum’s area of expertise—the laws and ethics of war—would hold little relevance for the United States by the end of 2018. President Trump had campaigned on a non-interventionist platform, promising to bring U.S. troops home from the extended wars in the Middle East and to put “America First.”¹ Yet while the President has delivered on some of his isolationist pledges—withdrawing from the Paris Climate Agreement, the Trans-Pacific Partnership free-trade agreement, and his predecessor’s deal with Iran to limit that country’s nuclear program²—he has been less successful in extricating the armed forces from far-flung military operations. Indeed, when the President tweeted his intention in December 2018 to recall American troops from

* Assistant Professor, University of Houston Law Center.

1. Mark Landler, *On Foreign Policy, President Trump Reverts to Candidate Trump*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/politics/trump-foreign-policy.html> [https://perma.cc/PVW4-2LKJ].

2. Max Boot, Editorial, *It Turns Out That Trump Is Better at Destroying Deals Than Making Them*, WASH. POST (May 9, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/05/09/it-turns-out-that-trump-is-better-at-destroying-deals-than-making-them/?utm_term=.eb2ccf56c809 [https://perma.cc/EV7V-X7E6].

Syria and Afghanistan,³ the idea was met with overwhelming opposition from Congress⁴ and prompted the resignation of then-Secretary of Defense James Mattis.⁵ Thus while the fight against the Islamic State terrorist group rages on in both Iraq and Syria, the war in Afghanistan has now gone on long enough that someone not born when it began is old enough to serve there, and military force is periodically brought to bear in Yemen, Somalia, Libya, and Niger.⁶ Clearly, wisdom regarding the laws and ethics of war remain as relevant now as ever.

While the existence of war remains an unfortunate constant, however, Professor Blum's remarks remind us that its nature is ever-changing. And in this regard, she offers some cause for optimism. Her primary claim is that despite the fact that the *jus ad bellum*—international-law rules regarding *when* states may use force—has largely failed to curtail war and the use of military force more generally, the same cannot be said for the *jus in bello*—the rules about *how* states may use force once the fighting begins. Rather, she argues, the way in which wars are fought has evolved since the last decade of the twentieth century—at least when it comes to liberal democracies⁷—to be less destructive and more protective of civilian lives as well as “private property, the environment, and other protected objects.”⁸ The laws of war, or international humanitarian law (IHL), place a higher premium on humanitarian concerns, and the primary emphasis has shifted from the traditional focus on the

3. Mark Landler, Helene Cooper & Eric Schmitt, *Trump to Withdraw U.S. Forces from Syria, Declaring 'We Have Won Against ISIS'*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/politics/trump-syria-turkey-troop-withdrawal.html> [https://perma.cc/LN72-NMA2].

4. Catie Edmondson, *Senate Rebukes Trump over Troop Withdrawals from Syria and Afghanistan*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/us/politics/senate-vote-syria-afghanistan.html> [https://perma.cc/YV3Z-DL5S].

5. Paul Sonne, Josh Dawsey & Missy Ryan, *Mattis Resigns After Clash with Trump over Troop Withdrawal from Syria and Afghanistan*, WASH. POST (Dec. 20, 2018), https://www.washingtonpost.com/world/national-security/trump-announces-mattis-will-leave-as-defense-secretary-at-the-end-of-february/2018/12/20/e1a846ee-e147-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.f3406f27a5c2 [https://perma.cc/98UY-GE4K].

6. Joshua Keating, *Fifteen Years After the Start of the Iraq War, the U.S. Is at War in at Least Seven Countries*, SLATE (Mar. 19, 2018), <https://slate.com/news-and-politics/2018/03/fifteen-years-after-the-start-of-the-iraq-war-the-u-s-is-at-war-in-at-least-seven-countries.html> [https://perma.cc/4J74-P6JA].

7. Blum explicitly limits her analysis to wars fought by liberal democracies because they “are committed to the rule of law (including international law) and to liberal values of individual rights and justice,” which “play an important part in [Blum’s] narrative about the evolution of warfare.” Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 Hous. L. Rev. 745, 749 (2019).

8. Note that Blum acknowledges that liberal democracies do not always live up to these values. This does not diminish the significance, however, of the expectations they set, which are viewed as rooted in law and norms. *Id.* at 749.

interests of nation-states to war's impact on individuals.

Professor Blum's remarks explore the fundamental question that springs from the paradox referenced in her lecture's title: Why, given the pervasiveness of war and the overwhelming destructive capacity of contemporary military arsenals, is war less destructive than ever? While recognizing that there is a range of explanations for the changing nature of war, she seeks to complement the political scientists' customary focus on geostrategic factors with an account of the role played by law's interaction with social and cultural norms, as well as with changing technology.

The technology of warfare, Blum argues, both drives and is driven by legal norms. The desire to minimize collateral harm is served by developing ever-more accurate weapons systems. At the same time, the availability of more accurate weapons increases pressure on states to minimize collateral damage. An example Blum points to is President Barack Obama's policy regarding drone strikes outside areas of active hostilities.⁹ This policy required a "near certainty" that non-combatants would not be injured or killed before a strike could be authorized.¹⁰ The laws of war are not so strict. Yet the technological ability to perform surgical strikes gave rise to a requirement to do so. Thus, military policy "has been informed" by both what technology enables and what it demands.¹¹

As for the role of social and cultural norms, Professor Blum points to liberalism's political commitment to provide "individuals and groups protection from harm and realization of rights and liberties."¹² The suffering caused by war is thus viewed as an evil, albeit a necessary one, that must be carried out in ways that minimize its destructive effects. Liberal democracies that end up harming civilians or protected spaces such as hospitals thus defend their actions as mistakes, rather than as legitimate, if regrettable, by-products of the use of force.

That these changes have coincided with the proliferation of both international human rights law (IHRL) and international criminal law (ICL), Blum points out, is no accident. Instead, there has been a

9. *Id.* at 773–74.

10. *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, U.S. DEP'T JUST. (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [<https://perma.cc/4GRB-S3WA>]; Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. TIMES (Aug. 6, 2016), https://www.nytimes.com/2016/08/07/us/politics/us-releases-rules-for-airstrike-killings-of-terror-suspects.html?_r=0 [<https://perma.cc/5Q4N-J245>].

11. Blum, *supra* note 7, at 774.

12. *Id.* at 777.

convergence of these disparate areas of law, with wartime regulation taking on characteristics of IHRL, such as an “emphasis on universal commitments to individual human rights and dignity,” even when it comes to the civilian nationals of the enemy.¹³ In addition, ICL’s promise of greater accountability for misconduct undertaken during military operations raises the stakes of noncompliance. Thus, while war itself remains ubiquitous, according to Blum, “the *jus in bello*, as it has been applied, shaped and developed in recent decades . . . is increasingly influential in regulating and limiting the destructiveness of war.”¹⁴

Professor Blum closes her remarks by asking how the trend of diminishing destructiveness in war might play out in the future. As an initial matter, she recognizes that the trend may stall, or even reverse.¹⁵ If it does not, however, she sees potential for more prominent roles both for the deployment of soft power, such as diplomacy, and reliance on military activities by (non-liberal, non-democratic) allied countries that may not be subject to the same constraints that the United States faces.¹⁶

Professors Kenneth Anderson and Ian Hurd’s commentaries on Professor Blum’s remarks present variations on her theme regarding the changing nature of war. Professor Anderson fully embraces Blum’s account of IHL’s evolution to elevate humanitarian concerns to the status of “apex universal value”—prioritizing the minimization of human suffering over international law’s traditional role of promoting and protecting the interests of states.¹⁷ He therefore picks up where Blum left off, asking whether the law of war’s development will continue to follow this path toward greater solicitude of human life and suffering. Unfortunately, he identifies some reasons to be skeptical. As Blum herself concedes, it is only in liberal democracies that the citizens and the government worry about the moral and political legitimacy of IHL, a concern that boosts the ability of laws and norms to impose constraints. Anderson emphasizes that the consensus of what IHL requires arose during the post-Cold War period of U.S. hegemony and that it evolved in concert with IHRL and the West’s more general embrace of various forms of global governance, such as U.N. institutions and the World Trade Organization.¹⁸ As non-liberal, non-democratic

13. *Id.* at 763.

14. *Id.* at 751.

15. *Id.* at 782–84.

16. *Id.* at 785–86.

17. Kenneth Anderson, *Who Owns the Rules of War in Today’s Post-Post-Cold War?*, 56 HOUS. L. REV. 789, 793 (2019).

18. *Id.* at 807–08.

states like Russia and China begin to flex their growing geopolitical muscles, he warns, this consensus might break down.¹⁹ In the post-Cold War era, these potentially dissenting voices were largely silent, but they are now reasserting themselves. Russia's persistent disregard for the sovereignty of Ukraine is one example of this phenomenon, as is China's contested claim of sovereignty over vast swaths of the South China Sea.²⁰ These states might champion a return to a more traditional sovereign-centric law that rejects the constraints that nations like the United States have read into IHL. And even if they do not explicitly object to the norms of IHL as they have evolved in recent decades, they may not abide by those norms.²¹ The result, Anderson cautions, might be Western democracies facing adversaries who do not accept all of the constraints by which the United States and its allies consider themselves bound. His commentary is thus a cautionary message to liberal democracies to remain engaged in the ongoing project of IHL's development and to temper the extent to which humanitarian concerns reign supreme, lest we find ourselves shackled by a set of rules that might make winning a war against a reemerging Great Power difficult.²²

Blum would not contest the primacy in her account of liberal democracies—indeed, she explicitly limits her analysis to such states.²³ Moreover, she concedes that the magnitude of the threat posed by state actors, as compared to non-state transnational groups like al Qaeda and the Islamic State, might inspire even liberal democracies to interpret more elastically the limits they currently recognize.²⁴ But she does not grapple with the question of how the reemergence of autocratic or authoritarian states as Great Powers on the international scene might impact liberal states' ability to control the evolution of IHL—or as Professor Anderson puts it, how they might lose ownership of IHL. His commentary thus embraces Blum's descriptive account and yet points to larger implications of its limited scope of application.

19. *Id.* at 810.

20. *Id.* at 816; see Stephen J. Hadley, *It's Time to Stand Up to Russia's Aggression in Ukraine*, FOREIGN POL'Y (Jan. 18, 2019), <https://foreignpolicy.com/2019/01/18/its-time-to-stand-up-to-russias-aggression-in-ukraine/> [<https://perma.cc/5BVF-D4YK>] (noting Russia's annexation of the Crimean Peninsula, invasion of eastern Ukraine, and attacks on Ukrainian naval ships in international waters).

21. Anderson, *supra* note 17, at 814.

22. *Id.* at 819–20.

23. Blum, *supra* note 7, at 749.

24. Blum, *supra* note 7, at 782.

While Professor Blum's remarks recount the ways in which the *jus in bello* have changed in recent years, Professor Hurd's commentary focuses on a different evolution in the laws of war—that of the *jus ad bellum*. In 1945, the U.N. Charter declared uses of military force unlawful under international law unless they represented acts of self-defense or were authorized by the U.N. Security Council.²⁵ Hurd's view is that the exception for self-defense has swallowed the rule. By making self-defense a legal construct, he argues, the Charter “invested in [that construct] the power to distinguish lawful—and therefore legitimate—uses of force from unlawful and illegitimate ones.”²⁶ While self-defense was originally understood to permit the use of force only in response to an armed attack and only for a limited time, both of those limits have “loosened considerably,” in Hurd's view, to the point where “self-defense now means the use of force across borders in response to urgent national security needs.”²⁷ Hurd thus argues that rather than constraining war, the contemporary idea of self-defense means that “state violence is lawful under a broader set of circumstances and with more agency on the part of governments than was imagined by the [U.N.] Charter.”²⁸ It is states' expansive use of self-defense, he goes on to say, that facilitates what Harold Koh has labeled the “forever war”—perpetual, low-intensity “military operations that are unbounded by battlefield limits, time, or realistic win conditions.”²⁹

While it does not make the argument explicitly, Professor Hurd's examination of the evolution of self-defense seems to reject the idea that you can look in isolation at the *jus in bello*. Rather, he seems to suggest, the erosion of constraints on state use of military force in self-defense has given rise to a particular form of conflict. It seems to me that Professor Blum would not disagree. In prior work, Blum has argued that the other-regarding norms that have infused *jus in bello* in recent decades have similarly impacted *jus ad bellum* rules, where contemporary law rejects the legitimacy of many of the historically accepted justifications for going to war—such as territorial conquest, religious conversion, or punishment for treaty violations.³⁰ In the end, however, Blum and

25. U.N. Charter art. 2, ¶ 4 (barring use of force); *id.* art. 51 (recognizing states' inherent right to self-defense).

26. Ian Hurd, “If I Had a Rocket Launcher”: *Self-Defense and Forever War in International Law*, 56 HOUS. L. REV. 821, 827 (2019).

27. *Id.* at 833.

28. *Id.* at 837.

29. *Id.* at 836.

30. Blum, *supra* note 7, at 747; *see also generally* Gabriella Blum, *Prizeless Wars, Invisible Victories: The Modern Goals of Armed Conflict*, 49 ARIZ. ST. L.J. 633 (2017).

Hurd seem to arrive, albeit through different routes, at the conclusion that it is the changing nature of war's justification that gives rise to the "forever war." Hurd locates the well-spring of our near-constant state of war in states' ability to redefine self-defense to serve their non-humanitarian interests. By contrast, Blum points to contemporary efforts to justify use of force on humanitarian grounds—articulating goals such as democratization or the global elimination of terrorist threats—and the inability actually to achieve these goals as perpetual war's genesis.

Blum's insightful remarks and the commentaries that Anderson and Hurd provide on them reveal a paradox different from the one to which the title of Blum's remarks refers: War itself is a constant, yet everything about its nature and the rules that govern it is dynamic. It is this combination of ubiquity and dynamism that promises to make projects like Blum's both timeless and invaluable. War will always be with us. Only through examining and appreciating the multitude of factors that shape—and are shaped by—the laws of war can we hope to minimize both its pervasiveness and its destructiveness.

744

HOUSTON LAW REVIEW

56:4
