

In April 2012, following lengthy negotiations, the United States agreed to hand over responsibility for these operations to Afghan forces, with most requiring prior authorization by an Afghan court and with U.S. personnel playing only a supporting role.⁷ Pursuant to Articles 5 and 6 of an April 2012 memorandum of understanding between Afghanistan and the United States on “Afghanization of Special Operations on Afghan Soil”:

5. The Participants affirm their intent to ensure that special operations are conducted within the framework of the Constitution of Afghanistan, including in particular articles 4, 5, 7, 38 and 57 of the Constitution. To that end, the Participants affirm their intent as follows:

A. special operations that are expected to result in detention or the search of a residential house or private compound are to be authorized in accordance with Afghan laws;

B. residential houses are to be searched only if necessary, and as part of the conduct of special operations, only Afghan Forces should search residential houses and private compounds;

C. the [Afghan Special Operations Unit] can enter private compounds, residential houses, and other areas for the purposes of search and arrest, in accordance with Afghan laws, with support from U.S. Forces only as required or requested; and

D. Afghan Forces are to protect any women, children, or culturally sensitive places.

6. Afghanistan affirms that it is to put into place the necessary arrangements and capacities to ensure that special operations are conducted within the framework of the Constitution of Afghanistan, in order to permit the Participants to fulfill their intent under paragraph 5 above. This is to include, but not be limited to:

A. establishing judicial, prosecution, and investigative mechanisms capable of issuing timely and operationally secure judicial authorizations to conduct special operations missions against persons who are reasonably suspected of meeting the criteria for prosecution or detention under Afghan laws⁸

In the weeks following agreement on the new procedures, Afghan commanders reportedly refused to approve more than two dozen nighttime operations proposed by U.S. forces.⁹

State Department Legal Adviser Outlines Legal Principles Bearing on Crisis in Syria

In late March 2012, U.S. Department of State Legal Adviser Harold Hongju Koh addressed the Annual Meeting of the American Society of International Law. Koh outlined the U.S. view

⁷ Karen DeYoung, *Afghan Officials Likely to Insist on Veto Power over Raids*, WASH. POST, Mar. 22, 2012, at A7; Matthew Rosenberg, *Deal Close on Night Raids, U.S. and Afghan Officials Say*, N.Y. TIMES, Apr. 4, 2012, at A9; Sieff, *supra* note 6; Alissa J. Rubin, *U.S. Transfers Control of Raids to Afghanistan*, N.Y. TIMES, Apr. 9, 2012, at A1; Sayed Salahuddin, *U.S., Afghanistan Sign Deal on Raids*, WASH. POST, Apr. 9, 2012, at A7.

⁸ Memorandum of Understanding Between the Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghan Soil (Apr. 9, 2012), at <http://www.afghanistan-un.org/2012/04/memorandum-of-understanding-between-the-islamic-republic-of-afghanistan-and-the-united-states-of-america-on-afghanization-of-special-operations-on-afghan-soil/>. [Editor’s note: The numbering of subparagraphs is believed correct, but numbering in the text as posted on the website of the Afghan Mission to the United Nations was jumbled.]

⁹ Kevin Sieff, *Afghan Army’s Defiance Grows*, WASH. POST, May 12, 2012, at A1.

of the international legal principles bearing on assessing and addressing ongoing violence between opponents of the Syrian regime and government forces.

Koh began by describing the situation in Syria, involving the regime's massive uses of force against its citizens, quoting President Obama's description of these events as "an appalling humanitarian disaster."¹ Koh then continued:

Given this alarming snapshot, what should we be doing about it? How can the United States best respond to the situation in Syria, consistent with domestic and international law as well as our values and interests? There are no easy answers, and there is no single tool capable of solving all the problems. . . .

. . . .

What international legal principles and other guidelines should govern our actions going forward? Let me close by suggesting three.

First, we must recognize that the primary responsibility for international peace and security in the United Nations system continues to rest with the Security Council. Under the UN Charter, only the Security Council can make certain decisions, such as sanctions determinations, that all UN member states are under a legal obligation to carry out. The General Assembly has already played a very important role in this crisis, as have regional organizations such as the Arab League, a role that Chapter VIII of the UN Charter expressly recognizes. We both support and applaud the constructive steps that have been taken by the General Assembly and particularly the Arab League, which has been a leader in seeking to resolve this crisis. But we will also continue to press ahead in the Security Council to build on the advances made in the March 21st Presidential Statement, with its unanimous endorsement of a UN-supervised cessation of violence, humanitarian access to all areas in need, and the beginning of a Syrian-led political transition.

Second, as international lawyers charged with dealing with complexity, we should avoid the trap of seeing this dynamic and multifaceted situation in one-dimensional terms. For that reason, I do not agree with those who insist upon viewing our commitment to solving the Syrian crisis solely through the lens of military intervention. The international community's commitment to solving a problem should not be measured so narrowly. As we have seen throughout the Arab Awakening, different circumstances call for different responses. . . .

[W]e specifically see no inconsistency between the U.S. approach to Syria and the U.S. approach to Libya. Neither our legal theories, nor our strategic objectives, nor our moral commitments have changed. What is different are the facts. As President Obama observed several weeks ago, in Libya we had "a UN Security Council mandate . . . and we knew that we could execute very effectively in a relatively short period of time." As difficult as Libya was, the President added, "[t]his is a much more complicated situation. . . . [T]he notion that the way to solve every one of these problems is to deploy our military, that hasn't been true in the past and it won't be true now." With respect to Libya, the Security Council of course adopted two important Resolutions, 1970 and 1973. The proposed Security Council resolutions on Syria have differed substantially from 1970 and 1973 in their terms. Moreover, from a practical perspective, it is by no means clear that the type of actions taken to protect Libyan civilians would have the same effect in Syria.

¹ U.S. Department of State Legal Adviser Harold Hongju Koh, Statement Regarding Syria, American Society of International Law Annual Meeting (Mar. 30, 2012), at <http://www.state.gov/s/l/releases/remarks/187163.htm>.

But that does not mean that the international community has turned away from the Syrian people or ignored the responsibility of the Syrian government to protect its civilian population. The Syrian government has been condemned for committing human rights violations by the General Assembly and the Human Rights Council; it has been placed under sanctions by the Arab League, the United States, and the European Union; and it has been the subject of a searching report by a UN Commission of Inquiry—which found credible evidence that it has committed crimes against humanity. . . . [T]he principle of a “Responsibility to Protect” vulnerable civilians, or R2P, itself recognizes the importance of pursuing such options. This list of actions does give a sense of how—consistent with the principle of R2P—we and our international partners have been continually seeking out, developing, and using the tools that are available to us and appropriate to the situation to advance the protection of the Syrian population.

Third and finally, a commitment to ensuring that the Assad regime cedes power and a commitment to denying impunity for gross human rights violations can and should be maintained simultaneously. Like so many aspects of the situation, this issue is a delicate one. But as I have already noted, the United States has strongly encouraged efforts to use emerging technologies to document and expose human rights abuses in Syria. . . . The international community must continue to work to uncover and tell the truth about what Assad and his thugs are doing, and ultimately, as Secretary Clinton has said, “there must be accountability for senior figures of the regime.” . . . We think it of the utmost importance that, we work with governments and NGOs alike to continue documenting human rights violations and collecting evidence to keep shining a light on the inexcusable actions the Assad regime is taking against its people, and so the international community can uncover and tell the truth about what is occurring.²

United States Pursues Multitrack Strategy to Address Conflict in Syria

As suggested by Legal Adviser Harold Hongju Koh’s March 2012 presentation to the American Society of International Law, the United States has pursued multiple avenues in seeking to address the conflict in Syria. As the internal conflict there intensified during the fall and winter of 2011–12, Russia and China, both supporters of the Assad regime, blocked a response by the Security Council; in October 2011, the two joined in a rare double veto of a U.S.-European resolution condemning Syria.¹

As the conflict continued, casualties mounted, and the Security Council remained inactive, the United States looked to other strategies. As described by the Department of State spokesperson Victoria Nuland,

[I]n a situation where the Security Council has been blocked from acting in support of the Arab League Plan, in support of the defense of a democratic path for Syria, we’re going to have to take measures outside the UN to strengthen and deepen and broaden the international community of pressure on Assad.²

² *Id.*

¹ Colum Lynch, *Russia and China Block Syria Resolution at U.N.*, WASH. POST, Oct. 5, 2011, at A9; Neil MacFarquhar, *With Rare Double U.N. Veto on Syria, Russia and China Try to Shield Friend*, N.Y. TIMES, Oct. 6, 2011, at A6; Editorial, *Cowardly Vetoes*, WASH. POST, Oct. 6, 2011, at A20.

² U.S. Dep’t of State Daily Press Briefing, Feb. 6, 2012, at <http://www.state.gov/r/pa/prs/dpb/2012/02/183454.htm>.