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The United States and International Humanitarian Law: Building It up, then Tearing It Down

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The United States and International Humanitarian Law: Building It Up, Then Tearing It Down

Morris Davis†

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“In war, in some sense, lies the very genius of law. It is law creative and active, it is the first principle of law. What is human warfare but just this, an effort to make the laws of God and nature takes sides with one party?”

— Henry David Thoreau

I. Introduction

Alfred Nobel was a Swedish scientist and inventor with a keen interest in chemical engineering. He perfected a method to stabilize the unpredictable liquid explosive, nitroglycerine, and he developed and patented dynamite, a widely used and commercially successful explosive that made him wealthy by the age of forty. During the latter part of his life, Nobel worked on developing weapons—rockets, cannons, and explosives—that he believed could make war so horrific that it would be unthinkable to resort to armed conflict. Influenced in part by his long friendship with international peace advocate Austrian Countess Bertha von Suttner, Nobel developed an interest in efforts to encourage peace. His last will and testament left the bulk of his considerable estate to a fund created for the purpose of awarding prizes to the persons or groups making the most significant contributions to society in five categories, including for “the person who shall have done the most or the best work for fraternity between nations, for the abolition or reduction of standing armies, and for the holding and promotion of peace congresses.” This prestigious award is the Nobel Peace Prize.

On October 9, 2009, the Nobel Committee announced that it had selected United States President Barack Obama as the recipient of the 2009 Nobel Peace Prize for his “extraordinary efforts to strengthen international diplomacy and cooperation

1 Henry David Thoreau, Early Spring in Massachusetts 147 (1881).
between peoples. The Nobel Committee’s official announcement said:

[Barack] Obama has as President created a new climate in international politics. Multilateral diplomacy has regained a central position, with emphasis on the role that the United Nations and other international institutions can play. Dialogue and negotiations are preferred as instruments for resolving even the most difficult international conflicts. . . . Only very rarely has a person to the same extent as Obama captured the world’s attention and given its people hope for a better future. His diplomacy is founded in the concept that those who are to lead the world must do so on the basis of values and attitudes that are shared by the majority of the world’s population.

President Obama traveled to Oslo, Norway, and on December 10, 2009, he accepted the Nobel Peace Prize. He delivered a speech at the award ceremony entitled, “A Just and Lasting Peace.” In it, he said:

War, in one form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease—the manner in which tribes and then civilizations sought power and settled their differences. And over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a “just war” emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence . . . .

Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. The Nobel Committee recognized this truth in awarding its first prize for peace to Henry Dunant—the founder of the Red Cross, and a driving

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6 Nobel Press Release, supra note 5.
force behind the Geneva Conventions.

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America’s commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor—we honor those ideals by upholding them not when it’s easy, but when it is hard.7

Has the United States lived up to the ideals that President Obama passionately argued the nation fights to defend? Some contend that his laudable commitment rests more on rhetoric than reality, and in the eyes of the world at least its foundations appear to have eroded in recent years.8 Former President and 2002 Nobel Peace Prize Laureate Jimmy Carter, in an article published in the New York Times in June 2012, said the United States is “abandoning its role as the global champion of human rights,” citing as examples policies that permit targeted assassinations, indefinite detention without trial at Guantanamo Bay, and warrantless wiretapping.9 Just two and a half years after President Obama accepted the Nobel Peace Prize and delivered his stirring speech, former President Carter warned:

At a time when popular revolutions are sweeping the globe, the United States should be strengthening, not weakening, basic rules of law and principles of justice enumerated in the Universal Declaration of Human Rights. But instead of making

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9 See id.
the world safer, America’s violation of international human rights abets our enemies and alienates our friends.

As concerned citizens, we must persuade Washington to reverse course and regain moral leadership according to international human rights norms that we had officially adopted as our own and cherished throughout the years.\footnote{Id.}

This article examines the development and the objectives of modern international humanitarian law, particularly the principle of distinction intended to limit the effects of war on those not directly involved in the conflict. It looks at actions the United States took after the terrorist attacks on September 11, 2001, that undermine the foundations upon which international humanitarian law rests.\footnote{See id.} It also looks at how these actions weaken the legal and moral authority of the United States and casts doubt upon its claim to be securely bound to the highest standards of conduct in times of war.\footnote{See id.}

\textit{War is hell. The law of war tries to make it a little less hellish.}\footnote{91 CONG. REC. 1830, 1839 (1945) (statement of Mr. Bailey, Sen. From North Carolina) (quoting General William T. Sherman). After the Civil War, General Sherman gave a speech to a group of veterans who cheered when he spoke of war. Sherman responded: “No, my friends; don’t look at it that way. War is hell.” Id.}

II. International Humanitarian Law Before 9/11

A. Law and War: The Effort to Contain the Effects of Warfare

To some, the notion that the constraints imposed by laws are expected to apply during the chaos and carnage of war seems patently irrational.\footnote{See generally 91 CONG. REC. 1839-41 (1945) (statements of Mr. Thomas, Sen. From Utah) (arguing against a lower conscription age in the Selective Training and Service Act of 1940).} A logical argument can be made that if two sides have reached a point where they are compelled to take up arms in an effort to force the other to capitulate, then they should employ all the means at their disposal in order to prevail.
Resorting to total war—the any means necessary approach—in the pursuit of victory or to exact retribution has been the case at times. General William Tecumseh Sherman is remembered for his scorched earth campaign across the American South in the latter part of the Civil War, which played a role in compelling General Robert E. Lee and his Confederate Army to surrender. After the siege and capture of Atlanta in the summer of 1864, Sherman’s forces marched across the Georgia heartland to Savannah before turning north towards Columbia and into the Carolinas. Along the way, his troops burned fields, farms, and factories; pillaged food and anything of value they could find; and took horses, mules and wagons from the farmers and townspeople they encountered. General Sherman’s name still evokes disdain in some of the areas his troops plundered a century and a half ago.

At the same time Sherman was laying siege to Atlanta in the summer of 1864, representatives from sixteen nations were assembled at a diplomatic conference in Geneva, Switzerland, where they drafted and signed the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The conference and the convention that it produced were in large part due to the efforts of one man: Henry Dunant.

B. Henry Dunant

Henry Dunant was born into a prominent family in Geneva in 1828. He was active in a number of religious and charitable movements, co-founded the Young Men’s Christian Association (YMCA) of Geneva in 1852, and helped transform the YMCA into an international organization in 1855. On a business trip to Italy in 1859, Dunant happened to be nearby when Emperor Napoleon and King Victor Emanuel II led the 150,000 men of the

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16 See id.


Franco-Sardinian Alliance into battle against Austrian Emperor Franz Josef and his 170,000 troops. The Battle of Solferino took place on June 24, 1859, and lasted for more than fifteen hours. Dunant wrote a vivid description of what transpired on the battlefield:

Here is a hand-to-hand struggle in all its horror and frightfulness; Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given; it is a sheer butchery; a struggle between savage beasts, maddened with blood and fury. Even the wounded fight to the last gasp. When they have no weapon left, they seize their enemies by the throat and tear them with their teeth.

A little further on, it is the same picture, only made the more ghastly by the approach of a squadron of cavalry, which gallops by, crushing dead and dying beneath its horses’ hoofs. One poor wounded man has his jaw carried away; another his head shattered; a third, who could have been saved, has his chest beaten in. Oaths and shrieks of rage, groans of anguish and despair, mingle with the whinnying of horses.

Here come the artillery, following the cavalry, and going at full gallop. The guns crash over the dead and wounded, strewn pell-mell on the ground. Brains spurt under the wheels, limbs are broken and torn, bodies mutilated past recognition—the soil is literally puddled with blood, and the plain littered with human remains.

What made the greatest impression on Dunant was not the ferocity of the battle itself, but the tremendous suffering that remained after the fighting had ended.

The stillness of the night was broken by groans, by stifled sighs of anguish and suffering. Heart-rending voices kept calling for help. Who could ever describe the agonies of that fearful night!

When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield; corpses were strewn over roads, ditches,

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19 See HENRY DUNANT, A MEMORY OF SOLFERINO 8-9 (1986).
20 Id. at 19-20.
ravines, thickets and fields; the approaches of Solferino were literally thick with dead. The fields were devastated, wheat and corn lying flat on the ground, fences broken, orchards ruined; here and there were pools of blood. The villages were deserted and bore the scars left by musket shots, bombs, rockets, grenades and shells. Walls were broken down and pierced with gaps where cannonballs had crushed through them. Houses were riddled with holes, shattered and ruined, and their inhabitants, who had been in hiding, crouching in cellars without light or food for nearly twenty hours, were beginning to crawl out, looking stunned by the terrors they had endured. All around Solferino, and especially in the village cemetery, the ground was littered with guns, knapsacks, cartridge-boxes, mess tins, helmets, shakoes, fatigue-caps, belts, equipment of every kind, remnants of blood-stained clothing and piles of broken weapons.

The poor wounded men that were being picked up all day long were ghastly pale and exhausted. Some, who had been the most badly hurt, had a stupefied look as though they could not grasp what was said to them; they stared at one out of haggard eyes, but their apparent prostration did not prevent them from feeling their pain. Others were anxious and excited by nervous strain and shaken by spasmodic trembling. Some, who had gaping wounds already beginning to show infection, were almost crazed with suffering. They begged to be put out of their misery, and writhed with faces distorted in the grip of the death-struggle....

Oh, the agony and suffering during those days, the twenty-fifth, twenty-sixth and twenty-seventh of June! 21

Dunant joined members of local communities in an effort to tend to the wounded and bury the dead. 22 His account of the days that followed record extraordinary acts of compassion and an abundance of pain and suffering. His observations formed the basis for his later thoughts on ways to mitigate the effects of warfare. Dunant wrote:

If there had been enough assistance to collect the wounded in the plains of Medola and from the bottom of the ravines of San Martino, on the sharp slopes of Mount Fontana, or on the low

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21 Id. at 41, 44, 60.
22 See generally id. at 122-23 (discussing Dunant's care for the wounded following battle).
hills above Solferino, how different things would have been! There would have been none of those long hours of waiting on June 24, hours of poignant anguish and bitter helplessness, during which those poor men of the Bersaglieri, Uhlans and Zouaves struggled to rise, despite their fearful pain, and beckoned vainly for a letter to be brought over to them, and there would never have been the terrible possibility of what only too probably happened the next day—living men being buried among the dead!

If there had been available for the wounded improved means of transportation better than those now existing, there would have been no need for the painful amputation that one Light Infantryman of the Guard had to undergo at Brescia. The need for that operation arose from deplorable lack of attention when he was being carried from the regimental flying ambulance to Castiglione. If this man did not die under the operation, as many soldiers did, he could thank his own strong and healthy constitution for it.²³

Dunant proposed the creation of groups of civilian volunteers—formed in times of peace and recognized as neutrals by the belligerents when called to action in times of war—dedicated to attending to the sick and wounded on the battlefield.

If an international relief society had existed at the time of Solferino, and if there had been volunteer helpers at Castiglione on June 24, 25 and 26, or at Brescia at about the same time, as well as at Mantua or Verona, what endless good they could have done!

Humanity and civilization call imperiously for such an organization as is here suggested. It seems as if the matter is one of actual duty, and that in carrying it out the cooperation of every man of influence, and the good wishes at least of every decent person can be relied upon with assurance. Is there in the world a prince or a monarch who would decline to support the proposed societies, happy to be able to give full assurance to his soldiers that they will be at once properly cared for if they should be wounded? Is there any Government that would hesitate to give its patronage to a group endeavoring in this manner to preserve the lives of useful citizens, for assuredly the soldier who receives a bullet in the defense of his country

²³ *Id.*
deserves all that country's solicitude? Is there a single officer, a single general, considering his troops as "his boys," who would not be anxious to facilitate the work of volunteer helpers? Is there a military commissary, or a military doctor, who would not be grateful for the assistance of a detachment of intelligent people, wisely and properly commanded and tactful in their work?24

Dunant's account of the Battle of Solferino and its brutal aftermath, and his suggestions on ways to alleviate suffering caused by war, led to a conference held in Geneva in 1863 that gave birth to the International Committee of the Red Cross (ICRC) and, a year later, the first of what would be several Geneva Conventions.25 Because of his contributions to achieving the ideals Alfred Nobel described of peace and a fraternity among nations, Henry Dunant was the recipient of the first Nobel Peace Prize awarded in December 1901.26

C. The Heart of International Humanitarian Law

International humanitarian law is rooted in the desire to limit the destructive effects of armed conflict.27 One of its most fundamental principles is the requirement for distinction between participants in the conflict and those entitled to protection from its harm.28 For example, the First Geneva Convention which Dunant helped to enact in 1864 required the armed forces of the signatories to honor the neutrality of medical personnel, chaplains, ambulances and hospitals.29

There were no comprehensive protections afforded civilians by treaty or convention prior to World War II since it was "a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must

24 Id. at 120-21, 126-27.
25 See DUNANT, supra note 19, at 130-31.
26 See Frédéric Passy, Henry Dunant—Facts, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/1901/dunant.html (last visited Jan. 20, 2014). Dunant spent the latter years of his life destitute and alone in a hospice in Heiden, Switzerland. He had no funeral and there were no mourners when he died in 1910 at eighty-two years of age. See id.
27 See DUNANT, supra note 19, at 129.
28 See id.
29 See id. at 130.
enjoy complete immunity." The duty to protect civilians did not need to be expressly prescribed because it was so universally understood that the "principle went without saying." The desire to create a line separating the participants from the protected was a heightened concern after World War II; a time when concentration camps, mass executions, the indiscriminate bombings of cities, and the destructive power of nuclear weapons were still fresh in the minds of civilized countries desiring to mitigate suffering and harm in future armed conflicts.

The principle of distinction is a focal point of each of the four Conventions of 1949. Geneva I, the "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," was essentially an updated version of the First Convention from 1864 on land warfare. Geneva II addressed basically the same rules, although it applied to members of the armed forces at sea. Geneva III spelled out the requirements for the treatment of prisoners of war. Geneva IV, entitled "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," was directed specifically at the special protections to be afforded civilian populations and civilian property during armed conflicts.

30 OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION IV: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3 (Jean S. Pictet ed., 1958).
31 Id.
34 See Geneva I, supra note 33.
35 See Geneva II, supra note 33.
36 See Geneva III, supra note 33.
37 See Geneva IV, supra note 33.
The one article that is set out in all four of the conventions is Common Article 3, which states in pertinent part:

Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.  

Geneva IV is the most comprehensive of the four conventions (with rules set out in 159 articles and three annexes). The commentary to Geneva IV provides: "In former times the need to protect the civilian population in wartime was not felt to the same degree as since the more recent wars. Military operations nowadays—particularly bombing from the air—threaten the whole population."

38 See Geneva I, supra note 33; Geneva II, supra note 33; Geneva III, supra note 33; Geneva IV, supra note 33.

39 See Geneva IV, supra note 33; see generally Geneva I, supra note 33; Geneva II, supra note 33; Geneva III, supra note 33 (setting out rules in 159 articles and three annexes).

40 UHLER ET AL., supra note 30, at 118.
History had proven illusory Alfred Nobel’s vision of advanced weaponry so destructive that it would act as a restraint on the will to resort to war, thereby reducing the damage armed conflicts caused.\footnote{See Tägil, supra note 3.} Where before the impact of war was generally confined to the combatants and the field of combat, every advance in technology—from sword, to bow, to musket, to missile—extended the reach of war’s destructive capabilities and broadened the scope of those subject to its harmful effects.\footnote{See generally Martin van Creveld, War and Technology, FOOTNOTES (Foreign Policy Research Inst.’s Wachman Ctr. for Civic and Int’l Literacy, Phila., Pa.), Oct. 2007, available at http://www.fpri.org/footnotes/1225.200710.vancreveld.wartech nology.html (discussing the impact of technology on warfare).} The Geneva Conventions of 1949 were intended to ensure that everyone associated with an armed conflict was covered by some specific status that conveyed defined rights and responsibilities.\footnote{See Geneva IV, supra note 33, art. 3.}

\section*{D. The United States: Leading the Development of International Humanitarian Law}

The United States was actively engaged in the post-World War II movement to better define the line separating combatants and civilians, and to more clearly articulate the rights and protections to be afforded those not taking part in hostilities.\footnote{See Christina D. Elmore, An Enemy Within Our Midst: Distinguishing Combatants from Civilians in the War Against Terrorism, 57 U. KAN. L. REV. 213, 219-20 (2008); see also Susan Tiefenbrun, 12 TEX. WESLEYAN L. REV. 91, 111 (2005).} In a letter dated April 25, 1951, transmitting the Conventions to President Harry S. Truman for his review and submission to the United States Senate for advice and consent for ratification, Secretary of State Dean Acheson recounted:

> In the light of experiences of World War II, there was recognized by all governments the urgent necessity for rather extensive revisions of the above-mentioned earlier conventions [the Geneva Conventions of 1929 and the Hague Convention of 1907] for the purpose of bringing them up to date, making them easier to apply uniformly and less susceptible to different interpretations, and providing more effective protection of the categories of persons covered. It was considered equally important to secure by treaty international legal protection for
civilians in belligerent and occupied territories. The generally unsatisfactory stopgap measure of attempting to apply the prisoners-of-war convention to certain categories of civilians during World War II had pointed up the need for a separate treaty establishing humane standards of treatment for civilians in time of war.

The United States had from the beginning actively supported the initiative taken in the fall of 1945 by the International Committee of the Red Cross to revise the existing conventions and to formulate a new civilian convention before the experiences of World War II had been forgotten.45

The Senate authorized ratification on July 6, 1955, with all the members present for the roll call vote casting their votes for approval. President Dwight D. Eisenhower—the former General of the Army who served as the Supreme Allied Commander in Europe in World War II—ratified the conventions on July 14, 1955.46

After World War II, the frequency of international armed conflicts declined from an average of more than six per year to less than one, and the number of battlefield deaths declined from 20,000 per year to less than 6,000.47 While those numbers suggest a positive downward trend, not all of the numbers are as encouraging. In World War I, for example, fourteen percent of all


deaths were civilian. Now, almost a century later, armed conflicts produce about ten civilian deaths for every one combatant that is killed. The data suggest that the effort to limit the effects of armed conflict to the combatants on the battlefield and to protect civilian populations has not been successful. Nonetheless, the belief in the underlying civilian protection principle has not dissipated. Researchers from the International Committee of the Red Cross in 1999-2000 concluded:

Yet the more these conflicts have degenerated into wars on civilians, the more people have reacted by reaffirming the norms, traditions, conventions and rules that seek to create a barrier between those who carry arms into battle and the civilian population. In the face of unending violence, these populations have not abandoned their principles nor forsaken their traditions. Large majorities in every war-torn country reject attacks on civilians in general and a wide range of actions that by design or default could harm the innocent. The experience has heightened consciousness of what is right and wrong in war. People in battle zones across the globe are looking to forces in civil society, their own state institutions, and international organizations to assert themselves and impose limits that will protect civilians.

The United States has been engaged militarily almost continuously since the end of World War II: in Korea, Vietnam, Iraq, Panama, Kosovo, Afghanistan, Libya, Yemen, and Somalia, among other places. While members of the U.S. armed forces failed on occasion to adhere to the standards established by the

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51 Greenberg & Boorstin, supra note 49, at 19.
52 See CAUSES OF PEACE, supra note 47, at Table 10.1. Anti-colonialism following World War II was a factor in many armed conflicts. The two colonial powers, France and the United Kingdom, have engaged in more state-based armed conflicts than any other countries from 1946-2008, followed by the two Cold War super-powers, Russia and the United States. See id.
Geneva Conventions and the spirit of international humanitarian law—the My Lai massacre during the Vietnam War is an infamous example—entering the twenty-first century, the United States was generally recognized as adhering to high standards on the battlefield.\(^53\) Earning and maintaining that reputation paid dividends. In the Gulf War in 1991, for example, the United States dropped leaflets encouraging Iraqi soldiers to surrender and providing instructions on how to do so safely.\(^54\) Consequently, more than 100,000 Iraqi soldiers deserted or surrendered, enabling the ground war to come to a quick end with minimal casualties for the United States and its coalition partners. About ninety-eight percent of Iraqi soldiers said they saw the leaflets, eighty-eight percent believed the message, and seventy percent cited it as a reason for deciding to put down their weapons and surrender.\(^55\) From a military perspective, having enemy troops lay down their weapons and raise their hands in surrender is far preferable to the soldiers digging in and fighting. From a national interest perspective, ending an armed conflict quickly reduces costs and facilitates the return to peace.\(^56\)

Despite the important leadership role the United States played in the development of international humanitarian law after World War II, it has at times opted not to approve agreements most other countries supported, including many adopted by traditional U.S. allies. The United States, for example, is not among the 172 state


\(^{54}\) See Andrew M. Clark & Thomas B. Christie, Ready... Ready... Drop!: A Content Analysis of Coalition Leaflets Used in the Iraq War, 67 GAZETTE 141 (2005).


parties to Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts that went into effect in 1978.\textsuperscript{57} President Reagan sent Additional Protocol II to the Senate for advice and consent, but in the same message he noted his objections to the requirements of Additional Protocol I:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view. Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and

our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.\footnote{Message from the President of the United States Transmitting Protocol II Additional to the Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflict, Jan. 29, 1987, S. Treaty Doc. No. 100-2, available at http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf.}

The United States joined with countries whom many consider to be among the international humanitarian law rouges’ gallery—China, Libya, Iraq, Israel, Qatar, and Yemen—in voting against the Rome Statute that created the International Criminal Court.\footnote{Michael Scharf, Results of the Rome Conference for an International Criminal Court, THE AM. SOC’Y OF INT’L LAW INSIGHTS, (Aug. 1998), available at http://dspace.cigilibrary.org/jspui/bitstream/123456789/8465/1/Results%20of%20the%20Rome%20Conference%20for%20an%20International%20Criminal%20Court.pdf?1. President Clinton signed the treaty shortly before leaving office, but it was never submitted to the Senate for advice and consent. See The Reckoning: The Battle for the International Criminal Court, Background, PUBLIC BROADCASTING SERVICE (PBS), http://www.pbs.org/pov/reckoning/background.php. On May 6, 2002, the Bush administration notified the United Nations Secretary General that the United States was not going to become a party to the treaty. See Letter from John R. Bolton, U.S. Under Sec’y of State for Arms Control and Int’l Sec. to Kofi Annan, UN Sec’y Gen. (May 6, 2002), available at http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Abagnin_in_bolton.pdf.}

The United States and Somalia are the only two countries that have not ratified the Convention on the Rights of the Child.\footnote{See Convention on the Rights of the Child: Frequently Asked Questions, UNITED NATIONS INTERNATIONAL CHILDREN’ S EMERGENCY FUND (UNICEF) (Nov. 30, 2005), http://www.unicef.org/crc/index_30229.html.}

The United States—along with China, Pakistan and Russia—has not signed the Ottawa Convention on Anti-Personnel Landmines.\footnote{See Daryll Kimball, The Ottawa Convention: Signatories and State-Parties, ARMS CONTROL ASS’N (Mar. 2013), http://www.armscontrol.org/factsheets/ottawasigs.}

Advocating for the necessity of respect for human rights and the principles of international humanitarian law, while opting to avoid the limitations of major international humanitarian initiatives, creates an appearance that the United States is better at preaching than it is at practicing. Expressions of ideals that do not match corresponding actions create an impression that there are two standards at play: one that applies to what the United States expects of others and one that the United States applies only to
itself.

E. Losing Momentum and Focus

The United States ratified the Geneva Conventions in 1955.\textsuperscript{62} Testifying before the Senate Committee on Foreign Relations in support of ratification, Deputy Under Secretary of State for Political Affairs Robert Murphy said:

The Geneva Conventions are another long step forward toward mitigating the severities of war on its helpless victims. They reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the Conventions. Our own conduct has served to establish higher standards and we can only benefit by having them incorporated in a stronger body of conventional wartime law. . . . We feel that ratification of the Conventions now before you would be fully in the interest of the United States.\textsuperscript{63}

Deputy Secretary Murphy's statement reflects the still popular notion that the United States is a shining light for other countries to follow. It conveys a sense that while the conventions were necessary to lift others up to the American standard, the conduct of the United States already lived up to the "enlightened practices" that were reduced to writing in Geneva.\textsuperscript{64}

Congress did nothing for forty years to enact a domestic means of enforcement for the Geneva Conventions' prohibitions. North Carolina Congressman Walter Jones introduced the War Crimes Act in 1995 to fill the void that followed the ratification of the conventions.\textsuperscript{65} He wanted to ensure that Americans who were victims of war crimes had the opportunity to pursue justice. At a hearing in June 1996 before a subcommittee of the House Judiciary Committee, Congressman Jones said:

The bill is simple and straightforward. Presently, in the absence of an international criminal tribunal or a military

\begin{itemize}
\item \textsuperscript{63} H.R. REP. NO. 104-698, at 2 (1996).
\item \textsuperscript{64} See id.
\end{itemize}
commission, we have no means by which we can try and prosecute individuals who have committed a war crime against an American citizen.

This legislation before you today will give the United States the legal authority to prosecute individuals who have committed a war crimes act against an American citizen. The bill restores justice by filling the gaps in federal criminal law relating to the prosecution of individuals for grave breaches of the Geneva Convention. When passed, the United States will no longer be a safe haven for anyone having committed such crimes.

The bill before the subcommittee is particularly important to the men and women in the armed services. As a member of the House National Security Committee, I was astonished to learn that currently there is no law that provides the means for prosecuting unspeakable crimes committed by foreign nationals against our U.S. service personnel.

While the Geneva Convention of 1949 provides the United States with the authority, we have not yet passed legislation to provide the courts with the enforcement mechanism. This gap in the federal law is unacceptable.66

Representative Jones was motivated to propose legislation in large part by the story of Michael Cronin who spent six years in the “Hanoi Hilton” as a prisoner of war after being shot down during the Vietnam War.67 Mr. Cronin returned home to the United States, earned a law degree, and worked to get legislation passed to create an enforcement mechanism for the Geneva Conventions. Testifying alongside Representative Jones at the subcommittee hearing, Mr. Cronin said:

I believe this is important legislation and I have personal experience to bear this out. Our opponents in the field have consistently denied Americans the benefits of the Geneva

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Conventions, and since World War II they have done so with impunity. This legislation can change that . . .

War is an extraordinary event. It defies rationality and ordinary laws. The worst effects of war can be ameliorated only by the laws of war, which are themselves extraordinary and can be enforced only by extraordinary means such as this bill.\(^6\)

The original proponents of the War Crimes Act, which passed with overwhelming bi-partisan support, envisioned Americans as the potential victims of the “unspeakable crimes” committed by others in the course of armed conflicts.\(^6\) The thought of Americans as potential perpetrators of war crimes was simply beyond the pale.\(^7\)

III. The United States and International Humanitarian Law
After 9/11

A. 9/11: The Home of the Brave In the Face of Fear

In January 1981, Tom Ahem was about to regain his freedom and end his 444-day ordeal as a hostage in the U.S. Embassy during the Iranian Revolution.\(^7\) The former Central Intelligence Agency (CIA) Tehran station chief was taken before Hossein Sheikh-ol-eslam, the man who had been his primary interrogator and abuser during his period of captivity.\(^7\) Sheikh-ol-eslam said that the beatings Ahern suffered were inconsistent with Islam and with Sheikh-ol-eslam’s personal values, and he offered Ahem the opportunity to beat him with the same rope he had used on Ahern. Tom Ahern declined the offer, protesting that, “we don’t do stuff like that.”\(^7\)


\(^7\) See H.R. REP. No. 104-698, supra note 63, at 2-3.


\(^7\) See generally MARK BOWDEN, GUESTS OF THE AYATOLLAH (2006) (detailing the Iranian Hostage Crisis and the role played by Hossein Sheikh-ol-eslam).

\(^7\) Id. at 579. Hossein Sheikh-ol-eslam now serves as the senior international
That was 1981. Things changed after the terrorist attacks on September 11, 2001. Some members of President George W. Bush's administration saw an opening created by the fear that followed the 9/11 attacks and seized upon it to radically expand executive branch power—particularly the power of the President himself—and in many respects undermined the basis for international humanitarian law championed by the United States after World War II. Columnist Andrew Sullivan described the transformation of America after 9/11 in a Newsweek article published in September 2011:

As mysterious envelopes containing anthrax began to appear in mailboxes, as our airports shut down and reopened as police states, as terror-advisory color codes were produced, as the vast new bureaucratic behemoth of the Department of Homeland Security was set up, as a system of torture prisons (beginning with Guantánamo Bay) was constructed ... many concluded the threat must be grave enough to justify shredding some of the Constitution's noblest principles and precedents. This handful of [Islamic] fanatics was supposedly a greater threat than the Nazis and the Soviets. And so much of our inherited moral wisdom—such as the absolute stricture against torture and the ideal of habeas corpus—were tossed aside. Dick Cheney, the man elected vice president as a calming father figure, became the most terrified of them all. And so we joined him in fearing that Al Qaeda was on the cusp of arming itself with WMDs that could be used to end our civilization.

In 2008, Barack Obama presented himself as a stark contrast to George W. Bush and the policies of his administration that had the


United States fighting two wars and engaged in practices at home and abroad that eroded liberties and America's moral standing. In a memorable speech before a huge crowd in Denver, Colorado, in August 2008, Obama accepted the Democratic Party's presidential nomination, declaring:

If John McCain wants to follow George Bush with more tough talk and bad strategy, that is his choice—but that is not the change we need.

We are the party of Roosevelt. We are the party of Kennedy. So don't tell me that Democrats won't defend this country. Don't tell me that Democrats won't keep us safe. The Bush-McCain foreign policy has squandered the legacy that generations of Americans—Democrats and Republicans—have built, and we are here to restore that legacy.

As Commander-in-Chief, I will never hesitate to defend this nation, but I will only send our troops into harm's way with a clear mission and a sacred commitment to give them the equipment they need in battle and the care and benefits they deserve when they come home.

I will end this war in Iraq responsibly and finish the fight against Al Qaida and the Taliban in Afghanistan. I will rebuild our military to meet future conflicts. But I will also renew the tough, direct diplomacy that can prevent Iran from obtaining nuclear weapons and curb Russian aggression. I will build new partnerships to defeat the threats of the twenty-first century: terrorism and nuclear proliferation; poverty and genocide; climate change and disease. And I will restore our moral standing so that America is once again that last, best hope for all who are called to the cause of freedom, who long for lives of peace, and who yearn for a better future.76

It appeared Obama intended to make good on his lofty campaign rhetoric and begin restoring America's moral standing once he was sworn in as president. On his second day in office, he signed an executive order directing a review of each detainee held at Guantanamo Bay, suspending military commissions, and mandating the closure of the detention facility not later than January 22, 2010.77 In May 2009, President Obama gave a major

speech at the National Archives—the home, as Obama noted, of the Declaration of Independence, the Constitution, and the Bill of Rights—on changing course on national security and returning to American values:

I've studied the Constitution as a student, I've taught it as a teacher, I've been bound by it as a lawyer and a legislator. I took an oath to preserve, protect, and defend the Constitution as Commander-in-Chief, and as a citizen, I know that we must never, ever, turn our back on its enduring principles for expedience sake.

I make this claim not simply as a matter of idealism. We uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset—in war and peace; in times of ease and in eras of upheaval. . . .

Unfortunately, faced with an uncertain threat, our government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often our government made decisions based on fear rather than foresight; that all too often our Government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us—Democrats and Republicans, politicians, journalists, and citizens—fell silent.

In other words, we went off course. 78

Now well into President Obama’s second term, it is clear that America has not made significant progress towards regaining its moral authority at home or abroad. Despite the pledges President Obama made in 2008 and 2009 to change course and recommit to America’s enduring principles, the detention facility at Guantanamo Bay remains open, indefinite detention without trial continues, and he has embraced and expanded most of the hawkish practices he inherited from President Bush. 79 Mitt Romney, 2012

78 President Barack Obama, Remarks by the President on National Security (May 21, 2009) [hereinafter National Security Remarks].

79 See Charlie Savage, Election Will Decide Future of Interrogation Methods for
Republican presidential candidate, pledged that if he was elected, he would take an even more radical national security approach than President Obama and restore some of the most extreme Bush-era practices that Obama banned.  

While the future course of America’s national security policy is unclear, one thing that is certain is that many of its post-9/11 practices have eroded the most fundamental objective of international humanitarian law: distinguishing civilians from combatants in order to mitigate the effects of armed conflicts on civilians. There are numerous examples that illustrate the point.

1. Labeling the Geneva Conventions “Quaint” and “Obsolete”

Then-acting White House Counsel Alberto Gonzales, who would later serve as the Attorney General of the United States, sent President Bush a memorandum on January 25, 2002, entitled “Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban.” In it, Gonzales wrote:

As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [Geneva Convention IV]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities or war crimes, such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary


See Election, supra note 79.


Id.
privileges, scrip (i.e., advances of monthly pay), athletic uniforms and scientific instruments.83

The Geneva Conventions were supposed to create a binding set of legal obligations regulating the conduct of their signatories during armed conflicts. They were supposed to prescribe the status of every person in and around an armed conflict and carry specific rights and responsibilities for each status. Treating the conventions as historical relics that the leader of a nation can dismiss at his or her leisure dilutes any authority they may have to compel military powers to operate within their bounds.

2. Creating a New Status to Which No Laws Apply

Not only did the Bush Administration decide that the Geneva Conventions did not apply to Al Qaeda and Taliban forces, it also decided that members of those forces and their supporters had no legal rights if captured, except for whatever rights the President alone afforded them as a matter of grace.84 Deputy Attorney General John Yoo and Special Counsel Robert Delahunty prepared a memorandum for Department of Defense General Counsel Jim Haynes on January 2, 2002, expressing their legal opinion that the only rights that applied were those the President extended at his discretion. For example, they wrote:

To say that the specific provisions of the Geneva and Hague Conventions do not apply in the current conflict with the Taliban militia as a legal requirement is by no means to say that the principles of the laws of armed conflict cannot be applied as a matter of U.S. Government policy. The President as Commander-in-Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgression against those standards. . . . A decision to apply the principles of the Geneva Conventions or of other laws of war as a matter of policy, not law, would be fully consistent with the past practice of the United States.85

83 Id.
84 See id.
85 Draft Memorandum from John Yoo, Deputy Assistant Att’y Gen., and Robert J. Delahunty, Special Counsel, Application of Treaties and Laws to Al Qaeda and Taliban Detainees to William J. Haynes II, Gen. Counsel of the Dep’t of Defense (Jan. 9, 2002),
Consistent with this legal guidance, President Bush signed a memorandum on February 7, 2002, saying the United States would abide by the Geneva Conventions with respect to the conflict in Afghanistan, but that the Conventions did not apply to captured Al Qaeda and Taliban forces. As he explained, "Our Nation recognizes that this new paradigm— ushered in not by us, but by terrorists— requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva." 

The Supreme Court later invalidated the flawed legal analysis that allowed individuals to be held indefinitely outside the reach of any law. In 2004, the Court held that detainees at Guantanamo Bay had the right under the federal habeas statute to challenge in federal court the government’s basis for holding them in detention. In 2006, the Court held that President Bush did not have the unilateral authority to create a military commission system to try alleged unlawful enemy combatants and that Common Article 3 of the Geneva Conventions applied to

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86 Memorandum from President George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees to the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff (Feb. 7, 2002), available at dspace.wrlc.org/doc/bitstream/2041/63446/00207display.pdf.

87 Id.

In 2008, the Court held that even though Congress expressly revoked federal court jurisdiction to hear detainee cases brought under the habeas statute in response to the Court’s 2004 decision, detainees nonetheless had a constitutional right of habeas corpus to challenge the legality of their detention. Despite the claims that a President has virtually limitless and unchecked authority to act in matters involving national security, the Supreme Court has made it clear that all three branches of government have a role to play and that “a state of war is not a blank check for the President.”

3. Rebranding Torture

Common Article 3 of the Geneva Conventions prohibits torture; as do the Universal Declaration of Human Rights, the Convention Against Torture, the War Crimes Act, and the U.S. Criminal Code. The United States was a leading proponent of such measures aimed at banning torture. When President Ronald Reagan sent the Convention Against Torture to the Senate for advice and consent for ratification in 1988, he wrote:

The United States participated actively and effectively in the negotiation of the Convention. It marks a significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice

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91 Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004). The “blank check” quote in Justice O’Connor’s opinion is from Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) and refers specifically to the rights of U.S. citizens. The Court’s subsequent decisions in detainee cases, however, show that periods of armed conflict do not give presidents a blank check over non-citizens either. See, e.g., Boumediene at 771 (holding that aliens detained as enemy combatants at Guantanamo Bay were entitled to the privilege of habeas corpus).
92 Geneva III, supra note 33.
94 See 18 U.S.C. §§ 2441, 2340A.
unfortunately still prevalent in the world today.

The core provisions of the Convention establish a regime for international cooperation in the criminal prosecution of torturers relying on so-called "universal jurisdiction." Each State Party is required either to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution.\(^9\)

The United States has taken severe action against those who commit torture when America's vital national interests are not involved. In January 2009, a federal court in Miami, Florida, sentenced Charles McArthur Emmanuel to ninety-seven years in prison for, among other things, torture conducted in Liberia.\(^9\) It was the first conviction and sentence ever under the federal torture statute since its enactment in 1994. Mr. Emmanuel, also known as Chuckie Taylor, is the son of former Liberian President Charles Taylor. From 1997 to 2003, he helped his father maintain power by torturing and murdering his critics.\(^7\) In May 2012, the International Criminal Court at The Hague sentenced Charles Taylor to fifty years in prison for aiding and abetting war crimes committed in Sierra Leone.\(^8\) Charles Taylor supplied weapons to the rebel forces of the Revolutionary United Front (RUF) in exchange for blood diamonds. The RUF abducted children and turned them into child soldiers, forced women into sexual slavery, and mutilated or murdered many others during more than a decade of civil war.\(^9\) Taylor's case marked the first war crimes conviction and sentence of a former head of state by an international war crimes tribunal.\(^10\)

The United States does not have an enviable record when it comes to torture committed on its behalf. In the wake of the

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\(^6\) Carmen Gentile, Son of Ex-President of Liberia Gets 97 Years, N.Y. TIMES, Jan. 10, 2009, at A14.


\(^8\) Id.

\(^9\) See id.

\(^10\) See id.
terrorist attacks in September 2001, some within the Bush administration wanted to use more aggressive interrogation techniques to extract information from suspected terrorists and terrorism supporters, but worried that they may cross the line and commit torture. The Department of Justice stepped in and provided legal cover for more harsh interrogation tactics. In a forty-six page memorandum prepared for White House Counsel Alberto Gonzales in August 2002, Assistant Attorney General Jay Bybee wrote:

We conclude that for an act to constitute torture as defined in §2340 [the torture provision of the U.S. Criminal Code], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent to intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under §2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual’s personality; or threatening to do any of these things to a third party. The legislative history simply reveals that Congress intended for the statute’s definition to track the Convention’s definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.

In addition to sanctioning extreme standards for permissible interrogation methods—anything short of the pain caused by death or organ failure—Bybee also provided legal cover in the event the

torture line was crossed.\textsuperscript{103} He concluded that any prohibition or criminal penalty for torture would be an unconstitutional intrusion on the President's authority as Commander-in-Chief in a time of war. He said:

Even if an interrogation method arguably were to violate §2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply §2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional. . . . [T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces.\textsuperscript{104}

Given the extreme threshold the Bybee memorandum set for acts constituting torture and the legal shield it provided for violations,\textsuperscript{105} the Department of Defense and the CIA implemented a series of enhanced interrogation techniques.\textsuperscript{106} In some instances

\textsuperscript{103} See Memorandum, supra note 101.

\textsuperscript{104} Id. at 31, 33.

\textsuperscript{105} Editorial, \textit{No Penalty for Torture}, N.Y. TIMES, Sept. 5, 2012, at A26 [hereinafter \textit{No Penalty for Torture}]. The memoranda drafted by Department of Justice lawyers sanctioning extreme interrogation techniques are commonly known as the "torture memos." \textit{Id.}

\textsuperscript{106} Memorandum from William J. Haynes II, General Counsel of the Dep't of Defense, to Donald Rumsfeld, Sec'y of Defense, Counter-Resistance Techniques (Nov. 27, 2002), available at http://www.torturingdemocracy.org/documents/20021127-1.pdf. Secretary of Defense Donald Rumsfeld, based on the legal advice of his general counsel, William J. Haynes, III, signed a memorandum authorizing harsh interrogation techniques that included: stress positions, forced standing for up to four hours, deprivation of light and sound, hooding, removing all of the detainee's clothing, shaving the detainee's facial hair, playing on phobias such as a fear of dogs, threats of harm to the detainee or his family, temperature extremes, dietary manipulation, slapping and poking, and waterboarding. Rumsfeld wrote on the memorandum, "I stand for 8-10 hours a day. Why is standing limited to 4 hours?" \textit{Id.}
the enhanced techniques crossed the line into torture.\(^\text{107}\)

Susan Crawford served as General Counsel of the Army during the Reagan administration and served as the Department of Defense Inspector General under former Vice President Dick Cheney when he was the Secretary of Defense.\(^\text{108}\) She was appointed to be the senior official responsible for overseeing the military commissions at Guantanamo Bay, a role entitled “Convening Authority,” by Secretary of Defense Robert Gates in February 2007 shortly after she retired as an appellate court judge.\(^\text{109}\) In an interview with Rob Woodrow of the *Washington Post* published in January 2009, in the final days of the Bush administration, Crawford explained why she dismissed military commission charges against Guantanamo detainee Mohammed al-Qahtani: “We tortured Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case for prosecution.”\(^\text{110}\)

The treatment Mohammed al-Qahtani experienced was not unique. The CIA acknowledged waterboarding three high-value detainees held in secret sites outside the United States.\(^\text{111}\) Khalid Sheikh Mohammed, the alleged mastermind behind the 9/11 attacks, was waterboarded a reported 183 times.\(^\text{112}\) Other investigations have found many more examples of conduct by members of the U.S. armed forces or intelligence agencies that would in the minds of most people constitute torture.\(^\text{113}\)

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\(^{107}\) See *No Penalty for Torture*, supra note 105.


\(^{110}\) Id.


\(^{112}\) Peter Finn & Julie Tate, *U.S. Looking into 2 Detainee Deaths*, WASH. POST, July 1, 2011, at A1.

President Obama ordered an end to enhanced interrogation techniques and compliance with the Army Field Manual’s limitations on interrogation methods in January 2009.\(^{114}\) He has, however, taken a “look forward, not back” approach to the abuses committed during the Bush administration.\(^{115}\) In his speech on national security in May 2009, he said:

[W]e need to focus on the future. I recognize that many still have a strong desire to focus on the past. When it comes to actions of the last eight years, passions are high. Some Americans are angry; others want to re-fight debates that have been settled, in some cases debates that they have lost. I know that these debates lead directly, in some cases, to a call for a fuller accounting, perhaps through an independent commission.

I’ve opposed the creation of such a commission because I believe that our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice.\(^{116}\)

Attorney General Eric Holder announced in June 2011 that an investigation into about 100 cases of potential abuse of detainees while in CIA custody was closed and that only two cases where detainees died while in custody would be pursued with a view towards potential prosecution.\(^{117}\) On August 20, 2012, he


\(^{115}\) No Penalty for Torture, supra note 105. As the editorial notes, while no one is facing prosecution for committing torture, former CIA officer John Kiriakou faced trial for talking with a reporter about torture and identifying who was involved. Kiriakou was convicted and sentenced to thirty months in confinement. See United States v. Kiriakou, No. 1:12cr127 (LMB), 2012 WL 3263854, at *1 (E.D. Va. 2012).

\(^{116}\) National Security Remarks, supra note 78.

announced that there was insufficient evidence to file charges in the two death cases and said they were closed. A decade after the Bybee memorandum opined that the Commander-in-Chief could order the detention and interrogation of anyone, anywhere, using any means he chooses, and that he could do so with impunity, the memorandum’s prediction proved to be true.

4. Indefinite Detention Without Trial or Meaningful Review

The Third Geneva Convention on the Treatment of Prisoners of War permits the detention of captured enemy forces and mandates that they “shall be released and repatriated without delay after the cessation of active hostilities.” That works reasonably well in a conventional armed conflict where the warring parties at some point in time decide to enter into an agreement to end hostilities, but it does not work well in a war declared on a tactic—terrorism—that in all likelihood will never reach a termination point. It could mean a life sentence for those suspected of involvement in terrorism that are captured and held in detention without charge or trial.

A total of 779 men have been detained at Guantanamo Bay since the detention facility opened on January 11, 2002. As of December 2013, the population stood at 158 detainees. That means that twelve years after the detention facility opened, eighty percent of the men the Bush administration assured the public

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118 See id.

119 See, e.g., id. ("The Justice Department said Thursday that it would not file charges in connection with the deaths of two prisoners held in CIA custody a decade ago, closing the last active criminal investigation into the agency’s treatment of prisoners after the Sept. 11, 2001, attacks.").

120 Geneva III, supra note 33, art. 18.


122 See id. (detailing inmates who are in “indefinite detention” since they cannot be tried or safely released).


were among the “worst of the worst” have been released from U.S. custody.\textsuperscript{125}

On September 21, 2012, the Department of Justice released the names of fifty-five Guantanamo detainees that were approved for transfer to the custody of other countries as part of a review of all detainee cases ordered by President Obama in January 2009 and completed in January 2010.\textsuperscript{126} The task force identified about thirty-six detainees that could face criminal prosecution in a military commission or federal court.\textsuperscript{127} However, the chief prosecutor for the military commissions, Brigadier General Mark Martin, said in June 2013 that, in the end, the number of detainees likely to face prosecution would not be more than 20, or about 2.5 percent of all the detainees ever held at Guantanamo.\textsuperscript{128}

On March 7, 2011, President Obama signed an executive order creating an administrative review process to periodically assess whether each detainee is properly detained for either prosecution or as an enemy combatant under the law of war.\textsuperscript{129} The

\textsuperscript{125} Ari Fleischer, White House Press Secretary, Press Briefing (Jan. 23, 2002), available at \url{http://www.presidency.ucsb.edu/ws/index.php?pid=61624}. (“The President also understands that the people who are detained [at Guantanamo] are detained because, for the most part they’re all al Qaeda, and if they were free they would engage in murder once again. These are not mere innocents. These are among the worst of the worst who are being detained because of what they have done, because of the suicidal nature of the actions that they have taken—their willingness, their training to go out and kill and destroy and engage in suicide if they can take others with them.”)


\textsuperscript{128} Jane Sutton, \textit{United States Scales Back Plans for Guantanamo Prosecutions}, \textit{REUTERS} (June 11, 2013), \url{http://www.reuters.com/article/2013/06/11/us-usa-guantanamo-idUSBRE95A0PA20130611}.

Department of Defense announced in July 2013 that it would begin parole-style hearings for seventy-one detainees, including forty-six that had been categorized as indefinite detainees because at the time they were deemed too dangerous to release but not subject to prosecution and twenty-five detainees previously considered candidates for prosecution. The first review board hearing was conducted on November 20, 2013, with detainee Mahmud al Mujahid appearing by video teleconference from Guantanamo before the board convened in Washington, D.C. It is uncertain whether the current round of reviews will prove any more beneficial to detainees than the one completed in 2010 that found fifty-five detainees eligible for transfer out of Guantanamo, although few have been released to date.

The Supreme Court said in June 2008 that Guantanamo detainees have the right to challenge the basis for their detention in federal court. Afterwards, the government was unable to persuade judges at the U.S. District Court for the District of Columbia by a preponderance of evidence that there was a legitimate basis for detention in most cases the judges considered. In the first two years after the Supreme Court’s decision, detainees won fifty-nine percent of their habeas challenges. In July 2010, however, the U.S. Court of Appeals for the District of Columbia Circuit reversed the first case it reviewed, Al-Adahi v. Obama, where habeas had been granted.


132 See 55 Set for Transfer, supra note 126.


134 See, e.g., William Glaberson, Judge Declares Five Detainees Held Illegally, N.Y. TIMES (Nov. 20, 2008), http://www.nytimes.com/2008/11/21/us/21guantanamo.html (“A federal judge issued the Bush administration a sharp setback on Thursday, ruling that five Algerian men have been held unlawfully at the Guantánamo Bay detention camp for nearly seven years and ordering their release.”).


136 Al-Adahi v. Obama, 613 F.3d 1102, 1111 (D.C. Cir. 2010).
After that decision, the government prevailed in eleven of the next twelve habeas cases, and the D.C. Circuit reversed the one case where habeas was granted. A Seton Hall study concluded: “The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene [v. Bush] is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government’s allegations. Now the government wins every petition.” In June 2012, the Supreme Court declined review in seven cases involving detainees.

The Obama administration attempted to block attorneys from visiting clients at Guantanamo after their habeas claims were terminated. Chief Judge Royce Lamberth rebuffed the administration’s efforts saying:

The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government’s attempt to supersede the Court’s authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual’s liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive’s grace before

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138 Denbeaux et al., supra note 135, at 1.
139 Adam Liptak, Justices Reject Detainees’ Appeal, Leaving Cloud Over Earlier Guantanamo Ruling, N.Y. TIMES (Jun. 12, 2012), http://www.nytimes.com/2012/06/12/us/politics/justices-decline-to-hear-appeals-by-guantanamo-detainees.html. The case of Adnan Latif was the one post-Al-Adahi case where habeas was granted but then reversed by the D.C. Circuit Court of Appeals, and it was one of the seven cases the Supreme Court declined to consider in June 2012. Latif had been cleared for transfer in 2006 and 2008, and again by the detention review task force in 2010. He was found dead in his cell at Guantanamo on September 8, 2012. He had been at Guantanamo over ten and a half years. Charlie Savage, Military Identifies Guantanamo Detainee Who Died, N.Y. TIMES (Sep. 12, 2012), http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html.
the Court will involve itself. This very notion offends the separation-of-powers principles and our constitutional scheme.\textsuperscript{141}

While Chief Judge Lamberth's ruling offered a glimmer of hope that the judicial branch still had some role to play in the cases of the Guantanamo detainees that will not face trial or transfer to another country, the prospect of any meaningful judicial intervention remains unlikely. Lamberth's former colleague, retired District Court Judge James Robertson, said in July 2012 at a symposium marking the fourth anniversary of the Supreme Court's \textit{Boumediene} decision that the D.C. Circuit has "gutted" the decision and "taken the capital 'M' off of the word 'meaningful'" in "meaningful review."\textsuperscript{142} He noted that not a single detainee has been released as a direct result of a court's habeas order, but he was cautiously optimistic about the future: "Some court, some day is going to find that the government can't hold these people for the rest of their lives."\textsuperscript{143}

It does not appear that the day Judge Robertson envisioned has arrived. On December 3, 2013, the D.C. Circuit affirmed the denial of a writ of habeas corpus in \textit{Ali v. Obama}.\textsuperscript{144} The court said that "the Constitution allows detention of enemy combatants for the duration of hostilities," although it acknowledged Ali's argument that he could face "lifetime detention" without charge or trial.\textsuperscript{145} Judge Brett Kavanaugh, writing for the court, said absent statutory authorization, "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention. The only question before us is whether the President has authority under the AUMF to detain Ali."\textsuperscript{146}

The reliance on the wartime authority to detain the enemy for

\textsuperscript{141} ld. at 28.

\textsuperscript{142} Lyle Denniston, \textit{Ex-judge: Boumediene is Being 'Gutted'}, SCOTUSBLOG (July 17, 2012), http://www.scotusblog.com/2012/07/ex-judge-boumediene-is-being-gutted/.

\textsuperscript{143} Id. The Guantanamo detainees are, in some respects, fortunate to have access to the courts. Federal courts have so far been unwilling to extend habeas to the much larger detainee population held at Bagram Air Base in Afghanistan. \textit{See} Maqaleh v. Hagel, Nos. 12–5404, 12–5399, 12–5401, 12–5407, 12–5410, 2013 WL 6767861 (D.C. Cir. 2013).

\textsuperscript{144} Ali v. Obama, 736 F.3d 542, 542 (D.C. Cir. 2013).

\textsuperscript{145} Id. at 552.

\textsuperscript{146} Id.
the duration of the conflict presents a conundrum for the Obama administration. In his State of the Union address in February 2013, President Obama said, "by the end of next year, our war in Afghanistan will be over."\textsuperscript{147} With the end of the war likely comes the end of the authority to detain enemy combatants held because of their connection to the conflict. It also triggers the obligation set out in Geneva Convention III to release and repatriate detainees "without delay."\textsuperscript{148} The end of the war in Afghanistan may hold the best hope for the men who have been detained at Guantanamo, in some cases for more than a dozen years, with no end in sight.\textsuperscript{149}

\textbf{B. Extrajudicial Assassination and Drone Strikes}

Unmanned aerial vehicles—UAVs in military vernacular, or as they are commonly referred to by the public, drones—have been in use from the start of the global war on terrorism.\textsuperscript{150} Their use has, however, increased dramatically since President Obama took office in January 2009.\textsuperscript{151} Not only has Obama used drone strikes more frequently than Bush, he has also used them in more places, in some instances launching strikes far removed from where most people envision the battlefield.\textsuperscript{152} There are scores of issues related to the use of drones, each one worthy of in-depth analysis, but particularly relevant to the erosion of the distinction between civilians and combatants is the unilateral power of the President to authorize killing almost anyone, almost anywhere, at virtually any time, and the legal authority for the CIA to kill when it is a civilian agency that does not enjoy combatant immunity.\textsuperscript{153}

\textsuperscript{147} President Barack Obama, Remarks by the President in the State of the Union Address (Feb. 12, 2013), available at http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address.

\textsuperscript{148} Geneva III, supra note 33, art. 118.

\textsuperscript{149} See Karen DeYoung, Afghan War's Approaching End Throws Legal Status of Guantanamo Detainees into Doubt, WASH. POST, Oct. 18, 2013, at A1.

\textsuperscript{150} See Unmanned Aircraft (UAS), FED. AVIATION ADMIN. (July 26, 2013), http://www.faa.gov/about/initiatives/uas/uas_faq/#Qn1.


\textsuperscript{152} See id.

Since 9/11, the United States has carried out drone strikes in Pakistan, Yemen, Somalia and Libya. The longest running and most extensive program by far is the one focused on militants in the tribal region of Pakistan. The New America Foundation has documented U.S. drone strikes conducted inside Pakistan from the first one authorized by President Bush in 2004 to the latest in 2013. They report that drone strikes in the country peaked in 2010 when there were 122 strikes—one every three days—that killed between 609 and 1,027 people. Their data show that, over time, the United States has gotten increasingly better at killing suspected militants and not civilians, but still they estimate that the number of militants killed accounts for about eighty-one percent of the 2,847 people confirmed killed in drone strikes. In 2013, militants were ninety-five percent of the confirmed killed. Peter Bergen, the Director of the National Security Studies Program at the New America Foundation and CNN’s national security analyst, said that civilians and unknown casualties account for about eleven percent of those killed during President Obama’s administration and about thirty-three percent during President Bush’s tenure in office. As a result of the U.S. drone campaign,
Pakistani civilians in the tribal regions are afraid to congregate in groups for even social gatherings and three-fourths consider the United States an enemy of Pakistan.\textsuperscript{161}

The Obama administration’s drone program differs from the Bush administration’s approach not just in frequency but also in scope. Under Bush, drone strikes were directed at specific individuals believed to be high-value leaders in terrorist organizations. Under Obama, strikes have been directed in some instances at unidentified individuals engaged in activities with characteristics suggesting they are terrorism related.\textsuperscript{162} The former are known as “personality strikes” and the latter as “signature strikes.”\textsuperscript{163} Some joke that the criteria for “signature strikes” are so lax that “three guys doing jumping jacks” could be construed as a terrorist training camp, while others worry that men loading a truck with fertilizer could be deemed bomb makers subject to attack, when perhaps they were just farmers.\textsuperscript{164}

Conducting signature drone strikes raises questions about compliance with the international humanitarian law principles of distinction, proportionality and military necessity.\textsuperscript{165} The risk such


\textsuperscript{162} See LIVING UNDER DRONES, supra note 161.


strikes pose to civilians is clear: targeting an unidentified individual or group based upon a trail of circumstantial evidence increases the risk to innocent people in the vicinity of the target. These strikes foment anti-American outrage among the local population, question the legitimacy of the host-nation government, and provide the impetus for some who otherwise would not have taken part in militant activities to do so in reprisal for an attack.

Additionally, the United States has two drone programs, one operated by the military and the other by the CIA. The military-run program is governed by the law of war, but the CIA is a civilian agency that is not under military command and control, and is not bound by the law of war. CIA General Counsel Stephen Preston told an audience at Harvard Law School in April 2012 that they act “in a manner consistent with the four basic principles in the law of armed conflict governing the use of force,” but a commitment to act consistent with those laws is not the same as being bound by them. Some have called for turning over responsibility for all lethal drone operations to the military alone. James Ross, Legal and Policy Director for Human Rights Watch, opined: “When the CIA general counsel says that the agency need only act in ‘a manner consistent’ with the ‘principles’ of international law, he is saying the laws of war aren’t really law at all. The Obama administration should make it clear that there’s no ‘CIA exception’ for its international legal obligations.”

166 See id. at 114.
172 Id. The American Civil Liberties Union (ACLU) filed Freedom of Information Act requests with several federal agencies seeking information on the legal basis for
A civilian agency controlled and operated paramilitary drone program has been the subject of significant criticism. United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, noted in his 2010 study on targeted killing that lethal drone strikes carried out by CIA personnel could subject the civilian operators to prosecution for murder under U.S. domestic law or the law of the country where the strike took place, or war crime charges if the target was not directly participating in hostilities at the time of the strike.\textsuperscript{173}

The legal confusion that results from having civilians involved in lethal combat operations was apparent in the military commission of Omar Khadr at Guantanamo Bay, Cuba. Khadr was charged with murder in violation of the law of war for throwing a grenade that killed a U.S. service member during a firefight in Afghanistan.\textsuperscript{174} Khadr was not in uniform, and he was not serving as part of an armed force or militia. Accordingly, he did not qualify for combatant immunity, which shields those acting in compliance with the law of war from criminal responsibility for the deliberate killing of another person.\textsuperscript{175} The U.S. Government had to amend its definition of murder in violation of the law of war shortly before Khadr’s trial began when it realized that defining the offense to include someone who was not in uniform and who therefore did not meet the requirements of international humanitarian law to qualify as a lawful combatant could apply to CIA drone operators.\textsuperscript{176}


\textsuperscript{176} See Charlie Savage, U.N. Official to Ask U.S. to End C.I.A. Drone Strikes, N.Y.
On May 23, 2013, the White House published a Presidential Policy Guidance factsheet on the conduct of lethal strikes outside the United States.\footnote{Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, THE WHITE HOUSE (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism.} In it, President Obama pledged that the United States would respect national sovereignty and international law. He could take a major step in that direction by officially assigning responsibility for lethal drone operations to the Department of Defense and mandating that uniformed members of the armed forces acting in accordance with international humanitarian law conduct all such operations.\footnote{See Daniel Klaidman, Exclusive: No More Drones for CIA, THE DAILY BEAST, Mar. 19, 2013, http://www.thedailybeast.com/articles/2013/03/19/exclusive-no-more-drones-for-cia.html.}

IV. The Road Forward: A Guiding Light or a Warning Light?

On September 14, 2012, President Obama went to Andrews Air Force Base for the arrival of the bodies of Ambassador Christopher Stevens and State Department employees Sean Smith, Glen Doherty and Tyrone Woods who were killed in Benghazi, Libya, in an attack on the U.S. Consulate on September 11th.\footnote{See David Nakamura, President Honors ‘Four Patriots’ Who Died in Benghazi, WASH. POST, Sept. 15, 2012, at A9.} Speaking at the ceremony, the President praised the men as heroes, saying they embraced and lived the American ideal. He ended his remarks:

Most of all, even in our grief, we will be resolute. For we are Americans, and we hold our head high knowing that because of these patriots—because of you—this country that we love will always shine as a light unto the world.\footnote{President Barack Obama, Remarks by the President at Transfer of Remains Ceremony for Benghazi Victims (Sept. 14, 2012), available at http://www.whitehouse.gov/the-press-office/2012/09/14/remarks-president-transfer-remains-ceremony-benghazi-victims.}

President Obama’s reference to the United States shining as a light unto the world drew upon the words former President Ronald Reagan used often about America representing “a shining city on a

The question is: does America shine as a guiding light or as a warning light?

Since 9/11, the United States has disparaged and disregarded international agreements it helped to create, crafted novel legal arguments in an effort to avoid application of laws it found inconvenient, redefined terms to fit its own purposes, and hid behind a curtain of secrecy whenever anyone challenged it. Large numbers of Americans, both Democrats and Republicans, embrace the notion of virtually limitless presidential power: the Commander-in-Chief can ignore any law, foreign or domestic, that impedes what he or she alone decides is necessary in the interest of national security; he or she can detain and torture anyone suspected of being a threat; and if capture may prove difficult, he or she can order a civilian agency to hunt the suspect down and kill him. Are those the kinds of values America should hold up as examples to the world?

In a speech on national security policy at the National Defense University in May 2013, President Obama said:

From our use of drones to the detention of terrorist suspects, the decisions that we are making now will define the type of nation—and world—that we leave to our children.

So America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us. We have to be mindful of James Madison's warning that "[n]o nation could preserve its freedom in the midst of continual warfare." Neither I, nor any President, can promise the total defeat of terror. We will never erase the evil that lies in the hearts of some human beings, nor stamp out every danger to our open society. But what we can do—what we must do—is dismantle networks that pose a direct danger to us, and make it less likely for new groups to gain a foothold, all the while maintaining the freedoms and ideals that we defend. And to define that strategy, we have to make decisions based not on fear, but on hard-earned wisdom.
If the period since 9/11 reflects how the United States views it obligations under international humanitarian law, then it should have the integrity to renounce the agreements it does not intend to honor. If, on the other hand, President Obama means what he says about America's values being the nation's strongest national security asset, he needs to lead the way and practice what he preaches. Erasing clear distinctions and replacing them with blurred lines undermines the foundation of the law of war. The road the United States chooses will determine if the foundation it spent decades helping to build is made of sandstone or granite.