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## Introduction: Targeting in an Asymmetrical World

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# The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians' Direct Participation in Hostilities

## INTRODUCTION: TARGETING IN AN ASYMMETRICAL WORLD

D. A. Jeremy Telman\*

*Abstract*

*This is the introduction to a collection of articles to be published in the Valparaiso University Law Review. The articles address the challenges presented by non-traditional warfare and non-traditional combatants in the contexts of the War on Terror and the trend toward multilateral and humanitarian interventions. Two of the contributions, those of Jonathan Hafetz and David Frakt, detail the hybrid model, part criminal law, part law of war, that the United States developed for addressing the status of detainees in the War on Terror. Two of the contributions, those of Rachel VanLandingham and Iain Pedden, propose international models for addressing the challenges of the new warfare, while Laurie Blank advocates a new focus on enforcement at both the national and international levels to address violations of the principle of distinction. Read together, the articles in this collection present a convincing argument that the United States needs to work with other states and international organizations to forge international solutions to the international problems posed by the new warfare.*

Thomas Friedman has recently observed that “the world is flat” – that is, as far as global economic competition is concerned – the playing field is increasingly level.<sup>1</sup> This is not the case in the realm of warfare. On the contrary, as armed conflict increasingly involves non-state actors opposed to state actors, or intervention in failed states by coalitions that draw on the capabilities of the major military powers, the disparity in military power and technology among the parties to armed conflict has

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<sup>1</sup> THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 46–47 (2005).

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increased markedly.<sup>2</sup> Unable to beat state militaries at their own game, non-state actors and the armed forces of weak states resort to tactics that skirt or distort the laws of armed conflict, and as they do so, states struggle to respond in a manner that is both militarily effective and consistent with the Law of Armed Conflict (“LOAC”). The result is a blurring of the distinction at the center of LOAC between combatants and non-combatants.<sup>3</sup> In asymmetrical warfare, every targeting decision is fraught with uncertainties because the lines separating those who lawfully may be targeted from those who may not have grown ambiguous.

This Issue offers various proposals to address the increasing challenge of targeting in the context of asymmetrical warfare. Taken together, the contributions to this Issue suggest that states, confronted with threats to their armed forces and to civilians from non-conventional forces, have improvised, creating *ad hoc* legal regimes to address the challenges of what one of our contributors has called the “new warfare,” in which armed conflict “now takes place *everywhere*—in cities, refugee camps and other historically non-military areas” rather than on traditional battlefields.<sup>4</sup>

Part I of this Introduction lays out the framework created by the Geneva Conventions (“the Conventions”)<sup>5</sup> and their Additional Protocols (“AP I” and “AP II” respectively)<sup>6</sup> within which targeting decisions are made. It also addresses the recent efforts by the International Committee of the Red Cross (“ICRC”) to provide

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<sup>2</sup> See Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 3-7 (2008) (describing the various asymmetries relevant to contemporary warfare).

<sup>3</sup> See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR* 251 (2010) (calling distinction “the most significant battlement concept a combatant must observe”).

<sup>4</sup> Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 45 (2010).

<sup>5</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

<sup>6</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

guidelines for state actors confronting non-combatants who directly participate in hostilities. In Part II, this Introduction summarizes two contributions to this Issue that highlight ways in which the United States has primarily relied on domestic mechanisms in attempting to devise strategies that can address the problems that have arisen in asymmetrical conflicts—such as those in Iraq and Afghanistan. Finally, in Part III, the Introduction summarizes three contributions to this Issue that propose ways forward through transnational mechanisms that will enable states to address the challenges of the new warfare without violating LOAC principles or compromising national security. Read together, the contributions to this Issue present a convincing argument that the United States needs to work with other states and international organizations to forge international solutions to the international problems posed by the new warfare.

#### I. THE INTERNATIONAL LEGAL FRAMEWORK

Asymmetrical warfare creates difficulties with respect to LOAC's fundamental categories regarding conflict status and combatant status.<sup>7</sup> In terms of the former, the Conventions create two types of conflict for LOAC purposes, international armed conflict ("IAC") governed by Article 2 common to all four of the Conventions ("CA 2"),<sup>8</sup> and non-international armed conflict ("NIAC"), governed by Article 3 common to all four of the Conventions ("CA 3").<sup>9</sup> But contemporary conflicts are often a mixture of the two, compounded by internal disturbances that might not rise to the level of armed conflict.<sup>10</sup>

<sup>7</sup> In a recent three-part series of articles, Samuel Estreicher has explored the possibility LOAC could privilege guerilla tactics in war. Estreicher raises concerns that certain ICRC statements have the unintended effect of encouraging those engaged in asymmetrical warfare to provoke state actors to engage in defensive measures that will help the guerillas to recruit more fighters. Estreicher concludes that LOAC needs to establish incentives to discourage harm done to civilians by both sides in asymmetrical conflicts. See Samuel Estreicher, *Privileging Asymmetric Warfare (Part III): The Intentional Killing of Civilians Under International Humanitarian Law*, 12 CHI. J. INT'L L. 589 (2012); Samuel Estreicher, *Privileging Asymmetric Warfare (Part II): The "Proportionality" Principle Under International Humanitarian Law*, 12 CHI. J. INT'L L. 143 (2011); Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties Under International Law*, 11 CHI. J. INT'L L. 425 (2010).

<sup>8</sup> GC III, *supra* note 5. CA 2 defines IAC as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . [and] all cases of partial or total occupation of the territory of a High Contracting Party . . ." *Id.*

<sup>9</sup> See generally *supra* note 5 (citing all Conventions). While the Conventions do not define NIAC, all armed conflicts that are not IAC are considered NIAC. The main challenge is in determining when internal disturbances rise to the level of NIAC.

<sup>10</sup> SOLIS, *supra* note 3, at 156. Gary Solis refers to such conflicts as "dual status" armed conflicts. *Id.*

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The new warfare gives rise to new legal challenges, which existing scholarship has only begun to address. The Bush administration took the position in the War on Terror that the conflict in Afghanistan was neither IAC nor NIAC, thus justifying a decision to deprive Taliban and al Qaeda detainees of all protections afforded by LOAC, including those of CA 3.<sup>11</sup> The Supreme Court rejected this position, finding that the war in Afghanistan was a form of NIAC and that detainees were thus entitled at least to the humane treatment listed in CA 3.<sup>12</sup> However, the War on Terror is not limited in its scope to Iraq and Afghanistan.<sup>13</sup> When the United States engages with Taliban fighters in Pakistan or targets terror suspects in Yemen or Somalia, the conflict defies easy categorization.<sup>14</sup>

In addition to conflict status, the new warfare blurs the lines that separate combatants from civilians and thus undermines the principle of distinction that “lies at the heart of the law governing warfare.”<sup>15</sup> Many of the difficulties of classification are attributable to the phenomenon known as direct participation in hostilities (“DPH”) by non-combatants. The basic principle of distinction posits that civilians enjoy immunity from direct attack in the context of armed conflict “unless and for such time as they take a direct part in hostilities.”<sup>16</sup>

In the IAC context, the Conventions and the Additional Protocols define the term “civilians” only negatively—as those not belonging to the armed forces of a party to a conflict and not participating in a *levée en*

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<sup>11</sup> See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel, Dep’t of Def. 10 (Jan. 22, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> (discussing the application of treaties and laws to al Qaeda and Taliban Detainees); Memorandum Concerning Humane Treatment of al Qaeda & Taliban Detainees from President George W. Bush to Richard B. Cheney, Vice President et al. 1 (Feb. 7, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (“I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . .”).

<sup>12</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (noting the broad, intended scope of the term “non-international armed conflict” and finding CA 3 applied to the conflict with al Qaeda in Afghanistan).

<sup>13</sup> See Jonathan Hafetz, *Redefining State Power and Individual Rights in the War on Terrorism*, 46 VAL. U. L. REV. 843, 847 (2012) (noting the battlefield in the War on Terror is global and the duration of the conflict is open-ended).

<sup>14</sup> Cf. *id.* at 3 (observing some Guantánamo Bay detainees were captured in Bosnia and The Gambia).

<sup>15</sup> Laurie Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765, 765 (2012). The principle of distinction was first codified in the AP I. AP I, *supra* note 6, at art. 48. Nonetheless, states recognize the principle as binding customary law. Blank, *supra*, at 769.

<sup>16</sup> AP I, *supra* note 6, at art. 51.

*masse*.<sup>17</sup> In the NIAC context, it is far more difficult to draw clear lines between civilians and combatants. The ICRC concludes that civilians are “all persons who are not members of [s]tate armed forces or organized armed groups of a party to the conflict.”<sup>18</sup>

After six years of consultation and drafting,<sup>19</sup> the ICRC in 2009 published its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (“ICRC Guidance”). While this document by no means settles the innumerable issues surrounding DPH,<sup>20</sup> it has in fact been subject to numerous critical commentaries.<sup>21</sup> It has considerable persuasive authority and certainly sets out the parameters for debate.

While combatants generally may not target civilians, they may target those who DPH. In addition, harm to people who DPH need not be

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<sup>17</sup> See *id.* at art. 50(1). AP I also defines armed forces of a party to a conflict as:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

*Id.* at art. 43(1).

<sup>18</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 1002 (2008) [hereinafter *ICRC Guidance*], available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>. Other sources site to different pagination, but this Introduction will refer to this version.

<sup>19</sup> See Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637, 637–38 (2010) (noting the document was the result of a six-year process, including meetings of military and humanitarian law experts in Geneva and The Hague between 2003 and 2008).

<sup>20</sup> See David J.R. Frakt, *Direction Participation in Hostilities as a War Crime: America’s Failed Efforts to Change the Law of War*, 46 VAL. U. L. REV. 729, 730 (2012) (arguing it could not do so, as the numerous meetings aided the ICRC in drafting its “Guidance” did not produce a consensus in all areas).

<sup>21</sup> See, e.g., W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 830 (2010) (concluding that Part IX of the ICRC Guidance ignored the advice of its experts, which resulted in faulty conclusions presented without supporting information); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 6 (2010) (noting some scholars, including Schmitt himself, participated in the meetings that produced the ICRC Guidance, but ultimately withdrew their names from the final draft); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 643 (2010) (finding the ICRC Guidance failed to resolve long-standing debates regarding the distinction between combatants and civilians and targeting in non-international armed conflicts).

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considered when assessing whether or not a targeting decision was proportional, in the LOAC sense of not causing excessive harm to civilians or non-military property.<sup>22</sup> The ICRC Guidance recognizes the need for combatants to be able to target civilians who DPH to protect themselves from attack and also to achieve military objectives.

But the most difficult challenge posed by the DPH problem is determining where to draw the line between a civilian who may not be targeted and one who may due to DPH.<sup>23</sup> The ICRC defines DPH as “specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”<sup>24</sup> To qualify as DPH, the conduct in question must satisfy three prongs: a threshold of harm, direct causation, and the belligerent nexus.<sup>25</sup> A civilian unconnected to any organized armed group is a legitimate target during all phases of DPH activities, including preparatory acts and travel to and from the site of the DPH activity.<sup>26</sup> A member of a non-state organized armed group who engages in DPH activity is a legitimate target for the duration of her membership in the group,<sup>27</sup> so long as that person engages in “continuous combat function.”<sup>28</sup>

The ICRC recognizes that DPH greatly complicates the challenges of implementing the principle of distinction in targeting decisions.<sup>29</sup> Nonetheless, the ICRC Guidance stresses the need for the people responsible for making targeting decisions to take “all feasible precautions” to avoid targeting civilians not engaged in DPH.<sup>30</sup> In addition, in a highly controversial section of the ICRC Guidance,<sup>31</sup> the ICRC posits, “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in

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<sup>22</sup> Schmitt, *supra* note 21, at 13.

<sup>23</sup> *See id.* at 14 (calling the concept of civilian status the greatest source of controversy among those who participated in drafting the ICRC Guidance).

<sup>24</sup> ICRC Guidance, *supra* note 18, at 1015.

<sup>25</sup> *Id.* at 1016–31.

<sup>26</sup> *Id.* at 1031–33, 1035–36. For an in-depth critique of the ICRC Guidance’s handling of this issue, see Bill Boothby, “And for Such Time As”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741, 743 (2010) (identifying three ways in which the ICRC definition of DPH is too narrow).

<sup>27</sup> ICRC Guidance, *supra* note 18, at 1036–37.

<sup>28</sup> *See id.* at 1007 (“[T]he decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”). *But see* Schmitt, *supra* note 21, at 21–24 (calling into question the practicality of the continuous combat function criterion).

<sup>29</sup> ICRC Guidance, *supra* note 18, at 1039.

<sup>30</sup> *Id.* at 1039–40.

<sup>31</sup> *See* Parks, *supra* note 21, at 772.

the prevailing circumstances.”<sup>32</sup> Critics of the ICRC Guidance object that this passage imports a human rights principle, the right to life, into the *lex specialis* of armed conflict.<sup>33</sup>

LOAC always involves a careful reconciliation of military necessity and the principle of humanity.<sup>34</sup> At least some scholars familiar with the ICRC Guidance have concluded that it deviates “from the generally accepted balance” and that states will therefore view the Guidance skeptically.<sup>35</sup> Moreover, while the ICRC has provided important guidance in its work on DPH, much of the work, including that of the ICRC, has merely laid the groundwork for identifying civilians who lawfully may be targeted. In its publications on DPH, the ICRC has focused for the most part on explicating rather than developing the law. Its guidance is an attempt to tease out the consequences of existing law, primarily the Geneva Conventions, for civilians directly participating in hostilities. The contributions to this Issue are not so limited. Rather, they offer predictions about the future development of LOAC relating to asymmetrical warfare and make recommendations regarding how it ought to develop.

## II. THE UNITED STATES’ *AD HOC* SOLUTIONS TO THE CHALLENGES OF THE NEW WARFARE

The ICRC and legal scholars have devoted relatively little thought to an enforcement regime that would deter civilians from engaging in DPH activities through mechanisms other than military targeting. The result has been the rise of a sort of legal limbo in which states create *ad hoc* systems of detention and review for people suspected of combatancy in asymmetrical conflicts. By their very nature, such *ad hoc* systems raise due process questions under both domestic and international law. As the rules are not devised in advance, people caught in the web of improvised detention schemes lack notice, access to information and to other tools that they need to defend themselves against accusations that they are terrorists, enemy combatants or civilians unlawfully engaged in DPH.

Professors Frakt and Hafetz point out that DPH itself is not a war crime.<sup>36</sup> That being the case, civilians who engage in combatancy can be prosecuted for ordinary crimes or for crimes (such as attacking civilians)

<sup>32</sup> ICRC Guidance, *supra* note 18, at 1044.

<sup>33</sup> Parks, *supra* note 21, at 797.

<sup>34</sup> Schmitt, *supra* note 21, at 6.

<sup>35</sup> *Id.* at 6–7.

<sup>36</sup> See Frakt, *supra* note 20, at 733 (citing to the ICRC Guidance for the proposition that LOAC “neither prohibits nor privileges civilian direct participation in hostilities”).



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that they commit as part of their DPH activities. While Professor Hafetz explores the damage that the *ad hoc* detention systems created during the War on Terror have done to the U.S. system of justice, Professor Frakt notes the conceptual gap between the dominant view that DPH is not a war crime and the U.S. decision to prosecute people for DPH during the War on Terror. Their contributions suggest that the United States has developed two models for addressing DPH—a war model and a criminal model. Neither model is entirely consistent with constitutional and LOAC protections of detainees.

A. *The Failed War Model for Dealing with DPH*

Professor Hafetz details the consequences of the existing confusion between a military and a criminal model for dealing with terror suspects. Since terror suspects are neither combatants subject to the strictures of LOAC nor criminals subject to domestic criminal law, the United States and other states have created regimes that give rise to new forms of military detention and expanded targeted killing programs, whose legality is open to question, as well as enhanced interrogation techniques, which are clearly unlawful.<sup>37</sup> Professor Hafetz's work illustrates the harm that can arise to domestic legal systems when they improvise solutions to gaps in international enforcement regimes.<sup>38</sup>

Professor Hafetz describes the *ad hoc* regimes developed under the Bush administration in his recent book, *Habeas Corpus after 9/11*.<sup>39</sup> As Professor Hafetz notes, the mechanisms that the United States adopted to address the threat of terrorism after 9/11 were not all necessitated by existing gaps in LOAC. Although the United States had complied with the Geneva Conventions in previous conflicts even when its enemies had not, the Bush administration "deliberately scuttled" that legal framework in the War on Terror.<sup>40</sup> Instead, relying on a series of secret memos generated by lawyers working in the Department of Justice's Office of Legal Counsel (the "OLC"), the administration created "a category of prisoners outside the law."<sup>41</sup> Overriding objections from Secretary of State Colin Powell and his legal advisor, William H. Taft IV, the Bush administration adopted the OLC's position that the "Geneva

<sup>37</sup> See Hafetz, *supra* note 13, at 845 (discussing the Bush administration's interrogation techniques as having "bordered on, and in some cases amounted to, torture").

<sup>38</sup> See *id.* at 856 (arguing that the United States' adoption of a war paradigm as part of its counter-terrorism strategy has resulted in an expansion of state power at the expense of individual liberties).

<sup>39</sup> JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM* (2011).

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *Id.* at 18.

Conventions did not apply to al Qaeda or the Taliban.”<sup>42</sup> The lawlessness of the United States’ conduct in the War on Terror was, at least in part, intentional. According to Professor Hafetz, the Bush administration’s decision to establish a detention facility for terror suspects at the U.S. Naval Base at Guantánamo Bay, Cuba, was motivated by its belief that “Guantánamo would be beyond the jurisdiction of the federal courts and thus immune from judicial review.”<sup>43</sup> The administration also believed that those detained at Guantánamo would be effectively beyond the jurisdictional reach of the writ of *habeas corpus*.<sup>44</sup>

Before it settled on the confusing appellation of “unlawful enemy combatant,” the Bush administration evidenced confusion regarding the status of those brought to the detention facility at Guantánamo. On the one hand, Bush administration officials compared Guantánamo detainees with enemy soldiers detained during prior wars.<sup>45</sup> Treating the detainees as battlefield “combatants” permitted the indefinite detention of those captured just as one can detain any enemy combatant during a conventional armed conflict for the duration of that conflict.<sup>46</sup> At the same time, the Bush administration referred to the detainees as “terrorists” and as “the worst of the worst,” suggesting that they were detained for criminal activities rather than as battlefield combatants.<sup>47</sup> In fact, many of the detainees were simply in the wrong place at the wrong time,<sup>48</sup> but the United States did not accord them a hearing to determine their combatant status, as required by both the Geneva Conventions and Army Regulation 1908.<sup>49</sup> As a result, Guantánamo became a “legal black

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<sup>42</sup> *Id.* at 20.

<sup>43</sup> *Id.* at 29.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 33.

<sup>46</sup> *Id.* Prisoners of war captured during an international armed conflict may be detained until the conflict is ended through surrender or peace treaty. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.”); see also Hafetz, *supra* note 13, at 847 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), in support of the generally recognized legitimacy of detention of enemy fighters to prevent their return to the battlefield).

<sup>47</sup> See HAFETZ, *supra* note 39, at 33–34 (internal quotation marks omitted) (explaining the confusing nomenclature used by Bush administration officials to describe the status of the detainees at Guantánamo).

<sup>48</sup> See *id.* at 36–37 (describing some of the “victims of incompetent battlefield vetting”).

<sup>49</sup> See GC III, *supra* note 5, at art. 5 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, [should be treated as Prisoners of War], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”); HAFETZ, *supra* note 39, at 35–36 (noting in the War on Terror, the United States abandoned its practice, established during the Vietnam and Persian Gulf wars, of providing tribunals consistent with Article 5 of GC III).

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hole" in which the detainees were tossed indefinitely based on elements of the Geneva Conventions, but in which they were stripped of the privileges guaranteed by those same Conventions.<sup>50</sup>

While the detention facility at Guantánamo, along with the Iraqi prison, Abu Ghraib, garnered most of the media attention, they were just part of a "U.S.-run global detention system."<sup>51</sup> Other U.S.-operated detention facilities were at least as bad as Guantánamo. Conditions at Bagram Theater Internment Facility at the Bagram Air Base ("Bagram") were so horrific that one prisoner who experienced internment at both Bagram and Guantánamo described his experience at the *former* as "the longest days of [his] life."<sup>52</sup> The ICRC reported gross mistreatment at Bagram in violation of the Geneva Conventions, and at least two detainees died at Bagram as a result of brutal interrogations during which they sustained injuries equivalent to what would have occurred had they been "run over by a bus."<sup>53</sup> Like the detainees at Guantánamo, the Bagram detainees did not get the benefit of status review by a "competent tribunal" as required by the Geneva Conventions. Instead, the United States introduced Enemy Combatant Review Boards, whose procedures "lacked the safeguards necessary to achieve accurate results."<sup>54</sup>

The detention systems set up in Iraq were not much different. U.S.-operated detention centers in Iraq held civilians as well as combatants without adequate review procedures that might insure that, consistent with LOAC, the United States was justified in continuing to intern those it had detained.<sup>55</sup> In Professor Hafetz's view, Iraq became another Guantánamo, highlighting "the dangers of extrajudicial detention and the importance of habeas corpus."<sup>56</sup>

Professor Hafetz does his best to describe conditions at the prisons about which we have some information, but he cannot describe what occurred in the name of the War on Terror at various CIA "black sites" at which even the identity of the prisoners is not revealed and to which the ICRC has no access, itself a violation of LOAC.<sup>57</sup> In order to effectuate

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<sup>50</sup> See *id.* at 34 (noting Guantánamo detainees were afforded neither the protections owed to prisoners of war nor those afforded to criminal suspects).

<sup>51</sup> Hafetz, *supra* note 13, at 846.

<sup>52</sup> HAFETZ, *supra* note 39, at 49 (alteration in original) (internal quotation marks omitted).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 50.

<sup>55</sup> See *id.* at 62-63 (describing the inadequacies of the status review procedures established by the U.S.-led Multi-National Force-Iraq).

<sup>56</sup> *Id.* at 67.

<sup>57</sup> See *id.* at 58-60 (internal quotation marks omitted) (describing the network of secret prisons into which hundreds of "ghost prisoners" disappeared).

the delivery of terror suspects to black sites and to countries that would conduct the sort of interrogations that U.S. law does not permit, the United States developed a program of “extraordinary rendition.”<sup>58</sup> This

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<sup>58</sup> See HAFETZ, *supra* note 39, at 51–60 (describing some detainees who were subject to extraordinary rendition); Hafetz, *supra* note 13, at 851 (describing the transition in U.S. use of rendition from “rendition to justice” to “extraordinary rendition”); *see also* First Amended Compl. at 1, ¶2, Mohammed v. Jeppesen Dataplan, Inc., No. 5:07-cv-02798 (N.D. Cal. Aug. 1, 2007) (characterizing extraordinary rendition as involving the “clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they are placed beyond the reach of the law and subjected to torture and other forms of cruel, inhuman, or degrading treatment”); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1201 n.4 (2007) (relying on definitions of “extraordinary rendition” provided by the New York City Bar Association and Wikipedia (internal quotation marks omitted)). Recent scholarship exploring the government’s extraordinary rendition program includes the following: Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1 (2009) (providing a history of the development of government-sponsored rendition, which was used initially to bring fugitives to trial, and describing the significant expansion of the United States’ extraordinary rendition program under the George W. Bush administration until its abolition in January 2009); Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GA. J. INT’L & COMP. L. 469 (2009) (concluding the state secrets privilege appropriately shields the policy of extraordinary rendition from judicial examination); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405 (2008) (arguing from the Founding era until 9/11, it was generally understood that rendition required congressional authorization and was for the purpose of bringing a fugitive to trial); Victor Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C. J. INT’L L. & COM. REG. 629 (2008) (suggesting means of oversight of executive actions through the court’s role in providing individuals the opportunity to vindicate their rights, while also protecting legitimate state secrets); Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479 (2008) (relating that since 9/11, the United States has “reportedly transferred more than 100 suspected terrorists to countries that routinely torture prisoners” and focusing on the extraordinary rendition of Maher Arar); Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions?*, 42 LOY. U. CHI. L.J. 523 (2011) (concluding U.S. law provides few legal restrictions and very few practical limitations on the ability of the United States in rendition operations, whether to the United States or elsewhere); Sadat, *supra* (examining the law governing rendition from U.S. territories or by U.S. agents and arguing that the extraordinary rendition program from occupied Iraq violates basic principles and precedents of international law); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) (contending that rendition is among the anti-terror techniques that the U.S. government has defended through legal arguments that intentionally “skirt[ ] the rule of law” by exploiting ambiguities and gaps in international human rights and humanitarian law); D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012); William G. Weaver & Robert M. Pallitto, *The Law: “Extraordinary Rendition” and Presidential Fiat*, 36 PRES. STUD. Q. 102 (2006) (arguing that, while U.S. Presidents have only recently claimed the power to authorize extraordinary renditions and that U.S. history suggests that such renditions are illegal, they are tolerated under principles of judicial deference to executive expertise); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT’L L. 295 (2007) (contending that the United States’ extraordinary rendition program

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program involved the United States in further violations of both U.S. and international law, which forbid the United States from delivering a person to a state in which the United States believes it is likely that the person will be subjected to torture.<sup>59</sup>

The U.S. Supreme Court stepped in, deciding three cases in 2004,<sup>60</sup> which caused the Bush administration and Congress to devise new detention schemes in their continued efforts to place their detention policies beyond the review of any Article III court. The Bush administration created the new Combatant Status Review Tribunal (“CSRT”) system, which purported to provide final determinations of the legality of continued detentions, thus eliminating the need for resort to the federal court system through *habeas* proceedings.<sup>61</sup> As the cases challenging that unconstitutional elimination of *habeas* rights wended their way through the court system, Congress stepped in with the Detainee Treatment Act (“DTA”), which sought, among other things, to strip detainees of their *habeas* rights.<sup>62</sup> Anticipating that the Supreme Court would restore *habeas* rights to detainees in *Hamdan v. Rumsfeld*,<sup>63</sup> the Bush administration switched its model from wartime detention to criminal prosecution and transferred some detainees, like the alleged

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constitutes grave breaches of the Geneva Conventions and proposing legal mechanisms to address those breaches); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT’L L. 585 (2006) (contending that extraordinary rendition violates both the UN Convention Against Torture and domestic law prohibitions on torture and conspiracy to commit torture); Matteo M. Winkler, *When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program*, 30 LOY. L.A. INT’L & COMP. L. REV. 33 (2008) (focusing on the European reaction to the abduction of Abu Omar in Italy and concluding that the U.S. extraordinary rendition program violates international legal norms prohibiting torture).

<sup>59</sup> See HAFETZ, *supra* note 39, at 56 (characterizing rendition as a violation of two international conventions to which the United States is a party: the Convention against Torture and the International Covenant on Civil and Political Rights (“ICCPR”).)

<sup>60</sup> See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding the government’s treatment of Hamdi did not accord with the constitutional requirements of due process because he was given no opportunity to rebut the government’s allegations before a neutral adjudicatory body); *Rasul v. Bush*, 542 U.S. 466 (2004) (permitting Guantánamo detainees to file *habeas* petitions challenging their detentions); *Rumsfeld v. Padilla*, 542 U.S. 425 (2004) (dismissing Padilla’s and al-Marri’s *habeas* petitions because they were filed against the wrong person and in the wrong court, but paving the way for the re-filing of the same petitions in the Fourth Circuit).

<sup>61</sup> See HAFETZ, *supra* note 39, at 135 (describing litigation in which the government claimed that the CSRT process “satisfied any rights [detainees] had” to due process).

<sup>62</sup> See *id.* at 140 (describing efforts to amend the federal *habeas* statute to eliminate *habeas* rights for Guantánamo detainees).

<sup>63</sup> 548 U.S. 557 (2006).

“dirty bomber” Jose Padilla, to the federal court system.<sup>64</sup> With *Hamdan*, the Supreme Court came full circle, striking down a domestic regime for dealing with detainees in wartime because it was inconsistent with international legal standards codified in CA3 of the Geneva Conventions.<sup>65</sup>

While Professor Hafetz highlights U.S. violations of LOAC in the War on Terror, he also describes the ways in which various laws passed in connection with the War on Terror violated our own domestic legal traditions, especially those regarding the availability of the writ of *habeas corpus*. He discusses in some detail the cases of Jose Padilla, Ali Saleh Kahlah al-Marri, and Yaser Hamdi, all of whom were detained incommunicado and denied access to lawyers.<sup>66</sup> The fact that Padilla and Hamdi were U.S. citizens did not entitle them to any procedural rights, nor did it protect them against harsh treatment.

The U.S. Court of Appeals for the Eleventh Circuit recently upheld Padilla’s conviction and called for an increase in his sentence of 208 months incarceration for conspiracy to harm people overseas and for material support for terror organizations.<sup>67</sup> In her partial dissent, Judge Rosemary Barkett observed:

Padilla presented substantial, detailed, and compelling evidence about the inhumane, cruel, and physically, emotionally, and mentally painful conditions in which he had already been detained for a period of almost four years. For example, he presented evidence at sentencing of being kept in extreme isolation at the military brig in South Carolina where he was subjected to cruel interrogations, prolonged physical and mental pain, extreme environmental stresses, noise and temperature variations, and deprivation of sensory stimuli and sleep.<sup>68</sup>

Judge Barkett also noted that none of these allegations were challenged on appeal.<sup>69</sup>

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<sup>64</sup> See HAFETZ, *supra* note 39, at 145 (noting Padilla was indicted on terrorism-related charges in Miami two days before the government’s response was due to Padilla’s renewed certiorari petition to the Supreme Court).

<sup>65</sup> See *id.* at 148 (summarizing *Hamdan*, 548 U.S. at 630-34).

<sup>66</sup> *Id.* at 73-78.

<sup>67</sup> *United States v. Jayyousi*, 657 F.3d 1085, 1119 (11th Cir. 2011).

<sup>68</sup> *Id.* at 1131 (Barkett, J., concurring in part, dissenting in part).

<sup>69</sup> *Id.*

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The Bush administration remained committed to its policy of extrajudicial detention. Shortly after the *Hamdan* decision was issued, the Bush administration drafted and Congress passed the Military Commissions Act ("MCA"),<sup>70</sup> which sought to interpret the Geneva Conventions so as to eliminate recourse to them as a possibility for those subject to detention in the War on Terror.<sup>71</sup> The MCA also sought once again to strip detainees of their *habeas* rights.<sup>72</sup> However, in *Boumediene v. Bush*,<sup>73</sup> the Supreme Court once again ruled, in a five to four decision, that the CSRT process coupled with limited appellate review as provided in the DTA were inadequate substitutes for *habeas* proceedings. The Court invalidated the MCA's elimination of *habeas* rights for Guantánamo detainees and directed the government to conduct prompt hearings on the legality of continued detention of people captured in connection with the War on Terror and detained at Guantánamo.<sup>74</sup> While the Supreme Court has also recognized the possibility that detainees subject to U.S. control at foreign prisons may bring *habeas* suits, Hafetz notes that lower courts have significantly narrowed the availability of that remedy.<sup>75</sup>

Professor Hafetz also rebuts arguments critical of the efficacy of a criminal law model for dealing with terrorists. Professor Hafetz first addresses the objection that criminal law is limited in that it can only punish past wrongdoing rather than prevent future harm.<sup>76</sup> However, prosecutors have actually been very successful in recent years in gaining convictions of terror suspects based on statutes imposing criminal

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<sup>70</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>71</sup> See HAFETZ, *supra* note 39, at 152-53 (noting the MCA gave the President authority to interpret the Geneva Conventions and prohibited individuals from relying on the Conventions in judicial proceedings).

<sup>72</sup> *Id.* at 153.

<sup>73</sup> 553 U.S. 723 (2008).

<sup>74</sup> HAFETZ, *supra* note 39, at 158. In *Munaf v. Green*, decided the same day as *Boumediene*, the Court considered *habeas* petitions brought by prisoners detained in Iraq under the authority of the Multi-National Force-Iraq. 553 U.S. 674 (2008). Although the Court found that such prisoners could file *habeas* petition so long as they were subject to the authority of the United States, it also found these particular petitioners were detained for the purposes of criminal prosecution in a foreign country. No U.S. court could provide relief in such cases. HAFETZ, *supra* note 39, at 167-68. Thus, while the Court seemed to be expanding (or reinforcing) the jurisdictional scope of *habeas* review, it also suggested that the government might easily evade such review by transferring custody to foreign governments. But this practice raises problems regarding the *non-refoulement* obligation under international human rights law. See *id.* at 194-95 (discussing human rights bodies' construction of the obligation of *non-refoulement* as barring governments from transferring people in their custody, regardless of location, to other states in which the detainees will be in danger of being subjected to torture).

<sup>75</sup> Hafetz, *supra* note 13, at 848-49.

<sup>76</sup> HAFETZ, *supra* note 39, at 220.

penalties for providing “material support” to terrorist organizations and under conspiracy laws.<sup>77</sup>

Professor Hafetz also addresses concerns regarding the difficulty in protecting state secrets in the context of criminal prosecutions of suspected terrorists.<sup>78</sup> In so doing, Professor Hafetz relies on the Classified Information Procedures Act (“CIPA”),<sup>79</sup> which has successfully protected state secrets in criminal proceedings for decades, without significant diminution of the government’s ability to prosecute criminal suspects.<sup>80</sup> Through discussion of numerous successful prosecutions of terror suspects,<sup>81</sup> Professor Hafetz builds a convincing case that our criminal justice system is up to the challenges presented by asymmetrical warfare.<sup>82</sup> The Bush administration’s strategy of seeking to place its detention system outside the law, beyond the review of any court, has proved to be unnecessary: We can prosecute terrorists for their criminal conduct in a manner that is consistent with both our constitutional protections afforded to criminal suspects and with LOAC. Professor Frakt reaches the same conclusion with respect to DPH, noting that “the prosecution of civilians who directly participated in hostilities is, quite properly, handled by the domestic court system.”<sup>83</sup> Professor Hafetz’s contribution to this volume builds on his earlier work and contends that the way in which the War on Terror has been institutionalized has done lasting harm to protections of civil liberties in the United States. What seemed like “a temporary accommodation to the exigencies” of the War on Terror has resulted in “a permanent

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<sup>77</sup> *Id.* at 221–22; see Hafetz, *supra* note 13, at 855 (noting federal prosecutors have obtained over 400 convictions in terrorism-related cases since 9/11).

<sup>78</sup> HAFETZ, *supra* note 39, at 223.

<sup>79</sup> Pub. L. No. 96-456, 94 Stat. 2025, 2025–21 (1980) (codified at 18 U.S.C. app. 3).

<sup>80</sup> See LARRY M. EIG, CONG. RESEARCH SERV., 89-172 A, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW (1989), available at <http://www.fas.org/sgp/crs/secrecy/89-172.pdf> (“Congress enacted the Classified Information Procedures Act (CIPA) to provide a . . . [means] for determining . . . whether a prosecution may proceed that both protects information the Executive regards as sensitive to security and assures the defendant a fair trial consistent with the mandates of the Constitution.” (footnote omitted)); Victor Hansen & Lawrence Friedman, *The Case Against Secret Evidence*, 12 ROGER WILLIAMS U. L. REV. 772, 786 (2007) (stating that CIPA was designed to address graymail cases “in which defendants threatened to disclose classified information at trial to force the government to dismiss the case”).

<sup>81</sup> See HAFETZ, *supra* note 39, at 226–27 (discussing prosecution of Zacarias Moussaoui); *id.* at 228–29 (discussing prosecution of those responsible for bombing U.S. embassies in East Africa in 1998); *id.* at 255 (discussing prosecution of the shoe bomber, Richard Reid).

<sup>82</sup> See *id.* at 254 (noting all federal prosecutions and military commissions were problematic).

<sup>83</sup> Frakt, *supra* note 20, at 761.



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transformation in the relationship among the state, society, and the individual.”<sup>84</sup>

Professor Hafetz notes that the three branches of the federal government have contributed during the Obama administration to the continuation of policies introduced during the Bush administration. Although President Obama campaigned on a promise to close the detention center at Guantánamo, in practice, it has proven quite difficult to do so,<sup>85</sup> in part because Congress has legislated aggressively to prevent Guantánamo’s closure.<sup>86</sup> The Obama administration has also continued the Bush administration’s policy of indefinite detention of terror suspects,<sup>87</sup> and in some cases Congress has pushed to expand the availability of indefinite detention to include new categories of detainees.<sup>88</sup> Courts have generally acquiesced in indefinite detention schemes.<sup>89</sup>

The Obama administration has also been unable to phase out the use of military commissions as it originally hoped to do. Congressional opponents of the use of civilian criminal courts for the prosecution of terror suspects have actually expressed concern that constitutional protections available in such courts could impede prosecution. Moreover, they advocate the continued use of harsh interrogation techniques that they believe will enable the government to extract from detainees useful information relevant to potential future attacks on the United States, its citizens, or its installations.<sup>90</sup> Finally, Professor Hafetz points out that the Obama administration has continued the Bush administration’s policy of using targeted killings as a tool in counterterrorism and has even expanded the program through the use of drone aircraft.<sup>91</sup>

The dynamic of the U.S. War on Terror exhibits a striking parallel to Otto von Bismarck’s strategy that resulted in a conservative unification of Germany in the nineteenth century.<sup>92</sup> Bismarck created a series of

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<sup>84</sup> Hafetz, *supra* note 13, at 857.

<sup>85</sup> *Id.* at 852.

<sup>86</sup> *Id.* at 853.

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* (discussing the 2012 National Defense Authorization Act that would permit indefinite detention of persons whose conduct was unrelated to the 9/11 attacks and who were not affiliated with al Qaeda).

<sup>89</sup> *Id.* at 854.

<sup>90</sup> *Id.* at 855.

<sup>91</sup> *Id.* at 856.

<sup>92</sup> *See* HANS-ULRICH WEHLER, *THE GERMAN EMPIRE 1871–1918*, at 54–55 (1985) (observing the Emperor continued to control the three pillars of absolutism after unification but also controlled the new imperial administration, and thus the unification was not democratic but “autocratic, semi-absolutist sham constitutionalism”).

crises in the 1860s under the banner of the primacy of foreign policy (*Primat der Außenpolitik*), which led to wars with Denmark, Austria, and France.<sup>93</sup> These international crises were then succeeded by engineered campaigns against various real or imagined enemies within: the *Kulturkampf* with Catholics,<sup>94</sup> the prolonged struggle against Democratic Socialism,<sup>95</sup> as well as the introduction of discriminatory policies against Germany's minority populations, including Poles, Jews, French, Danes, and Lithuanians.<sup>96</sup> Along the way, Bismarck exploited fears of external or internal threats to promote new security measures.<sup>97</sup> Liberals, who were the chief supporters of German unification,<sup>98</sup> supported Bismarck, even though the unified Germany that he created preserved the autocracy, provincialism, and militarism that liberals had hoped to overcome through their cosmopolitan nationalism.<sup>99</sup> Bismarck pulled off perhaps the greatest political trick of modern history. He was never really concerned with foreign policy at all. Rather, it was domestic policy that was really primary all along (*Primat der Innenpolitik*).<sup>100</sup>

George W. Bush was not a political strategist of Bismarck's caliber. Rather, the main characteristic that he as President shared with Bismarck as Chancellor was a tendency to manipulate foreign affairs for the purposes of a domestic agenda.<sup>101</sup> Recall that Bush campaigned on a platform of building up the United States' defensive capabilities but

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<sup>93</sup> See *id.* at 26–27 (calling the three wars “devices to legitimise the prevailing political system against the striving for social and political emancipation of the middle classes” and noting that “the three wars were waged for internal political reasons”).

<sup>94</sup> See ERICH EYCK, *BISMARCK AND THE GERMAN EMPIRE 202–10* (1964) (describing the campaign in which Bismarck enrolled the Liberal Party to oppose the German Catholic Center Party).

<sup>95</sup> See *id.* at 236–37 (describing how Bismarck exploited a failed attempt to assassinate the Emperor to push for new laws against the Social Democrats, launching an anti-Socialist campaign that continued until the end of Bismarck's career).

<sup>96</sup> See WEHLER, *supra* note 92, at 105–13 (describing various imperial policies that sought to weaken and undermine minority cultures within the Empire).

<sup>97</sup> See *id.* at 102 (noting the government's response to challenges was to promote new laws “culminating in special measures which made a mockery of the notion of the equality of the citizen before the law”).

<sup>98</sup> See EYCK, *supra* note 94, at 175 (calling the National Liberal Party the “party of German unification”).

<sup>99</sup> See *id.* at 139–41 (noting that the Indemnity Bill, which resolved the Constitutional Crisis of the 1860s, forced a split in the German Liberal Party in which the defenders of “[t]he principle of the *Rechtsstaat*, of the state governed by law” were defeated by the forces more committed to unification).

<sup>100</sup> See WEHLER, *supra* note 92, at 184–92 (describing German foreign policy during the Kaiserrich as a product of the needs of domestic policy).

<sup>101</sup> See EYCK, *supra* note 94, at 57 (explaining that Bismarck was elevated to the position of Prussian Minister-President because he was willing to take on the Prussian Parliament, by dissolving it if necessary).

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using the armed forces only for war, not for nation-building.<sup>102</sup> But 9/11 became the justification for extended nation-building campaigns in Afghanistan and Iraq. Meanwhile, the Bush administration quickly seized on the opportunity provided by the 9/11 attacks to attempt a permanent renegotiation of the balance between civil liberties and national security.<sup>103</sup> The most lasting legacy of the Bush administration, as Professor Hafetz illustrates, may well be the permanent expansion of the national surveillance state,<sup>104</sup> and the exploitation of an attack that posed no existential threat to the United States to create a lasting state of emergency.<sup>105</sup>

*B. The Failed Criminal Law Approach to DPH*

Professor Frakt's contribution to this Issue describes the attempt by the United States to treat DPH as a war crime and to prosecute detainees through military commissions.<sup>106</sup> The basis for doing so has never been clear, as Professor Frakt cites to numerous authorities for the rule that DPH itself is not a violation of LOAC.<sup>107</sup> The fact that DPH is not a violation of LOAC would not itself prevent the United States from treating it as a criminal offense for domestic purposes, as it sought to do first through an Executive Order from November 2001 and then through the 2006 Military Commissions Act ("MCA").<sup>108</sup> However, as Professor

<sup>102</sup> See George W. Bush, President of the United States of America, The 2nd Presidential Debate (Oct. 11, 2000), available at <http://www.pbs.org/newshour/bb/election/2000debates/2nddebate2.html> ("I don't think our troops ought to be used for what's called nation-building. I think our troops ought to be used to fight and win war.").

<sup>103</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); see also Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 141-45 (2010) (describing the very weak legal rationale for the National Security Agency's illegal warrantless wiretapping program).

<sup>104</sup> See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008) (describing the "National Surveillance State" as "a new form of governance that features the collection, collation, and analysis of information about populations both in the United States and around the world"). But see Orin S. Kerr, *The National Surveillance State: A Response to Balkin*, 93 MINN. L. REV. 2179, 2180 (2009) (arguing that the major change has not been the government's approach to surveillance but the advent of new technologies).

<sup>105</sup> See GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* 1122 (2005) (describing the frequency that western democratic parliamentary governments have been replaced by constitutional dictatorships based on the executive's recognition of a real or imagined crisis).

<sup>106</sup> Frakt, *supra* note 20, at 732.

<sup>107</sup> *Id.* (citing Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 520 (2005)); ICRC *Guidance*, *supra* note 18, at 83.

<sup>108</sup> See 10 U.S.C. § 950v(b)(15)-(16) (2006) (creating the crimes of "Murder In Violation Of The Law of War" and "Destruction Of Property In Violation Of The Law Of War"); Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,

Frakt explains, in defining the crime, U.S. law always relied on a presumed criminal prohibition on DPH, creating great confusion in the ensuing case law.<sup>109</sup>

Professor Frakt describes the idea of imposing criminal penalties for DPH as “novel and untested” when introduced by executive order in 2001.<sup>110</sup> The test did not go well. The Supreme Court’s decision in *Hamdan v. Rumsfeld* invalidated the military commissions established by executive order before any detainees could be tried for unprivileged belligerency.<sup>111</sup> Congress responded with the MCA, and most of Professor Frakt’s contribution describes the government’s attempts to use that piece of legislation to prosecute before military commissions a grand total of three detainees for DPH. Professor Frakt details all seven cases brought before military commissions. Two resulted in convictions after trial, five resulted in guilty pleas,<sup>112</sup> and one resulted in dismissal of all charges.<sup>113</sup> Professor Frakt is well-positioned to discuss this case law, as he was the appointed defense counsel to Mohammed Jawad, one of the Guantánamo detainees subject to prosecution.<sup>114</sup>

The MCA seemed to address the criminalization of DPH by requiring that the offense be “in violation of the law of war.” However, the Department of Defense (“DOD”) provided interpretive guidance indicating that it viewed all killings or destruction of property that were caused by DPH to be LOAC violations.<sup>115</sup> Initially, military courts rejected that interpretation. In the *Jawad* case, the military judge rejected the prosecution’s theory that DPH “by itself, is a violation of the laws of war.”<sup>116</sup> Military judges in two other cases similarly rejected the government’s attempts to transform DPH into a *per se* violation of LOAC.<sup>117</sup>

After Congress revised the MCA in 2009, the DOD issued more explicit interpretive guidelines specifying that military commissions had

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66 Fed. Reg. 57,833 (Nov. 16, 2001) (creating the new offense of “Murder by an Unprivileged Belligerent”).

<sup>109</sup> Frakt, *supra* note 20, at 732–34; *see also* Hafetz, *supra* note 13, at 850–51.

<sup>110</sup> Frakt, *supra* note 20, at 737.

<sup>111</sup> *Id.* (internal quotation marks omitted). *See generally* 548 U.S. 557 (2006) (invalidating the military commissions).

<sup>112</sup> Frakt, *supra* note 20, at 741.

<sup>113</sup> *See id.* 744–49 (discussing the case of Mohammad Jawad); David J. R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367 (2010).

<sup>114</sup> Frakt, *supra* note 20, at 742, n.59.

<sup>115</sup> *Id.* at 736.

<sup>116</sup> *Id.* at 746 (quoting *United States v. Jawad*, 2008 U.S. CMCR LEXIS, at \*1 (A.C.M.R. Sept. 28, 2008)) (internal quotation marks omitted) (Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction (D-007)).

<sup>117</sup> Frakt, *supra* note 20, at 747.

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jurisdiction to try people accused of DPH and could convict them of crimes including murder “even if such conduct does not violate the international law of war.”<sup>118</sup> The DOD interpretation is mind-boggling: Why would a military commission have jurisdiction over a crime allegedly committed by a civilian that is not war crime?

Faced with the DOD’s obstinate insistence on the authority of military commissions to try crimes that are not war crimes, military judges finally caved. In October 2010, a military commission accepted the guilty plea of Omar Khadr, despite the fact that he was charged with doing nothing more than taking part in a conventional battle and using a conventional weapon (a hand grenade) to kill a U.S. fighter.<sup>119</sup> The military commission denied various motions to dismiss the murder charge against Khadr based on the fact that Khadr had not committed a war crime.<sup>120</sup> Because the case was resolved through a plea bargain, the military commission never issued a definitive ruling on the issue.<sup>121</sup> However, in *United States v. Hamdan*, the Court of Military Commission Review issued a unanimous *en banc* decision adopting the DOD’s view that DPH itself could be prosecuted as a war crime.<sup>122</sup>

The notion that DPH could be a war crime remains largely untested. To this day, the prosecution of Omar Khadr, who was fifteen at the time that he committed the acts that led to his prosecution, stands as the only example of a conviction based on DPH as a war crime.<sup>123</sup> Professor Frakt proposes a narrower definition of the crime, limiting its application to “those who cross international borders—as alien insurgents—for the specific purpose of engaging in hostilities.”<sup>124</sup> Professor Frakt immediately notes that both the Australian David Hicks and the Canadian Omar Khadr could be prosecuted under such a rule, although

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<sup>118</sup> *Id.* at 747 (emphasis omitted) (citing U.S. MANUAL FOR MILITARY COMMISSIONS, pt. IV, § 5(15)(c), at IV-13 (2010)).

<sup>119</sup> *Id.* at 748 (citing Defendant’s Motion for Leave to Dismiss Complaint Without Prejudice and Supporting Brief at \*1, *United States v. Khadr*, Crim. No. 07-30014, 2007 U.S. Dist. Ct. Motions LEXIS, at 93015 (2007)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 755–57. As Professor Frakt reports, the same court later expressed its reluctance to “make conduct punishable by military commission *without any reference to international norms.*” *Id.* 757 (emphasis in original) (quoting *United States v. al Bahlul*, MCR 09-001 (U.S. Ct. Military Comm’n Review Sept. 9, 2011) (en banc)).

<sup>123</sup> *Id.* at 762.

<sup>124</sup> *Id.* at 763.

Khadr might be spared based on the fact that his father brought him to Afghanistan.<sup>125</sup>

Professor Frakt's recommendation would benefit some civilians engaged in DPH who could sincerely claim that they were merely protecting their homes and homelands from an invading force. His proposal would render U.S. law more humane, but it would not bring U.S. law, which criminalizes DPH, into line with LOAC, which does not. Taken together, Professor Frakt's and Professor Hafetz's contributions suggest that we need to move beyond domestic law solutions to the constellation of problems that arise out of asymmetrical conflicts. The three contributions discussed in the final Part of this Introduction do just that.

## II. REGULATING THE NEW WARFARE THROUGH INTERNATIONAL LEGAL REGIMES

Three of our contributors propose radically divergent solutions for the problems arising out of the new warfare. Lieutenant Colonel VanLandingham envisions an evolving rule of custom within LOAC that would permit multilateral humanitarian intervention, making use of regional organizations recognized under Chapter 8 of the U.N. Charter.<sup>126</sup> Major Pedden proposes to address the challenges of the new warfare through a new "minilateralism" and through a clear delineation between international humanitarian law and international human rights law, with the former being granted priority under the principle of *lex specialis derogat legi generali*.<sup>127</sup> Professor Blank proposes to address DPH problems along with other complexities associated with the new warfare through enforcement at the national, regional, and international levels that will provide appropriate sanctions for violations of the principle of distinction. The contributions to this Issue of Professor Blank and Major Pedden are unusual in the realm of international humanities law ("IHL") scholarship because of their focus on the operationalization of LOAC.<sup>128</sup>

<sup>125</sup> *Id.* It also may be relevant that since Khadr's family moved to Afghanistan in 1995, long before the United States invaded, it is hard to see how he could have traveled to Afghanistan with the intention of engaging in hostilities. *Id.*

<sup>126</sup> U.N. Charter arts. 52-54.

<sup>127</sup> Major Iain D. Pedden, *Lex Lacunae: The Merging Laws of War and Human Rights in Counterinsurgency*, 46 VAL. U. L. REV. 803, 806 n.14 (2012). For a discussion of the term, see Moisés Naim, *Minilateralism: The Magic Number to Get Real International Action*, FOREIGN POL'Y (July/Aug. 2009), <http://www.foreignpolicy.com/articles/2009/06/18/minilateralism>.

<sup>128</sup> See also Blank & Guiora, *supra* note 4, at 57-58 (describing operationalization as adapting LOAC to the realities of new warfare so that commanders are equipped with proper training regimes and operational guidelines).

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That is, they focus not only on LOAC as defined in international agreements, but also on state conduct as evidenced in military strategies, military handbooks, and rules of engagement.

A. *Expanding the Right of Humanitarian Intervention within the U.N. System*

Since the end of World War II, there have been occasional stirrings of hope that collective security might actually bring an end to conventional state-on-state warfare. Such was the design of the U.N. Charter's Chapter VII,<sup>129</sup> of course, but the Cold War intervened to prevent the promise of the Charter from being realized.<sup>130</sup> As Lieutenant Colonel VanLandingham details, individual states stepped into the breach, but their actions that may have had humanitarian aims were tainted by self-interest, and world opinion neither effectively condoned nor prevented such interventions.<sup>131</sup> There was a brief renaissance of hope for collective security in the 1990s as the United States was able, with the approval of the U.N. Security Council, to assemble an international coalition to oppose the Iraqi annexation of Kuwait.<sup>132</sup> Between 1990 and 1995, the Security Council authorized the use of force in Iraq, Somalia, Yugoslavia, Rwanda, and Haiti.<sup>133</sup> But the brief window of opportunity quickly slammed shut, as the international community was unable to intervene to prevent genocides in Rwanda and Yugoslavia, and NATO somewhat notoriously bombed Serbia without Security Council authorization in order to prevent Serb atrocities in Kosovo.<sup>134</sup>

In the aftermath of the 9/11 attacks, the Security Council was willing to authorize collective action to combat terrorism,<sup>135</sup> but it would not go so far as to authorize a renewal of hostilities against the government of

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<sup>129</sup> U.N. Charter arts. 39-51.

<sup>130</sup> See Rachel E. VanLandingham, *The Stars Aligned: The Legality, Legitimacy, and Legacy of 2011's Humanitarian Intervention in Libya*, 46 VAL. U. L. REV. 859, 873 (2012) (noting the voting rules in the Security Council stymied Security Council action and "frequently neutered the entire UN collective security regime during" the Cold War).

<sup>131</sup> *Id.* at 877-80.

<sup>132</sup> See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (calling on member states, acting in coordination with the Government of Kuwait, to use all necessary means to implement previous Resolutions relating to Iraq's invasion and annexation of Kuwait).

<sup>133</sup> VanLandingham, *supra* note 130, at 800.

<sup>134</sup> See *id.* at 868 (contending the Security Council's authorization of humanitarian intervention in Libya weakens any claim that intervention without such authorization could be lawful).

<sup>135</sup> See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling on member states to use all necessary means to combat terrorism); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (expressing readiness to take all necessary measures to respond to the terror attacks of September 11, 2001).

Saddam Hussein in Iraq.<sup>136</sup> Because the Security Council was once again paralyzed by disunity among its five permanent members, individual states and coalitions assumed the dominant role in collective security.

Drawing on the recent U.N Security Council authorization of NATO intervention in Libya,<sup>137</sup> Lieutenant Colonel VanLandingham finds grounds for optimism regarding the future prospects for effective collective security measures in response to significant humanitarian crises. Her contribution interacts with the other contributions to this Issue in interesting ways. It suggests that, in the future, asymmetrical warfare will be more of an issue for international law than for domestic law, as the conflicts will be between multinational forces and armed militias or the militaries of failed states. Lieutenant Colonel VanLandingham also suggests that the advent of Predator drone technology may embolden military powers to engage in humanitarian intervention more often, as they can do so without risk to their own personnel.<sup>138</sup> On the other hand, one might predict that if, as Lieutenant Colonel VanLandingham suggests, U.N.-authorized humanitarian intervention becomes the norm, there might be fewer asymmetrical conflicts in the future because the U.N. might come to play its intended role as a deterrent force to states or non-state actors that might otherwise be inclined to resort to force.

As Lieutenant Colonel VanLandingham describes the Libya intervention, it was made possible by a variety of developing doctrines, none of which quite fit the situation, but which have come together in a constellation of doctrines that she believes has the potential to harden into a rule of customary international law. Such a rule would permit Security Council authorized humanitarian intervention. The Security Council has for some time recognized that human rights abuses can “constitute a threat to international peace and security,” even if they occur in only one state.<sup>139</sup> In addition, Lieutenant Colonel VanLandingham contends that the Security Council Resolution authorizing intervention in Libya implements and reinforces the “responsibility to protect doctrine” that the international community

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<sup>136</sup> See Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 592–93 (2003) (describing the U.N. Security Council's refusal to go along with U.S. and U.K. demands for authorization of an invasion of Iraq).

<sup>137</sup> See VanLandingham, *supra* note 130, at 859 (citing S.C. Res. 1973, ¶¶ 4, 6–8, U.N. Doc. S/RES/1973 (Mar. 17, 2011)), which authorized the use of force in Libya in response to the humanitarian crisis brought about by the popular uprising that sought to remove Muammar Gaddafi from power).

<sup>138</sup> *Id.* at 865–66.

<sup>139</sup> *Id.* at 860.



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endorsed in 2005.<sup>140</sup> Finally, Lieutenant Colonel VanLandingham's analysis of the rhetoric underlying statements in support of intervention in Libya suggests a growing sense among states of a moral norm justifying humanitarian intervention to prevent mass atrocities.<sup>141</sup>

Lieutenant Colonel VanLandingham suggests that as humanitarian intervention becomes more common, the difficult targeting decisions that are the subject matter of the other contributions to this Issue will also increase in frequency. She contends that the advent of drone warfare will further complicate matters if states will contend, as the United States did with respect to the Libyan conflict, that their involvement in such conflicts do not constitute "hostilities."<sup>142</sup> However, two points seem essential in this context. First, the Obama administration's claim that U.S. involvement in the NATO intervention in Libya did not constitute "hostilities" for the purposes of the War Powers Resolution surprised many,<sup>143</sup> who, like the Author of this Introduction and Lieutenant Colonel VanLandingham, expected from the Obama administration (and from the Legal Advisor to the

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<sup>140</sup> *Id.* at 861.

<sup>141</sup> *Id.* at 864.

<sup>142</sup> *Id.* at 866 (citing Robert M. Chesney, *A Primer on the Libya/War Powers Resolution Compliance Debate*, BROOKINGS (June 17, 2011), [http://www.brookings.edu/opinions/2011/0617\\_war\\_powers\\_chesney.aspx?p=1](http://www.brookings.edu/opinions/2011/0617_war_powers_chesney.aspx?p=1)); see also Harold Koh, Legal Advisor U.S. Dep't of State, Testimony on Libya and War Powers Before the Senate Foreign Relations Committee (June 28, 2011), available at [http://foreign.senate.gov/imo/media/doc/Koh\\_Testimony.pdf](http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf). The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-48 (2000)), calls for congressional authorization of all uses of the U.S. armed forces within sixty days of their introduction into "hostilities" absent a declaration of war, an extension, or a wartime emergency that prevents Congress from meeting. War Powers Resolution, § 5(b), 50 U.S.C. §§ 1541, 1544(b). The Obama administration decided to avoid a confrontation with Congress over the legality of continued U.S. participation in NATO actions in Libya by contending that, limited as they were to air strikes and air support, U.S. participation in that NATO action did not constitute "hostilities." Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, available at <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?page-wanted=all>.

<sup>143</sup> According to the *New York Times*, the U.S. military aircraft attacked Libyan air defenses about sixty times, and U.S.-operated drones fired missiles at Qaddafi's forces about thirty times. Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8. In contending the U.S. involvement in Libya did not constitute "hostilities," the Obama administration did not even have the support of the Pentagon or the OLC, both of which reached the opposite conclusion. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES, June 17, 2011, <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?hp>; see also Louis Fisher, Testimony of Louis Fisher before the Senate Foreign Relations Committee (June 28, 2011), available at [http://foreign.senate.gov/imo/media/doc/Fisher\\_Testimony.pdf](http://foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf) (denouncing "[p]residential [d]oubletalk" with respect to the concept of "hostilities").

Department of State, Harold Koh)<sup>144</sup> greater transparency and compliance with the rule of law, especially with respect to war powers.<sup>145</sup> Second, as the administration's definition of "hostilities" is directly relevant only for the purposes of the War Powers Resolution and domestic law, it bears only a relationship of analogy to standards under LOAC for establishing when the resort to force rises to the level of an armed conflict.

But Lieutenant Colonel VanLandingham's focus on this constellation of doctrines that promote multinational intervention, whether based on a "right" of humanitarian intervention or a "responsibility to protect" suggests an erosion of traditional notions of state sovereignty.<sup>146</sup> Her work thus tracks themes in the development of international legal norms that may run counter to Major Pedden's focus on the need for the United States to work towards unilateral solutions to international challenges.

*B. Protecting Combatants through Treaty Law and the Lex Specialis Principle*

The point of departure for Major Pedden's work is the relationship between IHL and international human rights law. On that issue, the United States has adopted the minority view that, in areas in which the two bodies of law overlap, IHL should be recognized as the *lex specialis*, which trumps the more general human rights law.<sup>147</sup> The U.S. view has some support from the International Court of Justice ("ICJ"), which has twice recognized the *lex specialis* status of LOAC.<sup>148</sup> However, as Major

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<sup>144</sup> For condemnations of Koh's inconsistency on the issue in the years before and after he joined the Obama administration, see, for example, Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. TIMES, Aug. 6, 2011, [http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?\\_r=2&ref=opinion](http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?_r=2&ref=opinion); Mary Ellen O'Connell, *U.S. Strains Credibility on Its Libya Role*, CNN (June 21, 2011), <http://www.cnn.com/2011/OPINION/06/21/oconnell.libya.military/index.html>.

<sup>145</sup> See Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27 (criticizing the Obama administration for ignoring the advice of the OLC); see also Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62, 74 (2011) (calling upon the Obama administration to reaffirm its commitment to the tradition of executive branch deference to the OLC's conclusions).

<sup>146</sup> VanLandingham, *supra* note 130, at 864-65.

<sup>147</sup> Pedden, *supra* note 127, at 810-11.

<sup>148</sup> See *id.* 816-19 (discussing the ICJ's advisory opinions of the Use or Threat of Nuclear Weapons and on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory).

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Pedden notes, the ICJ has done little to clarify how to handle cases that implicate both bodies of law.<sup>149</sup>

The more prominent view is that the two bodies of law are complementary—that is, wherever possible, courts should construe the bodies of law as consistent with one another.<sup>150</sup> As a result, human rights principles have gained increasing prominence in international adjudications involving LOAC. Major Pedden concedes that human rights frameworks have also informed the U.S. Supreme Court’s wartime jurisprudence in cases relating to the U.S. government’s detention policies in the War on Terror.<sup>151</sup>

Major Pedden does not question the importance of human rights considerations at the level of rules of engagement.<sup>152</sup> In reviewing the tactical directives issued by U.S. generals directing the counter-insurgency program in Afghanistan, as well as major works of counterinsurgency theory, Major Pedden acknowledges that they adopt an approach consistent with complementarity.<sup>153</sup> As a result, the Tactical Directives issued by the International Security Assistance Force (“ISAF”) in Afghanistan, unclassified versions of which are attached as appendices to Major Pedden’s contribution,<sup>154</sup> expose ISAF forces to increased risk.<sup>155</sup> However, he maintains, rules of engagement adopted as a matter of policy cannot and should not ripen into rules of binding customary international law. “[T]he fact that we fight this way *now* should not require us to fight this way *forever*.”<sup>156</sup> Given that “the influence of human rights law in armed conflict shifts more risk onto combat personnel . . . [resulting in] more casualties,”<sup>157</sup> the need for state consent to emerging rules of custom is nowhere more important than in the realm of LOAC.

Major Pedden raises reasonable concerns that documents like the ICRC Guidance and the ICRC’s *Customary International Humanitarian Law*

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<sup>149</sup> See *id.* 816–17 (observing the ambiguity of the ICJ’s invocation of *lex specialis* in the *Nuclear Weapons* case and that its later decision in the *Wall* case “did little to clarify the issue in a meaningful way”).

<sup>150</sup> *Id.* at 810–11.

<sup>151</sup> *Id.* at 818.

<sup>152</sup> See *id.* 812 (citing the U.S. Standing Rules of Engagement as an example of the “effective importation of a widely-known legal standard from the human rights law framework into the law of war”).

<sup>153</sup> *Id.* at 821–24.

<sup>154</sup> *Id.* at apps. B–D.

<sup>155</sup> *Id.* at 805.

<sup>156</sup> *Id.* at 825 (emphasis in original).

<sup>157</sup> *Id.* at 819.

*Study*,<sup>158</sup> which import human rights standards into LOAC, can contribute to an environment in which state practice alone is treated as sufficient evidence of customary rules of law, without any evidence that such practice is accompanied by *opinio juris*;<sup>159</sup> that is, that state practice is informed by the belief that the practice is required by international law.<sup>160</sup> In particular, Major Pedden echoes W. Hays Parks' concerns that the ICRC Guidance's Recommendation IX imports into its DPH analysis a proportionality test borrowed from human rights law.<sup>161</sup>

Major Pedden offers two proposals that would permit the United States to reconcile conflicts between LOAC and human rights law. First, he calls for "[t]he use of inherent executive authority to harmonize the expression of the *opinio juris* in documents related to armed conflict."<sup>162</sup> Second, because of the challenges to finding international unanimity on all matters relating to LOAC, Major Pedden suggests that the United States adopt "minilateral" solutions to national security problems by forging with like-minded states international agreements that would have greater legitimacy in the eyes of the international community than do unilateral declarations of states' understandings of the requirements of LOAC.<sup>163</sup>

Major Pedden extols the virtues of a minimalism that would allow states to quickly negotiate an agreement that would not be diluted by the need to satisfy too many participants.<sup>164</sup> He contends that minilateral treaties agreed upon by a "critical mass" of specially affected states would achieve greater legitimacy in the world community than can unilateral actions or statements of the law.<sup>165</sup> One area in which Major Pedden suggests that minilateral approach might be effective is the law of targeted killing.<sup>166</sup>

At the same time, Major Pedden suggests that U.S. conduct must be accompanied by and consistent with statements coming from the Executive that express U.S. constructions of the *opinio juris* associated

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<sup>158</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

<sup>159</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt c. (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*) . . . ." (emphasis added)).

<sup>160</sup> Pedden, *supra* note 127, at 813–14.

<sup>161</sup> *Id.* at 815.

<sup>162</sup> *Id.* at 805.

<sup>163</sup> *Id.* (internal quotation marks omitted).

<sup>164</sup> *Id.* 826–27.

<sup>165</sup> *Id.* at 828.

<sup>166</sup> *Id.*

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with particular aspects of customary international law.<sup>167</sup> But Major Pedden is not encouraged by the Obama administration's embrace of the "fundamental guarantees" enumerated in AP I's Article 75,<sup>168</sup> because President Obama's statement has increased confusion over whether or not the United States is bound by Article 75 as a matter of customary international law and over whether LOAC or humanitarian law governs.<sup>169</sup> But Article 75 is emblematic of the difficulty in trying to keep these two bodies of law separate. Although it incorporates language from human rights treaties,<sup>170</sup> it is part of AP I and thus unquestionably a part of LOAC as well.

C. *Preserving Distinction in New Warfare*

In different ways, the work of Professors Hafetz and Frakt suggests that we should avoid attaching excessive criminal consequences to DPH. Professor Blank, while not calling for the criminalization of DPH and certainly not endorsing the improvisational chaos and human rights abuses associated with the War on Terror's treatment of terror suspects, seeks to bring the focus back to key principles. In particular, she argues that effective implementation of and adherence to LOAC depends on robust enforcement of all violations of the principle of distinction—that is, distinction in conduct, and not only in targeting—through the mechanisms of military justice and through national, regional, and international sanctions, and accountability regimes. Her work, like that of Major Pedden, focuses on the operationalization of LOAC principles at the level of the Rules of Engagement ("ROE") that inform combat decisions, and she addresses not only DPH but the broader problem of violations of the principle of distinction in the new warfare.

As Professor Blank notes, distinction has two components. First, it permits the targeting of combatants and prohibits the targeting of non-combatants, unless they engage in DPH. Second, it requires that combatants identify themselves as such.<sup>171</sup> Professor Blank points out that international criminal tribunals have repeatedly imposed criminal sanctions for the intentional targeting of civilians,<sup>172</sup> and the Rome Statute of the International Criminal Court ("Rome Statute") also imposes sanctions for targeting decisions that violate the principle of

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<sup>167</sup> *Id.* at 829.

<sup>168</sup> *Id.* at 830–31.

<sup>169</sup> *Id.* at 831.

<sup>170</sup> *See id.* at 830 n.163 (noting the language of Article 75 was "distilled from the ICCPR").

<sup>171</sup> Blank, *supra* note 15, at 766.

<sup>172</sup> *See id.* at 782 (discussing cases decided by the International Criminal Tribunal for Yugoslavia).

proportionality by causing excessive harm to civilians.<sup>173</sup> In addition, national courts enforce national criminal codes and military manuals that impose criminal sanctions for indiscriminate or intentional attacks on civilians.<sup>174</sup>

Despite this progress in enforcing one aspect of the principle of distinction, there is at present little, if any, enforcement of violations and accountability for the equally serious problem of combatants who undermine the principle of distinction by disguising themselves as civilians.<sup>175</sup> “Fighters who launch attacks in civilian clothing, from protected civilian sites and use civilians as shields are violating LOAC and must be held accountable for their conduct.”<sup>176</sup> Unless those who do so are held accountable, “distinction will only be enforced halfway.”<sup>177</sup> Blank notes numerous cases in which LOAC rules prohibiting perfidious attacks have been ignored in cases to which they obviously applied.<sup>178</sup>

Perfidy undermines the principle of distinction, thus leaving combatants to perceive civilians as potential combatants and justifiable targets. Professor Blank correctly notes that the victims of perfidy are the innocent civilians who “become the unintentional and tragic targets of soldiers who mistake them for legitimate targets when unable to distinguish between fighters and civilians.”<sup>179</sup> More generally, the victims are innocent civilians who are targeted because combatants have come to doubt their ability to distinguish between combatants and non-combatants, or the victims may be wounded combatants placed *hors de combat* who are shot because soldiers have come to fear treachery by wounded combatants who play possum.<sup>180</sup>

Yet prosecutions of perfidy are not always the appropriate response. Professor Blank discusses the perfidy of suicide bombers and of Bosnian Serbs who disguised themselves as U.N. peacekeepers and then massacred Bosnian Muslims who voluntarily surrendered. The threat of criminal prosecution will not deter a suicide bomber, and the Bosnian Serbs at Srebrenica were not prosecuted for perfidy because they were

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<sup>173</sup> See *id.* at 781 (discussing Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90).

<sup>174</sup> *Id.* at 782–83.

<sup>175</sup> *Id.* at 766.

<sup>176</sup> *Id.* at 778.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.* 786–88 (citing the U.N. report on Sri Lanka and the Bosnian Serb massacre at Srebrenica, in which thousands of Bosnian Muslims were tricked into surrendering to—and were later massacred by—Serbs disguised as UN peacekeepers).

<sup>179</sup> *Id.* at 790.

<sup>180</sup> See SOLIS, *supra* note 3, at 327–30 (describing the U.S. soldiers’ practice in the Iraq War, known as “double-tap[ping],” which involved “shooting of wounded or apparently dead insurgents to insure that they are dead”).

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prosecuted for genocide and crimes against humanity,<sup>181</sup> which Professor Blank acknowledges is a justifiable reason to forego a prosecution for perfidy.<sup>182</sup>

The placement of military objectives in residential areas or in protected places such as hospitals or places of worship is also a LOAC violation that undermines the principles of distinction.<sup>183</sup> Professor Blank emphasizes the obligation of all parties to take precautionary measures to protect civilian populations.<sup>184</sup> While legal commentary and the news media have focused on violations of the obligation to take precautions by states that have attacked military installations in civilian areas,<sup>185</sup> less attention has focused on the violations embodied in the placement of such military installations in civilian areas in the first place.<sup>186</sup> Similarly, Professor Blank notes that the widespread practice of using civilians as human shields—a clear violation of AP I, Article 51 and customary international law<sup>187</sup>—is rarely prosecuted in national courts or international tribunals.<sup>188</sup>

Professor Blank does not see prosecutions as a panacea. Rather, training manuals and military leaders must treat protecting the principle of distinction as a high priority, and to a large extent they already do so. Professor Blank's focus on the operationalization of LOAC illustrates a degree of flexibility in the lawful ROE applicable to different types of armed conflict. For example, Professor Blank notes that the ROE for the conflict in Iraq focused on status-based targeting, designating certain paramilitary "groups and organizations" as "hostile and engaged," and therefore appropriate for targeting.<sup>189</sup> In Afghanistan, by way of contrast, it was much more difficult to identify hostile groups and organizations. The ROE applicable in Afghanistan thus called for conduct-based targeting based on hostile acts or manifest hostile

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<sup>181</sup> Blank, *supra* note 15, at 788.

<sup>182</sup> *Id.*

<sup>183</sup> *See id.* at 777, 794 (discussing recent conflicts in which the co-mingling of military and civilian objects have undermined the principle of distinction).

<sup>184</sup> *See id.* 791–92 (discussing obligations of states parties under AP I, art. 57).

<sup>185</sup> *See id.* at 792–95 (detailing numerous instances and noting the "absence of—or at best minimal—condemnation of the practice of placing military equipment and objectives in civilian areas").

<sup>186</sup> *Id.* at 795.

<sup>187</sup> *See id.* at 798 (quoting AP I, art. 51(7) and referencing the Rome Statute, as well as military manuals).

<sup>188</sup> *See id.* at 797–800 (enumerating recent uses of human shields, noting the rarity of prosecutions and concluding that "[g]iven the widespread use of human shields, significantly greater efforts are needed to prosecute perpetrators of this serious war crime").

<sup>189</sup> *Id.* at 778–79.

intent.<sup>190</sup> The fact that ROE can be adapted in response to the idiosyncrasies of a particular conflict means that ROE can be calibrated to assure LOAC is operationalized in ways that “maximize protection of innocent civilians while still enabling mission fulfillment.”<sup>191</sup>

Where fighters fail to engage in combat in accordance with the principle of distinction, the failure to hold them accountable simply ratifies their unlawful behavior and encourages future violations that only serve to endanger innocent civilians. The mechanisms for enforcement are already in place, as “[n]ational courts, national criminal codes, and military manuals also criminalize attacks on civilians.”<sup>192</sup> International fact-finding investigations are also an important mechanism for establishing both the factual basis and the legal issues that arise out of particular armed conflicts.<sup>193</sup> While states must be willing to prosecute their own personnel for perfidious conduct, international tribunals should prosecute with equal vigor all serious violations of the principle of distinction. National and international fact-finding investigations should provide a basis for a more robust system of accountability that would create more comprehensive enforcement of both aspects of the principle of distinction.

#### IV. CONCLUSION

If we combine Professor Blank’s advocacy of transnational solutions to violations of the principle of distinction with Major Pedden’s advocacy of unilateralism, we may arrive at a solution that can address the concerns of all of our contributors. Major Pedden sees internationalism primarily as a source of new international obligations that will increase the risks faced by U.S. armed forces in facing counterinsurgency. But a unilateral approach to the question of criminal sanctions for DPH is a real possibility and would have a great deal more international legitimacy than do the *ad hoc* domestic regimes described by Professors Hafetz and Frakt. Unilateral solutions are also appropriate in the context of humanitarian interventions under the auspices of regional organizations for which Lieutenant Colonel VanLandingham advocates.

Thus the contributions to this Issue, each useful on its own, are especially valuable when read together. They offer a wealth of information on the subject of asymmetrical conflict, as well as proposals

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<sup>190</sup> *Id.* at 779.

<sup>191</sup> *Id.* at 781.

<sup>192</sup> *Id.* at 782.

<sup>193</sup> *Id.* at 802.



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for means by which greater clarity can be achieved in the realm of the fundamental LOAC principle of distinction.