> In war, in some sense, lies the very genius of law. It is law creative and active, it is the first principle of law. What is human warfare but just this, an effort to make the laws of God and nature takes sides with one party?
>
> -- Henry David Thoreau[1]

I. Introduction

Alfred Nobel was a Swedish scientist and inventor with a keen interest in chemical engineering. He perfected a method to stabilize the unpredictable liquid explosive nitroglycerine, and he developed and patented dynamite, a widely used and commercially successful explosive that made him wealthy by the age of forty.[2] During the latter part of his life Nobel worked on developing weapons – rockets, cannons, and explosives – that he believed could make war so terribly horrific that it would be unthinkable for nations to ever resort to armed conflict. Influenced in part by his long friendship with international peace advocate Austrian Countess Bertha von Suttner, Nobel developed an interest in efforts to encourage peace. His last will and testament, prepared in November 1895, left the bulk of his considerably estate to a fund created for the purpose of awarding prizes to the persons or groups making the most significant contributions to society in five categories, including one prize for "the person who shall have done the most or the best work for fraternity between nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses."[3] This prestigious award is commonly known as the Nobel Peace Prize.

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[1] "Early Spring in Massachusetts Volume 5," From the Journal of Henry David Thoreau, pg. 147, The Riverside Press (1881).
[2] "Alfred Nobel: His Life and Work," Nobelprize.org (Jun. 25, 2012) http://www.nobelprize.org/alfred_nobel/biographical/articles/life-work/index.html
[3] "Alfred Nobel's Thoughts about War and Peace." Nobelprize.org (Jun. 25, 2012) http://www.nobelprize.org/alfred_nobel/biographical/articles/tagil/ *See* also, "Full text of Alfred Nobel's Will," Nobelprize.org (Jun. 25, 2012) http://www.nobelprize.org/alfred_nobel/will/will-full.html

On October 9, 2009, the Nobel Committee announced that it had selected United States President Barack Obama as the recipient of the 2009 Nobel Peace Prize for his "extraordinary efforts to strengthen international diplomacy and cooperation between peoples."[4] The Nobel Committee's official announcement said:

> [Barack] Obama has as President created a new climate in international politics. Multilateral diplomacy has regained a central position, with emphasis on the role that the United Nations and other international institutions can play. Dialogue and negotiations are preferred as instruments for resolving even the most difficult international conflicts… Only very rarely has a person to the same extent as Obama captured the world's attention and given its people hope for a better future. His diplomacy is founded in the concept that those who are to lead the world must do so on the basis of values and attitudes that are shared by the majority of the world's population.[5]

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

> War, in one form or another, appeared with the first man. At the dawn of history, its morality was not questioned; it was simply a fact, like drought or disease – the manner in which tribes and then civilizations sought power and settled their differences.
>
> And over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a "just war" emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence…
>
> Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. The Nobel Committee recognized this truth in awarding its first prize for peace to Henry Dunant – the founder of the Red Cross, and a driving force behind the

[4] "The Nobel Peace Prize 2009 - Press Release," Nobelprize.org (Jun. 25, 2012) http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/press.html The award decision generated mixed reactions, including calls by some for President Obama to decline and state it was not warranted by his accomplishments after less than nine months in office. "A Nobel for Nothing," editorial, WASH. TIMES, B2, Oct. 11, 2009.

[5] *Id.*

Geneva Conventions.

> Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor – we honor those ideals by upholding them not when it's easy, but when it is hard.[6]

Has the United States lived up to the ideals that President Obama passionately argued the nation will fight to defend even when it is hard? Some contend that his laudable commitment rests more on rhetoric than reality, and in the eyes of the world at least its foundations appear to have eroded in recent years. Former President and 2002 Nobel Peace Prize Laureate Jimmy Carter, in an article published in the New York Times in June 2012, said the United States is "abandoning its role as the global champion of human rights," citing policies that permit targeted assassinations, indefinite detention without trial at Guantanamo Bay, and warrantless wiretapping as examples.[7] Just two and a half years after President Obama accepted the Nobel Peace Prize and delivered his stirring speech, former President Carter warned:

> At a time when popular revolutions are sweeping the globe, the United States should be strengthening, not weakening, basic rules of law and principles of justice enumerated in the Universal Declaration of Human Rights. But instead of making the world safer, America's violation of international human rights abets our enemies and alienates our friends.

[6] White House Press Office Release, "Remarks by the President at the Acceptance of the Nobel Peace Prize," Barack H. Obama, Dec. 10, 2009. http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize

[7] "A Cruel and Unusual Record," Jimmy Carter, op-ed, N.Y. TIMES, A19, Jun. 25, 2012.

> As concerned citizens, we must persuade Washington to reverse course and regain moral leadership according to international human rights norms that we had officially adopted as our own and cherished throughout the years.[8]

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

[8] *Id.*

War is hell.[9]

The law of war tries to make it a little less hellish.

II. International Humanitarian Law Before 9/11

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

To some, the notion that the constraints imposed by laws are expected to apply during the chaos and carnage of war seems patently irrational. You can make a logical argument that if two sides have reached a point where each feels compelled to take up arms in an effort to force the other to capitulate then they should be able to employ all the means at their disposal in order to prevail.

Resorting to total war – the any means necessary approach – in the pursuit of victory or to exact retribution has at times been the case. General William Tecumseh Sherman is remembered for his scorched earth campaign across the American south in the latter part of the Civil War, which played a role in bringing General Robert E. Lee and his Confederate Army to surrender. After the siege and capture of Atlanta in the summer of 1864, Sherman's forces marched across the Georgia heartland to Savannah before turning north towards Columbia and into the Carolinas. Along the way, his troops burned fields, farms, and factories; pillaged food and anything of value they could find; and took horses, mules and wagons from the farmers and

[9] General William Tecumseh Sherman. After the Civil War, General Sherman gave a speech to a group of veterans who cheered when he spoke of war. Sherman responded: "No, my friends; don't look at it that way. War is hell." Cong. Rec. Vol. 91, page 1839, March 7, 1945.

townspeople they encountered.[10] General Sherman's name still evokes disdain in some of the areas his troops plundered nearly a century and a half ago.

At the same time Sherman was laying siege to Atlanta that summer in 1864, representatives of sixteen nations were assembled at a diplomatic conference in Geneva, Switzerland, where they drafted and signed the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[11] The conference and the convention that it produced were in large part due to the efforts of Henry Dunant.

A. Henry Dunant

Henry Dunant was born into a prominent family in Geneva in 1828. He was active in a number of religious and charitable movements, co-founded the Young Men's Christian Association (YMCA) of Geneva in 1852, and helped transform the YMCA into an international organization in 1855.[12] On a business trip to Italy in 1859, Dunant happened to be nearby when Emperor Napoleon and King Victor Emanuel II led the 150,000 men of the Franco-Sardinian Alliance into battle against Austrian Emperor Franz Josef and his 170,000 troops. The Battle of Solferino took place on June 24, 1859, and lasted for more than fifteen hours. Dunant wrote a vivid description of what transpired on the battlefield:

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

[10] *See* The General Who Marched to Hell: William Tecumseh Sherman and His March to Fame and Infamy, Earl Schenck Miers, Knopf, 1951.
[11] A Memory of Solferino, Henry Dunant, International Committee of the Red Cross, ICRC Publication Ref. 0361 (Dec. 31, 1986). http://www.icrc.org/eng/resources/documents/publication/p0361.htm
[12] YMCA Historical Figures. http://www.ymca.int/who-we-are/history/ymca-historical-figures/

> A little further on, it is the same picture, only made the more ghastly by the approach of a squadron of cavalry, which gallops by, crushing dead and dying beneath its horses' hoofs. One poor wounded man has his jaw carried away; another his head shattered; a third, who could have been saved, has his chest beaten in. Oaths and shrieks of rage, groans of anguish and despair, mingle with the whinnying of horses.
>
> Here come the artillery, following the cavalry, and going at full gallop. The guns crash over the dead and wounded, strewn pell-mell on the ground. Brains spurt under the wheels, limbs are broken and torn, bodies mutilated past recognition-the soil is literally puddled with blood, and the plain littered with human remains.[13]

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

> The stillness of the night was broken by groans, by stifled sighs of anguish and suffering. Heart-rending voices kept calling for help. Who could ever describe the agonies of that fearful night!
>
> When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield; corpses were strewn over roads, ditches, ravines, thickets and fields; the approaches of Solferino were literally thick with dead. The fields were devastated, wheat and corn lying flat on the ground, fences broken, orchards ruined; here and there were pools of blood. The villages were deserted and bore the scars left by musket shots, bombs, rockets, grenades and shells. Walls were broken down and pierced with gaps where cannonballs had crushed through them. Houses were riddled with holes, shattered and ruined, and their inhabitants, who had been in hiding, crouching in cellars without light or food for nearly twenty hours, were beginning to crawl out, looking stunned by the terrors they had endured. All around Solferino, and especially in the village cemetery, the ground was littered with guns, knapsacks, cartridge-boxes, mess tins, helmets, shakoes, fatigue-caps, belts, equipment of every kind, remnants of blood-stained clothing and piles of broken weapons.
>
> The poor wounded men that were being picked up all day long were ghastly pale and exhausted. Some, who had been the most badly hurt, had a stupefied look as though they could not grasp what was said to them; they stared at one out of haggard eyes, but their apparent prostration did not prevent them from feeling their pain. Others were anxious and excited by nervous strain and shaken by spasmodic trembling. Some, who had gaping wounds already beginning to show infection, were almost crazed with suffering. They begged to be put out of their misery, and writhed with faces distorted in the grip of the death-struggle…

[13] Supra note 11, at pg. 6.

> Oh, the agony and suffering during those days, the twenty-fifth, twenty-sixth and twenty-seventh of June![14]

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

> If there had been enough assistance to collect the wounded in the plains of Medola and from the bottom of the ravines of San Martino, on the sharp slopes of Mount Fontana, or on the low hills above Solferino, how different things would have been! There would have been none of those long hours of waiting on June 24, hours of poignant anguish and bitter helplessness, during which those poor men of the Bersagliere, Uhlans and Zouaves struggled to rise, despite their fearful pain, and beckoned vainly for a letter to be brought over to them, and there would never have been the terrible possibility of what only too probably happened the next day-living men being buried among the dead!
>
> If there had been available for the wounded improved means of transportation better than those now existing, there would have been no need for the painful amputation which one Light Infantryman of the Guard had to undergo at Brescia. The need for that operation arose from deplorable lack of attention when he was being carried from the regimental flying ambulance to Castiglione. If this man did not die under the operation, as many soldiers did, he could thank his own strong and healthy constitution for it.[15]

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

> If an international relief society had existed at the time of Solferino, and if there had been volunteer helpers at Castiglione on June 24, 25 and 26, or at Brescia at about the same time, as well as at Mantua or Verona, what endless good they could have done! …
>
> Humanity and civilization call imperiously for such an organization as is here suggested. It seems as if the matter is one of actual duty, and that in carrying it out the cooperation of every man of influence, and the good wishes at least of

[14] Id. at pgs. 12 and 14.
[15] Id. at pgs. 28-29.

> every decent person can be relied upon with assurance. Is there in the world a prince or a monarch who would decline to support the proposed societies, happy to be able to give full assurance to his soldiers that they will be at once properly cared for if they should be wounded? Is there any Government that would hesitate to give its patronage to a group endeavoring in this manner to preserve the lives of useful citizens, for assuredly the soldier who receives a bullet in the defense of his country deserves all that country's solicitude? Is there a single officer, a single general, considering his troops as "his boys," who would not be anxious to facilitate the work of volunteer helpers? Is there a military commissary, or a military doctor, who would not be grateful for the assistance of a detachment of intelligent people, wisely and properly commanded and tactful in their work?[16]

Dunant's account of the Battle of Solferino and its aftermath, and his suggestions on ways to alleviate suffering caused by war, led to a conference held in Geneva in 1863 that gave birth to the International Committee of the Red Cross (ICRC) and, a year later, the first of what would be several Geneva Conventions. Because of his contributions to achieving the ideals Alfred Nobel had described of peace and a fraternity among nations, Henry Dunant won the first Nobel Peace Prize in December 1901.[17]

B. The Heart of International Humanitarian Law

International humanitarian law has its roots set in the desire to limit the destructive effects of armed conflict. One of its most fundamental principles is the requirement for distinction between participants in the conflict and those entitled to protection from its harm. For example, the First Geneva Convention that Dunant helped create in 1864 required the armed

[16] Id.

[17] "Henry Dunant – Biography," Nobelprize.org (Jul. 2, 2012) http://www.nobelprize.org/nobel_prizes/peace/laureates/1901/dunant.html Dunant spent the latter years of his life destitute and alone in a hospice in Heiden, Switzerland. He had no funeral and there were no mourners when he died in 1910 at 82 years of age. *Id*.

forces of the signatories to honor the neutrality of medical personnel, chaplains, ambulances and hospitals.[18]

There were no comprehensive protections afforded civilians by either treaty or convention prior to World War II because it was "a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity."[19] The duty to protect civilians was never expressly prescribed because it was so fundamentally understood that the "principle went without saying."[20] The desire to create a line separating the participants from the protected was a heightened concern after the World War II; a time when concentration camps, mass executions, the indiscriminate bombings of cities and the destructive power of nuclear weapons were still fresh in the minds of civilized countries desiring to mitigate suffering and harm in future armed conflicts.[21]

The principle of distinction is a focal point of each of the four Conventions of 1949.[22] Geneva I, the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, was essentially an updated version of the First Convention from 1864 on land warfare. Geneva II addressed mostly the same rules, although it applied to members of the armed forces at sea. Geneva III spelled out the requirements for the treatment of prisoners of war. Geneva IV, entitled *Geneva Convention Relative to the Protection of Civilian*

[18] Supra note 11, at pgs. 33-34.
[19] Jean S. Pictet, Commentary To Geneva Convention IV Relative To The Protection Of Civilian Persons In Time Of War, at p. 3 (1958). http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf
[20] *Id.*
[21] Statement of United Nations Secretary General Ban Ki-Moon, "Honoring Geneva Conventions, Secretary General Says Debate 'No Longer Between Peace and Justice But Between Peace and What Kind of Justice,'" SG/SM/12494, L/T/4417, HR/5002 (Sept. 26, 2009)
http://unispal.un.org/UNISPAL.NSF/0/857F5A937A9F5F808525763F005C2A9C
[22] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), 75 U.N.T.S. 31, signed 12 August 1949, entered into force 21 Oct. 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); 75 U.N.T.S. 85, signed 12 August 1949, entered into force 21 Oct. 1950; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), 75 U.N.T.S. 135, signed 12 August 1949, entered into force 21 Oct. 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 75 U.N.T.S. 287, signed 12 August 1949, entered into force 21 Oct. 1950.

Persons in Time of War, was directed specifically at the special protections to be afforded civilian populations and civilian property during armed conflicts.

The one article that is set out in all four of the conventions is Common Article 3, which states in pertinent part:

> Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[23]

Geneva IV on the protection of civilians is the most comprehensive of the four conventions with rules set out in 159 articles and three annexes.[24] The commentary to Geneva IV states: "In former times the need to protect the civilian population in wartime was not felt to the same degree as since the more recent wars. Military operations nowadays – particularly bombing from the air – threaten the whole population."[25] History had proven Alfred Nobel's vision of advanced weaponry so destructive that it would act as a restraint on the will to resort to

[23] *Id.*
[24] *Id.*
[25] *Supra* note 19 at p. 118.

war, thereby reducing the damage armed conflicts cause, to be erroneous. Where before the impact of war was generally confined to the combatants and the field of combat, every advance in technology – from sword, to bow, to musket, to missile – extended the reach of war's destructive capabilities and broadened the scope of those subject to its harmful effects. The Geneva Conventions of 1949 were intended to insure that everyone associated with an armed conflict was covered by some specific status that conveyed clearly defined rights and responsibilities.

C. The United States: Leading the Development of International Humanitarian Law

The United States was actively engaged in the post-World War II movement to better define the line separating combatants and civilians, and to more clearly articulate the rights and protections to be afforded those not taking part in hostilities. In a letter dated April 25, 1951, transmitting the conventions to President Harry S. Truman for his review and submission to the United States Senate for advice and consent for ratification, Secretary of State Dean Acheson recounted:

> In the light of experiences of World War II, there was recognized by all governments the urgent necessity for rather extensive revisions of the above-mentioned earlier conventions [the Geneva Conventions of 1929 and the Hague Convention of 1907] for the purpose of bringing them up to date, making them easier to apply uniformly and less susceptible to different interpretations, and providing more effective protection of the categories of persons covered. It was considered equally important to secure by treaty international legal protection for civilians in belligerent and occupied territories. The generally unsatisfactory stop-gap measure of attempting to apply the prisoners- of-war convention to certain categories of civilians during World War II had pointed up the need for a separate treaty establishing humane standards of treatment for civilians in time of war.
>
> The United States had from the beginning actively supported the initiative taken in the fall of 1945 by the International Committee of the Red Cross to revise the

> existing conventions and to formulate a new civilian convention before the experiences of World War I1 had been forgotten.[26]

The Senate authorized ratification on July 6, 1955, with all the members present for the roll-call vote casting their votes for approval. President Dwight D. Eisenhower – the former Army five-star General who served as the Supreme Allied Commander in Europe in World War II – ratified the conventions on July 14, 1955.[27]

Since the end of World War II, the frequency of international armed conflicts declined from an average of more than six per year to less than one, and the number of battlefield deaths declined from 20,000 per year to less than 6,000.[28] While those numbers suggest a positive downward trend, not all the numbers are as encouraging. In World War I, for example, the war claimed the lives of nine combatants for every one civilian. Now, less than a century later, wars result in about ten civilians deaths for every one combatant.[29] The data suggest that the effort to limit the effects of armed conflict to the combatants on the battlefield and to protect civilian populations has not been successful. Nonetheless, the belief in the underlying civilian protection principle has not dissipated. Researchers who surveyed people in war-torn areas for the International Committee of the Red Cross in 1999-2000 concluded:

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[26] Message from the President of the United States Transmitting Copies of the Geneva Conventions for the Protection of War Victims, Apr. 26, 1951, at A3. http://www.loc.gov/rr/frd/Military_Law/pdf/GC_message-1951.pdf

[27] *See* 101 CONG. REC. 9958-9973, at 9972-9973 (July 6, 1955); *See also* Eisenhower, Dwight D. To E. Roland Harriman, 1 August 1955. In *The Papers of Dwight David Eisenhower*, ed. L. Galambos and D. van Ee, doc. 1536. World Wide Web facsimile by The Dwight D. Eisenhower Memorial Commission of the print edition; Baltimore, MD: The Johns Hopkins University Press, 1996, http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/1536.cfm. The United States ratified Geneva IV with one reservation: "The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins." Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Berne, at p. 346 (1949). http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf.

[28] Human Security Report Project. *Human Security Report 2009/2010: The Causes of Peace and the Shrinking Costs of War*, pgs. 1-2, New York: Oxford University Press, 2011.

[29] Stanley B. Greenberg and Robert O. Boorstin, Public Perspective, *People on War: Civilians in the Line of Fire*, at pg. 19 (Nov/Dec. 2001).

> Yet the more these conflicts have degenerated into wars on civilians, the more people have reacted by reaffirming the norms, traditions, conventions and rules that seek to create a barrier between those who carry arms into battle and the civilian population. In the face of unending violence, these populations have not abandoned their principles nor forsaken their traditions. Large majorities in every war-torn country reject attacks on civilians in general and a wide range of actions that by design or default could harm the innocent. The experience has heightened consciousness of what is right and wrong in war. People in battle zones across the globe are looking to forces in civil society, their own state institutions, and international organizations to assert themselves and impose limits that will protect civilians.[30]

The United States has been engaged militarily almost continuously since the end of World War II: Korea, Vietnam, Iraq, Panama, Kosovo, Afghanistan, Libya, Yemen, and Somalia, among other places.[31] While there were instances where members of the U.S. armed forces failed to adhere to the standards established by the Geneva Conventions and the spirit of international humanitarian law – the My Lai massacre during the Vietnam War is one of the most infamous examples – entering the twenty-first century the United States was generally recognized as adhering to high standards on the battlefield.[32] Earning and maintaining that reputation paid dividends. In the Gulf War in 1991, the United States dropped leaflets encouraging Iraqi soldiers to surrender and providing instructions on how to do so safely. More than 100,000 Iraqi soldiers deserted or surrendered enabling the ground war to come to a quick end with minimal casualties for the United States and its coalition partners. About 98 percent of Iraqi soldiers said they saw the leaflets, 88 percent believed the message, and 70 percent cited it

[30] *Id.*

[31] Anti-colonialism following World War II was a factor in many armed conflicts. The two colonial powers, France and the United Kingdom, have been engaged in more state-based armed conflicts than any other countries from 1946-2008, followed by the two Cold War super-powers, Russia and the United States. *Supra* note 28, Table 10.1 at pg. 165.

[32] *See United States v. Calley*, 22 U.S.C.M.A. 534 (1973). First Lieutenant Calley was convicted of 22 counts of premeditated murder for ordering his troops to kill civilian men, women and children in the village of My Lai. *Id.* He was sentenced to confinement for life, but President Richard Nixon reduced his sentence and he ended up serving three years in house arrest. *A Speech of Remorse Over a Massacre*, Atlanta Journal-Constitution, at A1 (Aug. 22, 2009).

as a reason for deciding to put down their weapons and surrender.[33] From a military perspective, having enemy troops lay down their arms without firing a shot and raise their hands in surrender is far preferable to them digging in and fighting. From a national perspective, ending an armed conflict quickly reduces costs and facilitates the return to peace.

Despite the important leadership role the United States had in the development of international humanitarian law after World War II, it has at times opted not to approve agreements most other countries supported, including many of its traditional allies. The United States, for example, is not among the 172 state parties to Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts that went into effect in 1978.[34] President Reagan sent Additional Protocol II to the Senate for advice and consent, but in the same message he noted his objections to the requirements of Additional Protocol I.

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

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[33] Peter J. Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations of the Conduct of Psychological Operations (PSYOPS) Under Public International Law*, 57 A.F. L. REV. 209 (2005). *See also*, Douglas Waller, *Opening Up the Psyops War*, TIME, (Oct. 16, 2001).

[34] *See* list of state parties at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P

> Finally, the Joint Chiefs of Staff have also concluded that a number of the provisions of the Protocol are militarily unacceptable.
>
> It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.[35]

The United States joined with countries many consider to be among the international humanitarian law rouges' gallery – China, Libya, Iraq, Israel, Qatar, and Yemen – in voting against the Rome Statute that created the International Criminal Court.[36] The United States and Somalia are the only two countries that have not ratified the Convention on the Rights of the Child.[37] The United States – along with China, Pakistan and Russia – has not signed the Ottawa Convention on anti-personnel landmines.[38] Advocating for the necessity of respect for human rights and the principles of international humanitarian law while opting to avoid the limitations of major international humanitarian initiatives creates an appearance the United States is better at preaching than it is at practicing. Expression of ideals that do not match corresponding actions raise a presumption that there are two standards at play: one that applies to what the United States expects of others and a second that applies just to the United States.

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[35] Message from the President of the United States Transmitting Protocol II Additional to the Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflict, Jan. 29, 1987, at pgs. 3-4. http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf

[36] Michael Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL (American Society of International Law) Insights, Aug. 1998, *available at* http://www.asil.org/insigh23.cfm President Clinton signed the treaty shortly before leaving office, but it was never submitted to the Senate for advice and consent. On May 6, 2002, the Bush administration notified the United Nations Secretary General that the United States was not going to become a party to the treaty. *See* Letter from John R. Bolton, U.S. Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

[37] *See* United Nations International Children's Emergency Fund (UNICEF), frequently asked questions, *available at* http://www.unicef.org/crc/index_30229.html.

[38] *See* Arms Control Association, The Ottawa Convention: Signatories and State-Parties, *available at* http://www.armscontrol.org/factsheets/ottawasigs.

D. Losing Momentum and Focus

The United States ratified the Geneva Conventions in 1955. Testifying before the Senate Committee on Foreign Relations in support of ratification, Deputy Under Secretary of State Robert Murphy said:

> The Geneva conventions are another long step forward toward mitigating the severities of war on its helpless victims. They reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the conventions. Our own conduct has served to establish higher standards and we can only benefit by having them incorporated in a stronger body of conventional wartime law… We feel that ratification of the conventions now before you would be fully in the interest of the United States.[39]

Secretary Murphy's statement reflects the still popular notion that the United States is a shining light on a hill setting the example for other countries to follow. It conveys a sense that while the Conventions were necessary to lift others up to the American standard, the conduct of the United States already lived up to the "enlightened practices" that were reduced to writing in Geneva.

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

> The bill is simple and straightforward. Presently, in the absence of an international criminal tribunal or a military commission, we have no means by which we can try and prosecute individuals who have committed a war crime against an American citizen.
>
> This legislation before you today will give the United States the legal authority to prosecute individuals who have committed a war crimes act, against an American

[39] Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F and G, Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess. 5 (1955).

> citizen. The bill restores justice by filling the gaps in federal criminal law relating to the prosecution of individuals for grave beaches of the Geneva Convention: When passed, the United States will no longer be a safe haven for anyone having committed such crimes.
>
> The bill before the Subcommittee is particularly important to the men and women in the Armed Services. As a member of the House National Security Committee, I was astonished to learn that currently there is no law that provides the means for prosecuting unspeakable crimes committed by foreign nationals against our U.S. Service Personnel.
>
> While the Geneva Convention of 1949 provides the U.S. with the authority, we have not yet passed legislation to provide the courts with the enforcement mechanism. This gap in the federal law is unacceptable.[40]

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

> I believe this is important legislation and I have personal experience to bear this out. Our opponents in the field have consistently denied Americans the benefits of the Geneva Conventions, and since World War II they have done so with impunity. This legislation can change that…
>
> War is an extraordinary event. It defies rationality and ordinary laws. The worst effects of war can be ameliorated only by the laws of war, which are themselves extraordinary and can be enforced only by extraordinary means such as this bill.[41]

The original proponents of the War Crimes Act, which passed with overwhelming bi-partisan support, envisioned Americans as the potential victims of the "unspeakable crimes"

[40] War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims, 104th Cong. 5 (1996) (statement of Rep. Walter Jones). House Bill 2587 was the predecessor to House Bill 3680, which was enacted into law on August 21, 1996, as the War Crimes Act of 1996. H.R. REP. NO. 104-698 (1996), reprinted in 1996 U.S.C.C.A.N. 2166.

[41] *Supra*, note 40, at p. 7 (Statement of Mr. Michael P. Cronin).

committed by others in the course of armed conflicts. The thought of Americans as potential perpetrators of war crimes was simply beyond the pale.

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

9/11: How the Land of the Free and the Home of the Brave Became Less of Both

In January 1981, Tom Ahern was about to regain his freedom and end his 444 day ordeal as a hostage in the U.S. Embassy during the Iranian Revolution. The former C.I.A. Tehran station chief was taken before Hossein Sheikh-ol-eslam, the man who had been his primary interrogator and abuser during his period of captivity. Sheikh-ol-eslam said that the beatings Ahern suffered were inconsistent with Islam and with Sheikh-ol-eslam's personal values, and he offered Ahern the opportunity to beat him with the same rope that was used on Ahern. Tom Ahern declined the offer saying, "we don't do stuff like that."[42]

That was 1981. Things changed after the terrorist attacks on September 11, 2001.

Some members of President George W. Bush's administration saw the opening created by the fear that followed the 9/11 attacks and seized upon it to radically expand executive branch power – particularly the power of the President himself – and undermined the basis for international humanitarian law the United States championed after World War II. Conservative columnist Andrew Sullivan described the transformation of America post-9/11 in a Newsweek article in September 2011:

> As mysterious envelopes containing anthrax began to appear in mailboxes, as our airports shut down and reopened as police states, as terror-advisory color codes were produced, as the vast new bureaucratic behemoth of the Department of Homeland Security was set up, as a system of torture prisons (beginning with Guantánamo Bay) was constructed ... many concluded the threat must be grave enough to justify shredding some of the Constitution's noblest principles and precedents. This handful of [Islamic] fanatics was supposedly a greater threat

[42] Mark Bowden, *Guests of the Ayatollah*, 579 (Grove Press, 2006). Hossein Sheikh-ol-eslam now serves as the Deputy Speaker of the Iranian Parliament, the Majlis. Neil Snyder, *Coming Soon: The Global March to Jerusalem*, The American Thinker, (Mar. 28, 2012), http://www.americanthinker.com/blog/2012/03/coming_soonthe_global_march_to_jerusalem.html.

> than the Nazis and the Soviets. And so much of our inherited moral wisdom – such as the absolute stricture against torture and the ideal of habeas corpus – were tossed aside. Dick Cheney, the man elected vice president as a calming father figure, became the most terrified of them all. And so we joined him in fearing that Al Qaeda was on the cusp of arming itself with WMDs that could be used to end our civilization.[43]

In 2008, Barack Obama presented himself as a stark contrast to George W. Bush and the policies of his administration that had the United States fighting two wars and engaging in practices at home and abroad that eroded liberties and America's moral standing. In a memorable speech before a huge crowd in Denver in August 2008, Obama accepted the Democratic Party's presidential nomination and said:

> If John McCain wants to follow George Bush with more tough talk and bad strategy, that is his choice, but that is not the change that America needs. We are the party of Roosevelt. We are the party of Kennedy. So don't tell me that Democrats won't defend this country. Don't tell me that Democrats won't keep us safe. The Bush-McCain foreign policy has squandered the legacy that generations of Americans, Democrats and Republicans, have built, and we are here to restore that legacy. As commander-in-chief, I will never hesitate to defend this nation, but I will only send our troops into harm's way with a clear mission and a sacred commitment to give them the equipment they need in battle and the care and benefits they deserve when they come home. I will end this war in Iraq responsibly and finish the fight against Al Qaida and the Taliban in Afghanistan. I will rebuild our military to meet future conflicts, but I will also renew the tough, direct diplomacy that can prevent Iran from obtaining nuclear weapons and curb Russian aggression. I will build new partnerships to defeat the threats of the 21st century: terrorism and nuclear proliferation, poverty and genocide, climate change and disease. And I will restore our moral standing so that America is once again that last, best hope for all who are called to the cause of freedom, who long for lives of peace, and who yearn for a better future.[44]

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[43] Andrew Sullivan, *Did Osama Win?; Bin Laden hoped to provoke a civilizational war,* Newsweek, p. 20 (Sep. 12, 2001). For more in-depth analysis of the dramatic expansion of executive authority post-9/11 *see* Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*, (Little, Brown and Company, 2007) and Frederick A. O. Schwartz, Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror*, (The New Press, 2008).

[44] Transcript of the speech available at http://www.nytimes.com/2008/08/28/us/politics/28text-obama.html?pagewanted=all

It appeared Obama intended to make good on his lofty campaign rhetoric to begin restoring America's moral standing once he was sworn in as president. On his second day in office he signed an executive order directing a review of each detainee held at Guantanamo Bay, suspension of military commissions, and closure of the detention facility not later than January 22, 2010.[45] In May 2009, President Obama gave a major speech at the National Archives – the home, as Obama noted, of the Declaration of Independence, the Constitution, and the Bill of Rights – on changing course on national security and returning to American values. He said:

> I've studied the Constitution as a student, I've taught it as a teacher, I've been bound by it as a lawyer and a legislator. I took an oath to preserve, protect, and defend the Constitution as Commander-in-Chief, and as a citizen, I know that we must never, ever, turn our back on its enduring principles for expedience sake. I make this claim not simply as a matter of idealism. We uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset – in war and peace; in times of ease and in eras of upheaval…
>
> Unfortunately, faced with an uncertain threat, our government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often our government made decisions based on fear rather than foresight; that all too often our government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us – Democrats and Republicans, politicians, journalists, and citizens – fell silent. In other words, we went off course.[46]

As the 2012 presidential election nears, it is clear that America has made no real progress towards regaining its moral authority at home or abroad. Despite the pledges President Obama made in 2008 and 2009 to change course and recommit to America's enduring principles, the detention facility at Guantanamo Bay remains open, indefinite detention without trial continues,

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[45] Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Jan. 22, 2009, available at http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities

[46] Remarks by the President on National Security, May 21, 2009, available at http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

and he has embraced and even expanded nearly all of the hawkish practices he inherited from President Bush.[47] Republican candidate Mitt Romney has pledged that if he is elected he will take an even more radical national security approach than President Obama and restore some of the most extreme Bush-era practices that Obama banned.[48]

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

A. Deeming the Geneva Conventions "Quaint" and "Obsolete"

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

> As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for G.P.W. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities or war crimes, such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms and scientific instruments.[49]

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[47] Charlie Savage, *Election Will Decide Future of Interrogation Methods for Terrorism Suspects*, N.Y. Times, A14, Sep. 28, 2012. President Obama signed an executive order on Jan. 22, 2009, banning the enhanced interrogation techniques used during the Bush administration that many called torture. It appears he has made good on ending those practices. *Id*.

[48] *Id*.

[49] Memorandum from White House Counsel Alberto Gonzales to President George W. Bush, Jan. 25, 2002. http://www.torturingdemocracy.org/documents/20020125.pdf

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

B. Creating a New Status for Which No Laws Apply

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

> To say that the specific provisions of the Geneva and Hague Conventions do not apply in the current conflict with the Taliban militia as a legal requirement is by no means to say that the principles of the laws of armed conflict cannot be applied as a matter of U.S. Government policy. The President as Commander in Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgression against those standards… A decision to apply the principles of the Geneva Conventions or of other laws of war as a matter of policy, not law, would be fully consistent with the past practices of the United States.[50]

[50] Draft Memorandum from John Yoo and Robert J. Delahunty to William J. Haynes, III, Jan. 9, 2002, at pg. 26 of 42, available at: http://www.torturingdemocracy.org/documents/20020109.pdf Assistant Attorney General Jay S. Bybee signed the final version on Jan. 22, 2002. http://www.torturingdemocracy.org/documents/20020122.pdf Bybee is now a judge on the U.S. Court of Appeals for the Ninth Circuit. http://www.fjc.gov/public/home.nsf/hisj Yoo is a professor of law and the University of California at Berkley. http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235 A Department of Justice investigation found that Bybee and Yoo should not face criminal charges over their legal opinions, but that they committed professional misconduct and should be reported to their state bars for disciplinary actions. In February 2010, Associate Attorney General David

Consistent with this legal guidance, President Bush signed a memorandum on February 7, 2002, saying the United States would abide by the Geneva Conventions with respect to the conflict in Afghanistan, but that the conventions did not apply to captured Al Qaeda and Taliban forces.[51] As he explained: "Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva."[52]

The Supreme Court later invalidated the flawed legal analysis that allowed individuals to be held indefinitely outside the reach of any law. In 2004, the Court held that detainees at Guantanamo Bay had the right under the federal habeas statute to challenge in federal court the government's basis for holding them in detention.[53] In 2006, the Court held that President Bush did not have the unilateral authority to create a military commission system to try alleged unlawful enemy combatants and that Common Article 3 of the Geneva Convention applied to detainees.[54] In 2008, the Court held that even though Congress expressly revoked federal court jurisdiction to hear detainee cases brought under the habeas statute in response to the Court's earlier decision, detainees nonetheless had a constitutional right of habeas corpus to challenge the legality of their detention.[55] Despite the claims that a president has virtually limitless and unchecked authority to act in matters involving national security, the Supreme Court has made it

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Margolis overruled the findings and recommendations. Jess Bravin, *Lawyers Cleared Over 9/11 Memos*, Wall Street Journal, p. A5, (Feb. 20, 2010).

[51] President George W. Bush, "Humane Treatment of al Qaeda and Taliban Detainees," Feb. 7. 2002, available at: http://www.torturingdemocracy.org/documents/20020207-2.pdf

[52] *Id*.

[53] Rasul v. Bush, 542 U.S. 446 (2004).

[54] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[55] Boumediene v. Bush, 553 U.S. 723 (2008).

clear that all three branches of government have a role to play and that "a state of war is not a blank check for the President."[56]

C. Rebranding Torture

Torture is prohibited by Common Article 3 of the Geneva Conventions.[57] It is also prohibited by the Universal Declaration of Human Rights, the Convention Against Torture, the War Crimes Act, and the U.S. Criminal Code.[58] The United States was a leading proponent of these anti-torture measures. When President Ronald Reagan sent the Convention Against Torture to the Senate for advice and consent for ratification in 1988 he wrote:

> The United States participated actively and effectively in the negotiation of the Convention. It marks a significant step in the development during this century of international measures against torture and other inhuman treatment or punishment. Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.
>
> The core provisions of the Convention establish a regime for international cooperation in the criminal prosecution of torturers relying on so-called "universal jurisdiction." Each State Party is required either to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution.[59]

The United States has taken severe action against those who commit torture when its vital national interests are not involved. In January 2009, a federal court in Miami sentenced Charles McArthur Emmanuel to 97 years in prison for, among other things, torture committed in

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[56] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004). The "blank check" quote in Justice O'Connor's opinion is from Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) and refers specifically to the rights of U.S. citizens. The Court's subsequent decisions in detainee cases, however, show that periods of armed conflict do not give presidents a blank check over non-citizens either.

[57] *Supra* note 22.

[58] Universal Declaration of Human Rights, Article 5, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.unhcr.org/refworld/docid/3ae6b3a94.html [accessed 28 September 2012]; War Crimes Act, 18 U.S. Code §2441; U.S. Criminal Code, 18 U.S. Code Chap. 113C.

[59] Ronald W. Reagan, Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment, May 20, 1988. http://www.reagan.utexas.edu/archives/speeches/1988/052088f.htm The Senate gave consent on Oct. 27, 1990. http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:100TD00020:

Liberia.[60] It was the first conviction and sentence ever under the federal torture statute enacted in 1994. Mr. Emmanuel, also known as Chuckie Taylor, is the son of former Liberian President Charles Taylor. From 1997 to 2003, he helped his father maintain power by torturing and murdering his critics. In May 2012, the International Criminal Court at The Hague sentenced the father, Charles Taylor, to 50 years in prison for aiding and abetting war crimes committed in Sierra Leone. Taylor supplied weapons to the rebel forces of the Revolutionary United Front (RUF) in exchange for blood diamonds. The RUF abducted children and made them into child soldiers, forced women into sexual slavery, and mutilated or murdered many others during more than a decade of civil war. Taylor's case marked the first war crimes conviction and sentence of a former head of state by an international war crimes tribunal.[61]

The United States does not have as good a record when it comes to torture committed on its behalf. In the wake of the terrorist attacks in September 2001, some within the Bush administration wanted to use more aggressive interrogation techniques to extract information from suspected terrorists and terrorism supporters, but worried that they may cross the line and commit torture. The Department of Justice stepped in and provided legal cover for more harsh interrogation tactics. In a 46-page memorandum prepared for White House Counsel Alberto Gonzales in August 2002, Assistant Attorney General Jay Bybee wrote:

> We conclude that for an act to constitute torture as defined in Section 2340 [the torture provision of the U.S. Criminal Code], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent to intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that

[60] Carmen Gentile, *Son of Ex-President of Liberia Gets 97-Year Prison Sentence*, New York Times, p. A14 (Jan. 10, 2009).
[61] Drew Hinshaw, *Court Sentences Liberian Dictator*, Wall Street Journal, p. A13 (May 31, 2012).

> would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party. The legislative history simply reveals that Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.[62]

In addition to sanctioning extreme standards for permissible interrogation methods – anything short of the pain caused by death or organ failure – Bybee also provided legal cover in the event the torture line was crossed. He concluded that any prohibition or criminal penalty for torture would be an unconstitutional intrusion on the president's authority as Commander-in-Chief in a time of war. He said:

> Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional… [T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces.[63]

Given the extreme threshold the Bybee memorandum set for acts constituting torture and the legal shield it provided for violations, [64] the Department of Defense and the Central

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[62] Memorandum for Alberto R. Gonzales, Counsel for the President, *Re. Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,* Aug. 1, 2002, p. 1. http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf

[63] *Id*. at pgs. 31, 33.

[64] The memoranda drafted by Department of Justice lawyers sanctioning extreme interrogation techniques are commonly known as "the torture memos." Editorial, *No Penalty for Torture*, New York Times, p. A26 (Sep. 5, 2012).

Intelligence Agency implemented a series of enhanced interrogation techniques.[65] In some instances the enhanced techniques crossed the line into torture.

Susan Crawford served as General Counsel of the Army during the Reagan administration and served as the Department of Defense Inspector General under former Vice-President Dick Cheney when he was Secretary of Defense. She was appointed to be the senior official responsible for overseeing the military commissions at Guantanamo Bay by Secretary of Defense Robert Gates in February 2007 shortly after she retired as an appellate court judge. In an interview with the Washington Post's Bob Woodward published in January 2009 in the final days of the Bush administration, Crawford explained why she dismissed military commission charges against Guantanamo detainee Mohammed al-Qahtani: "We tortured Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case" for prosecution.[66]

The treatment Mohammed al-Qahtani experienced was not unique. The Central Intelligence Agency acknowledged waterboarding three high-value detainees held in secret sites outside the United States.[67] Khalid Sheikh Mohammed, the alleged mastermind behind the 9/11 attacks, was waterboarded 183 times.[68] Other investigations have found many more examples of

[65] Secretary of Defense Donald Rumsfeld, based on the legal advice of his general counsel, William J. Haynes, III, signed a memorandum authorizing harsh interrogation techniques that included: stress positions, forced standing for up to four hours, depravation of light and sound, hooding, removing all of the detainee's clothing, shaving the detainee's facial hair, playing on phobias such as a fear of dogs, threats of harm to the detainee or his family, temperature extremes, dietary manipulation, slapping and poking, and waterboarding. Rumsfeld wrote on the memorandum, "I stand for 8-10 hours a day. Why is standing limited to 4 hours?" Memorandum for the Secretary of Defense from the Department of Defense General Counsel, *Counter-Resistance Techniques*, Nov. 27, 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf

[66] Bob Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites 'Abusive' Methods Against 9/11 Suspect*, Washington Post, p. A1 (Jan. 14, 2009).

[67] Dan Eggen, *Justice Dept. 'Cannot' Probe Waterboarding, Mukasey Says*, Washington Post, p. A4 (Feb. 8, 2008).

[68] Peter Finn and Julie Tate, *U.S. looking into 2 detainee deaths*, Washington Post, p. A1 (Jul. 1, 2011).

conduct by members of the U.S. armed forces or intelligence agencies that would in the minds of most people constitute torture.[69]

President Obama ordered an end to enhanced interrogation techniques and compliance with the Army Field Manual's limitations on interrogation methods in January 2009.[70] He has, however, taken a "look forward, not back" approach to the abuses committed during the Bush administration.[71] In his speech on national security in May 2009, he said:

> [W]e need to focus on the future. I recognize that many still have a strong desire to focus on the past. When it comes to actions of the last eight years, passions are high. Some Americans are angry; others want to re-fight debates that have been settled, in some cases debates that they have lost. I know that these debates lead directly, in some cases, to a call for a fuller accounting, perhaps through an independent commission.
>
> I've opposed the creation of such a commission because I believe that our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice.[72]

Attorney General Eric Holder announced in June 2011 that an investigation into about 100 cases of potential abuse of detainees while in C.I.A. custody was closed and that only two cases where detainees died while in custody would be pursued with a view towards potential prosecution.[73] On August 20, 2012, he announced that there was insufficient evidence to file

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[69] *See Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and Its Impact*, Physicians for Human Rights, Jun. 2008, http://brokenlives.info/ and *Delivered Into Enemy Hands, US-Led Abuse and Rendition of Opponents to Gaddafi's Libya*, Human Rights Watch, Sep. 6, 2012, http://www.hrw.org/reports/2012/09/05/delivered-enemy-hands

[70] Executive Order 13491, *Ensuring Law Interrogations*, Jan. 22, 2009. http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations National security advisors to Republican presidential candidate Mitt Romney have suggested that if he is elected he should repeal Obama's order and authorize secret enhanced interrogation techniques. Romney has said that he does not consider waterboarding to be torture. Charlie Savage, *Election Will Decide Future of Interrogation Methods for Terrorism Suspects*, New York Times, p. A14 (Sep. 28, 2012).

[71] Editorial, *No Penalty for Torture*, New York Times, p. A26 (Sep. 4, 2012). As the editorial notes, while no one is facing prosecution for committing torture, former C.I.A. officer John Kiriakou is facing trial for talking with a reporter about torture and identifying who was involved.

[72] Supra note 46.

[73] Greg Miller, *Justice closes CIA prisoner probe without charges*, Washington Post, p. A2 (Aug. 31, 2012).

charges in the two death cases and they were closed.[74] A decade after the Bybee memorandum opined that the Commander-in-Chief could order the detention and interrogation of anyone, anywhere, using any means he chooses, and that he could do so with impunity, the memorandum's prediction proved to be true.

D. Indefinite Detention Without Trial or Meaningful Review

The Third Geneva Convention on the Treatment of Prisoners of War permits the detention of captured enemy forces and mandates that they "shall be released and repatriated without delay after the cessation of active hostilities."[75] That works reasonably well in a conventional war where the warring parties at some point in time decide to enter into an agreement to end hostilities, but it does not work so well in a war declared on a tactic – terrorism – that in all likelihood will never reach a termination point.[76] It could mean a life sentence for those suspected of involvement in terrorism that are captured and held in detention without charges or trial.

A total of 779 men have been detained at Guantanamo Bay since the detention facility opened on January 11, 2002.[77] On September 29, 2012, the youngest detainee, and the last detainee from a western nation, Omar Khadr, boarded an airplane bound for Canada. With his departure, the detainee population declined to 166 men.[78]

On September 21, 2012, the Department of Justice released the names of 55 Guantanamo detainees that were approved for transfer to the custody of other countries as part of a review of

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[74] *Id.*
[75] Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), Article 118, 75 U.N.T.S. 135, signed 12 August 1949, entered into force 21 Oct. 1950.
[76] Editorial, *The detainee problem; Holding terrorism suspects indefinitely without a trial offends American notions of due process*, Los Angeles Time, p. A25 (Sep. 23, 2012).
[77] The Guantanamo Project, an interactive database on Guantanamo detainees prepared jointly by the New York Times and NPR. http://projects.nytimes.com/guantanamo/
[78] Detainee Transfer Announced, Dept. of Defense News Release No. 784-12, Sep. 29, 2012. http://www.defense.gov/releases/release.aspx?releaseid=15592. *See* also Ian Austen, Sole Canadian Held at Guantanamo Bay is Repatriated, New York Times, p. A26 (Sep. 30, 2012).

all detainee cases ordered by President Obama in early 2009.[79] The review task force identified about 36 detainees that could face criminal prosecution in a military commission or federal court.[80] That leaves about 75 men, some already starting their second decade in detention, who may never face trial or transfer from Guantanamo.

The Supreme Court said in June 2008 that Guantanamo detainees have the right to challenge the basis for their detention in federal court.[81] Afterwards, the government was unable to persuade judges at the U.S. District Court for the District of Columbia by a preponderance of evidence that there was a legitimate basis for detention in most cases the judges considered. In the first two years after the Supreme Court's decision, detainees won 59 percent of their habeas challenges.[82] However, in July 2010 the U.S. Court of Appeals for the District of Columbia Circuit reversed the first case it reviewed, Al-Adahi v. Obama, where habeas was granted.[83] After that decision, the government prevailed in 11 of the next 12 habeas cases, and the D.C Circuit reversed the one case where habeas was granted.[84] A Seton Hall study concluded: "The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the

[79] *U.S. Names 55 Set for Transfer from Guantanamo*, New York Times, p. A6, (Sep. 22, 2012). There are some concerns about the potential transfer of detainees from Guantanamo. Those assessed as a low risk to the United States and its allies have already been transferred to other countries. The current list of 55 approved for transfer includes 34 assessed as high-risk and the 19 others medium-risk. Thomas Jocelyn, *34 "high risk" Guantanamo detainees approved for transfer*, The Long War Journal (Sep. 24, 2012). http://www.longwarjournal.org/archives/2012/09/34_high_risk_guantan.php

[80] Guantanamo Review Task Force, Final Report, Jan. 22, 2010. http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf

[81] Boumediene, supra note 55.

[82] *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review*, Seton Hall University School of Law Center for Policy and Research, May 1, 2012, at 1. http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf

[83] Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

[84] *Supra* note 82 at 4.

government's allegations. Now the government wins every petition."[85] In June 2012, the Supreme Court declined review in seven cases involving detainees.[86]

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

> The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends the separation-of-powers principles and our constitutional scheme.[87]

While Chief Judge Lambert's ruling offers a glimmer of hope that the judicial branch still has some role to play in the cases of the Guantanamo detainees that will not face trial or transfer to another country, the prospect of any meaningful judicial intervention is unlikely. Lambert's former colleague, Retired District Judge James Robertson, said in July 2012 at a symposium marking the fourth anniversary of the Supreme Court's Boumdiene decision that the Court of Appeals for the District of Columbia Circuit has "gutted" the decision and "taken the capital 'M'

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[85] *Id*. at 1.

[86] Adam Liptak, *Justices Reject Detainees' Appeal, Leaving Cloud Over Earlier Guantanamo Ruling*, New York Times, p. A14 (Jun. 12, 2012). The case of Adnan Latif was the one post-Al-Adahi case where habeas was granted but then reversed by the D.C. Circuit Court of Appeals, and it was one of the seven cases the Supreme Court declined to consider in June 2012. Latif had been cleared for transfer in 2006 and 2008, and again by the detention review task force in 2010. He was found dead in his cell at Guantanamo on September 8, 2012. He had been at Guantanamo over ten and a half years. Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, New York Times, p. A20 (Sep. 12, 2012).

[87] In Re: Guantanamo Detainee Continued Access to Counsel, memorandum opinion, p. 32 (Sep. 6, 2012). http://harpers.org/media/image/blogs/misc/counsel-access-decision-amended1.pdf

off of the word 'meaningful'" in "meaningful review."[88] He noted that not a single detainee has been released as a direct result of a court's habeas order, but he was cautiously optimistic about the future: "Some court, some day is going to find that the government can't hold these people for the rest of their lives."[89]

E. Extrajudicial Assassination and Drone Strikes

Unmanned aerial vehicles – UAVs in military vernacular or, as they commonly referred to by the public, drones – have been in use from the start of the ill-named war on terrorism. There use has, however, increased dramatically since President Obama took office in January 2009.[90] Not only has Obama used drone strikes more frequently than Bush did, he has also used them in more places, in some instances launching strikes far removed from the battlefield as most people envision that term. There are scores of issues related to the use of drones, each one worthy of in-depth analysis, but particularly relevant to the erosion of the distinction between civilians and combatants is the unilateral power of the president to authorize killing almost anyone, almost anywhere at any time, and the legal authority for the C.I.A. to kill when it is a civilian agency that does not enjoy combatant immunity.

Since 9/11, the United States has carried out drone strikes in Pakistan, Yemen and Somalia.[91] The longest running and most extensive program by far is the one focused on militants in the tribal region of Pakistan. The New America Foundation has documented U.S. drone strikes conducted inside Pakistan from the first one authorized by President Bush in 2004

[88] Lyle Denniston, *Ex-judge: Boumediene is being "gutted,"* SCOTUSblog (Jul. 17, 2012). http://www.scotusblog.com/2012/07/ex-judge-boumediene-is-being-gutted/

[89] *Id.* The Guantanamo detainees are, in some respects, fortunate to have access to the courts. Federal courts have so far been unwilling to extend habeas to the much larger detainee population held at Bagram Air Base in Afghanistan. Lyle Denniston, *The fate of Bagram detainees*, SCOTUSblog (Jul. 16, 2012). http://www.scotusblog.com/2012/07/the-fate-of-bagram-detainees/

[90] Peter Bergen and Katherine Tiedemann, *The Year of the Drone*, Foreign Policy (Apr. 26, 2010).

[91] Karen DeYoung, *U.S. sticks to secrecy as drone strikes surge*, Washington Post, p. A1 (Dec. 20, 2011).

to the latest in 2012.[92] They report that drone strikes in the country peaked in 2010 when there were 122 strikes – one every three days – that killed between 608 and 1,028 people.[93] Their data show that over time the U.S. has gotten increasingly better at killing suspected militants and not civilians, but still they estimate that militants account for just about 84 to 85 percent of the 1,877 to 3,186 people killed in drone strikes.[94] Peter Bergen, the Director of the National Security Studies Program at the New America Foundation and CNN's national security analyst, said that civilians and unknown casualties account for about 11 percent of those killed during President Obama's administration and about 33 percent during President Bush's tenure in office.[95] As a result of the U.S. drone campaign, Pakistani civilians in the tribal regions are afraid to congregate in groups for even social gatherings and three-fourths consider the United States an enemy of Pakistan.[96]

The Obama drone program differs from the Bush administration's approach not just in frequency but in scope, too. Under Bush, drone strikes were directed at specific individuals believed to be high-value leaders in terrorist organizations. Under Obama, strikes may be directed at unidentified individuals who are engaged in activities with characteristics that appear to be terrorism related. The former are known as "personality strikes" and the latter "signature

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[92] *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, The New America Foundation. http://counterterrorism.newamerica.net/drones

[93] *Id*.

[94] *Id*.

[95] *Drone strikes kill, maim and traumatize too many civilians, U.S. study says*, CNN (Sep. 25, 2012). http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/index.html

[96] International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, pgs. 17, 96 (Sep. 2012). http://livingunderdrones.org/ Yemeni President Abdu Rabbu Mansour Hadi praises U.S. drone strikes in his country and downplays concerns about them triggering anti-American sentiment. Scott Shane, *Drone Strikes Draw Praise From Leader Of Yemen*, New York Times, p. A6 (Sep. 29, 2012). Yemeni citizens may not share their President's sentiments. After a drone strike killed ten civilians, including women and children, a local activist said: "I would not be surprised if 100 tribesmen joined the lines of al-Qaida as a result of the latest drone mistake. This part of Yemen takes revenge very seriously." Chris Woods, *Who is held to account for deaths by drones in Yemen?*, The Guardian, (Sep. 6, 2012). http://www.guardian.co.uk/commentisfree/2012/sep/06/drone-deaths-yemen

strikes."[97] Some joke that the criteria for "signature strikes" are so lax that "three guys doing jumping jacks" could be construed as a terrorist training camp while others worry that men loading a truck with fertilizer could be deemed bombmakers and subject to attack when perhaps they are just farmers.[98]

Additionally, the United States has two drone programs, one operated by the military and the other by the C.I.A.[99] The military run program is governed by the laws of war, but the C.I.A. is a civilian agency separate from the military. C.I.A. General Counsel Stephen Preston told an audience at Harvard Law School in April 2012 that they act "in a manner consistent with the four basic principles in the law of armed conflict governing the use of force," but a commitment to act consistent with those laws is not the same as being bound by them.[100] Some have called for turning over responsibility for all lethal drone operations to the military alone.[101] James Ross, Legal and Policy Director for Human Rights Watch, said: "When the CIA general counsel says that the agency need only act in 'a manner consistent' with the 'principles' of international law, he is saying the laws of war aren't really law at all. The Obama administration should make it clear that there's no 'CIA exception' for its international legal obligations."[102]

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[97] *Id*. at pgs. 12-13. *See* also Human Rights Clinic (Columbia Law School) and the Center for Civilians in Conflict, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*, p. 8 (Sep. 29, 2012) http://civiliansinconflict.org/resources/pub/the-civilian-impact-of-drones

[98] Jo Becker and Scott Shane, *Secret 'Kill List' Proves a Test Of Obama's Principles and Will*, New York Times, p. A1 (May 29, 2012).

[99] *Supra* note 91.

[100] Full text of the speech is available at http://www.lawfareblog.com/2012/04/remarks-of-cia-general-counsel-stephen-preston-at-harvard-law-school/

[101] *US: Transfer CIA Drone Strikes to Military*, Human Rights Watch, (Apr. 20, 2012). http://www.hrw.org/news/2012/04/20/us-transfer-cia-drone-strikes-military

[102] *Id*. The American Civil Liberties Union (ACLU) filed Freedom of Information Act requests with several federal agencies seeking information on the legal basis for drone strikes. The C.I.A. refused to confirm or deny that it operated a drone program. The Court of Appeals for the District of Columbia Circuit heard oral argument in the ACLU's lawsuit to compel disclosure on September 20, 2012. http://www.aclu.org/national-security/predator-drone-foia The court appeared skeptical of the government's claim that officials had never publicly acknowledged the existence of a C.I.A. drone program. Wells Bennett, *Yesterday's Oral Argument in ACLU v. CIA*, Lawfare Blog (Sep. 21, 2012). http://www.lawfareblog.com/2012/09/yesterdays-oral-argument-in-aclu-v-cia/

III. Conclusion

On September 14, 2012, President Obama traveled to Andrews Air Force Base for the arrival of the bodies of Ambassador Christopher Stevens and State Department employees Sean Smith, Glen Doherty and Tyrone Woods who were killed in Benghazi, Libya, in an attack on the U.S. Consulate on September 11.[103] Speaking at the ceremony, the President praised the men as heroes, saying they embraced and lived the American ideal. He said:

> That's the message these four patriots sent. That's the message that each of you sends every day – civilians, military – to people in every corner of the world, that America is a friend, and that we care not just about our own country, not just about our own interests, but about theirs; that even as voices of suspicion and mistrust seek to divide countries and cultures from one another, the United States of America will never retreat from the world. We will never stop working for the dignity and freedom that every person deserves, whatever their creed, whatever their faith.
>
> That's the essence of American leadership. That's the spirit that sets us apart from other nations. This was their work in Benghazi, and this is the work we will carry on…
>
> Most of all, even in our grief, we will be resolute. For we are Americans, and we hold our head high knowing that because of these patriots – because of you – this country that we love will always shine as a light unto the world.[104]

President Obama's reference to the United States shining as a light unto the world draws upon the words former President Ronald Reagan used often and made famous about the nation representing "a shining city on a hill."[105] The question is does America's light shine as a guide or as a warning?

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[103] David Nakamura, *President honors 'four patriots' who died in Benghazi*, Washington Post, p. A9 (Sep. 15, 2012).
[104] White House Press Office Release, "Remarks by the President at Transfer of Remains Ceremony for Benghazi Victims," Barack H. Obama, Sep. 14, 2012. http://www.whitehouse.gov/the-press-office/2012/09/14/remarks-president-transfer-remains-ceremony-benghazi-victims
[105] Lou Cannon, *President Extols State of Nation; Administration 'Restored the American Dream,' Reagan Says*, Washington Post, p. A1 (Jan. 26, 1988). The phrase comes from the Bible in the Book of Matthew, Chapter 5, Verse 14: "You are the light of the world. A city set on a hill cannot be hidden." New American Standard Bible (1995). http://bible.cc/matthew/5-14.htm

Since 9/11, the United States has disparaged and disregarded international agreements it helped create, crafted novel legal arguments in an effort to avoid application of laws it suddenly found inconvenient, redefined terms to fit its own purposes, and hid behind a curtain of secrecy whenever anyone challenged it.[106] Large numbers of Americans, both Democrats and Republicans, embrace the notion of virtually limitless presidential power: the Commander-in-Chief can ignore any law, foreign or domestic, that impedes what he or she alone deems necessary in the interest of national security; he or she can detain and torture anyone suspected of posing a threat; and if capture may prove too difficult he or she can order a civilian agency to hunt the suspect down and kill him. Are those American values the nation wants to hold up as examples to the world?

If the period since 9/11 reflects how the United States views it obligations under international humanitarian law it should have the integrity to renounce the agreements it will not honor. If, on the other hand, President Obama meant what he said in his May 2009 national security speech about unbending values being the nation's strongest national security asset then he needs to lead the way and practice what he preached.[107] Erasing clear distinctions and replacing them with blurred lines undermines the foundation of the law of war. The United States should decide if the foundation it spent decades helping to build is made of sandstone or granite.

[106] See Setty, Sudha, *Judicial Formalism and the State Secrets Privilege*, 38 Wm. Mitchell L. Rev. 1629 (2012).
[107] *Supra* note 46.