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**BARNES-WALL FOUNDATION OF SOUTH CAROLINA**

**MILITARY LEGITIMACY REVIEW AWARD 2014 ANNOUNCEMENT**

The Military Legitimacy Review (MLR) is pleased to announce that the Barnes Wall Foundation of South Carolina, after careful consideration and deliberation, has selected for its 2014 Military Legitimacy Review Award University of Pennsylvania Law School (UPenn Law) Class of 2015 Juris Doctor Candidate Jon Todd's work entitled:

**Rewriting the AUMF – Bringing Guidance to Executive Decisions on Combatancy and Returning the U.S to the Path of the War Convention**

The Barnes Wall Foundation, through the efforts of the MLR and also from recommendations of service academy, university and law faculty professors, sought nominations for this award amongst many deserving student-candidates. Mister Todd was a scholar examining Just War Theory at UPenn Law when he completed this superb and presciently timely work regarding the Authorization for Use of Military Force (AUMF) from the perspectives of expanded understanding of combatancy in international law and a respect for the longstanding principle of distinction.

The award includes publication in MLR as well as a monetary prize ($500.00).

This award is not intended to recognize a paper for academic credit in an independent study, but an award for the best paper in a class or group of 3 or more. The topic and paper should relate to legal and moral issues in military operations and/or strategy (e.g. democracy, human rights and the rule of law, and religion/cultural issues), with the winning paper being posted with the author's permission on the Military Legitimacy Review (MLR) website at http:// militarylegitimacyreview.com/

With this award a new cycle for 2015 begins, with submissions solicited for the next year's competition encouraged and accepted through April 7th, 2015. For additional details please contact the Editor in Chief of the MLR, Professor of Law Kevin Govern, via info@ militarylegitimacyreview.com and / or khgovern@avemarialaw.edu for additional details.

**BARNES-WALL FOUNDATION OF SOUTH CAROLINA**

**MILITARY SCHOLARSHIP AWARD 2014 ANNOUNCEMENT**

The Military Legitimacy Review (MLR) is pleased to announce that the Barnes Wall Foundation of South Carolina, after careful consideration and deliberation, has selected for its 2014 Military Scholarship award United States Military Academy (USMA) Class of 2016 Cadet Anna L. Gulbis' work entitled:

***THE INEFFECTIVENESS OF ARMED HUMANITARIAN INTERVENTION AND THE NEED FOR REFORM OF GLOBAL POLITICS TO PREVENT HUMAN RIGHTS VIOLATIONS***

The Barnes Wall Foundation, through the efforts of the MLR and also from recommendations of service academy, university and law faculty professors, sought nominations for this award amongst many deserving student-candidates. Cadet Gulbis was a scholar examining Special Topics In Just War Theory at USMA when she completed this superb and presciently timely work regarding armed humanitarian intervention and the principle of the Responsibility to Protect from the perspectives of United States national security.

The award includes publication in MLR as well as a monetary prize ($250.00) given in this inaugural year of competition for military scholars and those pursuing a career in uniformed service for having written the best paper on a topic related to military legitimacy.

This award is not intended to recognize a paper for academic credit in an independent study, but an award for the best paper in a class or group of 3 or more. The topic and paper should relate to legal and moral issues in military operations and/or strategy (e.g. democracy, human rights and the rule of law, and religion/cultural issues), with the winning paper being posted with the author's permission on the Military Legitimacy Review (MLR) website at http:// militarylegitimacyreview.com/

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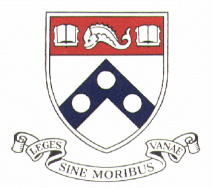
# Rewriting the AUMF – Bringing Guidance to Executive Decisions on Combatancy and Returning the U.S to the Path of the War Convention




Jon Todd[1]

## Introduction

As a country we are now in our second decade of the continuing effectiveness of the 2001 Authorization for Use of Military Force (AUMF). This legislation based on limited information and immediate legislative reaction to the horrific events of 9/11 continues to serve as the basis for ongoing military operations worldwide. Those operations include the invasion and continued occupation of Afghanistan, drone strikes throughout the Middle East that have resulted in thousands of deaths - intended and unintended,[2] the continued indefinite detention of dozens of persons[3] and the targeting and killing of at least one United States' citizen – though he clearly may not be the last.[4] In the furor and outrage over the attacks it is safe to assume that the primary focus of Congress was to empower the President to respond quickly and effectively to the overwhelming threat. However, the legislators in their haste, and perhaps inability to find common ground, were unable to provide meaningful guidance on any major questions of international law implicated by the contours of the new era of warfare.

It is my contention that if the AUMF is to have continuing effect it must be updated to reflect what I believe to be a trend toward an expanded understanding of combatancy in international law and a respect for the longstanding principle of distinction. In this update, Congress should address three factors in particular: who is a combatant – that is to say who falls in the category of targetable persons under the Law of Armed Conflict (LOAC), whether or not persons outside of this definition of combatancy can be targeted, and, if so, what criteria will be used to make those persons targetable. There have been other papers that discuss updating the

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[1] University of Pennsylvania Law School, J.D. expected 2015; Indiana University B.A. 2012.
[2] Matt Sledge, *The Toll of 5 Years of Drone Strikes: 2,400 Dead*, The Huffington Post, Jan. 1, 2014, *available at* http://www.huffingtonpost.com/2014/01/23/obama-drone-program-anniversary_n_4654825.html, last visited Mar. 26, 2014.
[3] Final Report Guantanamo Review Task Force, Jan. 22, 2010, at i-ii, *available* at http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf, last visited Mar. 26, 2014.
[4] Mark Mazzetti and Eric Schmitt, U.S. Militant, Hidden, Spurs Drone Debate, Feb. 28, 2014, at A1.

AUMF to include geographic and time limitations as well as the elimination of the requirement that the targetable classes of persons be somehow attached to the attacks that occurred on September 11th.[5] While these may be legitimate updates, those particular changes are not the focus of this paper.

I will proceed in six additional parts. In Section II I will focus on a brief overview of the U.S. approach to the concept of combatancy in the 'War on Terror' highlighting the issue of unlawful combatancy. In Section III I will provide a detailed analysis of the concept of combatancy historically and in international law in order to provide a foundation from which to further our discussion. I will then return to the U.S. approach to combatancy in more depth by analyzing the cases of Al-Aulaqi and Hamdan, as well the Military Commissions Acts of 2006 and 2009. In Section V I will briefly discuss the concept of combatancy and its relationship to the permission to target. I will then argue in Section VI that because the executive either has not acknowledged or cannot follow this evolving concept of combatancy in the context of modern warfare, Congress must reauthorize and update the AUMF to include and expand the concept of combatancy to include non-state actors, a recognition of partial compliance of combatants, and an incorporation of the ICRC guidance on Direct Participation in Hostilities into the actual text of the authorization so that the United States is not unnecessarily battling the developing international law. Finally, I will offer some concluding thoughts on the necessity of such an update. Before I begin, however, let me offer a brief review of principle of distinction.

### *LOAC Basic Principles and the Concept of Distinction*

The conceptions of jus ad bellum, the law governing the right to force, and jus in bello, the law governing the conduct of hostilities and protection of persons during conflict,[6] are the two primary foundations within just war theory and international humanitarian law (IHL).[7] While jus ad bellum concerns are certainly implicated in this discussion they are beyond the scope this paper. Instead I will focus primarily on jus in bello concerns. Under that heading there are three primary tenets creating the foundation of jus in bello, the principle of distinction, the

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[5] *See* Graham Cronugue, A New AUMF: Defining Combatants in the War on Terror, 22 Duke Journal of Comparative and International Law 377 (2012).

[6] *See* Laurie R. Blank, *A New Twist on an Old Story: Lawfare and theMixing of Proportionalities,* 43 Case W. Res. J. Int'l L. 707, 708 (2011).

[7] Also frequently referred to as the Law of Armed Conflict (LOAC). *See* David Luban, *Military Lawyers and the Two Cultures Problem*, Leiden Journal of International Law, Forthcoming; Georgetown Public Law Research Paper No. 12-057, *available at* SSRN: http://ssrn.com/abstract=2054832 ("Military Lawyers refer to the laws of war as "LOAC" - law of armed conflict – while civilians from the world of non-governmental organizations call the laws 'IHL' – international humanitarian law.")

principle of proportionality and the principle of military necessity.[8] Again, while certainly implicated in this discussion, these last two foundational principles of IHL are not the focus of this paper. The principle of distinction, however, is at the very core of the difficulty surrounding combatant status and presidential action under the AUMF.

The principle of distinction, in broad strokes, encompasses the idea that "parties to [a] conflict shall at all times distinguish between civilians and combatants.''[9] As would follow, attacks may only be directed at combatants and military objectives and therefore, attacks must not be directed against civilians.[10] This rule applies regardless of circumstance, whether or not the party in action is acting offensively or defensively.[11] The principle exists primarily to minimize the amount of harm inflicted to non-combatants.[12] Nevertheless, while attacks may not be directed against civilians, a necessary and proportional attack of a military objective that will result in foreseeable harm to civilians (including lethal harm) as a collateral damage is not prohibited by IHL. With that foundational understanding of distinction in mind, let us turn to the problems presented to the concept in the AUMF initiated 'War on Terror.'

**Combatancy in the 'War on Terror'**

***The Emergence of Unlawful Combatancy in the U.S.***

While seemingly straightforward in its declaration, the principles of distinction and combatancy encounter significant definitional problems in the context of modern warfare, especially in conflict with non-state actors, or state actors who do not comply with the requirements of IHL. This is clearly illustrated in the context of the United States' 'War on Terror'.

With the passing of the AUMF in the wake of the September 11th attacks, the United States in essence declared war on the Taliban and Al Qaeda as the primary forces responsible for the attacks. From the outset, the United States declared Al Qaeda members to be outside the protection of the Geneva Conventions and combatant status because Al-Qaeda constitutes a non-

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[8] Susan Tienfenbrun, *The Failure of International Laws of War and the Role of Art and Story-Telling as a Self-Help Remedy fro Restorative Justice,* 12 Tex. Wesleyan L. Rev. 91, 118 (2005).
[9] This tenet of customary IHL was codified in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. While codified in this Convention, the historical and normative foundations of the concept run much deeper as I will discuss more fully in Section III of this paper.
[10] *Id.* at art. 51.
[11] *Id.*
[12] *Id.* at art 48.

state foreign terrorist group that is not, and cannot be, a member to the Conventions by nature of its status. [13]

The Taliban presented a different problem. Afghanistan was a party to the Geneva Conventions and because the Taliban was the de facto ruling party of Afghan state, the United States determined that the Geneva Convention protections afforded to combatants applied to Taliban members, at least initially.[14] However, almost immediately the American military forces encountered difficulty in conflict with the Taliban because of their lack of distinguishability from the civilian populace.[15] In fact, members of the Taliban forces were known to make of use of civilian appearance to create a strategic military advantage in combat.[16]

In addition to the difficulty presented by an inability to distinguish Taliban combatants from civilians due to their failure to wear uniforms or a distinctive mark, the U.S. was presented with another difficulty. The Taliban did not have cognizable military hierarchy and therefore lacked transparent and accountable chain of command.[17] This arguably led to a rise in the tactics listed above, as those in command did not hold individual members of the fighting force responsible for their tactics.[18] At any rate, even if those in authority had been able to limit their subordinates' behavior to the internationally accepted Geneva standards, at least one commentator has argued that they outright rejected the IHL anyway.[19]

The difficulty such tactics presented to the IHL conception of distinction is apparent. If the enemy chooses to carry his arms discreetly, in the attire of a civilian, it unquestionably increases the risk to actual civilians and does little to forward the rule of law.[20] Such action

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[13] Memorandum from George Bush, President of the United States, to Richard Cheney, Vice President of the United States, Humane Treatment of al-Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf ; *See also*, Corn *supra* note 11, at 255-56.

[14] *Id.* That is to say that the United States came to the determination that the Taliban met the standard for the right kind of person prong.

[15] Lt. Col. Joseph Bialke, *Al-Qaeda and Taliban: Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. Rev. 1, 31 (2004)

[16] *Id.* As an example of this, Bialke noted that there were even male Taliban combatants captured "while hidden beneath traditional female burqas in mosques."

[17] *Id.* at 30

[18] *Id.*

[19] *Id.*

[20] *See* Derek Jinks, *Protective Parity and the Laws of War*, 79 Notre Dame L. Rev. 1493, 1526 (2004) ("when an enemy combatant removes his uniform (donning only civilian clothing) and conceals his weapons, he has committed conduct that arguably both (1) deprives him upon capture of POW status, and (2) transgresses the rule of distinction (and perhaps the prohibition on perfidy)--hence, endangering innocent civilians.").

makes it nearly impossible to make a meaningful divergence between combatant and civilian. In the view of the United States this behavior prevented these individuals from being accorded combatant status and the privileges associated with it under the terms of the Geneva Convention.[21] The status of such individuals has been labeled unlawful combatancy.[22]

***Unlawful Combatancy and the Civilian-Combatant Divide***[23]

The term "unlawful combatants" is relatively modern.[24] Formally, it stems from Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention of 1899.[25] As was discussed at length above, this Article established that in order to qualify as "lawful" combatants and consequently to receive POW status, combatants must be associated with a state and to satisfy the four conditions discussed at length above: 1) to be commanded by a person responsible for his subordinates; 2) to have a fixed distinctive sign recognizable at a distance; 3) to carry arms openly; 4) to conduct their operations in accordance with the laws and customs of war.[26]

In most cases, in order to qualify for a POW status, two different sets of requirements must be fulfilled. These requirements are sometimes referred to as the "right type of conflict" and the "right type of person" tests. The "right type of conflict" test examines whether the relevant armed conflict is of international or non-international character, since according to the traditional reading of Geneva Convention III (GCIII), POW status can only be acquired in the former kind of conflict.[27] The "right type of person" test, examines whether the person in question is of the type of persons enumerated in Article 4 of GCIII, which in the context of "unlawful combatants" often boils down to the four criteria of Article 4A(2), which are identical to those mentioned above.[28]

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[21] George W. Bush, *Fact Sheet: Status of Detainees at Guantanamo*, February 7, 2002. Available at, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=79402.

[22] *See* Bialke, *supra* note 27, at 4-6.

[23] My thanks to Ilya Rudyak for his contribution of this section of the paper.

[24] Geoffrey Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 Stan. L. & Pol'y Rev., 253, 257 (2011). The term is often associated with mid-twentieth century, probably because in the US. the distinction between unlawful and lawful combatants was explicitly pronounced in 1942 by the Supreme Court in *Ex parte* Quirin, 317 U.S. 1 (1942).

[25] Convention (II) with Respect to the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 403.

[26] Corn, *supra* note , at 258.

[27] *Id*, at 255.

[28] *Id*, at 273. These tests were used in 2002 by the US. which was satisfied with examining only the "right type of conflict test" in order to deny POW status from Al-Qaeda detainees, but had to

Taking this section in combination with the previous section, it is not difficult to see how the United States came to the conclusion that the forces it was in conflict with did not meet the requirements for lawful combatancy and therefore did not . Al-Qaeda members did not qualify, as they did not satisfy the right type of conflict prong. Taliban fighters did not qualify because they did not satisfy the right type of person prong. In the view of the United States, this left the status of these enemies in a state of legal limbo, and so the only protections of IHL the U.S. believed applied to those enemies was the very basic protections provided by Common Article 3.[29] It is not clear, however, that this status is in line with the foundational conception of distinction or our historical understanding of combatancy. To explore this idea more fully, I will now turn to an analysis of combatancy from a historical and normative perspective.

**The Traditional Concept of Combatancy**

***The Normative Foundations of Combatancy – Walzer's War Convention***

Combatancy and distinction are subsets of a broader concept of a law of warfare and the idea that combat can be bounded, and in some sense, controlled. Political Philospher Michael Walzer calls this broader understanding the War Convention. The War Convention, as Walzer defines it, is the "set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles and reciprocal arrangements that shape our judgments of military conduct."[30] It is more than just the specific rules we have adopted to guide our behavior in war - it is, more importantly, the judgments, arguments, and agreements that underlie those rules. As Walzer says, "[t]he common law of combat is developed through a kind of practical casuistry. . . we look to the lawyers for general formulas, but to historical cases and actual debates for those particular judgments that both reflect the war convention and constitute its vital force."[31]

It is my contention that underlying this idea is the assumption that what is understood as the War Convention is being molded over time taking on the additional contours that time and experience bring. It will take on the colors of historical context while progressing through time with the men and women who shape it by their argument, and, eventually, shared foundations of agreement. Put differently, our understanding of the rules of war is a combination of both our historical experience and our collective judgment about those experiences as they develop over time. In the next section I will attempt to draw out this historical experience that colors our

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examine also the "right type of person test" in order to deny POW status from Taliban detainees. *Id*, at 277.

[29] Memorandum from the Secretary of Defense on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Dept. of Defense. (Jul. 7, 2006), *available at* http://www.defense.gov/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf

[30] Michael Walzer, Just and Unjust Wars, 44 (1977)

[31] Id. at 45.

understanding combatancy in our current understanding of the War Convention by surveying the concepts of distinction and combatancy in the historical context as well as the written rules that arose in that context.

## *The Historical Foundations of Combatancy*

### The Deep Historical Roots of Distinction – Pre-Modern Combatancy

The concept of a discrepancy between lawful combatant and "other combatant" can be traced back to the Roman Empire and the dichotomy that existed between the civilized and barbarian worlds.[32] Though the comparison is imperfect, it is useful for illustrating the presence of a concept somewhat similar in structure to a modern distinction between lawful and unlawful combatants. Roman law treated citizens and barbarians as discrete categories: citizens were offered the protections of Roman civil law while barbarian existed as individuals with little or no rights and certainly without any of the protections of citizenship.[33]

In the context of warfare, the citizen-barbarian difference was essential: "armed operations against barbarians could be initiated without invoking the blessings and protection of the Roman gods that preceded wars against non-barbarians because the former did not possess the legal personality necessary to be legitimate subjects of warmaking."[34] Importantly, the legal framework of combat that applied to each category of persons was markedly different. The Roman laws of war that applied to combat with civilized nations, the bellum hostile, limited some forms of combat and military action whereas combat with barbarians, governed by the bellum romanum, which was nearly unlimited.[35]

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[32] For an extended discussion of the distinction between civilian and barbarian in the Roman world see William A. Bradford, *Barbarians at the Gate: A Post September 11th Proposal to Rationalize the Laws of War*, 73 Miss. L.J. 639, 863-875 (2004)

[33] William L. Burdick, The Principles of Roman Law 201 (1989).

[34] Bradford, *Barbarians at the Gate*, paraphrasing Julius Caesar, The Gallic Wars, (H.J. Edwards Trans., 1970).

[35] Robert E. Stacey, *The Age of Chivalry*, in The Laws of War: Constraints on Warfare in the Western World 27 (Howard, et al. eds., 1994). For a more detailed discussion on the differences between bellum hostile and bellum romanum, see Id. at 27, 34. For the Romans, however, the legitimacy of the target turned only on the question of the legitimacy of the war.[35] Defense of the frontiers and pacification of barbarians were considered legitimate aims and, within these legitimate aims, the conduct of war in the category of bellum romanum was essentially unrestrained. Once the validity of the war had been established there was no "distinction between [barbarian] combatants and non-combatants." Rape, plunder, pillaging and eradication were considered acceptable, if not necessary, aspects of war. Thus, the distinction between citizen and barbarian, while perhaps suggesting the infancy of discerning legitimate from illegitimate

In the post-Roman world, the citizen-barbarian divide morphed into a Christian-Non-Christian divide.[36] In the non-Christian side of the divide the notion of combatancy held no place – as was the case with the barbarians in the Roman laws of war, no distinction needed to be made between those able to be targeted and those protected by their status as non-combatants.[37] However, the rules of conduct in intra-Christian warfare did began to develop, and it is during the eleventh century that there first appears to be something resembling the principle of combatancy.[38]

This development in part occurred with the rise of a noble class of knights who viewed combat as a part of their profession and an activity in which the laboring class were not supposed to participate.[39] In addition to the rise of a fighting class, the Roman church pioneered a movement titled the "Peace of God" that "laid down the principle that the weak who could do no harm should not be harmed."[40] These two factors taken together, the notions of professional combatants, and a subsection of the population who were illegitimate targets, form the foundation of a more modern conception of combatancy. Along with this development, we see the seeds of a concept of unlawful combatancy – those who participate in combat are bound by a certain professional code and there are those who are seen as undesirable in combat and without a place on the battlefield.

**The Lieber Code and a Modern Foundation for Unlawful Combatancy**

When the feudal system of knights and the limited warrior class began to give way to the professional armies of the industrial revolution, distinction between civilian and combatant was once again clouded.[41] Discussing this phenomena, Nathan Canestaro writes "[t]he expanding scale of warfare, the advent of popular revolutions in some European countries, especially France, and repeated clashes between professional soldiers and armed peasantry during the Napoleonic wars, brought commoners into warfare in significant numbers for the first time."[42]

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targets, still falls significantly short of both the modern conception of distinction and the separation of jus in bello and jus ad bellum. *Id.*

[36] Robert E. Stacey, *The Age of Chivalry*, in The Laws of War: Constraints on Warfare in the Western World 27, 28 (Howard, et al. eds., 1994)

[37] *Id.* at 27-29

[38] *Id.* at 30

[39] *Id.*

[40] Geoffrey Parker, *Early Modern Europe* in The Laws of War: Constraints on Warfare in the Western World 40, 41 (Howard, et al. eds., 1994).

[41] Eric Talbot Jensen, *Combatant Status: It's Time for Intermediate Levels of Recognition for Partial Compliance*, 46 Va. J. Int'l L. 209, 215.

[42] Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq,* 43 Colum. J. Transnat'l L. 73, 82 (2004)(Quoted in Jensen, *Combatant Status*).

Part and parcel of these extended movements was the development of mass conscription, which further distorted the line between civilian and combatant.[43]

That prospect of an armed civilian populace in combat with a uniformed military again arose in the context of the American Civil War. Faced with the many moral and military difficulties associated with civil war, American Professor Francis Lieber began a running discussion with Union General Henry Halleck on the most just ways to pursue the war.[44] As a result of his conversations with General Halleck and others, Lieber and a group of Union officers were commissioned to draft what would become Instructions for the Government Armies of the United States in the Field, General Orders No. 100, also known as Lieber's Code[45]

Embedded in this code was an inherent respect for civilian life, especially that of women and children. In article 19 of the Code, Lieber stipulates that "Commanders, whenever admissible, [should] inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children may be removed."[46] This provision embodies the now legally entrenched IHL concept of distinction between combatants and noncombatants and even extends noncombatants status to men.[47]

Article 24 of the Code goes even further to express this sentiment explicitly, "the principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." This was part of a broad theme within the code that recognized that "as civilization has progressed, the distinction made between the state and its army on the one hand, and this private individual on the other hand, has solidified."[48]

Prior to the ultimate drafting of the Lieber Code, General Halleck acknowledged a slightly different difficulty of prosecuting the war against the Confederacy and distinguishing combatant from noncombatant. In it, we see the most explicit recognition yet of the modern idea of unlawful combatancy. General Halleck's problem arose because, as he complained, "[t]he rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and

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[43] *See id.*

[44] Theodor Meron, *Francis Lieber's Code and Principles of Humanity,* 36 Colum. J. Trasnat'l L. 269, 270 (1998).

[45] *Id.*; See also, Instructions for the Government Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863)(hereinafter Lieber's Code), available at http://avalon.law.yale.edu/19th_century/lieber.asp

[46] Lieber's Code, *supra* note 48, at art. 19

[47] Though it is worth noting that the emphasis is still put on those perceived to be most vulnerable, women and children. *Id.*

[48] Theodor Meron, War Crimes Law Comes of Age 136 (1998)

attack our troops, to burn bridges, and destroy property and persons within our lines," and then "demand that such persons be treated as ordinary belligerents."[49]

Faced with the distinct problem of armed individuals operating with no visible connection to the Confederate Army, Lieber wrote in Article 82 of the Code that "[m]en . . . who commit hostilities . . . without being part and portion of the of the organized hostile army, and without sharing continuously in the war . . . divesting themselves of the character or appearance of soldiers," are thereby "not entitled to the privileges of prisoners of war."[50] Under the code such men were not combatants but merely "highway robbers or pirates."[51]

In this provision we see highlighted what would become the primary factors for determining combatancy for the next century: participation in the organized army and maintaining the appearance of soldiers, typically through the wearing of uniforms. Others, operating outside these norms, were not given any of the protections that we now associate with combatancy and were considered inherently unlawful - the equivalent to criminals. What is unclear in the Code is what rights, if any, the individual would retain under that status. The only clue within the provision itself is that the note that the individuals should be "shall be treated summarily,"[52] suggesting no particular existence of any due process rights.

**The Hague Conventions and the Baseline of Lawful Combatancy**

The Lieber Code in turn, provided the foundation for the Hague Conventions of 1899 and 1907. The Hague Conventions, in part, were a global response "to a real fear of new weaponry and total war," and attempt to limit the potential dangers of such a war.[53] More important to the purposes of this paper, the conventions ended up being an attempt to make explicit the laws of war. Section 1, Chapter 1, Article 1 of the Convention of 1899 codified the four criteria necessary for militia and volunteer corps to be considered a lawful belligerent[54], and incident to that status, to qualify them for POW status.[55]

As I mentioned briefly earlier in the paper, the four conditions necessary to establishing lawful combatancy are that units and individuals must: be commanded by a person responsible

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[49] Letter from Henry Halleck to Francis Lieber (Aug. 6, 1862) reprinted in Richard Shelly Hartigan, Lieber's Code and the Law of War 108 (1983)
[50] Lieber's Code, *supra* note 48, at art. 82
[51] *Id.*
[52] *Id.*
[53] Adam Roberts, Land Warfare: From Hague to Nuremburg, in The Laws of War: Constraints on Warfare in the Western World 116, 120 (Howard, et al. eds., 1994).
[54] For the purposes of this paper, the terms belligerent and combatant will be used interchangeably.
[55] Corn, *supra* note 11, at 258.

for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry arms openly; and conduct their operations in accordance with the laws and customs of war.[56] Inherent in these criteria was the understanding that such combatants fought on behalf of the state as the treaty itself only applied to the states.[57]

While the nations involved managed to agree on many issues, including a limitation the types of weapons available to belligerents and the criteria for lawful combatancy, there was no general agreement on the status of irregular resistance fighters and those who do not .[58] The concept of unlawful combatancy as embodied in the aforementioned Article 82 of the Lieber Code[59] was not a provision that made the initial transition into Hague Conventions. In its stead, a paragraph was included in the Preamble of the 1899 Hague Convention stating simply:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, paragraph could arguably incorporate the concept of unlawful combatancy in the form of resistance movements, but it is strikingly unclear how such a vague statement of "the principles of international law, as the result from the usages established between civilized nations" would apply in any set of circumstances.

Beyond this limited gesture at rights existing outside the bounds of the treaty, Article 2 of the Convention provides protection to civilian, i.e. un-uniformed, resistance in a non-occupied territory under the imminent approach of enemy forces and the spontaneous taking up of arms of the populace - so long as the population did not have time to organize itself in accordance with the principles of Article 1.[60] Even then, such an armed population was required to comport with the rest of the laws of war.[61] In the context of the deliberations that occurred during the Convention, however, the status of non-uniformed combatants remained unclear. Beyond the very limited circumstances of imminent invasion, there were arguments in favor of legitimizing

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[56] Convention (ii) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War of Land. The Hague, July 29, 1899 (hereinafter Hague Covention 1899) *Available at* http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D

[57] Corn, *supra* note 11, at 258

[58] Roberts, *supra* note 56, at 121-122

[59] Stating that "[m]en . . . who commit hostilities . . . without being part and portion of the of the organized hostile army, and without sharing continuously in the war . . . divesting themselves of the character or appearance of soldiers," are thereby "not entitled to the privileges of prisoners of war." Lieber's Code, *supra* note 48, at art. 82.

[60] *Id.* at §1 Ch. 1. Art. 2.

[61] *Id.*

continuing armed civilian resistance – especially in the context of a larger nation invading a smaller nation.[62]

In opposition, other nations raised the argument that by legitimizing resistance conflict was prolonged and intensified, ultimately increasing its destructive power.[63] The status of the un-uniformed, unidentified belligerent – the fighter who did not abide3 by Article 1 – was ultimately left unresolved. The topic was raised again at the 1907 Convention, but encountered the same underlying issues and ended in the same stalemate with one minor exception. Article 2 was amended to include an explicit restatement of the requirement that the spontaneously resisting populace must carry their arms openly.[64] Whether that minor change signifies a special emphasis on the open carrying of arms or an acknowledgement that the other aspects of Article 1 are not particularly feasible under the circumstances imminent invasion is unclear.

**The Geneva Conventions and the Beginnings of Expanded Lawful Combatancy**

The next major gathering of nations on the laws pertaining to the waging of war was the Geneva Convention of 1929 that attempted to codify some of the lessons of WWI. This Convention was concerned primarily with the treatment of prisoners of war. Toward that end, the Convention chose to reaffirm the stance of the Hague Convention of 1907 on what qualified a belligerent for prisoner of war status.[65] The Convention did so without making any substantive changes to those provisions.[66] It did, however vary from the foundation provided by The Hague Conventions by enumerating its provisions as those necessary to achieve POW status and not lawful belligerent status.[67] But, because POW status was derived from the original Hague standard for lawful belligerency, it is almost universally accepted that POW status and lawful combatancy are synonymous in the modern context.[68] After sixteen years and the most destructive global conflict in history, the world reconvened for the Geneva Convention of 1949.

The first three agreements of the 1949 Convention largely built upon the two Hague Conventions and the 1929 Convention of the treatment of Prisoners of War. The revision of the third agreement on Prisoners of War did clarify at least one unresolved question from the

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[62] Roberts, *supra* note 56, at 122
[63] *Id.*
[64] §1 Ch. 1. Art. 2., Convention (ii) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War of Land. The Hague, October 18, 1907. *Available at* http://www.icrc.org/applic/ihl/ihl.nsf/ART/195-200012?OpenDocument
[65] Convention relative to the Treatment of Prisoners of War. Part I, art. 1, Geneva, July 27, 1929, *available at* *http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C55E3AD1A838247C12563CD00518D11*
[66] See *id.*
[67] Corn, *supra* note 11, at 259
[68] *Id.*

previous treaties, however. Article 4 paragraph 2 states that members of organized resistance forces, even in already occupied territories – i.e. areas which were no longer facing an imminent threat of invasion, but were in fact already invaded – were to be granted prisoner of war status, as long as they met the four criteria for legal belligerency.[69]

This was not the only expansion of combatancy coverage that was considered in 1949. As Jensen notes, the "issue of extending combatant status to those participating in civil wars was also debated at the Diplomatic Conference of 1949," however, "[t]he delegates decided against it because they did not want to grant combatant protections to groups fighting against their own government."[70] The contention was that too broad a net of combatancy protection was unworkable and perhaps even dangerous.[71] This issue would arise again in the context of the Additional Protocols discussed later in this section.

The final important addition of the 1949 Convention was that of Common Article 3 which provided the standard for treatment of persons involved in a conflict "not of an international character occurring in the territory of one of the" parties to the treaty.[72] This provision arose in part because "the experiences of the inter-war years had apparently generated enough concern to justify an intrusion of international regulation into the realm of intra-state hostilities."[73] The protections of such persons according to Common Article 3, however, are significantly limited in scope in comparison to the protections afforded to POW's.

Under Common Article 3, those no longer participating in combat are "to be treated humanely" which in practice means that such individuals should not be subject to "violence to life and person . . . outrages upon personal dignity, in particular humiliating and degrading treatment," or "the passing of sentences and the carrying out of executions without the previous judgment pronounced by a regularly constituted court."[74] Such provisions are provided to these individuals even though they were not to be accorded lawful combatant status. Because individuals and groups covered under this heading are presumably individuals taking arms against their government, there was reluctance among the ratifying to states to grant POW status to such fighters and the accompanying combatant immunity.[75]

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[69] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 4, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I], *available at* http://www.icrc.org/applic/ihl/ihl.nsf/ART/375-590007?OpenDocument
[70] *Id.*
[71] *Id* at 221.
[72] *Id*. at art. 3.
[73] Corn, *supra* note 11, at 263.
[74] GC I, *supra* note 73, art. 3
[75] *See* Corn, supra note 11, at 264-65

**Additional Protocols I & II and the Continuing Trend of the Expansion of Lawful Combatancy**

As is illustrated by the preceding sections, for the majority of the late 19th and early 20th century the distinction between civilian and combatant was largely dependent on the combatant comporting with the four criteria of lawful belligerency, primarily through the open carrying of arms and the wearing of distinctive sign - either as a part of the military forces of a nation-state, or in response to the invasion of another nation-state.

The rise of anticolonial forces and revolutionaries more broadly in the later half of the 20th century presented a serious challenge to this definition of combatancy because it left uncovered many of those who were actually involved in fighting. [76] Combat in the post 1945 world often took the form of guerrilla warfare directed at imperially sponsored regimes or imperial nations themselves, precisely because it traditionally empowered weaker forces to confront stronger ones.[77] The existing status of the law, however, did not necessarily cover many of these conflicts because they were not inherently international conflicts and the fighters themselves did not behave in the traditional way that armed forces of nations had in the past. It was under these conditions and, indeed, in part a response to these conditions that the additional protocols of 1977 were added to the tomes of international law.[78]

Additional Protocol I (API) begins by expanding the scope of international conflicts and thereby also the range of individuals considered lawful combatants. Included in international conflicts after the passage of Additional Protocol I, are "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[79] This by no means the only change introduced by API to the existing standards for combatancy. Indeed the most substantive changes to existing legal regime come in Article 44.

Article 44 explicitly acknowledges the difficulty in the application of the uniform requirement in the post WWII environment stating, "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself."[80] Therefore the treaty signatories agreed that, such a combatant shall remain a combatant so long as he carries arms openly "(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment

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[76] George Andreopoulos, The Age of National Liberation Movements, in The Laws of War: Constraints on Warfare in the Western World 191, 192-93 (Howard, et al. eds., 1994)
[77] *Id.* at 193
[78] *Id.* at 191-193
[79] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I*)*, June 8, 1977, 1125 UNTS 3, at art. 1.
[80] *Id.* at art. 44. § 3.

preceding the launching of an attack in which he is to participate."[81] This provision fundamentally altered the existing paradigm by guaranteeing lawful combatancy solely on the basis of the open carrying of arms.[82]

Additional Protocol II (APII) addresses the other problem of internal conflict, an issue previously thought to be almost beyond the reach of international law due to concerns about state sovereignty, however, was minimally addressed by Common Article 3. The treaty added slightly stronger protections than the baseline added by Common Article 3, but did not stipulate extending the protections of lawful combatants (i.e., POW status and combatant immunity) to fighters in an intra-state conflict.[83]

**The Current War Convention on Combatancy and the United States' Approach**

Having made our thousand-year trek over the course of a just few short pages, what historical contours do we see in our current War Convention? First and foremost, there does appear to be a historical foundation for the concept of unlawful combatancy – a status that is, depending on which period you observe, bereft of many or all of the rights of lawful combatancy. The roots of it were present as early the Romans and it is unequivocally stated in clearly recognizable form in the Lieber Code. However, part and parcel with this idea is the second theme - the concept that unlawful combatants are only a subset of all combatants. Even in the rebelling Confederate Army there were far more fighters who were lawful combatants than unlawful combatants. That is to say, unlawful combatants were the exception and not the norm. Finally, and in my view, most importantly, we see trend toward the expansion of the coverage traditional protections afforded by combatant status, particularly in the last century. The additional protocols were an open attempt to reach and protect individuals who the War Convention at that time did not explicitly address.

So what relevance do these three themes have for the current iteration of unlawful combatancy? First, the United States position that the Taliban, Al- Qaeda, and terrorists more broadly are unlawful combatants is prima facie historically viable. The status of non-state actors under IHL has not yet coalesced, and even if it had coalesced in favor of inclusion of those entities, none of the current U.S. enemies complies with the full set of the four traditional criteria

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[81] *Id.*

[82] *See* Corn, *supra* note 11, at 273-74. The drafters of the article do, however, attempt to limit the reach of the provision in paragraph 7 which states that "[t]his Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict." *Id*. at art. 44 § 7. As the Commentary on the Protocol compiled by ICRC states, though not stipulated "this article is mainly aimed at dealing with combatants using methods of guerrilla warfare." Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949, 1684 (1984).

[83] Corn, *supra* note 11, at 269

required for lawful combatancy anyway. However, the United States' particular approach is unusual in that it puts its entire class of current enemies in category of unlawful combatants – a point that will be discussed more fully in the next section. The third theme presents a much broader challenge to the United States approach in that it suggest that our War Convention is generally moving in the opposite direction of the United States by seeking to expand the class of lawful combatants and the protections available to all persons. This third point will be discussed in more detail in section VI. At this juncture, however, I will turn to a much more nuanced account of United States' approach to combatancy by looking the government's defense of unlawful combatancy in the U.S. courts, the courts response to those assertions, and Congress' very limited handling of subject in the Military Commissions Acts.

**Combatancy in the Courts and in Congress under the AUMF**

There are two primary arenas in which combatant status and the principle of distinction is implicated and where the executive has claimed the AUMF as the basis for its authority: targeted killings by drone strikes, and indefinite military detentions. The determination that an individual is an enemy or unlawful combatant should be foundational to determining whether that individual can be a target for killing or detention under the AUMF, a point that will be discussed further in section V. As it stands, it is unclear what, if any, criteria the legislature intended to guide this determination. This is particularly concerning given the wide range of individuals that the executive has determined to fall under these categories. To illustrate this point I will discuss two potentially problematic individuals that the government has argued before the Supreme Court are covered by the AUMF as unlawful combatants - Anwar Al Aulaqi, and Salim Ahmed Hamdan.

**Salim Hamdan – The Unlawful Combatant by Conspiracy**

Salim Ahmed Hamdan was detained by the United States shortly after the opening of hostilities against Al Qaeda in late 2001.[84] Hamdan was to be tried by military commission under the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism military order for the charges of conspiracy to commit war crimes.[85] Under that charge Hamdan was to be held responsible for "willfully and knowingly join[ing] an enterprise of persons who shared a common criminal purpose to commit . . . offenses triable military commission" including attacking civilians, civilian objects, murder by an unprivileged belligerent and terrorism.[86]

In the Government's brief submitted to the Supreme Court in Hamdan, the attorneys argued unequivocally that "[i]n the AUMF, Congress authorized the use of military commissions

[84] Hamdan v. Rumsfeld, 548 U.S. 557, 568-69 (2006).
[85] *Id.*
[86] *Id.* at 570.

in the ongoing conflict against al Qaeda"[87] More explicitly they argued from the direct text that the AUMF authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States."[88] Further they contended the authorization included a recognition "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," quoting the AUMF preamble, 115 Stat. 224.[89]

The government then argued from the plurality of the Court's ruling in *Hamdi* that "the AUMF authorized the President to exercise his traditional war powers, and it relied on Quirin for the proposition that "the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' "[90] Because "[t]he trial and punishment of enemy combatants") is a fundamental incident of war, it follows that, in authorizing the President "to use all necessary and appropriate force" against al Qaeda, the AUMF authorized the use of military commissions against enemy combatants, such as Hamdan.

The government's primary contention, in other words, was that Hamdan, by his association with members of Al Qaeda, became an enemy combatant an thereby a legitimate target for military detention, and presumably targeted killing, under the AUMF. In regard to Hamdan's status as a combatant, the Supreme Court made sure to note that Hamdan did not have any command authority, did not play a leadership role, or participate in the planning of any of the the triable offenses.[91] In fact, there were only four actions taken by Hamdan himself that were said to be in furtherance of the conspiracy: acting as Osama bin Laden's body guard and driver, transporting weapons used by al Qaeda members, driving Osama bin Laden to al Qaeda sponsored camps, and receiving weapons training at said camps.[92]

A plurality of the Court found the claim that conspiracy was triable violation of the laws of war to be a troubling contention. It notes that for Hamdan to be tried by a law-of-war military commission the Government "must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."[93] The Court noted succinctly "[t]hat burden is far from satisfied here."[94] There has nearly never been a charge of conspiracy brought before a military commission and indeed the charge

[87] Brief for Respondents at 16, Hamdan v. Rumsfeld, 548 U.S. 557 (2004).
[88] *Id.*
[89] *Id.*
[90] *Id.* (internal citations omitted)
[91] *Id.*
[92] *Id.*
[93] Hamdan v. Rumsfeld, 548 U.S. 557, 603 (2006).
[94] *Id.*

does not appear in either The Hague or Geneva Conventions.[95] As the Court notes, "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt."[96]

**Al-Aulaqi – The Combatant by Positional Status and Encouragement of Others**

Anwar Al-Aulaqi was a dual Yemeni-American citizen and Muslim cleric operating out of Yemen in early 2011 when he was killed by a drone strike authorized and executed by the United States government.[97] What led the U.S. government to place the cleric on their target list? Below is the D.C. District Court's summary of the offenses that put Al-Aulaqi on that list and ultimately led to his death as a result of a drone strike:

> On July 16, 2010, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") designated Anwar Al–Aulaqi as a Specially Designated Global Terrorist ("SDGT") in light of evidence that he was "acting for or on behalf of al-Qa'ida in the Arabian Peninsula (AQAP)" and "providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]" In its designation, OFAC explained that Anwar Al–Aulaqi had "taken on an increasingly operational role" in AQAP since late 2009, as he "facilitated training camps in Yemen in support of acts of terrorism" and provided "instructions" to Umar Farouk Abdulmutallab, the man accused of attempting to detonate a bomb aboard a Detroit-bound Northwest Airlines flight on Christmas Day 2009. Media sources have also reported ties between Anwar Al–Aulaqi and Nidal Malik Hasan, the U.S. Army Major suspected of killing 13 people in a November 2009 shooting at Fort Hood, Texas. According to a January 2010 Los Angeles Times article, unnamed "U.S. officials" have discovered that Anwar Al–Aulaqi and Hasan exchanged as many as eighteen e-mails prior to the Fort Hood shootings. Recently, Anwar Al–Aulaqi has made numerous public statements calling for "jihad against the West," praising the actions of "his students" Abdulmutallab and Hasan, and asking others to "follow suit."[98]

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[95] *Id.*; For an extended discussion of the illegitimacy of conspiracy to commit war crimes as an offense against the laws of war see Id. at 604-61; *See also* Raha Wala, Note, *From Guantanamo to Nuremberg and Back: An Analysis of Conspiracy to Commit War Crimes Under International Humanitarian Law*, 41 Geo. J. Int'l L. 683 (2010); But see, Hamdan v. Rumsfeld, 548 U.S. 557, 689-91 (Thomas, J., Dissenting).

[96] *Id.* at 604 (quoting W. Winthrop, Military Law and Precedents 841 (rev. 2d ed.1920)).3

[97] Mark Mazzetti, Charlie Savage, and Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. Times, Mar. 9, 2013, at A1.

[98] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (internal citations omitted.)

In short it appears that U.S. government was arguing that Al-Aulaqi became targetable combatant by virtue of his 'leadership position' within AQAP and something similar to inciting others to take violent acts.

As was discussed above IHL recognizes the principle of distinction that demands distinguishing civilian from combatant and this concept is deeply troubled by a executive scheme that recognizes little or no separation between civilian support of a military effort active participation in combat. However, it appears that the government may believe that in addition to the claim that Al-Aulaqi became a combatant his acts, he was also a combatant be nature of his status within AQAP. Perhaps more importantly, this decision was made, not by an elected body of representatives, but a small bureaucratic arm of the U.S. Treasury department.[99]

If the legislature chooses not to provide guidance, the courts occasionally choose to curtail the executive. However, as a general rule, the courts have been hesitant to address the outer boundaries of the reach of the AUMF's grant of executive authority in targeting decisions. This no more clearly represented than in the Al-Aulaqi case. In that case the District Court outright rejected the proposition that it had the authority or the knowledge to rule on the status of Anwar Al-Aulaqi stating that doing so would

> require this Court to decide: (1) the precise nature and extent of Anwar Al–Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al–Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al–Aulaqi's alleged terrorist activity renders him a 'concrete, specific, and imminent threat to life or physical safety[100]

Such considerations involved "complex policy questions" that "the D.C. Circuit has historically held non-justiciable under the political question doctrine."[101]

This would suggest that absent congressional directive or involvement, the executive is the only branch capable determining combatant status, and thereby an individual's ability to be killed abroad. This is perhaps is perhaps best summarized by the Court itself, "[t]o be sure, this Court recognizes the somewhat unsettling nature of its conclusion—that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is "constitutionally committed to the political branches" and judicially unreviewable."[102] The fact the courts appear to have abdicated any responsibility in this realm strongly cries out for congressional direction on this point.

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[99] *Id.*
[100] *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 49-51 (D.D.C. 2010
[101] *Id.*
[102] *Id.*

***Combatancy in the Congress***

Though not in the AUMF, the Congress has come fairly close to endorsing the view taken by the executive on the issue of unlawful combatancy. The Military Commissions Act of 2006[103] (2006 MCA) was the first legislative document to define unlawful combatancy. Subchapter 1 section 1 of the MCA defines an unlawful combatant as follows: "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)."[104] Subsection (ii) then expands this definition retroactively to include those "who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy."[105] Further, a military commission could thereby try any individual determined to be an unlawful combatant under these provisions.

The Supreme Court in Boumediene v. Bush explicitly invalidated the provisions of the 2006 MCA relating to the suspension of the writ of habeas corpus[106], and so Congress was required to pass similar piece of legislation in 2009 by the same name to address the Court's concerns. The 2009 MCA dropped the language of the denial of rights under the Geneva Conventions, but largely maintained its provisions on unlawful combatancy though under a slightly different moniker. Section 948(a)(7) defines an unprivileged enemy belligerent as an individual (other than a privileged belligerent) who—

(A) has engaged in hostilities against the United States or its coalition partners;

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[103] Following the Supreme Court's ruling in *Hamdan*, the Congress passed the 2006 Military Commissions Act (MCA) that contained a number of provisions reaffirming and expanding executive authority in the 'War on Terror.' This included sections 5 and 6 which state: 'No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.' MCA 2006, *supra* note 122, s 5(a) This provision is a prima facie repudiation the language of *Hamdan* that found rights associated with the Geneva Conventions to be binding on the United States government. In respect to unlawful combatants, Section 5 essentially meant that the combatant had no recourse under the Geneva Convention to have a court hear the legitimacy of the basis of their detention. In what also appears to be a repudiation of the plurality's decision in *Hamdan* that conspiracy to commit war crimes was not an offense recognized by IHL, the Congress chose to include conspiracy as crime triable by military commission in the Act.

[104] MCA 2006, Subchapter I, 948a (1)(i)

[105] MCA 2006, Subchapter I, 948a (1)(ii)

[106] *Boumediene v. Bush*, 555 U.S. 723, 732-33 (2008)

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) was a part of al Qaeda at the time of the alleged offense under this chapter.[107]

For clarification, a privileged belligerent was defined as any individual belonging to any of the eight categories enumerated in Article 4 of the Geneva Convention.[108] As was the case in the 2006 MCA, the 2009 version explicitly incorporated the idea that "[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter."[109]

In both the 2006 and 2009 MCAs provisions were included that made any attacks made on U.S. forces by unlawful combatants a war crime.[110] When this notion is paired with the definition of an unprivileged enemy belligerent of 2009 MCA and combined with the United States' determination that neither Al Qaeda nor the Taliban are covered by Article 4 of the Geneva Convention (iii), it becomes apparent that every member of the Taliban or Al Qaeda is an unprivileged enemy belligerent capable of being tried for war crimes by U.S. military commission. In short, all current enemies of the United States participating in hostilities against American forces are by nature unlawful combatants who can be tried for war crimes by a military commission. This view seems to wholeheartedly embrace the executive's collapsing of civilian support of military force with complete unlawful combatant status.

**Combatancy and the Permission to Target**

Before delving into potential changes to the current United States approach, it is necessary to clarify one further point about the nature of combatancy. By nature of their status, lawful combatants are provided with certain privileges and responsibilities. First among these are the rights to carry out attacks on military personnel and objectives. This right also entails combatant immunity – meaning that the individual or unit has no criminal responsibility for killing or injuring enemy personnel.[111] This immunity to prosecution also applies to any damage or destruction to property caused in connection with military operations.[112] This immunity only applies so long as the acts of the individual combatant or unit are also in compliance with the rest

[107] Military Commissions Act of 2009, 10 U.S.C. s 948(a)(7) (hereinafter MCA 2009)
[108] *Id.* at s 948(a)(6)
[109] *Id.* at s 948(c)
[110] *See* MCA 2006 s 950(v)(b); MCA 2009 s 950(t)
[111] Enemy personnel includes civilians taking direct part in the hostilities, a concept that will be discussed ____ *See* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L. & Pol. 769, 778 (2010)
[112] *Id.*

of the tenets of IHL.[113] Finally, combatants are guaranteed prisoner of war status and humane treatment in the event of capture.[114] The corollary to these responsibilities is that combatants are also thereby subject to "lawful attack by enemy military personnel at any time, wherever located, regardless of the duties in which he or she is engaged," and may be tried for any breaches of IHL.[115]

Conversely, civilians, as part of their designation as un-targetable non-combatants, are expected "not to use his or her protected status to engage in hostile acts."[116] This does not completely prevent civilians from assisting in the war effort; it simply means that they cannot be direct participants in hostilities and continue to be un-targetable. In other words, though there is some question as to the types of behavior that constitute direct participation in hostilities, there is no doubt that "[c]ivilians who take up arms. . . lose their immunity from attack during the time they are participating in hostilities – whether permanently, intermittently, or only once – and become legitimate targets."[117] Equally as accepted is the premise that a worker sewing the uniform for a soldier many miles from a battlefield would not be directly participating in hostilities.[118] How to define direct participation in hostilities beyond these two poles is a topic of significant international debate, a debate that will be discussed briefly later in the paper.

As was explored above in much greater detail, the United States has taken an approach very close to including every individual between those two poles. From Al-Aulaqi to Hamdan, the executive branch has determined that all individuals have purposefully or materially supported Al-Qaeda, the Taliban, or associated forces are unlawful combatants and thereby devoid of the protections of both civilians and combatants. To me this is an unsustainable course of action and one that ultimately eviscerates the principle of distinction and undermines the historical conception of a division between combatant and civilian.

**Congressional Guidance in an Updated AUMF**

As was discussed in the previous sections, the United States government, particularly the executive branch, has largely collapsed the categories of civilian and combatant in the 'War on Terror,' while retaining the rights of neither. Moreover it has done so under the auspices of the 2001 Authorization for the Use of Military Force. It is my assertion that because that executive

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 772-73
[117] Luari Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare,* 1 Harv. Nat'l Sec. J. 45, 63 (2010)
[118] Jens David Ohlin, *Targeting Co-Belligerents*, in Targeted Killings: Law and Morality in an Asymmetrical World 67 (Finkelstein, et. al. eds., 2011); For a more extended discussion of the spectrum between direct and indirect participation in hostilities see *id.* at 65-70

has misused and misconstrued the bounds of its authority under the AUMF and does not have strong incentives to alter that position, Congress must update the AUMF to include a broader recognition of combatancy that includes applying IHL to non-state actors, allowing for recognition of partial compliance with the IHL, an explicit statement in support of the principle of distinction and the concept of combatancy, and finally provide criteria for targeting those who do not fall into the expanded definition of combatancy and are therefore civilians.

To demonstrate this point I will first turn to the existing statutory language to illustrate the vague and sweeping language and how that language may imply the very stance that the executive branch has taken. From that starting point, I will explore each of my recommend fixes in more detail.

***Statutory Language of the Current AUMF***

Though it is ambiguous, the text of the AUMF remains the most obvious place to begin our discussion of a solution to the combatancy problem. There are only two main sections to the AUMF. The first authorizes the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[119] The second section acknowledges that the authorization is compliant with the War Powers resolution and that the AUMF does not alter any the requirements of that resolution.[120] For the purposes of this paper section one is the most relevant as it this section the executive relies on for many of its claims to authority.[121]

The first three categories in that section, the "nations, organizations or persons" along with those groups' or individuals' association to the September 11th attacks (planned, authorized, committed, or aided) determine who may be targeted under the authorization. However, the answer to this presumably factual question is left solely to the resolution of the president ('he determines'). In other words, "[t]he AUMF authorized force against essentially any actor the president determines had sufficient connections to the September 11th attacks."[122]

In addition to the authorizing text of the AUMF, there is also a preamble that is relied upon by the government in its legal arguments from time to time. In particular, the U.S. government cites to two specific lines from the preamble, "Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States"[123] It is not a difficult

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[119] Authorization for Use of Military Force Pub. L. 107-40 115 Stat. 224- 225 (2001).
[120] *Id.*
[121] See the arguments made in the Government's briefs in *Hamdan* and *Al-Aulaqi* discussed above.
[122] Cronogue, A New AUMF, at 379.
[123] Authorization for Use of Military Force Pub. L. 107-40 115 Stat. 224- 225 (2001)

intellectual leap to see how these provisions could be used to undermine the requirement that the targets of force be related to 9/11, as well as the general necessity of the AUMF. If the threat is ongoing indefinitely, and the President has the authority under the constitution already, why is the AUMF even necessary and why would the relationship to 9/11 matter? There are those who would argue that there may not be a need for the AUMF[124] as the War Powers Act may be unconstitutional.[125] However, for this paper, I will assume that such a contention is incorrect and, that the War Powers Act is constitutional and that an AUMF is required for a president to legally employ the military use of force abroad.

So where does this leave us? The executive branch has claimed that a man like Hamdan by virtue of his association to Al-Qaeda as a personal driver made him detainable - and presumably targetable. In the context of military detention and military commissions the U.S. Congress has largely endorsed this view. The executive has targeted and killed a United States citizen as a leader of AQAP for endorsing and promoting attacks on the United States. It is my contention that this state of affairs is unacceptable. For one, the United States has essentially claimed that none of its enemies in the War on Terror are true combatants or civilians. Instead they are the hybrid unlawful combatant without the protections or benefits of either combatant or civilian status.

To remedy this, I believe that Congress should implement three main ideas into a reauthorized and updated AUMF: (1) expand combatant protections to non-state actors to remove the argument that Al-Qaeda membership or support alone is ground for an immediate elimination of all combatant rights and civilian status thus eliminating the right type of conflict problem; (2) provide a framework from which individuals can reclaim some of the rights of combatants by complying with some of the four criteria establishing combatant status under the Geneva Conventions instead of making compliance and all or nothing affair; (3) reaffirm the United States' commitment to upholding IHL, the principle of distinction, and the idea that whenever possible there should be a consistent divide between civilian and combatant.

***Extension of Combatant Status to Non-State Actors***

As I mentioned briefly in Part II of this paper, Geoffrey Corn verbalizes the idea that within the Law of Armed Conflict there are traditionally two criteria for lawful combat status – the individual must be in the 'right type of conflict' and also be the 'right type of person.'[126] While acknowledging that this has been the traditional standard for combatant status and the rights and privileges associated with that status, Corn ultimately comes to the conclusion that the

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[124] *See* n. 128 *supra*

[125] See, e.g., Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 Notre Dame Law. 187, 209-13 (1975) (arguing Congress may declare 'offensive' wars); Rostow,Great Cases Make Bad Law: The War Powers Act, 50 Tex. L. Rev. 833, 864-66 (1972) (some 'undeclared wars' constitutionally legitimate).

[126] Corn, *supra* note 11, at 255

'right type of conflict' prong of the test may not be in the best interest of the international community.[127]

The argument for an extension of combatant immunity to non-state actors is made largely consequentialist grounds. Making an incentive-driven argument, Corn suggests that if "the primary goal of the equation is to ensure compliance with humanitarian law—and in particular to mitigate the risk to innocent civilians by enhancing the distinction between these civilians and belligerents—then extending the opportunity to qualify for combatant immunity to non-state belligerents could potentially contribute to this purpose."[128] After much deeper analysis, Corn concludes that, as the IHL stands, there is "absolutely no incentive for individuals associated with . . . non-state groups to endeavor to comply with the principles of humanitarian law," because even compliance with the four criteria will not necessarily protect them under IHL as non-state actors are deemed outside the reach of IHL.[129] Moreover, extending combatant immunity to these groups would not endanger the current authority of states in any meaningful way.[130]

***Recognition of Partial Compliance***

Paired with this expansion of IHL to non-state actors should also be a system that recognizes intermediate levels of compliance with the four IHL requirements for combatancy. Eric Jensen, rather than arguing for unlawful combatancy or against the IHL combatant/civilian divide, instead contends that there should be an acknowledgement in IHL of intermediate levels of compliance. Jensen suggests that it is in the best interest of the international community "to evolve the law to allow for intermediate levels of recognition for partial compliance with the requirements clearly identified in article 4 of the GPW, particularly that of wearing a fixed distinctive emblem, or uniform."[131]

As it currently stands, Jensen argues, IHL has "only negative incentives to comply with combatant status unless one can meet all four criteria of GPW."[132] This means that once a fighter operates outside of perfect compliance, "unlawful fighters know they will receive no benefits and will be quickly tried as murders in domestic courts or military tribunals."[133] Jensen's theory,

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[127] *Id.* at 293-94.
[128] *Id.* at 280.
[129] *Id.* at 293.
[130] Corn, *supra* note 11, at 294. ("[E]xtending the possibility to qualify for combatant immunity to these belligerents would in no way compromise the authority of states to prevent them from returning to hostilities after they've been captured, nor the authority to criminally sanction them for perfidious or treacherous conduct. . . .").
[131] Jensen, *supra* note 44, at 232
[132] *Id.*
[133] *Id.*

then, is that by providing positive incentives for partial compliance fighters who would normally operate completely outside the pale of IHL may alter their behavior to come more into law with IHL standards.[134]

When coupled with the expansion of combatant status to non-state actors this recognition of partial compliance creates a much more reasonable basis for combatancy in the modern world. Rather than excluding all those who take up arms against the United States and labeling them as unlawful combatants without any of the rights associated with combatants or civilians, the United States can expand the concept of combatancy to allow for the targeting of these individuals at any time or place, but to do so while ensuring that the rights that are associated with that status as combatant are still respected.

***Reaffirming the Combatant/Civilian Divide and Defining the Criteria for Targeting Non-Combatants***

This suggestion is perhaps the most nebulous of three issues that Congress must address, but it may also be the most important. As was hinted at above, the United States has chosen to pursue a course of action that declares all of its current enemies as beyond the pale of combatant or civilians status and the IHL. This has the troubling result of putting the entire 'War on Terror' in a realm of law and decision making that is left solely to the discretion of the executive. With that discretion, the executive branch has offered minimal protection to our enemies, and made the IHL largely irrelevant.

In addition to the remedies mentioned above, the Congress should announce the United States' continuing commitment to the longstanding principle of distinction – that there is a meaningful difference between civilian status and combatant status and that if you are not a combatant under the expanded heading above, you must, by definition, be a civilian. Moreover, the Congress should make explicit within its authorization what rights and responsibilities each category has under IHL – namely that civilians may not be targeted unless they are directly participating in hostilities, and that while combatants may be targeted at any time, they are entitled to prisoner of war status, and the rights that status encompasses, should they be captured.

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[134] *Id.* at 233-34. As an example of what kind positive incentive the law could provide, Jensen suggests that "[t]hese protections and benefits could include immunity from prosecution for speech or association crimes connected with political beliefs; abeyance of execution of punishment until conflict is resolved; offer of parole, including immunity for weapons crimes not resulting in death or injury; compliance with international law as a mitigating factor at sentencing; disallowance of the death penalty; and if the movement which the fighter is a part of eventually achieves combatant status, the fighter's prior lawful warlike actions may also be covered by combatant immunity. *Id.* at 234

Understanding that there will still be individuals who hover between the expanded combatant status and civilian status and realizing that there are still instances where civilians may be targeted historically and in the LOAC, Congress should also provide guidance to the executive on when individuals outside the expanded realm of combatancy can be targeted. I believe that this recommendation should resemble the ICRC Guidance of Direct Participation in Hostilities. Broadly, the ICRC Guidance recognizes that those who do not make up state armed forces or organized armed groups are civilians and are immune to attack "unless and for such time as they take direct part in hostilities."[135] The ICRC then provided three criteria for Direct Participation in Hostilities (DPH):

> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
>
> 2. [T]here must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
>
> 3. [T]he act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[136]

In addition to the three criteria that civilian must meet to constitute DPH, there was a remaining question of the lifespan of DPH. In other words, it was not necessarily clear when DPH began and when it ended. The ICRC attempted to answer this question as well. In regard to the timing of DPH, the ICRC first noted that measures taken in preparation to "execution of a specific act of [DPH], as well as the deployment to and the return from the location of execution" are considered part of DPH.[137]

**Conclusion**

The United States cannot alter the contours of the War Convention on its own. Nor should it be able to do so, as that would defeat the purpose of such a Convention – ideally a reflection of the common understanding of the bounds of war. However, it can move the balance of the scale in the right direction. For the past two hundred years, and especially in last fifty years, there has been a trend toward the expansion of the protections of combatancy so as to preserve distinction and maintain our collective belief that war can indeed be bounded. In the

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[135] Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, International Committee of the Red Cross, 20 (2009).
[136] *Id.*
[137] *Id*. at 21.

face of a new and difficult threat of international terrorism the United States has blinked and chosen to buck this trend. In our approach to Al Qaeda, the Taliban, and terrorists more broadly in the 'War on Terror' the United States has chosen to revert to older more archaic notions of combatancy that limit the rights of and protections afforded to the individual combatant (or civilian DPH). Given the broad scope of historical understandings of combatancy this is not an inherently unreasonable position.

In fact, it is possible that the judgments that define the War Convention will ultimately coalesce around the United States current interpretation. As the world's premiere military force, and the preeminent player in the new era of non-traditional warfare, the United States undoubtedly has tremendous sway in the direction the War Convention ultimately takes. In my view, rather than reverting to bygone understandings of combatancy, the United States should use its significant authority to pull the War Convention toward greater inclusion and protection and not exclusion, which would be a regression in our understanding of war and a retreat to a state of more limited bounds on the conduct of war.

While a move to expand the notion of combatancy would ideally occur at the executive level, so far there has been little apparent desire to do so. Moreover, outside of allegiance to the idealistic notions of the law of war that I have presented, the executive has little incentive behave in a way that would increase its understanding of the coverage of combatancy or count our enemies as civilian DPH as it would, at least in appearance if not in actuality, limit the executive's options in the pursuit of national security. As was discussed above the Courts have been of limited use and have presented mixed messages in discussions of combatancy. This leaves us Congress.

In summary, if you accept the view that the U.S. approach combatancy is counter to the trend of the War Convention, acknowledge that executive has little incentive to change its interpretation and the courts appear to be unwilling to meaningfully alter that interpretation, then you are left with the conclusion that Congress must provide guidance to the executive on how and whom the executive can treat as a combatant under the AUMF. To bring us in line with the progression of the War Convention, I argue that on the question of who is a combatant, Congress should include something like Corn's extension of combatant privileges to non-state actors, as well as Jensen's partial compliance, and a reaffirmation the combatant/civilian divide. Those ideas taken together provide incentives to groups like Al-Qaeda and the Taliban to comply to IHL standards - thereby decreasing the likelihood of unnecessary harm to civilians- as well as announce the United States' commitment to upholding international law and the principle of distinction. On the question of who can be targeted outside this expanded definition of combatancy, Congress should follow the model put forth by the ICRC in regard to civilian DPH. This model preserves civilian status, but recognizes that there are instances when the rights associated with the status can be forfeited by actions taken by the civilian.

Whether the use of force take the form of detention or targeting, the AUMF must not be used as blanket justification for any military action taken against any actor no matter how weak

their connection to Al-Qaeda or any associated force. More importantly, the United States should not be the actor pulling the War Convention backward. International law is moving toward greater protections and not fewer. The United States Congress should update the current AUMF, and any future AUMF, to recognize this reality.

# *THE INEFFECTIVENESS OF ARMED HUMANITARIAN INTERVENTION AND THE NEED FOR REFORM OF GLOBAL POLITICS TO PREVENT HUMAN RIGHTS VIOLATIONS*

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ABSTRACT

With the intention of proving the premise that armed humanitarian intervention is an inappropriate approach to addressing atrocities, this assessment of intervention first aims to achieve an understanding of political belief regarding armed humanitarian intervention through the discussion of history and current policy. Several shortcomings of armed humanitarian intervention are highlighted through case studies of intervention in Somalia, East Timor and Kosovo. The principle of armed humanitarian intervention and the principle of the Responsibility to Protect are discussed in terms of the widely accepted criterion of Jus Ad Bellum.

Subsequently, issues of the practical implementation of intervention, such as violations of sovereignty, indeterminable motive of the intervening nation and contractual duty of soldiers will be discussed and elaborated on. Finally, perspectives that support for humanitarian intervention, specifically the view of Immanuel Kant, are addressed. The paper concludes with the idea that rather than focusing political effort on improving the execution of humanitarian intervention, a restructuring of international government should take place in order to prevent human rights violations from occurring.

## INTRODUCTION

Armed humanitarian intervention is a problematic method of addressing cases of injustice and there are many issues that surround the practice. It is truly a paradox in which nations must decide between allowing atrocities and attempting to prevent them through military involvement.

The prevention of human rights violations through intervention may require the intervening nation to both sacrifice and deliberately take lives as a part of their efforts. Intervention has the potential to violate more rights than it protects and outcomes can seldom be predicted with any accuracy. Overall, armed humanitarian intervention is an inappropriate approach to addressing human rights violations.

Is armed humanitarian intervention moral? Does it have potential to be successful at ending rights violations? If it should be done, then what is the threshold for action? The answers to these questions are not only difficult to reach in their singular context, but the questions also lack individual distinction from one another. The potential for success in a case of armed humanitarian intervention plays into the morality of the act, while morality contributes to the determination of whether or not intervention should occur and so on. The morality of armed humanitarian intervention is best assessed when considered within the context of established moral principles that address political action and violence. This leads to a fair assessment of an issue that, for many people, is strongly tied to emotions and the perception of doing the right thing.

In an attempt to prove the premise that armed humanitarian intervention is an inappropriate approach to addressing atrocities, this assessment will first attempt to achieve an understanding of political belief regarding armed humanitarian intervention through the discussion of history and current policy. Several shortcomings of armed humanitarian intervention will be highlighted through case studies of intervention in Somalia, East Timor and Kosovo. Following that, the principle of armed humanitarian intervention will be discussed in terms of the widely accepted qualifications of Just War theory. Subsequently, issues of the practical implementation of intervention, including violations of sovereignty and indeterminable motive of the intervening nation will be elaborated upon and discussed. Finally, alternative perspectives that advocate for humanitarian intervention, specifically the view of Immanuel Kant, will be addressed.

## HISTORICAL CONTEXT

Armed humanitarian intervention is a novel concept in title alone. The principle of defending the innocent from wrongful infringement on natural freedoms can be seen throughout history, easily tracing back to the era of chivalry and even the biblical age. The issue is more complex today than it was in those times because defense of the innocent within armed humanitarian intervention is on the international rather than individual scale. In relatively recent times, instances have arisen where attempts at armed humanitarian intervention were deemed necessary. The analysis of events in Kosovo, Somalia, East Timor and Syria serve as case studies that help to identify key practical issues of intervention.

The War of Kosovo in 1999 was one of the first wars to be highly televised. Everyone around the world witnessed the imbalance of the war through their televisions. Footage revealed

that deaths were grossly concentrated on one side of the conflict. The Kosovo war began when Kosovo, one of two territories of Serbia, was mistreated by the Serbian military and the Yugoslavian government. The motivation for NATO countries to become involved in the defense of Kosovo is questioned and many believe in retrospect that some type of national interest on the part of the intervening countries played a role in the decision to intervene.

Potential reasons for NATO involvement include preserving the oil pipeline that runs through Kosovo from the Caspian Sea and obtaining U.S. construction firm contracts.[1] The conflict in Kosovo highlights several factors that play an important role in armed humanitarian intervention and the decision to intervene. First is the influence of the media. Were it not for the TV broadcasts of the emerging conflict in Kosovo, the public awareness of the events would not have extended as far, but awareness also would have been less misconstrued as a result of media bias. A second issue of intervention demonstrated by the case of Kosovo is the lack of clarity from intervening nations on their motivation for intervention.

Somalia is a case where the extent of the emergency of the situation that prompted intervention is almost entirely undisputed. In the 1920's when Somalia was weakened by damage from British aerial bombardments, the fascist government of Italy occupied the nation along with two other African nations to help establish a stronghold on the continent . The Italian dictator Mussolini publicly initiated a takeover of the nation. Somalia's military was unprepared to respond in self defense. Rebellion and revolt after the takeover resulted in a violent state of turmoil in Somaliland. In America, the crisis in Somalia served as an instigator for the U.S. government to turn toward isolationism. The United Nations and the United States did very little in defense of Somalia. The action that did occur succeeded in saving lives, but it is reasonable to ask why more action did not occur when there seemed to be justification and a necessity for full scale military intervention. The key problems of humanitarian intervention that arose in Somalia are the lack of a standard regarding when to apply armed humanitarian intervention and the need to account for the state of a nation post intervention to ensure that proper government structure

has been put in place to protect human rights in the future.[2]

A United Nations mission was established in East Timor in June 1999. East Timor was amidst debate with Portugal and Indonesia on the future of East Timor as a nation. During the discussions, political divisions and conflicting loyalties between Portugal and Indonesia placed

[1] Schwabach, Aaron. "Kosovo: Virtual War and International Law." *Law and Literature* 15.1 (2003): 1-22. *JSTOR*. Web. 9 Dec. 2013. <http://www.jstor.org/stable/10.1525/lal.2003.15.1.1>.
[2] Clarke, Walter, and Jeffrey Herbst. "Learning from Somalia; the Lessons of Armed Humanitarian Intervention." *The Journal of Modern African Studies* 37.2 (1999): 370-71. *JSTOR*. Web. 17 Oct. 2013. <http://www.jstor.org/stable/161866>.

East Timor in a position of impending civil war. Ultimately, the annexation of East Timor was dismissed and East Timor became an autonomous state. The case of East Timor in the 90's represents a drastic shift in global attitude toward intervention. When Indonesia originally invaded and annexed East Timor in the 70's, the rest of the world went along with suppression of East Timor's independence movement. However in 1999 the timing was right for the intervention in East Timor. Actions of the United Nations prevented a significant outbreak of international violence from occurring. Troops from Australia, New Zealand and Malaysia were able to conduct what was essentially a peacekeeping mission. The 1999 intervention is generally classified as reasonably successful. East Timor went on to gain its independence in 2002. Despite successes at the beginning of the century, a culture of civil unrest persisted in East Timor with a second intervention in 2006 and ongoing violence through 2013. The lack of resolve in a case of intervention such as East Timor 1999 which initially appeared to be a success, suggests that armed humanitarian intervention is not a truly effective means of eliminating human rights violations.[3]

All of these instances- Kosovo, Somalia, East Timor- are typical of armed humanitarian intervention in that none of them exemplify a purely right or wrong decision to intervene. Both a decision to intervene and a decision against intervention would have been controversial. The same is true of any occurrence of intervention. Definitively good and bad cases of armed humanitarian intervention don't seem to exist. All instances fall somewhere in the middle of a spectrum with failure and success at either extreme.

## CURRENT POLICY

In addition to the historical perspective, an understanding of the current legal status of humanitarian issues is essential to establishing the context of the debate on armed humanitarian intervention. The international policy that concerns humanitarian intervention is known as the Responsibility to Protect, often referred to hereafter as RtoP. The Responsibility to Protect is a doctrine that originated in 2001 when the International Commission on Intervention and State Sovereignty determined that sovereignty is not a right of all states, but rather a privilege that entails the responsibility of protecting human rights.[4] Since its 2001 introduction, the

[3] Sebastian, Leonard C., and Anthony L. Smith. "The East Timor Crisis: A Test Case for Humanitarian Intervention." *Southeast Asian Affairs* (2000): 64-83. *JSTOR*. Web. 20 Oct. 2013. <http://www.jstor.org/stable/27912244

[4] International Commission on Intervention and State Sovereignty . *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty.* Canada: International Development Research Centre, 2001. Print. December 2001

Responsibility to Protect was adopted by world leaders as a part of the 2005 World Summit Outcomes document and reaffirmed by the United Nations in 2006 and 2009.[5]

The International Commission on Intervention and State Sovereignty Report on the Responsibility to Protect established three key standards of a state's responsibility to protect human rights.[6] First, a state must protect its own people from atrocities. This overarching term, atrocities, encompasses four primary violations of human rights that RtoP targets including genocide, ethnic cleansings, war crimes and crimes against humanity. Secondly, should a state fail to meet the standards of human rights protection, the international community should then assist the state in fulfilling their responsibility to protect. Finally, the international community has a duty to carry out the assistive action in a timely and decisive manner. Included in the third point of the RtoP doctrine is the idea that once peaceful measures of addressing atrocities have failed, coercive intervention is permitted. The third point of RtoP is the most controversial because it frames intervention in protection of positive human rights for individuals as more important than the negative right of states to non intervention.[7]

In the absence of an international sovereign to regulate armed humanitarian intervention, several organizations, most notably the United Nations, ICRC and Human Rights Watch, assume various roles in advocating for and regulating intervention. The ICRC, International Committee of the Red Cross, is responsible for impartially reporting on the treatment of victims of conflicts and violence and providing aid to those individuals.[8] Similarly, Human Rights watch attempts to address issues of human rights injustice through objective investigations and advocacy.[9] The United Nations, as mentioned previously, adopted the Responsibility to Protect doctrine. The U.N. cannot strictly enforce human rights for reasons including a lack of international legal rights and the absence of its own military force. However, a main body of the United Nations organization is the U.N. Security Council. The Security Council is a group of fifteen member states that hold power of approval over use of force decisions. No nation can legally intervene on behalf of another nation or group without approval of the council.

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[5] Bellamy, Alex J., Sara E. Davies, and Luke Glanville. *The Responsibility to Protect and International Law*. Leiden, The Netherlands: Hotei Publishing, 2011. Print.

[6] International Commission on Intervention and State Sovereignty . *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty.* Canada: International Development Research Centre, 2001. Print. December 2001

[7] International Commission on Intervention and State Sovereignty . *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty.* Canada: International Development Research Centre, 2001. Print. December 2001

[8] The ICRC mission is found at http://www.icrc.org/eng/who-we-are/mandate/index.jsp

[9] The Human Rights watch mission is found at http://www.hrw.org/about

## JUST WAR AND ARMED HUMANITARIAN INTERVENTION[10]

Is armed humanitarian intervention moral? Politically, Responsibility to Protect is the guiding principle on issues of humanitarian intervention. Therefore, the just war analysis component of this paper will analyze RtoP with the understanding that RtoP is closely related to the broader topic of armed humanitarian intervention. RtoP grounds its permission of military force in Just War theory and also incorporates rules that attempt to address the shortcomings and ambiguities of Just War theory. Just War theory is a western principle which has developed strong international relevance. Proponents of Just War theory include well known philosophers such as Grotius, Locke and Kant. Brian Orend, a prolific philosophy writer, describes just war theory as "a coherent set of values which enables moral judgment in wartime."[11] The most basic tenet of just war theory is that under certain circumstances, the use of military force is permissible. Similarly, RtoP makes the claim that when mass atrocities are committed and a state fails to protect its people from those atrocities, military force by other states is permitted. Just War theory requires that certain standards be met before military force can be used and RtoP parallels the Just War theory requirement of the satisfaction of those standards. There are six standards that are required to justify military action under Just War theory. The Responsibility to Protect doctrine has corresponding requirements as well as additional caveats that protect the doctrine from objections that commonly arise in response to just war theory.

The first requirement of Just War theory before military action can take place is that a just cause exists.[12] In terms of RtoP, just cause is the occurrence of serious and irreparable harm to human beings.[13] As discussed, the criteria for the invocation of RtoP are defined to include genocide, ethnic cleansings, war crimes and crimes against humanity. Under these limitations, which are given greater distinction in the ICISS report on The Responsibility to Protect, it is clear that intervention is only encouraged by RtoP when a state has itself failed to maintain a standard of minimal justice.

The second criterion of just war theory is that a state considering military intervention has right intention.[14] Essentially, the objective of this criterion is to ensure that the act of military intervention in the case of RtoP is intended to prevent human suffering. Another criteria that will be discussed shortly, public declaration by proper authority, attempts to act as insurance that this criteria is met. Intention is the most delicate point of conflict in arguments against RtoP. It would be difficult to prevent a nation from enacting RtoP in a case where just cause exists but they also

[10] This section of the paper is adapted from a paper that was previously written for the author's prior USMA PY201 coursework.
[11] Orend, Brian. *The Morality of War.* Canada: Broadview Press, 2006. Print. p. 9-10.
[12] Ibid.
[13] Evans, G. "From Humanitarian Intervention to the Responsibility to Protect." *Wisconsin International Law Journal* 3.2 (2006): p. 710.
[14] Ibid. 45-50.

stand to make political gains through intervention with military force. This issue has arisen in recent examples of the Responsibility to Protect, such as Kosovo.

The third criterion that must be met to satisfy just war theory is public declaration by proper authority.[15] This requirement is a question of whether or not the military intervention is approved by a legitimate authority that can objectively assess that the five additional criteria of just war theory have been met. There is some debate as to whether public declaration by proper authority is important to just war theory. Regardless of whether public declaration is a critical consideration in other types of war, it is an essential component of ensuring that RtoP satisfies right intention. The legitimate authority, which for RtoP is the UN Security Council, should hold every nation to the same standard of assessment and be politically neutral. It is possible that a case could arise where a nation wants to protect human rights and prevent human suffering while they also would benefit politically in doing so. However in its current role, the Security Council lacks authority closely regulate RtoP actions the intervening state. Additionally, effective means of correcting the intervening state should their intentions or actions go amiss do not exist.

Last resort is the fourth requirement of Just War theory.[16] The adherence of RtoP to the satisfaction of the last resort criterion is dependent on one's definition of last resort. If, last resort is defined as having implemented but failed at all other means of correcting violations of human rights, then RtoP does not satisfy the criterion. However, a more practical definition of the last resort requirement is that all measures apart from military intervention have either been attempted or taken into account. With this definition it is not necessary that every action has been applied, but rather military action can reasonably be said to be the only effective means of success given the situation.[17] Given the nature of mass atrocities, it is essential that states take action against them in a timely manner. Under RtoP, the analysis and approval of the Security Council is again essential in the determination of the satisfaction of the criterion of last resort.

Probability of success and proportionality are the fifth and sixth just war criteria.[18] The first four principles of just war theory categorically hold the most weight in the arguments for and against the Right to Protect, but probability of success and proportionality are important to discuss nonetheless. Probability of success with respect to RtoP differs slightly from the implications of probability of success in terms of war. In war, probability of success is the likelihood that the conflict will be won. In humanitarian intervention, probability of success can more accurately be described as reasonable prospect. In RtoP, the goal is not to win rather than lose, but to conduct military action that will succeed in protecting human rights and incite consequences that are better than having taken no action at all.[19] Unlike war, RtoP does not require that a total victory is

[15] Ibid. 50-57.
[16] Ibid. 57-58.
[17] Evans, G. "From Humanitarian Intervention to the Responsibility to Protect." *Wisconsin International Law Journal* 3.2 (2006): p. 710
[18] Orend, Brian. *The Morality of War.* Canada: Broadview Press, 2006. Print. p. 58-60.
[19] Evans, G. "From Humanitarian Intervention to the Responsibility to Protect." *Wisconsin International Law Journal* 3.2 (2006): p. 710

probable in order for probability of success to be satisfied. Rather, RtoP requires only that the status of human rights in the state where intervention occurs be better off as a result of that intervention. Because of the far reaching nature of the characterization of probability of success when it comes to the Responsibility to Protect, the criterion is fairly easy to satisfy.

The sixth piece of criteria, proportionality, is very closely related to last resort and the requirement that the evocation of the Responsibility to Protect be approved by the United Nations Security Council. Proportionality requires that the benefits gained from military intervention are equal to or greater than the costs and casualties that the military action may produce.[20] With regard to RtoP, proportional action takes place when the minimum necessary means to secure the protection of human rights are employed. In terms of war, proportionality can be a challenging criterion because of the difficulty of weighing costs and benefits. This challenge is somewhat mitigated under Responsibility to Protect because of the checks and balances that theoretically occur as a result of the Security Council approval of RtoP as a last resort before any humanitarian intervention can occur. If a situation exists where the Security Council determined that military intervention is the last resort in protecting human rights, it should follow that military intervention is the minimum necessary means to secure the protection of those rights.

As demonstrated through the assessment of RtoP and just war theory, the thorough consideration of ethics that RtoP takes great care to incorporate greatly limits possible objections to RtoP, and armed humanitarian intervention, on strictly theoretical moral grounds. The issues that surround the responsibility to protect arise in the practical application of the doctrine. Examples of supposed humanitarian intervention under the basic tenets of the Responsibility to Protect in inevitably highlight many issues of the Just War theory justification of RtoP. Additionally, there are severe credibility implications of not implementing the Responsibility to Protect when a case exists where it technically should be implemented.[21] So although the theoretical moral argument for the Responsibility to Protect is relatively well-built, the translation of the doctrine to reality is insecure, which raises valid criticisms. Is RtoP, and by consequence armed humanitarian intervention, moral? By the standards of Just War theory a hypothetical morality exists. However, the unavoidable practical failure of armed humanitarian intervention in meeting the standards that stipulate the morality of RtoP raises serious concern as to whether it should be done.

Although the practical applications of RtoP have so far proved to be faulty, RtoP is morally sound and also has the potential to be more than just an aspirational doctrine. Hugo Grotius, one of the original supporters of just war theory said that the point of law is to bring to fruition the ideas of morality.[21] The Responsibility to Protect takes an initial step in the fulfillment of this idea that international law is important not only for peace and political stability, but also for the realization of universal moral principles. Although people often differ in opinion on the

[20] Orend, Brian. *The Morality of War.* Canada: Broadview Press, 2006. Print. p. 59-60.
[21] Orend, Brian. *The Morality of War.* Canada: Broadview Press, 2006. Print. p. 17-18.

means and the details, human rights is an important element of society. Whether people believe that a commitment to human rights stems from human nature,[22] it has developed into a moral norm whose importance the vast majority of people can collectively agree upon. The conflict surrounding the Responsibility to Protect concerns the implementation of the principle and the faults that arise during its execution rather than the ethics of the doctrine itself.

Based on the discussion of RtoP and just war theory, the Responsibility to Protect and the use of military force in the protection of human rights is justified. However, considering real examples of the implementation of Responsibility to Protect, it is often ineffective in protecting human rights because of incorrect adherence to the standards that the doctrine outlines. This assertion affirms a nearly parallel statement regarding armed humanitarian intervention; Intervention is a justifiable means of protecting human rights in some instances, but humanitarian intervention often violates more rights than it protects. RtoP, imperfect as it currently is, may hold potential in correcting the issue of humanitarian intervention as a violator of human rights. Because Responsibility to Protect is itself a moral principle, the continuation of streamlining regulations to improved implementation of the Responsibility to Protect could improve the global protection of human rights. However, a perfect form of RtoP could not be achieved without significant reforms in international politics.

## DISCUSSION: PRACTICAL FAILURES OF ARMED HUMANITARIAN INTERVENTION

In its current form under the regulation of Responsibility to Protect, armed humanitarian intervention is subject to a number of practical failures. These failures weaken the hypothetically just principle of responsibility to protect and are reason to work toward international political reform rather than solely a more perfect execution of RtoP. The primary objections to the Responsibility to Protect that arose during the analysis of RtoP and just war theory are protecting the rights of sovereign nations, the use of military force in order to achieve political goals under the guise of Responsibility to Protect, the shortcomings of the United Nations Security Council as a legitimate authority and the catch twenty-two that humanitarian intervention in RtoP is required to be the last resort but must also be done in a timely manner. Additional practical failures that were mentioned previously in this paper include violations of the contractual duties of soldiers and unproven long term effectiveness of armed humanitarian intervention.

[22] Author's Note: Belief in human rights as an element of human nature is a claim that was carefully considered. Opinions on human nature can largely be split into two camps that correspond with the views of Locke and Hobbes. Locke's incorporates a level of human rights in his definition of state of nature. The possible contradiction to the argument for a belief in human rights as a part of human nature comes from Hobbes. Hobbes state of nature is nasty, brutish and short, however sovereignties emerge from that state and put in place measures that protect people. Because Hobbes includes the emergence of sovereignties and protection in his theory, I include rights as a component of human nature.

A point that often presents itself in opposition to RtoP is the question of state sovereignty. Doesn't intervention infringe on the rights of a state as a sovereign nation? The professor of philosophy Alex Bellamy maintains that the rights of humans surpass the rights of states and must be protected first and foremost.[23] Though Bellamy's argument is naturally disputed, it is still a consideration. In addition to Bellamy's view, the argument also exists that if a state does not make every effort to protect their citizens or violates the rights of other nations, the state is no longer a minimally just society and has therefore given up their right to sovereignty.[24] In Right to Protect situations, it is often the case that states are not meeting the requirements of minimal justice and therefore, as long as the criteria of just cause is met and the state is not minimally just, state sovereignty becomes less of an issue. This idea points toward the most fundamental problem of RtoP and generally of the political framework for armed humanitarian intervention; there is no organization in place to objectively judge the satisfaction of intervention criteria.

Right intention is another element of armed humanitarian intervention that raises the question of who determines right and wrong with regard to RtoP. The U.N. Security council is not impervious to the interests of states, it being made of state representatives. The potential for subjectivity in determining right intention of an intervening state actor is overwhelming. There is a possibility of states taking advantage of the RtoP system by claiming human rights as justification for establishing military presence in another nation. In reality, the true or even parallel motivation for intervention could be a result of self interest. If other Security Council states would also benefit from that nation's self interested action, directly or indirectly, that may sway the Council decision on the justice of enacting RtoP. This idea is compounded by the fact that violations of human rights often occur without intervention.[25] A way to ensure that nations do not take advantage of the RtoP is to have a strong governing body to regulate declaration by proper authority. Doing so would increase the prospects of enforcing RtoP with objective consistency rather than only in situation where a political advantage could be gained.

Certainly, there are more issues than these that potentially arise in cases of armed humanitarian intervention. The issues discussed establish a general idea of the shortcomings of intervention in practice; although in a similar manner to traditional war, every instance of armed humanitarian intervention differs in some ways from the others. War and intervention are related in their use of military force, but they are also separated by the existential risk of intervention to potentially violate human rights in order to protect them. The existence of this hazard invites a need for more extensive regulation to overcome the element of hypocrisy. Although means to effectively control armed humanitarian intervention don't presently exist, the protection of human rights is important enough that some still support the idea of intervention.

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[23] Bellamy, Alex J., Sara E. Davies, and Luke Glanville. *The Responsibility to Protect and International Law*. Leiden, The Netherlands: Hotei Publishing, 2011. Print.

[24] Orend, Brian. *The Morality of War.* Canada: Broadview Press, 2006. Print. p. 35-37.

[25] Author's Note: This statement is made while also acknowledging that lack of political interest is not necessarily the only reason for non-intervention.

## ADDRESSING ARGUMENTS IN SUPPORT OF AHI

Immanuel Kant was a philosopher who lived from 1724 to 1804. Kantian philosophy, similar in many ways to a Hobbesian view point, promotes the intervention of humanity on a lawless state of nature. Kant outlined his view in the book *Toward Perpetual Peace. Perpetual Peace* proposes a gradual reorientation toward a global yet distant international republic where freedoms are enforced by a global agency.[26] Kant does not directly address the question of humanitarian intervention; During Kant's time the idea of intervention would likely not have been referred to under the same modern title. However, it can be argued that it the inference can be made from Kant's work in *Toward Perpetual Peace* that he would have supported armed humanitarian intervention. Before outlining Kant's beliefs, it should be established that Kant would likely fundamentally approve of armed humanitarian intervention because of it is a form of authorized coercion. Kant considered authorized coercion a just practice as a part of his proposal for a secure and peaceful global republic.[27] Authorized coercion involves coercing citizens in a manner routed in legality rather than moral or ethical impulse. Again, Kant would fundamentally support armed humanitarian intervention because it is a form of authorized coercion and a practice based in law, similar to what he proposes for the establishment of a global republic. This analysis of Kant's potential perspective holds that comparing the idea of armed humanitarian intervention to components of Kant's "humanity intervention"[28] reveals Kant's support for armed humanitarian intervention. This claim is potentially less certain than it originally seems.

One component of Kant's reasoning within *Perpetual Peace* is titled *Metaphysics and Morals.* The section is best summarized by the following quote;

> "implicit a priori in the idea of reason of such a (nonjuridical) condition is the notion that, before a public legal condition can be established, individual people, peoples, and states cannot be secure against violence from one another, due specifically to the right of each to do *what he believes is right and good* and not to be dependent on the opinion of others."[29]

Kant qualifies it as a duty to leave the state of nature where individuals try to coerce each other and to enter an existence where states willingly, although gradually, cede to a global republic. This may seem contradictory to the original assertion that Kant supports authorized coercion. The key is Kant's emphasis that the process of moving toward perpetual peace in a

[26] Kant, Immanuel. *Toward perpetual peace and other writings on politics, peace, and history*. New Haven: Yale University Press, 2006. Print.
[27] Ibid.
[28] A phrase used by Kant as a lays the framework for the transition from state of nature to peaceful global republic in *Perpetual Peace*
[29] Kant, "Metaphysics of Morals," P.45, 112.

global republic is a gradual one. This is so because ultimately, coercing states into the republic defeats the aims of the republic as an organization whose members are equal and free. Yet, some level of coercion is acceptable and even necessary along the path toward a global republic.[30] More simply, Kant blatantly supports political non-intervention, but not necessarily non-intervention during humanitarian crisis.

Despite this framework for Kant's potential support, it is most important to note that for Kant, successful humanitarian intervention is not the end goal. Kant would likely provide unenthusiastic approval of armed humanitarian intervention even specifically within today's political climate. However, rather than establishing ways to effectively intervene to prevent human rights violations, Kant's primary focus would be on creating a new dynamic in international politics where humanitarian intervention is no longer necessary.

Generally, public supporters of armed humanitarian intervention cite an emotionally backed need to defend human rights, rather than thoughtful arguments regarding the effectiveness of the practice of intervention. Even academic papers that highlight the positive aspects of intervention deny that armed humanitarian intervention is always the right thing to do. For example, Jennifer Welsh discussed the book of non-interventionist John Welsh and proposed that his strict stance is erroneous.[31] In fact, it could be said that although Welsh is arguing in favor of armed humanitarian intervention, the underlying premise is that human rights are important and something should be done to protect them. It is unlikely that many people would dispute that claim, be they in favor of armed humanitarian intervention or not.

Armed humanitarian intervention is one of the few methods currently available to address violations of human rights and certainly the option that provides the largest amount of immediate influence. However, it is important to keep in mind that the intervention debate is not one over how the world should be, but rather an argument over the means best suited to attaining and protecting human rights throughout the world. Intervention itself is concerning because within the current political framework it inevitably violates the principle of sovereignty, inescapably provides an opportunity for intervening nations to abuse power under the guise of protecting human rights and most importantly because adequate legal provisions for intervention do not exist.

CONCLUSION

[30] Emphasis remains on the idea that states should not be coerced into becoming members of a global republic. There is a distinction between coercion during the gradual process of globalization and coercion into entering the republic

[31] Welsh, Jennifer M. "A normative case for pluralism: reassessing Vincent's views on humanitarian intervention." *International Affairs (Royal Institute of International Affairs 1944-)* 87.5 (2011): 1193-204. *JSTOR*. Web. 18 Oct. 2013. <http://www.jstor.org/stable/41306949>.

The world is currently focused on how human rights can be properly protected. Armed humanitarian intervention plays a significant role in the discussion because it is the most visible and immediate form of correcting violations of human rights within the current global political structure. However, armed humanitarian intervention possesses complicated if not insurmountable flaws that should disqualify the practice. Rather than attempting to adjust international governance to make ethical intervention a possibility, it would ultimately be most effective to discuss and reform the structure of international government itself in accordance with Kant's ideas for a world republic. Armed humanitarian intervention, an imprecise and inappropriate means of impeding human rights atrocities, would become irrelevant under such a system. The founding principles of the Responsibility to Protect can also be interpreted in support of such a reform. A restatement of the questions originally posed in regard to armed humanitarian intervention emphasizes the credibility of dismissing the notion of intervention as the ultimate means of human rights protection. Is armed humanitarian intervention moral? Does it have potential to be successful at ending human rights violations? If it should be done, then what is the threshold for action? With the focus of human rights protection shifted toward prevention of atrocities rather than correction of violations, these inconclusive questions no longer need to be answered

## Announcing A New Initiative And Website On Issues Of Legitimacy And Faith

Posted on December 12, 2014

http://www.jesusmeetsmuhammad.com

From the Jesus Meets Muhammad About Link:

"Religion is the primary source of those standards of legitimacy that define what we consider to be right and wrong, and in an increasingly pluralistic world in which most people identify as either Christians or Muslims, conflicting standards of legitimacy can lead to religious hatred and violence. (See the Introduction to the J&M Book)

This website presents topics for discussion on issues of legitimacy that are related to the teachings of Jesus and Muhammad. But those ancient teachings did not address critical issues of national sovereignty, just war, democracy and fundamental human rights in our time and place. That requires that we apply the moral imperative to love God and our neighbors—even our unbelieving neighbors—as a governing principle of legitimacy. It is a common word of faith for Jews, Christians and Muslims, and when reason is used to apply that principle of faith to contemporary issues of legitimacy it enables us to reconcile our religious differences.

Reason requires that people of faith distinguish between voluntary moral standards and obligatory religious laws that are imposed on others. That is because freedom of religion and expression require that religious standards of belief and behavior be entirely voluntary, in contrast to Islamic regimes that deny freedom with blasphemy and apostasy laws.

This website promotes the premise that both Jesus and Muhammad would support libertarian democracy as a means of loving God and neighbor, and have their followers use reason to conform

their ancient holy laws to modern standards of legitimacy, leaving obligatory and coercive laws to elected lawmakers—not to God.

The J&M Book and other resources on this website can help Christians and Muslims better understand their differences and find the common ground needed to reconcile religious differences in a world of diverse and conflicting religious beliefs.

We welcome your comments and suggestions on our blog."

# Military Firearms in Ferguson and Beyond: Arms Transfers to Civilian Law Enforcement Under the '1033 Program'

*Kevin H. Govern*

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JURIST Guest Columnist Kevin Govern of Ave Maria School of Law in Naples, Florida, discusses the Department of Defense Excess Property Program—commonly known as the '1033 Program'—under scrutiny for the recent events in Ferguson, Missouri and concludes that this will result in stricter delineations concerning military cooperation than ever before…

Last year, JURIST highlighted the notable subject of the Defense Support for Civil Authorities [PDF], in the context of man-made and natural disasters. A variety of historic laws and policies are the foundations for providing defense support to civilian authorities. One law garnering very little public scrutiny before the Fall of 2014—but tremendous media coverage since—is the Department of Defense Excess Property Program, commonly referred to as the '1033 Program.' The '1033 Program' is primarily oriented towards counter-drug activities, but sometimes leads to very different capabilities and employments.

Section 1208 of The National Defense Authorization Act for Fiscal Year 1990, allowed the Secretary of Defense to:

[T]ransfer to Federal and State agencies personal property of the Department of Defense, including small arms and ammunition, that the Secretary determines is– (A) suitable for use by such agencies in counter-drug activities; and (B) excess to the needs of the Department of Defense."

The law further provided that:

2) The Secretary shall carry out this section in consultation with the Attorney General and the Director of National Drug Control Policy.

(b) Conditions for Transfer-The Secretary of Defense may transfer personal property under this section only if-

(1) the property is drawn from existing stocks of the Department of Defense;

(2) the recipient accepts the property on an as-is, where-is basis;
(3) the transfer is made without the expenditure of any funds available to the Department of Defense for the procurement of defense equipment; and

(4) all costs incurred subsequent to the transfer of the property are borne or reimbursed by the recipient.

In 1996, Congress replaced Section 1208 with Section 1033 that subsequently became Section 2576a, yet is still colloquially called the '1033 Program' through the present.

The Defense Logistics Agency (DLA) notes that "[s]ince its inception, the '1033 Program' has transferred more than $5.1 billion worth of property. In 2013 alone, $449,309,003.71 worth of property was transferred to law enforcement." As part of its outreach to civilian agencies, the DLA predicted that, "[i]f your law enforcement agency chooses to participate, it may become one of the more than 8,000 participating agencies to increase its capabilities, expand its patrol coverage, reduce response times and save the American taxpayer's investment.

Critics of the program, such as the ACLU, have remarked that "a disturbing range of military gear [is] being transferred to civilian police departments nationwide" and allege that "one-third of all war materiel parceled out to state, local and tribal police agencies is brand new."

Accountability problems are also surfacing as 184 state and local police agencies have been reportedly suspended from participating in the Pentagon's '1033 Program' for losing weapons or failing to comply with other stipulations. Notably, on August 26th the nationally-known sheriff of Maricopa County, Joe Arpaio, admitted that his department had been suspended from the program and is currently missing nine firearms—eight .45-caliber pistols and one M-16 rifle—issued to the agency out of 200 weapons from the surplus program. Twenty to 22 of the weapons vanished over the years, but roughly half were recovered from retired or current deputies who, incredibly, took them home. Under the '1033 Program,' the Maricopa County Sheriff's Office amassed an arsenal of "a Hummer, a tank, 90 M-16 rifles, 116 .45-caliber pistols, 34 M-14 rifles and three helicopters."

This '1033 Program,' coupled with National Guard troops deployment to Ferguson, Missouri, became the subject of critical medial focus in August 2014. Following the police shooting of the teenager Mike Brown, the Ferguson Police Department responded to protests and riots with a robust show of force, using gear that one media outlet documented as not obtained through the '1033 Program', yet others speculated to the contrary.

In response to calls for a 'demilitarization' of civilian police forces, Attorney General Eric H. Holder Jr. said "[a]t a time when we must seek to rebuild trust between law enforcement and the local community…I am deeply concerned that the deployment of military equipment and vehicles sends a conflicting message."

On Friday, August 15th, Senate Armed Services Chair Carl Levin (D-MI) called for a review of the so-called '1033 Program,' saying:

Congress established this program out of real concern that local law enforcement agencies were literally outgunned by drug criminals. We intended this equipment to keep police officers and their communities safe from heavily armed drug gangs and terrorist incidents. Before the defense authorization bill comes to the Senate floor, we will review this program to determine if equipment provided by the Defense Department is being used as intended.

Missouri Democratic Senator Claire McCaskill, the chairman of the Subcommittee on Financial & Contracting Oversight, also announced she will lead a hearing, observing that:

We need to de-militarize this situation—this kind of response by the police has become the problem instead of the solution. I obviously respect law enforcement's work to provide public safety, but my constituents are allowed to have peaceful protests and the police need to respect that right and protect that right. Today is going to be a new start, we can and need to do better.

Shortly thereafter, President Obama ordered a "comprehensive review of the government's decade-old strategy of outfitting local police departments with military-grade body armor, mine-resistant trucks, silencers and automatic rifles," according to media interviews of senior officials.

Early on August 21st, Missouri Governor Jay Nixon announced that the National Guard—which was brought in to provide security for the police command center—would be withdrawn from Ferguson; this withdrawal began the next day, some five days after being dispatched to help "quell the unrest" and four days before the burial of Michael Brown.

These recent developments—along with Congressional review of the surplus Department of Defense military equipment program—will lead to even stricter delineations than ever before regarding military cooperation with civil authorities, while still focusing on preparation, partnerships and vigilance.

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