American Indifference: The Lack of U.S. Response to Evolutions in the Law of Armed Conflict and How it Should be Addressed

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I. Introduction

We are in an unprecedented time of change for the law of armed conflict. Globalization and technology are providing non-state actors with unprecedented war-making capabilities including the ability to organize across borders and weaponry that levels the playing field with traditional state actors. These same factors allow states to combat non-state actors, and other nations for that matter, with an increasing array of tools. The consequential evolving areas of warfare create challenges for the law of armed conflict (LOAC) that threatens its relevance in the future. The law of armed conflict must evolve along with the warfare it regulates if it is to continue to serve as a viable constraint.

As a *lex specialis* of international law,[1] many factors contribute to that evolution. Certainly state practice is important, and many would say it is the most important aspect in creating customary international law.[2] In this it would seem intuitive that the United States, as one of the most significant practitioners, would have a significant influence. But state practice absent comment—without effort to explain that practice and how it complies with international law—is largely lost to history. The conversation and communication concerning the law is as important as the practice itself, both in explaining state practice and in contributing to the argument as to what is customary. The United States is currently ceding that role to others, which may ultimately produce results with which the United States does not agree. The International Committee for the Red Cross (ICRC), the United Nations, Human Rights Watch, the European Court of Human Rights, and even some nations are actively interpreting the law of armed conflict. What is striking is that these groups are largely devoid of practitioners and often skew the delicate balance between military necessity and unnecessary suffering.[3]

Three contemporary examples illustrate the on-going evolution and lack of U.S. response. First, despite being one of the most important modern statements on the law of armed conflict and despite U.S. objections to the document, [4] the United States failed to respond to the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law"[5] released in 2009. Second, the United States responded to questionable assertions by the Human Rights Council of the United Nations through its "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston"[6] concerning the targeting of enemy combatants and the use of drones[7] with a few high profile speeches by administration officials,[8] but no more lasting efforts to offer an alternative interpretation of the law. Finally, there is no on-going effort by the United States to contribute to the discussion on the impact of cyber operations on the law of armed conflict despite the obvious importance the United

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[1] INT'L AND OPERATIONAL LAW DEPT., U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 42 (2009).

[2] INTERNATIONAL COMMITTEE OF THE RED CROSS, *Customary International Law* 178-79 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) [hereinafter ICRC, *Customary International Law*] (focusing on state practice as the methodology for determining customary international law); *see also* Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 29 (June 3) (stating that it is "axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of States").

[3] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) (stating that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war"); HUMAN RIGHTS WATCH, BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 87 (2013) (concluding, for example, "that US forces are applying an overly broad definition of 'combatant' in targeted attacks, for example by designating persons as lawful targets based on their merely being members, rather than having military operational roles, in the armed group").

[4] *See, e.g.*, Kenneth Watkins, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretative Guidance*, 42 N.Y.U.J. INT'L & POL. 641 (2010) (describing problems and objections to the interpretative guidance's definition and treatment of "organized armed groups").

[5] ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 9 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], http://www.icrc.org/ eng/assets /files/other/icrc-002-0990.pdf (last visited Oct. 15, 2015); *see also*, Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U.J. INT''L & POL. 831, 833 (2010).

[6] Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, U.N. DOC. A/HRC/14/24/ADD.6 (May 28, 2010) [hereinafter U.N. Study on Targeted Killings].

[7] *See, e.g., id.* at ¶77 ("Less-than-lethal measures are especially appropriate when . . . armed forces operate . . . in the context of non-international armed conflict, in which rules are less clear. In these situations, States should use graduated force and, where possible, capture rather than kill. Thus, rather than using drone strikes, US forces should, wherever and whenever possible, conduct arrests, or use less-than-lethal force to restrain.").

[8] Eric Holder, Attorney General, Address at Northwestern University School of Law (Mar. 25, 2012).

States has placed on the development of cyber policy[9] and despite the emphasis the rest of the world is placing on it. [10]

There are valid reasons for the United States to move slowly in making formal declarations on its interpretation of international law. There are informal ways, however, that the United States can leverage to better reflect its position to the international community and participate in the on-going conversation, and ultimately influence the evolution of the law. In the United States we have many academics who study and write in this area, serving both in and out of the government.[11] Coming out of the wars in Iraq and Afghanistan, the United States also has many current practitioners who have the operational expertise and the intelligence to participate in this conversation. What the United States lacks is the proper forum to bring these groups together—one that provides some imprimatur of government authority, but is attenuated enough to allow communication without a formal process of approval; one that brings together the authoritative weight of academics and operational expertise of practitioners. In order to actively participate in influencing the direction of the LOAC, the U.S. government should support the development of a think tank at the United States Military Academy. This think tank will provide a forum for experienced academics and practitioners to discuss evolving issues and articulate legal interpretations that are indicative of U.S. policy. Part II of this article will highlight a few of the most important areas where the law of armed conflict is evolving and the problems created by a lack of U.S. engagement. In part III, a proposed solution and the justifications for that solution are presented. Ultimately, a government-supported think tank located at the United States Military Academy offers a unique opportunity to bring together the right people in the right forum and contribute significantly to this conversation in a way that benefits the United States.

II. Evolutions in the Law of Armed Conflict: Everyone is Talking but the United States

Each of the issues discussed below has generated significant commentary in academic circles that will not be recreated here. The point is, the U.S. government has not commented in any meaningful or consistent way. It is necessary to briefly describe the issues to understand their significance in the evolution of the law of armed conflict and the importance of some type of U.S.-generated response. Their inclusion here is not intended to imply that they represent the only areas where the law is evolving, but they are certainly some of the most significant.[12]

A. Direct Participation in Hostilities

The primary purpose of the law of armed conflict is to balance the military necessities of warring parties with the need to protect victims of armed conflict and noncombatants.[13] This is done primarily through the principle of distinction,[14] which requires parties to an armed conflict to direct their military operations only against combatants and military objectives.[15] Unfortunately, as warfare has developed, this has become increasingly difficult. The rise of conflicts with non-state groups and the increase of fighting in populated areas have led to an increased intermingling of civilians with armed actors.[16] Some belligerents, particularly when fighting a stronger military force, have used these changing circumstances to their advantage by hiding among civilian populations and recruiting part time fighters from the civilian community. The increased concern for the protection of civilians was one of the driving forces in bringing many nations together to negotiate and draft the additional protocol to the Geneva Conventions in the 1970s.[17] One of the provisions resulting from this concern was Article 51(3), which states that

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[9] *See* Cheryl Pellerin, *DOD Releases First Strategy for Operating in Cyberspace*, AMERICAN FORCES PRESS SERVICE (July 14, 2011), http://www.defense.gov/news/newsarticle.aspx?id=64686 (announcing cyberspace as a fifth domain of military operations equivalent to land, air, sea, and space and describing its significance to the U.S. government).

[10] *See, e.g.*, TALLIN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 1 (Michael Schmitt, ed., 2013) [hereinafter TALLIN MANUAL]. The NATO Cooperative Cyber Defence Centre of Excellence assembled a group of experts in Tallin, Estonia to consider the application of cyber activities to the law of war, which resulted in The TALLIN MANUAL. *Id.*

[11] *See, e.g.*, Jack Landman Goldsmith, Biography, HARVARD LAW SCHOOL, http://www.law.harvard.edu/faculty/directory/10320/Goldsmith (last visited Oct. 15, 2015); Martin S. Lederman, Our Faculty, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/lederman-martin-s.cfm (last visited Oct. 15, 2015).

[12] There are numerous other examples, both in evolving and established areas of the law of armed conflict, where statements on the U.S. position are inadequate. For example, U.S. practitioners still rely on the Matheson article from 1987 as the only authoritative statement as to what portions of AP I the United States considers customary international law. *See infra* note 15; *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987).

[13] Michael N. Schmitt, *The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 6 (2010).

[14] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 82 (2004) (describing the principle of distinction as fundamental and "intransgressible" to international humanitarian law).

[15] Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts art. 48, 8 June 1977, International Committee of the Red Cross, http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument [hereinafter Additional Protocol I].

[16] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 5.

[17] CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 xxix (ICRC ed. 1987).

"[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[18] Unfortunately, neither the original conventions nor the additional protocol define direct participation in hostilities. As the trend toward the intermingling of combatants and non-combatants increased, the ICRC felt the need to further define direct participation. In 2003, it initiated a collaborative process to answer three questions: who is considered a civilian for the purposes of the principle of distinction; what conduct amounts to direct participation in hostilities; and what modalities govern the loss of protection against direct attack.[19] In 2008 the ICRC published an eighty-five page document titled "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law" with its answers to these questions.[20]

Over forty eminent international law attorneys, military officers, government officials, and representatives of non-governmental organizations took part in the development of the guidance, including several from the United States. Yet, the ultimate guidance proved so controversial that many of the experts asked that their names be removed as participants for fear that inclusion would indicate support.[21] Ultimately, the ICRC published its interpretative guidance with the statement that it is "an expression solely of the ICRC's views."[22] Among those objecting to the final product were Professor Michael Schmitt of the Naval War College and W. Hays Parks, then of the Department of Defense (DOD) Office of the General Counsel, along with several high ranking officials from allied nations.[23]

In a volume of the New York University (NYU) Journal of Law and Politics, Professor Schmitt and Mr. Parks, along with Professor Boothby of the British Royal Air Force and Brigadier General (Retired) Watkins of the Canadian armed forces, described the most significant objections in a series of articles. In the broad sense, U.S. practitioners and experts felt that the interpretative guidance skewed the delicate balance between military necessity and humanity toward the latter, which ultimately weakens the LOAC as states participating in an armed conflict are unlikely to accept norms that place their military success at risk.[24] More specifically, these experts raised several objections.

First, the interpretative guidance creates a new party to armed conflicts—the non-state armed group—but applies different rules to this group in comparison to state armed forces. It gives broader protection to civilians supporting the non-state armed group over those available to civilians supporting state armed forces.[25] Secondly, the interpretative guidance provides a definition of direct participation that is too narrow and fails to take into account acts that enhance the military capability of a party to the conflict, particularly actions that benefit specific operations.[26] Furthermore, it confuses the determination of direct participation by introducing a "one step" analysis for determining who is directly participating.[27] Third, the ICRC's interpretation of the temporal component contained in the phrase "for such time as" provides overly expansive protection to civilians who regularly participate in hostilities in comparison to members of opposing armed forces, who are continuously targetable.[28] Lastly, Mr. Parks makes an impassioned argument that the ICRC exceeded its mandate in Section IX of the interpretative guidance by addressing restraints on the use of force in direct attack, as this is a component of the means and methods of warfare largely codified in the Hague treaties and not part of the protections for victims of hostilities contained in the Geneva Conventions.[29] He goes on to systematically dispute the ICRC's interpretation of military necessity and the limitations it places on targeting by military forces.[30] Together, these articles expose significant problems with the ICRC interpretative guidance and better reflect U.S. practice and the United States' position concerning direct participation in hostilities.

This example highlights the gap that currently exists in the U.S. law of armed conflict discussion. First, no better forum existed for some of the premier experts in the United

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[18] Additional Protocol I, *supra* note 15.

[19] ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 13.

[20] *Id.* at 8.

[21] Schmitt, *supra* note 13, at 6.

[22] ICRC INTERPRETIVE GUIDANCE, *supra* note 5, at 6.

[23] *See* Schmitt, *supra* note 13, at 6; 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, 769 note * (2010); Biography of Kenneth Watkins, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, https://www.law.upenn.edu/live/files/3812-watkin-short-biography-oct-2014pdf (last visited Oct. 15, 2015) (describing the professional experience of Brigadier General (Retired) Ken Watkin, Queen's Counsel, including service as the Judge Advocate General for Canadian forces and as a participant in the International Committee of the Red Cross (ICRC) Interpretative Guidance study); Biography of William Boothbay, GENEVA CENTRE FOR SECURITY POLICY, http://www.gcsp.ch/News-Knowledge/Experts/Fellows/Dr-William-Boothby (last visited Oct. 15, 2015) (describing professional experience of Dr. Boothby, including service as head of the Royal Air Force legal branch and a participant in the ICRC Interpretative Guidance study). While each of these individuals were or are officials in the United States or allied governments, each one participated in the ICRC process in his personal capacity and not as a representative of the government. Biography of Kenneth Watkins, *supra*; Biography of William Boothbay, *supra*.

[24] Schmitt, *supra* note 13, at 6.

[25] Watkins, *supra* note 4, at 644.

[26] Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, 42 N.Y.U. J. Int'l L &Pol. 697, 727 (2010).

[27] *Id.* at 728.

[28] Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L & Pol. 741, 743 (2010).

[29] Parks, *supra* note 23, at 794.

[30] *Id.* at 799.

States on the law of war to express their concerns with the ICRC Interpretative Guidance than in an academic journal of a private law school. Second, there was no forum that brought together these experts with current U.S. practitioners and other academics to discuss these issues and potentially produce a leading position that would carry more weight in rebutting the position of the ICRC. Imagine the International Criminal Court surveying the law on direct participation in hostilities in some future court case. Which will be more persuasive to their determination of what is customary international law—a publication by the ICRC or a collection of articles in the NYU Journal of Law and Politics?

The United States expressed similar objections to the ICRC Customary International Law Study,[31] published in 2005. In that situation the legal advisor to the Department of State and the General Counsel to the Department of Defense sent a twenty-nine page letter to the president of the ICRC stating that they did not believe that the study followed an appropriate methodological approach to identifying customary international law.[32] While this constitutes a legitimate United States response, it was sparse in comparison to the multi-volume document produced by the ICRC and it only focused on a few key provisions. The officials asserted that the U.S. would respond more thoroughly at a later time,[33] but that response never came.

B. Targeting in the "War on Terror"

Another area of significant importance to the United States is the application of the law of armed conflict to targeting of combatants who are members of non-state groups such as al Qaeda, and are, at times, located outside of areas of ongoing hostilities. The United States has developed its approach to this issue largely through state practice over the last decade. In 2010, the Human Rights Council of the United Nations released the "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," which was antithetical to U.S. practice in several respects.[34] First, it took a very strident and pejorative tone toward U.S. practice, characterizing targeted strikes as summary executions and equating them to illegal acts.[35] The introduction asserts that "too many criminal acts have been re-characterized so as to justify addressing them with the framework of the law of armed conflict" and that targeted killings "displace[] clear legal standards with a vaguely defined license to kill."[36]

Beyond the pejorative tone, the report takes legal positions that are clearly inconsistent with the U.S. interpretation of the law. First, the United Nations (U.N.) Study on Targeted Killings asserts that both international humanitarian law (IHL) and human rights law apply during armed conflict. Specifically, the study states that "[t]o the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from guidance offered by IHL principles, it is appropriate to draw guidance from human rights law."[37] This is an assertion the United States has never accepted, particularly the latter statement.[38] It would mean that human rights law applies anytime that the LOAC[39] does not clearly resolve a difficult targeting issue. The United States adheres to the traditional view that the LOAC is a *lex specialis* and where it controls, it supplants human rights law.[40] Further, the U.N. study takes the position that the United States cannot be in a non-international armed conflict with al-Qaeda because al-Qaeda and its associated forces are too loosely linked to constitute a "party" to an armed conflict and the violence it inflicts does not rise to the level of intensity and duration required by Additional Protocol II and customary international law.[41]

Finally, the U.N. study supports one of the positions of the ICRC concerning direct participation in hostilities that the United States finds problematic and that is discussed above. It asserts that the portion of the ICRC interpretative guidance that requires the parties to a conflict to use no more force than "what is actually necessary to accomplish a legitimate military purpose"[42] is stating an uncontroversial requirement, especially when targeting civilians who directly participate in hostilities.[43] This last point is interesting, in

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[31] ICRC, *Customary International Law*, *supra* note 2.

[32] John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007), http://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf.

[33] *Id.* at 444.

[34] U.N. Study on Targeted Killings, *supra* note 6.

[35] *Id.* ¶ 11.

[36] *Id.* at ¶¶ 2-3.

[37] *Id.* at ¶ 29.

[38] *See* Int'l and Operational Law Dept., U.S. Army Judge Advocate General's Legal Center & School, Operational Law Handbook 42 (2009).

[39] Human rights advocates tend to refer to the law of armed conflict as international humanitarian law (IHL). *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 239 (2000). Traditionalists tend to refer to it as law of war. *See generally*, Parks, *supra* note 23. The term "law of armed conflict" is used throughout this article, but it is recognized that all three are interchangeable references to the entire body of the law of armed conflict.

[40] JEAN PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 15 (1975) (stating that the law of armed conflict "is valid only in the case of armed conflict while human rights are essentially applicable in peacetime"); Robert J. Delahunty & John C. Yoo, *What is the Role of International Human Rights Law in the War on Terror?*, 59 DEPAUL L.REV. 803, 844 (2010).

[41] U.N. Study on Targeted Killings, *supra* note 6, ¶¶ 52-55.

[42] ICRC INTERPRETATIVE GUIDANCE, *supra* note 5, at 77.

[43] U.N. Study on Targeted Killings, *supra* note 6, ¶ 76.

that it provides another example of a U.N. document taking a position contrary to U.S. practice, but it also highlights the influential nature of ICRC publications and the need for a more persistent response.

In some ways the United States mounted a relatively robust response to criticism of its targeting program, particularly as it was applied to members of al-Qaeda outside of Afghanistan. This likely occurred because criticism was aimed directly at the United States. Plus, it came from more sources than just the United Nations.[44] In any case, the U.S. response came primarily through speeches by high ranking officials in the Obama administration. In March 2010, Harold Koh, the legal advisor to the U.S. Department of State, made the first of five major speeches by the Obama administration political appointees defending targeted killings by the United States.[45] In the speech he first affirms that the United States is in an armed conflict with al-Qaeda, [46] and that the United States may use force against this group under its right to self-defense.[47] Mr. Koh went on to dispute the claim that the use of drone strikes constitutes extrajudicial killing by asserting that under the law of war "a state that is engaged in an armed conflict or legitimate self-defense is not required to provide legal process before the state may use lethal force."[48]

In September 2011, John Brennan, who was President Obama's advisor on counterterrorism at the time, struck a similar tone in a speech he made at Harvard Law School.[49] There he said that:

> The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time.[50]

Brennan went on to assert that even under a more restrictive view, that only allows the use of force outside of a "hot" battlefield for the purposes of self-defense, the United States is still complying with the law of armed conflict because it only targets threats that are imminent, although modern conditions require a more flexible definition of imminence.[51] Similar speeches were made by Jeh Johnson, the General Counsel for the Department of Defense,[52] Eric Holder, the Attorney General,[53] and again by John Brennan.[54] Each reiterated the theme that the United States is in an armed conflict with al-Qaeda, the conflict extends beyond the "hot" battlefields of Iraq and Afghanistan, and the United States may target members of this group under the law of armed conflict without providing notice or some level of due process.[55]

These speeches appear to offer a clear view of the U.S. position concerning targeted killings. Unfortunately, they suffer from at least two problems. Most importantly, they all come from political appointees and each specifically asserts that they are expressing the position of the Obama Administration,[56] not the United States. In that context, their

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[44] *See, e.g.*, Human Rights Watch, *U.S.: 'Targeted Killing' Policy Disregards Human Rights Law* (May 1, 2012), http://www.hrw.org/news/2012/05/01 /us-targeted-killing-policy-disregards-human-rights-law (criticizing John Brennan's speech asserting that U.S. targeting practices were consistent with domestic and international law); Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C. 2010).

[45] Harold Koh, Legal Advisor, Dept. of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010).

[46] *Id.* ("In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qeada. . . . Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable laws, including the laws of war, in all aspects of these ongoing armed conflicts.").

[47] *Id.* (". . . [A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.").

[48] *Id.*

[49] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Harvard Law School Program on Law and Security (Sep. 16, 2011).

[50] *Id.*

[51] *Id.* ("In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define 'imminence.' We are finding increasing recognition in the international community that a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.").

[52] Jeh Johnson, General Counsel of the Department of Defense, Address at Yale Law School (Feb. 22, 2012).

[53] Holder, *supra* note 8.

[54] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012).

[55] The Department of Justice also released a White Paper in November 2011 to address the specific issue of targeting a U.S. Citizen who is a senior operational leader of al-Qa'ida. U.S. DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (Nov. 8, 2011), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf.

[56] *See, e.g.*, Brennan, *supra* note 54 ("I very much appreciate this opportunity to discuss *President Obama's counterterrorism strategy* . . . ." (emphasis added)); Koh, *supra* note 45 ("Since this is my first chance to address you as Legal Advisor, I thought I would speak to three issues. . . .

precedential value as a statement of the U.S. position is relatively limited. It is questionable whether scholars, other nations, or international organizations, would give them much weight in defining international law, particularly after this administration has left office. Second, it is telling that the highest officials in the U.S. government chose to respond to ongoing criticism to the U.S. position through speeches. It eliminates the need to overcome any type of bureaucratic process necessary to produce a more formal statement. Furthermore, it is an indication that the President did not want, or at least did not need these statements of the U.S. position to become more definitive. There are certainly reasons why a President would not want to bind himself or a future President where it is unnecessary. Unfortunately, this just lends to the concern that speeches will not be given the same level of credibility, particularly as time passes.

Speeches by important administration officials obviously have their place. However, a government sponsored law of armed conflict think tank would provide another tool to amplify the message delivered by high ranking officials. It would do this through writings by lesser government officials and academics that last beyond any one administration or one point in time. And while no one article or publication from the think tank will define the U.S. position concerning the law of war, over time it will provide pieces in a large mosaic that the world can look at to define the leading U.S. position, and thus influence the larger body of law.

C. Cyber Warfare

Although there are other evolving areas in the law of armed conflict, the last one that this article will discuss is cyber warfare. More than any other area, this may be the most complicated in terms of applying the existing legal framework to a completely new environment. Cyber operations can produce effects similar to a kinetic strike, but they also produce many other effects that negatively impact an opposing force or support allied forces; not to mention numerous applications that may create an incidental burden or benefit for a belligerent. To make things even more complicated, every type of entity can conduct cyber operations; from an individual acting alone, up to powerful nations and everything in between. Lastly, these parties can conduct their operations from anywhere in the world, openly or in complete secrecy. This complexity creates a morass of issues in the law of armed conflict. What rules apply? When do they apply and how?

At the urging of the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence, a group of experts attempted to answer these questions by "examin[ing] how extant legal norms appl[y] to this 'new' form of warfare."[57] Their efforts produced the *Tallin Manual on the International Law Applicable to Cyber Warfare*. The manual provides ninety-five rules over 282 pages in an effort to help governments understand the international legal implications of cyber operations.[58] The problem is that the manual only scratches the surface in answering the difficult questions that cyber warfare presents. As the editor admits there are no treaty provisions that deal with cyber warfare and expressions of *opinio juris* are sparse. In determining the application of the law of armed conflict to cyber warfare the international group of experts was forced to apply principles broadly, or in some cases craft broad rules where no existing principle applied.[59] These broad principles leave many questions in the scope and application of the law. Colonel Dave Wallace and Lieutenant Colonel Shane Reeves highlight just one of these gaps in their article on the application of the cyber warfare to *levee en masse*.[60]

There is much more to be done. First, as described above, the Tallin Manual does not completely define the *lex lata*[61] in its application to cyber warfare. But even more important, if the law of armed conflict is to remain relevant in this area, nations must address the *lex ferenda*,[62] or what the law should be. Too much legal ambiguity remains, and the law of armed conflict as it exists now cannot serve its purpose in maintaining the balance between military necessity and humanity in the area of cyber operations. The United States must be a part of this conversation and currently we have limited vehicles by which to do so. Again, a government sponsored think tank cannot fill this void, but it could keep the conversation moving forward and provide a continuous voice that does not currently exist.

III. The Potential Solution

In a perfect world the Department of State and Department of Defense would seamlessly execute an administrative process that brought government experts together to consider evolutions in the law of armed conflict and provide a consensus response that reflects the U.S. position. For many reasons this does not happen. In some cases it may be wise for the United States to refrain from publishing an *official* position in an evolving area where the

Second, to discuss the strategic vision of the international law that *we in the Obama Administration are attempting to implement*." (emphasis added)).

[57] TALLIN MANUAL, *supra* note 10, at 1.

[58] David Wallace & Shane R. Reeves, *The Law of Armed Conflict's "Wicked" Problem:* Levee en Masse *in Cyber Warfare*, 89 INT'L L. STUD. 646, 648 (2013).

[59] TALLIN MANUAL, *supra* note 10, at 5-6.

[60] Wallace & Reeves, *supra* note 58.

[61] *Lex lata* is defined as "what the law is." *See* J. Jeremy Marsh, Lex Lata *or* Lex Ferenda*? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 117 (2008).

[62] *Id*.

future is uncertain. In other cases, it seems that the very idea that a document may be viewed as the *official* position of the United States creates bureaucratic catatonia. The updated Law of War Manual for the Department of Defense is a perfect example of this. Efforts to update it began in 1996 and reports indicate that it was close to completion in 2010.[63] Four years later it still languishes, and some assert that it has been torpedoed by political concerns.[64]

The result is that nothing exists to provide any type of consensus response—whether official or not—that represents the U.S. view. To the extent that it is represented, the U.S. view comes from state practice, speeches by political appointees, and certain court opinions. All of these are problematic, and insufficient to say the least. While state practice is the most significant indicator of the U.S. view of international law, if no one documents that practice and links it to United States *opinio juris*, it loses its force. Speeches by high ranking political appointees are significant, but the political nature of their position, for better or worse, weakens the strength of these statements as an enduring view of the law. The political aspects of their position calls into question whether their view of the law will survive from one administration to the next and whether it will be accepted by allies or other branches within our U.S. government. Even without the political concerns, a few speeches are not enough to establish a basis for the U.S. view.

Given the landscape, U.S. federal court opinions that interpret the law of armed conflict might be the most authoritative statement on the U.S. view.[65] For obvious reasons, these are few and far between, and do not cover the range of evolving issues. They certainly do not serve to answer opposing voices which reflect views inconsistent with U.S. practice. Furthermore, judges are generalists and we should not leave it to them to define the U.S. position on a specialized area of law such as the law of armed conflict. It should be the other way around. A consensus view that reflects the position of U.S. experts and practitioners should inform judges in resolving court cases that implicate the LOAC.

A. The Benefit of a Think Tank

Current outlets for U.S.-centric expressions of the law are insufficient. The proposed government supported think tank cannot fill the void, but could serve as one tool in the government's arsenal to influence the evolution of international law. This entity could not replace the formal processes in the Department of State or the Department of Defense, and it could not purport to provide the *official* position of the United States on issues concerning the law of armed conflict. It could, however, bring government officials, practitioners, and academics together for the express purpose of studying evolving law of armed conflict issues with the intent of developing a consensus on what the U.S. position is or should be.

While this entity could never reach consensus in all areas, it could certainly find areas of agreement in important topics such as targeting, autonomous weapons, and cyber warfare, to name a few. For example, a conference sponsored by the think tank could conclude that the United States should continue to study the use of autonomous weapon systems because the technology is still undeveloped and it is unclear whether future systems will increase or decrease compliance with the law of armed conflict. Such a statement would provide a countervailing voice to organizations like Human Rights Watch, which are calling for an outright ban.[66] In this way, the think tank could signal the U.S. position to our allies, international organizations, and human rights groups without official action by the U.S. government.

Ultimately, increased expression of the U.S. position may prevent the crystallization of international law in a manner inconsistent with U.S. practice, or at least establish a foundation for the United States to assert persistent objector status. Furthermore, the output from the think tank creates a leading position for use by policy makers in developing U.S. doctrine. The stated mission of the think tank and the fact that it is government-created provide the imprimatur of government authority, while its structure and placement outside the Pentagon and the Department of State gives it the flexibility to study and respond proactively to law of armed conflict challenges. Warfare is evolving. If we do not proactively shape the law of armed conflict to evolve with it, this body of law will become ineffective in regulating warfare, or it will move in a direction that is contrary to the realities of warfare and prejudicial to the United States.

Some in Washington, D.C., may immediately object to this idea based on concerns that it would usurp the authority of officials at the Department of State and the Department of Defense. First, moving some small modicum of authority away from Washington, D.C., would not be detrimental. But more importantly, this would not usurp that authority, but rather provide a less formal outlet that officials in the government could communicate through, without setting U.S. policy. It is a way to signal the U.S. position without binding the government to that position. Furthermore, even

[63] Edwin Williamson and W. Hays Parks, *Where Is the Law of War Manual?*, THE WEEKLY STANDARD (Jul. 22, 2013), http://www.weeklystandard.com/articles/where-law-war-manual_739267.html.

[64] *Id.*

[65] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006) (finding that Common Article 3 of the Geneva Conventions serves as a minimum standard in all armed conflicts, and thus applies to the conflict with Al Qaeda and associated forces).

[66] *See* Lieutenant Colonel Shane Reeves & Major (Promotable) William J. Johnson, *Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk About It?* ARMY LAWYER 1-7 (Apr. 2014).

with the imprimatur of government support, it would not have the authority, prestige, or influence of Washington, D.C.

Others would argue that this type of forum already exists through such organizations as The Judge Advocate General's Legal Center and School and the Naval War College, and the accompanying publications such as *The Army Lawyer*, *The Military Law Review*, and *International Law Studies*. The Judge Advocate General's Legal Center and School is excellent at training and representing the views of practitioners. The International Law Department of the Naval War College has established a strong reputation as an academic organization that addresses the law of armed conflict on a broader international basis. This proposal, however, is different. We need an organization that brings both practitioners and academics together to focus on identifying the U.S. position in evolving areas of the law of armed conflict by examining U.S. state practice, or alternatively, arguing what the position should be in areas where it is unclear. Certainly there are many organizations and academics arguing as to how the law of armed conflict should apply to various issues, but this think tank would focus on U.S. interests and provide a proactive response that could then assist policy makers in more official settings. This is not to say that this organization would be some type of puppet to parrot views favorable to the United States. Instead, it would encourage free and open debate focused on identifying the U.S. interpretation on evolving areas in the law of armed conflict in an attempt to identify a consensus view between the academic and practitioner communities.

No other organization currently does this. The Judge Advocate General's Legal Center and School, along with *The Army Lawyer* and *Military Law Review*, have both a broader and more narrow focus. [67] They are broader in that the Legal Center and School is focused on all areas of law relevant to practice in the military, from contracts, to criminal law, to international law, including the law of armed conflict.[68] They are narrower in that the primary purpose is to build professional expertise in these various areas of law among judge advocates and civilian attorneys who work for the Department of Defense.[69] Typically, their goals are not to drive the evolution of the law, but to train practitioners on how to advise commanders on the law as it exists, and to generally take a conservative view where the law is unsettled.

The International Law Division of the Naval War College provides something closer to this model, but the emphasis is different. First, although it trains practitioners, its make-up and emphasis is more academic in nature. Most of its staff are military members or have military experience,[70] but it does not focus on bringing practitioners and government officials together with academics to study these issues.[71] Secondly, its contribution to the discussion is similar to other academic institutions in that its articles comment primarily on the view of international law from the perspective of the broader international community.[72] It does not typically, or at least purposefully, seek to describe the U.S. position. The proposed think tank is an organization whose stated goal is to study and identify the U.S. position concerning the law of armed conflict in order to provide a counter weight to the many voices who seek to shape international law in a manner inconsistent with U.S. practice.

There are many think tanks in the civilian community and similar organizations in academic institutions. These organizations do not have the specific mission of defining the U.S. position on the law of armed conflict. Typically, they are focused more on research and writing that tends towards broader discussions of the law. Furthermore, they do not draw important voices from inside the government, particularly practitioners of the law of armed conflict.

B. The United States Military Academy at West Point (West Point) as the Perfect Location

Of course, with enough resources the government can solve almost any issue. Thus, a solution that calls for more resources, especially in a time of increasing austerity for the Department of Defense, is not much of a solution. This solution, however, calls for almost no additional resources. The expertise already exists; the U.S. military only needs an entity to bring it together. The West Point Center for the

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[67] The mission of The Judge Advocate General's Legal Center and School is to "train[] and educate[] the Judge Advocate General's Corps Team of professionals and warriors in legal and leadership skills, develop[] capabilities, conduct[] strategic planning, and gather[] lessons learned to support the proactive delivery of principled counsel and mission-focused legal services to the Army and the Nation." *The Judge Advocate General's Legal Center and School Mission / Vision*, JAGCNET (June 19, 2012 12:55;08 PM), https://www.jagcnet.army.mil/Sites/tjaglcs.nsf/homeContent.xsp?open&documentId=298ABC690B7DBF2F85257A98006CEEF7.

[68] *The Military Law Review* states that it "provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their duties." Captain Laura A. O'Donnell, ed., 216 MIL. L. REV. ii, ii (2013).

[69] The notes on the inside cover of the *The Army Lawyer* state that its purpose is "to cover topics that come up recurrently and are of interest to the Army JAG Corps." Captain Marcia Reyes Steward, ed., ARMY LAW, (2014).

[70] International Law Division, *Who We Are*, NAVAL WAR COLLEGE (March 7, 2014), http://www.usnwc.edu/Research---Gaming/International-Law/Who-We-Are.aspx.

[71] International Law Division, *What We Do*, NAVAL WAR COLLEGE (Oct. 15, 2015), https://www.usnwc.edu/Departments---Colleges/International-Law/What-We-Do.aspx.

[72] *See, e.g.*, articles on International Law Studies, U.S. NAVAL WAR COLLEGE, http://stockton.usnwc.edu/ils/ (last visited Oct. 15, 2015) (providing an example of articles typically published by the International Law Division of the Naval War College).

Rule of Law,[73] which is co-located with the Department of Law, could serve as a perfect vehicle for this effort. As both a premier military institution and top-tier college, West Point is uniquely situated to facilitate a broader discussion and a comprehensive study of the law of armed conflict. West Point's novel attributes draw academics, commanders, and legal practitioners, thus providing a venue for discourse between these distinct groups. There are few organizations within the U.S. government that attract the number and quality of important leaders and thinkers in their fields for visits, conferences, lectures, and speeches.[74]

Additionally, West Point's special status in both the academic community and the U.S. military fosters an atmosphere that encourages the development of solutions to the law of armed conflict issues. One could easily imagine a conference hosting division and corps Staff Judge Advocates, members of the International Law Division of the Office of the Judge Advocate General, brigade commanders, and academic professors from around the world. In fact, this is already happening. Members of the ICRC visit each semester to speak to the cadets taking West Point's Law of Armed Conflict class. In October 2014, the Center for the Rule of Law co-hosted a conference with the Naval War College to consider the conflict in the Ukraine and implications for the law of armed conflict. The Army recently established the Army Cyber Institute at West Point,[75] which will serve as a key contributor to the discussion in the DOD on cyber operations and the law of armed conflict. Each year, faculty members both write and mentor cadets writing on LOAC issues.[76] These are just a few examples of the active engagement with the law of armed conflict that occurs at West Point. Plus, because of West Point's unique position as an academic institution, it benefits from funding sources not typically available to other DOD entities.

So how does the U.S. military get there? Under the best conditions, Congress would include language in the National Defense Authorization Act recognizing the Center for the Rule of Law at the United States Military Academy, or a similar organization, and giving it the mission of studying the evolution of the law of armed conflict for the purpose of assisting the executive branch and Congress with developing legal policy. Alternatively, the Department of Defense or the Department of the Army should assign this mission to the Center for the Rule of Law, similar to the Chief of Staff of the Army's creation of the Strategic Studies Group.[77] Again, whichever authority assigns the mission would draft the language in a such a way so as not to usurp the role of higher officials, but to clearly state that the purpose of the organization is to study the law of armed conflict and develop a consensus view for further use by the government.

If none of these is an option, The Judge Advocate General, U.S. Army, should support this organization as an entity inside the Corps that is focused on applying hard won expertise in this area to the consideration of current and future problems in the law of armed conflict. The Judge Advocate General, U.S. Army, could most easily do this by creating a LOAC fellowship within the Center for the Rule of Law at the United States Military Academy. The Judge Advocate General's Corps could fill this fellowship with a field grade officer with operational experience. This field grade officer would work with faculty members to coordinate conferences, edit material for publication, participate in scholarship, provide LOAC education to cadets, and work with entities such as the International Law Division on the DOD LOAC issues. This fellowship would be comparable to those experienced in other academic environments and the officer could complete it as the utilization tour subsequent to obtaining a Master of Laws (LL.M.) degree. Furthermore, this effort would support initiatives by the Army Chief of Staff to capitalize on operational experience[78] and expand institutional training opportunities.[79] While Congress, or even the Secretary of Defense, is not likely to address this issue anytime soon, maybe a grassroots effort by the JAG Corps could show its value and build the concept to meet the larger objective.

The U.S. military is in a unique time. Technology is driving the evolution of warfare in a manner likely unseen in history. The law of armed conflict must evolve with it and the United States needs to play an active and continuing part

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[73] West Point established the Center for the Rule of Law in 2009 to educate and promote the rule of law, including principles underlying the law of armed conflict, through conferences, programs, and experiential learning. Center for the Rule of Law, UNITED STATES MILITARY ACADEMY WEST POINT, http://www.usma.edu/crol/SitePages/Home.aspx (last visited Oct. 15, 2015).

[74] In this year alone West Point has been visited by the President of the United States, Secretary Condoleezza Rice, Congresspersons, CEOs, ambassadors, federal judges, most four-star generals in the Army, and numerous authors, journalist, and professors. *Press Releases*, West Point, http://www.westpoint.edu/news/SitePages/Press%20Releases.aspx (last visited Oct. 15, 2015).

[75] Joe Gould, *West Point to House Cyber Warfare Research Institute*, USA TODAY (April 8, 2014), http://www.usatoday.com/story/news/nation/2014/04/08/cyber-warfare-institute-west-point-academy/7463249/.

[76] *See, e.g.*, Cadet Allyson Hauptman, *Autonomous Weapons and the Law of Armed Conflict*, 218 MIL. L. REV. 170 (2013).

[77] CHIEF OF STAFF OF THE ARMY (CSA) STRATEGIC STUDIES GROUP, http://csa-strategic-studies-group.hqda.pentagon.mil/SSG_Index.html (last visited Oct. 15, 2015) ("The Strategic Studies Group (SSG) conducts independent, unconventional, and revolutionary research and analysis to generate innovative strategic and operational concepts for land forces in support of a governing theme provided by the CSA.").

[78] U.S. DEPT. OF ARMY, THE ARMY TRAINING STRATEGY: TRAINING IN A TIME OF TRANSITION, UNCERTAINTY, COMPLEXITY, AND AUSTERITY 7 (October 3, 2012) (affirming that one of the strategic goals of Army training over the next few years is to capitalize on the wealth of experience currently available in the force and apply that experience to future challenges).

[79] *Id.* at 9-11 (stating that institutional learning is one of the three pillars of leader development, that this learning must continue throughout an officer's career, and that the balance has shifted toward operational experience over the last decade and that it must shift in the other direction now that combat operations are decreasing).

in that evolution. Fortunately, the United States has an amazing pool of talent to tackle this problem. The U.S. military is at the tail end of almost fifteen years of conflict. The pool of experienced practitioners and judge advocates is unparalleled in recent history and may not be seen again for many years. The United States needs to harness this experience and use it to tackle the thorny legal issues of modern warfare. Furthermore, as one of the most experienced nations on earth in recent conflicts we need to harness this experience to add the U.S. voice to the international community as it shapes the law of armed conflict of the future.