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LAW OF WAR DEVELOPMENTS ISSUE

INTRODUCTION

*David Glazier**

I. INTRODUCTION

Each year the *Loyola of Los Angeles Law Review* publishes a special edition in which five competitively selected students write articles on individual topics within a larger area of law that is undergoing significant contemporary evolution. This issue continues that tradition, focusing on emerging developments in the law governing armed conflict, traditionally known as “the law of war,” or International Humanitarian Law (IHL), as it is now increasingly being called.

The cliché that “9/11 changed everything” rings particularly true with respect to public discussion of this subject. Prior to September 11, 2001, interest in the law of war was largely confined to military officials and scholars; a handful of civilian organizations, such as human rights groups and the International Committee of the Red Cross (ICRC); and those directly involved with the practice of international criminal law. Only a few U.S. law schools offered courses addressing the subject, and the term “war” was seemingly applied to metaphorical battles against problems like cancer, crime, drugs, and poverty more often than to actual armed conflict. While many remember President George W. Bush reading Florida schoolchildren a book about goats during the World Trade Center attacks, few now recall he was doing so as part of the “War on Illiteracy” he had declared just the previous day.¹

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1. See, e.g., Stephen Hegarty, *Bush Calls for War on Illiteracy*, ST. PETERSBURG TIMES (Sept. 11, 2001), available at http://www.sptimes.com/News/091101/Worldandnation/Bush_calls_for_war_on.shtml.

When Bush first spoke about a “war” against terrorists the day after 9/11,² it was thus unclear whether he meant this was to be another figurative fight or an actual armed conflict. Until that time terrorism had been treated almost exclusively as a criminal matter,³ and the president himself had spoken about the need “to find those responsible and to bring them to justice” in his public address the previous evening.⁴ But over the next few weeks it became clear that this was meant to be an actual “war.” Congress quickly enacted an Authorization for the Use of Military Force (AUMF) permitting the president to conduct hostilities against both those responsible for the attacks and those that had aided or sheltered them.⁵ Two United Nations (UN) Security Council resolutions referenced the United States’ right of self-defense,⁶ while the North Atlantic Treaty Organization (NATO) recognized 9/11 as the only armed attack on a member state justifying collective military measures in the alliance’s half-century of existence.⁷ Any residual doubts about the actuality of this conflict were dispelled by the October 7, 2001, launch of offensive combat operations against targets in Afghanistan under the moniker “Operation Enduring Freedom,” beginning what has become the longest war in U.S. history.

Despite specific past tense language in AUMF authorizing hostilities only against those responsible for the 9/11 attacks (al Qaeda) and any entity that had aided or sheltered them (the Afghan Taliban), however, President Bush soon began referring to a “global war on terror” and eventually broadened the scope of hostilities to include groups such as the Pakistani Taliban (Tehrik-i-Taliban)

2. George W. Bush, *Remarks by the President in Photo Opportunity with the National Security Team*, THE WHITE HOUSE (Sept. 12, 2001, 10:53 AM EDT), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010912-4.html>.

3. See, e.g., David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 966–69 (2009).

4. George W. Bush, *Statement by the President in His Address to the Nation*, U.S. DEP’T OF STATE (Sept. 11, 2001, 8:30 PM EDT), <http://2001-2009.state.gov/r/pa/ei/wh/rem/71940.htm>.

5. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)).

6. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (both referencing the inherent right of self-defense in their preambles).

7. See NORTH ATLANTIC TREATY ORG., *Countering Terrorism*, http://www.nato.int/cps/en/natohq/topics_77646.htm? (last updated Apr. 8, 2015 4:57 PM).

which did not even exist in 2001.⁸ And although the Obama administration publicly backed away from the controversial “global war” terminology, it nevertheless continued the expansion of U.S. military operations to target additional organizations such as Al Qaeda in the Arabian Peninsula and the Somalian Al Shabaab group, both of which were also founded well after 9/11.⁹

Collectively, these events have had the practical consequence of transforming the law of war from a comparatively obscure discipline into a matter of common concern for anyone endeavoring to participate in informed public discourse about post-9/11 U.S. national security policies. Treating terrorist groups like al-Qaeda and the Taliban—a group asserting to be the legitimate government of Afghanistan yet recognized as such by only three other Islamic nations—as adversaries in an armed conflict gives rise to a number of challenging legal questions. International legal rules governing armed conflicts between actual states are well developed. But the Bush administration quickly concluded that the best-known law of war provisions—those found in the four Geneva Conventions of 1949¹⁰—were inapplicable to al Qaeda, which was not a state, and that Taliban fighters failed to qualify for Convention protections due to their failure to wear uniforms or follow the law of war.¹¹ The unique attributes of this conflict have resulted in continuing uncertainty about which existing legal provisions should apply, complicating the assessment of decisions to rely upon law of war authority to for such matters as targeting (including the subsequent use of armed drones), indefinite detention, and military trials of

8. See, e.g., David Glazier, *The Drone—It's in the Way That You Use It*, in PREVENTATIVE FORCE: TARGETED KILLING AND TECHNOLOGY (Kirsten Fisk & Jennifer M. Ramos ed.) (forthcoming 2016) (manuscript at 4) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563657.

9. *Id.* at 4–5.

10. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

11. Memorandum from George W. Bush, President of the United States, to the Vice President et al., Humane Treatment of Taliban and Al Qaeda Detainees (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

suspected terrorists. The importance of these questions has led to burgeoning scholarly interest in this field. By 2007, 96 out of 101 U.S. academics responding to a joint American University-ICRC survey reported that IHL was now being taught at their institutions, either as a stand-alone course or at least covered topically within another course,¹² while a 2015 Westlaw search found that a remarkable 6,200 law review articles published since 9/11 include the term “law of war” in their text.¹³

This new enthusiasm for law of war issues extends beyond the overall conduct of the so-called “war on terror.” The increasingly frequent use of the internet as a means to disrupt economic or governmental functions across borders, or even across the globe, has led to extensive discourse and theorizing about “cyber warfare,” for example. And today’s remote controlled drones have stimulated prognostication and debate about a future expected to prominently feature “autonomous weapons” that will make independent decisions to kill without human intervention.

Given these developments, it is not surprising that most law students now express some interest in law of war issues.¹⁴ But I was still a bit apprehensive when approached by this law review’s Chief Developments Editor and asked to serve as the faculty advisor for this issue, which would feature student-written articles on topics they would select from the broad scope of this overall body of law. I knew that the review’s highly competitive Developments selection process would yield very bright, and highly motivated, students who were capable researchers and writers. But as a dedicated law of war scholar, I have all too often been disappointed by the efforts of

12. INT’L COMM. OF THE RED CROSS & WASH. COLL. OF LAW, TEACHING INTERNATIONAL HUMANITARIAN LAW AT U.S. LAW SCHOOLS 7, available at <https://www.wcl.american.edu/humright/center/documents/IHLSurveyReport.pdf>.

13. The author searched WestlawNext selecting just the “Law Reviews & Journals” checkbox under “Secondary Sources” for exact phrase “law of war” and date after 09-11-2001 on March 29, 2015, returning exactly 6,200 results. An entry-by-entry review of the first one hundred returns found that twelve had appeared in military journals; the remaining eighty-eight included a broad range of articles published in general and specialty journals. A review of the first one hundred entries from a similar search of work before 9/11 found that fully 40 percent of the works incorporating the phrase “law of war” were from military publications while many of the civilian publications were shorter notes, book reviews, and even a memorial notice.

14. See INT’L COMM. OF THE RED CROSS & WASH. COLL. OF LAW, *supra* note 12, at 8 (reporting 92 percent of students surveyed are “interested” or “very interested” in legal issues related to the “war on terror” with 96 percent reporting that level of interest in law governing “armed conflict”).

otherwise impressive professional commentators who have been enticed to leap into the post-9/11 publication fray by the “sexiness” of these topics but lacked the requisite background knowledge to produce credible contributions to this field. I was thus a bit skeptical as to whether law students without any prior grounding in this complex subset of international law would be able to produce work that would meaningfully advance our understanding of the issues they addressed. In hindsight I need not have worried. I now have the significant honor to being able to state categorically that each of the pieces comprising this volume does, in fact, offer important original insights that would do a professional academic proud!

II. CLASSIFYING THE CONFLICT WITH AL-QAEDA

The first article, written by Andrew Beshai,¹⁵ takes on the substantial challenge of locating the conflict against al-Qaeda within the two overall conflict classifications—international and non-international-recognized by the law of war. When this conflict began back in the fall of 2001, the answer seemed relatively straightforward. To get to Osama bin Laden and the core of his terrorist organization, the United States committed military forces to an intervention in Afghanistan, engaging in direct hostilities against both al-Qaeda and the Taliban, the latter the de facto governing force of that nation. Although President Bush concluded that the specific provisions of the Geneva Conventions were inapplicable to these groups, the government nevertheless considered this to be an international armed conflict,¹⁶ and felt entitled to draw authority from the applicable body of governing law for such collateral purposes as justifying the detention, and military trial, of opposing forces.¹⁷

This straightforward understanding was called into question five years later, however, when the Supreme Court halted military commission proceedings against Osama bin Laden’s erstwhile driver and sometime bodyguard, Salim Hamdan. The Court found that the commission failed to measure up to either requirements of the

15. Andrew Beshai, *The Boundless War: Challenging the Notion of a Global Armed Conflict Against Al-Qaeda and Its Affiliates*, 48 LOY. L.A. L. REV. 829 (2015).

16. Bush, *supra* note 11.

17. See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 § 1(e) (2002) (calling for military detention and trial of members of al Qaeda).

Uniform Code of Military Justice or to fair trial standards found in Common Article 3 (CA3) of the 1949 Geneva Conventions, the single provision in those treaties applicable to non-international armed conflict.¹⁸ In reaching this result, the Court determined that it “need not decide” the merits of the harder question of whether the full texts of the 1949 Conventions, applicable only to international conflicts “between two or more of the High Contracting Parties” applied.¹⁹ Justice Stevens’ opinion for the Court noted the government’s argument that al Qaeda, as a non-state group, could not qualify as a “High Contracting Party”²⁰ before concluding that the conflict would then, by default, be “not of an international character” and CA3 would thus apply.²¹ (He then went on to demonstrate that the Guantánamo commissions as being conducted at that time failed to satisfy CA3’s requirement for trials by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”)²² Stevens’ simplistic linguistic conclusion has subsequently been widely adopted without serious question, and the U.S. government now tends to treat its fight against al Qaeda and associated groups as a single non-international armed conflict spanning a number of diverse countries.²³

The problem with this approach is that it fails to comport with either the facial language of CA3 or the legal logic underlying international law’s bifurcation of conflict types. Read more fully, CA3 explicitly states that it applies to an “armed conflict not of an international character occurring in the territory of *one* of the High Contracting Parties.”²⁴ The use of the word “one” in this context is not coincidental; it reflects the core reason why non-international conflicts have always been subject to less international regulation than their intra-state counterparts. Prior to the international recognition of human rights in the UN Charter, international law essentially only regulated states in their external dealings with one

18. Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

19. *Id.* at 629–30 (quoting Common Article 2 of the 1949 Geneva Conventions).

20. *Id.*

21. *Id.* at 628–30.

22. *Id.* at 631–35 (quoting Common Article 3 of the 1949 Geneva Conventions).

23. See, e.g., Kenneth Anderson, *The Armed Conflict with Al Qaeda*, OPINIO JURIS (May 6, 2011, 11:54 PM EDT), <http://opiniojuris.org/2011/05/06/the-armed-conflict-with-al-qaeda/>.

24. Geneva I; Geneva II; Geneva III; Geneva IV.

another. It made sense for them to accept mutually binding, and advantageous, restrictions on their conduct of hostilities with one another, and a robust body of international conflict regulations has been developed over the last two centuries.²⁵ But states were reluctant to accept *any* external regulation of their conduct when dealing with non-state adversaries (i.e., rebels) within their own territory. These situations involved conflict against individuals who were breaching a duty of loyalty to the state they were fighting; that is to say, they were committing treason. And because the conflict was taking place within the state's own sovereign territory, it could bring the full scope of its domestic laws to bear, obviating the need for any international legal authority for such matters as detention or trial of opposing fighters.

The recognition of international human rights after the Second World War meant that states logically accepted the intrusion of international law restrictions into their domestic conduct for the first time, and it thus made sense that the 1949 Geneva Conventions included the initial, albeit minor, restrictions on state conduct of non-international hostilities.²⁶ But the application of these lesser restrictions—as compared to the robust regulation of international armed conflicts—was contingent upon the restricted geographic and political scope of the conflict. This was implicitly reconfirmed by the Additional Geneva Protocol II (APII) of 1977 that provided a modest expansion of the protections afforded by CA3. APII's application was thus expressly limited to conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups”²⁷

APII made another significant contribution to the definition of non-international armed conflicts, explicitly requiring the existence of a sufficient level of sustained violence for a situation to constitute qualifying hostilities. The second paragraph of APII's Article 1 declares that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a

25. *See, e.g.*, ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 1–10, 22–25 (3d ed. 2000).

26. *See id.* at 24.

27. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) art. 1, ¶ 1, June 8, 1977, 1125 UNTS 609.

similar nature” do not qualify as armed conflicts.²⁸ This floor logically precludes application of law of war rules to many situations, requiring the application of ordinary criminal law governed by human rights standards instead of military force.

Justice Stevens’ determination that the U.S. conflict with al Qaeda was non-international may have made sense for the limited purpose he intended—to establish that even the minimalist protections of CA3 were sufficient to establish the fatally flawed nature of the Guantánamo military commissions. But the broader implication that the United States might have the right to strike foreign nationals in distant states subject only to the modest limitations associated with non-international armed conflict defies logic given that the very legal foundation of those rules is based on the prerequisite of a sovereign state acting within its own territory.

Beshai’s article provides a logical, and highly original, conceptualization for reconciling these contradictions. He argues that rather than considering the conflict against al-Qaeda—which clearly does not qualify as a nation-state—and its various branches to be a single legal entity, we should adopt an “epicenter of hostilities” approach in which we disaggregate the overall conflict into a series of subcomponent parts, each located in an individual nation in which violent activity is focused. In some instances it may be determined that the situation within that nation fails to satisfy the level of ongoing violence necessary to establish the legal existence of an armed conflict. Where that is the case it will be necessary, as a matter of law, to treat the local perpetrators as criminals and rely upon domestic law enforcement rules and processes to counter the threat (as has traditionally been done with the vast majority of all terrorist acts to date, including the only actual terrorist uses of weapons of mass destruction—the nerve gas attacks carried out by Japan’s Aum Shinrikyo cult). Where the situation does lawfully rise to the level of an armed conflict, Beshai makes a strong case that it should be treated as a non-international armed conflict between the local state and the terrorist group, in which case international law allows the United States (and other concerned third states) to intervene in support of the affected state if it so requests. While this approach would logically impose greater limits on U.S. freedom of

28. *Id.* at art. 1, ¶ 2.

action than the current essentially unilateral approach, it offers substantial advantage in terms of soundly grounding counter-terrorism efforts within recognized legal rules and avoids the establishment of new precedents for military intervention in the territory of non-consenting third states which will ultimately contribute to a less stable and less secure world order.

III. COMPENSATING FORMER GUANTÁNAMO DETAINEES FOR MISTREATMENT

The second article in this issue is Cameron Bell's insightful examination of the government's obligation to compensate former Guantánamo detainees.²⁹ Treating 9/11 as an armed attack and the subsequent conflict with al Qaeda and the Taliban as a "war" allowed the United States to draw upon longstanding international legal authority to preventively detain opposing fighters for the duration of hostilities.

The details of this authority, however, are clouded by the government's failure to coherently identify which governing international legal rules apply; it has instead seemed to focus its energy on detailing which do not, exempting, for example, al Qaeda from any application of the Geneva Conventions at all while unilaterally concluding that Taliban fighters fail to qualify for their specific protections even if the treaties are otherwise applicable to Afghanistan. It has further endeavored to avoid legal scrutiny via the employment of offshore detention facilities, most prominently at the U.S. naval base at Guantánamo Bay, Cuba. Not surprisingly, then, Bush administration lawyers such as John Yoo and Jay Bybee articulated broad authority to engage in coercive interrogation practices that objective observers would consider to constitute torture.

A total of 779 men and boys have been detained at Guantánamo; 115 remained there as of May 2015 including 51 who had previously been cleared for release.³⁰ The vast majority of those detained were "sold" to the United States or coalition forces in response to bounty

29. Cameron Bell, *Repatriate . . . Then Compensate: Why the United States Owes Reparation Payments to Former Guantánamo Detainees*, 48 *LOY. L.A. L. REV.* 867 (2015).

30. Am. Civil Liberties Union, *Guantánamo by the Numbers*, www.aclu.org/infographic/guantanamo-numbers?redirect=national-security/guantanamo-numbers (last visited July 14, 2015).

offers, only 8 percent were considered by the government to be “Al-Qaeda fighters.”³¹ Many of these men have been subjected to extremely harsh treatment, some to outright torture. But the government has never admitted any wrongdoing nor offered any of these men compensation, or even an apology. To paraphrase Erich Segal, it seems to have adopted the mantra, “Guantánamo means never having to say you’re sorry.”

Bell examines the history of Guantánamo detention and the surrounding legal issues, particularly the application of the euphemistically titled “enhanced interrogation techniques.” After providing compelling evidence that U.S. detainee treatment constituted significant violations of international law, she explores state obligations to provide reparations under both customary legal rules governing state responsibility as well as specific treaty obligations under the Convention Against Torture.³² Bell then examines the complete lack of success detainees have had pursuing compensation via such vehicles as the Alien Tort Statute,³³ Federal Tort Claims Act,³⁴ and Torture Victim Protection Act³⁵ despite the U.S. international legal obligations to provide remedies for this sort of conduct. She offers plausible recommendations for judicial correction of this deficiency before ultimately concluding that the detainees’ best hope lies in getting foreign nations to pursue the issue on their behalf under international legal principles of state responsibility.

IV. DETENTION OF U.S. CITIZENS AWAY FROM THE THEATER OF WAR

The third article is an analysis by Diana Cho of the current status of U.S. authority to detain its own citizens in the ongoing war.³⁶ This question is complicated by the existence of a federal statute, “the Non-Detention Act”³⁷ enacted to prevent recurrence of unilateral

31. *Id.*

32. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

33. 28 U.S.C. § 1350 (2012).

34. *Id.* § 1346 .

35. Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350.

36. Diana Cho, *The NDAA, AUMF, and Citizens Detained Away from the Theater of War: Sounding a Clarion Call for a Clear Statement Principle*, 48 LOY. L.A. L. REV. 927 (2015).

37. Non-Detention Act, Pub. L. 92-128, 85 Stat. 347 (1971) (codified at 18 U.S.C. § 4001(a) (2006)).

executive-branch deprivations of liberty such as the World War II internment of Japanese Americans. The Non-Detention Act flatly declares that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”³⁸ In its 2004 *Hamdi* decision, Justice O’Connor’s plurality opinion concluded that the AUMF was sufficient to implicitly authorize executive detention, even of a U.S. citizen being held in the United States, because this “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”³⁹ The conclusion that the AUMF was a qualifying statutory authorization received a fifth vote from Justice Thomas, who otherwise dissented from the Court’s remand for further judicial consideration, arguing that the government had already met its burden of justifying Hamdi’s captivity.⁴⁰

The Court’s approval of Hamdi’s continuing detention was conditioned upon the fact that the petitioner was an “enemy combatant” who was “part of or supporting forces hostile to the United States or coalition partners” who had “engaged in conflict against the United States” in Afghanistan.⁴¹ It left open the issue of what other limits on detaining citizens might apply, including whether Americans could be preventively detained if captured outside a theater of active hostilities. This specific issue was presented to the Court in the concurrent case of José Padilla—a citizen detained upon return from travel to South Asia at Chicago’s O’Hare airport. But in a decision handed down the same day as *Hamdi*, the justices deferred reaching the merits, holding instead that Padilla was suing the wrong party (the Secretary of Defense rather than his immediate custodian) in the wrong court (the Southern District of New York rather than South Carolina where he was then being held).⁴² The government ultimately charged Padilla with ordinary terrorism related crimes and convicted him in a regular federal court, mooted any further challenge to his military detention. Meanwhile Hamdi, a dual U.S.-Saudi national, was released shortly

38. *Id.*

39. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (O’Connor, J., plurality opinion).

40. *Id.* at 586–87, 594–99 (Thomas, J., dissenting).

41. *Id.* at 516 (O’Connor, J., plurality opinion).

42. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

after the Court's decision in his case in exchange for agreeing to renounce his American citizenship.⁴³ The Court has thus not had the opportunity to offer any further guidance with respect to the detention of U.S. citizens in the ongoing conflict.

While the Court has not been heard from again, Congress has somewhat ambiguously reentered the fray. In December 2011, it included language in the National Defense Authorization Act (NDAA) for Fiscal Year 2012 which explicitly affirmed presidential authority under the AUMF for military detention of anyone who "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners"⁴⁴ This language made *no* exception based on nationality or location of capture. But a subsequent paragraph declares, "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."⁴⁵ A minor firestorm of public debate followed; some argue that the government already had the authority to detain citizens regardless of where they were captured so the NDAA didn't change anything; some argue that the government did not have this authority previously and that the language about "nothing in this section . . ." means that they still do not; and some argue that the NDAA does in fact represent a substantial expansion of U.S. detention authority.

Cho's informative article examines the legal authorities and history underlying this controversy in detail. In order to protect American's civil liberties, she argues that the Non-Detention Act's protection of citizens against executive detention should only be trumped by a "clear congressional authorization," and concludes that the ambiguous AUMF and NDAA language should be considered insufficient for this purpose.

V. CYBER ATTACKS AS WARFARE?

Ryan Patterson contributes the fourth piece in this issue, a critical examination of another post-9/11 development, the increasing

43. *Id.*

44. Pub. L. No. 112-81, 125 Stat. 1298 § 1021(b)(2) (2011).

45. *Id.* § 1021(e).

use of the internet as a way to inflict harm remotely, and assessment of appropriate state responses to this challenge.⁴⁶ In most cases the harm inflicted has been in the form of nuisance or economic interference with the functionality of particular websites, or general disruption of regular internet activity. But in at least one infamous instance—the use of the Stuxnet virus against Iranian nuclear centrifuges—the remote cyber activity actually inflicted physical damage.

Both pundits and government officials have been quick to label activity of this type as “cyber warfare.” As part of this rush to treat cyber threats as actual, rather than metaphorical, conflict, a group of leading law of war practitioners and scholars came together under NATO auspices to produce the Tallinn Manual, a handbook for applying existing customary international law rules to these new developments.⁴⁷ The U.S. government has gone farther, establishing the United States Cyber Command (USCYBERCOM) and the Army has just formally launched a new career branch, “Cyber Officer,”⁴⁸ providing an alternative to service in more traditional specialties such as Armor, Artillery, Infantry, and Intelligence.

Bucking this trend, Patterson provides a concise explanation of internet functionality and terminology being used in this field before exploring a number of difficulties with the classification of cyber activity as warfare. He ultimately concludes that states would generally be better served by prosecuting cyber incidents as crime under domestic law, seeking reparations for violations from responsible states, and emphasizing improved domestic cybersecurity over focusing on militarization of the problem.

VI. ACCOUNTABILITY FOR AUTONOMOUS WEAPONS’ MISTAKES

In the final article in this issue, Kelly Cass takes us from the present into the realm of future warfare, examining the issue of accountability for killing civilians by autonomous weapons, or

46. Ryan Patterson, *Silencing the Call to Arms: A Shift Away from Cyber Attacks as Warfare*, 48 *LOY. L.A. L. REV.* 969 (2015).

47. Int’l Grp. of Experts, *TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE* (Michael N. Schmitt ed., Cambridge Univ. Press 2013), available at http://issuu.com/nato_ccd_coe/docs/tallinnmanual?e=5903855/1802381.

48. Jim Tice, *Attention Officers: Sign up Soon for Cyber Transfers*, *ARMY TIMES* (Apr. 16, 2015), available at <http://armytimes.com/story/military/careers/army/officer/2015/04/16/army-cyber-voluntary-transfer-incentive-program/25811401/>.

“killer robots” as many critics choose to derisively term them.⁴⁹ While current U.S. drone use seems to have been a catalyst for much of the recent discussion on this subject, Cass begins by clarifying the important distinction between current remotely operated systems, which retain direct human control over all targeting decision, and actual autonomous weapons which, once activated, identify and engage targets without further involvement of a live individual. She notes that fully automated robots are in existence today, such as the U.S. Navy’s Phalanx Close-In Weapons System, but that the real concern is future weapons that will have some degree of “artificial intelligence,” rendering their future acts less predictable.

Some participants in the robotic warfare debate have gone so far as to suggest that autonomous robots might themselves commit war crimes for which the machine should be held accountable. Cass demonstrates, however, that machines are incapable of the human thought process necessary to satisfy the *mens rea* requirements of criminal law. She then evaluates the ability of these robots to comply with the foundational principles of the law of war before considering possible avenues for specific regulations or prohibitions concerning their use. She concludes that existing regulations can fairly be understood to limit autonomous weapons to use against non-human targets, an interpretation which would effectively guard against the parade of horrors most “killer robot” critics postulate.

The final part of Cass’s article provides a careful analysis of the potential financial and criminal liability for impermissible robotic killing. After considering each possible agent, she concludes that responsibility should lie just where it does for any other weapons system, with the operator who makes the decision to employ the weapon, as well as with the commander(s) responsible for that individual’s performance.

49. Kelly Cass, *Autonomous Weapons and Accountability: Seeking Solutions in the Law of War*, 48 LOY. L.A. L. REV. 1017 (2015).