ARTICLE

Analogies in Detentions: Distorting the Balance Between Military Necessity and Humanity

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Seventeen years after the 9/11 attacks, the United States' detention authority in the conflict against Al Qaeda, the Taliban, and associated forces is at its zenith. Congress and the federal courts have endorsed the Executive's position that the 2001 Authorization for Use of Military Force ("AUMF"), as informed by the laws of war, permits the President to detain individuals who were part of, or substantially supported, such enemy armed groups until the end of the ongoing armed conflict. To support this position, the United States has argued that certain provisions of the Third Geneva Convention on Prisoners of War ("GCIII"), a treaty that applies only to international armed conflicts ("IACs"), apply by analogy to the current non-international armed conflict ("NIAC"). The result is a sweeping authority to indefinitely detain individuals who may never have participated in hostilities against the United States and who may not currently pose any threat to the United States or its allies.

This status-based theory of detention is unsustainable in light of the circumstances of the ongoing conflict. The conflict against Al Qaeda and its various off-shoots has proven to be entirely unlike the IACs that informed the development of the laws of war. The initial campaign against core Al Qaeda, which planned and implemented the 9/11 attacks, and the Taliban government that harbored it, has morphed into a transnational conflict against various terrorist groups like the Islamic State of Iraq and the Levant ("ISIL") that did not exist in 2001. This conflict will likely continue for the foreseeable future, and the United States' legal positions must evolve to address the challenges presented by this type of modern conflict.

This Article makes three significant contributions to the robust scholarship and debate on detentions in NIAC. First, it explains the pitfalls of applying certain IAC rules by analogy to NIACs. In particular, applying these rules by analogy can disrupt the careful balance between the two fundamental principles of the laws of war that bind States in all armed conflicts: military necessity and humanity. Second, it shows how the United States' use of the Third Geneva Convention on Prisoners of War to justify, by analogy,

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the indefinite detention of non-State actors in NIACs has distorted this balance, rendering its detention practice unsustainable as a matter of international law. Importantly, military necessity permits the detention of Prisoners of War ("POWs") for the duration of an international armed conflict only because they have a legal obligation to return to the battlefield if released, rendering periodic threat reviews unnecessary. Non-State actors, by contrast, do not have a similar legal obligation, which makes assuming their threat for the duration of the hostilities problematic. Third, this Article proposes several realistic reforms that the United States can implement to ensure its legal theory for detentions is fully consistent with international law. Rather than applying IAC rules by analogy, the United States should develop criteria and procedures that replicate the delicate balance between military necessity and humanity that permeates the Geneva Conventions.

I. INTRODUCTION

"[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." Hamdi v. Rumsfeld[1]

In 2009, the D.C. District Court's Judge Robertson heard the habeas petition of Adham Mohammed Al Awad, a Yemeni national detained at Guantanamo since 2002.[2] Awad was captured in a hospital in Afghanistan after having his leg amputated due to injuries sustained in a United States ("U.S.") air strike. Judge Robertson wrote that the "case against Awad is gossamer thin" and that the evidence "has very little weight."[3] In particular, he noted, the U.S. government's ("Government") case "relies on 'raw' intelligence data, multiple levels of hearsay, and documents whose authenticity cannot be proven (and whose provenance is not known and perhaps unknowable)."[4] Robertson added that it "seems ludicrous to believe that he poses a security threat now."[5] Nevertheless, Judge Robertson denied Awad's petition for a writ of habeas corpus. He determined that it was "more likely than not" that Awad knew the Al Qaeda fighters in the hospital where he was captured and joined them in a barricade when coalition forces laid siege to the hospital.[6] For these reasons, the court could consider Awad "part of" Al Qaeda, at least for some period of time, and therefore lawfully detained until the end of hostilities against Al Qaeda.[7] Captured as a teenager, Awad spent close to fourteen years in Guantanamo, almost his entire adult-life, before being resettled in Oman in 2016.[8]

Judge Robertson is not a judge predisposed to permit the indefinite detention of alleged Al Qaeda members based on flimsy evidence. The opinion makes clear he felt uncomfortable with the outcome, but considered himself bound by precedent. The D.C. Circuit Court of Appeals, which has repeatedly affirmed that courts should not consider the threat posed by a

1. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).
2. Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C 2009).
3. *Id.* at 27.
4. *Id.* at 23.
5. *Id.* at 24.
6. *Id.* at 27.
7. *Id.*
8. *Detainee Transfers Announced,* U.S. DEP'T OF DEFENSE (Jan. 14, 2016), http://www.defense.gov/News/News-Releases/News-Release-View/Article/643066/detainee-transfers-announced.

detainee when evaluating the lawfulness of detention, upheld Robertson's opinion.[9]

U.S. detention practices and theories are again in the spotlight due to President Trump's January 30, 2018, Executive Order mandating that the Guantanamo Bay detention facility remain open.[10] Scholars,[11] NGOs,[12] foreign governments,[13] and international tribunals[14] have criticized the United States' assertion of detention authority in its conflict with Al Qaeda, the Taliban, and now ISIL. Much of the criticism comes from NGOs and human rights advocates who dismiss the legality of law-of-war detention in the current conflict.[15] This line of criticism is misplaced; law-of-war detention is firmly entrenched in international law and State practice during armed conflict.[16] Yet, Judge Robertson's decision to uphold the detention of an individual who does not, in his view, pose a threat reveals how the United States' theory of detention authority has exceeded the limits of what the law of war (or international humanitarian law ("IHL"), as it is also referred to) permits. Law-of-war detention's fundamental purpose is to mitigate threats to national security during times of armed conflict, and therefore it permits detention only where necessary for security reasons.[17] Detaining individuals who do not currently pose a threat is inconsistent with the foundational principles of IHL, including the principles of military necessity and humanity.

This Article explains how the U.S. ultimately adopted this controversial theory of detention, demonstrates the tension it creates with IHL, and proposes realistic reforms that the U.S. can implement to bring its detention

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9. *See infra*, note 127.

10. Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Feb. 2, 2018) (Section 2(d) orders the Secretary of Defense, in consultation with other department heads, to recommend policies to the President governing transfer of individuals to U.S. Naval Station Guantanamo Bay.).

11. *See, e.g.,* LAWRENCE HILL-CAWTHORNE, DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 72 (Oxford Univ. Press 2016).

12. *See, e.g., Guantanamo, Ten Years On*, HUMAN RIGHTS WATCH (Jan. 6, 2012), https://www.hrw.org/news/2012/01/06/guantanamo-ten-years.

13. Many of the recommendations submitted to the United States during its Universal Periodic Review at the Human Rights Council concerned ending detention without criminal charge and closing the detention facility at Guantanamo. *See* United Nations General Assembly Report of the Working Group on the Universal Periodic Review of the United States of America, A/HRC/30/12 (July 20, 2015).

14. *See, e.g., Towards the Closure of Guantanamo*, INTER-AM. COMM'N H.R., OAS/Ser.L/V/II.Doc.20/15 (June 3, 2015), http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf; Case of Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, Eur. Ct. H.R. (July 24, 2014), http://hudoc.echr.coe.int/eng?i=001-146047 (finding that Poland had violated several substantive and procedural provisions of the European Convention on Human Rights, including the prohibition on arbitrary detention, by assisting the United States in detaining Abu Zubaydah).

15. *Guantanamo: A Decade of Damage to Human Rights*, AMNESTY INTERNATIONAL (Jan. 11, 2012).

16. *Hamdi*, 542 U.S. 507, 518 (2004).

17. *See, e.g.,* HILL-CAWTHORNE, *supra* note 11, at 34.

practices into conformity with IHL. The story begins in the early 2000s when the U.S. started to capture and detain thousands of fighters on the battlefields of Afghanistan and Iraq. The U.S. did not consider these detainees Prisoners of War ("POWs")–either during the early stages of the conflicts when they were characterized as international armed conflicts ("IACs") or later when they morphed into non-international armed conflicts ("NIACs")[18]–and thus little of the treaty law that guided the U.S. during earlier conflicts was deemed applicable. In the conflict against Al Qaeda, the Bush Administration determined the Geneva Conventions inapplicable in their entirety given the conflict's transnational character, leaving only the "principles of the Geneva Convention" to guide the treatment of Al Qaeda detainees.[19] In 2006, the Supreme Court rejected this position in *Hamdan v. Rumsfeld*, and held that Common Article 3 to the Geneva Conventions applies to all NIACs, regardless of the location of hostilities.[20] Common Article 3 mandates baseline protections for detainees in NIACs, but it does not provide guidance on many important questions, such as the grounds for detention or the procedures for reviewing the detention's legality. The U.S. was forced to develop and defend its own rules at the same time that it was conducting some of the largest detention operations in U.S. history.[21]

U.S. assertion of detention authority was soon challenged in federal courts, requiring the U.S. to defend its detention operations in Guantanamo Bay, Cuba ("GTMO"). As a matter of domestic law, the 2001 Authorization for Use of Military Force ("AUMF"), enacted shortly after the 9/11 attacks, provides the President authority to "use all necessary and appropriate force" against the Taliban and Al Qaeda, but it does not explicitly confer authority to detain members of these groups.[22] The U.S. also needed a theory under international law to justify the ongoing detention of hundreds of individuals at GTMO, and thousands more in Iraq and Afghanistan. The U.S. turned to the Third Geneva Convention on Prisoners of War ("GCIII"), which

18. International armed conflicts are conflicts between two or more States. Non-international armed conflicts are those fought between a State and a non-State armed group, or between two or more non-State armed groups.

19. WHITE HOUSE OFF. OF THE PRESS SEC'Y, STATEMENT BY THE PRESS SECRETARY ON THE GENEVA CONVENTION (Feb. 7, 2002), *available at* http://www.state.gov/s/l/38727.htm.

20. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (stating that the term "'conflict not of an international character' is used [sic] in contradistinction to a conflict between nations" and thus Common Article 3 is applicable to the United States' conflict with Al Qaeda).

21. In Iraq alone, U.S. Forces detained over 100,000 individuals over the course of the conflict. Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 553 (2011).

22. The Authorization for Use of Military Force, Pub. L. No. 107-40 (2001). The AUMF states that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

applies only in IACs, to inform the scope of its detention authority. By analogizing members of non-State armed groups to Prisoners of War ("POWs"), the U.S. has taken the position that members of armed groups in NIACs may be detained until the end of hostilities in order to keep them off the battlefield. Accordingly, the U.S. adopted a primarily *status*-based detention criterion. Individuals who are part of Al Qaeda, the Taliban, or associated forces, may be detained until the end of hostilities based solely on their membership in these groups at the time of capture, regardless of the specific threat they pose during detention. Congress and the federal courts have embraced this theory of detention, further entrenching a legal position that is at odds with fundamental principles of IHL.

This Article makes three significant contributions to the robust scholarship and debate on detentions in NIAC. First, it explains the pitfalls of applying certain IAC rules by analogy to NIACs. In particular, applying these rules by analogy can disrupt the careful balance between the two fundamental principles of international humanitarian law that bind States in all armed conflicts: military necessity and humanity.[23] Second, it shows how the Government's use of GCIII to justify, by analogy, the detention of non-State actors in NIACs has distorted or even negated this balance, rendering its detention practice unsustainable as a matter of international law. In particular, it explains that military necessity permits the detention of POWs for the duration of an international armed conflict only because they have a *legal* obligation to return to the battlefield if released. Non-State actors, by contrast, do not have a similar legal obligation, making it problematic to assume their threat for the duration of the hostilities. Third, this Article proposes several realistic reforms that the U.S. can implement to ensure its legal theory for detentions is fully consistent with international law. Rather than applying IAC rules by analogy, the United States should develop criteria and procedures that replicate the delicate balance between military necessity and humanity that permeates the Geneva Conventions. This Article identifies logical criteria and procedures for detention in NIACs without relying on specific provisions in the Geneva Conventions that were never intended to apply in such circumstances. These criteria and procedures are directed at States, like the U.S., that generally consider human rights law inapplicable to law-of-war detention outside of their territory. These criteria and procedures are thus intended to serve as the minimum legal standards applicable to detentions in NIAC. States that have applicable human rights law obligations in armed conflict may be obliged to provide more robust protections.

There is an urgent need for the U.S., and other States fighting NIACs, to develop a framework for NIAC detention that appropriately balances military

23. *See infra*, Part IV.

necessity and humanity. The seventeen-year conflict against Al Qaeda and its various off-shoots have proven to be entirely unlike the IACs that informed the development of the laws of war. The initial campaign against core Al Qaeda, which planned and implemented the 9/11 attacks, and the Taliban government that harbored it, has morphed into a transnational conflict against various terrorist groups like the Islamic State of Iraq and the Levant ("ISIL") that did not exist in 2001. This conflict is likely to continue for the foreseeable future. The Government's legal positions must evolve to address the challenges presented by this modern conflict. This does not require a complete overhaul of U.S. detention practice. The U.S. has gradually implemented policies that help remedy the distorted balance between military necessity and humanity that its legal positions have created. These policies, however, are not sufficient substitutes for acknowledgment and strict implementation of legally binding obligations. The foundational principles of IHL cannot be swept under the rug by inapt analogies to treaties that have no legal force in the present conflict.

This is an opportune time for the U.S. to reform its legal theory of detentions. For the first time in seventeen years, the U.S. holds fewer than fifty law-of-war detainees[24] and can thus adapt its legal positions without materially affecting ongoing detention operations. If the U.S. continues to claim, based on a flawed analogy, the same sweeping authority to detain that it has over the past seventeen years, there is a real risk that its legal framework will unravel.[25] Moreover, as the Trump Administration reportedly considers bringing new detainees to GTMO, its legal theories will come under renewed scrutiny.[26] Continuing to rely on legal theories developed in the aftermath of 9/11 will certainly complicate counter-terrorism cooperation with key allies who face the risk of litigation in domestic and international courts if they assist the United States in a manner that violates their own international obligations.[27]

This Article proceeds as follows. Part II describes the gaps in the legal framework applicable to NIACs, and describes how States and academics

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24. *The Guantanamo Docket*, N.Y. TIMES, https://www.nytimes.com/interactive/projects/guantanamo.

25. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

26. *See* Shane Harris et. al., *Trump Administration Divided Over How to Handle Two ISIS Militants*, WASH. POST (Feb. 9, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-divided-over-how-to-handle-two-isis-militants/2018/02/09/17c2fafe-0dc6-11e8-8890-372e2047c935_story.html?utm_term=.0dea17610155.

27. For example, the United Kingdom ("U.K.") was sued by sixteen individuals who claimed that the British government knew or was complicit in their treatment and transfer to Guantanamo Bay by U.S. authorities following the September 11, 2001, attacks. The U.K. reached a confidential settlement with these individuals. *See Compensation to Guantanamo Bay Detainees 'Was Necessary,'* BBC (Nov. 16, 2010), http://www.bbc.com/news/uk-11769509. In 2017, the Canadian government agreed to pay former Guantanamo detainee Omar Khadr approximately $8 million for its role in facilitating his interrogation and detention by U.S. authorities. *See Canada 'Paid $8m' to Omar Khadr, ex Guantanamo Detainee*, BBC (July 7, 2017), http://www.bbc.com/news/world-us-canada-40510618.

have attempted to fill these gaps by applying the rules in IAC by analogy to NIACs. Part III explains the Government's legal theory that individuals who are formally or functionally part of enemy armed groups can be detained until the end of hostilities, based on its analogy to the GCIII. Part IV describes why applying IAC rules by analogy outside of the specific factual context that they were intended to regulate can undermine the critical balance between military necessity and humanity. Part V focuses on how the Government's application of specific provisions of GCIII disrupts this balance. Part VI proposes several legal reforms that the U.S. can adopt to bring its detention practice into full compliance with international law.

II. FILLING THE GAPS IN INTERNATIONAL HUMANITARIAN LAW

A. Gaps in International Humanitarian Law

The authority to detain enemy belligerents has long been considered a fundamental incident of war.[28] Detention in armed conflict is a non-punitive measure intended to keep the enemy off the battlefield, consistent with the principle of military necessity. The Geneva Conventions regulate all aspects of detention or internment in IACs, including who can be detained, the conditions of confinement, and applicable procedural safeguards. Existing treaty law does not provide similar guidance to States engaged in NIACs.[29] In the mid-twentieth century, when the Geneva Conventions were negotiated, the vast majority of NIACs constituted civil wars. States deemed these internal conflicts to be more appropriately governed by domestic laws.[30] The four Geneva Conventions thus contain only one article, Common Article 3, applicable in NIACs. Although the majority of conflicts

28. *Hamdi*, 542 U.S. 507, 518 (2004) ("the detention of individuals falling into the limited category we are considering…is so fundamental and accepted an incident to war"); Chris Jenks & Eric Talbot Jensen, *Indefinite Detention under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 46 (2011) ("The power to detain has always been considered incident to the conduct of military hostilities.").

29. Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, 88 INT'L L. STUD. 181, 181 (2011) (noting that the total number of treaty provisions governing IACs "outstrips the number governing [NIACs] by many dozens").

30. *Commentary of 2016 Article 3: Conflicts Not of an International Character*, INT'L COMM. OF THE RED CROSS (2016), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169864 ("In the 1940s, it seems that States predominantly had the regulation of internal armed conflicts in mind. The protection of their domestic affairs against comprehensive regulation by international law was one of the main concerns and motivators for limiting the substantive provisions applicable to non-international armed conflicts."). *See also* Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 265 (2011) (noting that States viewed extending the provisions of the Geneva Conventions to intra-state conflicts "as creating an unacceptable and ultimately unjustified intrusion upon their sovereignty").

today are considered NIACs, the difference in how international law regulates these conflicts is stark.

Common Article 3 provides baseline protections for persons taking no active part in the hostilities, including detainees and other individuals placed out of combat. It prohibits, *inter alia,* murder, torture, and the passing of sentences outside the legal process, and it imposes an obligation on parties to collect and care for the wounded and sick.[31] Additional Protocol II ("APII") to the Geneva Conventions supplements the protections contained in Common Article 3, but the United States is not a party to the Protocol and is thus not bound by its provisions except to the extent that they reflect customary international law ("CIL").[32] Although both Common Article 3 and APII contemplate that States may detain individuals in NIACs,[33] neither addresses key questions such as the criteria for detention, the procedures for ensuring the detention's lawfulness, the limits on detention authority, or the States' obligations when repatriating or resettling detainees.[34] For this reason, the International Committee for the Red Cross ("ICRC"), among others, has stated that there are "gaps or weaknesses" in the existing legal framework applicable in NIACs.[35]

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31. 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 GCIII].

32. Some of the gaps in conventional IHL have been filled by CIL. *See* Kevin Jon Heller, *The Use and Abuse of Analogy in IHL*, THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens David Ohlin ed., 2016) (stating that CIL has significantly closed the gaps between IACs and NIACs). The ICRC conducted a study of customary IHL and concluded that many of the customary rules of IHL apply equally in IACs and NIACs, especially those rules governing the methods and means of warfare. The United States, however, has criticized some of the ICRC's conclusions. *See* John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study on Customary International Law*, 89 INT'L REV. RED CROSS 443 (2007), *available at* https://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf. More importantly for the purposes of this Article, however, the ICRC did not identify a CIL rule that would govern the criteria for detention in NIACs.

33. International law scholars continue to debate the question of whether IHL "authorizes" detention in NIAC. For an overview of this debate, see Ryan Goodman, *Authorization versus Regulation of Detention in Non-International Armed Conflicts,* 91 INT'L L. STUD. 155 (2015). This Article does not take a position on that question given that the United States has authority under its domestic law to detain.

34. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201 (2010); Heller, *supra* note 32 (noting that Common Article 3 and APII are "silent on the authorization for targeting and detention" and impose only "rudimentary limits on when individuals may be targeted or detained"); Serdar Mohammed & Others v. Sec'y of State for Def. [2015] EWCA Civ. 843 (July 30, 2015) ("The difficulties in identifying authority under international humanitarian law to detain in an internationalized non-international armed conflict in either treaty or customary international law also apply to the identification of grounds on which such detention is permitted").

35. Jakob Kellenberger, *Strengthening Legal Protection for Victims of Armed Conflicts*, 92(879) INT'L REV. RED CROSS 799, 799 (Sept. 21, 2010), https://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm.

These gaps have posed significant challenges for international legal practitioners by creating "uncertainty over the source and content of the rules governing detention in NIAC."[36] John Bellinger, the former Legal Adviser to the State Department, and Vijay Padmanabhan wrote that they "found it frustrating that international law had yet to develop clear rules that could guide policymakers, like those at the State Department, who wish to follow international law in combating groups like Al Qaeda."[37] Bellinger and Padmanabhan concluded that there was a "pressing need to fill in the gaps in the existing law of detention," and thus urged States to begin elaborating a set of new legal rules.[38]

There has been some progress towards clarifying applicable rules or best practices for detentions in NIACs, although it is exceedingly unlikely that States will agree to additional legally-binding rules in NIACs in the near future. Recognizing this lack of treaty or customary international law guidance in NIACs, in 2011, States adopted Resolution 1 at the 31st International Conference of the Red Cross and Red Crescent.[39] This resolution invited the ICRC to conduct further research and consultations with States to "ensure that international humanitarian law remains practical and relevant in providing legal protections to all persons deprived of their liberty in relation to armed conflict."[40] The ICRC proceeded to hold a number of consultations with States and has produced several reports outlining the conclusions of these consultations.[41] At the 32nd International Conference in 2015, States recommended

> the pursuit of further in-depth work . . . with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC.[42]

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36. INT'L COMM. OF THE RED CROSS, STRENGTHENING LEGAL PROTECTION FOR PERSONS DEPRIVED OF THEIR LIBERTY IN RELATION TO NON-INTERNATIONAL ARMED CONFLICT, REGIONAL CONSULTATIONS 2012–13, BACKGROUND PAPER 3, *available at* https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf.

37. Bellinger & Padmanabhan, *supra* note 34, at 203.

38. *Id.* at 243.

39. *31st Int'l Conference 2011: Resolution 1 - Strengthening legal protection for victims of armed conflicts,* INT'L COMM. OF THE RED CROSS (Jan. 12, 2011), https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm.

40. *Id.* para. 6.

41. These reports are available at https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0.

42. 32nd Int'l Conference of the Red Cross and Red Crescent, *Resolution 1 Strengthening international humanitarian law protecting persons deprived of their liberty*, 32IC/15/R1, para.15 (Dec. 8–10 2015),

In 2007, the Danish government also convened the "Copenhagen Process on the Handling of Detainees in International Military Operations."[43] This process, which included twenty-four countries from Europe, Asia, Africa, and North and South America, had two broad objectives: "to reach consensus among states and relevant international organizations on the international legal regimes applicable to taking and handling detainees in military operations; and to agree upon generally acceptable principles, rules, and standards for the treatment of detainees."[44] Upon its conclusion in October 2012, the Copenhagen Process adopted sixteen principles.[45] The U.S. actively participated in drafting these principles, which largely reflect the practices it had developed in recent years. These principles are not, however, legally binding, and the Commentary further makes clear that "the mere inclusion of a practice in [the principles] should not be taken as evidence that States regard the practice as required out of a sense of legal obligation."[46] As such, they cannot be considered as evidence of new customary international law.

B. Gap Filling by Analogy

Despite these various initiatives to clarify and develop the laws applicable in NIACs, significant gaps in the legal framework remain. For NIACs occurring within a State's own territory, human rights obligations may fill many of these gaps.[47] For some States, these human rights obligations may also apply outside of their territory. State Parties to the European Convention on Human Rights ("ECHR"), for example, have obligations under that treaty that apply extra-territorially if they exercise "effective control" over an area or individuals outside of their borders, such as in cases of detention.[48]

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http://rcrcconference.org/wp-content/uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf.

43. Bruce "Ossie" Oswald & Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16(39) AMER. SOC. INT'L L. INSIGHTS (Dec. 26, 2012), https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees.

44. *Id.*

45. The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines, Oct. 19, 2012 [hereinafter Copenhagen Principles].

46. *Id.* at cmt. 16.2.

47. *See* Jelena Pejic, *Procedural Principles for Interment/Administrative Detention*, 87 INT'L REV. RED CROSS 375, 377 (2005) (stating that human rights law is a "complementary source of law in situations of armed conflict"); CrimA 6659/06 A & B v. State of Israel 62(4) PD 329, para. 9 (2008) (Isr.) ("In addition, where there is a lacuna in the laws of armed conflict … it is possible to fill it by resorting to international human rights law.").

48. In *Bankovic and others v. Belgium and 16 other States*, the European Court of Human Rights (ECtHR) acknowledged that State Parties' human rights obligations under the European Convention

International human rights law, however, does not provide the applicable legal framework for many States engaged in extra-territorial NIACs. The U.S., for example, does not interpret most of its human rights obligations–such as those in the International Covenant on Civil and Political Rights–as applying extra-territorially, where the conflict against Al Qaeda, the Taliban, and associated forces is being fought.[49] In addition, the U.S. has long argued that IHL is the *lex specialis* in situations of armed conflict.[50] Under the *lex specialis* doctrine, the more specific rule applicable to a particular situation (such as an IHL rule in armed conflict) applies over a more generally applicable rule (such as a human rights rule). Accordingly, the U.S. generally views IHL (which applies during situations of armed conflict) rather than human rights law as the applicable legal framework to

on Human Rights (ECHR) were primarily territorial. Nevertheless, the Court subsequently established a number of exceptions to this default rule. Pursuant to ECtHR jurisprudence, a State's obligations under the convention may extend outside its territory when the State exercises "effective control" of an area outside of its territory, *see* Loizidou v. Turkey, 23 Eur. Comm'n H.R. Dec & Rep. 513 (1998), or even when the State exercises "physical power and control" over a particular individual, *see* Al Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18, 59 (2011). In its decision in the Serdar Mohammed Case, the UK Court of Appeals felt constrained to apply the jurisdictional holdings of the ECtHR, as adopted by the UK Supreme Court in *Smith v. MOD*. Serdar Mohammed & Others v. Sec'y of State for Def. [2015] EWCA Civ. 843, July 30, 2015. Nevertheless, it noted that the ECtHR's sweeping interpretation of the ECHR created a number of challenges for State Parties. "Difficult questions, both legal and practical, will undoubtedly arise as to how the ECHR protections, designed to regulate the domestic exercise of State power, are to be applied in the very different context of extra-territorial military operations." *Id.* para. 96.

49. *See* Colette Connor, *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. INT'L L.J. 509, 517-20 (2008). One exception to this general rule is the Convention against Torture (CAT). In its 2014 presentation before the Committee Against Torture, the United States stated that a situation of armed conflict does not suspend operation of the CAT, although the more specialized laws of war take precedence over the CAT where the two conflict. It further clarified that Article 16 of the CAT (which prohibits cruel, inhuman, or degrading treatment or punishment) as well as other provisions with the same jurisdictional language apply extra-territorially in places the U.S. government controls as a governmental authority. The U.S. further stated that it would apply its obligations under Article 15 to the Periodic Review Board process for detainees at Guantanamo Bay, Cuba. *See Statement by NSC Spokesperson Bernadette Meehan on the U.S. Presentation to the Committee Against Torture*, THE WHITE HOUSE OFFICE OF THE PRESS SEC'Y (Nov. 12, 2014), *available at* https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a.

50. This Article does not take a position on whether the United States' argument is correct, as other scholars have debated this question in much greater depth. *See, e.g.,* Oona Hathaway et al, *Which Law Governs during Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012). Rather, this Article focuses on the tension with the United States' legal theory under IHL. For a brief description of the United States' position on *lex specialis, see Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, U.S. DEP'T OF STATE, para. 507 (Dec. 30, 2011), *available at* www.state.gov/j/drl/rls/179781.htm ("Under the doctrine of lex specialis, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in international humanitarian law").

regulate NIAC detentions, at least for detentions occurring outside of the United States.[51]

The predominant way many States have addressed the gaps in IHL is to apply relevant rules in IACs–including the Geneva Conventions–by analogy to NIACs.[52] Beyond the detention context, the United States has applied IAC analogies to determine who can be targeted with lethal force and which armed groups should be considered part of the ongoing conflict.[53] There is a practical appeal to this analogy approach. As Professor Sivakumaran notes, "to extend a law to cover an analogous situation is . . . markedly easier than to create a new law, and in many ways there [is] no feasible alternative to regulation by analogy."[54] Gap-filling by analogy entails examining the rules applicable in IACs and determining whether they can or should practically

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51. Observations of the United States of America on the Human Rights Committee's Draft General Comment 35: Article 9, June 10, 2014 (asserting that "international humanitarian law is the *lex specialis* in both international and non-international armed conflicts, including with respect to detention of enemy combatants in the context of the armed conflict"). The United Nations Human Rights Committee (HRC) takes a different view, stating that Article 9 of the International Covenant on Civil and Political Rights continues to apply in situations of armed conflict. "While rules of international humanitarian law may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive." Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R 1, 19 (Dec. 14, 2016) *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/35&Lang=en. The HRC acknowledges, "Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary." *Id.*

52. *See* GENERAL COUNSEL OF THE DEP'T OF DEFENSE, U.S. DEP'T OF DEF. LAW OF WAR MANUAL § 3.7.2.4, at 93-94 (2015) ("Legal rules applicable to international armed conflict may be applied by analogy to non-international armed conflict."); Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY L. 9, 11 (2017) ("practitioners always default to the principles of the Geneva Conventions when searching for an analogous legal framework"); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 50 (2009) ("…the application of IHL to noninternational conflicts, and the conflict with Al Qaeda in particular, is often an exercise in analogical or deductive reasoning"); Bellinger & Padmanabhan, *supra* note 34, at 208 ("The limited treaty law governing noninternational armed conflict has led many governments, international organizations, and scholars to suggest that some or all of the rules from international armed conflicts should be applied in noninternational armed conflicts."). This analogy approach is not entirely a new innovation. Richard R. Baxter, *The Geneva Conventions of 1949*, 62 INT'L L. STUD. 220, 228 (1980) ("Prior to the adoption of the Geneva Civilians Convention of 1949, there was only a rudimentary body of law regarding the protection of civilians…When civilians were interned in occupied areas, we considered ourselves under an obligation to apply to them by analogy the provisions of the Prisoners of War Convention of 1929.").

53. *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, THE WHITE HOUSE 1, 20 (Dec. 2016) [hereinafter WHITE HOUSE REPORT ON MILITARY FORCE], https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf (stating that the United States can target individuals who perform functions for the benefit of an armed group that "are analogous to those traditionally performed by members of a country's armed forces"). The United States also uses the IAC concept of "co-belligerency" to determine whether certain non-State armed groups have joined an ongoing NIAC, making them lawful targets. *See id.* at 4-5.

54. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS 65 (2012).

be applied in NIACs.[55] This process requires some translation since the laws of war were not designed to apply to conflicts against "a diffuse, difficult-to-identify terrorist enemy."[56]

The practice of applying IAC rules by analogy has been generally uncontroversial in the academic literature.[57] In the detention context, much of the debate has instead focused on which IAC rules to apply by analogy: the GCIII (which applies to POWs) or the Fourth Geneva Convention ("GCIV") (related to the internment of civilians*)*.[58] This discussion generally focuses on the following question: are members of non-State armed groups more like members of a State's armed forces, or more like ordinary civilians who decide to pick up arms?[59]

The question of which IAC rules to apply by analogy significantly affects both the scope of a State's detention authority and the procedures that are required to ensure the lawfulness of such detention. GCIII implicitly recognizes that POWs may be detained until the end of hostilities. Article 21 states that the "Detaining Power may subject prisoners of war to internment," while Article 118 provides that POWs "shall be released and repatriated without delay after the cessation of active hostilities."[60] Under this POW analogy, detainees in NIACs may be detained for the duration of the conflict based solely on their *status* as members of an armed group. As with POWs, an ongoing review of the legality of their detention would not be legally required after those detainees' combatant status is confirmed. In GCIV, a civilian, by contrast, may only be detained for "imperative reasons of security"[61] and must be released "as soon as the reasons which

55. Charles P. Trumbull, *Filling the "Gaps" in the Law Applicable to Non-International Armed Conflicts*, ICRC INTERCROSS BLOG (Jan. 2, 2014), http://intercrossblog.icrc.org/blog/contemporary-ihl-challenges-use-of-force-and-non-international-armed-conflicts.

56. Harold Hongju Koh, Legal Adviser, United States Dept. of State, Keynote Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) [hereinafter Koh ASIL speech]. Accordingly, in applying IAC rules to NIACs by analogy, the United States does not always apply the analogous IAC law strictly to the NIAC context, but may instead focus on application of its animating principles.

57. *See, e.g.,* Laura Olsen, *Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Interment Standards*, 42 CASE W. RES. J. INT'L L. 197, 208 (2009) ("Applied by analogy, IHL of international armed conflict would provide bases for internment."). See Heller, *supra* note 31, for a critique of the use of analogies in IHL.

58. *See, e.g.,* Olsen, *supra* note 57, at 208–11 (discussing costs and benefits of the GCIII and GCIV analogies); Goodman, *supra* note 52 (noting that the Fourth Geneva Convention contains "the most closely analogous rules"); HILL-CAWTHORNE, *supra* note 11, at 230–42 (comparing the GCIII and GCIV analogies). *See also infra* 64–69 regarding discussion of government experts at ICRC thematic meeting on criteria for detention.

59. Trumbull, *supra* note 55.

60. GCIII, *supra* note 31, at arts. 21 and 118.

61. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]. This provision applies to the internment of civilians in occupied territory. The standard for the internment of civilians in the territory of a party to the conflict is slightly different. Article 42 states that such individuals may be interned if

necessitated his internment no longer exist."[62] Under this civilian analogy, individuals in NIACs would be detained based on their *threat* and would be subject to periodic reviews to assess whether that threat remains sufficiently high to justify ongoing detention.

This debate between the competing GCIII and GCIV analogies was evident in the ICRC's regional and thematic meetings of government experts, convened pursuant to its mandate under Resolution 1 cited above.[63] The ICRC's report summarizing these meetings indicated that government experts were divided on which legal framework should apply by analogy to NIAC detentions. According to the ICRC, "most experts thought 'imperative reasons of security'–drawn from GC IV–was an acceptable way to articulate the permissible grounds for NIAC-related detention. However, the exact contours of what amounted to 'imperative reasons of security' were thought by some to require further clarification."[64] The government experts in the GCIV camp argued that such a standard would "cover the instances in which internment was necessary in NIACs," including direct participation in hostilities, espionage, recruitment, incitement to join the enemy, and financing the enemy.[65] The opposing view was that "membership in a non-State armed group might often be an appropriate ground for internment."[66] The government experts advocating for the GCIII analogy argued that limiting internment solely to imperative reasons of security "was too narrow or strict."[67] These experts opined "there was no sound reason for imposing a standard drawn from GCIV, which was intended to apply primarily to civilians, to the exclusion of a membership-based standard drawn from GCIII, which was intended to apply primarily to the armed forces."[68] Furthermore, proponents of the GCIII analogy argued that it was important to maintain the "dichotomy between civilians

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the security of the Detaining Power makes it "absolutely necessary." The ICRC relies on the "imperative reasons of security" standard since detention in occupied territory more closely resembles the situations in which States fighting NIACs detain individuals outside of their territory. INT'L COMM. OF THE RED CROSS, *supra* note 30, para. 721. The standard in both articles, however, is based on the threat posed by the individual rather than his or her status.

62. GCIV, *supra* note 61, at art. 132.

63. 31st Int'l Conference of the Red Cross and Red Crescent, *supra* note 39.

64. INT'L COMM. OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY, THEMATIC CONSULTATION OF GOVERNMENT EXPERTS ON GROUNDS AND PROCEDURES FOR INTERNMENT AND DETENTION 17 (Oct. 20–22, 2014).

65. *Id.*

66. *Id.* at 18.

67. *Id.*

68. *Id.*

and combatants that runs throughout IHL" and that treating all individuals in NIACs as civilians would blur this dichotomy.[69]

III. THE UNITED STATES' POSITION: UNLAWFUL BELLIGERENTS ARE ANALOGOUS TO PRISONERS OF WAR

The U.S. is a primary proponent of the POW analogy approach. Under the Bush, Obama, and Trump Administrations, the Government has argued that the GCIII provides the appropriate analogy to inform its detention authority under the AUMF. Individuals who are part of an enemy armed group are subject to targeting and detention similar to that of members of a State's armed forces. In addition, individuals who "substantially support" enemy armed groups can be detained by analogy to Article 4 in the Third Geneva Convention, which permits the detention of "persons who accompany the armed forces without actually being members thereof."[70] Both categories of individuals, it claims, can be detained until the end of hostilities. U.S. federal courts[71] and the Congress have also endorsed this position.[72]

A. Evolution of the Executive's Position

The Government's legal theory of detention authority was first tested before the Supreme Court in 2004. The case of *Hamdi v. Rumsfeld* arose after U.S. forces detained Yasser Hamdi, an American citizen, in Afghanistan.[73] The Government alleged that Hamdi was an unlawful enemy combatant who had joined the Taliban, bore arms, and was captured while fleeing with his unit. Accordingly, the Government argued that his detention was lawful under the 2001 AUMF because it authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks against the World Trade Center and the Pentagon.[74] The AUMF does not, however, explicitly authorize the detention of members of such groups.

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69. *Id. See also* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 379 (2004) (noting that the conceptual and normative structure of IHL requires a sharp distinction between civilians and combatants).

70. GCIII, *supra* note 31, at art. 4(A)4. This provision mentions by example members of military aircraft crews, war correspondents, supply contractors and members of labor units or of services responsible for the welfare of the armed forces.

71. *See infra*, Part III(B).

72. Nat'l Def. Authorization Act for 2012, 125 Stat. 1298 § 1021(b)(2) (2012).

73. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

74. *Id.* at 518. The United States also argued that the President possessed the authority to detain Hamdi pursuant to Article II of the Constitution. The Supreme Court did not address that constitutional claim.

The Supreme Court plurality concluded that

> [the] detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, 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.[75]

The Court explained that the "purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[76] Citing Article 118 of GCIII, the Court wrote, "it is a clearly established principle of the law of war that detention may last no longer than active hostilities."[77] The Court made clear that its holding was limited to the "narrow circumstances" in Hamdi's case, and accordingly it only decided that the AUMF authorizes the detention of individuals who fought with the Taliban against the United States in Afghanistan.[78] The Court did not address whether the AUMF conferred similar authority to detain in other contexts, such as individuals captured outside of active battlefields, individuals who did not participate in hostilities, or individuals who have a more tenuous connection to the Taliban or Al Qaeda. The Court stated that "the permissible bounds of the [enemy combatant] category will be defined by the lower courts as subsequent cases are presented to them."[79]

Congress attempted to deprive the federal courts of this opportunity by passing legislation to restrict rights of GTMO detainees to petition for a writ of habeas corpus. In 2008, the Supreme Court held in *Boumediene v. Bush* that the Constitution's Suspension Clause extended to Guantanamo Bay, giving detainees at GTMO the Constitutional right to file petitions for a writ of habeas corpus in federal court.[80] The Court declined, however, to clarify the "procedural or substantive contours of this habeas review," leaving such

75. *Id.*
76. *Id.*
77. *Id.* at 520.
78. *Id.* at 519.
79. *Id.* at 522. Although the plurality upheld the legality of law-of-war detention in principle, it also rejected the "Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." *Id.* at 535. The plurality held that Hamdi must be afforded the opportunity to refute his classification as an enemy combatant and thus remanded the case for further proceedings. The Government ultimately chose to moot the case by transferring Hamdi to Saudi Arabia with the condition that he renounce his U.S. citizenship. Terrence Neilan, *U.S. Returns Detainee to Saudi Arabia after 3 Years*, N.Y. TIMES (Oct. 11, 2004), http://www.nytimes.com/2004/10/11/international/middleeast/us-returns-detainee-to-saudi-arabia-after-3-years.html?_r=0.
80. Boumediene v. Bush, 553 U.S. 723 (2008).

questions to the district courts to answer in the first instance.[81] The Court likewise did not opine on the critical question of who can be detained under the AUMF.

On remand, the Bush Administration set forth its theory of detention authority, which the district court adopted. The Government stated

> An 'enemy combatant' is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[82]

The Obama Administration, despite criticizing detention without trial or charge during the 2008 presidential campaign,[83] made only minor adjustments to the Bush Administration's claimed scope of detention authority.[84] Following the Supreme Court's decision in *Boumediene*, the D.C. District Court was inundated with habeas petitions. Soon after President Obama took office, Judge Bates requested the Administration articulate its theory regarding the scope of its detention authority.[85] This litigation deadline forced the new Administration to crystallize its legal theories before various task forces established by the President to examine this issue had completed their work.[86] As Charlie Savage notes, the "legal process drove

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81. Benjamin Wittes et al., *The Emerging Law of Detention 2.0, Guantanamo Habeas Cases as Lawmaking,* HARV. SCHOOL NAT'L SECURITY RESEARCH COMMITTEE 6 (2012), *available at* https://www.brookings.edu/wp-content/uploads/2016/06/Chesney-Full-Text-Update32913.pdf.

82. Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008). This case involved six Algerian nationals who were arrested by Bosnian authorities in October 2001 on suspicion of planning to attack the U.S. Embassy in Sarajevo. They were subsequently released from prison in January 2002, but immediately detained by U.S. authorities and transferred to Guantanamo. In habeas proceedings, the Government withdrew its allegation that the petitioners had planned to attack the U.S. Embassy, but claimed that they were lawfully detained on the basis that they had planned to travel to Afghanistan to fight U.S. forces. The district court granted the habeas petition for five of the petitioners, ruling that it could not "adequately assess the credibility and reliability of the *sole* source information relied upon" by the respondents. *Id.* at 197. The court added, "To allow enemy combatancy to rest on *so thin* a reed would be inconsistent with this Court's obligation under the Supreme Court's decision in *Hamdi* to protect petitioners from the risk of erroneous detention." *Id.* (emphasis in original). The district court found that the sixth detainee, Belkacem Bensayah, was lawfully detained as the Government had established by a preponderance of the evidence that he had served as an al-Qaida facilitator. *Id.* at 198

83. *Election 2008 Party Platforms* N.Y. TIMES (2008), http://elections.nytimes.com/2008/president/issues/party-platforms/index.html.

84. *See* CHARLIE SAVAGE, POWER WARS 118–19 (2015). The one significant departure from the Bush Administration was that the Obama Administration based its detention authority solely on the AUMF, rather than on the President's powers under Article II of the Constitution.

85. *Id.* at 117.

86. Executive Order 13,493 established a Special Task Force on Detainee Disposition to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations…" Exec. Order No.

the policy process."[87] Once in a defensive litigation position, the pressure on litigators was to "request a judgment in favor of the government on the broadest possible grounds so as to preserve executive flexibility to the greatest possible extent."[88] These pressures likely led the Administration to assert a broader theory of authority than it otherwise would have adopted.

The Administration set forth its theory of detention authority in a brief filed on March 13, 2009. Similar to the Bush Administration, the Obama Administration turned to the laws of international armed conflict–and in particular GCIII–to support its detention authority. The 2001 AUMF, the U.S. argued, granted the President the authority to detain those individuals who "would in appropriately *analogous* circumstances in a traditional international armed conflict, render them detainable."[89] This means:

> The President has the authority to detain persons that planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[90]

The Government also asserted that its detention authority under the AUMF is "informed by principles of the laws of war."[91] Because the international legal framework applicable to NIACs is "less well codified," the Government explained, "[p]rinciples derived from law-of-war rules

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13,493, 74 Fed. Reg. 4901 (Jan. 27, 2009), Section I(e). This Task Force submitted a preliminary report on July 20, 2009, which noted the need to "consider in greater depth … what the rules and boundaries should be for any future detentions under the law of war." DEP'T OF JUSTICE, DETENTION POLICY TASK FORCE, MEMORANDUM FOR THE ATTORNEY GENERAL & THE SECRETARY OF DEFENSE (July 20, 2009), *available at* https://www.justice.gov/sites/default/files/opa/legacy/2009/07/22/preliminary-rpt-dptf-072009.pdf. To this author's knowledge a final report addressing this issue was never submitted.

87. SAVAGE, *supra* note 84, at 117.

88. Rebecca Ingber, *Interpretation Catalysts and Executive Power Decisionmaking*, 38 YALE J. INT'L L. 359, 379 (2013). Charlie Savage notes that Administration lawyers were concerned that articulating a more narrow theory of detention, in the short period they had in drafting the brief, raised a risk of "unintended consequences." This led the Administration to largely adopt the standard that had been employed by the prior Administration. SAVAGE, *supra* note 84, at 117.

89. Respondents' Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 312 (D.D.C. 2009) (No. 08-442) [hereinafter March 13 Brief].

90. *Id.* Koh ASIL speech, *supra* note 56. In his ASIL speech, Koh noted that the United States has defended its detention authority "based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war."

91. March 13 Brief, *supra* note 89, at 1.

governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized for the current conflict."[92]

The U.S. has been opaque, however, on how law-of-war principles inform the AUMF in practice. It has not explained the full set of IAC rules and principles that inform the AUMF, the criteria for identifying these principles, or the legal effect such principles have in interpreting the AUMF. At the same time, the Government has urged courts to defer to its interpretation of these international law principles and how they inform the AUMF. In a brief before the D.C. Circuit, the Government argued "where the laws of war are unclear or analogies to traditional international armed conflicts are inapt, a court should accord substantial deference to the political branches in construing how the laws of war apply to this nontraditional conflict."[93] Courts have largely obliged in providing this deference.

Using international law to interpret a domestic statute has a long pedigree in American jurisprudence, although the proper role of international law in the U.S. domestic legal system remains debated. In general, however, international law can be used both to limit and expand authority conferred by Congress. It is thus worth more closely examining what role law-of-war principles have played in interpreting the President's authority under the AUMF.

The U.S. has framed its appeal to international law as a limiting principle in interpreting the AUMF. It argued that the proposition that the laws of war must inform the AUMF is consistent with a long line of cases starting with *Murray v. Schooner Charming Betsy*.[94] *Schooner Charming Betsy* established the canon of construction that domestic statutes "ought never to be construed to violate the law of nations if any other possible construction remains."[95] This canon presumes that Congress would not generally intend to enact a law that conflicts with an applicable rule of international law. Accordingly, to the extent that a statute is ambiguous, it should be

92. *Id.* The United States noted that a "forward-looking multi-agency effort is underway to develop a comprehensive detention policy with respect to individuals captured in connection with armed conflicts and counterterrorism operations, and the views of the Executive Branch may evolve as a result." *Id.* at 2. As one national security official stated, "The idea was to put [the March 13] standard in place and revisit it later, but this revisiting didn't happen." SAVAGE, *supra* note 84, at 120.

93. Response to Petition for Rehearing and Rehearing en Banc at 8 n.3, Al Bihani v. Obama, No. 09-5051 (May 13, 2010) [hereinafter Response to Petition for Rehearing], http://www.scotusblog.com/wp-content/uploads/2010/05/US-response-re-rehear-Al-Bihani-5-13-10.pdf; March 13 Brief, *supra* note 89, at 6, fn 2. The U.S. similarly argued in its March 13 brief that courts should "defer to the President's judgment that the AUMF, construed in light of the law-of-war principles that inform its interpretation, entitle him to treat members of irregular forces as state military forces are treated for purposes of detention." March 13 Brief, *supra* note 89, at 6, fn 2.

94. Response to Petition for Rehearing, *supra* note 93, at 7.

95. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

interpreted in a manner that avoids such a conflict. In *Bihani v. Obama*, for example, the United States argued that the laws of war can limit the President's authority under the AUMF, and that the AUMF should be interpreted in a manner consistent with the laws of war. The Government argued that this approach is consistent with the plurality's holding in *Hamdi*, which "discussed the Third Geneva Convention and other law-of-war sources when addressing detention authority under the AUMF."[96]

The Government's invocation of GCIII to inform the AUMF, however, does not fit comfortably in the *Schooner Charming Betsy* framework. GCIII, with the exception of Common Article 3, does not apply to the conflict against Al Qaeda and the Taliban[97] so there is no specific conflict between it and the AUMF. The Government implicitly recognizes this absence of legal conflict; if it did not, it would refer to the specific international rules it deems applicable in NIACs rather than the analogous principles of IACs. More significantly, the U.S. has invoked international law not solely to identify the maximum duration of its detention authority, but also to support its theory of who it can detain under the AUMF. Even though the AUMF does not explicitly establish any detention authority, the U.S. has argued, based on GCIII's analogous provisions, that the AUMF confers the authority to detain individuals who could in analogous circumstances be detained in IACs. This includes persons who are part of, or substantially supported, Taliban, Al Qaeda, or associated forces.

Despite attempts to frame international law as a limiting principle, both the Executive and the federal courts have used the laws of war primarily to increase the President's detention authority under domestic law. The Government's detention authority under the AUMF has expanded to cover not only those groups that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,"[98] but also to cover groups that subsequently became "associated forces" of Al Qaeda or the Taliban.[99] Professor Ingber argues that the Government's use of international law to inform the AUMF represents an example of what she calls "Reverse Betsy."[100] Rather than interpreting a statute to avoid conflict with an applicable rule of international law, the U.S. has invoked

96. Response to Petition for Rehearing, *supra* note 93, at 8.

97. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 629–30 (2006) (holding that Common Article 3 is applicable to the conflict with Al Qaeda).

98. The Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

99. March 13 Brief, *supra* note 89, at 2.

100. Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49, 62 (2016); *see also* Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1593 (2004) ("The modern enemy combatant cases all rely on international law in evaluating the constitutionality of detentions, but only as an argument to justify the President's exercise of power.").

international law "for the purpose of permitting executive action to the limits of what international law might permit."[101] The theory, at least implicitly, is that Congress intended the AUMF to grant the President the maximum authority permitted by international law.[102] In other words, the AUMF affirmatively authorizes whatever measures are not prohibited by international law.[103] Although this is a plausible interpretation of the ambiguous "necessary and appropriate force" language in the AUMF, invoking the Geneva Conventions as a positive authority, or at least justification, to use force flips the Conventions' underlying purpose on its head. The Geneva Conventions were intended to mitigate the inherent suffering caused by war, not to justify or legitimize indefinite detention.

The use of international law to expand the President's authority is not necessarily concerning.[104] However, the basis for the Government's assertion, that international law permits the detention of persons in NIACs who would "in appropriately analogous circumstances" be detainable in IACs, remains unclear. It is "anything but self-evident that states are free to

101. Ingber, *supra* note 100, at 62.

102. *See* Al Bihani v. Obama, 619 F.3d 1, 43 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of re-hearing en banc) ("As a practical matter, it would be quite odd to think that Congress, when passing the AUMF, did not intend to authorize at least what the international laws of war permit, subject of course to separate prohibitions found in domestic U.S. law."). In practice, however, the courts have also used this theory that the AUMF must authorize whatever is permitted under international law to avoid conflicts with other applicable domestic laws, such as the 1971 Non-Detention Act, which prohibits the detention or imprisonment of U.S. citizens except pursuant to an act of Congress. 18 USC § 4001(a).

103. Apart from its use as a tool of statutory interpretation, appealing to international law to inform the AUMF can help immunize or preserve the Government's assertion of authority in several ways. First, by stating that the AUMF is informed by law of war principles, the U.S. can bolster its argument that it is acting consistent with international law. Indeed, the Obama Administration went to great lengths to argue that its military operations were "in full compliance with international law." Koh ASIL speech, *supra* note 56. The United States undoubtedly cares about complying with international law for its own sake, but claims of international law compliance serve a more practical interest as well. "Acts sanctioned by law enjoy a humanitarian cover that helps shield them from criticism." Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 56 (1994). Accordingly, the Government's assertion that its interpretation of the AUMF is informed by and consistent with international law provides a degree of legitimacy to its actions and reduces political pressure to adopt a more limited theory of detention. Second, stating that the AUMF is informed by international law helps to generate acquiescence from other branches of Government. As Professor Ingber notes, "Courts have shown a willingness to defer to the Executive's position in large part because the executive has, in recent years, gone to great lengths to insist on compliance with international law, in contrast to the early positions by the prior Administration." Ingber, *supra* note 100, at 96. Lastly, framing GCIII as a potential limiting principle (albeit a superficial one given the indefinite nature of the conflict) mitigates the risk that courts will seek to impose a more restrictive principle to constrain executive power, such as one based on domestic criminal law or human rights principles. Invoking international law as a limiting principle is also attractive given the deference afforded to the Executive branch in interpreting international law.

104. JOHN FABIAN WITT, LINCOLN'S CODE 269 (2012) ("Since the days of Alexander Hamilton, American statesmen had used the laws of war as a vehicle for expanding the authority of the federal government and the executive branch in particular.").

analogize at will between IAC and NIAC."[105] The United Kingdom ("U.K.") Court of Appeals similarly questioned this analogy approach in the *Serdar Mohammed* case, stating that "[t]he proposition that the provisions in Geneva III and Geneva IV can be applied by analogy to [authorize detention in NIAC] is highly controversial."[106]

Professor Goodman has presented the most compelling justification for the U.S. analogy theory. Because "IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts," he reasons, "whatever is permitted in international armed conflict is permitted in non-international armed conflict."[107] He argues that, since IAC permits the detention of POWs for the duration of hostilities, the less restrictive rules governing NIACs must permit the detention of enemy belligerents for the same duration. Goodman's argument, however, is ultimately unpersuasive because it focuses solely on the rules of IHL set forth in treaty law. As discussed in Part IV, the fundamental principles of IHL–military necessity and humanity–impose important constraints on State action in all armed conflicts. In some circumstances, these principles place greater limitations on States in NIACs than they do in IACs.

B. Federal Courts' Embrace of the Third Geneva Convention on Prisoners of War Analogy

The federal district courts for the District of Columbia were initially skeptical of the Government's arguments that certain individuals at Guantanamo were lawfully detained.[108] The district courts generally accepted the Government's legal theory of its detention authority, but found in many cases that the Government had failed to establish, by a preponderance of the evidence, that detainees were "part of" Al Qaeda, the Taliban or associated forces at the point of capture.[109] Judge Huvelle went even further in her skepticism of the Government's case and rejected the Government's status-based criterion of detention, based on GCIII, when

105. Heller, *supra* note 32, at 3.

106. Serdar Mohammed, *supra* note 34, para. 217.

107. Goodman, *supra* note 52, at 50. Other commentators have similarly argued that the laws in IACs are more restrictive than the laws in NIACs. *See* Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/.

108. Of the first thirty-five habeas cases reviewed following the Supreme Court's decision in *Boumediene*, the D.C. district court ordered the release of 29 individuals. Olsen, *supra* note 57, at 224.

109. *See, e.g.,* Al Rabiah v. United States, 658 F. Supp. 2d. 11, 42 (D.D.C. 2009) ("The Government's simple explanation for the evidence in this case is that Al Rabiah made confessions that the Court should accept as true. The simple response is that the Court does not accept confessions that even the Government's own interrogators did not believe. The writ of habeas corpus shall issue.").

granting the writ of habeas corpus for GTMO detainee, Yasin Basardh.[110] Her analysis warrants close examination because, as IHL requires, it recognizes the imperative to balance necessity and humanity.

Basardh, a Yemeni national, was an admitted Taliban fighter captured in 2002.[111] Basardh cooperated with U.S. interrogators and provided extensive (albeit sometimes unreliable) information about his associates.[112] In response to Basardh's cooperation, other GTMO detainees physically attacked and threatened Basardh's life.[113] Judge Huvelle determined that the U.S. had failed to meet its burden of establishing that Basardh was lawfully detained under the AUMF. Specifically, Judge Huvelle noted that the AUMF is intended to protect against "future acts of international terrorism against the United States" and therefore requires "some nexus between the force (i.e., detention) and its purpose (i.e., preventing individuals from rejoining the enemy to commit future acts)."[114] Accordingly, "Basardh's current likelihood of rejoining the enemy is relevant to whether his continued detention is authorized under the law."[115] However, given Basardh's extensive cooperation with U.S. interrogators in detention, Judge Huvelle determined that "Basardh can no longer constitute a threat to the United States."[116] She concluded, "[t]he Executive's asserted justification for his continued detention lacks a basis in fact as well as in law."[117] The U.S. did not appeal Judge Huvelle's decision and Basardh was subsequently resettled in Spain in 2010. It did, however, appeal other district court decisions that ordered the release of GTMO detainees.[118]

The D.C. Circuit subsequently rejected Judge Huvelle's threat-based analysis and overturned many of the district court decisions that had granted the writ of habeas corpus based on insufficient evidence of membership in the Taliban or Al Qaeda. The Court of Appeals "instructed district court judges to tilt their interpretation of ambiguous evidence more sharply

110. Basardh v. Obama, 612 F. Supp. 2d 30 (D.D.C. 2009).

111. Del Quentin Wilber, *Detainee Informer Presents Quandary for Government*, WASH. POST (Feb. 3, 2009).

112. *Id.*

113. *Basardh*, 612 F. Supp. 2d at 32.

114. *Id.* at 34.

115. *Id.* at 35.

116. *Id.* Judge Huvelle also noted that the Government did not even argue that Basardh was likely to rejoin hostilities if released. *See id.* at 35 n.11.

117. *Id.* at 35.

118. The United States' decision to appeal these district court decisions was somewhat surprising given its stated goal of closing Guantanamo. The district court decisions ordering the release of GTMO detainees would have made this goal substantially easier, especially given the opposition to discretionary transfers in Congress. Charlie Savage comments that the decision to appeal these cases may have been driven by Justice Department litigators who were frustrated with the losses piling up in the district court. SAVAGE, *supra* note 84, at 299–300.

against the prisoners."[119] For example, the D.C. Circuit stated in *Al-Adahi v. Obama* that the district court had erred in viewing each piece of the Government's evidence in isolation. This error, according to the D.C. Circuit, resulted from the lower court's "failure to appreciate conditional probability analysis."[120] Lower courts must not consider the sufficiency of each piece of evidence in isolation. Evidence that, standing alone, may be insufficient to justify detention may nevertheless increase the weight of other evidence presented by the Government. Courts must therefore consider the cumulative weight of the evidence. For example, inconsistencies in the detainee's story may be relevant to the court's evaluation of his credibility "which in turn bears on the reliability of the Government's evidence."[121]

More significantly, the D.C. Circuit expanded the scope of who can be detained under the AUMF well beyond the "limited category" of individuals at issue in *Hamdi*. First, according to the D.C. Circuit, U.S. detention authority is not confined to detaining individuals who actually engaged in hostilities against the U.S., or who were captured on a traditional battlefield like Iraq or Afghanistan (two factors that the Supreme Court plurality deemed important in its *Hamdi* decision).[122] Membership in a *group* involved in hostilities sufficiently provides a basis for detention.[123] Second, it is not necessary to show that a detainee was formally part of the Taliban or Al Qaeda's command and control structure.[124] The "determination of whether an individual is 'part of' Al-Qaida' must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing on the actions of the individual in relation to the organization."[125] An individual can be deemed a functional member of Al Qaeda or the Taliban based on, *inter alia,* the following evidence: recruitment by Al Qaeda operatives, travel facilitation by Al Qaeda, travel in Afghanistan or Pakistan via known terrorist travel routes, residence at an Al Qaeda guest house, participation in a military style training camp, departure from Afghanistan via routes used

119. *Id.* at 300.

120. Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

121. Latif v. Obama, 677 F.3d 1175, 1195–96 (D.C. Cir. 2012).

122. *Salahi*, 625 F.3d at 752 (D.C. Cir. 2010) (noting that Salahi is not accused of participating in military action against the United States).

123. In addition, the United States has argued that "individuals who are part of an enemy force when captured may be detained, whether or not they personally engaged in hostilities or *subjectively intended to fight against the nation that captured them*." Brief for Respondents in Opposition on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 7, Al-Bihani v. Obama, No 10-1383 (Nov. 2011) (emphasis added), *available at* https://www.justice.gov/sites/default/files/osg/briefs/2011/01/01/2010-1383.resp.pdf.

124. Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010).

125. Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010); Salahi v. Obama, 625 F.3d 745, 751-52 (D.C. Cir. 2010).

by other extremists, and providing false cover stories to interrogators.[126] Third, the threat posed by a detainee, if released, is irrelevant to the lawfulness of his detention. As the D.C. Circuit stated in *Awad v. Obama*, "the United States' authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities."[127]

Seventeen years after 9/11, U.S. detention authority is at its zenith. The Supreme Court's decision in *Hamdi* (at a time when the conflict more closely resembled a traditional international armed conflict) that a narrow category of individuals who were part of and fought with the Taliban can be detained until the end of hostilities has gradually expanded to permit prolonged and indefinite detention for a far greater category of individuals. The Obama Administration, which previously criticized such broad interpretations of the AUMF, missed key opportunities to reign in executive power by allowing its legal theories to be formulated in the context of habeas litigation with a Circuit Court that was inclined to enhance executive authority and disregard international law constraints.[128] The Trump Administration has generally adopted the same legal positions formulated by the Obama Administration, which the D.C. Court of Appeals has continued to endorse.[129]

IV. CONCERNS WITH ANALOGIES IN INTERNATIONAL HUMANITARIAN LAW

This Part explains the methodological problem underlying the application of certain IAC rules by analogy to NIACs. IHL is a unique legal framework because its rules reflect a tension between two often diametrically opposed forces: the need to use overwhelming force to subdue

126. Uthman v. Obama, 637 F.3d 400, 411 (D.C. Cir. 2011). *See* Al-Adahi v. Obama, 613 F.3d 1102, 1108 (D.C. Cir. 2010) ("an individual's attendance at an al-Qaida guesthouse is powerful–indeed overwhelming–evidence that the individual was part of al-Qaida") (internal quotations and citations omitted).

127. Awad v. Obama, 608 F.3d at 11. *See also* Anam v. Obama, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (noting that the Executive can detain an individual who is part of al-Qaeda "even if that individual does not presently pose a threat to the security of the United States"); Respondents' Combined Motion to Dismiss the Petition & Opposition to Petitioner's Motion for Judgment & Order Granting Writ of Habeas Corpus at 22, Davliatov v. Obama, No. 15-1959 (D.C. Cir. 2015) (arguing that the petitioner "is mistaken…in suggesting that his own likelihood of returning to the battlefield determines the permissible duration of his detention").

128. Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (noting that the premise that the AUMF and other statutes are limited by international law is "mistaken"). In its decision to deny rehearing en banc, the full D.C. Circuit noted that the panel's discussion of the role of international law-of-war principles in interpreting the AUMF was dicta.

129. Al-Alwi v. Trump, No. 1:15-cv-00681, No. 17-5067 (D.C. Cir. Aug. 7, 2018).

the enemy and the desire to mitigate the destruction caused by war.[130] The treaties governing the laws of war accordingly represent a considered "compromise formula" between these two objectives.[131] Applying IAC rules by analogy can disrupt the careful balance between the two cardinal principles of IHL: military necessity and humanity. These principles, which apply in all armed conflicts, "provide the foundation for the specific law of war rules" and "form the general guide for conduct during war" when no specific rule applies (as is often the case in NIACs).[132] Section A describes the principles of military necessity and humanity. Section B explains how these principles interact to shape the rules of IHL. Section C demonstrates how applying IAC rules by analogy can, in certain contexts, disrupt the balance between these principles.

A. The Principles of Military Necessity and Humanity

Military necessity pervades the entire body of IHL. A legal framework designed to regulate the conduct of hostilities cannot ignore the realities and fundamental objective of war. Promulgated by the Union forces during the Civil War in 1863, the Lieber Code first defined the principle of military necessity as the principle justifying those measures "indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war."[133] This definition has been largely unchanged in the past 150 years. The 2015 Department of Defense Law of War Manual describes military necessity as the "principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war."[134] There is no universally-accepted definition

130. *See, e.g.*, Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419, 426 (2015) (noting that the principal function of IHL is to "balance the necessity of war with a mitigation of human suffering by regulating the conduct and consequence of hostilities").

131. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2nd ed. 2010) ("Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula."). *See also* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 796 (2010).

132. GENERAL COUNSEL OF THE DEP'T OF DEFENSE, *supra* note 52, § 2.1.2, at 51 (June 2015). The applicability of law-of-war principles is further reinforced by the famous Martens Clause, which has been incorporated into various law-of-war treaties. This clause "reflects the idea that when no specific rule applies, the principles of the law of war form the general guide for conduct during war." *Id.* § 19.8.3, at 1162.

133. Instructions for the Armies of the United Sates in the Field, Headquarters, United States Army, Gen. Order No. 100, Article 14 (Apr. 24, 1863). *See also id.* art. 15 ("Military necessity admits of all destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war"). [hereinafter *Lieber Code*].

134. GENERAL COUNSEL OF THE DEP'T OF DEFENSE, *supra* note 52, § 2.2, at 52-58.

of military necessity,[135] but it is understood to justify the use of force against persons and property provided that (1) there is a military requirement to undertake a certain action and (2) the action is not otherwise prohibited by IHL. Although frequently described as a justification, military necessity is also understood as an implicit limitation. The use of force that is not necessary to achieve a legitimate military purpose is prohibited.[136]

This principle underpins various IHL rules that govern who and what can be attacked during armed conflict. Article 52 of Additional Protocol I to the Geneva Conventions of 1949 ("API"), for example, states that "[a]ttacks shall be limited strictly to military objectives … [which are] those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offer a definite military advantage."[137] In other words, "lawful violence in war must be leveraged to the attainment of some discernible military advantage as a direct result."[138]

Military necessity is not the sole beacon in determining what is lawful in the laws of war. One of the underlying objectives of IHL is to limit the suffering and destruction incident to warfare. As stated in the 1907 Hague Convention, the "right of belligerents to adopt means of injuring the enemy is not unlimited."[139] The principle of humanity serves as an important check

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135. In the Hostage Case, the Military Tribunal defined military necessity as follows: "Military necessity permits a belligerent, subject to the laws of war, to apply any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money." United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948), reprinted in 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1253-56 (1950).

136. Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT'L L.J. 39, 45 (2010) ("Military necessity has helped distinguish between acts deemed materially necessary and hence prima facie permissible, on the one hand, and those deemed materially unnecessary and hence 'impermissible,' on the other, in war."); A. P. V. ROGERS, LAW ON THE BATTLEFIELD 6 (2d ed. 2004) ("[N]o action may be taken which is not militarily necessary.").

137. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. The United States is not a party to API, but recognizes many of its provisions, including Article 52(2), as customary international law. Brian J. Egan, Legal Adviser, Remarks on International Law, Legal Diplomacy, and the Counter-ISIL Campaign at the American Society of International Law, Washington, D.C. (April 1, 2016), https://2009-2017.state.gov/s/l/releases/remarks/255493.htm. Protocol III to the Convention on Certain Conventional Weapons (CCW) adopts the same definition of "military objective" as that used in Additional Protocol I to the Geneva Conventions. *See* Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 CCW Convention) art. 1(3), Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1543 [hereinafter CCW Protocol III]. The United States is a party to this convention and protocol.

138. DINSTEIN, *supra* note 131, at 4.

139. Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 22., Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague Regulations are annexed to the Convention). This

on military necessity and "forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose."[140] Humanity can be understood as the mirror image of military necessity.[141] Methods and measures that are not necessary to defeat the enemy are prohibited by the principle of humanity. It is prohibited as a matter of treaty and customary international law to cause wanton destruction of property, use weapons intended to cause unnecessary suffering, and mistreat detainees because these acts inflict suffering without conferring a military advantage.

B. The Balance Between Necessity and Humanity

IHL constitutes a "carefully thought out balance between the principles of military necessity and humanity."[142] As Professor Dinstein notes, "no part of [the law of international armed conflict] overlooks military requirements, just as no part of [the law of international armed conflict] loses sight of humanitarian considerations."[143] The rules of IHL constitute "a dialectical compromise between these two forces."[144]

The balance between military necessity and humanity in the individual rules of IHL can be implicit or explicit.[145] The prohibition on undetectable anti-personnel mines implicitly incorporates this balance. Such mines plainly provide a military advantage, but the risk posed to civilians is deemed unacceptably high. Accordingly, to strike the optimal balance between necessity and humanity, States have placed certain limitations on the use of mines that reduce the risk to civilians.[146] In many IHL rules, the compromise

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principle has been incorporated into numerous IHL treaties. *See, e.g.,* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, at preamble ("Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering").

140. GENERAL COUNSEL OF THE DEP'T OF DEFENSE, *supra* note 52, § 2.3, at 58-60.

141. *Id.* (noting that the principle of humanity is the logical inverse of the principle of military necessity).

142. Schmitt, *supra* note 131, at 798; *see also* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War,* 20 DUKE J. COMP. & INT'L L. 429, 447 (2010) ("*jus in bello* is about balancing protection of humanitarian or liberty values with military necessity"); Baxter, *supra* note 52, at 220 ("the law seeks to limit the measures of war to those which are necessary and to curb those activities which produce suffering out of all proportion to the military advantage to be gained").

143. DINSTEIN, *supra* note 131, at 5.

144. *Id. See also* Hayashi, *supra* note 136, at 50 ("[I]nternational humanitarian law has been developed with a view to striking a realistic balance between military necessity and humanitarian considerations wherever they collide.").

145. Schmitt, *supra* note 131, at 802–05.

146. Amended Protocol II to the Convention on Certain Conventional Weapons (CCW) imposes a number of obligations on High Contracting Parties with respect to their use of mines. Anti-personnel mines that are not capable of self-destruction and self-deactivation, for example, must be "placed

between military necessity and humanity is more explicit, requiring parties to take "reasonable" or "feasible" measures to protect civilians when attacking military objectives. For example, Article 57 of API requires parties to a conflict to take "all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[147] In other rules, a heightened military necessity may create an exception to a general rule animated by the principle of humanity. Article 56 of API prohibits attacks against "[w]orks or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations."[148] This prohibition on attacking a dam or dyke can be overcome "only if it is used for other than its normal function and in a regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support."[149] Finally, in some rules, humanitarian considerations create an absolute bar, which not even military necessity can overcome. In these cases, such as the absolute bar on torture,[150] on attacks against the civilian population by way of reprisals,[151] and on the use of weapons that cause injury with non-detectable fragments,[152] "the presupposition must be that the framers of the norm have already weighed the demands of military necessity and (for humanitarian reasons) have rejected them as a valid exception."[153]

The balance between military necessity and humanity struck by States is not always evident in a single rule but is instead only apparent in the interaction of several different provisions. Article 51 of API permits parties to inflict collateral damage when attacking military objectives, provided that the expected damage to civilians or civilian objects is not excessive in relation to the concrete and direct military advantage anticipated.[154] In some

within a perimeter-marked area which is monitored by military personnel and protected by fending or other means, to ensure the effective exclusion of civilians from the area." Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II to the 1980 CCW Convention) art. 5(2)(a), May 3, 1996, 2048 U.N.T.S. 93 [hereinafter CCW Amended Protocol II].

147. API, *supra* note 137, at art. 57; *see also* CCW Amended Protocol II, *supra* note 146, at art. 3(10) ("All feasible precautions shall be taken to protect civilians from the effects" of mines, booby-traps and other devices.).

148. API, *supra* note 137, at art. 56(1).

149. *Id.* at art. 56(2)(a).

150. GCIII, *supra* note 31, at art. 3(1)(a).

151. API, *supra* note 137, at art. 51(6); *see also Customary IHL, Rule 146: Reprisals against Protected Persons*, INT'L COMM. OF THE RED CROSS, *available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule146 (last visited Apr. 3, 2018) ("The Geneva Conventions prohibit the taking of belligerent reprisals against persons [protected by the Geneva Conventions].").

152. Protocol on Non-Detectable Fragments (Protocol I to the 1980 CCW Convention), Oct. 10, 1980, 1342 U.N.T.S. 168, 19 I.L.M. 1529.

153. DINSTEIN, *supra* note 131, at 6.

154. API, *supra* note 137, at art. 51(5).

circumstances, even extensive civilian casualties may be deemed lawful.[155] This rule, read in isolation, arguably elevates military necessity over humanity by using the anticipated military advantage as the barometer by which the acceptable degree of expected civilian casualties is calculated. Nevertheless, to properly understand the intended balance between military necessity and humanity, one must also consider the related IHL rules that impose on parties both offensive and defensive obligations intended to limit civilian casualties.[156] Article 57 of API requires an attacking force to take "all feasible precautions in the choice of means and method of attack" with a view to limiting civilian casualties.[157] Such precautions include giving effective advance warning to civilians, unless circumstances do not permit doing so. Article 58 creates a defensive obligation to remove civilians from the vicinity of military objectives and to avoid locating military objectives near densely populated areas.[158] The relatively permissive rule established by Article 51 assumes that States have or will take these precautionary measures to reduce the risk to civilians. As the negotiating history of API indicates, the establishment of these precautionary obligations was a precondition to agreement on the rule of proportionality.[159]

C. Undermining the Balance

Applying IAC rules of to "analogous" situations in NIACs can disrupt the careful balance between military necessity and humanity struck in those rules in at least two ways. First, IAC rules of were developed in and tailored to a specific factual context. IACs are fought between States' armed forces, soldiers are identifiable and operate within a military chain of command, States have the means to respect IHL and the ability to punish violations,

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155. DINSTEIN, *supra* note 131, at 131. The destruction of an important military base, for example, may justify significant casualties among civilians working on or living near the base.

156. *See* Charles P. Trumbull IV, *Re-Thinking the Principle of Proportionality Outside of Hot Battlefields*, 55 VA. J. INT'L L. 521, 556–57 (2015); *see also* Corn, *supra* note 130, at 465 ("The precautions obligation is a key source of that procedural component of LOAC efficiency and must be considered alongside the substantive, obligations of distinction and proportionality as core LOAC obligations.").

157. API, *supra* note 137, at art. 57(2)(c); *id.* at art. 57(2)(a)(ii).

158. *Id.* at art. 58(a) and (b).

159. XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 285 (CDDH/215/Rev. 1, ¶97) ("Paragraph 2 (a) of article 50 required much time and effort to work out, but the other paragraphs were fairly quickly agreed upon. The so-called rule of proportionality in paragraph 2 (a) iii was found ultimately to be acceptable when it was preceded by paragraph 2 (a) i and paragraph 2 (a) ii which prescribe additional precautions."). *See also* GENERAL COUNSEL OF THE DEP'T OF DEFENSE, *supra* note 52, § 5.10.4, at 246-47 (noting that "U.S. military manuals reflect the fundamental connection between the requirement to take feasible precautions in planning and conducting attacks and the prohibition on attacks expected to cause excessive incidental harm").

and there is generally a discrete end of hostilities. The IAC rules also encourage soldiers to distinguish themselves from the civilian population in order to receive the protections granted to POWs. Identifying analogous situations in NIACs will inevitably entail some degree of factual dissonance with IACs given the asymmetry of parties in NIACs. The risk is not simply inherent in applying a rule from one context to a slightly different context. In armed conflict, "[w]hen circumstance change, the perceived sufficiency of a particular balancing of military necessity and humanity may come into question."[160] For this reason, "it is important that the rules applicable in armed conflicts apply only in the situations for which they were created."[161]

Second, as noted above, IHL has a gestalt character. The intended balance between necessity and humanity that permeates IHL is not always evident in a single rule. The balance between these principles is carefully woven throughout a mosaic of provisions that serve to both facilitate warfare and limit the suffering caused by it.[162] The laws of war are an integrated whole, such that one rule cannot necessarily be transposed to other contexts in isolation without disrupting the overall balance. For this reason, cherry-picking certain rules from IACs (i.e., rules that favor military necessity) and applying them to NIACs without applying interrelated rules (i.e., those that favor humanitarian considerations) can further compound the problem inherent in applying IAC rules outside of their intended context.

This is not to say that analogies are problematic in all circumstances. There may be situations where it is helpful to look to IAC rules for guidance, especially when identifying limits on State action. Many of the provisions in IACs governing the treatment of detainees, such as the provision requiring ICRC access to detention facilities, can be applied in NIACs without disrupting the balance between necessity and humanity. States uncertain of their legal obligations in NIACs may choose the more protective rules in IACs as their default.

The deliberate balance between necessity and humanity in the rules of IAC, however, does require States to proceed with caution when applying these rules by analogy to ensure that an appropriate balance is maintained. There is no specific test for determining how this balance should be struck in a particular context, but any legal framework that unreasonably discounts either of these principles runs counter to the underlying purpose of IHL and will likely be viewed as impracticable or illegitimate. In applying IAC rules

160. Schmitt, *supra* note 131, at 799.

161. INT'L COMM. OF THE RED CROSS, *supra* note 30, para. 389*; see also* Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 237 (2011) (noting that "care needs to be taken" when "drawing from the law of international armed conflict and applying it to situations of internal armed conflict").

162. *See* Corn, *supra* note 130, at 428 (noting that IHL rules do not "function in a vacuum").

by analogy, it is thus critical to consider: (1) how the balance between necessity and humanity was struck in the IAC rule; (2) the specific factual circumstances or assumptions, if any, that may have influenced the formulation of the rule; (3) whether the factual differences between IACs and NIACs would upset the balance; and (4) whether application of other interrelated rules would be necessary to preserve this balance. Accordingly, in the detention context, the most relevant question is not whether members of non-State armed groups are more like soldiers or more like civilians. Rather, the most relevant question is whether there are differences between these categories of individuals that would disrupt the balance between military necessity and humanity in whichever IAC rules are to be applied by analogy. Part V argues that there are key differences between POWs and members of non-State armed groups that render the GCIII analogy unsustainable, at least in its present application.

V. PROBLEMS WITH THE ANALOGY TO THE THIRD GENEVA CONVENTION ON PRISONERS OF WAR

This Part explains why the legal theory that members of non-State armed groups can be detained until the end of hostilities, based on analogous provisions in the Third Geneva Convention, undermines (and potentially disregards) the critical balance between necessity and humanity.[163] This distorted balance is especially concerning given the U.S. conflict with Al Qaeda, the Taliban, and now ISIL increasingly bears less resemblance to the traditional conflicts in which the laws of war were developed.

Section A focuses on the analogy between members of armed groups and POWs. It argues there are important differences between these categories that directly implicate the balance between necessity and humanity that was established in GCIII. Moreover, it shows how the U.S. has selectively applied those provisions in GCIII that are animated by military necessity, without applying related and counter-balancing provisions that promote humanitarian considerations. Section B explains how the nature of the current conflict exacerbates the concerns identified in Section A, making the U.S. analogy unsustainable. In particular, the increasing scope and duration of the current conflict against Al Qaeda, the Taliban, and ISIL make the "practical circumstances" of this conflict

163. The argument presented in this Part does not suggest, however, that the United States should necessarily adopt the civilian analogy in GCIV, which permits the detention of civilians only for imperative reasons of security. GCIV, *supra* note 61, at art. 78. Such a standard, which was not intended to apply to members of armed groups in NIACs, generally exceeds would what be required by the principles of military necessity and humanity.

"entirely unlike those of the conflicts that informed the development of the law of war."[164]

A. Differences Between Prisoners of War and Members of Non-State Armed Groups

At first glance, the analogy between POWs and members of armed groups is attractive. Members of non-State armed groups often have more in common with soldiers in a State's armed forces than they do with the civilian population. They may swear an oath of allegiance to the leader of the armed group, give and implement orders within an established hierarchy, receive military training, and earn a salary for their service. For these reasons, from a factual standpoint, the analogy to GCIII may be more compelling than the analogy to GCIV favored by the ICRC and many other States. Notwithstanding these similarities, there are key differences between these two groups that have important ramifications under the laws of war. This Section first examines the military and humanitarian considerations that influenced the provisions of the Third Geneva Convention. It then explains why the differences between members of non-State armed groups and POWs make this analogy difficult to apply without disrupting that balance.

i. The Balance Between Necessity and Humanity in the Third Geneva Convention on Prisoners of War

The provisions in GCIII on POWs–including Articles 21 and 118–reflect States' understandings that there is a military necessity to detain POWs until the end of hostilities based on the ongoing threat posed by enemy soldiers. At the same time, GCIII contains a number of rules, based on the principle of humanity, intended to mitigate the hardship of indefinite detention, including, *inter alia*, provisions on the conditions of confinement, religious exercise, and leisure.

The premise in GCIII that soldiers pose an ongoing threat until the end of hostilities is not based on the subjective judgment of military commanders. As members of a State's armed forces, POWs have a *legal* obligation to re-join their armed forces if released or repatriated, and States have a strong interest in facilitating their return to military service.[165] Even during captivity, soldiers often have an obligation to continue the fight in

164. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

165. *See* Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950) ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.").

more limited ways. The U.S. military's Code of Conduct instructs all soldiers in detention to "continue to resist by all means available," to "give no information or take part in any action which might be harmful to [their] comrades," and to "make every effort to escape and aid others to escape."[166] A soldier's sworn duty to protect his country and oppose its enemies does not cease in captivity, and he can be prosecuted for failing to fulfill these duties.[167]

This legal obligation on each soldier underpins many of the rules in the Third Geneva Convention. As one commentator notes, "[t]he international rules relating to prisoners are applied on the assumption that a given person is a prisoner who continues to owe allegiance to the captee State."[168] For example, GCIII prohibits the punishment of POWs who are re-captured after making a successful escape from detention[169] because it is considered a "moral right" or "duty" of every POW to attempt to return to his armed forces.[170] GCIII also limits the interrogation of POWs. Article 17 states that a POW, "when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."[171] The Detaining Power is prohibited from using any "form of coercion," threats, insults, or disadvantageous treatment to secure this or other information.[172] States' shared understanding that soldiers have an obligation to their nation not to divulge information that could aid the enemy motivates this rule. As the ICRC Commentary to Article 17 of GCIII notes, "the prisoner may, and indeed must, refrain from giving military information to the Detaining

166. Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958), *reprinted as amended in* 10 U.S.C. §802 at 974 (2012).

167. *See generally* William P. Lyons, *Prisoners of War and the Code of Conduct,* 62 INT'L L. STUD. SER. U.S. NAVAL WAR. COL. 343 (1980). Following the Korean War, for example, the military investigated the conduct in detention of 565 returned POWs; of these, 68 were separated from the services, 3 resigned, 2 were given restricted assignments, and 11 were convicted by court martial. *Id.* at 348. The significant incidences of American POW cooperation with their North Korean captors led President Eisenhower to issue the Code of Conduct in 1955. *Id.*

168. R.C. HINGORANI, PRISONERS OF WAR 183 (1982).

169. The Geneva Conventions also recognize the Detaining Powers' legitimate interest in preventing escapes. Accordingly, a POW who is captured before his escape is completed may be punished. However, such punishment is limited to "disciplinary punishment only" unless the escaping POW commits other aggravating offenses such as "violence against life or limb." GCIII, *supra* note 31, at arts. 92–93.

170. *Id.* at 93. *See also* A.J. BARKER, PRISONERS OF WAR 149 (1975) ("As most civilized nations recognize that POWs consider it their duty to escape, offences committed during escapes have generally been treated with considerable leniency"); U.K. Ministry of Defence, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 8.109 (2004) [hereinafter UK LAW OF ARMED CONFLICT JOINT SERVICE MANUAL] (The United Kingdom's manual on the Law of Armed Conflict recognizes that "[t]he law of armed conflict makes allowance for the fact that many states require members of their armed forces who become prisoners of war to endeavor to escape.").

171. GCIII, *supra* note 31, at art. 17.

172. *Id.*

Power; he must therefore be protected against any inquisitorial practices on the part of that Power."[173]

The legal duty that a soldier owes to his State similarly informs the rules regarding parole.[174] The practice of paroling captured soldiers based on a solemn promise that they would not re-engage in hostilities against the Detaining Power was common in the eighteenth and nineteenth centuries, as many armies did not want to expend the resources to house and feed captured soldiers if there was another means of ensuring (i.e., parole) that they would not return to the battlefield.[175] This practice was severely curtailed during the Civil War, and restrictions on the use of parole were included in the Lieber Code.[176] Following the parole of 13,000 Union soldiers captured by the Confederate Army in Harper's Ferry and Richmond, the Union protested that "such paroles asked the solders to give up something they had no right to trade away, namely their obligation to serve their nation."[177] Accordingly, Article 21 of GCIII permits the parole of POWs only if authorized by the laws or regulations of the POW's own State; it also prohibits the Detaining Power from compelling a POW to accept parole.[178] Soldiers cannot be forced to make a promise in violation of their obligation to their State. If a State does permit its soldiers to accept parole, however, it is "bound neither to require nor to accept from [paroled POWs] any service incompatible with the parole or promise given."[179] Most nations do not permit their soldiers to accept parole given that the requisite promise to refrain from hostilities once released would contravene soldiers' legal duty to their armed forces.[180]

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173. *Commentary of 1960 on the Convention (III) relative to the Treatment of Prisoners of War. Geneva 12 August 1949*, INT'L COMM. OF THE RED CROSS 155, 156 (1960), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=8529885A31B81646C12563CD00425E14 [hereinafter ICRC, COMMENTARY].

174. The U.S. Department of Defense defines "parole" as "promises given the captor by a POW to fulfill stated conditions such as not to bear arms or not to escape, in consideration of special privileges, such as release from captivity or lessened restraint." U.S. DEP'T OF DEF., DIRECTIVE 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT art. 3(a)(5) (1988).

175. WITT, *supra* note 104, at 21–23. Even though the American Revolutionary forces agreed to parole British forces based on a promise that they not return to fight in the Revolutionary War, the Americans soon understood that these paroles were a strategic blunder. Paroled individuals were free to serve elsewhere in the British Empire, freeing other forces to take their place in the war against the American colonies. For more historical background on paroles in armed conflict, *see* Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).

176. *Lieber Code*, *supra* note 133, at arts. 119–134. Article 131 states, "If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him, he is free of his parole." *Id.*

177. WITT, *supra* note 104, at 230.

178. GCIII, *supra* note 31, at art. 21.

179. *Id.*

180. *See, e.g.,* GENERAL COUNSEL OF THE DEP'T OF DEFENSE, *supra* note 52, § 9.4.2.1, at 544 ("U.S. policy has prohibited the acceptance of parole."); UK LAW OF ARMED CONFLICT JOINT

The legal duty of allegiance owed by each soldier removes any doubt as to the danger posed by POWs if released and renders periodic threat reviews (similar to the biannual reviews mandated in GCIV) unnecessary. The acknowledgment in GCIII that POWs may be detained until the end of hostilities simply reflects the shared understanding that there is *ipso facto* a military necessity to detain individuals who have a legal obligation to return to the battlefield if released.

Where this assumption can no longer be supported based on changed circumstances–as in the case of incurably sick or wounded POWs–POWs must be repatriated regardless of whether hostilities have ceased.[181] Article 110 of GCIII requires that the following detainees be repatriated:

> (1) incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished; (2) wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished; and (3) wounded and sick who have recovered, but whose mental or physical fitness seems to have gravely and permanently diminished.[182]

This provision demonstrates the drafters' conviction that detention authority in IACs should be tied to military necessity, and that the principle of humanity prevails when the military necessity of detention ceases to exist.[183] Detainees should not be detained longer than necessary. Article 117 provides an additional guarantee that repatriated POWs will not pose a continuing threat to the Detaining Power by prohibiting the receiving State from employing repatriated POWs "on active military service."[184]

SERVICE MANUAL, *supra* note 170, at Sec. 8.108 ("As a matter of United Kingdom practice, personnel of its armed forces are not permitted either to seek or to be granted parole."); Canada Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual, B-GJ-005-104/FP-021, para. 1025 ("Canadian law does not permit members of the [Canadian Forces] to give their parole.").

181. *See* HILL-CAWTHORNE, *supra* note 11, at 61 (noting that these provisions demonstrate that States' authority to detain POWs is limited to what is necessary to prevent them from returning to the battlefield).

182. GCIII, *supra* note 31, at art. 110.

183. ICRC, COMMENTARY, *supra* note 173, at 514 ("The main objection raised by the Detaining Power against early repatriation is that the repatriated prisoners of war might return to active service. This danger does not exist in the case of wounded and sick in this category."); *see also* HINGORANI, *supra* note 168, at 174 ("The capture of enemy personnel is usually effected in order to prevent their future participation in hostilities. However, since these sick and wounded prisoners do not present such a threat any longer, the captor generally does not object to their repatriation.").

184. Even if a soldier does return to active military service and is subsequently recaptured, the Detaining Power cannot punish him for violating Article 117 of GCIII. As the ICRC Commentary notes, soldiers "cannot be held responsible for action by the State whose orders they were obliged to obey." ICRC, COMMENTARY, *supra* note 173, at 539.

ii. Members of Non-State Armed Groups

Non-State actors, unlike soldiers, do not have a legal obligation to support or rejoin their armed group if released.[185] Their intention to commit belligerent acts cannot therefore be presumed or imputed as a duty to their sovereign.[186] To the contrary, members of non-State armed groups often cooperate with interrogators during captivity, providing information on the activities or plans of their former associates.[187] They may also refuse to re-join the conflict for a number of reasons, including fear of re-capture or death, disillusionment with the cause, family pressure, maturation in detention, or a change in the nature or geographic focus of the ongoing conflict.[188] One Afghan detainee at Guantanamo, Mohammed Kamin, explained during his Periodic Review Board hearing that he joined the Taliban because he thought the American invasion would bring the same hardships as the Russian invasion in the 1980s:[189]

> [W]hen the U.S. came into my country to get Osama Bin Laden, we were told that the Americans were going to remove the Quran from our schools, stop us attending our Mosques and other things to harm my people. So, when I look back on my mindset before coming to Guantanamo, I know I had the wrong information.[190]

He added,

185. WITT, *supra* note 104, at 22. The United States recognized this important distinction between career soldiers and voluntary militia during the Revolutionary War. Despite General Washington's preference for prisoner exchanges with the British forces, Congress realized that these exchanges provided a military advantage to the British. "Captured British soldiers would resume their arms upon exchange, the Congress observed, but Americans held by the British had often reached the end of their enlistments and might not rejoin the Continental Army at all." *Id.*

186. *Cf.* Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950).

187. *See, e.g.,* Peter Finn, *For Two Detainees Who Told What They Knew, Guantanamo Becomes a Gilded Cage,* WASH. POST (Mar. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/24/AR2010032403135.html (noting that two detainees in Guantanamo who cooperated with U.S. authorities are wanted dead by their former associates); Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government,* WASH. POST (Feb. 3, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020203337.html (describing Yasim Basardh's extensive cooperation with interrogators at GTMO).

188. The publicly available sessions from the Guantanamo Periodic Review Boards can provide significant insight into the factors that motivated individuals to fight with Al Qaeda or the Taliban in Afghanistan, and the reasons that they might decide not to re-engage in hostilities. Some of the transcripts of these hearings are available at www.prs.mil. In many cases, detainees requested that their statements not be made public.

189. *Transcript of Hearing, Mohammed Kamin, ISN No. 1045*, GUANTANAMO PERIODIC REVIEW BD. (Aug. 18, 2015), http://www.prs.mil/Portals/60/Documents/ISN1045/150818_U_ISN1045_HEARING_TRANSCRIPT_DETAINEE_SESSION_PUBLIC_v1.pdf. Mr. Kamin was approved for transfer by the PRB and subsequently transferred to the United Arab Emirates in 2016.

190. *Id.*

> [t]he fear that I had about the U.S. did not occur and instead of occupying my country, I see they are helping to rebuild. I walk by the TV in my cell and I see so much of the destructions [sic] happening in Afghanistan and all the time it really bothers me. But, also I hear reports of more schools, hospitals and roads being opened. I want my son to have those opportunities in my country.[191]

Similarly, if a detainee is repatriated or resettled, the receiving government would likely take certain security measures to prohibit (rather than facilitate) his re-engagement. This is especially the case given that the U.S. would not transfer a detainee to a hostile government or to a State that is not capable of taking appropriate security measures.[192] Accordingly, in NIACs, it cannot be assumed *a priori* that there will be a military necessity to detain a non-State enemy combatant for the duration of hostilities.[193]

The U.S. Government's legal position that it can hold members of the Taliban, Al Qaeda, and associated forces until the end of hostilities, irrespective of their threat, is in tension with the limitations imposed by IHL.[194] There is no military necessity to detain an individual who no longer presents a threat or an individual whose threat could be mitigated in other ways that do not interfere with the military mission. Given that members of Al Qaeda and the Taliban do not have a legal obligation to return to the battlefield, their threat cannot be presumed for the duration of hostilities. This is not to say that members of armed groups may not continue to pose a threat for the duration of hostilities; some members may feel an ideological

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191. *Id.*

192. The Department of Defense publicly stated in 2016 that the security assurances obtained from governments that accept detainees from Guantanamo Bay generally cover restrictions on travel, monitoring of the detainee, periodic sharing of information, and measures to aid the detainee in re-entering society. U.S. DEP'T OF DEF., PLAN FOR CLOSING THE GUANTANAMO BAY DETENTION FACILITY (2016), *available at* https://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf.

193. There is little reliable data on re-engagement trends for non-State actors in armed conflicts. *See* Dennis A. Pluchinsky, *Global Jihadist Recidivism: A Red Flag,* 31 STUD. CONFLICT & TERRORISM 182, 183–84 (2008). The United States' data on re-engagement rates of former Guantanamo detainees, however, sheds some light on re-engagement rates for detainees in long-term, law-of-war detention. As of January 15, 2018, the Director of National Intelligence reported that 16.9% of former GTMO detainees have been deemed, by a preponderance of the evidence, to have re-engaged in terrorist or insurgent activities (although not necessarily against the United States). This number drops to 4.6% for detainees transferred under the Obama Administration. *See* OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY (GTMO), CUBA (Mar. 09, 2018), *available at* https://www.dni.gov/files/documents/Newsroom/GTMO_Reengagement_Summary_CDA_-Response.pdf. The fact that a small number of detainees will re-engage if released should certainly inform States' authority to detain under IHL, but it does not justify blanket authority to hold until the end of hostilities the vast majority of detainees who would not return to the battlefield if released.

194. Some commentators argue that the detention of individuals who do not pose a threat may be considered a violation of Common Article 3's humane treatment requirements. HILL-CAWTHORNE, *supra* note 11, at 81–82.

or honor-based duty to oppose their perceived enemy until the conflict ceases. The only way to determine such a detainee's ongoing threat, however, is to conduct periodic reviews, as the U.S. now does as a matter of *policy* but not as a legal requirement. As discussed further in Part VI, these reviews are an important step in ensuring that the United States' domestic detention authority is consistent with IHL, but the *legal* position that it can continue to detain individuals regardless of their threat directly ignores fundamental principles of IHL.

iii. The United States Analogy Ignores Important Humanitarian Considerations

The U.S. Government's selective application of GCIII's provisions further distorts the intended balance between military and necessity in that treaty. Articles 21 and 118 of GCIII, which permit the detention of POWs until the end of hostilities, reflect States' shared views regarding what is necessary from a military standpoint in IACs. POWs are subject to indefinite detention in order to prevent them from returning to the battlefield, as they would be legally obliged to do if released. Other provisions in GCIII, however, reflect States' views regarding the measures that are necessary from a humanitarian standpoint. POWs, for example, are entitled to "combatant immunity" and thus cannot be prosecuted for their participation in hostilities so long as they comply with IHL.[195] The concept of combatant immunity reflects States' belief that soldiers should not be punished solely for participating in hostilities on behalf of their sovereign, provided they satisfy the requirements of a lawful combatant.[196] This immunity serves to both promote compliance with IHL and mitigate the inherently harmful effects of indefinite detention.[197] Moreover, as the purpose of detention in IHL is non-punitive, GCIII requires that POWs be confined in relatively comfortable conditions. POWs are to be afforded "every guarantee of hygiene and healthfulness";[198] shall be quartered "under conditions as favourable as those for the forces of the Detaining Power";[199] and are provided with sufficient clothes, food, medical care, with a stipend, with recreational, religious, with intellectual opportunities,[200] and with robust due process guarantees.[201]

195. *See generally* Corn, *supra* note 30.

196. *Id.*

197. *Id.* at 287 (stating that combatant immunity is "not merely a humanitarian principle; it is an incentive to comply with the law during the conduct of military operations").

198. GCIII, *supra* note 31, at art. 22.

199. *Id.* at art. 25.

200. *Id.* at arts. 26, 27, 30, 34, 38, and 60.

201. *See generally id.* at arts. 99–108.

Members of non-State armed groups, by contrast, do not enjoy the combatant privilege and can be prosecuted for crimes under the domestic law of the Detaining Power, even if they comply with IHL rules.[202] Unlike soldiers, non-State actors do not have a duty or authority to take up arms, and States have a legitimate interest in using the threat of criminal prosecution as a deterrent from engaging in hostilities against lawful governments.[203] The U.S. position is that enemy combatants in NIACs can be prosecuted at any time, even after years in law-of-war detention.[204] A key part of the Obama Administration's plan to close Guantanamo, announced in 2016, specifically envisioned prosecuting certain detainees–most of whom had been detained since 2002–in either military commissions or Article III courts.[205] This prospect of prosecution compounds the inherent unease with indefinite detention. Unlike POWs, non-State actors must serve their detention without knowing that they will be released at the end of hostilities (whenever that may occur).

The U.S. has also elected not to apply, by analogy, many provisions in GCIII that regulate conditions of confinement for POWs. The U.S. asserts that it is only obliged to provide the baseline protections in Common Article 3. Although the detention conditions at Guantanamo meet, and in many cases now exceed, the conditions required by Common Article 3,[206] the conditions are clearly not similar to POW camps. Detainees at Guantanamo are treated humanely, have daily access to excellent medical care, can exercise their religious beliefs, and generally live in communal settings that are more comfortable than many penal institutions.[207] Nevertheless, the

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202. *See, e.g., id.* at art. 3 ("The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."); Tom Ruys, *The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict*, 50 STAN. J. INT'L L. 247, 260 (2014) ("Members of [non-State armed groups] do not enjoy combatant privilege and cannot claim POW protection, but are instead exposed to criminal prosecution and punishment (including capital punishment) under domestic law.").

203. Corn, *supra* note 30, at 266. Professor Corn argues that there may be potential benefits to extending combatant immunity to non-State actors who satisfy the conditions of a lawful combatant (i.e., wearing uniforms, carrying arms openly, operating under a responsible command structure, and complying with the laws of war). *See also* Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209 (2005).

204. Corn, *supra* note 30, at 278.

205. U.S. DEP'T OF DEF., *supra* note 192.

206. U.S. DEP'T OF DEF., REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT'S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT (2009) [hereinafter Walsh Report], available *at* http://www.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf. The Walsh Report made a number of policy recommendations regarding improvements to the conditions of confinement at GTMO. Many of these recommendations were subsequently implemented by the Obama Administration.

207. Tyler Pager & Paige Leskin, *Military: Gitmo Detainees Not Treated Like in Early Days*, USA TODAY (Mar. 16, 2015), https://www.usatoday.com/story/news/nation/2015/03/16/gitmo-

conditions at Guantanamo are not as favorable as the conditions under which U.S. forces on that base are accommodated, as would be required by Article 25 of GCIII.[208]

In sum, the U.S. Government's legal theory that members of non-State armed groups can be held for the duration of hostilities, by analogy to GCIII, disrupts the important balance struck in IHL between military necessity and humanity. The U.S. legal position tilts toward military necessity by assuming that members of armed groups (and even non-members who substantially support that group) continue to pose a threat for the duration of hostilities. In the absence of a legal obligation to return to the battlefield, however, this continuing threat cannot be presumed.[209] At the same time, the U.S. analogy approach to GCIII is selective. The U.S. does not apply by analogy many provisions in GCIII that are intended to mitigate the harmful effects of indefinite detention, such as combatant immunity and the various provisions in GCIII intended to ensure that detention is non-punitive. For the U.S., law-of-war analogies generally serve as a one-way ratchet that prioritizes military necessity at the cost of humanitarian considerations.

B. The Analogy is Unsustainable in Light of the Current Conflict

The Supreme Court cautioned in 2004 that its understanding of the President's detention authority under the AUMF "may unravel" if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."[210] The U.S. faces that situation today. The conflict against Al Qaeda, the Taliban, and now ISIL, bears little resemblance to the traditional armed conflicts that informed the Supreme Court's decision in *Hamdi.* Hostilities are often waged outside of active battlefields; the enemy is increasingly more decentralized; and there is no foreseeable end to the conflict.

At least one Supreme Court Justice has signaled a willingness to revisit the scope of U.S. detention authority. In the Court's decision to deny the

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outdated-images/24874103/. The description of conditions in this media article is consistent with this author's first-hand observations on multiple trips to Guantanamo Bay.

208. Professor Blank also argues that there is a punitive quality to detentions in Guantanamo. She notes that both the Bush and Obama Administrations consider the detainees at Guantanamo as "terrorists," and that law of war detention is being employed in lieu of criminal prosecution. Rather than detaining these individuals based solely on military necessity, she argues that the United States continues to detain them "because of what they did, as a substitute for prosecution." Laurie Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1190 (2011).

209. Evidence that an individual swore an oath of allegiance to the leader of an armed group may, however, create a rebuttable presumption that the detainee would return to the battlefield if released.

210. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

petition for a writ of certiorari in *Hussain v. Obama,* Justice Breyer noted that the Court had not addressed whether the AUMF authorizes and whether the Constitution permits the detention of Al Qaeda or Taliban members who did not personally engage in hostilities against the U.S., or whether domestic law limits the duration of detention.[211] If the Supreme Court decides to resolve these unanswered questions, it will likely consider three developments since its *Hamdi* decision: (1) the expanded scope of the U.S. detention authority; (2) the increasing duration of the conflict; and (3) the evolving nature of the conflict. Like the "conditional probability analysis" adopted by the D.C. Circuit,[212] these developments should not be considered in isolation. Their cumulative effect significantly exacerbates the distorted balance between necessity and humanity described in Section A and stretches the analogy to traditional armed conflicts that informed the Court's decision in *Hamdi* to its breaking point.

i. Scope & Burden of Proof

U.S. detention authority has gradually increased over the past decade. The Supreme Court's decision in *Hamdi* (decided when the conflict more closely resembled a traditional international armed conflict), permitting detention of individuals who were part of and fought with the Taliban until the end of hostilities, has been expanded to allow prolonged and indefinite detention for a far greater category of individuals. As discussed in Part III.B, the D.C. Circuit broadened the scope of the United States law-of-war detention authority well beyond the "limited category" of individuals at issue in *Hamdi*.[213] The U.S. now has the authority to detain for the duration of hostilities individuals who never fought against the U.S., who were never formally part of an enemy armed group, and who do not currently pose a threat.[214] Unlike the limited category identified in *Hamdi*, individuals falling within the current U.S. detention authority may bear little resemblance to soldiers in a State's armed forces.

The D.C. Circuit has also expanded the scope of the U.S. detention authority by setting a low bar on the Government's evidentiary burden. The D.C. Circuit has consistently held that, to satisfy habeas review, the Government need only establish membership by a preponderance of the

211. Hussain v. Obama, 134 S.Ct. 1621, 1622 (2014) (Breyer, J., respecting denial of certiorari). Justice Breyer agreed with the Court's decision to deny certiorari because Hussain's petition did not ask the Supreme Court to resolve these unanswered questions.

212. *See supra* notes 120–122.

213. *Hamdi*, 542 U.S. at 518.

214. *See supra*, Part III.B.

evidence[215] and has indicated that the Constitution may not require even this low standard.[216] In practice, in certain circumstances, the burden may even shift to the detainee to prove his case. The D.C. Circuit has ruled that Government documents introduced as evidence against the detainee, such as interrogation reports, are entitled to a "presumption of regularity" and accuracy in the absence of clear evidence to the contrary.[217] The D.C. Circuit acknowledged that these interrogation reports are "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes," but nevertheless found that such a presumption is warranted because it "is impossible to cure the conditions under which these documents were created."[218] The D.C. Circuit also ruled that hearsay may be considered against the detainee to the extent it demonstrates sufficient indicia of reliability.[219]

There is reason to be concerned with this relaxed burden of proof and standards for evidence because uncorroborated allegations or circumstantial evidence of membership in an enemy armed group can result in detention lasting longer than many felony convictions. Indeed, in some cases, this low burden of proof has reportedly contributed to prolonged detention based on faulty intelligence.[220] For this reason, other countries with extensive

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215. This evidentiary standard only applies at the time of the habeas proceeding; the courts have not articulated any burden of proof at the time of capture, similar to what would be required by law enforcement officials when making an arrest.

216. Awad v. Obama, 608 F.3d 1, 10–11 (D.C. Cir. 2010). *See also* Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010) ("Although we doubt…that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case."); Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring). There is little dispute that the United States is engaged in an armed conflict against terrorist groups that conceal themselves among the civilian population. Members of these organizations do not wear uniforms, carry weapons openly, or otherwise advertise their membership in their respective armed groups. This naturally makes it difficult to differentiate between bona fide members and civilians with tenuous (or no) connections to such groups. For these reasons, it may be acceptable to permit a lower burden of proof for temporary detention, during which time the Detaining Power can determine the threat posed by the individual and any information of intelligence value he or she may possess.

217. Latif v. Obama, 677 F.3d 1175, 1178 (D.C. Cir. 2012) (explaining that this presumption permits the court in its review of Government=produced documents to accept that, in the absence of clear evidence to the contrary, the public officers responsible for preparing the documents in question "properly discharged their official duties").

218. *Id.* at 1179. In his dissenting opinion, Judge Tatel argues that because interrogation reports are "compiled in the field" and in the "fog of war," contain "multiple levels of hearsay," "depend on translators of unknown quality" and "include cautionary disclaimers" they should not be afforded the same presumption of regularity that Government documents prepared in the course of ordinary business are afforded. *Id.* at 1210. He concludes that the majority's opinion not only "mov[es] the goal posts" but "calls the game in the government's favor." *Id.* at 1216.

219. Al Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010).

220. *See* Carol Rosenberg, *New Guantanamo Intelligence Upends Old 'Worst of the Worst' Assumptions,* MIAMI HERALD (Sept. 30, 2016), http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article105037571.html (describing the case of Afghan national Abdul Zahir, who was initially captured based, at least in part, on suspicions of involvement with chemical/biological weapons activity). The Periodic Review Board subsequently determined, fourteen

experience employing administrative detention impose a higher burden of proof on the government to justify law-of-war detention. The Supreme Court of Israel, for example, has ruled that clear and convincing evidence is required to justify the detention of unlawful combatants.[221] It did so, acknowledging that this "requirement is not always easy to prove," but deemed that this burden of proof is necessary given the "importance of the right to personal liberty" and the fact that administrative detention is an "unusual and extreme measure."[222]

ii. Duration

The conflict with Al Qaeda, the Taliban, and associated forces is now in its seventeenth year and the majority of the detainees remaining at GTMO have been detained for almost as long.[223] Unlike traditional international armed conflicts, low-intensity conflicts against terrorist groups may last for decades because these groups are unlikely to sign a peace agreement or lay down their weapons.[224] The duration of the conflict against Al Qaeda and the Taliban, which far exceeds that of any prior conflict fought by the U.S., is a glaring example of how the current conflict no longer resembles the traditional conflicts that informed the laws of war. The duration of this conflict puts additional strain on the analogy to the rules of GCIII.[225]

Even the eventual defeat of Al Qaeda and the Taliban[226] may not necessarily lead to a conclusion that the conflict is over, requiring the release

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years after his capture, that he was "probably misidentified as the individual who had ties to al-Qaeda's weapons facilitation." Guantanamo Periodic Review Bd., *Abdul Sahir, ISN No. 753,* n.p. 2016, *available at* http://www.prs.mil/Portals/60/Documents/ISN753/160711_U_ISN753_FINAL_DETERMINATION_PUBLIC.pdf.

221. A & B v. Israel, *supra* note 47, para. 22.

222. *Id.* para. 23.

223. The Miami Herald tracks the status of the remaining 40 detainees at Guantanamo Bay, including their respective dates of arrival at the facility. *Guantanamo Periodic Review Guide,* MIAMI HERALD, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article68333292.html.

224. WHITE HOUSE REPORT ON MILITARY FORCE, *supra* note 53, at 11; Bellinger & Padmanabhan, *supra* note 34, at 229. *See also* Stephen W. Preston, Gen. Counsel, Dep't of Def., Address at the Annual Meeting of the American Society of International Law: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015), *available at* http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911 [hereinafter Preston ASIL speech].

225. *See* Yuval Shany, *A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention*, 93 INT'L L. STUD. 102, 115 (2017).

226. The conflict against the Taliban and core Al Qaeda continues, but it is possible to imagine a conclusion to the conflict against these two groups. As President Obama stated in 2013, "the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us. They did not direct the attacks in Benghazi or Boston. They've not carried out a successful attack on our homeland since 9/11." *Remarks by the President at the National Defense University*, WHITE HOUSE: OFF. OF THE PRESS SEC'Y (May 23, 2013),

of detainees held pursuant to the AUMF. The U.S. has interpreted the 2001 AUMF to authorize uses of force against ISIL, a group that arose under this name in 2012. The Government's legal theory is that ISIL is a successor force to Al Qaeda in Iraq ("AQI"), which merged with core Al Qaeda in 2004.[227] Stephen Preston, the former Department of Defense General Counsel, explained that the "2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together."[228] Despite recent disputes between Al Qaeda and ISIL, Preston argued that ISIL is properly considered a successor force, for purposes of the AUMF, because "ISIL now claims that it, not al-Qa'ida's current leadership, is the true executor of bin Laden's legacy."[229] Acting General Counsel for the Department of Defense, William Castle, made the same argument in 2017, stating, "ISIS is the direct and immediate manifestation of AQI."[230] The Department of Justice repeated this argument in the habeas litigation of *Doe v. Mattis,* involving an American citizen held in DoD custody due to his alleged membership in ISIL.[231]

The assertion that the 2001 AUMF authorizes the use of force against ISIL has generated significant controversy. Professors Goodman and Roisman, for example, noted that there are "serious flaws in this position."[232] In particular, they note that "ISIL did not exist on 9/11, it was never unified with [core Al Qaeda]–the organization that did perpetrate 9/11–and it has now severed ties altogether with that group."[233] Ben Wittes similarly expressed concern regarding the implications of the Obama Administration's position, stating "'associated' does not mean 'not associated' or 'repudiated by' or 'broken with' or even 'used to be associated with.'"[234]

Identifying ISIL as a successor force to AQI is understandable for purposes of determining the scope of the United States' domestic authority,

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https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

227. President Obama explicitly made this connection on September 10, 2014, stating that ISIL was "formerly al Qaeda's affiliate in Iraq." *Statement by the President on ISIL*, WHITE HOUSE: OFF. OF THE PRESS SEC'Y (Sept. 10, 2014), https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1.

228. Preston ASIL speech, *supra* note 224.

229. *Id.*

230. William S. Castle, *The Global War on Terrorism: Do we Need a New AUMF*, SCRIBD (Dec. 11, 2017), https://www.scribd.com/document/366923593/Dod-Acting-General-Counsel-William-Castle-NYC-Bar-Remarks-Aumf-Dec-11.

231. Brief for Respondent, Doe v. Mattis, 288 F. Supp. 3d 195 (2018), (No. 1:17-cv-0269-TSC).

232. Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda – Part 1 (Organizational Structure)*, JUST SECURITY BLOG, (Oct. 1, 2014), https://www.justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure/.

233. *Id.*

234. Benjamin Wittes, *Not Asking the Girl to Dance*, LAWFARE BLOG (Sept. 10, 2014), https://www.lawfareblog.com/not-asking-girl-dance.

but it is raises distinct concerns under international law. In particular, the characterization of ISIL as a successor force to Al Qaeda could have significant implications regarding the scope and duration of the U.S. detention authority. The U.S. has not clarified whether it views hostilities against ISIL as part of the same conflict against the Taliban and Al Qaeda or as a separate conflict. If the U.S. takes the position that there is a single conflict, the conflict started on 9/11 against Al Qaeda and the Taliban will not end until the U.S. also defeats Al Qaeda's successor groups, including ISIL. This expansion of the conflict, and the Government's legal position that detainees can be held until the end of hostilities, would provide the U.S. with sweeping legal authority to hold individuals detained at any time since 9/11. A detainee captured in 2001 based on his membership in, or substantial support to, core Al Qaeda could be held as long as hostilities against ISIL continue, even though both ISIL and its predecessor organization AQI did not exist at the time he was captured. This detainee may be held based solely on a preponderance of the evidence, and regardless of whether he engaged in hostilities against the U.S. or poses any continuing threat.

iii. Nature of Conflict

With the end of major combat operations in Iraq and Afghanistan, the U.S. conflict against Al Qaeda and the Taliban increasingly resembles a law enforcement operation rather than a traditional armed conflict.[235] The U.S. has ended major "combat operations" in Afghanistan and transitioned the lead for security to Afghan security forces.[236] A limited number of U.S forces remain primarily in a train, advise, and assist role.[237] U.S. ground forces generally do not engage Al Qaeda on active battlefields, and the U.S. does not currently operate permanent law-of-war detention facilities in or near any area of active hostilities. Law enforcement officials are often involved in operations to capture Al Qaeda (and even ISIL members), who are then prosecuted in civilian courts.[238] Neither Al Qaeda nor the Taliban poses an

235. The United States' campaign against ISIL continues to rely heavily on the military, although the several thousand U.S. troops in Iraq and Syria primarily train, support, and enable local forces. *See* Kevin Baron, *How the U.S. Military Sees the Anti-ISIS Fight*, THE ATLANTIC (Jan. 18, 2017), https://www.theatlantic.com/international/archive/2017/01/obama-doctrine-military-trump/513470/.

236. *Statement by the President on the End of the Combat Mission in Afghanistan*, WHITE HOUSE: OFF. OF THE PRESS SEC'Y (Dec. 28, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan.

237. *Id.*

238. *See, e.g.*, Karen DeYoung, Adam Goldman, & Julie Tate, *U.S. Captured Benghazi Suspect in Secret Raid*, WASH. POST (June 17, 2014), https://www.washingtonpost.com/world/national-security/us-captured-benghazi-suspect-in-secret-raid/2014/06/17/7ef8746e-f5cf-11e3-a3a5-42be35962a52_story.html?utm_term=.ad1b8f8e9c67e (describing the joint Special Operations and

existential threat to the U.S., and their ability to carry out mass attacks similar to 9/11 has been severely diminished, despite their ongoing commitment to killing civilians.[239] In short, members of these groups resemble criminals more than combatants and are increasingly treated as such.

The U.S. has historically combatted similar threats within a criminal law framework that respects constitutional protections and fundamental human rights. It has dismantled mafias and gangs, extradited and prosecuted violent drug traffickers, and convicted domestic terrorists like Timothy McVeigh and Dzokhar Tsarnaev. Congress has also enacted legislation since 9/11 to extend U.S. criminal law jurisdiction to cover material support for terrorism committed overseas,[240] and the Department of Justice has "prosecuted not only terrorism suspects apprehended in the United States, but also those captured in various places abroad including Afghanistan, Pakistan, and off the Somali coast."[241] As the current conflict against Al Qaeda increasingly resembles a law enforcement operation (even if carried out with military force in certain locations), the notion of *prolonged* indefinite detention without the due process protections afforded to individuals who are prosecuted for similar conduct seems inconsistent with American values and commitment to human rights principles.[242] Law-of-war detention must be used solely to incapacitate future threats. It should not be used as a mechanism to detain individuals for prior acts.[243]

FBI mission to capture the suspect and noting that he was awaiting transfer to the United Sates for prosecution in federal court); Adam Goldman & Eric Schmitt, *Benghazi Attacks Suspect is Captured in Libya by U.S. Commandos*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/world/africa/benghazi-attacks-second-suspect-captured.html (noting that a suspect in the Benghazi attacks was captured by American commandos in Libya and will be taken to the United States to face criminal charges).

239. According to a study by New America, violent "jihadists" have killed 95 people inside the United States over the past 15 years. Peter Bergen et al., *The Threat is not Existential*, NEW AMERICA, http://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/#americas-layered-defenses.

240. *See, e.g.,* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(c)-(d), 118 Stat. 3638, 3762-63 (2004) (amending the material support statute to expand jurisdiction for offenses committed extraterritorially).

241. WHITE HOUSE REPORT ON MILITARY FORCE, *supra* note 53, at 36. This report notes that "while law-of-armed conflict detention is permissible in the course of an armed conflict…criminal trials can hold individuals accountable for their unlawful actions, offer victims a forum for redress, encourage cooperation, and provide a stable, long-term basis for incarceration for those found to be guilty." *Id.*

242. President Obama, for one, has repeatedly stated that the detention facility at Guantanamo Bay is inconsistent with our values. *See, e.g.*, *Remarks by the President on Plan to Close the Prison at Guantanamo Bay*, WHITE HOUSE: OFF. OF THE PRESS SEC'Y (Feb. 23, 2016), https://www.whitehouse.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay.

243. As the Israeli Supreme Court noted, "The basic premise is that administrative detention is meant to prevent future danger to the security of the state or to the public safety. Administrative detention is not meant to be a tool used to punish previous acts, or to be used in place of criminal proceedings." Salama v. IDF Commander in Judea and Samaria, 15 Isr. L. Rep. 289 (2002–2003).

On several occasions, President Obama expressed unease with the authority that his Administration fought to preserve. "Unless we discipline our thinking, our definitions, our actions, we may…continue to grant Presidents unbounded powers more suited for traditional armed conflicts between nation states."[244] The Obama Administration accordingly took actions to address these concerns, including significantly reducing the detainee population at GTMO and implementing robust procedures, described in greater depth below, to ensure "any prolonged detention is carefully evaluated and justified."[245] Nevertheless, seventeen years into a conflict that bears little resemblance to traditional IACs, the Government's legal position is increasingly untenable. As the Supreme Court warned in *Hamdi*,[246] the U.S. legal framework will start to unravel unless it alters its legal positions to reflect this new reality. Given President Trump's order to continue detention operations at Guantanamo, the need for reform is even more compelling.

VI. A NEW FRAMEWORK FOR LAW OF WAR DETENTIONS

The U.S. has an opportunity to develop a sustainable legal theory for detentions in NIACs. The U.S. holds fewer than 50 detainees in law-of-war detention, and it can adjust its legal theory without materially affecting ongoing detention operations. The U.S. should look to international law to inform the limits of detention authority under the AUMF because "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[247] Yet, IHL is largely silent on the criteria for detention in NIACs. The ongoing debate regarding which Geneva Convention should apply by analogy to regulate NIAC detentions presents a false dichotomy, confusing *lex ferenda* with *lex lata*.[248] There is no legal basis to claim that the criteria for detention in NIACs must be drawn from either GCIII or GCIV, as these treaties apply only to IACs. There is also reason to be cautious in applying certain provisions from these treaties, as neither GCIII nor GCIV was intended to regulate the transnational

244. Similarly, President Obama has noted that "GTMO has become a symbol around the world for an America that flouts the rule of law." Remarks at National Defense University, 2013 DAILY COMP. PRES. DOC. 11 (May 23, 2013).

245. Remarks at the National Archives and Records Administration, 2009 DAILY COMP. PRES. DOC. (May 21, 2009).

246. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

247. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

248. *Lex ferenda* refers to what the law should be, while *lex lata* refers to what the law currently is. *Lex ferenda*, BLACK'S LAW DICTIONARY (10th ed. 2014). *Lex lata*, BLACK'S LAW DICTIONARY (10th ed. 2014).

NIACs that States primarily fight today.[249] Members of non-State armed groups in NIACs are not POWs or civilians, the two categories that GCIII and GCIV were intended to protect. The facts and assumptions that informed the drafting of these two Conventions simply do not apply to non-State belligerents in NIACs. Although these Conventions, and especially GCIV, may offer helpful guidance, trying to develop a detention framework based exclusively on either the GCIII or GCIV model is tantamount to forcing a square peg in a round hole.

The sole limitations in IHL on who can be detained in NIACs are derived from the principles of military necessity and humanity. IHL only prohibits detention during NIAC when it does not confer a military advantage.[250] In other words, it only prohibits the detention of individuals who do not pose an ongoing threat or impediment to the military mission. In this sense, IHL is both broader and more restrictive than the current U.S. interpretation of the AUMF. IHL is substantively more expansive than the AUMF to the extent that it would permit the detention of certain individuals who pose a threat to U.S. or coalition forces, but who are not part of or substantially supporting Al Qaeda, the Taliban or associated forces.[251] IHL is temporally more restrictive, on the other hand, as military necessity does not necessarily permit the indefinite detention of all such detainees, including those who are deemed to be functionally or formally part of such groups.[252] When the circumstances justifying the initial detention cease to exist, the detainee must be released. Otherwise the use of force inherent in the detention is unlawful as it serves no military purpose.

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249. This Article has focused on concerns regarding the analogy to POWs in GCIII, given that is the analogy the United States has adopted. Whereas the GCIII analogy may ignore humanitarian considerations and at times even exceed the principle of military necessity by permitting the detention of individuals regardless of their threat, the GCIV analogy arguably imposes too strict a standard for detention for enemy belligerents by requiring evidence of "imperative reasons of security." Such a standard is not required by any law of treaty or custom applicable in NIACs.

250. This also assumes that there is nexus between the individual's actions and the armed conflict.

251. Even the imperative reasons of security standard from GCIV may be more flexible, in some circumstances, than the GCIII analogy adopted by the United States. The United Kingdom has interpreted the imperative reasons of security standard to permit the internment in NIACs of "persons who are involved in actively and violently resisting the mission or presence of [UK Armed Forces] or seeking to undermine the host nation government." Ministry of Def., Joint Doctrine Publication 1–10 Captured Persons (CPERS), 2015, para. 148 (UK).

252. Israel's Unlawful Combatant Law, discussed in greater detail *infra*, is similar to the AUMF in that it permits the detention of individuals who participated directly or indirectly in hostilities against the State of Israel or persons who are members of a force carrying out hostilities against the State. Nevertheless, the majority of detentions conducted under this authority "endured for a few days, weeks or months, and only a few orders endured for over two years." Dvir Saar & Ben Wahlhaus, *Preventive Detention for National Security Purposes: The Three Facets of the Israeli Experience*, *in* DETENTION OF NON-STATE ACTORS ENGAGED IN HOSTILITIES: THE FUTURE LAW 182, 217 (Gregory Rose & Bruce Oswald eds., 2016).

The sparse regulation of IHL applicable in NIACs does not have any normative significance. The drafters of Common Article 3 to the Geneva Conventions and Additional Protocol II did not intend to create unbounded detention authority in NIACs; rather, they presumed that States would develop the criteria and procedures for detention, consistent with applicable domestic law constraints. This disconnect between the historical understanding of the role of international law in NIACs, and the United States' reliance on IHL to inform the scope of its domestic authority in its current NIAC, underpins many of the concerns with the United States' interpretation of the AUMF. The U.S. interprets the AUMF to authorize whatever it understands IHL to permit in NIACs, while the drafters of these IHL instruments intentionally declined to regulate this field in deference to State sovereignty.[253] IHL was never intended to set the parameters of NIAC detentions, a role that was reserved for States' domestic laws.[254]

Appealing solely to IHL to set the limits on NIAC detentions also disregards the progressive development of international law over the past several decades. The international legal landscape has evolved significantly since the mid-twentieth century when the principal IHL treaties were negotiated. At that time, the prevailing view was that international law should regulate only the relationship between States and not the relationship between States and individuals.[255] States' understanding of international law has changed significantly in the past fifty years. The proliferation of human rights treaties demonstrates that international law can and should constrain State action with respect to individuals within its territory and/or jurisdiction.[256] Colombia, for example, affords individuals detained in its conflict against the FARC the protections guaranteed under its criminal laws and human rights

253. INT'L COMM. OF THE RED CROSS, COMMENTARY OF 1987 ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), 8 JUNE 1977 1319, para. 4412 (1987), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0f47ae2f6a509689c12563cd004399df?OpenDocument [hereinafter ICRC, COMMENTARY TO ADDITIONAL PROTOCOL II] (noting that a number of delegations at the Diplomatic Conference objected to a more robust draft of Additional Protocol II because, inter alia, it did not provide "sufficient guarantees for respect due to national sovereignty and for non-interference with internal affairs").

254. Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 413 (2009) ("states conducting administrative detention in non-international armed conflict will be governed by their domestic laws, which generally include human rights provisions and due process requirements.").

255. HILL-CAWTHORNE, *supra* note 11, at 161 ("IHL's distinction between international and non-international armed conflicts arises from historical considerations regarding the scope of international law and concerns for preserving state sovereignty").

256. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 245 (2000) ("The humanization of the law of war received its greatest impetus not from internal developments but from the international human rights instruments adopted in the post-UN Charter period and the creation of international process of state accountability.").

obligations.[257] The U.S. interpretation of the AUMF to authorize whatever is permitted by IHL treaties ignores the trajectory and modern understanding of international law. Respecting basic principles of human rights, such as the prohibition on arbitrary detention, is crucial to establishing a sustainable framework for NIAC detentions, especially with respect to locations where the U.S. exercises *de jure* or *de facto* sovereignty. The need to establish a detention regime consistent with human rights law principles will be even more pressing if the United States eventually closes the detention facility in Guantanamo and transfers the remaining detainees to the U.S. where the International Covenant on Civil and Political Rights would impose additional obligations.[258]

This Part proposes several basic reforms that the United States can implement to ensure that its detention framework is fully consistent with IHL. First, the U.S. must adopt a threat-based criterion for detention. Second, it should acknowledge a legal (rather than policy) requirement to conduct periodic threat reviews to ensure that detention lasts no longer than necessary. Finally, it must acknowledge a legal obligation to release, repatriate, or resettle detainees who no longer pose a threat to United States national security.

The adoption of these criteria would not affect who can be *targeted* in NIACs. The ICRC recognized in its Commentary to Additional Protocol II to the Geneva Conventions that "[t]hose who belong to armed forces or armed groups may be attacked at any time."[259] Killing members of enemy armed groups and those who directly participate in hostilities plainly presents a military advantage, unless they are *hors de combat*, given the threat they pose to the State's armed forces. For the reasons explained above, however, the threat posed by non-State actors after capture cannot be assumed *ex ante* for the duration of hostilities.

A. Criteria for Initial Capture and Detention

The U.S. criteria for detention must be, at a minimum, consistent with the principles of military necessity and humanity. This means that the initial decision to detain an individual in a NIAC, beyond any temporary confinement for screening purposes, must be based on the threat that he or

257. HILL-CAWTHORNE, *supra* note 11, at 165 ("In January 2008 a new system of detention became applicable under Colombian law generally, and this follows a purely human rights, criminal law-approach to the procedural regulation of detention, applicable even to detentions carried out in relation to the non-international armed conflict.").

258. Article 9 of the ICCPR prohibits "arbitrary arrest or detention" and affords all detainees certain due process rights. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

259. ICRC, COMMENTARY TO ADDITIONAL PROTOCOL II, *supra* note 253, at art. 13, para. 4789.

she poses. Consistent with military necessity, the United States would have broad authority to capture and detain in NIACs, at least for some period of time. Permissible grounds for detention could include: demonstrating hostile intent, engaging in hostile acts, engaging in sabotage or espionage, providing substantial support to terrorist or subversive activities, or being a member of an armed group opposed to the U.S..[260] Detaining individuals solely for the purpose of gathering intelligence[261] or for leverage in prisoner exchanges,[262] by contrast, is impermissible.

Although this Article has argued that indefinite detention based solely on membership status is problematic, it is generally accepted among States and international tribunals that members of enemy armed groups may be captured and detained for some period, even under the "imperative reasons of security" standard in GCIV.[263] The ICRC Commentary to GCIV, for example, recognizes that a belligerent may intern individuals, subject to the periodic review process, "if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances."[264] Accordingly, the U.S. could continue to capture members of the Taliban, Al Qaeda, and associated forces. Membership in these groups can generally serve as a sufficient indicator of threat *at the time of capture*,[265] even though it cannot itself justify detention for the duration of hostilities for the reasons set forth above. Detention justified solely on past acts, rather than future threat, is punitive and therefore inconsistent with IHL. Accordingly, the

260. Copenhagen Principles, *supra* note 45, at cmt. 1.3 (noting that individuals may be detained in transnational NIACs for "posing a threat to the security of the military operation, for participating in hostilities, for belonging to an enemy organised armed group, for his or her own protection, or if the person is accused of committing a serious criminal offence").

261. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.").

262. Anonymous v. Ministry of Def. ("Lebanese Detainee Case"), 2000 Isr. L. Rep. xix (2000).

263. *See, e.g.,* Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgement of Trial Chamber, para. 284, (Feb. 26, 2001), *aff'd*, Case No. IT–95–14/2–A., http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf ("[A]ctivities threatening the security of the State, such as subversive activities or direct assistance to the enemy, may permit a Party to intern people or place them in assigned residence–but only if it has a *serious and legitimate reason* to think that they are members of a subversive organization." (emphasis in original)). During the Iraq war, the U.N. Security Council authorized the Multi National Forces-Iraq (MNF-I) to detain individuals based on an "imperative threat to security." S.C. Res. 1546 (June 8, 2004). MNF-I interpreted this criterion to include, inter alia, "members of terrorist organizations or insurgent groups known to carry out attacks on Coalition Forces." HILL-CAWTHORNE, *supra* note 11, at 175.

264. INT'L COMM. OF THE RED CROSS, COMMENTARY TO THE FOURTH GENEVA CONVENTION 258 (Jean S. Pictet et al. eds., 1958). The ICRC similarly recognizes that individuals in NIACs who perform a "continuous combat function" lose their civilian status and can be targeted at any time. NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 28 (Int'l Comm. of the Red Cross ed., 2009). A State must at least have the ability to detain anyone it is permitted to target with lethal force.

265. Saar & Wahlhaus, *supra* note 252, at 228 (noting that "mere membership in a hostile organization could indicate an individual threat").

justification for detention must be periodically assessed to ensure that it remains necessary, keeping in mind that the initial grounds for detention must be re-evaluated in light of the changing circumstances.

The Israeli Supreme Court's analysis of Israel's Internment of Unlawful Combatants Law ("IUCL") provides a helpful model for how to interpret a domestic statute consistent with these IHL principles. The IUCL authorized the detention of any person who is "a member of a force carrying out hostilities against the State of Israel."[266] Like the AUMF, the IUCL appeared to authorize detention based on membership in an enemy armed group. The Israeli Supreme Court, however, noted that its domestic law "should be interpreted in a manner that is as consistent, insofar as possible, with the norms of international law."[267] It added that IHL requires the State to establish "a personal threat to state security posed by the detainee."[268] It proceeded to establish the general parameters defining who could be detained under the IUCL, in a manner consistent with IHL. "[O]n the one hand it is insufficient to simply show some kind of tenuous connection with a terrorist organization in order to include the person within the cycle of hostilities in the broad meaning of this concept."[269] It also made clear, however, that the Israeli government did not need to show that the individual took a direct part in hostilities. Rather, the Israeli Supreme Court must consider the "prisoner's connection and the nature of his contributions to the cycle of hostilities in the broad sense of this concept … which naturally includes proof of an individual threat that derives from the type of involvement in the organization."[270]

B. Periodic Reviews

The U.S. must also implement periodic reviews out of a sense of legal obligation in order to ensure that continued detention is justified by military necessity. IHL does not specify the procedures of such reviews, although the principle of military necessity dictates that some ongoing review is necessary.[271] Accordingly, States have significant discretion in establishing

266. A & B v. State of Israel, *supra* note 47, para. 21. The IUCL also permits the detention of individuals who "participated either directly or indirectly in hostile acts against the State of Israel." Internment of Unlawful Combatants Law, 5762-2002, SH No. 1834 § 2 (Isr.) [hereinafter IUCL].

267. A & B v. State of Israel, *supra* note 47, para. 9.

268. *Id.* para. 19.

269. *Id.* para. 21.

270. *Id. See also* Shany, *supra* note 225, at 116 (noting "a certain uneasiness on the part of the Court with the membership-based tilt of the 2002 Law, and doubts as to whether detention on the basis of group affiliation complies with Israel's Basic Law: Human Dignity and Liberty and with the internment provisions of the Geneva Conventions").

271. The requirement for periodic reviews also serves to ensure that detention is not arbitrary. While this right is derived from international human rights law, the ICRC's Customary IHL study states

the procedures for these periodic reviews, which may necessarily depend on the circumstances. Detainees held for relatively short periods of time, or detainees held in areas of active hostilities, may receive less robust procedures than detainees held in long-term detention or in locations where the U.S. exercises *de jure or de facto* sovereignty, such as in Guantanamo. Similarly, States may permit a lower burden of proof at the time of capture than that which would be required to justify prolonged detention.[272] In all circumstances, however, the detaining authority must assess any relevant new information regarding the threat posed by the detainee, and re-assess prior information based on any changing circumstances.[273]

An emerging body of soft law and State practice provides some detail on the minimum procedural safeguards that should be afforded to detainees in periodic reviews. A detainee must be informed of the basis for the detention in a language he understands[274] and he should be afforded a meaningful opportunity to rebut the charges against him.[275] Where possible, the detainee should be provided a personal representative and, if necessary, an interpreter to assist him in the review process.[276] Subject to security considerations, the detainee should also be permitted to attend the hearing.[277] The reviewing body should be "impartial and objective."[278] Although this authority may be within the military chain of command, it

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that the prohibition on arbitrary detention is a rule of customary international law applicable in all armed conflicts. *See Customary IHL, Rule 99: Deprivation of liberty*, INT'L COMM. OF THE RED CROSS, *available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule99 (stating that arbitrary deprivation of liberty is prohibited as inconsistent with the humane treatment requirements in Common Article 3 to the Geneva Conventions); *see also* Human Rights Council, Investigation of the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings (Feb. 15, 2016), A/HRC/31/CRP.3, para. 128, http://www.ohchr.org/Documents/Countries/LY/A_HRC_31_CRP_3.pdf (stating that customary international law applicable to NIACs prohibits arbitrary detention and therefore requires initial and periodic reviews).

272. Israel, for example, requires more exacting evidence in order to renew the duration of administrative detention. "The strength of the evidence necessary to justify administrative detention could change over time. Evidence that would justify issuing an order of administrative detention might not constitute sufficient cause to extend that detention." Salama v. IDF Commander in Judea and Samaria, 15 Isr. L. Rep., para. 8.

273. In A & B v. Israel, the Israeli Supreme Court noted, "importance should be attached to the quantity and quality of the evidence against the prisoner and the degree to which the relevant intelligence information against him is current." A & B, v. Israel, *supra* note 47, para. 22.

274. Copenhagen Principles, *supra* note 45, at princ. 7. *See also* Pejic, *supra* note 47, at 384.

275. Pejic, *supra* note 47, at 384.

276. Copenhagen Principles, *supra* note 45, at cmt. 12.4.

277. *Id.*

278. Copenhagen Principles, *supra* note 45, at princ. 12. Israel requires that a detainee held under the Internment of Unlawful Combatants Law be brought before the district court every six months for a reassessment of the detention order. IUCL, *supra* note 266, § 5. The UK Supreme Court recently held that the reviewing authority may be within the military, but it must be "independent of those responsible for authorizing the detention under review." Serdar Mohammed v. Ministry of Def., [2017] UKSC 2, para. 105.

"must be able to evaluate the relevant information" and "make a good faith judgment without any outside interference."[279] The detainee should be promptly informed of the outcome of the process.

The U.S. has already introduced periodic reviews into its detention operations as a matter of policy. In the initial stages of the conflicts in Iraq and Afghanistan, these review procedures were intended primarily to assess whether a detainee met the criteria for detention, i.e., whether the detainee was properly considered an enemy combatant.[280] Over the years, the U.S. adopted increasingly more robust procedures to also review the continuing threat posed by detainees. Current Department of Defense policy states: "unprivileged belligerents may be released or transferred while active hostilities are ongoing if a competent authority determines that the threat the individual poses to the security of the United States can be mitigated by other lawful means."[281] Accordingly, as a policy matter, the U.S. now considers the threat posed by the detainee in deciding whether to use its discretionary authority to release or transfer that individual.

In Afghanistan, detainees held at the Detention Facility in Parwan ("DFIP") were provided a Detainee Review Board ("DRB"), comprised of three field grade officers.[282] The DRBs were instructed to "review all reasonably available information to determine whether each person transferred to the DFIP meets the criteria for detention and, if so, whether the person's continued interment is necessary."[283] Each detainee was assigned a commissioned officer to act as the detainee's "personal representative" ("PR"). The PR was to act and advocate in the best interests of the detainee and assist the detainee in gathering and presenting reasonably available evidence and witnesses to the Board.[284] The detainee was permitted, but not required, to attend and participate in the unclassified portion of the hearing, which was interpreted into the detainee's language.[285] At the beginning of each hearing, the detainee was also advised of the purpose of the hearing, his opportunity to present information, and the

279. Copenhagen Principles, *supra* note 45, at cmt. 12.2.

280. Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT'L SEC. REV. 255, 279 (2015) ("The first boards, consisting mostly of military intelligence personnel, were charged with determining whether detainees were, in fact, enemy combatants. If so, they would be evaluated to determine if they met the criteria to be transferred to Guantanamo."); Bovarnick, *supra* note 52, at 16–17.

281. U.S. Dep't of Def. Dir. 2310.01E, DoD Detainee Program [hereinafter DoD Dir. 2310.01E], § 3(m)(2) (Aug. 19, 2014).

282. Vice Admiral Robert S. Harward, Memorandum for US Military Forces Conducting Detention Operations in Afghanistan (July 11, 2010), *available at* http://www.politico.com/pdf/PPM205_bagrambrfb.pdf.

283. *Id.* § 7.

284. *Id.* § 9(e).

285. *Id.* § 12(h).

consequences of the Board's decision.[286] At the conclusion of the hearing, Board members would first determine whether the detainee met the criteria for detention. Using a preponderance of the evidence standard, decisions were based on a majority vote.[287] A decision that the detainee did not meet the criteria for detention was final and binding and would result in the detainee's release "as soon as practicable."[288] If the Board found that the detainee met the criteria for detention, it could issue one of four disposition recommendations to the Convening Authority: (1) continued detention at the DFIP; (2) transfer to Afghan authorities for criminal prosecution; (3) transfer to Afghan authorities for participation in a reconciliation program; or (4) release.[289] For non-Afghan nationals, the Board could also recommend transfer to a third country for prosecution, participation in a reconciliation program, or release.[290] Detainees not released or transferred would receive a new DRB every six months.[291]

President Obama also mandated the periodic review of certain GTMO detainees in Executive Order 13567 ("Order").[292] The Order instructed that each eligible detainee receive an initial review within one year by the Periodic Review Board ("PRB"), comprising a senior official from the Departments of State, Defense, Justice, Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff.[293] The purpose of the

286. *Id.* § 12(g).

287. *Id.* § 12(n).

288. *Id.* § 12(n)(2).

289. *Id.* § 12(n)(3). A recommendation for transfer or release would be based on an assessment that continued detention at the DFIP was not necessary to mitigate the threat posed by the detainee, even though the detainee met the legal criteria for detention.

290. *Id.*

291. *Id.* § 7.

292. Exec. Order No. 13,567, 76 Fed. Reg. 13, 277 (Mar. 7, 2011). President Obama also ordered a comprehensive review of GTMO detainees when he first took office; *see* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009). Obama instructed an interagency task force, comprising officials from the Departments of Justice, Defense, State, and Homeland Security, the Director of National Intelligence, and the Joint Chiefs of Staff, to assemble all information in the possession of the federal government and review the status of each individual currently detained at Guantanamo. The task force was to determine whether it was "possible to transfer or release [each GTMO detainee] consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release." *Id.* For those detainees who were deemed too dangerous to release or transfer, the task force was instructed to evaluate the viability of prosecution or "select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals." *Id.* The Guantanamo Task Force completed its work on January 22, 2010. The Task Force approved 126 detainees for transfer, referred 44 for prosecution either in federal court or a military commission, and determined that 48 detainees were too dangerous to release but not feasible for prosecution. U.S. DEP'T OF JUSTICE ET AL., FINAL REPORT, GUANTANAMO REVIEW TASK FORCE (2010), https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf. All GTMO detainees not already approved for release under this process were eligible for the PRB process, unless they were in the military commission's process.

293. Exec. Order No. 13,567, *supra* note 292.

hearing is to determine whether continued law of war detention is "necessary to protect against a significant threat to the security of the United States."[294] Prior to the hearing, the detainee is provided, in writing and in a language he understands, with notice of the PRB and an unclassified summary of the information against him.[295] Each detainee is assigned a personal representative (a field grade officer) who can review the classified material and advocate on the detainee's behalf. A private counsel may also represent detainees at no cost to the Government.[296] The detainee is permitted to present the PRB with an oral or written statement, introduce relevant information, answer questions posed by Board members, and call witnesses under certain circumstances.[297] All mitigating information relevant to the detainee must be provided to the PRB and any information derived from torture was excluded from the review process consistent with the provisions in the Convention against Torture.[298] President Trump's Executive Order on Guantanamo preserved the PRB process for current and future detainees at the facility.[299]

The GTMO PRBs highlight both the costs and benefits of robust review procedures. Despite the requirement in the Order that each eligible detainee receive an initial review within one year, the PRB did not conduct its first hearing until November 2013, eighteen months after the Order was issued, and the first round of initial reviews were not completed until September 2016. These delays were due primarily to the challenges inherent in establishing from scratch a transparent and credible administrative review process. The Government had to create and staff a Periodic Review Secretariat, nominate Board members, develop procedures for conducting the hearings (which often last many hours), compile the detainee dossiers, screen information that may have been derived from ill-treatment, contract linguists, determine how to provide access to journalists and foreign government observers, and establish secure communications between GTMO and the PRB. These extensive procedures would be entirely unworkable in areas of active hostilities. On the other hand, these robust procedures were warranted given the detainees' length of detention and manageable given their location on a military base where the U.S. exercises *de facto* sovereignty.

The results of the PRB demonstrate the crucial importance of conducting such reviews. Of the 64 detainees reviewed by the PRB between

294. *Id.* at Sec. 2.
295. *Id.* at Sec. 3(a)(1).
296. *Id.* at Sec. 3(a)(2).
297. *Id.* at Sec. 3(a)(3).
298. *Id.* at Sec. 10(b).
299. Exec. Order No. 13,823, *supra* note 10, at Sec. 2(e).

2013 and 2016, the PRB ultimately approved 38 for transfer. This relatively high rate of transfer illustrates the need to institute periodic review on a systematic basis. The reasons that initially justified detention may diminish or disappear over time, and the intelligence that initially justified detention may be re-evaluated based on new information.[300] Standardized periodic reviews are crucial in ensuring that the U.S. does not detain individuals for longer than required by military necessity. Adopting periodic reviews as a legal obligation is also critical, as policies can be changed, suspended, or implemented in different ways at the discretion of the government.

C. The End of Hostilities Is the Outer Limit of Detention Authority

The Supreme Court correctly noted in *Hamdi* that it "is a clearly established principle of the law of war that detention may last no longer than active hostilities."[301] The end of hostilities is the outer limit on detention, but not the only limit. Another fundamental principle of IHL is that detainees must be released as soon as the circumstances justifying their detention cease to exist.[302] As Jelena Pejic notes, "one of the most important principles governing internment/administrative detention is that this form of deprivation of liberty must cease as soon as the individual ceases to pose a real threat to State security, meaning that deprivation of liberty on such grounds cannot be indefinite."[303] The principal justification for detention in armed conflict is to prevent detainees from returning to the battlefield if released. In some circumstances, continued detention may not be necessary to protect against such a threat. Detainees may become incurably sick or wounded, they may credibly renounce their membership in the armed group, or their own government may be able to take measures to prevent any material chance of recidivism. In such circumstances, the justification for detention (i.e., to prevent his return to the battlefield) no longer exists and the detainee must be released, even if hostilities continue.

The Supreme Court appears to acknowledge this important limitation on the U.S. detention authority in its *Hamdi* opinion. Responding to Hamdi's claim that Congress did not authorize indefinite detention, the Court stated: "If the Government does not consider this unconventional war won for two generations, *and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States*, then the position it has taken through the litigation of this case suggests that Hamdi's detention could last for the rest of his life."[304] Implicit in this sentence is that Hamdi must be released if

300. Rosenberg, *supra* note 220.
301. *Hamdi*, 542 U.S. 507, 520 (2004).
302. Copenhagen Principles, *supra* note 45, at princ. 4.
303. Pejic, *supra* note 47, at 382.
304. *Hamdi*, 542 U.S. 507, 520 (2004) (emphasis added).

either of two conditions are satisfied: (1) the hostilities have ended, or (2) it is determined that he would not rejoin the forces fighting the U.S. if released. This often-overlooked clause suggests that the Court did intend to link law-of-war detention to an ongoing threat, contrary to the subsequent holdings of the D.C. Circuit. The only way to credibly comply with this guidance is to conduct periodic reviews, as described above. Assuming that a detainee would return to the fight, based solely on prior acts, would be inconsistent with IHL, and arguably inconsistent with the Supreme Court's intent.

VII. CONCLUSION

The U.S. detention practices and policies have evolved significantly over the past decade. These changes, including periodic reviews to assess detainees' ongoing threats, are welcome improvements and should be further ingrained in Department of Defense doctrine. The Government's legal positions, however, have remained stagnant, even as the nature of the conflict has changed substantially since the U.S. toppled the Taliban government in Afghanistan and Saddam Hussein in Iraq. The placeholder theory of detention articulated in the March 13, 2009, brief–which made only minor adjustments to the prior Administration's legal positions–calcified within the Executive Branch. The federal courts deferred to the Executive and further expanded the scope of the AUMF. The result is a sweeping authority to indefinitely detain individuals who may never have participated in hostilities against the U.S. and who may not currently pose any threat to the U.S. or its allies. This is not sustainable and will come under increasing scrutiny if the Trump Administration increases the number of individuals held in law-of-war detention.

The comprehensive review of U.S. detention legal theories and policies promised, but undelivered, by Executive Order 13493 is needed more than ever. States' legal theories regarding NIAC detention must evolve to meet the realities of a new type of conflict in which enemy fighters bear little resemblance to a State's armed forces and hostilities can continue for decades. The paucity of IHL applicable in NIACs gives States significant flexibility to design a detention framework that both protects national security and respects individual rights. Filling these gaps in IHL by applying IAC rules by analogy, however, is not often the optimal solution. Neither GCIII nor GCIV is applicable to NIACs as a matter of treaty or customary international law. States may draw inspiration from both Conventions in developing their detention frameworks, but there is no basis to assert that these Conventions authorize or limit State action in NIACs.

As a practical matter, States must also be cautious in applying IAC rules by analogy to NIACs, as applying IHL rules outside of their intended context can distort the balance between military necessity and humanity that

underpins the reticulated body of IHL. The U.S. analogy to GCIII to justify the detention of non-State actors until the end of hostilities demonstrates how the use of analogies can disrupt this balance. The rules in GCIII governing the detention of POWs are premised on soldiers' legal obligation to fight on behalf of their country. This legal obligation renders periodic threat reviews–required for civilians under GCIV–meaningless. GCIII permits the detention of POWs until the end of hostilities because States can safely assume that detention will remain necessary to mitigate the threat posed by POWs. In other words, there is a military necessity to detain members of a State's armed forces for the duration of the conflict. This assumption is not necessarily valid with respect to non-State actors in NIACs, despite the similarities between members of armed groups and soldiers. Importantly, non-State actors are not legally bound to support their armed group, making their ongoing threat difficult to establish *ex ante*. For this reason, the U.S. has acknowledged, as a matter of policy, the need to periodically assess the threat posed by each detainee in law-of-war custody. Yet, it continues to claim legal authority to detain individuals who do not pose an ongoing threat. Detention that does not confer a military advantage is plainly inconsistent with the IHL principles of military necessity and humanity.

This Article has proposed several feasible reforms that the U.S. can implement to ensure that its detention theories and practices are fully consistent with IHL. These adjustments would not materially affect ongoing or future detention operations, as they are largely consistent with current U.S. practice. Nevertheless, they are critical to ensuring that the U.S. remains a leader in respecting and promoting respect for IHL. By adopting a legal theory of detention grounded in the fundamental principles of IHL, rather than on flawed analogies to GCIII, the U.S. can set an example for other States to follow and help ensure that IHL remains relevant and practical in this new type of conflict.

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