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DETENTION OPERATIONS IN CONTEMPORARY CONFLICTS:
FOUR CHALLENGES FOR THE GENEVA CONVENTIONS
AND OTHER EXISTING LAW

*By John B. Bellinger III and Vijay M. Padmanabhan**

In September 2010, President Jakob Kellenberger of the International Committee for the Red Cross (ICRC) summarized the conclusions of a two-year, internal ICRC study of changes that have occurred in the nature of armed conflict since the signing of the Geneva Conventions in 1949,¹ and he also suggested how international humanitarian law (IHL) should respond to those changes.² In a previous address marking the sixtieth anniversary of the Geneva Conventions, Kellenberger had observed that in the place of traditional conflicts between state-sponsored armies on a battlefield, modern conflicts frequently involve nonstate actors, such as terrorist groups—a development that has blurred the line between civilians and combatants, and created challenges for IHL.³ The ICRC study concluded that IHL generally provides a suitable legal framework for regulating armed conflict. Kellenberger explained, “What is required in most cases—to improve the situation of persons affected by armed conflict—is greater compliance with the existing legal framework, not the adoption of new rules.” Nonetheless, Kellenberger said that the ICRC study found numerous “gaps or weaknesses in the existing legal framework, which requires further development or clarification.” One area that he specifically identified for future legal development was detention of persons in noninternational armed

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¹ Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

² Jakob Kellenberger, Official Statement of ICRC: Strengthening Legal Protection for Victims of Armed Conflicts (Sept. 21, 2010), *at* <http://www.icrc.org/web/eng/siteeng0.nsf/html/ihl-development-statement-210910>. The ICRC internal study has not been publicly released.

³ Jakob Kellenberger, Official Statement of ICRC: Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future (Aug. 12, 2009), *at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-statement-president-120809>.

conflict, where he identified “an urgent need to explore new legal ways for dealing exhaustively” with the subject.⁴

Kellenberger’s remarks reflect a growing recognition among government and international organization officials⁵ and among IHL experts⁶ that the black-letter rules of the venerable Geneva Conventions often do not provide clear guidance for states engaged in conflicts with nonstate actors. As the ICRC study concluded, one particular subset of problems arises from the detention by states of members of nonstate groups who pose a threat to the state and its people.⁷ The traditional international armed conflict paradigm, featuring prisoners of war detained until the end of hostilities, breaks down in a conflict of indefinite, and potentially unending, duration, with actors not entitled to combatant status under international law. Likewise, the criminal law model developed for peacetime arrests of those within a state’s jurisdiction is typically unavailable or, at best, impractical for detaining nonstate actors that military or intelligence personnel pick up outside a state’s borders. In these circumstances, a state is left without clear, comprehensive international rules to govern its detention operations.⁸

This article focuses on four questions, left open by the Geneva Conventions, regarding detention operations in such conflicts:

- Which individuals are subject to detention?
- What legal process must the state provide to those detained?
- When does the state’s right to detain terminate?
- What legal obligations do states have in connection with repatriating detainees at the end of detention?

While these questions are not the only ones surrounding conflicts with nonstate actors that require legal resolution, they are the questions that were the most difficult questions in our service in the Office of the Legal Adviser at the U.S. Department of State.⁹ During our respective

⁴ Kellenberger, *supra* note 2.

⁵ See, e.g., FOREIGN AFFAIRS COMM., VISIT TO GUANTÁNAMO BAY, 2006–07, H.C. 44, at 3 (UK) (concluding that Geneva Conventions “lack clarity and are out of date” and require updating to “deal[] more satisfactorily with asymmetric warfare, with international terrorism, with the status of irregular combatants”); ANNE-MARIE LIZIN, REPORT ON GUANTANAMO BAY (OSCE Parliamentary Assembly) 13 (June 30, 2006) (describing “legal haziness” surrounding application of Geneva Conventions to members of Al Qaeda).

⁶ See, e.g., Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-terror Combat Operations*, 42 ISR. L. REV. 46 (2009) (describing as “axiomatic” the fact that common Article 3 fails to provide sufficient guidance on “a wide array of battlefield conduct that does not implicate such treatment decisions”); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1367–68 (2008) (discussing substantive and procedural legal gaps in IHL as applied to armed conflicts with terrorist organizations).

⁷ Kellenberger, *supra* note 2 (concluding that the “dearth of legal norms applicable in non-international armed conflicts” is a significant obstacle to “safeguarding the life, health and dignity of those who have been detained”).

⁸ This need for legal development is not surprising. See W. Michael Reisman, *Assessing Claims to Revise the Law of War*, 97 AJIL 82, 82 (2003) (explaining that “deliberative and measured” nature of the law means that it lags behind changing facts).

⁹ The question of which individuals may be detained is closely related to the issue of which individuals may be targeted for attack. In an effort to shed light on this matter, the ICRC recently completed a seven-year expert process to produce interpretive guidance on when civilians are “directly participating in hostilities.” INT’L COMM. RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). Many participating experts disagreed with the ICRC on how to apply the concept to important groups and to individual functions in conflicts with nonstate actors—with the consequence that the ICRC was compelled to issue the guidance without the list of participating experts. See Michael

tenures at the State Department, we responded regularly to concerns raised by foreign governments, nongovernmental and international organizations, scholars, and the media that U.S. policies on these matters, as implemented by the Bush administration after the 9/11 attacks, violated international law.¹⁰ Our efforts to identify a consensus view on the applicable international legal standards were undercut, however, by strongly conflicting assertions of these standards by international legal experts. We found it frustrating that international law had yet to develop clear legal rules that could guide policymakers, like those at the State Department, who wish to follow international law in combating groups like Al Qaeda.¹¹

In 2007, the Office of the Legal Adviser initiated a series of meetings with several states that have engaged in counterterrorism and detention operations. The goal was to identify applicable international legal rules as well as the areas where further legal development is needed. These meetings were conducted in parallel with other international efforts to develop relevant international law. Denmark convened the “Copenhagen Process” in response to concerns that Danish troops were involved in a range of situations involving the potential detention of non-state enemy fighters without sufficient guidance on applicable rules. The goal was “to establish a common framework for all troop-contributing States” on detention questions in UN-approved multilateral operations. Issues considered included standards for detainee transfers and differences in detention rules between international, noninternational, and peacetime settings.¹² These governmental efforts built upon the work of numerous legal scholars and nongovernmental and intergovernmental organizations, among others—work that has generated a plethora of proposals for developing legal standards in this area.

These various efforts at developing new law have been hampered in various ways, two of which merit special attention. First, many governments¹³ and nongovernmental organizations¹⁴ insist that existing rules are adequate and that the problem, if any, is that states fail to

N. Schmitt, *The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010) (explaining difficulties with guidance from perspective of expert who worked on the study). We have chosen to focus on the detention questions discussed here because, taken together, they form a related set of issues that requires further attention from international law.

¹⁰ See John B. Bellinger III, *Legal Issues Related to Armed Conflict with Non-state Groups*, in PRISONERS IN WAR 251 (Sibylle Scheipers ed., 2010) (responding to criticism that U.S. detention policy violates international law on these issues). The Obama administration has had to respond to similar criticisms. Harold Hongju Koh, The Obama Administration and International Law, Remarks Made at the American Society of International Law (Mar. 25, 2010), at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

¹¹ We wish to emphasize that international law relating to detention does contain certain rules that are clearly stated, such as the prohibitions on torture and on cruel, inhuman, and degrading treatment. *But see* H.M.G. CABINET OFFICE, CONSOLIDATED GUIDANCE TO INTELLIGENCE OFFICERS AND SERVICE PERSONNEL ON THE DETENTION AND INTERVIEWING OF DETAINEES OVERSEAS, AND ON THE PASSING AND RECEIPT OF INTELLIGENCE RELATING TO DETAINEES 3 (2010) (UK) (“[T]here is no agreed or exhaustive definition of what constitutes cruel, inhuman or degrading treatment or punishment.”). Our focus in this article is on the questions we have identified—where states would benefit from greater legal clarity and consensus.

¹² See Thomas Winkler, Acting Legal Advisor, Danish Ministry of Foreign Affairs, Address at the 31st Round Table on Current Issues of International Humanitarian Law (Sept. 5, 2008), at <http://en.calameo.com/read/00000837926fb084b36c9> (describing rationale behind Copenhagen Process).

¹³ For example, in responding to a recommendation by the House of Commons Foreign Affairs Committee that the Geneva Conventions be updated, the British government said that “the Government continues to believe the best solution lies in better and more effective application of existing international humanitarian law.” SECRETARY OF STATE FOR FOREIGN & COMMONWEALTH AFFAIRS, RESPONSE TO FOREIGN AFFAIRS COMMITTEE 3 (2007), available at http://www.fco.gov.uk/resources/en/pdf/7179755/2007_mar_guantanamo_bay; see also Ariane Bernard, *European Faults U.S. Official for Remarks on Geneva Rules*, N.Y. TIMES, Sept. 23, 2006, at A4 (quoting European Union counterterrorism chief Gijs de Vries: “The opinion of Europe’s ministers is that respecting the

adhere to those rules.¹⁵ This insistence that existing rules provide adequate guidance regarding contemporary conflicts is understandable;¹⁶ since those rules have served a critical role in restraining the behavior of states in the situations for which they were designed, care must be taken to avoid weakening the overall framework of which they are a part.¹⁷ Moreover, there is a real risk that states and nonstate actors will abuse holes in the law when they are identified as such. During the time that we served in government, we believe the United States erred by straining to take advantage of gaps in international law in order to avoid applying important protections for detainees as elements of its post-9/11 detention policy.¹⁸ Nevertheless, the failure by other observers to acknowledge the limitations of existing law hampers efforts to develop new law. Pretending that clear detention rules already exist to guide state practice does not serve the cause of international humanitarian or human rights law.

Second, those that do agree that existing legal rules are not clear and exhaustive cannot agree on how the law should be developed. Some scholars and the ICRC have argued that the rules for international armed conflicts should be applied in noninternational armed conflicts. Other scholars and human rights groups have advocated the use of national laws, guided by human rights law, to fill existing gaps. Neither of these approaches works, however, because the questions that we have raised are answered in an inadequate or conflicting manner in those bodies of law. As a consequence, as the ICRC study acknowledged, states engaged in conflicts with nonstate actors lack sufficient guidance from international law as to how to make difficult choices in detention policy.¹⁹

The first goal of this article is to clarify the existing state of the law in order to lay a foundation from which states can develop clear rules to answer the four questions discussed here.²⁰ Our

rules, not bending them, is essential to our credibility and hence to our effectiveness in the fight against terrorism.”); Dan E. Stigall, Christopher L. Blakesley, & Chris Jenks, *Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict*, 30 U. PA. J. INT’L L. 1367, 1379 (2008) (quoting Danish officials: “the challenge was not the elaboration of new rules, but to make the existing legal framework fully applicable in practice”).

¹⁴ See, e.g., EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM, AND HUMAN RIGHTS, INTERNATIONAL COMMISSION OF JURISTS, ASSESSING DAMAGE, URGING ACTION 20 (2009), available at <http://ejp.icj.org/IMG/EJP-Report.pdf> (“[H]uman rights law provides sufficient flexibility for States to adjust to security needs; States should rely upon this framework rather than seek to re-write the rule book.”); see also Kellenberger, *supra* note 2.

¹⁵ The insistence that implementation is the critical issue in IHL is a point that has been made for many years. See Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589, 598 (1983) (“The principal difficulty regarding the application of international humanitarian law has been the refusal of states ‘to apply the conventions in situations where they clearly should be applied.’”).

¹⁶ See Reisman, *supra* note 8, at 82–83 (describing inherent resistance to changes in legal arrangements even in the face of drastically changed factual realities).

¹⁷ See, e.g., Arturo Carrillo-Suárez, Hors de Logique, *Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT’L L. REV. 1, 114–15 (1999) (describing positive humanitarian benefits that would accrue from implementing existing treatment protections applicable in noninternational armed conflict in Colombian civil war).

¹⁸ See, e.g., Brief for Respondent-Appellee at 49 n.25, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) (contesting appellant’s argument that common Article 3 of the Geneva Conventions constitutes customary international law binding in all conflicts); see also Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT’L L. 295, 323 (2007) (accusing Bush administration of “exploiting a seam” through manipulation of gaps).

¹⁹ Kellenberger, *supra* note 2 (noting lack of clear legal guidance available to detaining authorities).

²⁰ See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 52 (1990) (“[R]ules which are perceived to have a high degree of determinacy—that is, readily ascertainable normative content—would seem to have a better chance of actually regulating conduct in the real world than those which are less determinate.”).

methodology is to look first at the treaty provisions applicable in noninternational armed conflict and demonstrate where they do not provide adequate guidance to the questions posed. We then look to IHL (for international armed conflict), municipal law, and international human rights law as potential sources of applicable law. We establish that these additional sources themselves contain gaps and ambiguities that raise doubts as to whether simply applying those bodies of law would answer our questions. The context in which the rules were developed impedes their direct application to armed conflicts with nonstate actors.

The second task for this article is to identify options and to develop convergences on each of the four questions—which may, in turn, help us begin formulating answers to them. Our goal is not to propose fixes that “contemplate[] the detention of more people, in more circumstances, and with fewer procedural protections than under current international law.”²¹ Rather, our hope is that by identifying areas of agreement among states detaining nonstate fighters, and by suggesting additional considerations that should receive further thought, the international community will be better positioned to develop new law for guiding and constraining state action in future conflicts. While we recognize that a new international instrument, even if advisable, is unlikely to be achieved in the near future, an agreement on common principles by like-minded states would further the process of legal development—which is urgently needed in this area.

I. THE PROBLEM ELABORATED

It is not an accident that the Geneva Conventions do not provide a full set of legal rules governing conflicts between states and nonstate actors. Those Conventions were drafted with armed conflicts between states as the primary focus. Common Article 2 of the Geneva Conventions, which is the jurisdictional provision for the bulk of the Conventions’ protections, limits application of the Conventions to conflicts between high contracting parties, which are limited to states.²² Thus, the Geneva Conventions generally provide regulations governing armed conflicts between nation-states. Only common Article 3 and Additional Protocols I²³ and II²⁴ apply, as a matter of treaty law, to at least some conflicts involving nonstate groups.²⁵ Those treaty provisions provide important protections owed to those detained in some conflicts with nonstate actors.

²¹ Deborah N. Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, 41 CREIGHTON L. REV. 663, 676 (2008).

²² See, e.g., Geneva Convention III, *supra* note 1, Art. 2 (“[T]he present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . .”).

²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter Additional Protocol I].

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 UNTS. 609 [hereinafter Additional Protocol II].

²⁵ The Convention on Certain Conventional Weapons and its Protocols also apply to noninternational armed conflict. See 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, Art. 1, Oct. 10, 1980, 1342 UNTS 137, 19 ILM 1524 (“This Convention and its annexed Protocols shall also apply . . . to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949.”) The prohibitions on weapons in these treaties do not address the detention questions that are the subject of this article.

Common Article 3 applies as a matter of customary international law to all conflicts.²⁶ The article prohibits murder, mutilation, cruel treatment, torture, and outrages upon personal dignity, including humiliating and degrading treatment of persons not taking active part in hostilities. It also requires that those detained may not be criminally sentenced or executed “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Additional Protocol II applies only to conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”²⁷ When applicable,²⁸ the Protocol builds upon common Article 3 by elaborating upon the treatment protections owed those who are detained and by adding specific protections that combatants owe the civilian population in noninternational armed conflicts.

Additional Protocol I is, for the most part, limited in its application to international armed conflicts. Article 1(4), however, extends Protocol I’s protections to conflicts in “which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,” meaning that it will be applicable in some conflicts with nonstate groups. Article 96(3) of Protocol I even allows nonstate groups engaged in these kinds of conflicts the opportunity to assume responsibilities through unilateral declaration, thereby bringing the Geneva Conventions and Additional Protocol I into effect for the conflicts. In addition to restricting the means and methods of warfare that may be employed in these conflicts, Additional Protocol I protects civilians and civilian objects and, most importantly for our purposes, establishes rules regarding the treatment of captured fighters.

The most important of these treatment protections is Article 75, which provides protection from torture, outrages upon personal dignity, and collective punishments, as well as various procedural protections that must be provided before imposing criminal punishment. Many states, organizations, and scholars believe that Article 75 is custom in both international and

²⁶ See Michael J. Matheson, *Continuity and Change in the Law of War: 1975–2005: Detainees and POWs*, 38 GEO. WASH. INT’L L. REV. 543, 547–48 (2006) (describing depth and breadth of this view). The U.S. Supreme Court held in *Hamdan v. Rumsfeld*, *supra* note 18, at 629–30, that common Article 3 applied as a matter of treaty law to the U.S. conflict with Al Qaeda. There is some question regarding whether this treaty interpretation is correct, given that the text of common Article 3 limits application to conflicts “occurring in the territory of one of the High Contracting Parties.” See INT’L COMM. RED CROSS, GENEVA CONVENTION [III] RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 37 (Jean S. Pictet gen. ed., 1960) (interpreting the term “one” to mean “within the confines of a single country”) [hereinafter THIRD GENEVA CONVENTION COMMENTARY]. It is also in conflict with the interpretation of “international armed conflict” made by other municipal courts. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel, para. 21 [2006], at <http://elyon1.court.gov.il/eng/home/index.html> (“Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.”).

²⁷ See Additional Protocol II, *supra* note 24, Art. 1. Additional Protocol II is potentially applicable to the government of Afghanistan’s noninternational armed conflict with the Taliban because the Taliban exercises control over a portion of Afghan territory from which it conducts sustained and continuous military operations against the government. However, a conflict with a group like Al Qaeda is unlikely to fall within the ambit of Additional Protocol II because Al Qaeda does not control territory.

²⁸ Although the United States signed Additional Protocol II, and President Reagan transmitted it to the Senate in 1987, it has not been approved by the Senate. The White House recently called upon the Senate to provide its advice and consent to Additional Protocol II. White House Fact Sheet, *New Actions on Guantánamo and Detainee Policy* (Mar. 7, 2011), at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guantanamo-and-detainee-policy>.

noninternational armed conflicts.²⁹ The Obama administration announced in March 2011 that the United States would apply Article 75 out of a “sense of legal obligation” in international armed conflicts, but the administration neither stated that Article 75 is customary international law nor agreed to apply Article 75 in noninternational armed conflicts, such as the conflict with Al Qaeda.³⁰ While this announcement is a good first step, we believe that the United States and other countries should apply Article 75 as a legal obligation in all conflicts.

Together, common Article 3, Additional Protocol II, and Article 75 provide important treatment protections in conflicts between states and nonstate actors. We believe that the United States should have provided all detainees in the conflict with Al Qaeda and the Taliban the protections of common Article 3 and Article 75 from the outset of the conflict.³¹ Had the United States applied those established international rules, it might have prevented cases of detainee mistreatment and blunted the charge that it had placed detainees into a “legal black

²⁹ See *Civilians Claims (Eri. v. Eth.)*, Eritrea’s Claims 15, 16, 23 & 27–32, Partial Award (Eritrea Ethiopia Claims Comm’n Dec. 17, 2004), 44 ILM 601 (2005) (“The Commission views Article 75 of Protocol I as reflecting particularly important customary principles.”); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 299–383 (2005) (describing protections of Article 75 as customary international law); Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 209, 233 (Dieter Fleck ed., 1995) (same); see also *Hamdan v. Rumsfeld*, *supra* note 18, at 633 (plurality) (stating that United States owes detainees in the conflict with Al Qaeda Article 75 protections as a matter of customary international law).

³⁰ White House Fact Sheet, *supra* note 28. During the Reagan administration, the Department of Defense Law of War Working Group concluded that Article 75 was already part of customary international law in international armed conflicts. Memorandum from the Law of War Working Group to the Assistant General Counsel, Office of the Secretary of Defense (May 9, 1986), cited in Matheson, *supra* note 26, at 546. The Legal Adviser’s Office of the State Department agreed with that conclusion, and Deputy Legal Adviser Michael Matheson announced on behalf of the administration in 1987 that the fundamental guarantees contained in Article 75 were among those parts of Additional Protocol I that the United States believed “should be observed and in due course recognized as customary law.” Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 422 (1987). Two decades later, Matheson argued that the provisions of Article 75 had, by then, come “to be widely accepted as part of customary law applicable in all armed conflicts.” Matheson, *supra* note 26, at 547. In its decision in *Hamdan*, *supra* note 18, at 633, a plurality of the U.S. Supreme Court also concluded that the trial protections set forth in Article 75 are customary international law.

Nevertheless, after many years of review and urging by the Office of the Legal Adviser, the Bush administration was unable to arrive at an agreed position confirming the status of Article 75 as customary international law, or agreeing to apply it as a legal obligation in either international or noninternational armed conflicts. See John B. Bellinger III, *For Obama, Vexing Detainee Decisions Loom* (Apr. 14, 2010), at <http://www.cfr.org/human-rights/obama-vexing-detainee-decisions-loom/p21895> (explaining that eight years of review by both the Bush and Obama administrations have yet to produce an executive branch position on this issue); Julian E. Barnes, *Internal Critics Seek a Softer Line; Bush Administration Moderates Push to Change Detention and Interrogation Policies Before Their Time’s Up*, L.A. TIMES, Nov. 12, 2008, at A20 (noting disagreements within Bush administration on Article 75’s status as customary law). Difficulty in establishing general and consistent state practice required to arrive at the determination of customary law was a primary stumbling block. It appears these same difficulties explain why the Obama administration has not explicitly stated that Article 75 is customary international law. See John B. Bellinger III, *Obama, Bush and the Geneva Conventions* (Aug. 11, 2010), at http://shadow.foreignpolicy.com/posts/2010/08/11/obama_bush_and_the_geneva_conventions (noting failure of Obama administration to commit to following Article 75 as a matter of law in conflict with Al Qaeda).

³¹ This is not to say that all of the treatment protections provided even by these instruments are models of clarity. The International Criminal Tribunal for the Former Yugoslavia was unwilling to permit criminal prosecutions to proceed for violations of the prohibition on “violence to life and person,” because the term was insufficiently precise to support prosecution under international law. Prosecutor v. Vasiljević, Judgment, Case No. IT-98-32-T, paras. 193–204 (Nov. 29, 2002); see also H.M.G. CABINET OFFICE, *supra* note 11 (noting lack of consensus on what constitutes “cruel, inhuman and degrading treatment”). Nevertheless, the United States’ decision to fully implement common Article 3 after the Supreme Court decision in *Hamdan* suggests that implementation was possible.

hole.”³² And although those rules do not address the particular detention questions raised here, earlier U.S. acceptance of its treatment obligations under international rules might have led members of the international community to be more willing to acknowledge areas in which detention rules need further elaboration.

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 conflict. During the drafting of the Geneva Conventions, the ICRC proposed applying the entire body of protections to noninternational armed conflict, but the idea was rejected by states.³³ Some present-day scholars advocate the same idea, in essence seeking to supersede the states’ decision at the Geneva Conference to treat international and noninternational armed conflict differently.³⁴

The ICRC and other experts, while accepting that the Geneva Conventions recognize a difference between international and noninternational armed conflict, have concluded that nearly all of those Conventions,³⁵ as well as Additional Protocol I, have achieved the status of customary law applicable in noninternational armed conflict.³⁶ The conclusion that many or all rules applicable to international armed conflict are customary international law in noninternational armed conflict is suspect, however, given the paucity of state practice and *opinio juris* to establish this proposition.³⁷ But even if the entirety of the Third and Fourth Geneva

³² Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 27th F. A. Mann Lecture (Nov. 25, 2003), at <http://www.statewatch.org/news/2003/nov/guantanamo.pdf>. Both President Obama and his 2008 Republican opponent Senator John McCain agree with the assessment that fealty to IHL treatment protections would have been beneficial to the United States. See Interview by Bob Schieffer with Senator John McCain (Aug. 30, 2009), at http://www.huffingtonpost.com/2009/08/30/mccain-whacks-cheney-tort_n_272179.html (arguing that detainee interrogations during the Bush administration were conducted inconsistently with the Geneva Conventions, resulting in a propaganda benefit for Al Qaeda and in harm to U.S. relations with its allies); Barack Obama, *Protecting Our Security and Our Values*, Address at the National Archives (May 21, 2009) (explaining decision to ban enhanced interrogation techniques because they undermined the rule of law, aided Al Qaeda recruitment, and put U.S. military personnel at risk of similar mistreatment).

³³ THIRD GENEVA CONVENTION COMMENTARY, *supra* note 26, at 60.

³⁴ See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 755–56 (2004) (arguing for elimination of distinction between international and noninternational armed conflict categories); James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT’L REV. RED CROSS 313, 313–14 (2003) (summarizing support for this position).

³⁵ The International Court of Justice has affirmed the status of the Geneva Conventions as customary international law in conflicts between states. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, 257 (July 8) (“[T]hese fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”); see also Oscar Schachter, *Entangled Treaty and Custom*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE* 717, 718 (Yoram Dinstein ed., 1989) (“[C]ommentators have observed an increasing tendency on the part of governments and lawyers to consider the rules in international agreements as customary law on one ground or another, and therefore binding on States not parties to the agreement.”).

³⁶ See HENCKAERTS & DOSWALD-BECK, *supra* note 29 (concluding that 136 of 161 rules constituted customary law in both international and noninternational armed conflict); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654 n.4 (2004–05) (claiming “core principles of [the law of armed conflict] apply across the spectrum of conflict types”); Stewart, *supra* note 34, at 321–22 (summarizing literature supporting international armed conflict rules as customary international law applicable in noninternational armed conflicts).

³⁷ See Letter from John B. Bellinger III & William J. Haynes II to Jakob Kellenberger (Nov. 3, 2006), at http://www.defense.gov/home/pdf/Customary_International_Humanitarian_Law.pdf (describing U.S. government concerns with methodology employed by ICRC in describing norms as custom); see also *Prosecutor v. Tadić*, Decision

Conventions were to apply to conflicts with nonstate actors, the four questions we presented above would remain unanswered. In some instances the Conventions fail to address the questions at all; in others, they provide answers designed for international armed conflicts that are difficult to apply to conflicts with nonstate actors.

The difficulty in applying the rules of international armed conflict to noninternational armed conflict is not surprising, given the differences between these types of wars. International armed conflicts are conflicts between states in which it is relatively easy to distinguish between combatants and civilians, with different substantive detention standards and processes assigned to each group. These conflicts also hold out the prospect of a definite end of hostilities, followed by an organized repatriation of enemy soldiers and civilians.³⁸ By contrast, in conflicts involving nonstate actors, the distinction between civilians and combatants is uncertain and blurred, thereby making detention rules based on status difficult to apply—mandating more robust review procedures to ensure that the correct person is detained. These conflicts are indefinite in length, potentially with no identifiable point of closure—which requires a reconceptualization of the end of hostilities. And they involve fighters from many countries, many of whom may commit serious human rights violations, making repatriation much more difficult. These differences explain why the rules of international armed conflict do not address the full range of detention issues in conflicts with nonstate actors.³⁹

Other writers argue that conflicts with nonstate actors are governed by national laws, which are themselves regulated by international human rights law.⁴⁰ Some base this view on a reluctance to accept that conflicts with nonstate actors can amount to war governed by IHL.⁴¹ This particular position is incorrect, however, as it is clear that some conflicts with nonstate actors rise to the level of armed conflicts, in which IHL is applicable.⁴² But even given that IHL regulates some conflicts

on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, para. 126 (Oct. 2, 1995) (holding that rules from international armed conflict have not made a “full and mechanical transplant” to noninternational armed conflict); Iain Scobbie, *The Approach to Customary International Law in the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 15, 30 (Elizabeth Wilmshurst & Susan Breau eds., 2007) (“There appears to be too easy an elision from the fact of widespread participation in the Geneva Conventions and Additional Protocols to the normative conclusion of customary status.”).

³⁸ See Remarks by Attorney General Michael Mukasey, Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008), at <http://www.justice.gov/archive/ag/speeches/2008/ag-speech-0807213.html> (encapsulating differences between international armed conflict and conflicts with nonstate actors).

³⁹ See Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429 (2010) (discussing difficulties of applying IHL to armed conflicts against nonstate actors whose organizational structure is loose, evolving, and subject to debate).

⁴⁰ See EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM, AND HUMAN RIGHTS, *supra* note 14, at 52 (arguing that in conflict between the United States and Al Qaeda, “the legal framework that applies is not international humanitarian law, but that of international human rights law and domestic criminal law”); Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, 148 (2008) (arguing that in absence of noninternational armed conflict rules on detention, “domestic law, tempered by international human rights obligations,” governs); *UN Expert Praises Spain’s Role on Terrorism But Calls for Legal Reforms*, UN NEWS CENTRE (May 14, 2008), at <http://www.un.org/apps/news/story.asp?NewsID=26674&Cr=terrorism&Cr1> (quoting Martin Scheinin saying that “terrorism must be combated within the framework of the law, including human rights law”).

⁴¹ See Alain Pellet, *No, This Is Not War!* (Oct. 3, 2001), at https://www.unodc.org/tldb/bibliography/Biblio_Internat_Law_Pellet_2001.doc (arguing 9/11 attacks were not an act of war, because they did not emanate from a state actor).

⁴² See *Tadić*, *supra* note 37, para. 70 (holding armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”); see also *Hamdan v. Rumsfeld*, *supra* note 18, at 630–31 (holding that conflict

with nonstate actors, the complementary nature of different bodies of international law suggests that human rights law also contributes to regulation of these conflicts.

Nevertheless, determining how to apply human rights law is difficult because the relationship between human rights law and IHL is complex.⁴³ In the *Wall* case the International Court of Justice (ICJ) set forth its view on the relationship between the two, finding three possible situations: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”⁴⁴ But the ICJ has provided limited guidance on how a state should determine which of these three situations applies.

Lex specialis and complementarity provide a partial methodology for reconciling IHL and human rights law. The principle of *lex specialis* provides that in the event of conflict, the more specific rule applicable in a particular situation should be applied—which would usually be the IHL rule in armed conflict situations. Thus, the ICJ explained in the *Nuclear Weapons* case that, while the human rights–based protection against arbitrary deprivation of life continued to apply during armed conflict, the more specific IHL rule determined its content.⁴⁵ *Lex specialis* must be applied with the complementary nature of international legal obligations in mind:⁴⁶ human rights law should be read in light of relevant IHL, and vice versa.

Lex specialis and complementarity do not, however, fully reconcile these competing bodies of law. Complementarity is helpful only when the purposes of IHL and human rights law are the same. When the rules offered by both bodies of law are in conflict, or when one body of law has deliberately left discretion to states, a methodology is needed to prioritize between the rules,⁴⁷ and specificity is not always sufficient for that purpose. For example, the International Covenant on Civil and Political Rights (ICCPR) requires judicial review of the legality of security detention,⁴⁸ whereas the Fourth Geneva Convention specifically allows for administrative review. Since the two bodies of law have different presumptions about the context of detention, they have different, specific, but contradictory rules as to who must perform the required review. Thus, determining which set of rules applies requires a framework other than complementarity or *lex specialis*—a framework that needs to be developed.

between the United States and Al Qaeda is a “conflict not of an international character” to which common Article 3 of the Geneva Conventions applies).

⁴³ A vibrant literature theorizes on how human rights law and IHL should interact. See, e.g., Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, J. INT’L HUMANITARIAN L. STUD. (forthcoming) (arguing human rights law can play gap-filling role in parts of IHL dealing with peacelike activities, such as detention, but not with rules related to actual combat); Cordula Droeger, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 312 (2007) (arguing complementarity and specificity guide determination of when to apply which body of law); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000) (tracing the history of relationship between these two bodies of law).

⁴⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 106 (July 9).

⁴⁵ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 35, at 240 (“The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict . . .”).

⁴⁶ See Vienna Convention on the Law of Treaties, Art. 31, para. (3)(c), *opened for signature* May 23, 1969, 1155 UNTS 331 (“There shall be taken into account, together with the context: . . . [a]ny relevant rules of international law applicable in the relations between the parties.”).

⁴⁷ See Cordula Droeger, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT’L REV. RED CROSS 501, 527 (2008) (arguing that the limit of complementarity arises when rules conflict).

⁴⁸ Art. 9(3), Mar. 23, 1976, 999 UNTS 171.

Moreover, the peacetime foundation of human rights law makes it difficult to apply wholesale to conflicts with nonstate actors.⁴⁹ Because of this peacetime premise, human rights law presumes criminal detention is the primary route to incapacitation of threats. Many human rights actors have used this preference to argue that a state should be able to detain only those members of nonstate groups whom it criminally prosecutes.⁵⁰ Such an approach is not mandated, however, by all human rights regimes. Some human rights instruments permit states to use preventive detention to mitigate threats to society.⁵¹ Legal scholars and human rights bodies, including the UN Human Rights Committee, have recognized that states may administratively detain individuals for security purposes in some circumstances, if given procedural

⁴⁹ One point of some dispute is whether human rights obligations extend extraterritorially. The United States has long rejected the view that the ICCPR applies to extraterritorial actions by state agents. The plain words of ICCPR Article 2(1) limit its application to “all individuals within its territory and subject to its jurisdiction.” The United States, for many years and across administrations, has interpreted this provision as limiting the scope of application of the ICCPR to individuals who are both in state territory and subject to its jurisdiction. U.S. DEP’T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, annex 1 (Oct. 21, 2005), at <http://www.state.gov/g/drl/rls/55504.htm>. The U.S. position relies not only on the text of Article 2, but also on its negotiating history, which appears to support the U.S. position.

The ICCPR Human Rights Committee, by contrast, has written that the “and” in Article 2 actually means “or.” UN Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) (“[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”) Such an interpretation would mean that the Covenant protects individuals who are within the State’s territory and also those who are subject to its jurisdiction. In his commentary on the Covenant, Manfred Nowak explains that this interpretation “correct[s] the wording of this provision” by bringing it closer to the object and purpose of the treaty. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 43–44 (2d rev. ed. 2005).

Unlike the ICCPR, the European Convention on Human Rights contains no textual territorial limitation to application. See Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, Nov. 4, 1950, ETS No. 5, 213 UNTS 221 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”). The European Court of Human Rights has interpreted this provision to mean that the Convention’s protections extend to those under the “effective control” of a state party to the treaty. See *Banković v. Belgium*, App. No. 52207/99, para. 70 (Eur. Ct. H.R. Dec. 12, 2001), 41 ILM 517 (“[T]he responsibility of a Contracting Party was capable of being engaged when as a consequence of military action . . . it exercised effective control of an area outside its national territory.”).

The American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123 [hereinafter American Convention], similarly has no express territorial limitations on its application. Article 1 provides: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”

The Inter-American Commission on Human Rights has interpreted the American Convention to apply extraterritorially in certain circumstances. See, e.g., *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, para. 37 (1999) (holding Convention may extend “to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad”).

⁵⁰ See Michael Ratner, Letter to the Editor, *A New Court for Terror Suspects?*, N.Y. TIMES, July 16, 2007, at A15 (“No domestic or international law permits preventive detention under the current circumstances.”); Rona, *supra* note 40, at 148 (arguing absence of detailed IHL detention provisions in noninternational armed conflict means that criminal trial must be used prior to detention).

⁵¹ Preventive detention has been approved in some instances by human rights bodies outside the security context at issue here. For example, the Human Rights Committee rejected a complaint against a New Zealand law permitting preventive detention of sexual predators. See UN Human Rights Comm., *Rameka v. New Zealand*, Communication No. 1090/2002, para. 7.3, UN Doc. CCPR/C/79/D/1090/2002 (Nov. 6, 2003) (allowing preventive detention provided periodic review requirement was met). By contrast, the Committee was critical of a French law permitting preventive detention of sex offenders for one-year periods after the completion of their criminal detention based on a finding of continued dangerousness. See UN Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations, France, para. 16, UN Doc.

protections.⁵² Even the European Convention on Human Rights,⁵³ which generally has been interpreted as prohibiting administrative detention for security purposes,⁵⁴ allows it when the requirements for derogation from the Convention are met.⁵⁵

If criminal prosecution were legally required for detention of nonstate actors, numerous practical difficulties would ensue.⁵⁶ Criminal convictions require the state to possess admissible evidence that establishes that an individual violated an existing law, and that satisfies a high standard of proof, such as beyond a reasonable doubt. These evidentiary problems often doom prosecutions. States may capture nonstate fighters on or adjacent to the battlefield in circumstances where evidence collection either cannot occur or cannot be a priority. Sources of evidence may also include intelligence sources that cannot be subjected to the rigors of confrontation without compromising sources and methods.

Even when the state does have admissible evidence, actions taken outside the prosecuting state may not violate the law of the other state, given the limits on extraterritorial application of criminal law. Bringing nonstate fighters back for prosecution before national courts also presents practical difficulties. Should the United States take Taliban fighters picked up in Afghanistan to the United States for prosecution? Would witnesses be available to testify so far from where any crimes were committed? And what about the resources that would be needed to conduct thousands, or even tens of thousands, of trials? These difficulties, which are central to the decision in IHL to de-link incapacitation and criminal prosecution, all apply to conflicts with nonstate actors.

Requiring criminal trials to justify detention in noninternational armed conflict is also legally problematic. Common Article 3 and Additional Protocol II specifically contemplate security detention separate from criminal prosecution.⁵⁷ Reading human rights law to prohibit noncriminal detention would be inconsistent with applying the most specific applicable legal rules (*lex specialis*) and would fail to read international legal obligations in light of one another (complementarity).

But these arguments in favor of noncriminal detention in conflicts with nonstate actors do not alter the reality that few provisions of human rights law regulate preventive detention. The

CCPR/C/FRA/CO/4 (July 31, 2008) (describing the law as “problematic under Articles 9, 14 and 15 of the Covenant”). The Committee has not been clear about when it believes such detention is permissible and when it becomes problematic.

⁵² See UN Human Rights Comm., General Comment No. 8, Art. 9, para. 4 (1992), UN Doc. HRI/GEN/1/Rev.1 (1994) (“if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary”).

⁵³ *Supra* note 49.

⁵⁴ See *Ciulla v. Italy*, 13 Eur. Ct. H.R. 346, paras. 41–42 (1989) (holding Italian preventive detention law targeting organized crime violated exhaustive list of purposes for detention in European Convention on Human Rights Article 5, which “must be interpreted strictly”).

⁵⁵ See *Lawless v. Ireland* (No. 3), 3 Eur. Ct. H.R. (ser. A), para. 48 (1961) (upholding Irish law allowing for security detention without trial based on proper invocation of European Convention on Human Rights Article 15 derogation from Article 5). Article 15 allows for derogation “in time of war or other public emergency threatening the life of the nation.” It is doubtful that all conflicts with nonstate actors that are the subject of this article would meet this standard.

⁵⁶ See Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y 1, 11 (2009) (summarizing arguments against use of criminal law in conflicts with terrorists).

⁵⁷ See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1085–86 (2008) (evaluating common Article 3 and Additional Protocol II to support this proposition).

absence of much treaty law in the area results in a lack of uniformity in state practice, which makes it difficult to locate many customary human rights norms governing preventive detention.⁵⁸ The few restrictions that do exist are often subject to derogation, allowing states to avoid restrictions on preventive detention imposed by human rights treaties during the very detention situations that we are addressing in this article.⁵⁹

Together, these limitations of existing IHL, human rights law, and domestic criminal law explain in general terms why our four questions are inadequately addressed. We now turn to each of the questions to examine the specific uncertainties associated with each and to offer our suggestions as to how the law should develop.

II. SCOPE OF DETENTION AUTHORITY: WHO MAY BE DETAINED?

The first question to be addressed is which individuals are subject to detention in a conflict with a nonstate actor. One of the most common complaints that we heard in the State Department was that the United States employed an overbroad definition of who was subject to detention in its conflict with Al Qaeda. These complaints were fueled by unreasonable assertions regarding the scope of detention authority.⁶⁰ Underlying this debate is the need for greater clarity in determining who is subject to detention in conflicts with nonstate actors. It is clear that an individual who is caught with a weapon on the battlefield or who is about to plant an improvised explosive device is subject to detention. But what about those who smuggled in the weapons used by the insurgent groups? Or the financier whose funds facilitated the purchase of weapons? Or even a religious leader whose fiery sermon incited the attacks?

In general terms, the IHL principle of military necessity allows a state to use “measures not prohibited by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”⁶¹ This principle gives states the authority to detain enemy fighters when necessary to achieve their military objective,⁶² but it is limited by restrictions on

⁵⁸ This problem exists under the classical formulation of customary international law, which looks both for uniform and extensive state practice and for *opinio juris* to support a finding of custom. See INTERNATIONAL LAW ASSOCIATION, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 21 (2000) (“For State practice to create a rule of customary law, it must be virtually uniform, both internally and collectively.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). Modern human rights scholars often label as custom various norms that are not supported by uniform or extensive state practice but that are widely acclaimed as legally obligatory. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1200–01 (2007) (discussing move to describe norms as custom based on *opinio juris* alone).

⁵⁹ See *Lawless v. Ireland*; see also Kellenberger, *supra* note 2 (arguing that because human rights law permits derogations during times of emergency, there is no substitute for IHL on detention questions in noninternational armed conflict). ICCPR Article 4 allows for derogation from Article 14 of the treaty, which regulates detention. In General Comment No. 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, para. 8, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), however, the Human Rights Committee has listed the right to be free from being “arbitrarily arrest[ed] and detain[ed]” as not subject to derogation. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 58, §702 cmt. N, also lists arbitrary detention as a *jus cogens* norm not subject to derogation.

⁶⁰ See Neil A. Lewis, *Fate of Guantánamo Detainees Is Debated in Federal Court*, N.Y. TIMES, Dec. 2, 2004, at A36 (quoting Justice Department official to the effect that “a little old lady in Switzerland” could be detained as enemy combatant for donating money to a charity that, unbeknownst to her, funded Al Qaeda).

⁶¹ U.S. DEP’T OF ARMY FIELD MANUAL 27-10, Art. 3 (1956).

⁶² See War Dep’t, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field, Art. 15 (1863), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS,

detention authority designed to protect humanitarian interests.⁶³ The challenge in conflicts with nonstate actors is to identify the humanitarian limits on military necessity that cabin the state's detention authority.⁶⁴

Such limits cannot be found in the instruments governing noninternational armed conflict.⁶⁵ Common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I, and Additional Protocol II all contemplate that states will undertake detention operations in noninternational armed conflict, but provide no guidance as to who may be detained. They only provide restrictions on how those who are detained are treated. This gap in the law leaves states searching for additional sources of law to guide the exercise of detention authority.

Many scholars and international and nongovernmental organizations have argued that as a matter of either law or policy, rules developed in international armed conflict should restrict detention in noninternational armed conflict.⁶⁶ But the Geneva Conventions are premised on a world in which combatants generally qualify for prisoner-of-war status and in which civilians do not regularly engage in hostilities. Neither of these assumptions is true in conflicts with nonstate actors—which suggests the limited value of importing international armed conflict rules here.

Article 4 of the Third Geneva Convention specifies the criteria for categorizing enemy fighters as prisoners of war: they are generally the members of armed forces of a party to the conflict or members of other militias who have been captured and who meet four additional criteria: (1) being commanded by a person responsible for his subordinates, (2) wearing distinctive signs or uniforms, (3) carrying arms openly, and (4) conducting operations in accordance with the laws and customs of war.⁶⁷ Article 44 of Additional Protocol I expands

RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler & Jiri Toman eds., 1988) (“Military necessity . . . allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor . . .”).

⁶³ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16–17 (2004) (describing tension in IHL between principle of necessity and the need to protect humanitarian interests).

⁶⁴ One clear restraint on military necessity is the Martens Clause. See Hague Convention (II) Respecting the Laws and Customs of War on Land, pmbl., July 29, 1899, 32 Stat. 1803:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Nevertheless, it is difficult to concretize application of this general provision to detention operations in conflicts with nonstate actors.

⁶⁵ For a discussion of the substantive scope of detention authority and its importance in balancing liberty and security, see Waxman, *supra* note 56.

⁶⁶ See *supra* notes 34–36 and accompanying text. Even if the international armed conflict detention rules are not legally applicable, they may be useful by analogy or as representing the potentially most stringent restrictions on detention in noninternational armed conflict. See Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AJIL 48, 49–51 (2009) (explaining that when detention is allowed in international armed conflict, it must a fortiori be permitted in noninternational armed conflict).

⁶⁷ Article 4 has itself engendered vigorous legal debate regarding whether members of regular armed forces must meet the four criteria of Article 4(A)(2) to qualify for prisoner-of-war status. Compare Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants,”* 75 GEO. WASH. L. REV. 1105, 1125–26 (2007) (arguing that armed forces are not “regular” unless they meet the four criteria), with Evan J. Wallach, *Afghanistan, Quirin and Uchiyama: Does the Sauce Suit the Gander?*, 2003 ARMY LAW., Nov. 2003, at 18, 24 (contending that four criteria are applicable only to “militia or volunteer corps,” not to regular state troops).

the prisoner-of-war protections by granting status to combatants who generally do not distinguish themselves from the general population, provided that they carry arms openly while visible to the enemy during preparation for an attack and during an actual military engagement. Based on their categorization as combatants, prisoners of war may be detained until the cessation of active hostilities, with the treatment protections provided by the Conventions.⁶⁸

Most nonstate armed groups fail to satisfy the requirements for prisoner-of-war status, even under the relaxed standards of Additional Protocol I. Terrorist groups like Al Qaeda, for example, do not carry their arms openly, whether during actual combat operations or otherwise.⁶⁹ They also use perfidious attacks on civilians as a means of warfare, thus systematically violating the laws and customs of war. Because nonstate fighters do not fit within the prisoner-of-war category, the Third Geneva Convention provides no guidance on the scope of detention authority.⁷⁰

Some scholars⁷¹ and courts⁷² urge that if nonstate fighters do not qualify as prisoners of war, they must be treated as civilian protected persons subject to protection by the Fourth Geneva Convention. Article 4 defines “protected persons” as those “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power.” Protected persons may be detained only on the basis of individualized determinations that the security of the detaining power makes detention absolutely necessary, and detention must cease when the need ends.⁷³ Those supporting the

⁶⁸ See Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45, 45–46 (2003) (summarizing rights and burdens associated with combatant status).

⁶⁹ See Steven Erlanger, *Yemen Says Bomb Suspect Met with Qaeda Figures*, N.Y. TIMES, Jan. 8, 2010, at A12 (describing use of “underwear bomb”).

⁷⁰ Some observers have urged that, as a matter of policy, detained members of Al Qaeda should be provided prisoner-of-war privileges. See Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT’L L. REV., Summer 2005, at 1, 47–52 (summarizing support for this position). We do not understand those who support granting prisoner-of-war privileges to detainees in conflicts with nonstate actors as saying that anyone may be detained under the laws of war provided that the state grants prisoner-of-war privileges to them. Such an argument would give states unbridled detention authority at the cost of relatively meager treatment protections. Nevertheless, it may be that states have sometimes granted prisoner-of-war status to undeserving groups in order to claim authority to detain. See Luisa Vierucci, *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to Which Guantanamo Bay Detainees Are Entitled*, 1 J. INT’L CRIM. JUST. 284, 300 n.76 (2003) (explaining that the British detained Iraqi students as prisoners of war during the first Gulf war in order to exercise detention authority).

⁷¹ See, e.g., Antonio Cassese, *Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law*, at 14, HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.*, *supra* note 26, available at <http://www.stoptorture.org.il/files/cassese.pdf> (“It must be underlined again that no ‘intermediate status’ exists between that of combatant and the status of civilian.”); Dörmann, *supra* note 68, at 72 (“Thus for the purposes of the law on the conduct of hostilities, there is no gap. Either a person is a combatant or a civilian.”); Goodman, *supra* note 66, at 51 (arguing that civilians who take part in hostilities remain civilians); Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 L. & INEQ. 195, 207–08 (2004) (marshaling support for this position). This approach is taken by the Israeli Supreme Court. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.*, *supra* note 26, para. 28 (“It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva* Conventions.”).

⁷² See HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.*, *supra* note 26, para. 28 (holding Palestinian terrorists to be civilians because the law does not recognize any categories other than lawful combatant and civilian).

⁷³ See Geneva Convention IV, *supra* note 1, Art. 42 (allowing for detention of civilians when demanded by security). Article 43 of the Fourth Geneva Convention specifies procedures for authorizing detention that require individualized review, as is discussed in part III.

view that all individuals fall within the categories of prisoner of war or protected person point to the official ICRC commentary to the Fourth Geneva Convention, which states it was not the intention of the drafters to leave any group of individuals uncovered.⁷⁴ Those in favor of this approach also draw support from the text of the Convention. Article 4 does not expressly exclude those who are engaged in fighting from protected person status. And Article 5 suggests by negative inference that engaging in hostile activities in the territory of a party to the conflict or in occupied territory does not necessarily deprive an individual of protected person status.⁷⁵

Under the terms of the Fourth Geneva Convention, however, many members of nonstate groups, because of their nationality, are not entitled to protected person status. Excluded from protected person status are nationals of the party or occupying power, nationals of neutral states in the territory of a belligerent state, and nationals of co-belligerent states, provided that these states have diplomatic representation with the detaining state.⁷⁶ As a consequence, members of nonstate groups often will be excluded from protected person status based on their citizenship. In Afghanistan, for example, Taliban fighters picked up by the Afghan government would not be entitled to protected person status because they are citizens of Afghanistan.⁷⁷ Those same fighters picked up by the United States would also not be protected persons, because they are nationals of co-belligerent states with which the United States has normal diplomatic relations. Nor would most foreign Al Qaeda fighters picked up by coalition forces in Afghanistan be protected persons, because almost all are nationals of “neutral states” that have diplomatic relations with coalition members.

Moreover, the negotiating history of the Fourth Geneva Convention calls into question the conclusion that protected person status was intended to be a safety net protecting those who took up arms illegally. Nowhere within the debate at the conference did delegates suggest that all combatants not qualifying for prisoner-of-war status were entitled to protected person status, and some delegations made specific comments to the contrary.⁷⁸ For those engaged in

⁷⁴ See INT'L COMM. RED CROSS, GENEVA CONVENTION [IV] RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 51 (Jean S. Pictet gen. ed., 1960) [hereinafter FOURTH GENEVA CONVENTION COMMENTARY] (“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.”).

⁷⁵ See Geneva Convention IV, *supra* note 1, Art. 5 (describing protections for protected persons who are detained as “a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power”); see also FOURTH GENEVA CONVENTION COMMENTARY, *supra* note 74, at 53 (explaining that the need to provide protections to those accused of acts like sabotage and terrorism requires treating them as protected persons).

⁷⁶ Geneva Convention IV, *supra* note 1, Art. 4. “Normal diplomatic representation” requires that the state have at least one diplomatic representative accredited to the belligerent state who has the freedom to make diplomatic representations. FOURTH GENEVA CONVENTION COMMENTARY, *supra* note 74, at 49. The consequence of normal diplomatic relations is that states may use normal diplomatic channels, including consular visits, to protect the interests of their nationals with the belligerent state. *Id.*

⁷⁷ The ICTY in *Tadić* held that in some instances ethnicity may trump formal nationality in determining whether a person qualifies for protected person status. Thus, Bosnian Yugoslavs held by the rump, Serb-dominated Yugoslavia were effectively diplomatically abandoned and consequently entitled to protected person status. Prosecutor v. Tadić, Jurisdiction, Case No. IT-94-1-AR72, paras. 165–69 (July 15, 1999). Under a more functional approach to protected person status, some nonstate groups might gain protected person status based on diplomatic abandonment by their home states.

⁷⁸ For example, a British delegate at the Geneva Conference explained that “the whole conception of the Civilian Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms,” who “could not expect full protection under rules of war to which they did not conform.” 2 FINAL RECORD OF THE

fighting who are entitled to protected person status, Article 5 allows states to deny most privileges to those within its territory or occupied territory who are under suspicion of engaging in activities hostile to the security of the state. Presumably, nonstate fighters often would fall within this exclusion.

This apparent gap in the law has led some states and scholars to argue that the law includes a third category, sometimes called “unlawful combatants” or “unprivileged belligerents.”⁷⁹ While supporters of the two-category approach dispute whether the category exists, it has a long historical pedigree.⁸⁰ Supporters of this three-category approach note that the Fourth Geneva Convention was designed to protect those for whom fighting is not a regular occupation—but not those who illegitimately bear arms on a consistent basis.⁸¹ They also note that treating such fighters as civilians would create limitations on targeting that would create the perverse reality that states have lesser leeway to target those who violate the laws of war, because they are civilians, than in fighting lawful combatants.⁸²

DIPLOMATIC CONFERENCE OF GENEVA OF 1949, sec. A, at 621 (1949); *see also* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1053 (2004) (detailing Geneva Conference debate on application of the Fourth Convention to unlawful combatants).

⁷⁹ During the Bush administration, Taliban and Al Qaeda fighters were labeled “unlawful combatants” or simply “enemy combatants.” *See* Memorandum from President George W. Bush to the Vice President, Secretaries of State and Defense, Attorney General, and Other Officials, para. 2(d) (Feb. 7, 2002), at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> [hereinafter Bush memorandum] (concluding that Taliban detainees are “unlawful combatants” and that Al Qaeda detainees do not get prisoner-of-war protections); Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, para. (a) (July 7, 2004), at <http://www.defense.gov/news/Jul2004/d20040707review.pdf> [hereinafter Wolfowitz memorandum] (defining as enemy combatant “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.”). The Obama administration dropped the term “enemy combatant” but continues to assert the right to detain members of Al Qaeda, the Taliban, and their associated forces and “substantial supporters” as authorized by Congress. Brief for Respondent, *Hamlily v. Obama*, 616 F.Supp.2d 63 (D.D.C. 2009) (No. 05-0763). Observers have rightly concluded that both administrations have claimed the right to detain these individuals until the end of hostilities based on their status. *See* BENJAMIN WITTES, ROBERT CHESNEY, & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 16–17 (2010) (describing the minor changes to detention authority claimed by the Obama administration).

⁸⁰ *See* Curtis A. Bradley, *The United States, Israel & Unlawful Combatants*, 12 GREEN BAG 2D 397, 404–05 (2009) (marshaling arguments in favor of viewing nonstate fighters as a subset of combatants not entitled to protections as either prisoners of war or protected persons); INGRID DETTER, *THE LAW OF WAR* 148 (2000) (arguing that an unlawful combatant is one committing belligerent acts against a state while not part of a regular military force or militias); DINSTEIN, *supra* note 63, at 29 (explaining that an unlawful combatant “is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy”); Instructions for the Government of Armies of the United States in the Field, Arts. 84, 85 (1898) (originally issued as General Orders No. 100) (categorizing private persons who sabotage behind enemy lines as underserving of prisoner-of-war status and subject to summary execution); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 83 (1990) (criticizing Additional Protocol I for failing to respect the traditional category of “unprivileged belligerent”); Adam Roberts, Counterterrorism and the Laws of War: A Critique of the U.S. Approach, Remarks at the Brookings Institution (Mar. 11, 2002), at <http://www.brookings.edu/events/2002/0311terrorism.aspx> (“There is a long record of certain people coming into the category of unlawful combatants—pirates, spies, saboteurs, and so on. It has been absurd that there should have been a debate about whether or not that category exists.”); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 522 (2005) (“[U]nlawful combatants or unprivileged belligerents . . . are either civilians who have joined the conflict or members of a purported military organization who do not meet the requirements for lawful combatant status.”).

⁸¹ *See* Bradley, *supra* note 80, at 402 (arguing against viewing members of terrorist groups as civilians).

⁸² Civilians are not subject to targeting unless and for such time as they take a direct part in hostilities. Additional Protocol I, *supra* note 23, Art. 51(3). Categorizing nonstate fighters as civilians would mean that the state could not target these fighters at all times, as it could a state army, but rather only “for such time” as they are participating.

Unlawful combatants, like lawful combatants, are subject to detention based on their status as combatants, although without the privileges of prisoner-of-war status.⁸³ Unlike the category of lawful combatant, however, no strictly drawn boundaries delimit the category of unlawful combatant. Such boundaries are necessary to determine what relationship an individual must have with an enemy organization in order to be detained.

This issue has stymied the U.S. federal courts in their efforts to determine the scope of U.S. detention authority in the conflict with Al Qaeda. The Supreme Court held in *Hamdi v. Rumsfeld* that the Authorization to Use Military Force (AUMF) after the 9/11 attacks authorized detaining an individual who “‘was part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.”⁸⁴ Following this decision, much legal debate has centered on the question of what relationship an individual must have with enemy forces to fall within the congressional authorization.

The Obama administration has argued that the AUMF should be interpreted in light of IHL detention authority.⁸⁵ The administration’s view is that the AUMF grants to the executive the power to detain those individuals whose relationship to Al Qaeda or the Taliban “would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.” Such a test leaves those involved in the 9/11 attacks, as well as “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,” subject to detention.⁸⁶ Unable to come up with a test for who is “part of” Al Qaeda or the Taliban, or to identify how much support is sufficiently “substantial” to justify detention,⁸⁷ the administration suggested that the test should combine formal and functional elements. Under its approach, an individual may be detained based on evidence either of formal affiliation with the enemy organization (such as an oath of loyalty) or of functional affiliation (such as joint training or staying in enemy guesthouses).

Some judges on the U.S. District Court for the District of Columbia developed a more robust membership test using law-of-war principles, referred to here as the “command-structure test.” Under that test, members of Al Qaeda and the Taliban are subject to detention if

It also means that some nonstate group members could not be targeted at all because their participation is insufficiently direct, even though someone engaged in an identical function for a state army would be subject to targeting. See Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 736–39 (2009) (commenting on perverse consequences of viewing militant groups as groups of civilians). The Israeli Supreme Court acknowledged these difficulties in concluding that Palestinian militants were civilians, but sought to resolve the concern by defining “direct participation” broadly and viewing the rest period between terrorist acts by committed militants as a form of participation. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., *supra* note 26.

⁸³ As discussed earlier, unlawful combatants would still be entitled, at a minimum, to the treatment protections of common Article 3 as a matter of customary international law.

⁸⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

⁸⁵ See Brief for Respondent, *Hamdi v. Obama* (“The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war.”). As discussed below, the D.C. Circuit rejected this view in *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010).

⁸⁶ *Hamdi v. Obama*, 616 F.Supp.2d at 67–68 (quoting Respondent’s Memorandum Regarding the Government’s Detention Authority (Mar. 13, 2009)).

⁸⁷ See Brief for Respondent, *Hamdi v. Obama* (“It is neither possible nor advisable . . . to attempt to identify, in the abstract, the precise nature and degree of ‘substantial support’ . . . that . . . would be sufficient to bring persons . . . within the foregoing framework.”).

“the individual functions or participates within or under the command structure of the organization—i.e., whether he receives and executes orders or directions.”⁸⁸ Application of this test led to conflicting answers as to whether those who “substantially support” Al Qaeda and the Taliban are subject to detention.⁸⁹

But further development of this test has been stymied by the three-judge panel of the U.S. Court of Appeals for the D.C. Circuit in *Al-Bihani v. Obama*, which explicitly rejected reliance on international law, IHL or otherwise, in interpreting the scope of detention authority granted by Congress in the AUMF. The panel held that only U.S. law is relevant to interpreting the AUMF.⁹⁰ Relying on the text of the AUMF and the Military Commissions Act of 2009, the panel concluded that individuals who have “purposefully and materially supported” hostilities against the United States or its coalition partners are subject to detention as unprivileged belligerents.⁹¹ This definition has been criticized as overbroad because a supporter of Al Qaeda or the Taliban whose function does not resemble that of a combatant, such as a business associate, would be subject to detention until the cessation of hostilities.⁹²

Other scholars and groups completely reject the war paradigm—and with it, IHL—as a means of analyzing detention questions. They contend, instead, that national law, constrained by international human rights law, is the applicable legal framework for detention in a conflict with a nonstate actor. Some of these individuals and groups argue that a state may detain only those whom it plans to prosecute for criminal violations, is criminally prosecuting, or has criminally convicted. But as we explained above, this narrow view is problematic as a matter of legal interpretation, given that human rights law actually permits security detention in some instances, and that criminal prosecution is often impractical as a matter of policy.⁹³

That said, human rights law provides limited guidance on who is subject to security detention.⁹⁴ The only substantive restriction on security detention in the ICCPR is that such detention should not be “arbitrary,”⁹⁵ which “is not to be equated with ‘against the law’, but must

⁸⁸ *Hamlily v. Obama*, 616 F.Supp.2d at 75; see also Chesney & Goldsmith, *supra* note 57, at 1122 (advocating similar approach).

⁸⁹ See *Hamlily v. Obama*, 616 F.Supp.2d at 76 (explaining difference in application of command-structure test from a previous D.C. district court opinion).

⁹⁰ *Al-Bihani v. Obama*, 590 F.3d at 871 (describing as “mistaken” the contention that AUMF detention authority must be read in light of international law). Seven judges of the D.C. Circuit subsequently indicated their view that this statement was dictum. *Al-Bihani v. Obama*, 619 F.3d 1, 1 (2010) (Sentelle, J., concurring in denial of reh’g en banc). The conclusion also appears to be at odds with the Supreme Court decision in *Hamdi*, where the Court looked to international law to interpret the AUMF. See *Hamdi v. Rumsfeld*, 542 U.S. at 518 (plurality opinion) (relying on international law to conclude that AUMF grants authority to the executive to detain members of the Taliban); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2092 (2005) (arguing law of war is limiting principle on detention authorized by AUMF).

⁹¹ *Al-Bihani v. Obama*, 590 F.3d at 872.

⁹² See, e.g., Goodman, *supra* note 66, at 62 n.74 (summarizing statements from senators critical of this definition); Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 777 (2007) (“One who merely materially supports hostilities is not a fighter or combatant.”); Joanne Mariner, *A First Look at the Military Commissions Act of 2009*, at <http://writ.news.findlaw.com/mariner/20091104.html>. (“[T]here is no basis in the laws of war for treating people who merely support hostilities as belligerents. So in this sense, the law is clearly overbroad.”).

⁹³ See *supra* notes 50–59 and accompanying text (describing problems with “prosecute or release” model).

⁹⁴ See Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE J. INT’L L. 369, 389 (2008) (arguing that more attention needs to be paid to substantive standards for preventive detention in human rights jurisprudence).

⁹⁵ See ICCPR, *supra* note 48, Art. 9(1) (“No one shall be subjected to arbitrary arrest or detention.”).

be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and illegality.”⁹⁶ In practical terms, all that is required is that detention be reasonably necessary for a legitimate government purpose, such as security.⁹⁷ Thus, the Human Rights Committee criticized the Israeli practice of detaining Lebanese as “bargaining chips” even though the Lebanese posed no threat to Israeli security.⁹⁸ The Committee has also policed the length of preventive detention, as we discuss further below. But beyond these points, existing standards do not tell us what kinds of security threats merit noncriminal detention.

In our view, therefore, law must be developed to provide additional guidance on who is subject to detention in conflicts with nonstate actors. As states try to address this question, it appears to us that two alternative routes have emerged that require further consideration. First, states could adopt a rule permitting detention of those members of nonstate groups who pose an imperative threat to security. The Obama administration recently announced that a similar standard would be applied by Periodic Review Boards determining whether continued detention is mandated for those whom the administration originally designated for detention or prosecution.⁹⁹ This regime is premised on individualized determinations of prospective threat, as provided in the Fourth Geneva Convention for protected persons and in preventive detention regimes permitted by human rights law.

If such an approach is adopted, consideration must be given to the degree of discretion that international law should grant states in determining whether a particular kind and intensity of security risk merits detention. Our experience explaining U.S. detention criteria to our allies suggests discomfort with a system that affords states too wide a discretion in this area. Slippery-slope concerns about expansion of noncriminal detention into other areas may explain part of the discomfort.¹⁰⁰ Establishing this type of detention regime also requires states to develop relevant procedures to predict future dangerousness—which, as we discuss in part III, may be difficult.

Second, states could set boundaries around the category of unlawful combatants by developing workable criteria for determining which members of nonstate groups should, like lawful combatants, be detained under the laws of war based on their status.¹⁰¹ The inquiry under such

⁹⁶ UN Human Rights Comm., Views: Communication No. 1085/2002, para. 8.3, UN Doc. CCPR/C/86/D/1085/2002 (2006).

⁹⁷ See UN Human Rights Comm., Views: Communication No. 1324/2004, para. 7.2, UN Doc. CCPR/C/88/D/1324/2004 (2006) (explaining that detention is “arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought”).

⁹⁸ See UN Human Rights Comm., Concluding Observations: Israel, para. 21, UN Doc. CCPR/C/79/Add.93 (1998) (criticizing practice of holding Lebanese as bargaining chips in return for captured Israeli soldiers or their corpses).

⁹⁹ Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

¹⁰⁰ See David C. Fathi, *Dangers of a Preventive Detention Law*, BOSTON GLOBE, Jan. 1, 2009, at A19 (arguing that allowing preventive detention without requirement of mental illness risks “civil commitment exception from swallowing the rule that those whom the government wants to imprison must first be provided with the protections of a criminal trial”); cf. *Allen v. Illinois*, 478 U.S. 364, 380 (Stevens, J., dissenting) (arguing that to allow civil commitment statute for sexual predators to evade Fifth Amendment requirements could lead to expansion of civil commitment statutes to avoid constitutional protections for criminal defendants).

¹⁰¹ An alternative to preventive, wartime detention would be to criminalize membership in an enemy organization. Indeed, many of the criteria suggested below for determining membership in an enemy nonstate group are acts that are illegal under the domestic law of many states. See, e.g., 18 U.S.C. §2339 (2010) (criminalizing various acts as material support for terrorism). Criminalizing membership in enemy nonstate groups is limited by national and international law protections for freedom of association. See, e.g., *Scales v. United States*, 367 U.S. 203, 222

an approach would focus not on whether any particular individual presents a prospective risk, but on whether the individual falls within a category subject to detention.

Several potential ways of moving forward under this rubric are available. One option is to develop further the command-structure criteria that have been used in the D.C. district courts in the Guantánamo habeas litigation. Under that test, individuals who give or receive orders from nonstate groups with which a state is at war would be subject to detention. An alternative approach is to focus on the function of the individual, allowing for detention of those group members whose functions most closely match those of traditional combatants.¹⁰² Yet another possibility, proposed by the Obama administration (and mentioned earlier), is to create a hybrid set of criteria that allows for detention when individuals either satisfy formal indicia of membership in particular organizations (such as a formal oath of loyalty to the group, as is sometimes used by Al Qaeda) or engage in activities that create a functional equivalent.

The advantage of a categorical approach is that it is more amenable to a “single-shot” process because the only question is whether an individual falls within the category subject to detention. But using a particular category to define unlawful combatant subject to detention would leave open the question of when membership in that category is no longer a sufficient basis for detention. The traditional answer for armed conflict—namely, ending detention at the end of hostilities—breaks down in these conflicts, as we discuss in part IV.

Developing either approach more fully would go a long way toward clarifying the scope of detention authority for states in conflicts with nonstate actors.

III. WHAT PROCEDURAL PROTECTIONS FOR DETAINEES?

Our second question is what procedures should be made available to detainees for evaluating the lawfulness of their detention.¹⁰³ Foreign governments and nongovernmental and intergovernmental organizations sharply criticized the Bush administration with respect to the procedures it provided to detainees in the conflict with Al Qaeda and the Taliban. The Bush administration generally resisted providing detainees process—from failing to create an administrative process to review the individual cases before being pressured by the federal courts, to opposition to federal court involvement in cases concerning detainees held outside the United States.

We believe those decisions to have been poor policy, given the nature of conflicts with nonstate actors. Legal process is needed to determine whether any particular individual is subject to detention, because of the high risk of erroneously identifying individuals as members of nonstate groups. Nonstate fighters are unlikely to wear uniforms or carry identification cards that clearly

(1961) (describing “close constitutional questions” created if Congress criminalized “passive” membership in an organization); *id.* at 263–64 (Douglas, J., dissenting) (arguing that criminalization of even active membership in an organization violates freedom of association unless the actions are themselves criminal). In any event, as we discussed above, we are skeptical whether it is practical in the context of military conflicts with nonstate actors to require states to hold a criminal trials in order to prove the acts required for detention of individuals captured outside their territory.

¹⁰² The ICRC has used a functional approach to determine which members of nonstate groups should be treated like combatants for targeting purposes. The “continuous combat function” test allows states to target—in the same manner as combatants—members of armed groups whose “continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities.” INT’L COMM. RED CROSS, *supra* note 9, at 34.

¹⁰³ The two questions are related. The substantive test for detention will influence the kind of process needed to evaluate the test. *See Waxman, supra* note 56, at 25 (discussing interrelationship between substantive definition of who may be detained and process provided).

indicate membership in the group. And these fighters have every incentive to obfuscate regarding their membership: they are subject to prosecution for their belligerent acts due to a lack of combatant immunity, and are unlikely to receive prisoner-of-war privileges from admitting combatant activity.

Given these factors, it is surprising that the Geneva Conventions provisions governing non-international armed conflict are silent on the availability of review procedures. Common Article 3, Article 75 of Additional Protocol I, and Additional Protocol II, while all contemplating detention of enemy fighters, do not require states to employ any particular set of procedures to determine who is subject to detention.¹⁰⁴

As with the question of who is subject to detention, rules from international armed conflict are inadequate to fill the gap. In international armed conflicts most combatants are detained without any prior process confirming that they are subject to detention. No such process is needed because most lawful combatants do not contest that they engaged in belligerent acts. Unlike non-state fighters, lawful combatants benefit from prisoner-of-war protections linked to their status—a powerful incentive to admit to that status. Challenges would typically be futile in any event since combatants are so often captured in uniform, on the battlefield, in the course of belligerent acts.

The only detention-related procedure specified for combatants in the Third Geneva Convention is Article 5.¹⁰⁵ “Should any doubt arise” whether a detainee who has committed “a belligerent act” deserves prisoner-of-war status, Article 5 provides that he should “enjoy the protection” of the Third Geneva Convention until his status is determined otherwise “by a competent tribunal.” Article 5 tribunals were envisioned to perform a limited, but important, function: to determine whether a detained person who has committed a belligerent act receives prisoner-of-war status.¹⁰⁶ But because Article 5 grants the right of a tribunal only to those who have committed belligerent acts, it is not strictly relevant to the antecedent question of whether the detainee has actually committed a belligerent act.¹⁰⁷

Text aside, it is consistent with the spirit of Article 5 for the “competent tribunal” to consider whether the detainee in question is not a belligerent but an innocent civilian who has never

¹⁰⁴ See Kellenberger, *supra* note 2 (describing ICRC conclusions that “[t]here are simply no procedural safeguards in treaties of humanitarian law to deal with [security internees] during non-international armed conflicts.”).

¹⁰⁵ Article 75 of Additional Protocol I provides procedural protections accompanying trials on criminal charges of combatants in an international armed conflict. It provides nothing, however, regarding the procedures that must accompany the decision to detain the combatant.

¹⁰⁶ THIRD GENEVA CONVENTION COMMENTARY, *supra* note 26, at 77 (explaining that a consequence of the tribunal determination would be whether detainee could be prosecuted for “taking part in the fight without the right to do so”).

¹⁰⁷ The limited scope of Article 5 is confirmed by the provision’s negotiating history. The original draft text of Article 5(2) read as follows: “Should any doubt arise whether any of these persons belong to one of the categories named in said Article” FOURTH GENEVA CONVENTION COMMENTARY, *supra* note 74, at 77.

During the negotiation of the Geneva Conventions, the Dutch proposed an amendment limiting “these persons” entitled to a “competent tribunal” to persons who had committed a belligerent act and fell into the powers of the enemy. This amendment reflected the concern that captured prisoners who had committed belligerent acts were subject to summary execution as *franc tireurs* and therefore needed a competent tribunal to adjudicate their status. See FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 270–71 (1949) (quoting Dutch representative explaining that multiple individuals needed to be involved in determining whether someone who committed a belligerent act deserved prisoner-of-war status because of the risk that “he will be considered to be a franc tireur and be put against the wall and shot on the spot.”); see also FOURTH GENEVA CONVENTION COMMENTARY, *supra* note 74, at 78 (stating that the Dutch clarification of who received Article 5 tribunals “reduce[d] the number of doubtful cases in any future conflict”).

committed a belligerent act.¹⁰⁸ U.S. Army Regulation 190-8, which implements Article 5 for the United States, specifically allows U.S. military tribunals to inquire whether a captured person is an “[i]nnocent civilian who should be immediately returned to his home or released.”¹⁰⁹ The Bush administration declined to provide tribunals under AR 190-8 to determine the status of captured Al Qaeda or Taliban members because the president found that no doubt existed as to whether they deserved such status.¹¹⁰ This decision conflated the question of whether members of the Taliban and Al Qaeda qualified for prisoner-of-war status with the separate question of whether the detainees were, in fact, affiliated with those groups.¹¹¹ Given the doubts that many detainees were raising regarding their relationship with the enemy organizations, AR 190-8 tribunals could have played an important role in determining whether the detainees were actually belligerents. This departure from traditional U.S. military practice resulted in the detention of some apparently uninvolved civilians for years longer than necessary.¹¹²

After the Supreme Court’s 2004 decisions in *Rasul*¹¹³ and *Hamdi*,¹¹⁴ the United States began providing detainees with Combatant Status Review Tribunals (CSRTs) that were patterned on the procedures of AR 190-8.¹¹⁵ Despite the use of familiar procedures, however, CSRTs were criticized by the U.S. Supreme Court, among others, for their failure to allow detainees legal representation during hearings, their overreliance on hearsay and classified evidence, and detainees’ limited opportunity to introduce exculpatory evidence or to rebut the evidence against them.¹¹⁶ After the Detainee Treatment Act of 2005 replaced habeas corpus

¹⁰⁸ See Murphy, *supra* note 67, at 1131 (arguing that “spirit” of Article 5 encompasses this question).

¹⁰⁹ U.S. Army, Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, para. 1-6(e)(10)(c) (Oct. 1, 1997), at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf> [hereinafter Army Regulation 190-8].

¹¹⁰ See Bush memorandum, *supra* note 79, para. 2(d) (finding that Al Qaeda and Taliban fighters were not entitled to prisoner-of-war status); see also Katharine Q. Seelye, *Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (quoting then Secretary of Defense Rumsfeld explaining decision not to grant Article 5 hearings).

¹¹¹ The question of whether actual Taliban members are entitled to prisoner-of-war status has been the subject of intense academic debate. See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 372–73 & nn. 24–25 (2004) (summarizing debate regarding prisoner-of-war status in conflict with Al Qaeda and the Taliban).

¹¹² Detainees were screened by the U.S. military after capture on the battlefield and later at a centralized detention facility to ensure that only belligerents were subject to further detention. Brief for Respondents at 5–6, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343). But there was no formalized process of executive branch review outside the theater of operations, or any external check on that determination, including no right to legal representation or judicial review. See *id.* at 13–16 (summarizing U.S. government arguments against judicial imposition of formalized review requirements at Guantánamo Bay). As a consequence, only about one-third of the detainees initially brought to Guantánamo Bay were linked to Al Qaeda. BENJAMIN WITTES & ZAAHIRA WYNE, *THE CURRENT DETAINEE POPULATION AT GUANTANAMO: AN EMPIRICAL STUDY 2* (2008), at http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx. Subsequent judicial review demonstrated a large percentage of detainees were held without adequate evidence of their participation in the conflict. See WITTES ET AL., *supra* note 79, at 10 (explaining that in three-fourths of Guantánamo habeas cases, the Court has ordered the detainee released).

¹¹³ See *Rasul v. Bush*, *supra* note 112, at 485 (holding that the federal habeas statute allowed courts to hear petitions filed by detainees at Guantánamo Bay).

¹¹⁴ See *Hamdi v. Rumsfeld*, *supra* note 84, at 533 (holding that the Fifth Amendment Due Process Clause required that a U.S. citizen picked up on the battlefield in Afghanistan be provided both notice of the reasons for his detention and the opportunity to rebut those reasons in front of a neutral decision maker).

¹¹⁵ See Wolfowitz memorandum, *supra* note 79 (creating CSRTs).

¹¹⁶ See *Boumediene v. Bush*, 553 U.S. 723 (2008) (criticizing CSRTs for limiting, because of lack of counsel, detainees’ opportunity to present exculpatory evidence). The Defense Department also employed personnel for the tribunals who lacked experience in evaluating the intelligence information that was generally the basis for government detention. Declaration of Lt. Col. Stephen Abraham, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir., 2007);

review with more limited review of the CSRT determinations in the U.S. federal courts,¹¹⁷ the process was also criticized for providing inadequate judicial supervision of detention decisions.¹¹⁸

These criticisms reflect the failure of Article 5 to prescribe adequate procedures to govern tribunals making status determinations.¹¹⁹ Military, civilian, and administrative tribunals all potentially meet the article's requirements.¹²⁰ Panels of military officers,¹²¹ a single military legal officer,¹²² and courts are used by different states to conduct Article 5 reviews.¹²³ The article also includes no requirements concerning counsel or appeal. Whereas some states provide legal representation at hearings at the taxpayer's expense,¹²⁴ others provide only assistance from military officers (as occurs with CSRTs)¹²⁵ or no assistance at all.¹²⁶ States differ, too, concerning the right to appeal, with some allowing appeals only to military officials,¹²⁷ and others to higher-level courts.¹²⁸ Since the criticisms of CSRT procedures would also apply to Article 5 tribunals, it is fair to infer that procedures beyond those required by the Third Geneva Convention need to be developed.

see also Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1205 (2007) (criticizing CSRTs for restrictions on counsel and for unfair evidentiary rules); Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433, 451–52 (2007) (same).

¹¹⁷ Detainee Treatment Act of 2005, §1005 (2006).

¹¹⁸ *See, e.g.*, Brian J. Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009, 1034–35 (2007) (criticizing Detainee Treatment Act review scheme); Rona, *supra* note 40, at 148–49 (same). In *Boumediene v. Bush*, 553 U.S. at 732, the Court held that detainees held at Guantánamo Bay are protected by the Suspension Clause, and found Congress acted unconstitutionally in stripping their habeas rights.

¹¹⁹ Of course, Article 5 does expect that tribunals be “fair, competent, and impartial.” *See* United States v. Noriega, 808 F.Supp. 791, 796 (S.D. Fla. 1992) (describing concerns of the drafters of the Geneva Conventions). The lack of opportunity for Guantánamo detainees to rebut secret evidence and to introduce exculpatory evidence has raised concerns about fairness.

¹²⁰ The original text of Article 5 proposed resolution of such doubt by a “responsible authority.” This text was replaced by “competent tribunal” in order to preclude giving responsibility for this determination to a single person of subordinate authority. THIRD GENEVA CONVENTION COMMENTARY, *supra* note 26, at 77; *see also* Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What If There Were a War and No One Could Be Detained Without an Attorney?*, 34 DENV. J. INT'L L. & POL'Y 63, 79 (2006) (“A ‘competent tribunal’ is not based on the law enforcement model; Article 5 tribunals are not courts.”).

¹²¹ The United States uses a panel of three commissioned officers, one of whom must be of field grade, to conduct Article 5 reviews. Army Regulation 190-8, *supra* note 111, para. 1-6(c).

¹²² *See* Ministry of National Defence, Regulations Respecting the Determination of the Entitlement of Persons Detained by the Canadian Forces to Prisoner-of-War Status, SOR/91-134 (Jan. 25, 1991) (Can.), at <http://www.canlii.org/en/ca/laws/regu/sor-91-134/latest/sor-91-134.html> (allowing military authority to appoint a military legal officer to conduct review).

¹²³ *See* Geneva Conventions Act, 1957, Part III, §10(A) (Austl.) (granting jurisdiction to the Supreme Court of the state or territory where person is being held to hear status-review claims); Incarceration of Unlawful Combatants Law, sec. 5 (2002) (Isr.), at <http://www.justice.gov.il/MOJHeb/HeskeminVeKishreiHutz/KishreiChutz/HukimEnglish/> (granting judges of district court the authority to determine whether prisoner does not meet requirement for prisoner-of-war status).

¹²⁴ *See* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 587 (2002) (describing practice in the United Kingdom).

¹²⁵ Ministry of National Defence, *supra* note 124, sec. 10 (providing for an officer or noncommissioned member of the military to assist the detainee).

¹²⁶ U.S. Army Regulation 190-8 makes no mention of representation by counsel or military personnel to assist the detainee.

¹²⁷ Ministry of National Defence, *supra* note 122, sec. 17 (allowing military authority that appointed review officer to review determination).

¹²⁸ *See* Naqvi, *supra* note 124, at 591 (explaining that Israel allows appeal of prisoner-of-war determinations to its Supreme Court).

Both the Fourth Geneva Convention and human rights law provide some useful procedural guidance. Unlike the Third Geneva Convention, the Fourth Geneva Convention does specify procedural protections that must be provided when detaining protected persons: (1) initial review by “an appropriate court or administrative board” specified by the state,¹²⁹ (2) right of appeal, whether to an administrative body or court,¹³⁰ and (3) at least twice-yearly review of detention decisions.¹³¹ These rights are supplemented by Article 75 of Additional Protocol I, which grants detainees the right to know the reasons for their detention.¹³² Civilian protected persons must be provided greater process than combatants because of the different nature of the detention inquiry. Individualized assessment of whether a protected person poses a security risk, as is contemplated by the Fourth Geneva Convention, requires process. As discussed above, however, it is unlikely that nonstate fighters would qualify for protected person status as a matter of law, although the procedural requirements are a valuable touchstone for legal development.

The IHL procedural requirements for detention of protected persons are somewhat similar to the procedural requirements found in human rights law governing administrative detention. Human rights treaties, like Article 75, require that states give detainees notice of the reasons for their detention.¹³³ Unlike IHL, however, the opportunity to challenge that detention promptly must occur in front of a judicial body,¹³⁴ presumably with counsel,¹³⁵ and include appeal to a higher-level court. These general similarities have led to a consensus among scholars regarding the need to provide detainees notice of the reasons for their detention,¹³⁶ the opportunity to rebut those reasons in front of independent decision makers,¹³⁷ and the right to appeal adverse judgments.¹³⁸

¹²⁹ Geneva Convention IV, *supra* note 1, Art. 43. Article 78 does not spell out the locus of review, but the ICRC commentary suggests a requirement similar to Article 43. See *FOURTH GENEVA CONVENTION COMMENTARY*, *supra* note 74, at 368 (explaining that occupying power “must observe the stipulations of Article 43, which contains a precise and detailed statement of the procedure to be followed when a protected person . . . is interned”).

¹³⁰ Geneva Convention IV, *supra* note 1, Art. 78. Whether appeals are heard by a “court” or a “board” is left to the occupying power. *FOURTH GENEVA CONVENTION COMMENTARY*, *supra* note 74, at 368–69. Protected persons detained in the territory of a party to the conflict have no comparable right.

¹³¹ Geneva Convention IV, *supra* note 1, Arts. 43, 78.

¹³² Additional Protocol I, *supra* note 23, Art. 75(3) (“Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.”).

¹³³ See, e.g., ICCPR, *supra* note 48, Art. 9(2) (“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”) The Human Rights Committee has interpreted this provision to extend a right to administrative detainees to know the reasons for their detention. UN Human Rights Comm., *supra* note 52, para. 4.

¹³⁴ See ICCPR, *supra* note 48, Art. 9(4) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”); American Convention, *supra* note 49, Art. 7(6) (“Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.”); European Convention on Human Rights, *supra* note 49, Art. 5(4) (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”).

¹³⁵ See UN Human Rights Comm., Concluding Observations: Israel, para. 13, UN Doc. CCPR/CO/78/ISR (2003) (recommending Israel provide anyone detained access to a lawyer within forty-eight hours); see also *Hamdi v. Rumsfeld*, *supra* note 84, at 539 (holding that a U.S. citizen detained as an enemy combatant “unquestionably has the right to access to counsel” in habeas proceedings).

¹³⁶ See Chesney & Goldsmith, *supra* note 57, at 1128–29 (describing difficult evidentiary questions that follow from recognizing such a right); Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES.

While we agree with the importance of providing notice, review, and some form of appeal in conflicts with nonstate actors, implementation of these requirements creates new difficulties. One problem is posed by the prevalence of classified information in cases against nonstate actors. A body reviewing state evidence against a nonstate actor may need to assess intelligence information and foreign government communications, which the executive is traditionally loathe to share with the courts. The state may prefer to share such information in the form of intelligence summaries, but it is difficult for a court to assess such evidence without access to the sources that are the basis for intelligence reports.¹³⁹ These concerns led the U.S. government to argue in favor of administrative review of detention cases, with extremely limited court review, if it is to occur at all.¹⁴⁰

We believe that the good performance of the D.C. Circuit to date in reviewing the cases of Guantánamo detainees suggests that courts may review cases of this sort while protecting classified information. The decision in *Bismullah v. Gates* may provide a useful starting point for designing review requirements. The D.C. Circuit rejected the government's argument that *ex parte*, *in camera* review of classified information should be the norm in hearings reviewing CSRT determinations.¹⁴¹ The court held that there was a presumption that defense counsel with the requisite security clearance had a "need to know" all information about their clients' cases. But the court also allowed that in exceptional situations—involving "highly sensitive information, or information pertaining to a highly sensitive source or to anyone other than the detainee"—the government could present evidence to the court alone, *ex parte* and *in camera*.¹⁴² This outcome reflects a sensitive and sensible balance between the need to protect information and the need to protect the rights of detainees; it is a balance that must be struck in any notice and review requirement.

J. INT'L L. 403, 433 (2009) (arguing for application of Article 75 notice requirements in detentions in noninternational armed conflict); Hakimi, *supra* note 94, at 410 ("[T]he detainee must be informed of the factual basis for detention and be given a genuine opportunity to respond."); Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 384 (2005) (describing notice as requirement in both IHL and human rights law).

¹³⁷ See Chesney & Goldsmith, *supra* note 57, at 1131 (describing as "preferable" insertion of "a judicial decision-maker at the front end of the process"); Deeks, *supra* note 136, at 433 (arguing that Fourth Geneva Convention requirement of "initial review of the detention by an independent court or board" be extended to detainees in noninternational armed conflict); Pejic, *supra* note 136, at 386 ("Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body").

¹³⁸ See Deeks, *supra* note 136 (arguing for "right of appeal" in detention in noninternational armed conflict).

¹³⁹ See *Mahjoub v. Canada*, [2005] F.C. 156, para. 54 (Can.) (refusing to accept Immigration Ministry finding that Mahjoub posed a threat to Canada, absent evidence that minister had independently reviewed intelligence information, including source material); *Parhat v. Gates*, 532 F.3d 834, 846–47 (D.C. Cir. 2008) (holding government evidence could not be assessed without consideration of the reliability of the sources).

¹⁴⁰ See Brief for Respondent at 25–27, *Hamdi v. Rumsfeld*, *supra* note 84 (No. 03–6696) (arguing that the "Executive's Determination That an Individual Is an Enemy Combatant Is Entitled to the Utmost Deference by a Court"); Brief for Respondents at 52–59, *Rasul v. Bush*, *supra* note 112 (same).

The Obama administration has questioned in other contexts the role of the judiciary in reviewing classified information. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (affirming government contention that suit concerning extraordinary renditions could not be heard, because of the link between the allegations in the case and classified information).

¹⁴¹ See *Bismullah v. Gates*, *supra* note 116, at 187 ("Counsel simply cannot argue, nor can the court determine, whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence.").

¹⁴² See *id.* at 187–88 (suggesting judicial deference to executive branch determinations that evidence was so sensitive that disclosure was impossible).

A second difficulty concerning judicial review is whether it is feasible in conflicts having larger numbers of detainees.¹⁴³ For example, the demands that the U.S. federal courts have imposed on the government in justifying detention at Guantánamo could not practically be applied if many more detainees were involved. In 2007, the D.C. Circuit in *Bismullah v. Gates* interpreted the Detainee Treatment Act as granting the court the authority to review all reasonably available information in the government's possession bearing on the issue of whether the detainee was an enemy combatant.¹⁴⁴ In seeking en banc and later Supreme Court review of the decision, the United States explained that meeting such demands required "hundreds of man-hours" per case, diverting valuable intelligence and military resources from the ongoing war effort.¹⁴⁵ While these demands may be met relatively easily with small numbers of detainees, such as the population at Guantánamo, they would be impractical if imposed in conflicts with nonstate actors resulting in thousands of detainees.¹⁴⁶ In those cases, administrative review may be more realistic.

Beyond these considerations regarding the scope of the right to notice and review, we believe that further legal development is needed on three procedural questions that will arise during reviews. First, procedural minimums for many aspects of detention hearings need to be established. How should the reviewing entity handle important questions such as the standard of proof, evidentiary restrictions, and the obligation to share information with the detainee? How quickly must the review occur? Detention in a conflict with a nonstate actor requires standards on these issues that are less stringent than in peacetime criminal detention but that are more exacting than in traditional international armed conflict. Although different legal systems might reach different answers to these questions, an international floor would help states structure their procedures.

Second, it must be determined whether reviews can be conducted only once or whether periodic status reviews are required. Here, the substance of the review, as discussed in the part II, is critical. If individualized dangerousness is the standard, as is the case in administrative detention governed by human rights law and by security detention governed by the Fourth Geneva Convention, the review procedures will need to allow for periodic assessment of whether the threat persists over time. By contrast, when the inquiry is whether a detainee falls within a category where detention is permitted, such as detention of combatants under the Third Geneva Convention, a one-time determination that the detainee falls within the category may be sufficient.¹⁴⁷

Third, the law should provide guidance on what role geography should play in determining what process, if any, is due. The U.S. federal courts have linked the level of process afforded to detainees with the locations where they are detained. Thus, detainees held at Guantánamo

¹⁴³ See *id.* at 435 (questioning whether it is feasible to provide counsel and judicial review in conflicts in which state detains thousands of individuals); Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 622 (2008) (same).

¹⁴⁴ *Bismullah v. Gates*, *supra* note 116, at 180.

¹⁴⁵ Petition for Writ of Certiorari at 29, *Gates v. Bismullah*, 554 U.S. 913 (2008) (No. 07-1054).

¹⁴⁶ The Obama administration apparently agrees. See Motion for Certification of This Court's April 2, 2009 Order for Interlocutory Appeal Pursuant to 28 U.S.C. §1292(b), *Maqaleh v. Gates*, 604 F.Supp.2d 205 (D. D.C. 2009), *rev'd* 605 F.3d 84 (D.C. Cir. 2010) (arguing that so many individuals would be able to bring habeas petitions in Afghanistan under the district court's ruling that implementation would be prohibitively difficult).

¹⁴⁷ See Waxman, *supra* note 56, at 35.

Bay receive substantial process, including the right of habeas corpus, whereas detainees held in Afghanistan and Iraq receive far less, even when they are picked up somewhere else and then transferred there.¹⁴⁸ At first blush, this distinction makes some sense. It is far more difficult to conduct hearings and court reviews when individuals are located in an area of active hostilities. And to the extent that detainees held near an active battlefield are captured in combat, the need for process may be less, given the dearth of innocent explanations for firing a gun at a state's armed forces. Capturing forces may also be less equipped in heavy fighting to collect the evidence that additional process would require.

Despite the superficial attractions of making geographic distinctions in relation to the detention of nonstate fighters, the situation is not so straightforward, and criticisms abound. Many potential captures, both near a zone of active hostilities and away, involve individuals in civilian settings who will be difficult to distinguish from actual civilians, creating a need for greater process rather than less. The very concept of a battlefield may be itself difficult to maintain when operations are taking place in urban settings or hostile villages. And allowing procedural requirements to vary based on geography creates perverse incentives for states. If, as the D.C. Circuit has held, states may capture individuals away from an area of active hostilities but then bring them to one and thereby avoid providing process, they will have an incentive to do just that.¹⁴⁹ Such an incentive is directly contrary to the humanitarian impulses of both the Third and Fourth Geneva Conventions, which require shielding captured persons from the dangers posed by active warfare.¹⁵⁰ Equally important, moving detainees to a battlefield detention facility does not either address or reduce the difficult factual questions surrounding their detention. Further consideration needs to be given to modulating process requirements to account for geographic differences, without creating zones with no procedural requirements of any sort.

IV. WHEN DOES THE CONFLICT END?

A major reason for the intense debate on the scope of detention authority and the procedural safeguards for detainees is concern about the length of detention. Foreign governments and human rights groups frequently complained to us that detention as a combatant in the conflict with Al Qaeda and the Taliban amounted to a sentence of life imprisonment.

The source of this complaint is that the United States has applied the IHL end-of-detention rule applicable in noninternational armed conflict to detention of Al Qaeda and Taliban members. As a matter of customary IHL, and as specifically provided in Additional Protocol II, enemy combatants may be detained until at least the end of active hostilities, and perhaps longer. Article 2(2) of Additional Protocol II specifies that the treaty's treatment protections extend beyond the end of the armed conflict "until the end of such deprivation or restriction

¹⁴⁸ See *Maqaleh v. Gates*, 605 F.3d at 87 (holding detainees picked up outside of Afghanistan and transported there have no right of habeas corpus).

¹⁴⁹ *Id.*

¹⁵⁰ See Geneva Convention III, *supra* note 1, Art. 19 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."); Geneva Convention IV, *supra* note 1, Art. 83 ("The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.").

of liberty.”¹⁵¹ The official ICRC commentary on Additional Protocol II explains that while “in principle” detentions should terminate at the “end of active hostilities,” they may continue after the end of fighting “for security reasons.”¹⁵² Critics asked us the reasonable question of how the United States would ever identify the “end of active hostilities.”¹⁵³

This indeterminacy is inherent in a rule premised on an event (end of hostilities) whose timing is, by definition, unknown while hostilities continue. Detention until the end of active hostilities is authorized because it is necessary to prevent combatants returning to the battlefield. When the fighting ends, the justification for detention evaporates, at which point the detaining state becomes obligated to release its prisoners. But as sensible as this justification may be, the rule subjects wartime prisoners to indefinite, potentially long-term detention.

Identifying the end of active hostilities presents difficulties even in international armed conflicts. The Korean War ended with an armistice agreement rather than a formal peace treaty, and cross-border skirmishes occur to this day.¹⁵⁴ At what point did “active hostilities” terminate? Still, one can at least envision how most international armed conflicts will end. By contrast, it is unclear as a practical matter how a state will identify the end of many conflicts involving nonstate actors.¹⁵⁵ As a general matter, conflicts with nonstate actors will not end with the signing of a formal surrender document on a battleship. Low-intensity hostilities may continue for generations, especially if a proliferation of nonstate groups operating under separate commands makes a total end to fighting difficult.¹⁵⁶ The result is that a norm that requires release and repatriation only upon cessation of active hostilities may lead to life imprisonment. Such a result may be an unduly harsh consequence of involvement with a nonstate group.¹⁵⁷

¹⁵¹ See Additional Protocol II, *supra* note 274, Art. 2(2) (“At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict . . . shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.”).

¹⁵² COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1360 (Yves Sandoz et al., 1987). Because traditional noninternational armed conflicts are internal conflicts, internal security reasons may give states continuing security rationales for maintaining detention after the cessation of active hostilities, an option not available in international armed conflict. See Geneva Convention III, *supra* note 1, Art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

¹⁵³ It is unclear whether the federal courts will accept detention until the end of active hostilities based on the finding that a detainee is a member of Al Qaeda or the Taliban. See *Hamdi v. Rumsfeld*, *supra* note 84, at 521 (O’Connor, J., plurality) (“If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, [detention authority predicated on the law of war] may unravel.”).

¹⁵⁴ See Choe Sang-Hun, *Korean Tensions Grow as South Curbs Trade to North*, N.Y. TIMES, May 24, 2010, at A1 (detailing South Korean accusation that North Korea sank a South Korean submarine).

¹⁵⁵ See Brooks, *supra* note 34, at 726 (“[T]here is no obvious point at which the U.S. will be able to declare victory and end the conflict [against terrorism].”); Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457, 484–85 (2003) (arguing that end of hostilities in the war against terrorism is impossible to picture). Of course, there are exceptions to this general pattern. Noninternational armed conflicts with traditional rebel groups that hold and govern territory are more subject to a formal end. For example, the conflict between Sri Lanka and the Tamil Tigers came to a definite end in 2009 with the complete military defeat of the latter. See Somini Sengupta & Seth Mydans, *Rebels Routed in Sri Lanka After 25 Years of War*, N.Y. TIMES, May 18, 2009, at A1 (reporting on announcement from the Tigers that its fight against the Sri Lankan government had “reached its bitter end.”).

¹⁵⁶ See Waxman, *supra* note 39, at 435–36.

¹⁵⁷ See *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 465–66 (D.D.C. 2005) (“Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.”).

Unhappiness with the IHL norm requires identifying an alternative, three of which have been previously discussed elsewhere. One approach is to tie conflicts with nonstate actors to related, traditional international armed conflicts whenever possible. Under this approach, the end of the traditional international armed conflict would also mark the end of the conflict with the nonstate actor, at least for detention purposes. The ICRC, for example, viewed the U.S. conflict with Al Qaeda and the Taliban as an international armed conflict. When the ICRC took the position that the international armed conflict between the United States and Afghanistan ended in June 2002, it concluded that the Geneva Conventions ceased providing a legal basis for detention without criminal charge of those picked up during the international armed conflict.¹⁵⁸ Although the ICRC recognized that a noninternational armed conflict continued between the government of Afghanistan and the Taliban (thereby justifying continued security detention), in other cases such a traditional noninternational armed conflict may not exist, meaning the end of the international armed conflict would mark the end of detention authority. For example, if Afghanistan and the Taliban were to make peace, it would be unclear whether under this approach the United States could continue to detain Al Qaeda or Taliban fighters.

Linking detention authority in conflicts with nonstate groups to associated international armed conflicts is problematic for several reasons. First, it is available only when an international armed conflict occurs in tandem with the conflict with the nonstate actor—which is often not the case. Second, identifying the end of traditional international armed conflicts can be difficult, as already discussed. Third, so long as the conflict with the nonstate actor remains ongoing, release on the basis of a related international armed conflict does not mitigate the threat posed by detainees unless their state of nationality is able and willing to ensure that they will not engage in the conflict that continues—which seems unlikely.

A second approach would be to impose a time limit on detention. Human rights law does appear to contemplate some time limit on preventive security detentions in national legal regimes, after which the state must release, prosecute, or deport the detainee—although a precise rule on duration does not exist.¹⁵⁹ The most extreme version of a temporal limit to security detention would be to fix a maximum time limit (for example, two years) on security detention.¹⁶⁰ Such a requirement would often result in outright release of detainees at the end of specified period since the reason for security detention is, in many instances, the inability to prosecute or deport the individual.

¹⁵⁸ See Adam Roberts, *The Laws of War in the War on Terror*, in INTERNATIONAL LAW AND THE WAR ON TERROR 175, 196 n.38 (Fred L. Borch & Paul S. Wilson, eds., 2003) (quoting aide-mémoire from the ICRC to the United States dated November 19, 2002); see also Allen S. Weiner, Hamdan, *Terror, War*, 11 LEWIS & CLARK L. REV. 997, 1018–19 (2007) (arguing plausible argument can be made that United States had to release all Taliban and Al Qaeda detainees after installation of transitional government in Afghanistan); AMNESTY INTERNATIONAL, U.S. DETENTIONS IN AFGHANISTAN: AN AIDE-MÉMOIRE FOR CONTINUED ACTION 3 (June 7, 2005), available at <http://www.amnesty.org/en/library/asset/AMR51/093/2005/en/4fa11d9e-d4de-11dd-8a23-d58a49c0d652/amr510932005en.pdf> (arguing that United States was obligated to release all prisoners in June 2002 that it did not intend to charge criminally). But see Murphy, *supra* note 67, at 1123 (questioning conclusion of ICRC that international armed conflict in Afghanistan ended in June 2002 despite the continued presence of tens of thousands of U.S. troops); Maqaleh v. Gates, *supra* note 148, at 97 (“It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war.”).

¹⁵⁹ See, e.g., UN Human Rights Comm., Concluding Observations: Cameroon, para. 204, UN Doc. CCPR/A/49/40 (1994) (explaining that ICCPR Article 9(4) requires a time limit on administrative detention).

¹⁶⁰ Hakimi, *supra* note 94, at 412–13 (raising as an example a two-year maximum on security detentions before detainees must be prosecuted, deported, or released).

Outright release of dangerous nonstate fighters based on a time limit, while beneficial from the perspective of detainee, raises security risks for the detaining state.¹⁶¹ A U.S. Department of Defense report concluded that nearly 20 percent of detainees who have been released from Guantánamo Bay are suspected of engaging in terrorist activity after release.¹⁶² One such detainee, who was released to Saudi Arabia in 2007, is now second in command of Al Qaeda in Yemen, the group believed to have trained the suspect who attempted to destroy a U.S. airliner during Christmas 2009.¹⁶³ Likewise, detainees returned to Kuwait in 2005 subsequently became suicide bombers in Iraq.¹⁶⁴ Releasing fighters pursuant to an arbitrary time limit would be inconsistent with the purpose of preventive detention, which is to keep those who may commit acts of violence off the battlefield.

A third approach is to terminate detention authority over individual fighters when they no longer pose a threat to the security of the state. Given the inadequacies in the current, end-of-hostilities rule, we believe this approach is the most promising. It is the approach taken in the Fourth Geneva Convention, which provides that states must terminate detention of protected persons when the detainee in question no longer poses a danger to the state.¹⁶⁵ It has also been embraced by successive U.S. administrations in the conflict with Al Qaeda and the Taliban.¹⁶⁶ Curt Bradley and Jack Goldsmith have provided the intellectual architecture for this approach. The two contend such individualized reviews are akin to reconceptualizing the end of the conflict in terms of the individual rather than the nonstate group.¹⁶⁷ When the conflict with a particular detainee is terminated, in the sense that the individual no longer poses a threat to the state, he must be released.¹⁶⁸

Key to a dangerousness regime is periodic review during detention, which allows the detaining state to assess continually the dangerousness of the detainee. As discussed above, the Fourth Geneva Convention specifies twice-annual reviews of detention decisions of civilians during armed conflict.¹⁶⁹ Dangerousness reviews could consider the detainee's past conduct, level of responsibility

¹⁶¹ *But see* CHRISTIANE SHIELDS DELESSERT, *RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES* 108 (arguing that after some time in detention, prisoners of war lose their value and therefore should be subject to release and repatriation).

¹⁶² *See* Elisabeth Bumiller, *Many Ex-detainees Said to Be Engaged in Terror*, N.Y. TIMES, Jan. 7, 2010, at A16 (citing to a classified Pentagon report). However, many critics of the Defense Department statistics allege that many of those accused of returning to the fight have done nothing more than speak critically of the United States. *See* Rajiv Chandrasekaran, *Detainees 'Return to the Fight'*, WASH. POST, Feb. 23, 2009, at A11 (quoting Mark Denbeaux and Human Rights Watch regarding their skepticism about Pentagon figures).

¹⁶³ *See* Steven Erlanger, *Yemen's Chaos Aids the Evolution of a Qaeda Cell*, N.Y. TIMES, Jan. 3, 2010, at A1 (explaining former Guantánamo detainee Said Ali al-Shihri's role in Al Qaeda in Yemen).

¹⁶⁴ Alissa J. Rubin, *Bomber's Final Messages Exhort Fighters Against U.S.*, N.Y. TIMES, May 9, 2008, at A14.

¹⁶⁵ *See* Geneva Convention IV, *supra* note 1, Art. 132 ("Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.").

¹⁶⁶ Exec. Order No. 13,567, *supra* note 99; Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantánamo Bay, Cuba, para. 1(c), Memorandum from Gordon R. England, Sec'y of the Navy, to Sec'y of State and Others (Sept. 14, 2004) (specifying purpose of review as to determine whether "the enemy combatant represents a continuing threat to the U.S. or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters").

¹⁶⁷ Bradley & Goldsmith, *supra* note 90, at 2125.

¹⁶⁸ The Bush administration tried this approach for Guantánamo detainees by establishing Administrative Review Boards (ARBs). *See* Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantánamo Bay, Cuba, *supra* note 166. While the ARBs were a good idea in theory, in reality the Defense Department allocated too few resources and provided the detainees too little process to make them effective. These failings led the Obama administration to establish its own Guantánamo Review Task Force to address much the same task.

¹⁶⁹ *See* Geneva Convention IV, *supra* note 1, Arts. 43 (requiring review "at least twice yearly"), 78 (requiring review "if possible every six months").

within the nonstate organization, statements and actions during confinement,¹⁷⁰ age, health, and psychological profile.¹⁷¹ These periodic reviews could also employ progressively higher standards of proof to justify detention. The standards could begin by permitting a review as deferential as one involving the some-evidence standard, and could progressively raise the burden, over a period of years, to clear and convincing evidence or beyond a reasonable doubt.¹⁷² Such an approach would recognize the greater liberty interests at stake as the time spent in detention increases.¹⁷³

Periodic reviews raise difficult procedural questions. One such question is where reviews should take place. Periodic reviews are resource intensive and become even more so in proportion to the procedural protections involved. The most “rights protective” approach to periodic reviews would be to conduct these hearings in national courts, with detainees afforded counsel to assist in the reviews.¹⁷⁴ But twice-annual judicial proceedings on dangerousness would limit a state’s ability to detain nonstate actors, as the time and financial resources involved could quickly overwhelm the judicial system. Moreover, even assuming that the resources exist, judges may be less well equipped than members of the military and intelligence personnel to determine whether a particular individual is dangerous. And it may be exceedingly difficult for any fact finder to determine when the dangerousness of any particular individual no longer requires detention.¹⁷⁵ If periodic review is unlikely to produce accurate results, then it is harder to justify its costs. These concerns have led both the Bush and Obama administrations to use administrative procedures to make these reviews—which, we believe, is a reasonable position. Another question, as noted above, involves the standard of proof that the state needs to satisfy to justify detention; progressively raising the standard of proof as the time in detention increases is an approach that merits careful consideration. In such reviews, a balance needs to be struck between providing detainees with a fair chance to challenge their status and ensuring that the procedural requirements are not so stringent and burdensome that maintaining detention becomes impossible. As the time spent in detention increases, the liberty costs associated with detention also increase, meaning that the balance may shift in favor of supporting more stringent evidentiary standards to support detention.

Such a review process has limits. The greater the procedural protections provided to detainees, the greater the risk of false negatives.¹⁷⁶ The discomfort with this potential outcome was apparent in the outrage expressed by members of Congress when it became known that former Guantánamo detainees were involved in the organization that assisted in the attempted bombing of a U.S.

¹⁷⁰ The U.S. federal courts are already wrestling with the question of whether a detainee may secure earlier release by renouncing his relationship with Al Qaeda and the Taliban during confinement. The district courts have divided on the question. See WITTES ET AL., *supra* note 79, at 29–31 (comparing *Basardh* and *Awad* habeas decisions).

¹⁷¹ Bradley & Goldsmith, *supra* note 90, at 2125.

¹⁷² See Hakimi, *supra* note 94, at 413 (arguing for increasing the standard of review in administrative detentions as the length of detention increases); Waxman, *supra* note 6, at 1408–12 (same).

¹⁷³ See *In re Guantanamo Detainee Cases*, *supra* note 157 (explaining that detainee liberty interest grows as the length of anticipated detention increases).

¹⁷⁴ See Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J. L. & PUB. POL’Y 149, 202–07 (2005) (arguing that periodic reviews in the U.S. conflict with Al Qaeda should take place in Article III courts, with detainees represented by counsel).

¹⁷⁵ See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 3 (2003) (describing criticism of U.S. Supreme Court decision in *Kansas v. Hendricks* allowing for civil commitment of sex offenders after the completion of criminal sentence).

¹⁷⁶ See generally Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT’L L. 245 (2009) (discussing procedural and evidentiary rigor in relation to problem of false positives and negatives).

airliner on Christmas day, 2009.¹⁷⁷ That risk is inescapable, however; it is the cost of addressing the equally problematic risk of false positives that result from inadequate process. Nevertheless, it would be wrong to infer that procedural safeguards will necessarily prevent a state from continuing to detain those who are dangerous—and for exceedingly long terms, or even life. Administrative detention regimes employed in other contexts in the United States, such as for sex offenders, often result in repeated determinations that detention must continue, as the danger remains.

V. THE END OF DETENTION: HOW, WHERE, AND WITH WHAT CONDITIONS?

Up to this point, we have considered questions that emerge from the state's desire to detain nonstate fighters. But just as vexing a problem for the state is where to send detainees after the state determines that they should be released. Whereas the release of prisoners occurs primarily after the conclusion of hostilities in international armed conflicts or traditional, land-based civil wars, issues concerning the release of detainees may arise while a conflict with a nonstate actor is ongoing if some sort of periodic review process, such as the one endorsed in the previous section, is implemented.

One of the most difficult challenges that we faced in the State Department was determining where to transfer detainees whom the Defense Department had decided to release in the conflict with Al Qaeda. These sorts of issues arise rarely in international armed conflict, in which it is assumed lawful combatants will be returned to their state of nationality, in whose armed forces they had been serving. It is also not a problem in internal conflicts, in which those detained by the state are nationals of that same state. By contrast, at Guantánamo alone, the United States detained individuals from more than forty countries.¹⁷⁸

The State Department encountered considerable logistical difficulties in returning detainees to a wide range of countries, given the time and resources involved in concluding scores of repatriation agreements. The department's efforts were made more difficult by a number of detainees who had little or no connection with their states of nationality. Some detainees at Guantánamo, for example, spent many years away from their home states prior to capture and were caught in other states fighting for Al Qaeda. Under those circumstances, should an Algerian national who spent extensive time in Bosnia, much of it illegally, be returned to Algeria or Bosnia? Sometimes we could not even identify a target state for return because no state claimed an interest in the detainee in question.

Even when the State Department could identify a state for repatriation, the department was often stymied by concerns the detainee would be mistreated after transfer. While mistreatment of returned detainees is a risk in international armed conflict, it is even more of a risk in conflicts with nonstate groups like Al Qaeda. Many of the Guantánamo detainees were nationals of states with poor human rights records. And suspected members of Al Qaeda were at particular risk because of their home states' heinous treatment records with respect to suspected Islamic militants, who are often enemies of those states as well.

¹⁷⁷ See Peter Baker & Charlie Savage, *Terror Attempt May Hinder Plans to Close Guantánamo*, N.Y. TIMES, Jan. 1, 2010, at A14 (describing Senators McCain, Graham, and Lieberman's effort to use Christmas-day attempt as reason for blocking potential transfer of Guantánamo detainees to Yemen).

¹⁷⁸ See Kathleen T. Rhem, *Detainees Living in Varied Conditions at Guantánamo*, AM. FORCES PRESS SERV., Feb. 16, 2005, at <http://www.defense.gov/news/newsarticle.aspx?id=25882> (quoting Defense Department press release).

Our experience suggests the need for clearer international rules governing repatriation questions in conflicts with nonstate actors. The ICRC has reached the same conclusion.¹⁷⁹ Unfortunately, the Geneva Conventions provisions dealing with noninternational armed conflict are generally silent on repatriation questions. Common Article 3 and Additional Protocols I and II, all of which have some application in conflicts with nonstate actors, do not provide rules for states regarding repatriation beyond the requirement of release at the cessation of active hostilities, as discussed above. Nor are the treaty provisions governing international armed conflict helpful. Article 118 of the Third Geneva Convention requires that prisoners of war be “repatriated” at the end of hostilities, and offers no alternatives.¹⁸⁰

Historically, the absence of IHL rules on repatriation questions has resulted in prisoners being returned to their home countries despite the risk of mistreatment there. After World War II the United States and the United Kingdom entered an agreement with the Soviet Union to repatriate all Soviet citizens.¹⁸¹ Soviet prisoners were therefore forcibly repatriated even when they expressed fears of mistreatment. Those fears were justified, as the Soviets treated many returned prisoners brutally; for example, many were sent to forced labor camps in Siberia, and some were even executed.¹⁸² Nevertheless, states rejected a proposal at the 1949 Geneva Conference that would have given prisoners of war the right to apply for transfer to willing states other than their home states.¹⁸³ States did not want to be legally obligated to accept detained enemy soldiers for resettlement.¹⁸⁴ They were also concerned that allowing prisoners the right to opt out of repatriation would result in detaining states pressuring prisoners of war to do so.¹⁸⁵

Despite the failure to include relevant provisions in the Geneva Conventions themselves, post-Conventions practice suggests that states are now reluctant to repatriate enemy fighters when they face substantial risk of mistreatment. After the Korean War, UN forces, led by the United States, resisted Chinese, North Korean, and Soviet demands that prisoners who feared post-transfer treatment be forcibly repatriated to North Korea; some prisoners were resettled, instead, in South Korea and the United States.¹⁸⁶ Similar practices followed the Iran-Iraq war

¹⁷⁹ See Kellenberger, *supra* note 2 (concluding that “the legal guidance available to detaining authorities [with respect to transfers] is insufficient. There is an immediate need for a set of workable substantive and procedural rules for protecting the integrity and dignity of those [who are transferred from one authority to another].”).

¹⁸⁰ Article 118 provides: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”

¹⁸¹ See Agreement Relating to Prisoners of War and Civilians Liberated by Forces Operating Under Soviet Command and Forces Operating Under United States of America Command, U.S.-Soviet Union, Art. 1, Feb. 11, 1945 (“All Soviet citizens liberated by the forces operating under United States command . . . will, without delay after their liberation, be separated from enemy prisoners of war and will be maintained separately from them in camps or points of concentration until they have been handed over to the Soviet . . . authorities . . .”).

¹⁸² See DELESSERT, *supra* note 175, at 151–56 (reporting on Soviet atrocities).

¹⁸³ The Austrian proposal would have given prisoners of war the right “to apply for their transfer to any other country which is ready to accept them.” THIRD GENEVA CONVENTION COMMENTARY, *supra* note 26, at 542.

¹⁸⁴ Meron, *supra* note 43, at 254–55. Meron explains that states were concerned that the logical corollary of a right to opt out of repatriation was a duty to offer asylum on the part of the detaining state, a duty no major state was willing to assume. *Id.* at 255.

¹⁸⁵ Such pressure is not unprecedented in modern warfare. See John Quigley, *Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War After the Close of Hostilities*, 5 AM. U. J. INT’L L. & POL’Y 73, 81 (1989) (describing ICRC’s concerns that Iran and Iraq were pressuring prisoners to oppose repatriation after their war). States may see a propaganda benefit when enemy state prisoners refuse to return to their home states. See *id.* (explaining that Iran pressured Iraqi prisoners to demonstrate against Iraq for propaganda purposes).

¹⁸⁶ See Jan P. Charnatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391, 391–94 (1953) (describing struggle between the United States and Soviet Union over this issue).

and the first Gulf war.¹⁸⁷ Likewise, in noninternational armed conflict the United States has adopted a policy not to repatriate detainees when it is more likely than not that the individual will be tortured,¹⁸⁸ although critics accused the Bush administration of failing to observe this policy uniformly.¹⁸⁹

Current state practice, as described above, evidences a broad consensus that detainees should not be sent to countries where there is reason to believe that they will be tortured or otherwise severely mistreated, though the specific contours of this protection are sometimes disputed.¹⁹⁰ This prohibition is known in international law as the principle of *non-refoulement*—for which there are three potential sources. First, the Geneva Conventions, including the provisions governing non-international armed conflict, contain a prohibition on torture and inhuman and degrading treatment. Some IHL experts have found an implied obligation from this prohibition that states not repatriate detainees when they face a substantial risk of mistreatment.¹⁹¹ While this analysis mirrors the analysis conducted by some human rights bodies as discussed below, other IHL experts have rejected such an implied obligation within the Geneva Conventions.¹⁹²

Second, the Fourth Geneva Convention restricts transfers of protected persons who may be persecuted. Article 45 prohibits the transfer of protected persons “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.” Of course, as we discussed earlier, Article 45 has limited application in a conflict with a nonstate actor, at least as a matter of treaty law, because nonstate fighters are unlikely to qualify as protected persons. Moreover, the Pictet commentary to Article 45 states that it does not prevent deportation of “aliens in individual cases when state security demands such action.”¹⁹³ Presumably, some nonstate fighters, even if deemed protected persons, would fall into this security exception.

¹⁸⁷ Meron, *supra* note 43, at 256.

¹⁸⁸ See Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, annex 1, at 57, UN Doc. CAT/C/48/Add.3 (2005):

U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds.

See also Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, §2242(a), 112 Stat. 2681-761, 822:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

¹⁸⁹ See HUM. RTS. WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2005) (claiming detainees returned from Guantánamo to Russia were mistreated after transfer).

¹⁹⁰ For a comprehensive discussion of the treaty and customary international law bases for this norm, see Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87 (Erika Feller, Volker Türk, & Frances Nicholson eds., 2003).

¹⁹¹ See Michael Byers, Legal Opinion on the December 18, 2005 “Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan,” at 3 (Apr. 7, 2006), *Amnesty Int'l Can. v. Canada*, [2008] F.C. 336 (Can.).

¹⁹² See Christopher Greenwood, Report: International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces, at 27, para. 64, *Amnesty Int'l Can. v. Canada* (arguing that neither the text of common Article 3 nor state practice supports an implied transfer obligation).

¹⁹³ See FOURTH GENEVA CONVENTION COMMENTARY, *supra* note 74, at 266 (explaining that Article 45 does not restrict expulsions of “undesirable foreigners” from state territory).

Third, international human rights law restricts transfers of individuals who will potentially encounter mistreatment. As discussed earlier, the principle of complementarity requires that human rights and IHL obligations be read consistently whenever possible. Given the shared interest in both bodies of law against transfers that would subject persons to mistreatment, application of human rights transfer restrictions to conflicts with nonstate actors is in accordance with the principle of complementarity.¹⁹⁴

Human rights law transfer restrictions are found in numerous instruments. Article 33(1) of the Convention Related to the Status of Refugees (Refugee Convention) prohibits states from expelling or returning refugees “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁹⁵ This obligation is not absolute, as the Refugee Convention contains two important exclusions from protection that relate to security considerations. Article 1(F) exempts from refugee protection individuals who are seriously suspected of having committed war crimes, crimes against the peace, or serious nonpolitical crimes outside the country of refuge.¹⁹⁶ And Article 33(2) denies *non-refoulement* protections to refugees if there are reasonable grounds for regarding the detainee a “danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (Torture Convention) provides: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁹⁷ Unlike the Refugee Convention, the Tor-

¹⁹⁴ See Emanuela-Chiara Gillard, *There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons*, 90 INT’L REV. RED CROSS 703, 706 (2008) (arguing that Refugee Convention and Torture Convention *non-refoulement* provisions apply during armed conflicts); Cordula Droegge, *Transfers of Detainees: Legal Framework, Non-refoulement and Contemporary Challenges*, 90 INT’L REV. RED CROSS 669, 676 (2008) (explaining that *lex specialis* does not preclude application of human rights *non-refoulement* protections during armed conflict). *But see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1230 (2004) (arguing that Third Geneva Convention provides complete set of treatment protections for prisoners of war precluding application of Torture Convention protections).

¹⁹⁵ Convention Relating to the Status of Refugees, Art. 33(1), July 28, 1951, 189 UNTS 150.

¹⁹⁶ See *id.*, Art. 1(F):

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

¹⁹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3(1), Dec. 10, 1984, S. TREATY DOC. NO. 20-100 (1988), 1465 UNTS 85. In its ratification of the Torture Convention in 1990, the United States entered an understanding stating that it interpreted the phrase “substantial grounds for believing” as “if it is more likely than not.” 136 CONG. REC. 36,198 (1990) (enacted). The Committee Against Torture has been critical of this understanding. See UN Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: United States of America, para. 40, UN Doc. CAT/C/USA/CO/2 (July 25, 2006) (recommending that United States withdraw its reservation).

ture Convention includes no security exclusion.¹⁹⁸ The ICCPR¹⁹⁹ and the European Convention on Human Rights²⁰⁰ have also been interpreted to include protection, with no exceptions, against transfer to face torture or cruel, inhuman, or degrading treatment.

Despite the broad consensus on the general principle that detainees should not be transferred when they face torture or other serious mistreatment, certain aspects of the principle of *non-refoulement* require further legal clarification. Many transfers in conflicts with nonstate actors are undertaken by international forces of nationals present in their home states to their home governments. This issue has arisen repeatedly with respect to transfers of prisoners from allied forces to the governments of Afghanistan and Iraq, respectively. The United States and the United Kingdom have taken the position that *non-refoulement* protection does not apply as a matter of law to in-country transfers (although both countries nonetheless seek assurances against torture as a matter of policy). Their position has been driven by practical concerns about what precisely foreign forces are to do, for example, with an Iraqi national detained in Iraq if they are prohibited from returning the person to the Iraqi government. The Fourth Geneva Convention prohibits forced transfers of protected persons out of occupied territory “regardless of their motive.”²⁰¹ The Committee Against Torture would apply Article 3 to “in country” transfers, although it has failed to provide practical suggestions on what foreign forces should do with such individuals if they cannot be returned to their home governments.²⁰² Since it appears that this situation is arising more frequently, clear law is needed on what transfer obligations exist with respect to nationals in their own territories.

It is also unclear what process must be provided to detainees in order to consider their fears of mistreatment upon repatriation. As a general matter, treaty provisions restricting transfers

¹⁹⁸ The United States has interpreted Article 3 of the Torture Convention to apply only to transfers originating from the United States. See United States Written Response to Questions Asked by the Committee Against Torture, at 32 (Apr. 28, 2006), available at <http://www.state.gov/drl/rls/68554.htm> (“[T]he United States, while recognizing that some members of the Committee may disagree, believes that Article 3 of the CAT does not impose obligations on the United States with respect to an individual who is outside the territory of the United States.”). Many international organizations and human rights groups, including the Committee Against Torture, disagree with the territorial limitations identified by the United States. See Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 673 n.65 (2006) (summarizing opposition to U.S. interpretation).

The United States has nevertheless applied the Torture Convention standard as a policy matter, albeit with some notable exceptions, in transfers from one state to another in the conflict with Al Qaeda. See *supra* note 189 (describing policy and its failings). The Obama administration recently reaffirmed this policy. See U.S. Dep’t of Justice Press Release No. 09-835, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), at <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html> (confirming U.S. policy not to transfer detainees to face torture in different scenarios).

¹⁹⁹ See UN Human Rights Comm., General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, para. 9, UN Doc. HRI/GEN/1/Rev.1 (1992) (“[S]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”).

²⁰⁰ See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), para. 88 (1989) (interpreting Article 3 to include an implicit obligation not to extradite someone when he could face treatment that, if it occurred in the transferring state, would violate Article 3); *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, para. 80 (finding *non-refoulement* obligation to be absolute); *Saadi v. Italy*, App. No. 37201/06, para. 127 (Eur. Ct. H.R. Feb. 28, 2008) (same).

²⁰¹ See Geneva Convention IV, *supra* note 1, Art. 49 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”). As discussed earlier, detainees may not be protected persons. Nevertheless, it would remain unclear precisely what an occupying power should do with a detainee if he cannot be returned to the control of his home government.

²⁰² See Gillard, *supra* note 194, at 712–15 (describing the dispute between the United Kingdom, United States, and Committee Against Torture).

based on fears of mistreatment do not contain explicit procedural requirements for assessing the risk of mistreatment. Article 32(2) of the Refugee Convention is the exception, as it does prohibit states from expelling refugees except through “due process of law,” including the right to submit evidence and be represented during an expulsion proceeding, unless “compelling reasons of national security otherwise require.” A wide range of human rights bodies have indicated *non-refoulement* has a procedural component, though without specifying what the associated procedural rights would be.²⁰³ States faced with repatriating members of nonstate groups need legal guidance on the following questions, among others: Who should be empowered to assess risk of mistreatment? What evidentiary standard should be employed? What evidence is it appropriate for the court to consider? And should the detainee be represented by counsel in such a proceeding.²⁰⁴

These open questions aside, human rights law is generally clear about *when* states should not transfer detainees; by contrast, it provides no guidance on *where* states should send detainees if torture considerations prevent repatriation. For example, when a state has a range of options with respect to a particular detainee, is the state free to choose a destination for the detainee, or does the detainee have the right to select his own end destination?²⁰⁵ By contrast, and as human rights advocates acknowledge, some situations present few plausible options for transfer.²⁰⁶

When torture considerations require resettlement of nonstate fighters outside of their home countries, doing so has proven more difficult than after more conventional conflicts. Fighters for nonstate actors may be ideologically committed to the nonstate actor’s cause, creating a security risk for any state that resettles these detainees. In contrast to the willingness of the United States and other countries to resettle Iraqi refugees after the first Gulf war, concern that detainees at Guantánamo may engage in terrorist activity after transfer has prevented third countries, including the United States, from accepting detainees for resettlement. The difficulty in identifying third countries willing to accept Guantánamo detainees for resettlement has slowed the closing of the detention facility at Guantánamo Bay.

When third-country resettlement is not possible, continued detention until a third country is located may not be permitted. Both the U.S. Supreme Court in *Zadvydas v. Davis*²⁰⁷ and the British House of Lords in *A v. Secretary of State*²⁰⁸ have struck down efforts to detain aliens

²⁰³ See *id.* at 732–36 (describing jurisprudence of European Court of Human Rights, Human Rights Committee, and Committee Against Torture recognizing a procedural element to the *non-refoulement* right without specifying the content of that right).

²⁰⁴ The D.C. Circuit has held that U.S. federal courts cannot second-guess the executive branch’s determination that a detainee being transferred from Guantánamo Bay will not be tortured after repatriation. See *Kiyemba v. Obama*, 561 F.3d 509, 514–15 (D.C. Cir. 2009) (relying on Supreme Court decision in *Munaf v. Geren*). Thus, at least for transfers from outside the United States, detainees get no judicial process on the repatriation question.

²⁰⁵ Detainees at Guantánamo Bay have, in many instances, opposed resettlement in their home countries or third countries, sometimes for reasons having nothing to do with fears of mistreatment. See Editorial, *The Clock Is Ticking: The White House and Congress Can Still Do Right by the Uighurs*, WASH. POST, Oct. 21, 2009, at A26 (explaining that a Uighur detainee refused to be resettled in Palau because that country refused to accept his brother for resettlement).

²⁰⁶ See Gillard, *supra* note 194, at 707 (regretting lack of clear answers to the practical problems posed by imposition of *non-refoulement* protections).

²⁰⁷ See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (using constitutional avoidance doctrine to conclude that Congress had not authorized indefinite detention of aliens pending deportation).

²⁰⁸ See *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56 (holding that indefinite detention of dangerous aliens pending deportation was a disproportionate restriction of European Convention rights).

indefinitely pending deportation, although the U.S. Supreme Court has not answered whether this rule applies to “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”²⁰⁹ Detainees at Guantánamo who have been ordered released but who cannot be resettled have argued that the prohibition on extended detention pending deportation entitles them to resettlement in the United States.²¹⁰

This combination of factors creates a dilemma for states looking to protect their civilian populations from the risks posed by dangerous fighters for nonstate groups. International law generally prohibits states from transferring detainees to their home countries if they will be mistreated after transfer. But alternatives, such as third-country resettlement or continued detention, may not be available as a matter of fact. Further legal development is needed to create tools to allow states simultaneously to terminate detention of nonstate actors, to respect their human rights obligations, and to protect the security of their own populations.

The role of diplomatic assurances needs to be carefully considered as the law continues to develop. These assurances—promises obtained from receiving states that they will not torture or otherwise mistreat detainees—are not used to eliminate fully the risk of post-transfer mistreatment. Rather, the United States and other states have used the assurances to reduce the risk of mistreatment to a sufficient extent that transfer may be conducted consistent with human rights obligations.²¹¹

Advocates of assurances argue that these bilateral commitments not to mistreat detainees can be effective if the assurances are monitored and penalties or costs imposed for violating them.²¹² Indeed, such a bilateral promise to the United States may be harder to violate than an amorphous treaty commitment not to mistreat nationals. Human rights groups have been critical of reliance on diplomatic assurances, however, because they note that states asked to give assurances usually have already violated international commitments not to mistreat their people.²¹³ These groups ask why these bilateral promises are any more likely to be followed. Their criticisms are bolstered by a small number of highly publicized cases in which states have mistreated returned detainees despite previous assurances to the contrary.²¹⁴

Notwithstanding these highly publicized failures, we believe that diplomatic assurances do have a role in allowing states to meet international legal obligations. The Obama administration agrees, as it recently announced its intention to continue overseas transfers pursuant to an

²⁰⁹ *Zadvydas v. Davis*, 533 U.S. at 696.

²¹⁰ See *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009) (describing argument of Chinese national Uighur detainees who claimed right to resettle in the United States). Although the D.C. Circuit rejected this claim, *id.* at 1028–29, the Supreme Court, 130 S.Ct. 1235 (2010), vacated the decision. On remand, 605 F.3d 1046 (2010), the D.C. Circuit reinstated, with modifications, its earlier holding.

²¹¹ For example, Article 3 of the Torture Convention permits transfers in the absence of “substantial grounds” for believing that the individual will be tortured.

²¹² See ASHLEY S. DEEKS, AVOIDING TRANSFERS TO TORTURE 33–34 (2008), available at <http://www.cfr.org/terrorism-and-the-law/avoiding-transfers-torture/p16693> (arguing in favor of assurances that employ robust monitoring mechanisms and “increase incentives to comply and raise the costs of noncompliance”).

²¹³ See, e.g., HUM. RTS. WATCH, *supra* note 189 (arguing that mistreatment of Russian detainees after their transfer from Guantánamo Bay demonstrates ineffectiveness of diplomatic assurances).

²¹⁴ Prominently cited cases of failures of assurances include the deportation of Maher Arar from the United States to Syria and transfers of Guantánamo detainees to Russia and Tunisia. See DEEKS, *supra* note 212, at 20–21 & n.32 (collating examples of failures of assurances cited by human rights groups).

improved assurances policy.²¹⁵ The current administration appears to have learned from the mistakes made by the Bush administration with respect to assurances and is insisting that the State Department be involved in evaluating all assurances. There is no substitute for the State Department's diplomatic knowledge in assessing whether the promises made by a foreign government are credible. The Obama administration is also mandating that a meaningful monitoring mechanism always be included.²¹⁶ Our experience in negotiating and implementing assurances suggests that they are most effective when they are accompanied by effective monitoring and a political commitment to carry out the assurances, neither of which has always been present. But obtaining suitable monitoring arrangements, in particular, has been difficult because other states view them as infringing their sovereignty.

In instances in which assurances cannot reduce treatment risks, states may consider releasing the detained persons into their own populations subject to restrictions. International law must consider whether states should be permitted to employ control orders to regulate those released and, if so, what the limitations are on their use. After the House of Lords struck down an antiterrorism law allowing for indefinite detention of alien suspected terrorists pending deportation, the United Kingdom enacted a system of control orders to restrict the movement of suspected terrorists while not in detention facilities.²¹⁷ Under British law, control orders allow the state to impose movement restrictions, electronic surveillance, restrictions on occupation, and curfews on these suspected terrorists in order to mitigate their potential threat.

British courts have interpreted the European Convention on Human Rights as imposing severe restrictions on their use. In *Secretary of State for the Home Department v. AF*, the Law Lords relied on an earlier European Court of Human Rights judgment to hold that detainees being subjected to control orders have the right to sufficient information about the reasons for the restrictions so as to be able to challenge the orders.²¹⁸ This requirement has undermined the ability of the British government to impose control orders, because the information in question is often intelligence information that it cannot release to the detainees.²¹⁹ The Law Lords have also held that the European Convention restricts the length of curfews that may be imposed²²⁰ and the extent to which a detainee may be cut off from friends and family.²²¹ As a consequence of these decisions, the control orders left in place have been less stringent than desired and less effective than hoped; some high-profile escapes have occurred.²²² Given the potential value of control orders as restrictions short of detention that can mitigate threats posed by nonstate actors, further consideration must be given

²¹⁵ U.S. Dep't of Justice Press Release No. 09-835, *supra* note 198.

²¹⁶ *Id.*

²¹⁷ Prevention of Terrorism Act, 2005, c.2 (Eng.).

²¹⁸ See *Sec'y of State for the Home Dept. v. AF*, [2009] UKHL 28, para. 59 (relying upon European Court of Human Rights judgment in *A v. United Kingdom*).

²¹⁹ Lord Hoffman explained the "dilemma" that this ruling created for the British government: it could either release information that it believed would compromise national security, or allow a potentially dangerous terrorist to go free without restriction. *Id.*, para. 51.

²²⁰ See *Sec'y of State for the Home Dep't v. JJ*, [2007] UKHL 45, para. 24 (setting aside an eighteen-hour curfew as a deprivation of liberty contrary to European Convention on Human Rights Article 5).

²²¹ See *Sec'y of State for the Home Dept. v. AP*, [2009] EWCA (Civ.) 731, paras. 86–89 (holding a requirement that detainee relocate from London violated the European Convention on Human Rights).

²²² See FRESH PERSPECTIVES ON THE 'WAR ON TERROR' 343 (Miriam Gani & Penelope Mathew eds., 2008) (describing failures of the control-order system); see also Vijay M. Padmanabhan, *Introductory Note to Human Rights Committee and the European Court of Human Rights—Treatment of Terrorism Suspects*, 48 ILM 567, 569 (2009) (detailing difficulties that British have faced with use of control orders).

as to whether international law may relax restrictions on imposing these orders while still protecting the rights of persons subject to them.

States also should consider creating an international resettlement mechanism to aid in identifying third-country resettlement options. One constant frustration in the State Department's efforts to relocate Guantánamo detainees was the department's inability to involve more effectively the Office of the UN High Commissioner for Refugees. The UNHCR has a mandate limited to actual refugees, which most former combatants in noninternational armed conflict will not be. A new agency—with a mandate to assist in postconflict resettlement—would be free of that limitation. States would still need to work out a protocol for sharing information with the new agency. Any agency involved in resettling members of nonstate groups would need to share information with the receiving state regarding the threat the resettled individuals may pose. Much of that information may be classified, however, and states have been reluctant to share such information with UN agencies.²²³ In those cases where Guantánamo detainees may have met the requirements for refugee status, cooperation was stymied by the United States' refusal to provide classified information to UNHCR.

A final question is whether protection from transfers to face mistreatment should be conceptualized in absolute terms. The ICCPR, Torture Convention, and European Convention on Human Rights have all been interpreted to contain no security exceptions.²²⁴ The United Kingdom has repeatedly argued that the European Convention should be interpreted to allow states, in making their repatriation decisions, to balance the security risks posed by the individual against the risk of post-transfer mistreatment.²²⁵ Such an approach would be consistent with the Fourth Geneva Convention and the Refugee Convention, which both include exceptions to transfer protections for aliens who pose a security threat to the states where they are currently located. While the European Court of Human Rights has rejected the British suggestion, it seems to us that a balancing approach could potentially take into account the threat posed by nonstate actors and, when *non-refoulement* protections apply, the dearth of transfer options.

VI. CONCLUSION

Our goal has been to demonstrate the need to develop new international law regarding the detention of persons in conflicts with nonstate actors. Rather than seeking to replace existing international rules, we see the need for new rules where existing rules do not apply or are uncertain in application. Our call for legal development is consistent with the ICRC's recognition of a "dearth of legal norms" applicable to noninternational armed conflict.²²⁶ While IHL does provide important treatment protections for detainees in common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I, and Additional Protocol II, it fails to provide adequate guidance on many critical legal questions, including the four that we have been focusing on here. An all-too-frequent response to this situation is simply to reiterate that states need to implement existing rules—presumably meaning that states will find answers by applying the

²²³ See American Service-Members' Protection Act of 2002, §2006 (mandating that president set up measures to prevent the transfer of classified information to the International Criminal Court for use in investigations, apprehensions, or prosecutions).

²²⁴ See *supra* notes 197–200 and accompanying text.

²²⁵ See *Saadi*, *supra* note 200, para. 122 (summarizing British position).

²²⁶ Kellenberger, *supra* note 2.

law of international armed conflict or international human rights law. But as we have demonstrated, these different bodies of law either have no answers or offer confusing or conflicting answers to many questions. Implementing the existing rules is not enough.

The current gaps in the law concerning detention can be filled in various ways, many of which might be consistent with established law. We see this situation as arguably fortunate and potentially productive because it gives states the legal space required to follow alternative directions in responding to the problems discussed. The laboratory of ideas of the different states, to borrow a term from U.S. constitutional jurisprudence, could generate different potential approaches to answering our questions—approaches that could, over time, generate rich comparisons and ultimately lead to international consensus.

Based on our experience of the international reaction to U.S. policies in the conflict with Al Qaeda, support for such a laboratory of ideas is not shared. Few in the international community have been willing to accept that a range of potential policy options is available on these questions. As noted at the outset of our discussion, a major reason for this reluctance is the fear that this policy freedom may be abused, as it was when the Bush administration exploited holes in the law to advance policies that ran counter to the spirit of the law, if not its letter. That said, the gaps still exist, and if the international community will not support a laboratory-of-ideas approach, the only alternative is for the international community to develop new law to guide policymakers. It is to further that task that we have tried to identify areas of developing consensus that may facilitate further development of the international law on detention.

A critical, threshold question is whether states should embark on the process of drafting a new international treaty to deal with the gaps identified. In 2006, then British Secretary of State for Defence John Reid created a stir when he called for rewriting the Geneva Conventions because of the “risk [in] continuing to fight a 21st century conflict with 20th century rules.”²²⁷ The UK House of Commons Foreign Affairs Committee expressed a similar position.²²⁸ While we agree with the sentiment behind Reid’s statement, negotiating a new international treaty on these questions is highly unlikely in the near term. Politically, the polarization created by the U.S. conflict with Al Qaeda precludes the possibility that enough states would reach sufficient agreement on these questions to conclude a treaty. Legally, even if states had the political will to conclude an agreement, we are nowhere near having a narrow-enough set of potential answers to the full range of questions that a treaty would address and around which states could coalesce. These problems contributed to the collapse of the ICRC-led “Harvard Process” in 2003, which was designed to address questions of this sort.²²⁹

As an interim measure, we suggest that states that are engaged in detention operations in conflicts with nonstate actors intensify efforts to agree on a common set of principles to guide detention. As we noted earlier, past efforts at such a task have been hampered by a reluctance to admit that existing law is inadequate and by disagreements about how any gaps in the law

²²⁷ John Reid, 20th-Century Rules, 21st-Century Conflict, Remarks at the Royal United Services Institute for Defence and Security Studies (Apr. 3, 2006), at http://www.responsibilitytoprotect.org/files/UK_SecretaryofState_Speech_Apr_2006.pdf.

²²⁸ See FOREIGN AFFAIRS COMM., *supra* note 5, para. 85 (“We conclude that . . . the Geneva Conventions are failing to provide necessary protection because they lack clarity and are out of date. We recommend that the Government work with other signatories to the Geneva Conventions and with the International Committee of the Red Cross to update the Conventions . . .”).

²²⁹ See Stigall et al., *supra* note 13, at 1378 n.47 (describing collapse of the Harvard Process).

may be fixed. If detaining states come to the table committed to developing new rules, the areas of convergence suggested in this article can potentially serve as a useful guide for negotiators.

The time for making progress may actually be at hand. Efforts at reasonable legal dialogue in the years after 9/11 were stymied by passions aroused by the horror of the attacks and also by the Bush administration's responses to them. A decade later these emotions are beginning to fade, and a new president occupies the White House. Detaining states may be more willing to think openly about the challenges that they face in detaining nonstate actors, and about how the law needs to develop to address those difficulties.

We suggest that states engaged in detention operations involving nonstate actors could potentially work together to begin elaborating a set of new legal rules. The practice of specially affected states is especially important in developing international law because the extent and depth of their experience provides a useful background against which to evaluate possible new rules.²³⁰ The experience of these states would ensure that they come to the table with realistic ideas and possible proposals to address our four questions.²³¹ And these states may share sufficient interests in common to allow the emergence of principles that generate diplomatic consensus while also being sufficiently specific to provide operational guidance.²³² Rules that are deliberately vague in order to generate broad support are unlikely to provide any further guidance on our four original questions beyond existing law.

If such a process is set in motion, it is essential that these states hear the voices of other groups with stakes in these issues—which would enhance the international legitimacy required for a law-building exercise. For example, the ICRC is a valuable voice that, while appreciating the difficulties and challenges of war, would represent the humanitarian interests of those being detained.²³³ The states involved would also be well advised to consult with human rights groups and other states to identify and, insofar as possible, address their areas of concern. If any set of principles that emerges is to serve as the foundation for developing a new treaty in this area, broader participation—and not just by the detaining states—would be needed from the outset.

The continued relevance of international law in governing contemporary conflicts will require that states address, rather than ignore or avoid, the stress that conflicts with nonstate actors exert on existing legal rules. Because of the pressing need to fill the gaps in the existing law of detention, we hope that the relevant actors will acknowledge the limitations of existing law and take effective steps to address them.

²³⁰ The International Court of Justice has recognized the importance of “specially affected States” in determining when a practice may amount to customary international law. *North Sea Continental Shelf Cases* (F.R.G./Den.; F.R.G./Neth.), 1969 ICJ REP. 3, 42 (Feb. 20).

²³¹ See Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT'L L. 445, 448 (2003) (explaining that nongovernmental organizations, unlike affected states, have “no security interest to defend” and are therefore “without any pressure to take the real world into account”).

²³² The failure to account for these interests is the cause of instruments like the Ottawa Convention, which regulates landmines, and to which most important war-fighting states are not parties. See *id.* at 452–53 (noting limited worth of Ottawa Convention because critical states, such as the United States, are not parties).

²³³ The ICRC recently announced its intent to begin bilateral consultations with states on areas where IHL needs further clarification and development, and to address the subject at the next International Conference of the Red Cross and Red Crescent. See Kellenberger, *supra* note 2. These consultations could play an important role in developing the law in the directions we are suggesting.