

**A SQUARE PEG IN A ROUND HOLE: STRETCHING LAW OF WAR  
DETENTION TOO FAR**

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I. INTRODUCTION

On March 7, 2011, President Obama issued Executive Order 13,567, providing for indefinite detention of approximately forty-eight detainees at Guantánamo Bay and possibly more in the future.<sup>1</sup> Nearly a year after a Department of Justice-led task force called for indefinite detention “under the laws of war,”<sup>2</sup> the Obama administration established periodic review and other procedures for such detention. The Executive Order, along with the Terrorist Detention Review Reform Act (“TDRRA”) proposed by Senator Lindsey Graham,<sup>3</sup> has generated extensive discussion about the necessity for and benefits of providing such procedural rights to

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1. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011).

2. DEP’T OF JUSTICE, GUANTANAMO REVIEW TASK FORCE FINAL REPORT 11 (2010), [www.justice.gov/ag/guantanamo-review-final-report.pdf](http://www.justice.gov/ag/guantanamo-review-final-report.pdf) [hereinafter Task Force Report]; Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, WASH. POST, Jan. 22, 2010, at A1.

3. S. 3707, 111th Cong. (2010). See generally Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221 (2011). The TDRRA was reintroduced in March 2011 as S. 553 “Detention of Unprivileged Enemy Belligerents Act.” *Id.* at 226, n.20.

detainees,<sup>4</sup> the merits of criminal prosecution versus military detention or trial,<sup>5</sup> and other hotly-debated questions. Surely additional process is a positive step, one that can only improve the situation for those held in a sort of legal limbo without charge and without any ability to identify the end of the detention. But process alone cannot answer deeper questions about the lawfulness of an indefinite detention regime in general or the lawfulness of such detention for particular individuals. One key underlying question, therefore, is whether characterizing the detention of these forty-eight individuals—and likely others in the future—as “under the laws of war” is truly an accurate label.

Calling the indefinite detention of terrorist suspects at Guantánamo Bay or other detention facilities “law of war” detention suggests that the detention fits within an existing legal framework, that it has a stamp of approval, a legal imprimatur of sorts. In the framework of the American legal system that certainly sounds better than “indefinite detention,” which conjures up images of persons held with no recourse to the courts or other means for challenging detention. The law of war does indeed provide for detention without charge of both prisoners of war and civilians in certain circumstances; however, the question here is whether the indefinite detention currently at issue can truly be called “law of war” detention or whether it is a perversion of that concept, the proverbial square peg in a round hole.

This Article highlights three problems with the past and newly proposed indefinite detention of terrorist suspects, problems that expose how this system stretches the traditional notion of law of war detention beyond its limits. For many reasons, the system poses severe challenges to fundamental American principles of adjudication of individual accountability and granting individuals their “day in court.”<sup>6</sup> These broader questions concerning the morality of indefinite detention, the appropriate system for prosecution of terrorist suspects, and the lawfulness generally of detention in the context of counterterror operations are beyond the scope of this Article and are addressed in numerous law review articles,

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4. See Kuhn, *supra* note 3, at 267-68 (discussing how TDRRA procedural reforms would expedite the hearing process for Guantánamo detainees).

5. See Task Force Report, *supra* note 2, at 19-23 (discussing the feasibility of criminally prosecuting Guantánamo detainees).

6. See Amos N. Guiora & Laurie R. Blank, *Denied Their Day in Court: The Indefinite Detention of Post-9/11 Terrorism Suspects Violates America's Principles*, L.A. TIMES, Jan. 4, 2011, at A13; Laurie R. Blank, *Detention, Trials & American Values*, INTLAWGIRLS (Jan. 9, 2011), <http://intlwgrrls.blogspot.com/2011/01/detention-trials-american-values.html>; Press Release, Am. Civil Liberties Union, President Obama Orders Guantánamo Closed And End To Torture (Jan. 22, 2009), available at <http://www.aclu.org/national-security/president-obama-orders-guantanamo-closed-and-end-torture>.

newspaper articles, and opinion pieces.<sup>7</sup> This Article does not purport to analyze the full scope of detention options for persons captured within the context of the conflict with al-Qaeda and other terrorist groups. Rather, this Article will focus on the problems created by affixing the label of “law of war” or “under the laws of war” to the indefinite detention ongoing and further contemplated in Executive Order 13,567 and in the TDRRA: problems of definition, problems of purpose, and problems of posture.

This set of problems is just one example of the consequences of choosing a “war” paradigm to encapsulate and describe the conflict with al-Qaeda and associated terrorist groups. The decision to characterize the U.S. response to, and operations against, such terrorist groups as an armed conflict has sparked intense debate among policymakers and legal scholars over whether a state can engage in an armed conflict with transnational terrorist groups and what the contours of such an armed conflict look like.<sup>8</sup> One component of this “war” paradigm has been the decision to hold captured individuals in military detention and, in some cases, prosecute them before military commissions. Many aspects of current U.S. military operations are, of course, squarely within the paradigm of armed conflict—the United States is engaged in a non-international armed conflict in both Afghanistan and Pakistan—but the notion of an armed conflict against transnational terrorist groups still poses a range of difficult questions, including who we are fighting against, how we can fight them, and where the conflict is taking place. This Article will proceed on the assumption that the

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7. See, e.g., Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369 (2008); David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 727 (2009) (noting that some human rights groups maintain that the government must “try or release” military detainees); 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 (2007); John B. Bellinger, III, Legal Advisor to the U.S. Dep't of State, Legal Issues in the War on Terrorism, Speech at the London School of Economics 7-8 (Oct. 31, 2006), available at [http://www.lse.ac.uk/collections/LSEPublicLecturesandEvents/pdf/20061031\\_JohnBellinger.pdf](http://www.lse.ac.uk/collections/LSEPublicLecturesandEvents/pdf/20061031_JohnBellinger.pdf); Michael Ratner, Letter to the Editor, *A New Court for Terror Suspects?*, N.Y. TIMES, July 15, 2007, at A12.

8. See, e.g., 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, 679-80 (2004); Steven R. Ratner, *Are the Geneva Conventions Out of Date?* 48 L. QUADRANGLE NOTES 66, 70 (2005); Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 352-55 (2004); Geoffrey S. Corn & Eric T. Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counterterror Combat Operations*, 42 ISR. L. REV. 46, 49-50 (2009); Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499, 499 (2005); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55, 60 (2003) [hereinafter Rona, *Interesting Times*].

United States is indeed engaged in an armed conflict with terrorist groups, in accordance with the United States' position. However, this Article challenges the presumption that all forms of detention of terrorist suspects must therefore be detention "under the laws of war." For this reason, it is important to examine and understand the fundamental purposes of law of war detention in order to analyze whether the existing and ongoing indefinite detention regime could possibly fit within those purposes and that paradigm.

The first two sections therefore discuss problems that derive directly from the clash of indefinite detention of terrorist suspects with traditional law of war detention. Problems of definition, addressed in the first section, involve the geography of the battlefield and the temporal parameters of a conflict with terrorist groups. Our current difficulties in identifying and understanding the geographic and temporal boundaries of the armed conflict with al-Qaeda and other terrorist groups raise serious concerns for the application of law of war detention to persons detained in the course of counterterror operations against such groups. When identifying the parameters of the battlefield—the geographic limits of the armed conflict—is challenging, it becomes difficult to assess when particular persons are detained within the course of an armed conflict and therefore fit within a paradigm of law of war detention. Second, the nature of the current indefinite detention regime suggests that the detention is punitive in nature, even if not formally so, whereas law of war detention is traditionally protective in purpose and scope. To the extent that persons detained are held essentially in lieu of prosecution, such indefinite detention seems directly at odds with the spirit and purpose of traditional law of war detention.

Finally, the third section tackles the problem of perspective or posture. The indefinite detention regime is a system created in a reactive posture, one designed to meet a desired result rather than one developed proactively within an existing legal framework. While there is no doubt that new conflicts pose new questions and challenges, the failure to engage in foundational discussions about the nature of U.S. counterterrorism goals and legal parameters has meant that the United States is continually operating from a reactive posture rather than on the basis of established criteria, standards, and guidelines for future engagements. Although this problem of posture is inherently policy-based, it raises comprehensive questions of law and morality that bear directly on the appropriateness of identifying the indefinite detention regime as "law of war" detention.

Detention of terrorist suspects captured in the course of robust counterterror and military operations may well be the appropriate policy and legal choice in the context of today's conflict with terrorist groups and today's national security imperatives. Others have debated that question extensively and will continue to do so. Calling

such detention “law of war” detention, however, improperly suggests that it is simply detention in the ordinary course of the business of armed conflict, which it is not.

## II. PROBLEMS OF DEFINITION

The essential prerequisite to the notion of terrorist suspects being held in detention “under the laws of war” is that we are operating within a paradigm that triggers the law of armed conflict. The law of armed conflict (“LOAC”), otherwise known as international humanitarian law or the law of war, applies to situations of armed conflict and governs the conduct of hostilities and the protection of persons during conflict.<sup>9</sup> Traditionally, the primary questions involved in detention of persons during wartime involved who could be detained and what privileges and rights they had regarding treatment, communication, and other issues. In the situation the United States faces today, some question whether the struggle against al-Qaeda and other terrorist groups even constitutes an armed conflict,<sup>10</sup> which raises existential questions about the use of detention “under the laws of war.” Since the September 11th attacks, the United States has consistently stated that it is engaged

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9. See INT’L COMM. OF THE RED CROSS, *War and International Humanitarian Law* (Oct. 2010), <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>. The law of armed conflict is set forth primarily in the four Geneva Conventions of August 14, 1949, and their Additional Protocols: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted by Conference* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention].

10. See, e.g., Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91 INT’L REV. RED CROSS 95, 97-102 (2009); HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 250-55 (2005); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror,”* 87 INT’L REV. RED CROSS 39, 45-46 (2005); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323, 323 (2002); Rona, *Interesting Times*, *supra* note 8, at 62; Int’l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 7-8 (Nov. 26-30, 2007), <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf>.

“in an armed conflict with al-Qaeda, as well as the Taliban and associated forces,”<sup>11</sup> and the appropriateness of law of war detention for terrorist suspects will therefore be addressed here within that context. Two difficult problems of definition arise directly from this framework and pose a significant challenge to the application of law of war detention to persons detained in the course of operations against al-Qaeda and other terrorist groups: defining the geographic scope of the battlefield and defining the end of the hostilities or the end of the conflict.

A. *Defining the Battlefield*

From a practical standpoint, detaining an individual under the laws of war suggests that such person was captured within the context of an armed conflict because the laws of war apply only during armed conflict. If the United States is engaged in an armed conflict with terrorist groups—namely al-Qaeda—the question of where that conflict is taking place becomes critically important in assessing whether a particular person is being detained in connection with that armed conflict. Indeed, “[t]he laws of war operate within temporal and geographic realms; considerable attention is given to when it can be said that an ‘armed conflict’ has arisen and ended, and also to where it is that protected persons are located . . . .”<sup>12</sup> And yet, defining the parameters of the battlefield, often called the zone of combat, in contemporary conflicts with terrorist groups and other transnational, nonstate actors is problematic and, as of now, unsettled at best.<sup>13</sup>

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11. Harold Koh, Legal Adviser, U.S. Dep’t of State, The Obama Administration and International Law, Keynote Address at Annual Meeting of Am. Soc’y of Int’l Law (Mar. 25, 2010). All three branches of the U.S. government have demonstrated that they view the situation as an armed conflict. See Authorization for Use of Military Force (AUMF), 50 U.S.C. 1541 § 2(a) (2006); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (stating that the September 11 attacks “created a state of armed conflict that requires the use of the United States Armed Forces”); Dep’t of Def. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), available at <http://www.globalsecurity.org/security/library/policy/dod/d2002032lord.pdf>; see also Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 10 (2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf> (“The United States is engaged in a continuing armed conflict against Al Qaida, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.”).

12. Murphy, *supra* note 7, at 1150.

13. For a comprehensive discussion of the problems in defining the battlefield in contemporary conflicts and suggested ways to frame such definitions, see Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L.

Traditionally, the law of neutrality provided the guiding framework for the parameters of the battle space in an international armed conflict. When two or more states are fighting and certain other states remain neutral, the line between the two forms the divider between the application of the laws of war and the law of neutrality.<sup>14</sup> The law of neutrality is based on the fundamental principle that neutral territory is inviolable<sup>15</sup> and focuses on three main goals: (1) “contain[] the spread of hostilities[, particularly] by keeping down the number of participants;” (2) “define[] the legal [rights of] parties and nonparties to the conflict;” and (3) “limit[] the impact of war on nonparticipants, [especially] with regard to commerce.”<sup>16</sup> In this way, neutrality law leads to a geographic-based framework in which belligerents can fight on belligerent territory or the commons but must refrain from any operations on neutral territory.<sup>17</sup> In essence, the battle space in a traditional armed conflict between two or more states is anywhere outside the sovereign territory of any of the neutral states.<sup>18</sup> The language of the Geneva Conventions tracks this concept fairly closely. Common Article 2, which sets forth the definition of international armed conflict, states that such conflict occurs in “all cases of declared war

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(forthcoming 2010).

14. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 24 (Cambridge Univ. Press 3d ed. 2001) (“The laws of neutrality are operative only as long as the neutral State retains its neutral status. Once that State becomes immersed in the hostilities, the laws of neutrality cease being applicable, and the laws of warfare take their place. However, if the neutral State is not drawn into the war, the laws of neutrality are activated from the onset of the war until its conclusion.”).

15. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V]. See also GERHARD VON GLAHN, *LAW AMONG NATIONS* 844 (6th ed. 1992) (“The basic right beyond any question is the inviolability of neutral territory . . . and . . . all other neutral rights really are mere corollaries to that fundamental principle . . . .”); MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 534 (1959) (“The chief and most vital right of a neutral state is that of the inviolability of its territory.”); GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 179-83 (6th ed. 1976) (explaining that the rights and duties of neutral powers under international customary law can be summarized in three basic rules: (1) a neutral state must abstain from taking sides in the war and from assisting either belligerent; (2) a neutral state has the right and duty to prevent its territory from being used by either belligerent as a base for hostile operations; and (3) a neutral state must acquiesce in certain restrictions which belligerents are entitled to impose on peaceful intercourse between its citizens and their enemies, in particular, limitations on the freedom of the seas).

16. John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 139 (1997) (emphasis omitted).

17. *Id.*

18. DINSTEIN, *supra* note 14, at 24-25 (“[T]he region of war does not include the territories of neutral States, and no hostilities are permissible within neutral boundaries.”).

or . . . any other armed conflict which may arise between two or more of the High Contracting Parties.”<sup>19</sup> In Common Article 3, non-international armed conflicts include conflicts between a state and nonstate armed groups that are “occurring in the territory of one of the High Contracting Parties.”<sup>20</sup> Both of these formulations tie the location of the armed conflict directly to the territory of one or more belligerent parties.

The neutrality framework as a geographic parameter is left wanting in today’s conflicts with terrorist groups, however. First, as a formal matter, the law of neutrality technically only applies in cases of international armed conflict.<sup>21</sup> Even analogizing to the situations we face today is highly problematic, however, because today’s conflicts not only pit states against nonstate actors but because those actors and groups often do not have any territorial nexus beyond wherever they can find safe haven from government intrusion. As state and nonstate actors

have . . . shifted *unpredictably* and *irregularly* between acts characteristic of wartime and those characteristic of not-wartime[,] . . . [t]he unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries.<sup>22</sup>

Simply locating terrorist groups and operatives does not therefore identify the parameters of the battlefield; the fact that the United States and other states use a combination of military operations and law enforcement measures to combat terrorism blurs the lines one

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19. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC Common art. 2].

20. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention Common art. 3].

21. See, e.g., Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT’L L. REV. 83, 90 (1998) (“The traditional law of neutrality takes hold in [internal conflicts] only in the event that the contending force attains a level of power that causes other nations to recognize it as a belligerent.”).

22. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 7 (2004).

might look for in defining the battlefield. In many situations, “the fight against transnational jihadi groups . . . largely takes place away from any recognizable battlefield.”<sup>23</sup>

Second, a look at U.S. jurisprudence in the past and today demonstrates a clear break between the framework applied in past wars and the views courts are taking today. Thus, a 1942 decision upholding the lawfulness of an order evacuating Japanese-Americans to a military area stated plainly that

[t]he field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive.<sup>24</sup>

Similarly, the United States’ entrance into World War I “brought the port of New York within the field of active [military] operations.”<sup>25</sup> In each of those cases, the United States was a belligerent in an international armed conflict; the law of neutrality mandated that U.S. territory was belligerent territory and therefore part of the battlefield or combat zone. The courts take a decidedly different view in today’s conflicts, however, consistently referring to the United States as “outside a zone of combat,”<sup>26</sup> “distant from a zone of combat,”<sup>27</sup> or not within any “active [or formal] theater of war,”<sup>28</sup> even while recognizing the novel geographic nature of the conflict. As one court noted, comparing the arrest of Yaser Hamdi—captured after a firefight in Afghanistan—to Jose Padilla—captured upon disembarking a plane at Chicago’s O’Hare airport—would be akin to comparing apples and oranges, clearly showing the court’s view of a distinct difference between the characterization of the United States and the characterization of Afghanistan.<sup>29</sup> Even more recently, in

23. Hakimi, *supra* note 7, at 369.

24. *Ex parte Kanai*, 46 F. Supp. 286, 288 (E.D. Wis. 1942).

25. *United States ex rel. Wessels v. McDonald*, 265 F. 754, 763 (E.D.N.Y. 1920). Note, however, that in resolving claims for destruction of trees on a plantation in the Philippines during World War II, the U.S. Court of Claims found that the plantation was not part of the combat zone at the time of the destruction because it was more than fifty miles from where the fighting was at that time. *Baras Plantation Co., Inc. v. United States*, 105 F. Supp. 1003, 1004 (Ct. Cl. 1952). The court defined the combat zone in a narrow way—perhaps specifically for its purposes in that case—as “that part of a theater of operations in which the active operations of the combat units are conducted. Specifically, the area occupied by the field armies, between the front line and the forward boundary of the communications zone.” *Id.* at 1003-04.

26. *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003).

27. *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting).

28. *Boumediene v. Bush*, 553 U.S. 723, 770 (2008); *al-Marri v. Wright*, 487 F.3d 160, 196 n.1 (4th Cir. 2007).

29. *See Hamdi v. Rumsfeld (Hamdi IV)*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) (“To compare this battlefield capture to the domestic arrest

*Maqaleh v. Gates*, both the district court and the court of appeals distinguished between Afghanistan, “a theater of active military combat,”<sup>30</sup> and other areas (including the United States), which are described as “far removed from *any* battlefield.”<sup>31</sup> In a traditional belligerency-neutrality framework, one would expect to see U.S. territory viewed as part of the battlefield; the fact that courts consistently trend the other way highlights both the difference in approach and the uncertainty involved in defining today’s conflicts.

The lack of conclusive legal framework is not limited to the courts but rather extends to the policy and scholarly communities as well. Some argue, like the Bush administration, that the whole world is the battlefield in this conflict with terrorist groups. As President George W. Bush stated shortly after the September 11 attacks, “[o]ur war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan.”<sup>32</sup> In effect, the whole world is a war zone. Others, in contrast, take a much more limited view of the battle space, arguing that it is limited to Afghanistan and possibly the border areas of Pakistan.<sup>33</sup>

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in *Padilla v. Rumsfeld* is to compare apples and oranges.”).

30. *Maqaleh v. Gates*, 605 F.3d 84, 88 (D.C. Cir. 2010).

31. *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 229 (D.D.C. 2009) (holding that individuals captured in Afghanistan and detained at Bagram are not entitled to habeas corpus and specifically distinguishing between detained battlefield enemy belligerents and individuals apprehended outside the zone of combat operations) (emphasis added).

32. Kenneth Roth, *The Law of War in the War on Terror: Washington Abuse of “Enemy Combatants,”* 83 FOREIGN AFF. 2 (2004). See also *Fox News Sunday* (Fox television broadcast Nov. 10, 2002), available at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,69783,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,69783,00.html) (Secretary of State Rice explaining that “[w]e’re in a new kind of war, and we’ve made very clear that it is important that this new kind of war be fought on different battlefields”); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429, 442 (2010) (noting that this view “extend[s] the boundaries of the conflict to take in al-Qaeda’s operations around the world”) (citing Anthony Dworkin, *Beyond the “War on Terror:” Towards a New Transatlantic Framework for Counterterrorism*, 13 EUR. COUNCIL ON FOREIGN REL. 1, 5 (2009)); Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS, May 18, 2010, [http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL\\_20100518](http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL_20100518) (“The battlefield in the ‘war on terror’ is global and not restricted to a particular nation . . . This is war and we are entitled to kill them anywhere we find them.” (quoting Jeffrey Addicott, former legal advisor to the U.S. Army Special Forces)).

33. See *Lawful Use of Combat Drones: Hearing before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov. Reform*, 111th Cong. 3-5 (2010) (statement of Mary Ellen O’Connell, Robert and Marion Short Professor of Law, University of Notre Dame, The Law School); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858-64 (2009); *Lawful Use of Combat Drones: Hearing before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov. Reform*, 111th Cong. (2010) (submission of Michael W. Lewis, Law Professor, Ohio Northern University Pettit College of Law) (discussing the

At present, no workable legal framework exists for identifying the parameters of the battlefield and thus for assessing whether an individual captured in course of counterterrorism operations was so captured within an armed conflict or as part of a law enforcement operation outside the bounds of an existing conflict. U.S. practice suggests that any identifiable parameters to the zone of combat are driven solely by case-by-case considerations rather than the application of a defined legal paradigm.<sup>34</sup> This problem raises serious concerns for the application of law of war detention as the defining paradigm for detention of terrorist suspects. If, in essence, law of war detention is detention of persons “picked up on the battlefield,” the failure to identify the battlefield greatly undermines the practical application of this framework. Rather, we run the grave risk of detaining people within this paradigm who were not captured on the battlefield, that is, within the parameters of this armed conflict.

### *B. Defining the Timeframe*

The Geneva Conventions reference the end of armed conflict with phrases such as “cessation of active hostilities”<sup>35</sup> and “general close of military operations.”<sup>36</sup> At the time the conventions were drafted, the “general close of military operations” was considered to be “when the last shot has been fired.”<sup>37</sup> The Commentary to the Fourth Geneva Convention then provides further explanation:

When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on

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argument for a limited geographical scope to the battlefield in the conflict with al-Qaeda).

34. See Blank, *supra* note 13, at 21-22 (“U.S. practice, where decisions to use force are based on belligerent status or conduct rather than any adherence to geographic or spatial concepts, does indeed compel the conclusion that the U.S. views the whole world as a battlefield. And yet, at the same time, the U.S. also seems to view certain areas as outside the scope of appropriate belligerent activity, most likely based on a conception of what the host nation can or will do to address a particular threat. The co-existence of these two themes suggests that delineating the lines between battlefield and non-battlefield is based more on arbitrary decision-making than on a process stemming from traditional law-based conceptions of the theater of hostilities.”).

35. See Third Geneva Convention, *supra* note 9, art. 118 (referring to the release and repatriation of prisoners of war).

36. See Fourth Geneva Convention, *supra* note 9, art. 6 (denoting the end of application of the Fourth Geneva Convention in the territory of parties to the conflict upon the general close of military operations, or in occupied territory, one year after the general close of military operations); see also Additional Protocol I, *supra* note 9, art. 3(b) (“The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations . . .”).

37. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, at 815. See Fourth Geneva Convention, *supra* note 9.

an armistice, a capitulation or simply on *deballatio*. On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.<sup>38</sup>

Both of these temporal frameworks are relevant to the timeframe of detention under the laws of war. The first—“cessation of active hostilities”—marks the endpoint of detention of prisoners of war and the time when such persons must be repatriated under the Third Geneva Convention. The second—“general close of military operations”—denotes the end of application of the Fourth Geneva Convention; when either armed conflict has ended or the law of belligerent occupation has ceased to apply to persons within occupied territory, including civilians detained for security reasons. Thus, internment of civilians under the Fourth Geneva Convention “must cease as soon as possible after the close of hostilities or the end of occupation.”<sup>39</sup>

Applying these concepts in practice can be difficult even in traditional armed conflict situations. Article 118 of the Third Geneva Convention sought specifically to eliminate pretexts to delay repatriation used in earlier conflicts, such as the absence of a formal peace treaty or the “non-termination of the armed conflict by or against a co-belligerent.”<sup>40</sup> Sporadic fighting may continue after the conclusion of a general armistice or truce that achieves a cessation of hostilities. Another reason, noted by the Eritrea-Ethiopia Claims Commission, is that a “state that has not been totally defeated is unlikely to release all the POWs it holds without assurance that its own personnel held by its enemy will also be released, and it is unreasonable to expect otherwise.”<sup>41</sup> The rule in Article 133 of the Fourth Geneva Convention has a similar goal of minimizing reasons to delay repatriation and release. “[I]t is as a rule important for civilian internees as for prisoners of war that internment should cease as soon as possible after the close of hostilities.”<sup>42</sup> Recognizing that “[t]he disorganization caused by war may quite possibly involve some delay before the return to normal” and the release of internees,

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38. Int'l Comm. Red Cross, Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War, art. 6, ¶ 2 (1958) [hereinafter Fourth Geneva Convention Commentary] (footnotes omitted). See also Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 845-46 (2004).

39. U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 9.111 (2004) [hereinafter UK MANUAL].

40. ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 217 (2008).

41. Eritrea v. Ethiopia, 26 R.I.A.A. 23, 66 (Eritrea-Ethiopia Claims Comm'n 2003), available at [www.pca-cpa.org/upload/files/ER17.pdf](http://www.pca-cpa.org/upload/files/ER17.pdf).

42. Fourth Geneva Convention Commentary, *supra* note 38, art. 133, ¶ 1.

the Commentary nonetheless emphasizes that “restrictive measures taken regarding protected persons are to be cancelled as soon as possible after the close of hostilities.”<sup>43</sup>

Even in the context of a more traditional armed conflict, lengthy civilian detention or internment regimes will prove difficult to sustain. As an examination of U.S. practice in Iraq demonstrates, “the capacity to employ military detention without criminal charge as a practical matter will decay over time. . . . [and ultimately must be abandoned r]egardless of whether such detention is legally and factually warranted in the first instance.”<sup>44</sup> Notwithstanding any of these expected complications, one can reasonably foresee or anticipate what the end of hostilities, and the corresponding trigger for release of prisoners of war, will be. The central issue here is that while persons traditionally held in law of war detention are held for an unknown time, it is not an *undefined* period of time.

In contrast, the nature of terrorism and counterterrorism is that we are not going to defeat terrorism; rather, terrorism is something to be managed, minimized, and defended against.<sup>45</sup> At the most basic level, “[a] war against groups of transnational terrorists, by its very nature, lacks a well-delineated timeline.”<sup>46</sup> Not only can we not envision an end to the hostilities, but more problematic, we have absolutely no way of identifying what that end might look like. Terrorist groups morph, splinter, and reconfigure, making it difficult to determine if, let alone when, they have been defeated. Although traditional notions of repatriation at the end of hostilities may offer helpful guidance in a geographically confined conflict with a nonstate actor or terrorist group, such as the Tamil Tigers in Sri Lanka,<sup>47</sup> the diffuse geographical nature of most conflicts with terrorist groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts. In a conflict with transnational terrorist groups, we will not see a surrender ceremony, the equivalent of V-E Day, or any other identifiable moment marking the end of the conflict.

In fact, the traditionally broad parameters for applying LOAC so

43. *Id.* (footnotes omitted).

44. Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 553 (2011).

45. Carrie Vance, *A War to Be Won, to Be Won*, OPEdNEWS.COM (May 27, 2010), <http://www.opednews.com/articles/A-War-to-Be-Won-to-be-Wo-by-carrie-vance-100524-408.html> (“All terrorist groups end, but terrorism, like crime, never ends.” (quoting Seth G. Jones)); SETH G. JONES & MARTIN C. LIBICKI, *HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA*, at xii, xvi-xvii (2008).

46. Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2467 (2008).

47. Waxman, *supra* note 32, at 452-53 (“[A] particular organization . . . [may be] sufficiently coherent and could eventually be defeated in some meaningful sense (or its military capacity sufficiently degraded to declare its defeat).”).

as to maximize protection for all persons in the combat zone only serve to exacerbate these temporal ambiguities. In *Prosecutor v. Tadic*, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held that the temporal and geographic limits range beyond the exact time and place of hostilities.<sup>48</sup> The Tribunal declared that “[i]nternational humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.”<sup>49</sup> There is no doubt that this broad scope plays a critical role in protecting both fighters and civilians alike in all types of armed conflicts by ensuring the application of the law across the theater of conflict even if hostilities are not taking place in that exact location or at that exact time. In the context of terrorism, however, this broad framework can easily lead to a definition paralysis because it is unlikely that a “general conclusion of peace”<sup>50</sup> will be achieved in any foreseeable period of time, if ever.

Thus, the United States might defeat al-Qaeda in some meaningful way, ending their ability to launch any effective attacks against the United States or its allies.<sup>51</sup> But, some other terrorist group will take up—or have already taken up—the same fight, and the United States will still be engaged in a conflict with terrorist groups. The consequence of this uncertainty and this very nature of terrorism is that detention until the end of hostilities effectively means generational, if not lifetime, detention because applying concepts such as “cessation of active hostilities” or “general close of military operations” can lead to conflicts—and detention—that continue *ad infinitum*.<sup>52</sup> Such detention is on another scale entirely

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48. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

49. *Id.*

50. *Id.*

51. Some U.S. courts have thus talked of a time “when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed . . . .” *Padilla v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002).

52. See Amos N. Guiora, Professor of Law, SJ Quinney College of Law, American Counterterrorism: The Triangle of Detention, Interrogation and Trial, Keynote Address at the Magna Carta Institute’s Symposium, Towards a Global Legal Counterterrorism Model: Transatlantic Perspectives 6 (Dec. 23, 2009), available at <http://ssrn.com/abstract=1527314> (“Precisely because there is no defined end to terrorism, a ceremony reminiscent of General MacArthur receiving Japan’s surrender on the ‘USS Missouri’ will not take place. Terrorism cannot be defeated; at best, it can be managed or minimized. Therefore, in direct contrast to the war paradigm, terrorists cannot be returned at the cessation of hostilities as terrorism will not ‘cease’. Were terrorism detention paradigms to be established based on the war paradigm then—following the analogy to its logical conclusion—terrorists would never be released. This would lead to an indefinite detention paradigm which is both unconstitutional and

from law of war detention as traditionally understood or conceived. In this way, the problems of definition in both the geographic and temporal realms pose nearly intractable problems for the application of law of war detention to the detention of terrorist suspects in the current context. Law of war detention fundamentally involves detaining persons captured in the course of an armed conflict or occupation (whether persons who are fighting or civilians detained for reasons of security under the Fourth Geneva Convention) until the end of the conflict or occupation. Without the ability to delineate where an armed conflict is taking place or even frame the conditions under which it can be termed “over,” imposing “law of war” detention on such a framework is extraordinarily problematic at best and immoral at worst.

### III. PROBLEMS OF PURPOSE

The overwhelming majority of individuals held at Guantánamo, either currently or at any time in the past nine years, have been detained without charge.<sup>53</sup> In this, they may seem at first blush to be akin to prisoners of war, who are also held without charge. The law of war clearly contemplates detention without charge or trial for both combatants and civilians during conflict. Although the detention of suspected terrorists may therefore seem to fit within the parameters of the law of war, a closer examination of the purposes of both traditional law of war detention and the apparent purposes of detention of suspected terrorists at Guantánamo demonstrates a significant diversion of purpose between the two types of detention. While the former is based on the notion of protective custody, the latter includes powerful suggestions—both overt and subliminal—that the detention is inherently punitive in some way.

#### A. *Detention of Prisoners of War*

Under the prisoner of war (“POW”) detention regime in the Third Geneva Convention and earlier customary and conventional law, preventing a return to hostilities is the underlying purpose of detention. “The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on

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immoral. It is, also, the *de facto* paradigm that has characterized both the Bush and Obama Administrations.”). Furthermore, the reliance on a political determination to identify the end of hostilities makes it easy to imagine a scenario in which a conflict against terrorist groups or terrorism does last for generations. See *al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (discussing the “Geneva Conventions[] requirement of] release and repatriation only at the ‘cessation of active hostilities”).

53. Of 779 total detainees held at some time at Guantánamo, only twenty-six have ever been charged. See *Here’s the Current Status of Proposed Military Commission Cases*, MCLATCHY WASHINGTON BUREAU (Nov. 13, 2009), <http://www.mcclatchydc.com/2009/11/13/v-print/78882/heres-the-current-status-of-proposed.html>.

he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.”<sup>54</sup> In particular, POWs are not liable to prosecution for their lawful wartime acts, which reinforces the fact that they are not held as a form of punishment for engaging in combat. Thus, the detention of a combatant “has only one purpose: to preclude the further participation of the prisoner of war in the ongoing hostilities. The detention is not due to any criminal act committed by the prisoner of war, and he cannot be prosecuted and punished ‘simply for having taken part in hostilities.’”<sup>55</sup>

Historical and modern incarnations of law of war detention rest on this notion. As the Lieber Code stated in one of the earliest codifications of the modern law of war, “[s]o soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”<sup>56</sup> The Nuremberg Tribunal similarly upheld this purpose for prisoner of war detention, stating that wartime captivity is “neither revenge nor punishment, but solely protective custody.”<sup>57</sup> In particular, the Tribunal reinforced that the protective nature of POW detention stems from long-standing principles of international law, and was not specific to the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, the relevant applicable conventional law.<sup>58</sup> More recently, the U.S. Supreme Court held in *Hamdi v. Rumsfeld* that detention of enemy

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54. *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (footnotes omitted).

55. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 28 (2004) (citing A. ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS* 82 (1976)). *See also* Third Geneva Convention, *supra* note 9, arts. 87, 99; *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent’s municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. This doctrine has a long history, which is reflected in part in various early international conventions, statutes and documents.”) (footnotes omitted).

56. Francis Lieber, *WAR DEPARTMENT, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* art. 57 (1863), *available at* <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter Lieber Code].

57. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 229 (1947). *See also* TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 19 (1970) (“War consists largely of acts that would be criminal if performed in time of peace . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.”); Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. RED CROSS 571, 572 (2002).

58. *International Military Tribunal*, *supra* note 57, at 248-49.

fighters until the end of hostilities is a “fundamental incident” of warfare, stemming from military necessity and basic principles of the law of war.<sup>59</sup>

Beyond this fundamental framework of detention affirmatively designed to be nonpunitive, the overarching conception of protective custody for POW detention can be seen throughout the Third Geneva Convention. As the ICTY Appeals Chamber recently stated, “the protection of POWs is covered by an extensive net of provisions within the Third Geneva Convention,”<sup>60</sup> and numerous components of this comprehensive framework repeatedly emphasize that such detention is protective in nature. At the macro level, detaining powers retain a measure of responsibility for the treatment of POWs even after they are transferred to another power, demonstrating the strong protective underpinnings of POW custody.<sup>61</sup> The Commentary thus explains that “it was never the intention of the authors of the Convention thereby to relieve the transferring Power of all responsibility with regard to the prisoners who are transferred.”<sup>62</sup> A system based solely on punitive conceptions would not require this retention of responsibility as a protective measure.

More specifically, the Third Geneva Convention requires that detaining powers take proactive steps to protect POWs from the hazards of combat. Articles 19 and 23 mandate that POWs be held “far enough from the combat zone for them to be out of danger”<sup>63</sup> and cannot be “detained in areas where [they] may be exposed to the fire of the combat zone.”<sup>64</sup> Article 13 also prohibits reprisals against POWs because, among other reasons, “the feelings which lie behind such practices are absolutely contrary to the spirit of the Geneva Conventions.”<sup>65</sup> When combined with the extensive provisions

59. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

60. *Prosecutor v. Karadzic*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia July 9, 2009). *See also* *Eritrea v. Ethiopia*, 26 R.I.A.A. 23, 43 (Eri.-Eth. Claims Comm’n 2003) (explaining the conventional and customary law applicable to POWs provides “an extremely detailed and comprehensive code for the treatment of POWs”); *Eritrea v. Ethiopia*, 26 R.I.A.A. 73, 91-92 (Eri.-Eth. Claims Comm’n 2003).

61. Third Geneva Convention, *supra* note 9, art. 12 (“Nevertheless, if [the transferee] Power fails to carry out the provisions of the Convention in any important respect the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war.”).

62. Int’l Comm. of the Red Cross, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War, art. 12, ¶ 3 (1960) [hereinafter Third Geneva Convention Commentary].

63. Third Geneva Convention, *supra* note 9, art. 19.

64. *Id.* art. 23.

65. Third Geneva Convention Commentary, *supra* note 62, art. 13, ¶ 3.

governing treatment of POWs, relations with the authorities, relations with the exterior, and other issues, the protective function and nature of POW custody is unassailable. Therefore, “[i]t should always be remembered that prisoners of war are not convicted criminals in need of corrective training or punishment,”<sup>66</sup> but are simply held so as to remove them from the battlefield.

*B. Detention of Protected Persons and Other Civilians*

POWs are not the only individuals who can be detained in the course of armed conflict. The Fourth Geneva Convention explicitly contemplates the detention of civilians during international armed conflict “only if the security of the Detaining Power makes it absolutely necessary,”<sup>67</sup> or during belligerent occupation for “imperative reasons of security.”<sup>68</sup> For example, the United Nations Security Council Resolution governing the activities of the Multi-National Force-Iraq authorized the coalition forces to “take all necessary measures to contribute to the maintenance of security and stability in Iraq,”<sup>69</sup> including “internment where . . . necessary for imperative reasons of security.”<sup>70</sup> The primary recourse a detaining power has in such circumstances is to assigned residence or internment, and only if security reasons make such measures absolutely necessary. The Commentary to the Fourth Geneva Convention offers some further explanation about the nature of imperative reasons of security:

a belligerent may intern people . . . if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage[,] . . . .

the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.<sup>71</sup>

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66. UK MANUAL, *supra* note 39, ¶ 8.1.1.

67. Fourth Geneva Convention, *supra* note 9, art. 42.

68. *Id.* art. 78; *see id.* art. 5 (referring to individuals who are “definitely suspected of or engaged in activities hostile to the security of the State”); *see also* Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 404 (2009).

69. S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004). *See also* Public Notice, Office of the Administrator of the Coalition Provisions Authority Regarding Public Incitement to Violence and Disorder (June 5, 2003), *available at* <http://dosfan.lib.uic.edu/ERC/cpa/english/regulations/PN1.pdf> (announcing that all individuals engaged in public incitement to violence and disorder “will be subject to immediate detention by CPA security forces and held as security internee[s] under the Fourth Geneva Convention of 1949”).

70. S.C. Res. 1546, *supra* note 69, at Annex 11. For a comprehensive discussion of security detention in Iraq, *see generally* Chesney, *supra* note 44.

71. Fourth Geneva Convention Commentary, *supra* note 38, art. 42, ¶ 1 (footnote

In particular, the mere fact that an individual is an enemy national is not sufficient to justify such internment; rather, any detention must be based on an individualized determination of the threat to security the individual poses.<sup>72</sup> For example, “subversive activity carried on inside the territory of a [p]arty to the conflict or actions which are of direct assistance to an enemy [p]ower” fits within this framework.<sup>73</sup> The rules governing such internment bear a marked similarity to many of the rules for POW detention, including the obligation to ensure that internment camps are not exposed to the dangers of war.<sup>74</sup>

In situations of non-international armed conflict, Common Article 3 clearly contemplates detention of one or more forms, referencing individuals who are *hors de combat* because of detention, among other reasons.<sup>75</sup> However, the law applicable to non-international armed conflict provides little guidance or rules governing detention, particularly administrative detention such as that contemplated in the Fourth Geneva Convention and Additional Protocol I. “Therefore, states conducting administrative detention in non-international armed conflict will be governed by their domestic laws, which generally include human rights provisions and due process requirements.”<sup>76</sup> In addition, the law of international armed conflict provides useful analogies and guidance for exploring the parameters of detention in non-international armed conflict.<sup>77</sup>

Beyond the basic parameters of the regime for detention of civilians, the comparative focus on a nonpunitive paradigm is critical for the purposes of the instant analysis. Article 78 of the Fourth Geneva Convention, the foundation for security internment during armed conflict or belligerent occupation, “relates to people who have not been guilty of any infringement of the penal provisions enacted

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omitted).

72. UK MANUAL, *supra* note 39, ¶¶ 9, 31; Deeks, *supra* note 68, at 407 (“Embedded in these rules is the unstated requirement that a person must be detained based on the particularities of his situation. For instance, a state may not detain a person for something his neighbor has done, or use a person as a bargaining chip to obtain the release of a detainee held by the opposing state.”); Ryan Goodman, *The Second Annual Solf-Warren Lecture in International and Operational Law*, 201 MIL. L. REV. 237, 245 (2009).

73. Fourth Geneva Convention Commentary, *supra* note 38, art. 42, ¶ 1; Goodman, *supra* note 72, at 245-46.

74. Fourth Geneva Convention, *supra* note 9, art. 83. For further discussion of the specific rules governing internment of civilians and the similarities to POW detention, see UK MANUAL, *supra* note 39, ¶¶ 9.37-.86.

75. Geneva Convention Common art. 3, *supra* note 20, ¶ I (“Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . .”).

76. Deeks, *supra* note 68, at 413.

77. See, e.g., Goodman, *supra* note 72, at 240-42.

by the Occupying Power” but are considered “dangerous to its security.”<sup>78</sup> Most telling, the Commentary specifically states that “[t]he precautions taken with regard to them cannot, therefore, be in the nature of a punishment.”<sup>79</sup> Those persons accused of criminal conduct enjoy the basic rights inherent in a criminal justice system—the right to be informed of the charges against them, the right to a speedy trial, the right to defense counsel, and the right to appeal the verdict.<sup>80</sup> The Fourth Geneva Convention thus marks a clear line between those who are in custody for punitive reasons—those who are charged with and prosecuted for a crime—and those who are in security internment, which is non-punitive in nature and does not involve criminal charge or prosecution.<sup>81</sup> Furthermore, Article 75(3) of Additional Protocol I specifically distinguishes between persons detained administratively and persons detained for punitive purposes.<sup>82</sup> This framework runs parallel in some ways to the regime for detention of POWs, who are not subject to prosecution except for crimes committed during captivity or precapture violations of the law of armed conflict.<sup>83</sup>

*C. The Implicitly—or Explicitly—Punitive Nature of the Current Detention Regime*

As discussed above, traditional law of war detention does not rest on punitive purposes but rather seeks to fulfill protective and preventive goals through protective custody. Here, the “law of war” detention conceived of in Executive Order 13,567, in the *de facto* indefinite detention ongoing at Guantánamo and in the proposed TDRRA parts ways irrevocably with its traditional counterpart. The United States has gone to great lengths—and rightly so in most cases—to argue and demonstrate that the individuals at Guantánamo are not lawful belligerents. Rather, they are persons not entitled to any form of privileged combatancy under traditional principles of international law. Still more, they are generally persons we suspect (or, depending on the evidence available, could prove) have committed violent crimes against Americans, American

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78. Fourth Geneva Convention Commentary, *supra* note 38, art. 78, ¶ 1.

79. *Id.* ¶ 2.

80. Fourth Geneva Convention, *supra* note 9, art. 71.

81. Compare Fourth Geneva Convention Commentary, *supra* note 38, art. 78, ¶ 1, with Fourth Geneva Convention, *supra* note 9, art. 71.

82. Additional Protocol I, *supra* note 9, 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. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”).

83. See *supra* note 57 and accompanying text.

interests, and American allies. Unlike law of war detention, therefore, where individuals held in protective custody are specifically not suspected of or charged with any crime, the detainees to be held in indefinite detention are effectively held in punitive custody and suspected of culpability in violent, criminal terrorist attacks, but they are neither charged nor prosecuted.

First, the general discourse emanating from the U.S. government over the past nine years demonstrates that both the Bush and Obama administrations ultimately view the detainees at Guantánamo as “terrorists” rather than as “suspected terrorists.” Although this may seem to be a semantic point, it lays the first stone in the foundation for the punitive detention framework we now see. Numerous statements by high-level government officials—including the President—confirm this attitude of detaining “the worst of the worst”<sup>84</sup> or “committed terrorists”<sup>85</sup> or “killers.”<sup>86</sup> Second, indefinite detention is often presented as an alternative to either Article III criminal trials or prosecutions before military commissions.<sup>87</sup> This view of the options for addressing detainee questions suggests that detention is in lieu of prosecution; that is, detention is a reasonable alternative when prosecution is not a viable option.<sup>88</sup> However, law of war detention is not an alternative to prosecution—the central focus of both POW detention and civilian detention for security reasons under the Fourth Geneva Convention is not criminal prosecution but protective and preventive detention.<sup>89</sup> To suggest that the United States can either prosecute detainees or hold them in indefinite detention is equivalent to suggesting that detention is another form of punishment.

Rather, as the above discussion demonstrates, the law of war envisions detention without charge solely for those held in protective or preventive custody. Persons who are accused of criminal activity are to be tried either as war criminals for violations of the law of war or within the domestic criminal system for those who have violated domestic penal law. Both the Third and Fourth Geneva Conventions provide fundamental rights to those accused of criminal activity, including the right to be informed of the charges, the right to

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84. Neil A. Lewis and Eric Schmitt, *Cuba Detentions May Last Years*, N.Y. TIMES, Feb. 13, 2004, at A1; Katharine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s, Rumsfeld and Cheney Declare*, N.Y. TIMES, Jan. 28, 2002, at A6.

85. Lewis & Schmitt, *supra* note 84, at A1.

86. Katharine Q. Seelye and David E. Sanger, *A Nation Challenged: Bush Reconsiders Stand on Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A1.

87. Task Force Report, *supra* note 2; Peter Finn, *Most Guantanamo Detainees Low-Level Fighters, Guantanamo Report Task Force Advises 126 be Transferred*, WASH. POST, May 29, 2010, at A3.

88. *See supra* note 87 and accompanying text.

89. *See supra* note 57 and accompanying text.

assistance of counsel, and the right to appeal, for example.<sup>90</sup> Punitive detention within the law of war context thus must involve notification of charge, a trial, and basic rights commensurate with such a process. Indeed, the Conventions consistently emphasize that a regular trial is a “safeguard [that] is absolutely general. It applies to all accused persons, even those who are charged with having contravened the Geneva Conventions themselves.”<sup>91</sup> When, as here, persons are held in indefinite detention as a substitute for prosecution rather than for protective and preventive purposes, the detention takes on decidedly punitive characteristics. One of the strongest factors pointing to a punitive detention framework is that the United States views the detainees at Guantánamo as criminals for the sole fact that they took part in hostilities against American and allied forces without any lawful belligerent’s privilege.<sup>92</sup> In some cases, individuals designated for indefinite detention “under the laws of war” are so designated because the government has decided that it cannot try them—for reasons of evidentiary shortcomings or coercive statements—even though it ordinarily would prosecute them.<sup>93</sup> Holding such persons without charge for an indefinite, and potentially decades-long, period of time can only be characterized as punitive—the United States is detaining them because of what they did, as a substitute for prosecution.

This Article does not purport to suggest that the laws of war do not contemplate prosecution or punishment of detained persons who are accused of criminal activity, either before or during captivity, whether fighters or civilians. As discussed above, the Third and Fourth Geneva Conventions provide for the prosecution of POWs and civilians for violations of the laws of war and domestic law. Critically, however, detention without charge in the law of war framework is not for such persons. Detention without charge—the

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90. See, e.g., Third Geneva Convention, *supra* note 9, arts. 99-107; Fourth Geneva Convention, *supra* note 9, arts. 68-73.

91. Fourth Geneva Convention Commentary, *supra* note 38, art. 71, ¶ 1 (Article 3 “prohibits at all times and in all cases whatsoever ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,’” and Article 147 includes “the fact of wilfully depriving a protected person of ‘the rights of fair and regular trial prescribed in the present Convention’ . . . among the grave breaches listed in that Article which call for the severest penalties.”).

92. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (D.D.C. 2008) (presenting U.S. government’s definition of enemy combatant as, *inter alia*, a person who took part in hostilities against the United States); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Defense, on Application of Treaties and Laws to al-Qaeda and Taliban Detainees 25 (Jan. 9, 2002).

93. See generally Task Force Report, *supra* note 2.

equivalent to the indefinite detention both ongoing and proposed today—is only for those persons held in protective custody, whether POWs or civilians detained for imperative reasons of security. Attaching the label “under the laws of war” to indefinite detention for punitive reasons creates a fundamental problem of purpose that stretches law of war detention beyond its limits and undermines both the principles of the law of war and the rule of law in general.

#### IV. PROBLEMS OF POSTURE

Questions of how to define the geographical and temporal parameters of the battlefield in today’s conflicts and how to delineate between protective and punitive detention go to the heart of the legal principles underlying law of war detention. The final stretch in the fabric of law of war detention the current framework poses lies more in the realm of policy and morality. The reliance on indefinite detention, both from the start of detention at Guantánamo and through the proposed formalization of the regime at present, has consistently been a reactive posture. The policy of indefinite detention is an example of starting with a result and finding the legal and policy justifications for it. The effect is to take a problematic decision and “prettify” it, which is exactly what applying the label “under the laws of war” to indefinite detention of terrorist suspects does.

The central problem is that effective counterterrorism depends on a prospective, proactive posture of defining the parameters and paradigms of operational and policy options and frameworks. In the context of counterterrorism, decision-makers must define threats, targets, and operational responses in advance so as to create the opportunities for effective and lawful counterterrorism.

The failure to engage in a robust debate regarding both definition and application directly contributes to operational over-reaction, which has tactical and strategic ramifications that, in the main, prevent effective counterterrorism.

Definitions minimize amorphousness, thereby reducing wiggle room otherwise available to the executive branch. This is particularly important with respect to the due process discussion; by failing to clearly define what rights are to be protected, the ability to minimize rights is greatly enhanced. In the tension and fear that pervades the terrorism/counterterrorism discussion, minimizing individual rights in response to either a threat or an attack is, lamentably, a recurring theme.<sup>94</sup>

The consistently reactive posture in the United States post-

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94. Amos N. Guiora, *Due Process and Counterterrorism*, 26 EMORY INT’L L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1680009](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680009).

September 11th has undermined the protection of individual rights on many occasions; the indefinite detention without charge or trial is one of the most comprehensive and problematic of such examples. Thus, the perception—and likely the reality—is that the United States has found itself with a number of detainees that it feels unable to prosecute, release, or transfer and therefore, needs to create a system to hold them indefinitely. This approach creates paradigms based on results rather than based on values, principles, and legal parameters. The very fact that the label “under the laws of war” is attached to indefinite detention that varies in numerous ways from traditional law of war detention is a clear example of this reactive posture and how it can compromise a principled and moral approach to effective counterterrorism.

In contrast, a proactive approach in which the government defines terms, criteria, and guidelines would enable a more principled application of the law to a complicated situation fraught with complex legal, political, and moral questions. Such terms, for example, would need to include not only the “who”—combatants, terrorists, etc.—but the “what”—what is terrorism; what is armed conflict; what will the end of the conflict look like; where is the conflict taking place; and what is detention in the context of armed conflict or counterterrorism operations against transnational terrorist groups or non-state actors. Extraordinary amounts of energy have been expended over the past nine years on the questions of who and how to detain and, at times, who and how to prosecute. Although less murky than before, these questions remain hotly contested and not satisfactorily answered<sup>95</sup>—partly because of the failure to define effectively who and what constitutes a threat and in great measure because of the failure to establish criteria and standards for the decision-making process. The questions of where and how long, the geographical and temporal parameters of conflict, have been addressed only minimally on the surface level, if at all. By the same token, the question of why—why we detain certain persons and why we prosecute certain persons—also remains unresolved. The effect of not defining the terms and criteria relevant to these questions is the potential for generational,<sup>96</sup> even lifetime detention without charge or any venue for adjudication of individual responsibility.

Some will counter by saying that law of war detention is detention without charge until the end of hostilities, which is indeed true, but the problems of definition and purpose discussed above

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95. David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POLY. REV. 375, 375 (July 21, 2010); see Geoffrey S. Corn, *The Role of the Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity and Judicial Review*, 43 NEW ENG. L. REV. 17, 22 (2008).

96. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 785 (2008).

demonstrate that the comparison is inapt. De jure protective custody until the end of hostilities that one can envision and understand is not the same paradigm as de facto punitive custody until a time that we cannot define or describe in any effective manner. Detention of suspected terrorists and other fighters in a conflict with transnational terrorist groups and other nonstate actors is likely an important facet of such a conflict and can help accomplish critical national security and counterterrorism objectives. That does not mean, however, that such detention can rightly be termed “law of war detention” or detention “under the laws of war” without unduly stretching the fabric of traditional law of war detention too far.