

“THE END OF ACTIVE HOSTILITIES:” THE OBLIGATION TO RELEASE CONFLICT INTERNEES UNDER INTERNATIONAL LAW

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I. INTRODUCTION

In August 2014, the United States, upon request of the Iraqi government, and with support of a growing coalition of Western and Arab states, launched air strikes on the Islamic State in Iraq and Syria, reviving a conflict that had ended with the withdrawal of all United States troops in 2011. The Obama administration argued – mainly for domestic reasons – that the Islamic State was a successor organization of Al Qaeda, raising concerns that the “Forever War” would indeed never end.¹ The

1. Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel To Iraq and the Authorization of Military Operations in Syria, 2014 DAILY COMP. PRESIDENT. DOC. 697 (Sept. 23, 2014); Harold Hongju Koh, *Obama’s ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?* JUST SECURITY (Sep. 29, 2014, 8:03 AM), <https://www.justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly->

start of this operation coincided with the drawdown of troops and the end of detention operations in Afghanistan.² While that withdrawal anticipated the end of combat operations there, and many hoped for a declaration of the end of hostilities with regard to the conflict against the Taliban by President Obama, the rhetoric around the emergence of IS suggested the “conflict” against Al Qaeda, whether in Afghanistan, Iraq, or Syria, was not to end anytime soon.³ Since, doubts have emerged about whether the conflict against the Taliban has indeed ended, as the United States continues to support Afghan operations through air strikes and Special Forces advisors.⁴ In October

illegal-really/ (noting the danger inherent in the “splinter theory” interpretation of the 2001 al-Qaeda AUMF to Obama’s plans to end the “Forever War”); see also MICHAEL JOHN GARCIA & JENNIFER K. ELSEA, CONG. RESEARCH SERV., U.S. MILITARY ACTION AGAINST THE ISLAMIC STATE: ANSWERS TO FREQUENTLY ASKED LEGAL QUESTIONS (Sep. 9, 2014) (discussing questions related to domestic war powers arising out of the start of the military operations against ISIS). For earlier critiques of the “Forever War” see, for example, Laurie R. Blank, *A Square Peg in A Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1181 (2011) (criticizing hostilities against terrorists groups because “[t]errorist groups morph, splinter, and reconfigure, making it difficult to determine if, let alone when, they have been defeated”); Stephen I. Vladeck, *Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L SECURITY L. & POL’Y 53, 53 (2006) (arguing there is no clear basis on which to determine the war on terror has ended because it lacks clear objectives or a clearly defined enemy).

2. DoD News, *Obama, Hagel Mark End of Operation Enduring Freedom*, U.S. DEP’T OF DEF. (Dec. 28, 2014), <http://www.defense.gov/News/Article/603860>. On December 10, 2014, the United States announced it had closed its detention facilities in Bagram after handing over two Tunisian detainees it had held there to the Afghan authorities. Jim Miklaszewski & M. Alex Johnson, *U.S. Closes Bagram Detention Center, Hands Over Last Afghan Prisoners*, NBC NEWS (Dec. 10, 2014, 6:59 PM), <http://www.nbcnews.com/storyline/cia-torture-report/u-s-closes-bagram-detention-center-hands-over-last-afghan-n265851>.

3. DoD News, *supra* note 2 (discussing the end of the combat mission in Afghanistan); see also Message to the Congress on Submitting Proposed Legislation To Authorize the Use of Military Force Against the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization, 2015 DAILY COMP. PRES. DOC. 93 (Feb. 11, 2015) (declaring that the President intends to rely on the AUMF 2001 to continue the use of military force); Ryan Goodman, *Obama’s Forever War Starts Now*, FOREIGN POLICY (Feb. 12, 2015), <http://foreignpolicy.com/2015/02/12/obamas-forever-war-starts-now-aumf-isis-islamic-state/>.

4. See Nathalie Weizmann, *Why U.S. Being a Party to Armed Conflict in Afghanistan May Not End Soon*, JUST SECURITY (Jan. 7, 2015, 9:09 AM), <http://justsecurity.org/18904/u-s-forces-transition-drawdown-afghanistan/> (explaining

2015, Obama announced a halt to the drawdown of troops from Afghanistan, given the deteriorating security situation,⁵ and ultimately decided to keep 5,500 troops in the country beyond the end of 2016.⁶

Both the Bush and the Obama administrations have argued they are in an armed conflict against Al Qaeda and associated forces independent of the conflict in Afghanistan.⁷ The 2001 Authorization for Use of Military Force (AUMF 2001) authorizes operations against those responsible for the attacks of September 11 and those harboring them, as well as to prevent further attacks by “such nations, organizations, and persons.”⁸

the factual circumstances and scholarly opinion on whether the United States might remain a party to the non-international armed conflict in Afghanistan). Michael M. Phillips, *Treading Line Between War and Peace, U.S. Special Forces Groom Afghan Troops*, WALL STREET J. (Aug. 28, 2015 1:28 PM) <http://www.wsj.com/articles/treading-line-between-war-and-peace-u-s-special-forces-groom-afghan-troops-1440782892>; Matthew Rosenberg & Eric Schmitt, *U.S. Is Escalating a Secretive War in Afghanistan*, N.Y. TIMES (Feb. 12, 2015), <http://www.nytimes.com/2015/02/13/world/asia/data-from-seized-computer-fuels-a-surge-in-us-raids-on-al-qaeda.html> (reporting that U.S. Special Forces have actively engaged in a series of night raids conducted since November 2014 with the Afghan forces to capture Taliban and Al Qaeda commanders).

5. Matthew Rosenberg & Michael D. Shear, *In Reversal, Obama Says U.S. Soldiers Will Stay in Afghanistan to 2017*, N.Y. TIMES (Oct. 15, 2015) <http://www.nytimes.com/2015/10/16/world/asia/obama-troop-withdrawal-afghanistan.html?>

6. U.S. DEP'T OF DEF., ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 6 (December 2015), http://www.defense.gov/Portals/1/Documents/pubs/1225_Report_Dec_2015_-_Final_20151210.pdf.

7. See, e.g., Address to a Joint Session of Congress and the Nation, 37 WEEKLY COMP. PRES. DOC 1347, 1348 (Sep. 20, 2001) (“Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach had been found, stopped and defeated.”); THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 1-4 (May 2010), https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (presenting a plan to defeat Al Qaeda and associated forces); see also Kelisiana Thynne, *Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 161-62 (2009) (discussing the Obama administration’s attempts to define the enemy in the transnational conflict against terrorist networks).

8. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2012)). The domestic authorization, or the lack thereof, does not determine which rules of international law are applicable to such operations. The U.S. Supreme Court has interpreted the AUMF 2001 as the source of domestic detention authority for internees the United States holds at Guantánamo or in any other theater of war related to the AUMF. See *infra* Part II.A.

The lack of geographical limitation in the AUMF 2001 contributes to a lack of clarity over which hostilities have to end, against whom, and where, before the government has an obligation to release detainees.⁹ Obama has not suggested that the operation against IS would change his intention to close Guantánamo. But it is likely his administration would want to rely on a continuation of hostilities with some variant of Al Qaeda to claim continued detention authority for those individuals at Guantánamo it does not want to, or practically cannot release.¹⁰ Without ground troops, the United States is unlikely to capture many detainees in the conflict against IS; yet, it already held Umm Sayyaf, the wife of an IS leader, since her capture during a Special Forces raid on May 15, 2015, in military detention until she was transferred to Iraqi-Kurdish authorities on August 6, 2015.¹¹ U.S. allies may also be tempted to borrow from the U.S. blueprint for detention authorities for extraterritorial non-international armed conflicts developed in the past years.

Guantánamo itself is an unlikely model for a new site of detention; yet, the legal rationale for status-based detention of so-called “unprivileged belligerents” has been integrated into U.S. military doctrine.¹² While contested as a proper interpretation of detention authorities in a non-international armed conflict,¹³ it may make its way into a number of protracted conflicts. The legal framework for detention in Guantánamo has entangled the law of international armed

9. Stephen I. Vladeck, *Detention after the AUMF*, 82 *FORDHAM L. REV.* 2189, 2196 (2014) (recognizing that “[m]ilitary detention under the laws of war requires war as a necessary antecedent”).

10. *See id.* at 2191 (asserting that preservation of the AUMF 2001 is necessary for continued detention of Guantanamo detainees).

11. Press Release, Dep’t of Def., Defense Department Announces the Transfer of Umm Sayyaf (Aug. 6, 2015), <http://www.defense.gov/News/News-Releases/News-Release-View/Article/612827>.

12. *See infra* notes 301-306 and accompanying text.

13. *See* Int’l Comm. of the Red Cross, *Meeting of all States on Strengthening Humanitarian Law Protecting Persons Deprived of their Liberty*, 9-11 (April 27-29, 2015) [hereinafter ICRC] (noting the continuing disagreement over grounds of detention permissible in a non-international armed conflict under international law).

conflict and non-international armed conflict in a way that downplays the protective and strengthens the enabling aspects of international humanitarian law (IHL).¹⁴ The experience with Guantánamo shows that status-based detention until the end of hostilities in non-international armed conflict is highly problematic for policy reasons and, as this article argues, as a matter of international law. The complexity of determining the end of hostilities in a non-international armed conflict compounds these concerns. The Obama administration has confused the debate by declaring the end of combat operations in Afghanistan, while maintaining that the law of armed conflict continues to apply to its operations against Al Qaeda and the Taliban.¹⁵ It stated in federal court that hostilities against the Taliban continue, opposing a habeas petition by a Guantánamo detainee who argued the end of combat operations in

14. See Madeline Morris, Frances A. Eberhard & Michael A. Watsula, *After Guantánamo: War, Crime, and Detention*, 3 HARV. L. & POLY REV. ONLINE 1, 4-5 (2009) (noting the paucity of treaty rules governing non-international armed conflict and the difficulty to apply rules of international armed conflict to the relation between a State and a non-state actor).

15. See Stephen Preston, General Counsel, U.S. Dep't of Def., *The Legal Framework for the United States' Use of Military Force Since 9/11* (Apr. 10, 2015) (text available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1931>) (“[T]he President made clear that ‘our combat mission in Afghanistan is ending’ . . . [however,] because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because al-Qa’ida and associated forces continue to target U.S. persons and interests actively, the United States will use military force against them as necessary. Active hostilities will continue in Afghanistan (and elsewhere) at least through 2015 and perhaps beyond. There is no doubt that we remain in a state of armed conflict against the Taliban, al-Qa’ida and associated forces as a matter of international law.”). In the National Defense Authorization Bill 2015, Congress requested within 90 days from its enactment a report by the Secretary of Defense, in consultation with the Attorney-General and the Secretary of State, on the impact of the end of major combat operations on the authority to detain members of Al Qaeda and the Taliban under the AUMF 2001 or “any other legal authority.” CARL LEVIN AND HOWARD P. ‘BUCK’ MCKEON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015, Pub. L. No. 113-291, § 1234(a), 128 Stat. 3292, 3557 (2014) [hereinafter NDAA 2015]. That report has not been made available to the public.

Afghanistan and Obama's declarations that the war in Afghanistan was over compelled his release.¹⁶

This article discusses how to determine the "end of active hostilities," which limits, according to *Hamdi v. Rumsfeld*, the detention authority over so-called "enemy combatants" captured on the battlefield in Afghanistan.¹⁷ Did it end on January 1, 2015, the official start of Operation Resolute Support in Afghanistan? Will it only end with the withdrawal of all U.S. forces from Afghanistan? Does it matter whether Congress repeals the AUMF 2001 or not? If hostilities have not ended, how long can the government rely on the "law of war" to hold internees at Guantánamo?

In the United States, the debate has long centered on the repeal of the domestic authorization for the use of force under the AUMF 2001 and the determination by the President that the conflict against either of those groups have ended.¹⁸ Both are

16. Respondent's Opposition to Petitioner's Motion to Grant Petition for Writ of Habeas Corpus, *Al Warafi v. Obama*, 2015 WL 4600420 (D.D.C. July. 30, 2015) (No. CV 09-2368 (RCL)).

17. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities.").

18. See Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J. 115, 116 (2014) (proposing several possible scenarios to repeal the AUMF 2001 and replace it with war powers more adequate for the current situation); BILL FRENCH & JOHN BRADSHAW, NAT'L SEC. NETWORK, ENDING THE ENDLESS WAR. AN INCREMENTAL APPROACH TO REPEALING THE 2001 AUMF (2014), http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL1.pdf (predicting the expansive use of the AUMF 2001 by future administrations if the law is not refined); ROBERT CHESNEY ET AL., HOOVER INST., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 6-7 (2013) (outlining a statutory basis and a new legal foundation for 'next-generation terrorist threats'). Another relevant field of interest is the "ius post-bellum" – the question of which law applies once hostilities have ended. See, e.g., Michael Jefferson Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT'L SEC. J. 377, 431 (2014) (arguing that the customary law of self-defense would replace IHL rules once the conflict between the United States and Al Qaeda had ended); Robert M. Chesney, *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 210–11 (2013) (stating that if the legal questions posed by the first post-9/11 decade were difficult, the legal questions posed by the second post-9/11 decade will be more so).

seen to end authorities under the “law of war,”¹⁹ and thus the end of the authority to detain individuals in relation with that conflict.²⁰ International law, the source of the “laws of war,” now receives increased attention, but existing literature has scratched only at the surface of the notion of “end of hostilities” in a non-international armed conflict.²¹ Most commentary, and indeed the U.S. government, appears now to be in agreement that the end of hostilities requires a factual determination of the situation on the ground.²² While courts and experts have

19. See *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (citing *Hamdi*, 542 U.S. at 521 for the principle that the “law of war” requires release of detainees at the end of the conflict and asserting that the “determination of when hostilities have ceased is a political decision, and [the court] defers to the Executive’s opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war”).

20. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

21. See Ryan J. Vogel, *Ending the ‘Drone War’ or Expanding It? Assessing the Legal Authority for Continued U.S. Operations Against Al-Qa’ida after Afghanistan*, 8 ALB. GOV. L. REV. 280 (2015); see also Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 198-201 (2014) (discussing treaty provisions and proposals by the ICRC and international tribunals to determine the end of an armed conflict); Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 CARDOZO L. REV. 625, 632-57 (2014) (summarizing the ways the United States ended wartime detention in World War I, World War II, Korea, Vietnam, and the 1991 Gulf War); Eric Talbot Jensen, *Guantanamo and the End of Hostilities*, 37 S. ILL. U.L.J. 491, 492-93, 504-07 (2013) (discussing how the treaty-based and customary rules on the end of detention authority would apply in the context of Afghanistan); John B. Bellinger, III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 229-31 (2011) (discussing three alternative approaches to end of detention authority that have been proposed due to dissatisfaction with the IHL approach to the end of such detention authority).

22. See, e.g., Marty Lederman, *Understanding the “End of War” Dispute in the Al Warafi Habeas Case*, JUST SECURITY (May 27, 2015, 9:07 AM), <https://www.justsecurity.org/23171/understanding-end-war-dispute-al-warafi-habeas-case> (predicting that a court will pay great deference to the Executive Branch’s assessment of the relevant facts in determining if an armed conflict exists); Nathalie Weizmann, *The End of Active Hostilities Versus the End of Armed Conflict*, LAWFARE (May 28, 2015, 2:17 PM), <https://www.lawfareblog.com/end-active-hostilities-versus-end-armed-conflict-%C2%A0> (noting that under IHL, determination of the end of an armed conflict is a fact-specific inquiry rather than a legal inquiry). See also *Al Warafi v. Obama*, No. 09-2368 (RCL),

determined whether a non-international armed conflict existed at a particular moment in time, no precedent has yet addressed the question of the end of a non-international armed conflict and its effect on IHL rules on targeting and detention.²³ This piece discusses the doctrinal and practical implications of the determination of the end of non-international armed conflict, including conflicts where a foreign force supports a host government against a local insurgency. While its focus lies on the obligation to release detainees held in relation to such an armed conflict, it also highlights the challenges to the framework of IHL as a whole.

Part I outlines key controversies in the current framework of detention authority in non-international armed conflict, and situates the article's argument in these debates. Part II discusses how the legal concepts developed by the Bush and Obama administration have effectively neutralized existing obligations to release internees at Guantánamo. Part III analyzes the drafting history of the 1949 Geneva Conventions and presents a framework for the obligation to release under the Third and Fourth Geneva Conventions. Part IV proposes criteria to determine the end of hostilities in a non-international armed conflict, and applies them to the situation in Afghanistan. Part V discusses whether IHL and IHRL prohibits indefinite detention in cases where the end of hostilities cannot be determined.

II. WHICH CONFLICT? WHICH AUTHORITY TO DETAIN?

For Guantánamo, the United States has claimed a customary authority to intern so-called “unprivileged belligerents” until the end of (undefined) hostilities, including in a non-international armed conflict, and without positive

2015 WL 4600420, at *11 (D.D.C. Jul. 30, 2015) (holding that the status of war is better determined by the actual conduct of a political branch, rather than proclamations from the branch).

23. The recent decision by Judge Lamberth in *Al Warafi v. Obama* assumes, without detailed reasoning, that the end of active hostilities is equivalent to the moment when the “fighting stops.” *Al Warafi*, 2015 WL 4600420, at *13 (citing *Al Bihani*, 590 F.3d at 874).

obligation to release until the President declares the end of a “state of war,”²⁴ or, more recently, the end of hostilities.²⁵ Three premises underlie this claim, all of which remain fraught with controversy. One, whether the United States is involved in a transnational armed conflict against Al Qaeda, and if yes, which groups form part of the adversary party to that conflict.²⁶ Two, whether IHL displaces human rights law in times of armed conflict, and related to this question, whether the law of non-international armed conflict provides an inherent authority to detain without trial (“intern”) members of an organized armed group. Third, if there is such an authority, whether it allows internment based on the status of fighters, rather than based on an individual threat assessment. This section outlines the existing debate and explains why these issues pose a challenge for defining the obligation to release internees under international law.

24. Brief for Appellees at 34, 40, *Al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051) (arguing the end of a state of war is a determination for the political branches and not the courts, and that the law of war allows detention until the end of the “larger conflict” with the Taliban and Al Qaeda of enemy combatants who were not prisoners of war, without regard to the classification of the conflict as international or non-international).

25. Respondent’s Opposition to Petitioner’s Motion to Grant Petition for Writ of Habeas Corpus at 14-15, *Al Warafi v. Obama*, 2015 WL 4600420 (D.D.C. July. 30, 2015) (No. CV 09-2368 (RCL)).

26. See Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUDIES 1, 13 (2014) (advocating the nature of an organization, as opposed to the territorial limits of a group, governs whether an armed conflict exists); Rosa Brooks, *Duck-Rabbits and Drones: Legal Indeterminacy in the War on Terror*, 25 STAN. L. & POL’Y REV. 301, 315 (2014) (arguing that the current law of war is somewhat arbitrary and a new framework to govern armed conflict should be created). For a strong argument that a transnational terrorist network cannot be a non-state party to an armed conflict see HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 254-55 (2005) and Jordan J. Paust, *Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense*, 8 ALBANY GOV’T L. REV. 166, 169 n.5 (2015) (noting widespread recognition that the United States cannot be at war with Al Qaeda).

A. *The Obligation to Release and the Temporal Scope of International Humanitarian Law*

The end of “active hostilities” has several consequences under international law. It is the point in time when a party to the conflict may no longer rely on IHL, or the law of armed conflict, to justify detention or targeting operations.²⁷ While there has been increased attention to the temporal scope of the application of IHL,²⁸ the only treatise on the obligation to release prisoners of war dates from 1977, and discusses neither obligations under the Fourth Geneva Convention nor in a non-international armed conflict.²⁹ International law scholarship does not provide a detailed answer to solve the complex issues related to the beginning or end of an

27. See Weizmann, *supra* note 22 (discussing the point at which non-criminal detention must end under IHL); see also Weizmann, *supra* note 4 (stating that detention and targeting activities are governed by IHL during armed conflict).

28. See JULIA GRIGNON, L'APPLICABILITE TEMPORELLE DU DROIT INTERNATIONAL HUMANITAIRE 246-56 (2014) (discussing the need to define the beginning and end an armed conflict). The author thanks Marko Milanović for referring her to Grignon's dissertation, and Patrick Huser and Professor Franz Mali for research assistance. See also Rogier Bartels, *From Jus in Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?*, in JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 297, 301 (Carsten Stahn et al. eds., 2014) (explaining that recent reports have “found the end of the temporal scope of application to be a “complicated issue . . . in need of thorough research”); Marko Milanović, *The End of Application of International Humanitarian Law*, 96 INT'L REV. RED CROSS 163, 174 (2014) (explaining that the end of an international armed conflict is difficult to determine, but that it “will also end the application of those rules of IHL regulating the conduct of hostilities”).

29. CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1 OF THE 3RD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 109, 114-18 (1977); While Shields Delessert explicitly excludes a discussion of the obligation to release in non-international armed conflict, a French monograph, contains a brief chapter on the subject that could not be consulted. CATHERINE MAIA, ROBERT KOLB & DAMIEN SCALIA, LA PROTECTION DES PRISONNIERS DE GUERRE EN DROIT INTERNATIONAL HUMANITAIRE (2014). A new Commentary to the Geneva Conventions, published in December 2015, also contains chapters on the temporal scope of armed conflict and the obligation to release prisoners of war and internees. THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta & Marco Sassòli, eds., 2015).

extraterritorial non-international armed conflict.³⁰ This article contributes to the nascent literature on the temporal scope of IHL a detailed analysis of the drafting history of the provisions related to the cessation of hostilities and the obligation to release in the Third and Fourth Geneva Convention of 1949³¹ and the Additional Protocols.³²

As Part III will show, IHL in international armed conflict contains enabling and protective elements. It is a matter of debate whether IHL in non-international armed conflict is purely protective, and only imposes limits on the actions of a party to the conflict, or also contains permissive elements, such as an inherent authority to intern. This affects the ability to identify an obligation to release under international law. The relevant provisions of the Geneva Conventions aim to ascertain that persons remain protected by IHL if they are, after the end of hostilities, still affected by restrictive measures, such as detention.³³ This does not mean that IHL provides a source of authority for internment once the end of hostilities removes a justifiable recourse to military necessity.³⁴ It is more difficult to determine when a foreign State party to an extraterritorial

30. For a recent example of a conceptual framework, see Milanović, *supra* note 28, at 185-88 (discussing the fragile legal applicability of the IHL framework to the confrontation between the United States and Al Qaeda as the “core” Al Qaeda organization is further degraded by U.S. military operations and as those operations subsequently decrease); and see also Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT’L REV. RED CROSS 561, 561-62 (2013) (analyzing when international peace-keeping forces become a party to a pre-existing non-international armed conflict).

31. GC III, *supra* note 20, art. 118; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter GC IV].

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP 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), Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

33. See GC III, *supra* note 20, art. 5; GC IV, *supra* note 31, art. 6 (noting that persons detained after the end of hostilities will continue to benefit from the protections of the Geneva Conventions, and noting continued obligations of an Occupying power which exercise governmental functions after the close of general military operations.).

34. See *infra* notes 389-392 and accompanying text.

non-international armed conflict ceases to be a party to that conflict, a situation discussed in Part IV. After the end of hostilities, the justification for internment must be taken from a different body of law.³⁵

B. Transnational Armed Conflict: A Contested Model

From October 2001, the United States was engaged in an international armed conflict against the (de facto) government of Afghanistan, the Taliban.³⁶ This conflict transformed into a non-international armed conflict at the latest in June 2002.³⁷ Generally, experts classify as “non-international” any armed confrontation between a State and a non-state actor, even if it crosses state borders.³⁸ Some believe that hostilities between a foreign armed force and a non-state armed actor constitute an international armed conflict if the territorial State does not consent to the use of armed force on its territory.³⁹ A minority

35. See Jelena Pejić, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT'L L. 71, 78, 81 (2004) (stating that “after the end of hostilities in the international armed conflict,” neither the Third nor the Fourth Geneva Convention can “be considered a valid legal framework for the detention of persons who have not been released or subject to criminal process.”).

36. Robin Geiß & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT'L REV. RED CROSS 11, 14 (2011).

37. Most commentators mark the transformation of that conflict into a non-international armed conflict with June 2002, when the Afghan Transitional Administration started to function. The conflict onwards was between foreign coalition forces and the new Afghan government on the one side and armed opposition on the other side. See, e.g., *id.* at 15; Dapo Akande, *Classification of Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 63 (Elizabeth Wilmshurst ed., 2012) (referring to a letter by the ICRC to the UK government); Françoise J. Hampson, *Afghanistan 2001 – 2010*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 242, 256 (Elizabeth Wilmshurst ed., 2012) (concluding that the post-2002 conflict in Afghanistan was a non-international one, with the United States and the new Afghan government on one side, and the Taliban or the Taliban and Al Qaeda on the other side).

38. INT'L COMM. OF THE RED CROSS, ICRC Doc. 32/IC/15/11, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 15 (2015) (noting numerous instances where States have accepted the applicability of Common Article 3 to extraterritorial non-international armed conflicts).

39. Akande, *supra* note 37, at 73-75 (noting that the majority view would consider such conflicts of a non-international character, as long as the State directs attacks only

argue that the conflict remains an international one, because current fighting between the United States and the Taliban is in direct sequence of the conflict that started in 2001.⁴⁰ Others again believe that the language of Common Article 3 and the ICRC Commentary to the Third and Fourth Geneva Conventions bar the category of an extraterritorial non-international armed conflict.⁴¹

At least two authors argue that the only construction under which the drafters could envisage binding the non-state party to

against the non-state actor); *see also* Yoram Dinstein, *Concluding Remarks, in* NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 400, 41?? (Watkin & Norris eds., 2012) (“[A]s long as the two central governments of States A and B (acting separately or in collaboration with each other) wage hostilities only against the insurgents, the two simultaneous conflicts – despite their cross-border effects – remain non-international armed conflicts. But if the two central governments become embroiled in combat against each other, the armed conflict crosses the third threshold and becomes an international armed conflict.” *Id.* at 414).

40. Yoram Dinstein, *Terrorism and Afghanistan, in* THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 85 INT’L L. STUDIES 43, 51-52 (Michael N. Schmitt ed., 2009) (stating the view, “[c]ontrary to conventional opinion,” that the conflict between the United States and the Taliban continued to be an international armed conflict after the installation of a new government because hostilities are “a direct sequel to the hostilities that led to the ouster of the Taliban from the seat of power in Kabul.”). The author thanks Professor Paust for pointing out the disagreement over the classification of the conflict in Afghanistan.

41. The drafting history on the point remains obscure – the framers’ concerns definitely lay elsewhere. For the proponents of a strict “internal conflict” rule speaks the language of the ICRC Commentary which introduces the phrase “within the confines of a single country” at three different places, in both the Commentary on the Geneva Conventions and again in the Commentary on AP II. 3 INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean Pictet et al eds., 1960) [hereinafter GC III COMMENTARY]; 4 INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Jean Pictet et al. eds., 1958) [Hereinafter COMMENTARY GC IV]; SYLVIE-STOYANKA JUNOD, INT’L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1320 (1987) [Hereinafter COMMENTARY AP II] (using the language “within the territory of a single state”). *But see* Jelena Pejić, *The Protective Scope of Common Article 3: More than Meets the Eye*, 881 INT’L REV. RED CROSS 189, 199 (2011) (noting that the initial Stockholm proposal for a definition of a conflict not of an international character spoke of “armed conflict . . . which may occur on the territory of one or more of the High Contracting Parties”).

a conflict to the provisions of an international treaty was through the “contracting State’s domestic legislative sovereignty.”⁴² If the territorial state had not signed the Geneva Conventions, the non-state actor could not be bound by Common Article 3, and the novel edifice would fall apart. The huge leap the drafters were bracing themselves for was to subject a State to obligations of international law on their own territory, at the time a domain of inter-state relations only. This author thus tends to the opinion that reference “occurring on the territory of a High Contracting party” meant to exclude the application of Common Article 3 to the territory of a State that had not signed the 1949 Geneva Conventions, a distinction that is now, with the almost universal ratification of these treaties, irrelevant.

Article 3 common to the Geneva Conventions of 1949⁴³ thus applies where a State faces a non-state adversary with a minimum level of organization, or two such non-state actors are fighting each other on the territory of a State party to the Geneva Conventions, with the violence reaching a certain level of intensity.⁴⁴ Intensity can either be established through protracted armed hostilities (e.g. frequent hit-and-runs on military or other government installations and a military response to those acts, such as raids in villages suspected of harboring insurgents, or strikes on rebels bases), or brief, but very intense armed confrontations (e.g. two-day shelling and firing of rockets between a village or town and its surroundings).⁴⁵ AP II requires in addition to the element of

42. Pejić, *supra* note 35, at 201 (following NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 258 (2008)).

43. GC III, *supra* note 21, art. 3; GC IV, *supra* note 31, art. 3; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II].

44. COMMENTARY AP II, *supra* note 41, at 1350.

45. Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 154-56 (1997) (concluding that a two-day clash, despite its brief duration, was sufficient to trigger provisions of Common Article 3).

minimum level of organization and intensity of armed violence that the non-state actor controls part of the territory of the affected State.⁴⁶

Internal disturbances and tensions, including the use of State armed force to restore law and order or to prevent violence, sporadic acts of violence and criminal activity, were excluded from the scope of application of Common Article 3 and Additional Protocol II.⁴⁷ The International Criminal Tribunal for the former Yugoslavia (ICTY) distinguished in *Boškoski* “isolated acts of terrorism” from “protracted violence of this type, especially where they require the engagement of the armed forces in hostilities,” to determine whether acts of terrorism may give rise to a situation of armed conflict.⁴⁸ The so-called “war” against Al Qaeda fulfilled that requirement during the initial phase of the (then international armed) conflict in Afghanistan.⁴⁹

It is a rather uncontroversial proposition that the conflict against the Taliban would end with the withdrawal of all U.S. combat troops from Afghanistan.⁵⁰ What is contested is whether the end of combat operations in Afghanistan, or even withdrawal of all U.S. forces from that country, would also end the applicability of IHL to other operations against Al Qaeda. One position is that Al Qaeda’s capacity to engage in hostilities depends on its embedment in local or regional insurgencies, and

46. AP II, *supra* note 32, art. 1, ¶ 131. The United States is not a party to AP II. See Int’l Comm. of the Red Cross, *Treaties and State Parties to Such Treaties, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, ICRC, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

47. COMMENTARY AP II, *supra* note 41, at 1356.

48. Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 185, 190 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008).

49. See Hampson, *supra* note 37, at 256 (noting that Al Qaeda may have been a party to the conflict as an ally of the Taliban); see also Thynne, *supra* note 4, at 168-171 (arguing that only in Afghanistan, the violence between the United States and Al Qaeda fulfilled the criteria for an armed conflict).

50. See, e.g., Lederman, *supra* note 22 (discussing the effect of the withdrawal of troops from Afghanistan).

that at some point after 2002, “core Al Qaeda” had no longer the capacity to independently engage in what would qualify as hostilities.⁵¹ This position, argued here, implies that operations against members of Al Qaeda would normally not be governed by IHL unless Al Qaeda members participate in hostilities alongside local insurgent groups.⁵² The other position is that the intensity of hostilities and the capacity of Al Qaeda need to be understood as an aggregate of all groups affiliated with Al Qaeda, as long as they are planning or conducting attacks against the United States, and that the law of armed conflict applies to members of those groups – no matter where they are.⁵³ The latter position creates the most difficulties for determining the end of this conflict, as one set of Al Qaeda members in one part of the world may be replaced by another set of Al Qaeda members, or as in the case of IS, a successor organization.

This article cannot come to a definite conclusion on this very complex issue. Part IV argues that the current definition of

51. Noam Lubell, *The War (?) Against Al-Qaeda in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 421, 435-41 (Elizabeth Wilmshurst ed., 2012) (“[R]egardless of the extraterritorial element, the fighting between the US and Al-Qaeda could potentially be classified as non-international armed conflict.”). For a possible argument that drone strikes had diminished Al Qaeda’s capacity to engage in attacks on Western targets by 2010, see Peter Bergen, *A Gripping Glimpse into Bin Laden’s Decline and Fall*, CNN (Mar. 12, 2015, 12:50 PM), <http://www.cnn.com/2015/03/10/opinions/bergen-bin-laden-al-qaeda-decline-fall/index.html> (describing Al Qaeda documents “that demonstrate that almost a decade after 9/11 al Qaeda was struggling to get any kind of operation going against Western targets”).

52. See Thynne, *supra* note 4, at 168-171 (discussing the criteria necessary for IHL to apply to operations against Al Qaeda).

53. See, e.g., Vogel, *supra* note 21 at 291-294 (arguing it was likely that the armed confrontation with Al Qaeda would continue to satisfy the criteria under international law for an armed conflict, referring *inter alia* to possible actions by IS). See also ICRC Doc. 32IC/15/11, *supra* note 38, at 15 (arguing against geographically unbound targeting rules under IHL); Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT SECURITY L. 245, 250-52 (2010) (arguing against the aggregation of geographically dispersed incidents into one transnational armed conflict). The *ius ad bellum* may limit the possibilities to lawfully strike or carry out a capture operation against such persons. See, e.g., Christine Gray, *Targeted Killings: Recent US Attempts to Create a Legal Framework* 66 CURRENT LEGAL PROBS. 75 (2013).

non-international armed conflict requires a combination of intensity of hostilities and capacity of the non-state party to the conflict to engage in sustained hostilities and operate through a chain of command, and that only reciprocal and actual hostilities give rise to the application of IHL between two different armed actors.⁵⁴ Applying this analysis, it is hard to accept the notion of a transnational, geographically unbound conflict between the United States and Al Qaeda as a transnational network. It remains contested among experts under which circumstances IHL would apply to armed violence that occurs unbound by a particular territory.⁵⁵ No international tribunal has yet discussed this question.

The German Federal Prosecutor, in a decision not to prosecute the killing of a German citizen in Pakistan in a U.S. drone strike, found that “as [international law] currently stand[s], the application of the international laws of war, with their special prohibitions and empowerments, continues to be limited in territorial scope to actual theatres of war only.”⁵⁶ The Federal Prosecutor distinguished between “theatres of war” where “a conflict is currently being waged,” and “region of war” which consists of all territory under the control of a party to the

54. Setting this threshold too high risks the loss of IHL protections for victims of armed violence; setting it too low risks granting IHL authorities for the use of lethal force in situations where this is not justified. *See infra* Part IV.

55. Jelena Pejić’s and Noam Lubell’s contrasting points of view during a 2015 panel discussion serve to highlight this disagreement. Panel Discussion – Scope of the Law in Armed Conflict (International Committee of the Red Cross 2015), <https://www.icrc.org/en/event/scope-of-law>. Jelena Pejić argued for a geographical limitation of the applicability of IHL, while Noam Lubell argued that IHL may govern the use of force outside the territory of a core conflict if there is sufficient nexus between that violence and an existing armed conflict. *Id.*. Compare SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 233 (2012) (arguing that only if Al Qaeda affiliates in different countries operate under a single command, can one aggregate their actions to contribute to the intensity of a non-international armed conflict) with Jordan J. Paust, *Operationalizing Use of Drones Against Non-State Terrorists under the International Law of Self-Defense*, 8 ALBANY GOV’T L. REV. 166, 169 n.5 (2015) (noting that at least 30 writers recognize that the United States cannot be at war with Al Qaeda).

56. Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan, Case No. 3 BJs 7/12-4, Decision to Terminate Proceedings, 157 ILR 722, 746 (Germany, Federal Prosecutor General Jul. 23, 2013).

conflict.⁵⁷ It is not clear whether this statement, in terms of the limitation of the scope of the prohibitions of IHL, is compatible with *Tadić*, which found that IHL applies to “the whole territory under the control of a party, whether or not actual combat takes place there.”⁵⁸ Both the Federal Prosecutor and the ICTY in *Tadić* aim to expand the protective aspects of IHL, but come to seemingly incompatible conclusions. The German Federal Prosecutor rejects the doctrine of a geographically unbound armed conflict;⁵⁹ the ICTY expands the notion of armed conflict to ensure its jurisdiction over war crimes and the protection of victims of armed conflict wherever they may find themselves.⁶⁰ This highlights the inherent tension between international bodies’ choice of the model that provides the highest degree of protection for those affected by armed violence and the desire of States to broaden their power by invoking or denying the existence of an armed conflict.⁶¹

C. *The Authority to Detain in Armed Conflict*

As of October 2015, 91 detainees remain at Guantánamo.⁶² According to unofficial statistics, 47 of them remain slated since 2010 for continued detention, without prospect of criminal

57. *Id.* at 743 n.91. See also EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 118 (2015) (albeit relying on a source published in 2007).

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

59. See *Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan*, 157 ILR at 746 (limiting the application of international laws of war to the territorial scope of “actual theaters of war”).

60. Prosecutor v. Tadić, Case No. IT-94-1-I AT ¶ 67-68 (expanding the temporal and geographical scope of “armed conflict”).

61. See *infra* Part IV.A.

62. Ambereen Choudhury & Kasia Klimasinska, *Six Yemenis Released from Guantanamo Bay, Sent to Oman*, BLOOMBERG BUSINESS (Jun. 13, 2015, 11:54 AM), <http://www.bloomberg.com/news/articles/2015-06-13/u-s-govt-transfers-6-guantanamo-bay-prisoners-to-oman>.

prosecution.⁶³ The Periodic Review Board, an administrative tribunal created after the 2010 inter-agency Task Force has found continued detention was no longer necessary for seventeen out of twenty detainees whose cases it decided since late 2013.⁶⁴ Only seven of them have been released.⁶⁵

Officials have expressed hope that the reduction in the number of detainees would persuade Congress to approve transfers into the United States and allow the closure of Guantánamo.⁶⁶ But transfer does not equal release: it transplants security detention onto the U.S. mainland,⁶⁷ and, where the government wants to keep detainees beyond the end of hostilities, risks eroding protections against indefinite detention of non-citizens in U.S. domestic law.⁶⁸ It is also

63. See *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/held/> (last visited Feb. 17, 2016).

64. HUMAN RIGHTS FIRST, GUANTÁNAMO PERIODIC REVIEW BOARDS FACT SHEET, 1 (Feb. 2016) <http://www.humanrightsfirst.org/sites/default/files/guantanamo-prb-fact-sheet.pdf> (noting that eighteen of the twenty-two detainees that have had hearings have received decisions, fifteen of whom have been released with the remaining three being recommended for continued detention).

65. HUMAN RIGHTS FIRST, *supra* note 64, at 1. It is difficult to assess the number of detainees who would remain in the category of “too dangerous for release.” The Periodic Review Board might clear more detainees as it goes along, but some of those waiting for prosecution before a military commission may ultimately be re-classified as slated for continued detention.

66. See Charlie Savage, *Uruguay Accepts 6 Detainees Held at Guantánamo*, N.Y. TIMES (Dec. 7, 2014), <http://www.nytimes.com/2014/12/08/world/americas/us-transfers-6-guantanamo-detainees-to-uruguay.html> (arguing it would be cheaper to house the detainees on domestic soil, and that closing Guantánamo would eliminate fodder for terrorist propaganda).

67. Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 580 (2013) (discussing Obama’s 2009 order to acquire a maximum security state prison in Illinois to house Guantánamo detainees).

68. See U.S. DEP’T OF JUSTICE, REPORT PURSUANT TO SECTION 1039 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014 (May 14, 2014), <https://www.hsdl.org/?view&did=753466> (proposing to rely on § 412 of the Patriot Act (8 U.S.C. § 1226(a)), for continued detention of detainees transferred into the United States). Most commentators agree that closure of Guantánamo would entail the transfer to and indefinite detention in the United States of at least some of the detainees but disagree over (1) whether this would bring the detainees more due process rights than they currently have (or rather, do not have); (2) whether transfer is worth the risk of setting bad precedent; (3) and whether even favorable decisions would have any real

unclear under which detention authority Afghanistan held the six non-Afghan internees handed over before the closure of the U.S. detention operations at Bagram.⁶⁹ Even though the closure of Bagram and uptake in recent transfers have rekindled hope that Guantánamo will close one day,⁷⁰ this optimism cannot stand in for an analysis of the lawfulness of detention of the men who continue to be held there. First and foremost, there is an obligation to release where there is no legal basis for detention.

impact on the lives of the detainees. See Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189, 2193-2205 (2014); Deborah Pearlstein, *On Steve Vladeck's Post-AUMF Detention*, OPINIO IURIS (Apr. 21, 2014), <http://opiniojuris.org/2014/04/21/steve-vladecks-post-aumf-detention/>; Ben Wittes, *What Would it Actually Take to Close Guantnamo?* LAWFARE (Feb. 2, 2015, 10:31 PM), <http://www.lawfareblog.com/2015/02/what-would-it-actually-take-to-close-guantanamo/>; Steve Vladeck, *What it Really Means to "Close Guantánamo,"* JUST SECURITY (Jan. 26, 2015, 10:10 AM), <http://justsecurity.org/19378/means-close-guantanamo/>; Gabor Rona, *How Not to Close Guantanamo: Bring It Here*, LAWFARE (Feb. 5, 2015, 9:46 AM), <http://www.lawfareblog.com/2015/02/how-not-to-close-guantanamo-bring-it-here/>; Steve Vladeck, *The Meaningful Legal Differences Between Stateside and Guantánamo Detention*, LAWFARE (Feb. 5, 2015, 3:30 PM), <http://www.lawfareblog.com/2015/02/guantanamo-nihilism/>; Ramzi Kassem, *Why We Shouldn't Import Guantánamo: A Holistic Perspective*, LAWFARE (Feb. 10, 2015, 11:40 AM), <http://www.lawfareblog.com/2015/02/why-we-shouldnt-import-guantanamo-a-holistic-perspective/>.

69. Kate Clark, *The 'Other Guantanamo' (13): What Should Afghanistan Do with America's Foreign Detainees?* AFG. ANALYSTS NETWORK (Mar. 2, 2015), <https://www.afghanistan-analysts.org/the-other-guantanamo-13-what-should-afghanistan-do-with-americas-foreign-detainees/> (stating that, without being charged with a crime, the detention of these six detainees has no basis in Afghan law). At least two of the detainees have been released since. *Tunisian Men Tortured by CIA and Detained Without Charge for over a Decade in U.S. Custody Are Finally Freed*, INT'L JUSTICE NETWORK (June 30, 2015) <http://www.ijnetwork.org/index.php/ijn-news/346-tunisian-men-tortured-by-cia-and-detained-without-charge-for-over-a-decade-in-u-s-custody-are-finally-freed>. Similar problems of lawfulness of detention after transfer, on a much larger scale, beset the policy of handing over internees in Iraq between 2009 and 2011. See Richard Pregent, *Rule of Law Capacity Building in Iraq*, 86 INT'L L. STUDIES 324, 328-29 (2010).

70. See, e.g., Jennifer Daskal, *The 2015 National Defense Authorization Act: A Silver Lining for Guantanamo Detainees*, JUST SECURITY (Dec. 5, 2014, 8:29 AM), <http://justsecurity.org/18020/2015-national-defense-authorization-act-silver-lining-guantanamo-detainees/> (labeling the transfer of detainees authorized by the Obama administration "a blessing rather than a blow").

1. The Legal Basis for Internment in Armed Conflict

In international armed conflict, the rules on internment are detailed in the Third Geneva Convention for prisoners of war (“GC III”) and in the Fourth Geneva Convention (“GC IV”) for “civilians” who pose a security threat to the Detaining power.⁷¹ Persons who fall under Article 4(A)(2) GC III are entitled to the protection of prisoner-of-war status and may be interned under Article 21 GC III until cessation of active hostilities.⁷² “Protected persons” under the Fourth Geneva Convention may be interned when this is “absolutely necessary”⁷³ for the security of the Detaining power or when they pose an “imperative threat to security” to an Occupying power.⁷⁴

The conflict between the United States and various groups under the umbrella of the Taliban in Afghanistan is, according to the majority view, a non-international armed conflict.⁷⁵ One author has argued that armed violence between a State and non-state actor without consent of the territorial government would trigger the full application of the four Geneva Conventions.⁷⁶ In such a scenario, the members of the non-state actor would most likely be civilians participating in hostilities and, if detained, be protected under the Fourth Geneva Convention.⁷⁷ But this is not the scenario currently in

71. GC III, *supra* note 20, art. 21; GC IV, *supra* note 31, art. 42.

72. GC III, *supra* note 20, arts. 4, 21, 118.

73. GC IV, *supra* note 31, art. 42.

74. *Id.* art. 78.

75. See *supra* notes 38-42, for a discussion of the different viewpoints on extraterritorial non-international armed conflicts. For the Geiß & Siegrist, *supra* note 36, at 15 (“The organisation of the armed opposition, and the hostilities, have reached such a level that one can safely admit the existence of non-international armed conflict.”); Ryan Goodman et al., *Hamdan, the ICRC Commentary to Protocol II, and Conflict Party Structure: A Reply*, OPINIO IURIS (May 3, 2007) <http://opiniojuris.org/2007/05/03/hamdan-the-icrc-commentary-to-protocol-ii-and-conflict-party-structure-a-reply/> (arguing that it is the structure of the parties to the conflict, not the territorial expansion, that matters for classification of conflicts as international or non-international); see also Louise Arimatsu, *Territories, Boundaries, and the Law of Armed Conflict*, 12 Y.B. INT’L HUMANITARIAN L. 157 (2009) (arguing that a relational thinking has replaced the earlier territorial thinking in IHL).

76. Akande, *supra* note 37, at 73.

77. Akande, *supra* note 37, at 78.

Afghanistan, where the United States conducts operations against a number of non-state actors involved in armed violence on Afghan territory with the consent of the Afghan government and in support of the latter's military operations.

In a non-international armed conflict, the situation is considerably more complex. Treaty law is limited to provisions on treatment of detainees, including due process guarantees.⁷⁸ The source of a detention authority in a non-international armed conflict is therefore the subject of an intense controversy among scholars and States, and particularly tricky when it comes to the authority to intern non-state fighters in an extraterritorial non-international armed conflict. Two questions deserve a brief discussion here, to position the author and this paper, without pretending to do justice to the complexity of the debate. The first question relates to the relationship between IHL and human rights. The second issue is whether status-based internment in non-international armed conflict can be derived from customary IHL.

2. The Relationship between IHL and International Human Rights Law

States and scholars disagree whether humanitarian law displaces human rights law in its entirety – this is the position of the United States – or only where IHL treaties or customary law supply special rules that displace human rights law or inform the available general human rights rules.⁷⁹ While courts in the United States, in the narrow context of habeas petitions, and Canada have accepted a view of complete preemption, the

78. Common Article 3 and AP II are the only treaty-based provisions applicable in non-international armed conflict. In addition, certain rules of international armed conflict also apply as a matter of customary international law to non-international armed conflicts. See art. 3 common to GC I-IV, *supra* note 31; AP II, *supra* note 32.

79. See Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?*, 91 INT'L L. STUDIES 32, 45–53 (2015), for the relationship between IHL and IHRL; Oona A. Hathaway, et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1883–88 (2012).

International Court of Justice,⁸⁰ the European Court of Human Rights and courts in the United Kingdom have rejected this position.⁸¹

This article follows the “complementarity” view, which argues that international human rights law continues to apply during an armed conflict, but its content, for example the scope of the right to life or lawful detention, is modified by the more specific IHL rule applicable in the circumstances.⁸² IHL therefore provides principles and rules that either displace or inform international human rights obligations and domestic laws of State parties to a conflict. It also imposes obligations on non-state parties to a conflict.⁸³ The core analysis of this article in Part III and IV concerns the substance of these IHL principles and rules.

For authors who believe IHL does not authorize internment in non-international armed conflict at all, domestic law, a UN Security Council Resolution or similar documents with legal force are the only possible legal source of internment both before and after the end of hostilities.⁸⁴ In a recent opinion paper, the

80. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 102, 106 (July 9) (noting that IHL law continues to apply in cases of armed conflict).

81. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 507–10 (2004) (explaining that AUMF permits the detention of enemy combatants and the limited judicial review of such detention); *Amnesty International Canada v. Canada* (Chief of the Defence Staff), [2008] F.C.A. 401 (Can.) [2009] 4 F.C.R. 149 (Can.), <http://reports.fja.gc.ca/eng/2009/2008fca401.html> (finding that Canadian armed forces in Afghanistan could rely on IHL as a basis for internment in Afghanistan *Serdar Mohammed v. Ministry of Defence* [2014] EWHC (QB) 1369 [276] (Eng.), *aff'd* [2015] EWCA (Civ) 843 (following the ICJ’s view on complementarity of IHL and IHRL); *Al-Skeini & Others v. United Kingdom*, EUR. CT. H.R. at 34–35, 39, 68–69 (2011). The author thanks Andrew Thomson for his insights on the Canadian jurisprudence.

82. See *Rona*, *supra* note 79, at 47 (pointing out that “the overwhelming weight of international jurisprudence has long accepted the application of human rights law in armed conflicts); see also, Jordan J. Paust, *Human Rights on the Battlefield*, 47 GEO. WASH. INT’L L. REV. 509, 561 (2015) (arguing that human rights continue to apply during war, are not trumped by laws of war, and some human rights prevail over inconsistent laws of war).

83. See *infra*, Part III.B.

84. See *Serdar Mohammed v. Sec’y of State for Def.* [2014] EWHC (QB) 1369 [114], [232], [418], *aff’d by* [2015] EWCA (Civ) 843 (Eng.) (rejecting the United Kingdom’s

International Committee of the Red Cross (ICRC) posited there is an inherent authority to intern in non-international armed conflict, but that any deprivation of liberty needs to be based on a law that fulfills the principle of legality.⁸⁵ Indeed, the oblique reference to internment in the law of non-international armed conflict cannot in itself ensure legality and safeguard against arbitrariness of detention.⁸⁶ Any limits on internment derive from domestic and international human rights safeguards against arbitrary detention.⁸⁷ Even if one assumes an inherent authority to intern in a non-international armed conflict, the principle of legality still requires a domestic law to provide grounds and procedures of review of internment, which allows individuals to predict which kind of conduct would subject them to internment and that are amenable to meaningful review by

argument of an inherent authority to detain in IHL under treaty law or customary IHL) for the most detailed analysis by a court of treaty and customary law as well as the academic debate to date; *but see* Serdar Mohammed, [2015] EWCA (Civ) 843, [232] (Eng.) (contrasting the UK detention policy in Afghanistan from the Canadian policy, as the latter rested on a bilateral agreement with Afghanistan which stated detainees would be treated as prisoners of war.

85. Int'l Comm. of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges, Opinion Paper 6*, at 6–8, (Nov. 2014); *but see* Serdar Mohammed, [2015] EWCA (Civ) 843, [202]-[04], [218]-[19] (Eng.) (declining to accept the ICRC position that the “absence of a prohibition” creates a positive authority to detain under IHL as reflective of customary international law and considering of “a certain artificiality” the assumption of an authority to intern under IHL where scope and procedures of review need to be derived from IHRL).

86. *See* AP II, *supra* note 32, art. 5 (providing protection for “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” and speaks of “places of internment or detention.”). Article 6 of AP II lists due process guarantees for persons under criminal prosecution. *Id.* Article 6(5) of AP II encourages parties to a conflict to grant “amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” *Id.* GC I, *supra* note 70, art. 3; GC II, *supra* note 70, art. 3; GC III, *supra* note 21, art. 3; and GC IV, *supra* note 31, art. 3., speak of protection of persons “placed ‘hors de combat’ by sickness, wounds, detention, or any other cause.” None of the provisions detail procedures or grounds for internment.

87. *See, e.g.,* Jonathan Horowitz, *IHL Doesn't Regulate NIAC Internment-A Drafting History Perspective*, OPINIO IURIS (Feb. 9, 2015), <http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective/> (stating that a “co-existence of different legal regimes” prohibits arbitrary detention).

an independent court or tribunal.⁸⁸ Internment in Guantánamo, under this view, therefore needs a domestic detention authority in order to be lawful under international humanitarian and human rights law.⁸⁹

The Human Rights Committee emphasized that “elements of inappropriateness, injustice, lack of predictability and illegality”⁹⁰ all factor into the determination whether deprivation of liberty is arbitrary. Appropriateness, justness, and predictability go beyond mere legality and procedural aspects and pertain to the substance of those rules, i.e. the grounds for internment. But there is “almost no guidance on when security-based administrative detention may be lawful under the ICCPR,”⁹¹ and neither does human rights law provide us with “a shared understanding as to the point at which detention becomes arbitrary by virtue of its duration.”⁹² In a non-international armed conflict, it is thus useful to turn to both IHL and to human rights law to evaluate the legitimacy of grounds for detention and limits to its duration.

88. Int’l Comm. of the Red Cross, *supra* note 78, at 7; *see also* ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 56–58, 71–77 (2013) (making a compelling case that legality – the principle that any deprivation of liberty has to have a basis in predictable law – also applies in armed conflict); Oscar Solera, *Permissible Grounds for Internment/Administrative Detention*, in INT’L INSTITUTE OF HUMANITARIAN L., GLOBAL VIOLENCE: CONSEQUENCES AND RESPONSES 175, 175 (Marco Odello & Gian Luca Beruto eds., 2011) (“[I]n the absence of international norms, the legal basis [for internment] would need to be expressly established in domestic law.”).

89. Rona, *supra* note 79, at 44–45 (arguing that the United States relied on the AUMF as domestic detention authority). *See infra* Part II.B (discussing whether the AUMF is sufficient to satisfy the principle of legality).

90. Van Alphen v. the Netherlands, Decisions U.N. Human Rights Comm., Communication No. 305/1988, at 274 (1990); A v. Australia, Decisions U.N. Human Rights Comm., Communication No. 560/1993, at 23 U.N. Doc. CCPR/C/59/D/560/1993 (1997); Abdelhamid Taright et al. v. Algeria, Decisions U.N. Human Rights Comm., Communication No. 1085/2002, at 9, UN Doc. CCPR/C/86/D/1085/2002 (2006); *see also* Bellinger & Padmanabhan, *supra* note 21, at 219–20 (referring to the Human Rights Committee’s position).

91. Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 389, 392 (2008).

92. *Id.* at 394.

The obligation to release is related to the presence or not of legitimate grounds for internment, and not the procedural requirements for the review of those grounds. Therefore, the law of international armed conflict can inform the evaluation of whether a particular ground for internment is appropriate and just in a non-international armed conflict.⁹³ The two questions are not entirely independent: internment based on status and internment based on necessity require different procedures and frequency of review. But the desire to avoid or to obtain heightened procedures should not alone drive the choice of the grounds for internment.

In its 2014 General Comment on Article 9 of the International Covenant for Civil and Political Rights (“ICCPR”), the U.N. Human Rights Committee noted that outside international armed conflict, security detention must conform to the principles of necessity and proportionality, be limited in time, and State parties must show a “direct present and imperative threat” to justify detention, subject to review by a tribunal which enjoys judicial independence from the Detaining authority.⁹⁴ This resembles the terms of the Fourth Geneva Convention rather than those of the Third Geneva Convention.⁹⁵

93. This article does not seek to derive a customary authority to detain in analogy to international armed conflict. Rather, it seeks to evaluate the traditional grounds for internment and release and analyzes to what extent they have informed and should inform State practice in non-international armed conflict. For a similar exercise of introducing substantive elements into conflict internment, using criminal sentencing standards as a guidepost, see Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326, 378-79 (2014) (proposing the introduction of an evaluation of prior conduct into a periodic review model, which would allow judges to order release when a detainee has been detained for longer than would be proportionate to his conduct under criminal law).

94. U.N. Human Right Comm., *General Comment No. 35 – Article 9 (Liberty and Security of Person)*, at 4, 5, 14, 19, U.N.Doc. CCPR/C/GC/35 (2014). For a critique of General comment No. 35 see Jonathan Horowitz, *Clarity or Confusion? General Comment 35 and Security Detention*, JUST SECURITY (Nov. 21, 2014, 2:38 PM), <https://www.justsecurity.org/17702/clarity-confusion-general-comment-35-security-detention/> (arguing that for non-international armed conflict, the Comment falls below the threshold safeguards required by IHRL, and above what would be required in international armed conflict).

95. See *infra* Part III.

The United States and Canada submitted that internment in non-international armed conflict without judicial review until the end of hostilities is not arbitrary, but the Human Rights Committee did not incorporate the proposed changes in the final version.⁹⁶ The United States position depends on the acceptance of a number of controversial propositions, namely that IHL today knows the category of “unprivileged belligerent,” that the law of non-international armed conflict allows status-based detention, and that IHL displaces human rights law in its entirety during an armed conflict.⁹⁷ All three premises on who may be detained on what grounds in a non-international armed conflict are far less settled custom than the United States claims.

96. See *infra* note 298 and accompanying text; see also *Observations of the United States of America on the Human Rights Committee’s Draft General Comment 35: Article 9*, ¶¶ 19-23 (Jun. 10, 2014), <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>; *Human Rights Committee, Draft General Comment No. 35 Article 9: Liberty and Security of Person Comments by the Government of Canada* ¶¶ 12, 13, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx> (both noting that IHL as *lex specialis* allows internment until the end of hostilities in a non-international armed conflict); *Observations by the Government of the United Kingdom of Great Britain and Northern Ireland on draft General Comment 35 on Article 9 of the International Covenant on Civil and Political Rights (ICCPR) - liberty and security of person*, ¶ 21, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx> (noting that IHL displaces Article 9(4) ICCPR insofar as detainees held in relation with an armed conflict do not have the right to judicial habeas review).

97. See JAMES R. SCHLESINGER, HAROLD BROWN, TILLIE K. FOWLER & CHARLES A HOMER, U.S. OFFICE OF THE SEC’Y OF DEF. FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD OPERATIONS 81-82 (Aug. 24, 2004), <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA428743> (noting that the Bush administration classified the Taliban and Al Qaeda detainees as “unlawful combatants” or “unprivileged belligerents,” and while criticizing “the [detention] policy as vague and lacking, concluding that “as a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW status. Although there is not a particular label for this category in law of war conventions, the concept of “unlawful combatant” or “unprivileged belligerent” is a part of the law of war.”). But not everything that is logical is necessarily international law. DEBUF, *supra* note 88, at 465 (“[.] we accept that, as a matter of logic, international humanitarian law should allow parties to a conflict to intern persons who pose a direct military threat . . . But it is well-known . . . that the fact that the law should do something does not always mean it actually does.”).

3. Is There a “Third Status” in IHL?

The U.S. administration has argued that the law of war allows to detain members of non-state armed groups as “unprivileged belligerents” in analogy to the Third Geneva Convention, without granting them prisoner-of-war privileges.⁹⁸ The existence of a “third status” in the framework of the Geneva Conventions is subject to intense debate in the literature. Proponents argue that civilians who took up arms on the battlefield were protected under neither the Third nor the Fourth Geneva Convention.⁹⁹ Opponents of the “third status” point to the text of Article 4 GC IV, the ICRC Commentary, and Article 75 AP I to argue that no one was left outside the protective framework of the Conventions.¹⁰⁰

Jason Callen parsed the drafting history of the 1949 Geneva Conventions on the concept of “unprivileged belligerency.” He points to the efforts of several delegations, ultimately unsuccessful, to include a passage on minimal protection in draft Article 3 (now Article 4) GC III.¹⁰¹ Several delegates rejected the

98. See *id.* (pointing out that the President of the United States “determined the Geneva Conventions did not apply to the U.S. conflict with al Qaeda”).

99. See, e.g., GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 146 (2012); RICHARD BAXTER, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, in *HUMANIZING THE LAWS OF WAR* 37 (DETLEV F. VAGTS ET AL. EDS., 2013); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1031 (2004); Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT’L L. 209, 235–36 (2005).

100. See Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants”* 85 INT’L REV. RED CROSS 45, 72 (2003) (proposing that there is no gap in the applicable law, therefore a person is either a combatant or civilian); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 392–97 (2004) (arguing that Baxter’s distinction between battlefield unprivileged belligerents, who are not covered by either Convention, and individuals threats against the internal security, such as spies and saboteurs, whose inclusion into the Fourth Geneva Convention came at the price of the withdrawal of communication privileges under Article 5 GC IV, are “illusory, overstated, and, in some respects, inconsequential”); see also Pejić, *supra* note 34, at 79-80; MARCO SASSÒLI, *Transnational Armed Groups and International Humanitarian Law*, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, Winter 2006, at 1, 16-19), <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf>.

101. Callen, *supra* note 98, at 1048-49.

idea that persons not protected under the Third Geneva Convention would be protected under the Fourth Geneva Convention.¹⁰² Callen argues this and similar statements show the Third Geneva Convention was intended as the safety net for gaps in protection, and that the conference rejected this.¹⁰³ As Knut Dörmann pointed out, this conclusion does not quite tail with the ultimate broad reach of “protected person” in the Fourth Geneva Convention.¹⁰⁴ While there was a push in Committee III to define more properly the meaning of “civilian” and “avoid the use of the expression ‘protected persons,’”¹⁰⁵ the Conference did not drop this “broad and elastic” term in favor of another, more rigid expression.¹⁰⁶ This lends credibility to the broad interpretation of protection expressed in the ICRC Commentary.¹⁰⁷ The Danish delegate also urged, without recorded opposition, that any category of fighters outside the scope of Third and Fourth Geneva Convention would be protected by then emerging international human rights principles.¹⁰⁸

102. See Minutes of the Thirteenth Plenary Meeting, *in* II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 270-71 (1949) [hereinafter II-B FINAL RECORD] (recording the exchange between the Soviet delegate and Dutch delegate).

103. Callen, *supra* note 98, at 1048-49.

104. See Dörmann, *supra* note 100, at 58 (noting that no “fundamental changes” were made to the initial draft of Article 4 GC IV, despite criticism by the delegate of the United Kingdom that the phrasing suggested “that all persons participating in hostilities would be protected, whether they conformed to the laws of war or not” (quoting Committee III, Summary Record of the Second Plenary Meeting, *in* II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 621 (1949)); GC IV, *supra* note 31, art. 4 (“[p]ersons protected by the Convention are 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 of which they are not nationals”).

105. Committee III, Summary Record of the Second Plenary Meeting, *in* II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 621-22 (1949) [hereinafter II-A FINAL RECORD] (proposal by the Luxemburg delegate).

106. *Id.* at 622.

107. *Id.* at 813-14 (the ICRC Commentary follows the summary of the work of Committee III of the meaning of draft Article 3 (Art. 4 GC IV)); COMMENTARY GC IV, *supra* note 41, at 46.

108. *Id.* at 268 (recording the exchange between the Danish and the British delegate).

Even if one concludes that the majority of the participants at the Diplomatic Conference wanted to exclude “battlefield civilians” from the protection of the 1949 Conventions, the IHL clock did not stop in 1949. The statements during the detailed and passionate debate on draft Article 42 bis (later 45) of Additional Protocol I indicate broad support for the notion that persons participating in hostilities who did not qualify for prisoner-of-war status would be protected by the Fourth Geneva Convention.¹⁰⁹ Article 75 provided ultimately the uncontested safety gap that the 1949 Geneva Conventions failed to secure.¹¹⁰ Any reliance on customary law regulating the detention of “unprivileged belligerents” must also account for the development of human rights law in conjunction with the IHL of non-international armed conflict. The drafters of Additional Protocol I had the ICCPR, adopted in 1966, in mind, when they talked about fundamental guarantees,¹¹¹ but also expressed satisfaction that those very guarantees derived from the Fourth Geneva Convention.¹¹²

The United States is not a signatory to Additional Protocol I because it believes it offers too broad protections for “irregular

109. See, e.g. CDDH/III/SR.33, Summary Record of the Thirty-Second Meeting, in XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 1974-77, at 327-28 [hereinafter OFFICIAL RECORDS] (stating, from the perspective of a delegate of the Netherlands, that a fighter who did not qualify for POW status, was protected under the provisions of the Fourth Geneva Convention of protected persons in occupied territory, or draft Article 65 [later 75]); *id.* at 331 (stating, from the perspective of a delegate of the United States, that if “the captive was not entitled to such treatment [as prisoner of war] he would in any case receive the safeguards of the Fourth Convention and of article 65 of Protocol I”); *id.* at 336 (presenting Article 42b by the British delegate, explaining that where a fighter had killed a “certain number of members of the enemy armed forces, either in combat or under occupation” he could either be determined as prisoner-of-war and enjoy combatant privilege, or be classified as civilian); see also *id.* at 351 (agreeing with the British delegate’s statement).

110. See CDDH/III/SR.43, Summary Record of the Forty-Third Meeting, in XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 1974-77, at 26 (presenting the draft of Article 65 (later 75)).

111. *Id.* at 28 (statement by the Dutch delegate).

112. *Id.* at 31 (statement by the Belgian delegate).

fighters.”¹¹³ It may therefore claim exemption from any customary obligation arising out of Articles 43 and 44 AP I.¹¹⁴ It cannot, however, assert customary status for its interpretation in the face of contradictory treaty history. Furthermore, the United States, in a 1999 proceeding before the Inter-American Commission of Human Rights related to detention during the United States military operation in Grenada took the position that eight members of the Grenada Revolutionary Military Council “did not meet the terms of Article 4 of the Third Geneva Convention which define POW status, and maintains that the petitioners were civilians briefly detained for reasons of military necessity.”¹¹⁵

Hence, even if one concludes the Geneva Conventions initially did not cover all categories of fighters, it was not correct, as of 2001, to rely on a “custom” of status-based internment for “unprivileged belligerents” in international armed conflicts. Neither does State practice support the existence of a customary rule on status-based internment in a non-international armed conflict.¹¹⁶

4. The Case Against Status-Based Internment in Non-International Armed Conflict

Supporters of status-based internment in a non-international armed conflict also derive an authority to

113. *Cf. supra* note 106 (explaining that one of the reasons for the United States’ rejection of Article 43 was the objection that parts of the article “provided *too many* protections to unlawful combatants”) (emphasis in original).

114. *See* Marty Lederman, *Top Ten Myths About Hamdan, Geneva, and Interrogations*, GEORGETOWN LAW FACULTY BLOG (Jul. 5, 2006), http://gulcfac.typepad.com/georgetown_university_law/2006/07/top_ten_myths_a_1.html (discussing the reasons for the rejection by the United States of Articles 43 and 44 AP I, and arguing that the United States has accepted that Article 75 AP I applies to irregular fighters).

115. *Coard et al. v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report, No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev ¶ 50 (1999). While the United States also claimed the Third Geneva Convention may have provided a basis for detaining the petitioners, the cited statement appears to have been the United States’ ultimate position on the issue. *Id.* ¶¶ 46-50.

116. *See* Serdar Mohammed, [2015] EWCA (Civ) 843, [220]-[242] (Eng.) for the conclusion of the UK Court of Appeals in Serdar Mohammad’s case that the existence of a customary rule is not supported by State practice. *See also supra* note 67.

detain from the notion that a fighter may be targeted based on a “continuous combat function,” until he or she leaves the armed group that is party to the conflict.¹¹⁷ If a fighter may be targeted based on status, this would also include the lesser power to detain.¹¹⁸ Such a fighter may then be held until the end of hostilities, as he or she remains a member of the organized armed group despite his detention.¹¹⁹ In this author’s view, this argument misunderstands the fundamental premise of prisoner-of-war status, the only category giving rise to status-based internment in the Geneva Conventions, namely the status of the soldier as the agent of the State party to a conflict.¹²⁰ Unless a non-state party to a conflict becomes a subject of international law through recognition of belligerency, there is no such agency relationship between a fighter and the group under international law.¹²¹ More merit has the argument that IHL seeks to balance military necessity with humanitarian considerations, and therefore contains both permissive and restrictive elements on targeting and detention.¹²² But the rules on lawful targeting and the rules on detention in non-international armed conflict are not congruent. The UK Court of Appeals recently rejected the argument that the import of rules of international armed conflict on targeting into

117. Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT’L L. STUDIES 60, 105–06 (2015).

118. *Id.* at 105.

119. *Id.* at 105-06.

120. SHIELDS DELESSERT, *supra* note 29, at 178 (noting that originally, the right to release and repatriation belonged to the State in whose army the prisoner served, and discussing divergent views on whether the Third Geneva Convention bestowed individual rights); Commentary GC III, *supra* note 41, at 547 (“[A] member of the armed forces who becomes a prisoner of war in enemy hands remains a member of the armed forces of his country. Account must therefore be taken of the duty of allegiance which binds a prisoner of war to those armed forces”).

121. *But see infra* note 294, and accompanying text (discussing another proposal to extend status-based detention to members of a non-state party to a conflict).

122. Aughey & Sari, *supra* note 117, at 90-91.

non-international armed conflict extended to an authority to detain in such conflicts.¹²³

The ICRC, a “significant number of States,” and numerous scholars therefore find that individualized, threat-based assessments would be the most appropriate justification for internment in non-international armed conflict.¹²⁴ The Copenhagen Principles, cited in the literature as evidence for States’ conviction that IHL grants the authority to intern in non-international armed conflict, closely track the language of the Fourth Geneva Convention on grounds and procedures for internment.¹²⁵ They do mention membership in an organized armed group as reason for detention,¹²⁶ but the remainder of the Commentary speaks of “reasons of security,” or “threat to security.”¹²⁷ Nowhere does it suggest that this could translate into status-based internment without periodic review; on the contrary, it foresees regular review of the necessity of continued

123. Serdar Mohammed, [2015] EWCA (Civ) 843, [214]-[219], [237]-[244] (Eng.) (discussing treaty and customary international law); DEBUF, *supra* note 88, at 381-96 (discussing scholarly proposals arguing for an authority to detain any individual who may be lawfully targeted as a direct participant in hostilities); Rona, *supra* note 79, at 44-45.

124. See ICRC, *supra* note 13, at 9 (“A significant number of States considered that the most appropriate articulation of grounds for internment was ‘imperative reasons of security’, although there was some discussion about how to interpret the concept.”); see, e.g., SIVAKUMARAN, *supra* note 55, at 301-05; Chatham House & Int’l Comm. of the Red Cross, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, London, 22-23 September 2008*, 91 INT’L REV. RED CROSS 859, 865-66 (2009); see also *infra*, note 297, for additional sources and state practice.

125. Aughey & Sari, *supra* note 117, at 106-07 (noting that the Copenhagen principles are evidence of States’ belief an inherent authorization to intern in non-international armed conflict exists); MINISTRY OF FOREIGN AFFAIRS OF DEN., THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS: PRINCIPLES AND GUIDELINES ¶ II, <http://um.dk/en/foreign-policy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/> [hereinafter COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES] (noting that the Copenhagen Principles are not an expression of *opinio iuris* of the participating States).

126. COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES, *supra* note 125, at ¶ 1.3.

127. *Id.* ¶¶ 12.1-12.2.

detention.¹²⁸ One author has recently argued that the Copenhagen Principles represent a “departure” from the “requirements of the Geneva Conventions, and the classic status-based detention paradigm.”¹²⁹ He can only arrive at this conclusion by eliding the rules of the Fourth Geneva Convention and their possible translation into rules applicable in non-international armed conflict.

The 2015 U.S. Department of Defense Law of War Manual recognizes that precise legal requirements for a detention regime established by a State in non-international armed conflict would likely depend a great deal on its domestic law, and argues, in frustratingly vague terms, that “a variety of legal theories under international law” allow States to conduct status-based or threat-based internment in a non-international armed conflict.¹³⁰ The only example it gives for status-based internment is a quote from General Kitson’s account of the British practice during the Mau Mau uprising in Kenya of “saying to a man ‘You are not a criminal but you are on the wrong side. You must be restrained until this trouble is over.’”¹³¹ This statement, made in relation to a military operation well before the adoption of the Additional Protocols and relevant human rights treaties, is hardly evidence of extensive State practice of status-based internment in a non-international armed conflict.¹³² As States have indeed regulated the grounds

128. COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES, *supra* note 125, at Princ. 12, ¶ 12.2.

129. Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT’L SEC. J., 255, 298-90 (2015) (citing Article 5 of GC III, *supra* note 20, and arguing that the Copenhagen Principles merge what is kept apart in the U.S. habeas jurisprudence, namely the review of individual threat, and the evaluation of initial and ongoing detention authority).

130. U.S. DEPT OF DEF., LAW OF WAR MANUAL 1046 (2015), http://www.dod.mil/dodgc/images/law_war_manual15.pdf (citing FRANK KITSON, GANGS AND COUNTER-GANGS 45 (1960)).

131. *Id.* at 1046 n.202.

132. It is noteworthy that the Manual does not claim that the authority to intern based on status in non-international armed conflict derives from customary international law, but from a “variety of legal theories under international law.” *Id.* at 1046.

and procedures for internment in non-international armed conflicts in their domestic laws, it follows that the substance of those laws was scrutinized under emerging international and domestic human rights norms, with an increasing understanding that detention without trial should be an exceptional measure, subject to individual threat assessment and be of limited duration.¹³³ Ultimately, the issue awaits resolution as a matter of international law in a binding instrument; given the divergence of State views on permissible grounds for detention in non-international armed conflict, this is unlikely to happen soon.¹³⁴ This makes it even more relevant to identify a benchmark for the end of hostilities as well as to determine whether IHL allows indefinite detention.

III. GUANTANAMO AND THE INDEFINITE DETENTION CONUNDRUM

A. *The AUMF, Hamdi, and NDAA 2012 as Legal Basis for Internment*

States regulate internment – or preventative security detention – related to an internal armed conflict through their domestic laws.¹³⁵ The United States has referred to the AUMF

133. See *infra* Part V (discussing a recent UN study that concluded that there was “a strong trend . . . toward setting a maximum time limit on detention”).

134. ICRC, *supra* note 13, at 14-15. The consultation reports do not attribute opinions expressed to individual States. It is therefore difficult to say how much support the United States and Canada (which have asserted that they possess status-based detention authority to the UN Human Rights Committee, *Observations of the United States of America on the Human Rights Committee’s Draft General Comment 35: Article 9*, *supra* note 95; *Human Rights Committee, Draft General Comment No. 35 Article 9: Liberty and Security of Person Comments by the Government of Canada*, *supra* note 95). The resolution adopted at the 32nd International Conference of the Red Cross and Red Crescent only recommended further consultations on the issue. 32nd Int’l Conference of the Red Cross & Red Crescent, *Resolution 1: Strengthening international humanitarian law protecting persons deprived of their liberty*, 32IC/15/R1 (Dec. 8-10 2015), http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf.

135. See, e.g., Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 413 (2009) (reasoning that “states conducting administrative detention in non-international armed conflict [are] governed by their

as domestic legal basis, finding the authority to intern was implied in the authorization to use military force.¹³⁶ The AUMF 2001, however, at most presumes internment, and is not sufficiently detailed to provide a basis for lawful detention in accordance to the principle of legality discussed above.¹³⁷ The plurality in *Hamdi v. Rumsfeld* thought this was unproblematic: The AUMF authorized all “necessary and appropriate force,” which, the Court found, included the authority to detain inherent in the laws of war.¹³⁸ Consequently, the Court held that persons captured on the battlefield, including U.S. citizens, may be detained “for the duration of the relevant conflict” to “prevent their return to the battlefield.”¹³⁹ This may have been the correct understanding of the law for a person fighting on behalf of government forces in an international armed conflict, such as Yasir Hamdi, who fought for the Taliban and was captured in late 2001, during the phase of international armed conflict in Afghanistan. ¹⁴⁰ U.S. courts have found that customary IHL allows for the detention without trial of so-called

domestic laws); CAROLYN HAMILTON ET AL., ADMINISTRATIVE DETENTION OF CHILDREN: A GLOBAL REPORT 45-49 (University of Essex, 2011).

136. DEBUF, *supra* note 88, at 472.

137. *See supra* notes 84-89 and accompanying text.

138. *Hamdi v. Rumsfeld*, 542 U.S. 507, 507, 519 (2004) (O’Connor, J., plurality opinion).

139. *Id.* at 519, 521 (O’Connor, J., plurality opinion). Justices Souter and Ginsburg found the AUMF lacked the “clear statement” for military detention of citizens required by 18 U.S.C. § 4001(a). *Id.* at 545 (Souter, J., concurring in the judgment). Justices Scalia and Stevens thought Congress had to suspend habeas corpus if it desired to allow Executive detention without judicial review of citizens held inside the United States, even if they were enemy combatants. *Id.* at 573 (Scalia, J., dissenting). Hence, four Justices disagreed that Congress had provided sufficient legal basis to allow internment of U.S. citizens, at least in the narrowly circumscribed facts the *Hamdi* petition presented.

140. From October 2001 until June 2002, the United States was engaged in an international armed conflict against the de facto government of the Taliban. *See supra*, note 36. Art. 21 GC III, *supra* note 20, allows internment until cessation of active hostilities for persons who have been determined to be prisoners of war under Articles 4 and 5 GC III. Hamdi was not granted prisoner-of-war status, but was held as a so-called “enemy combatant.” *Hamdi*, 542 U.S. at 510.

“unlawful combatants”, now called “unprivileged belligerents,” at least until the end of hostilities.¹⁴¹

The Court, however, did not differentiate between the different types of detention authorities under international law. It used one treaty provision – Article 118 GC III – as the only possible reading of the detention authority inherent in the AUMF 2001, no matter the status of the individual detainee.¹⁴² As explained below, this does not reflect the law of international armed conflict: prisoners of war may be detained until the end of active hostilities (Third Geneva Convention), and other persons may be interned as long as their internment is absolutely necessary for security reasons until at the latest the end of active hostilities (Fourth Geneva Convention).¹⁴³ Even less so does it reflect State practice of internment in non-international armed conflict.

In the NDAA 2012, Congress affirmed the Obama’s administration’s interpretation of detention authority under the

141. See *Hamdi*, 542 U.S. at 520 (O’Connor, J., plurality opinion) (noting that the established principle of law allows detention to last at least to the end of hostilities); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 54-58 (D.D.C. 2009) (distinguishing between detention and internment and interpreting the Third Geneva Convention as regulating internment of prisoners of war only and maintaining a customary authority to detain individuals who do not meet the requirements of prisoners of war).

142. The Court’s understanding of this principle derives from a very selective reading of the literature submitted to it by the parties and in various *amicus curiae* briefs. The authority cited is, next to the Third Geneva Convention, an article by Jordan Paust. Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 510-11 (2003) (cited in the *Brief of Amici Curiae International Law Professors Listed Herein in Support of Petitioners*, No. 03-6696, *Hamdi v. Rumsfeld*, 542 U.S. 507 (Feb. 23, 2004)). Paust’s article correctly outlines the authorities to intern contained in the Third and Fourth Geneva Conventions, and specifically explains that so-called “unprivileged belligerents” may be interned under the Fourth Geneva Convention. Yet, the Court makes no mention of the Fourth Geneva Convention.

143. A recent comment to the denial of certiorari of a habeas case suggests that at least one of the Justices is at unease with the consequences of this decision. See *Hussain v. Obama*, 134 S. Ct 1621, 1622 (Apr. 21, 2014) (Breyer, J., statement respecting the denial of certiorari) (“[The Supreme Court] has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not ‘engaged in an armed conflict against the United States’ in Afghanistan prior to his capture.”).

AUMF 2001.¹⁴⁴ The statute raises at least as many questions as it answers. Its provisions purport to limit Executive detention authority with reference to the laws of war.¹⁴⁵ At the same time, it codifies concepts whose origin in the law of war is widely contested, e.g. the notion of “associated forces” and “substantial support” to terrorist groups, introduced by the Executive to expand the categories of persons who may be interned under the AUMF 2001.¹⁴⁶ Its formulation of “[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force” provides no safeguards against indefinite detention: it is by no means clear which military operations against which actor the AUMF 2001 authorizes, and not all of those military operations are necessarily governed by IHL.¹⁴⁷

The recent debate on the source of the president’s authority to use force against the Islamic State illustrates this difficulty.¹⁴⁸ The administration’s reliance on the AUMF 2001 for those military operations draws to a considerable extent on domestic political expediency, rather than the classification of the relationship between a State party to a conflict and a

144. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021–34, 125 Stat. 1298, 1562-73 (Dec. 31, 2011) [hereinafter NDAA 2012].

145. NDAA 2012 § 1021(c)(1).

146. A district judge found provisions of the NDAA 2012 unconstitutional under the Fifth (and First) Amendment. *Hedges v. Obama*, 890 F. Supp. 2d 424, 472 (S.D.N.Y. 2012), *vacated*, 724 F.3d 170 (2d Cir. 2013) (holding that petitioners lacked standing under Article III, and, thus, never reaching the substantive constitutional questions raised by petitioners). See Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT’L SECURITY L. & POL’Y 167, 202 (2013) (arguing that the NDAA 2012 fails to clarify the “test for review of continuing threat” or criteria “to discern when detention may end.”); Colby P. Horowitz, Note, *Creating a More Meaningful Detention Statute: Lessons Learned from Hedges v. Obama*, 81 FORDHAM L. REV. 2853, 2896-97 (2013); see Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War – Part I*, OPINIO IURIS (Dec. 31, 2011), <https://www.lawfareblog.com/ndaa-good-bad-and-laws-war-part-i>, for a less critical reading of the NDAA 2012.

147. NDAA 2012 § 1021(c)(1); See *supra* Part I.B; see also *infra* Part IV.

148. See E-mail from a Senior Obama Administration Official, to the N.Y. Times (Sep. 10, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1301198/is-war-powers-theory-background-statement.pdf> (explaining the President’s reliance on the AUMF in order conduct airstrikes against the Islamic State in Iraq and Syria).

non-state actor which IHL requires.¹⁴⁹ The debate about the AUMF confuses the need for a Congressional authorization of certain types of military operations under the U.S. Constitution with the requirement of a lawful basis for detention in armed conflict. As discussed in Part I.C.1, in international armed conflict, the Third and Fourth Geneva Convention may provide such authorization,¹⁵⁰ and grounds and procedures need not necessarily be detailed in a domestic statute. In non-international armed conflict, the only possible source for detention authority is domestic law; simple reference or legislative affirmation of analogies drawn from concepts arising out of the relationship between States in international armed conflict cannot replace an authority to detain with sufficient clarity.¹⁵¹ The U.S. government has insisted that a law authorizing open-ended security detention in armed conflict must be vague in order not to interfere with the Executive's discretion in interpreting its own authority to detain.¹⁵² This stands against the requirement that laws authorizing internment must meet the standard of legality in order not to be arbitrary.

Although, as submitted, the *Hamdi* court erred in accepting status-based detention authority independent of the type of

149. Jack Goldsmith, *The Obama Administration Does Not Want a New AUMF*, LAWFARE INSTITUTE (Jan. 21, 2015, 6:35 AM), <http://www.lawfareblog.com/2015/01/the-obama-administration-does-not-want-a-new-aumf/>.

150. GC III, *supra* note 21, art. 42; GC IV, *supra* note 31, arts. 42, 78; *see supra* Part I.C(1).

151. The government claims it can derive the concept of "associated forces" from the concept of co-belligerency. That concept stems from the law of neutrality, which regulates the relations between States that are not parties to a conflict to States that are. Training, financing, and other alleged indicators for the existence of "associated forces" may be violations of the law of neutrality, but do not turn a State from a neutral to a co-belligerent. Non-state actors are not bound by the law of neutrality, even though their members may be prosecuted under domestic law for acts which criminalize support to the party in a foreign conflict. *See, e.g.* MICHAEL BOTHE, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 578-80 (Dieter Fleck ed., 2nd ed. 2008); Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L. L.J. 75, 89-113 (2011).

152. *See* Brief for the Appellants at 47-50, *Hedges v. Obama*, Nos. 12-3176, 12-3644 (2d Cir. Nov. 6, 2012); *see also* Horowitz, *supra* note 146, at 2883-84.

conflict, the U.S. Supreme Court was correct in setting the outer limit of this type of internment with the “end of active hostilities.”¹⁵³ As Part III shows, IHL, seeking to prevent the abuse of government authority in war time, restricts the ability of States to manipulate the determination of the end of hostilities and thus the moment when the obligation to release attaches. The obligation to release depends on the legal basis under which an individual is held. Where a country, as does the United States, refers to the Third Geneva Convention in analogy to claim an authority to detain in non-international armed conflict, it must as a minimum accept the restraining aspects of this framework as well.¹⁵⁴

B. An Unsatisfactory Solution: Preventing Indefinite Detention through a Hybrid Model

Most scholarship on the end of the conflict in the United States has accepted the notion of “law of war detention” put forth in *Hamdi v. Rumsfeld*.¹⁵⁵ The Obama administration, the

153. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (concluding that internment of individuals, during “the duration of the particular conflict in which they were captured . . . is an accepted incident to war”).

154. David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 995-96 (2009) (arguing that the United States “should be free to select appropriate measures from the full scope of permissible courses of action under the law of war, but should also be subject to virtually all the constraints it imposes”, noting for example the conditions of detention at Guantanamo as incompatible with the customary law of war “benefits . . . part and parcel of the legal authority to detain individuals preventively in the first place.” *Id.* at 1024); Jinks, *supra* note 92, at 399 (“The substantive laws of war should be tightly coupled with the procedural rights recognized in the laws of war. Otherwise, the Conventions would give states an incentive to characterize hostilities as an ‘armed conflict’ in order to decrease procedural rights protections.”); see also CHRISTOPHER GREENWOOD, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 45, 52 (Dieter Fleck ed., 2nd ed. 2008); KEVIN JON HELLER, *The Use and Abuse of Analogy in IHL forthcoming in THEORETICAL BOUNDARIES OF ARMED CONFLICT & HUMAN RIGHTS* (Jens Ohlin ed., 2015), <http://ssrn.com/abstract=2546359>.

155. See, e.g., Jensen, *supra* note 21, at 498 (stating that his analysis did not question the ruling in *Hamdi*); Pearlstein, *supra* note 21, at 189-91, 199-203 (arguing that in the context of an international armed conflict in which the AUMF 2001 was enacted, the U.S. Supreme Court was correct to construe the detention authority inherent in the AUMF as limited by Article 118 of the Third Geneva Convention);

habeas jurisprudence after *Boumediene* and the NDAA 2012, which codified that jurisprudence, have expanded the concept of status-based detention until the end of hostilities to groups that were once associated with Al Qaeda and those substantially supporting them.¹⁵⁶ The D.C. Circuit ruling in *Kiyemba v. Obama* has further cemented the idea that a determination that detention was no longer necessary to contain the threat an individual poses need not result in release of that individual.¹⁵⁷ This has made the determination of the “end of hostilities” the linchpin of the question whether and when the U.S. government would have an obligation to release detainees currently held at Guantánamo.

Some believe that under *Hamdi*, the end of hostilities in Afghanistan would “create a presumption of repatriation” of Taliban fighters,¹⁵⁸ which “may be overcome on an individual basis by a finding that a released and repatriated fighter will return to the battle.”¹⁵⁹ But once hostilities have ended, there is, as a matter of law, no “battle” to which a released fighter can return.¹⁶⁰ Another author has argued that the end of combat operations in Afghanistan will have “little” bearing under

GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL Approach* 146 (2012); Blank, *supra* note 1, at 1192 (criticizing the model for its practical and moral implications, but conceding as “true” “that law of war detention is detention without charge until the end of hostilities”). *But see* Hafetz, *supra* note 93, at 333-38, 346 (2014) (asserting opposition to the use of status-based detention at Guantánamo); Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants,”* 10 Y.B. OF INT’L HUMANITARIAN L. 232, 235, 240 (2007) (arguing the United States’ definition of “enemy combatant” is too loose).

156. *See supra* Part II.A.

157. *See Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (noting that the due process clause does not apply to aliens without property or presence in the sovereign United States); *see also* *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010) (holding that courts may not enter into an enquiry on the necessity of continued detention in the context of an armed conflict).

158. Jensen, *supra* note 21, at 508.

159. *Id.* at 507 (“[I]t seems logical to presume that the President’s determination that hostilities have concluded between specific Parties to an armed conflict and the corresponding withdrawal of troops from the area of conflict create a presumption that detainees from that conflict should be repatriated.”).

160. *See infra* Part IV.A (examining the difficulties in determining the end of hostilities as a matter of law).

international law on the continuation of a transnational armed conflict, that, in any case, the Taliban and Al Qaeda will continue to fight against the United States as troops draw down, and that the President has not announced the termination of hostilities.¹⁶¹ Given the contested nature of the notion of a “transnational armed conflict,” the first is itself hardly a tenable statement,¹⁶² the second relies on the very analysis of non-international armed conflict it rejects,¹⁶³ and the third is largely irrelevant under international law.¹⁶⁴

Some authors discuss the difficulty arising out of the lack of definite rules on security detention in the treaty law regulating non-international armed conflicts and, to some extent, in human rights law.¹⁶⁵ While one pair of authors draws the conclusion that non-international armed conflict treaty law allows continued detention after the end of hostilities,¹⁶⁶ another

161. See, Adams *supra* note 18, at 423-25 (2014) (arguing the removal of U.S. troops from Afghanistan will not bring “a conclusion of peace”).

162. See *supra* Part I.AB (discussing the controversy over the concept of transnational armed conflict).

163. See *infra* Part IV.A (examining indicators of the beginning and end of a non-international armed conflict).

164. See *infra* Part II.B (noting that determination of the end of hostilities is a factual enquiry independent from political statements).

165. See Bellinger & Padmanabhan, *supra* note 21, at 229 (noting that although the rules provide for the release of detainees upon “the end of active hostilities,” there is substantial difficulty associated with determining the precise end of a non-international armed conflict).

166. See *id.* at 228-29. (arguing that security detention may continue after the end of hostilities in a non-international armed conflict). “[I]n principle, measures restricting people’s liberty, taken for reasons related to the conflict, should cease at the end of active hostilities, i.e., when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken.” COMMENTARY AP II, *supra* note 41, at 1360. The language in Article 2(2) is an indicator that the drafters of AP II were not willing at the time to see international law interfere with their domestic detention regimes. See Rona, *supra* note 79, at 36-37 (discussing the reasons for States to avoid treaty rules to regulate detention in a non-international armed conflict, including the fact that their domestic laws already provided them with such authority). Nevertheless, they wanted to avoid a gap in protection after the end of hostilities. COMMENTARY AP II, *supra* note 41, at 1360. This cannot be seen as authorization for

author correctly concludes that Additional Protocol II provides no authority to detain and, therefore, “can be read to stand at most for the proposition that the law of non-international armed conflict does not prohibit detention beyond the cessation of hostilities.”¹⁶⁷ A third author found that authority to detain may continue under domestic law until the end of the “state of war,”¹⁶⁸ i.e. the repeal of war time legislation authorized by Congress.

Commentators who believe non-international armed conflict authorizes status-based detention until the end of hostilities struggle with the difficulty to prevent indefinite detention when it is not possible to determine the end of hostilities. They propose thus to end “detention authority over individual fighters when they no longer pose a threat to the security of the state.”¹⁶⁹ One author reasons that the individual threat-based review of the Fourth Geneva Convention would have been the more appropriate source of authority to intern members of Al Qaeda as well as members of the Taliban once the latter were no longer the government of Afghanistan.¹⁷⁰

continued internment, which has to come from a different source, and needs to comply with domestic and, now, international human rights law, especially after the end of hostilities. See *infra* Part III.A (discussing Articles 118 GC III and 133 GC IV and the duties they impose regarding release of detainees).

167. Pearlstein, *supra* note 21, at 202.

168. See Jensen, *supra* note 21, at 500 (“[I]t appears that there is no domestic law preclusion to the continued exercise of ‘war powers,’ at least by Congress in the case of a declared war, long after the hostilities have been officially proclaimed completed.”).

169. Bellinger & Padmanabhan, *supra* note 21, at 230-31 (arguing that release of non-state fighters who no longer pose a threat to the security of the state is “the most promising” solution for the conundrum to determine an obligation to release in non-international armed conflicts; alternatively, they propose to set a time limit for detention, or to end the authority to detain when a related international armed conflict ends); see David Mortlock, *Definite Detention: The Scope of the President’s Authority to Detain Enemy Combatants*, 4 HARV. L. & POL’Y REV. 375, 403-04 (2010) (examining the risk returning a detainee to society poses); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War On Terrorism*, 118 HARV. L. REV. 2048, 2124-25 (2005) (arguing that hostilities cease with an individual who no longer poses a threat to the Detaining power).

170. See Hafetz, *supra* note 93, at 350-51 (arguing that the backward-looking status-based determination in the D.C. Circuit’s habeas jurisprudence is inadequate to

This article agrees with the last proposal: it also argues that this model was closer to an existing customary rule under international law than the framework adopted by the Bush and maintained by the Obama administration. This matters, as it allows to criticize the integration of the anomaly of Guantánamo into the military doctrine of the United States, and it will matter for current and future habeas litigation on whether courts may order the release of a particular detainee.¹⁷¹ On the one hand, the government may want to avoid such a precedent by transferring detainees before a court asserts an authority to order release. Advocates for detainees, on the other hand, may realize that IHL, with its insistence on the factual determination of the end of hostilities, may not always provide the answers most helpful to them.¹⁷² Yet, the discussion on the obligation to release and the endpoint of hostilities authorized under the AUMF 2001 shows the fault lines in the detention framework at Guantánamo. There is a small chance for courts and policy-makers to undo some of the legal damage that framework has created.¹⁷³

The Periodic Review Board, established in 2010 and reviewing individual cases of Guantánamo detainees since

meet the challenge of meaningful judicial review for detainees captured in wildly different circumstances).

171. See, e.g., *Al Odah v. United States*, No. 13-1420 (CKK) mem. op. at 17-19 (D.D.C. Aug. 3, 2014) (dismissing the petitioner's request for release based on the fact he no longer posed a threat, relying on precedent holding that threat assessment was not within the court's purview).

172. See, e.g., *Al Warafi v. Obama*, No. 09-2368 (RCL), mem. op. at 9-10 (D.D.C. Jul. 30, 2015) (rejecting the petitioner's argument that presidential declarations on the end of war in Afghanistan should be dispositive on the question of whether active hostilities continue).

173. See Charles Garraway, *War and Peace: Where Is the Divide?*, in 88 INT'L L. STUDIES 93, 102-03 (2012) (comparing any U.S. policy-maker who wishes to change the legal course on its "war" against Al Qaeda with "the lost traveler seeking directions to Mullingar[, who] was advised, 'If I was you, sir, I would not start from here!'"'). While Garraway would agree with this article that conducting operations against Al Qaeda under an armed conflict paradigm was not the most fortuitous idea, he would not share its conclusions on detention of "unprivileged belligerents." See *id.* at 102, 110 (criticizing the United States' flexible detention of unlawful combatants, yet recognizing that there is international support for status-based detention and targeting of belligerents).

2013,¹⁷⁴ conducts threat assessments. The government argues in habeas proceedings that a recommendation for release by the review board does not give rise to an obligation to release.¹⁷⁵ In a 2014 report to Congress, the government claimed it could rely on the “law-of-war” and on § 412 of the Patriot Act to authorize continued detention, with minimal judicial review, after transfer of detainees from Guantánamo to the United States.¹⁷⁶ This indicates that the Obama administration plans to rely on the authority granted in *Hamdi* for quite some time after the official end of combat operations in Afghanistan.

174. U.S. DEP’T OF DEF., *About the Periodic Review Board* <http://www.prs.mil/AboutthePRB.aspx> (last visited Aug. 27, 2015); see Jason Leopold, *Guantanamo’s Indefinite Prisoners Will Finally Have Cases Reviewed Just as Senate Committee Set to Hold Hearing on Closing Prison*, FREEDOM OF THE PRESS FOUND. (July 20, 2013), <https://freedom.press/blog/2013/07/guantanamos-indefinite-prisoners-will-finally-have-cases-reviewed-just-senate> (announcing the cases will of detainees will be reviewed for the first time).

175. See Respondent’s Combined Opposition to Parhat’s Motion for Immediate Release into the United States and to Parhat’s Motion for Judgment on His Habeas Petition at 10-14, *In re Guantanamo Bay Detainee Litig.*, No. 05-1509 (RMU) (D.D.C. Aug. 5, 2008) (stating that the AUMF comprises continued detention authority as part of the “winding down” of an armed conflict, and that release was not obligatory after a recommendation for release). District judges have accepted the government’s argument that courts have no power to order transfer of a detainee who the inter-agency process has recommended for transfer. *Al Wirghi v. Obama*, 2014 U.S. Dist. LEXIS 91835 (D.D.C. July 3, 2014) (following *Ahjam v. Obama*, 2014 U.S. Dist. LEXIS 49967 (D.D.C. Mar. 21, 2014)) (denying the argument that detention after recommendation for transfer is arbitrary, the inter-agency determination only concluded that the threat posed by the detainee can be mitigated through security measures).

176. See U.S. DEP’T OF JUSTICE, *supra* note 68, at 1, 6 (“Historically, the courts have treated detainees held under the laws of war who are brought to the United States as outside the reach of the immigration laws” and “assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war”). Congress passed § 412 of the Patriot Act (§ 236A of the INA; 8 U.S.C. 1226(a)) to override the limit on detention of non-citizens in removal proceedings the U.S. Supreme Court imposed in *Zadvydas v. Davis*. 533 U.S. 678, 690 (2001) (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem”); see also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001*, Pub. L. 107-56, § 412, 115 Stat 272 (2001).

The United States does not limit this hybrid doctrine to Guantánamo.¹⁷⁷ In the 2014 Detainee Directive of the U.S. Department of Defense, “unprivileged belligerents”¹⁷⁸ fall between the regime applicable to prisoners of war – they are detainable until the end of hostilities – and the regime applicable to civilian internees – they may be released before the end of active hostilities if they do not pose a threat, or that threat can be mitigated through transfer to a safe country.¹⁷⁹ The Directive contains no explicit exception for continued detention after hostilities have ended: Law-of-war detention is lawful “until a competent authority determines that the conflict has ended or that active hostilities have ceased.”¹⁸⁰

Two aspects about this definition of detention authority are troubling: the broad discretion given to the (unnamed) competent authority to define the end of hostilities¹⁸¹ and the authorization of detention during “pending efforts to ensure a safe and orderly release or transfer.”¹⁸² The first highlights the

177. See Steve Vladeck, *The Very Strange New DoD Detainee Directive*, JUST SECURITY (Sep. 4, 2014, 1:14 PM), <http://justsecurity.org/14608/dod-detainee-directive/#more-14608> (noting that the Directive would regulate U.S. detainee operations in Guantánamo and elsewhere).

178. See *id.* (criticizing the use of the term “unprivileged belligerent” in the directive as inconsistent with international law).

179. See DEPT OF DEF. DIRECTIVE, DOD DETAINEE PROGRAM, No. 2310.01E ¶ 3(m)(2) (Aug. 19, 2014), <http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf> (noting that unprivileged belligerents may be released during an ongoing conflict if a competent authority deems the threat they pose can be mitigated); see also ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, ¶ 6-16 (a)(2) (Oct. 1 1997) (“After hostilities cease and subject to the provisions of (3) below, [civilian internees] will be released as soon as the reasons for their internment are determined by the theater commander to no longer exist.”).

180. DEPT OF DEF. DIRECTIVE, *supra* note 179, ¶ 3(f).

181. See Gabor Rona, *Guest Post: DoD Directive 2310.01E*, JUST SECURITY (Sep. 5, 2014, 4:48 PM) <http://justsecurity.org/14670/guest-post-dod-directive-2310-01e/> (noting the flaws in the definition of unprivileged belligerent as inconsistent with international law).

182. DEPT OF DEF DIRECTIVE, *DoD Detainee Program*, No. 2310.01E ¶ 3(f) (Aug. 19, 2014) <http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf>. The same phrasing was used during the transfer of detention authority from U.S. to Iraqi custody at the end of the MNF-I presence in Iraq; see *Agreement Between the United States of*

importance of limiting the notion of “hostilities” to actual hostilities with a sufficient nexus to the circumstances of capture to warrant internment under IHL. Where the “competent authority” relies on the aggregation of different threats posed by loosely affiliated groups to determine a continued global transnational armed conflict, there is a risk that “hostilities” would never end,¹⁸³ disabling the test for the applicability of IHL set out in the Third and Fourth Geneva Conventions.¹⁸⁴ The second suggests the introduction of a domestic basis for the authority to detain persons for years after they have been determined not to be a threat, even after hostilities have ended.¹⁸⁵ Both propositions, this article argues, are incompatible with international law.¹⁸⁶

America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Iraq-U.S., art. 22, ¶ 4, Nov. 17, 2008 <http://www.state.gov/documents/organization/122074.pdf> [hereinafter SOFA US-IRAQ 2008] (“Competent Iraqi authorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.”).

183. See text accompanying note 3, *supra* (arguing that relying on aggregation of threats posed by affiliate groups may mean that hostilities will not end anytime soon with Al Qaeda). This is compounded by the lack of legal clarity of the Obama administration as to the basis for the authorization to use military force in theaters other than Afghanistan. See, e.g., Obama, *Hagel Mark End of Operation Enduring Freedom*, *supra* note 3 (“Although existing statutes provide me with the authority I need to take these actions, I have repeatedly expressed my commitment to working with the Congress to pass a bipartisan authorization for the use of military force (AUMF) against ISIL.”).

184. See GC III, *supra* note 20, arts. 5, 118; GC IV, *supra* note 31, arts. 6, 133 (limiting the applicability of the Conventions to the existence of active hostilities, and limiting the authority to detain with the end of hostilities).

185. At the signature of the 2008 Status of Forces Agreement in Iraq, the United States held 15,000 internees in Iraq and argued their “safe and orderly transfer” would take time. See Jeffrey Azarva, *Is U.S. Detention Policy in Iraq Working?*, THE MIDDLE EAST QUARTERLY, Winter 2009, at 5–14, <http://www.meforum.org/2040/is-us-detention-policy-in-iraq-working> (mentioning the number of detainees still in custody during 2008). Ultimately, it took over a year to effect the transfer of all detainees, with some of those considered most dangerous kept until the last week before ultimate withdrawal from Iraq. See Gregg Carlstrom, *US Hands over Last Detainee in Iraq*, AL JAZEERA (Dec. 18,

There are two ways in which a government must release individuals under international law: where law imposes a positive obligation to release, and where there is no, or no longer, an adequate lawful basis to detain. Where a government derives its authority to intern from the “law of war,” that authority would end when the law of war is no longer applicable. The Geneva Convention of 1949 have regulated the end of their own applicability and the end of an authority to detain in international armed conflict.

IV. THE OBLIGATION TO RELEASE UNDER IHL

The Geneva Conventions of 1949 provide a positive obligation to release internees at the end of an international armed conflict. Prisoners of war who are held because of their status as members of the armed forces of a State party to the conflict have to be released and repatriated after “cessation of active hostilities,” under Article 118 GC III.¹⁸⁷ “Protected persons” under GC IV, e.g., any detainees of enemy nationality or allegiance in the hands of a State party to the conflict who are not prisoners of war under the Third Geneva Convention, must be released when their continued internment is no longer absolutely necessary for the security of the Detaining power.¹⁸⁸ Those still interned at the end of hostilities must be released “as soon as possible.”¹⁸⁹ Both the Third and the Fourth Geneva

2011, 5:46 GMT), <http://www.aljazeera.com/news/middleeast/2011/12/201112178207516374.html> (describing the controversy over the handover of a detainee responsible for the death of 5 American soldiers, but who might face only limited charges before an Iraqi court).

186. See Rona, *supra* note 174 (arguing the DoD Directive is at odds with international law).

187. GC III, *supra* note 20, art. 118.

188. See GC IV, *supra* note 31, at art. 42, 78, 132, 133 (defining grounds for internment of civilians and the moment of release).

189. GC IV, *supra* note 31, at art. 133. The Fourth Geneva Convention left one gap in protection as it applies only to nationals of an enemy State. See *id.* at art. 4 (detailing persons protected under the Convention). Many detainees at Guantánamo, however, are nationals of allies or neutral States; AP I has closed this gap with its art. 45 (3), which extends the fundamental guarantees of art. 75 to all persons in the hands of a party to a conflict, including those who neither qualify for prisoner-of-war status nor for protection

Conventions have exceptions for persons undergoing trial or serving sentences for criminal offenses, including war crimes.¹⁹⁰ The obligation to release is unilateral and unconditional.¹⁹¹

In contrast, the two treaty sources for non-international armed conflict – Common Article 3 and Additional Protocol II – are silent on grounds for deprivation of liberty and release.¹⁹²

under the Fourth Geneva Convention. See AP I, *supra* note 32, art. 45(3) (“Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”). The ICTY has ruled that the relevant criterion for protection is allegiance to an enemy party to the conflict, not the formal nationality. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, ¶¶ 164-66, (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999) (“[T]he Convention intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection.”). The ICTY’s approach seems the correct one, but is not entirely settled law. See DEBUF, *supra* note 88, at 290-92 (discussing State practice regarding the nationality criterion of the Fourth Geneva Convention).

190. See GC III, *supra* note 21, at art. 115 (providing that “prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation . . . may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents”) (emphasis added); see also GC IV, *supra* note 31, at art. 133 (explaining that even after the close of hostilities, internees “against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties,” may be detained “until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.”).

191. See Yoram Dinstein, *The Release of Prisoners of War* in STUDIES AND ESSAYS ON IHL AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 37, 40, 44 (Christoph Swinarski ed., 1984) (“each Detaining power must proceed without delay to a unilateral release of the prisoner of war which it holds in captivity” but “only when the point of cessation is actually reached, does the duty to release prisoners of war under the Article materialize”); Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186, 219-20 (1995) (noting that while the legal obligation is unilateral, repatriation agreements have “often reflect[ed] the bargaining positions of the states”); see also SHIELDS DELESSERT, *supra* note 29, at 10, 130-33.

192. See GC I, *supra* note 70, art. 3; GC II, *supra* note 70, art. 3; GC III, *supra* note 21, art. 3; GC IV, *supra* note 31, art. 3 (discussing the treatment of individuals who do not, or no longer take part in hostilities – but does not describe the grounds for detention or release); AP II, *supra* note 32, art. 4 (listing fundamental guarantees of human treatment for those who do not or no longer take part in hostilities, without describing the grounds for deprivation of liberty and release).

Both aim, however, to ensure that any person deprived of liberty would benefit from due process guarantees.¹⁹³ Those due process guarantees are not unique to armed conflict: they are drawn from prevailing domestic, and starting in the 1970's, international human rights law.¹⁹⁴ The grounds for detention in a non-international armed conflict have to be defined in domestic law; as discussed above, IHL and international human rights law disfavor status-based internment in a non-international armed conflict.¹⁹⁵ Where domestic law relies on the applicability of the "law of war" to justify detention, this article argues it can only do so until the end of hostilities.¹⁹⁶ IHL permits certain restriction of human rights, including deprivation of liberty, for reasons of military necessity.¹⁹⁷ Where hostilities have ended, military necessity, and hence IHL, can no longer be a justification for security internment.¹⁹⁸

193. See GC I, *supra* note 70, art. 3; GC II, *supra* note 70, art. 3; GC III, *supra* note 21, art. 3; GC IV, *supra* note 31, art. 3 (prohibiting criminal convictions "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."). See also AP II, *supra* note 32, art. 6 (noting procedural guarantees for persons under criminal prosecution in relation to an armed conflict).

194. See OFFICIAL RECORDS, *infra* note 277 and accompanying text (noting that the ICCPR was a source of inspiration for fundamental guarantees in AP I).

195. See Rona, *supra* note 79, at 34 (arguing source of detention power must be domestic in nature).

196. *But see* Jensen, *supra* note 21, at 493-500 (discussing relevant treaty law and finding evidence of a customary basis to detain after the end of hostilities in U.S. jurisprudence).

197. See DEBUF, *supra* note 88, at 85-86 (referring to a 2004 background paper by Louise Doswald-Beck explaining that military necessity provides a basis to justify internment while hostilities are ongoing).

198. See *Coard et al. v. U.S.*, No. 109/99, Annual Report of the Inter-American Commission on Human Rights 1999, ¶ 57 (Apr. 13, 1999) (discussing the delayed release of detainees to Grenadian custody after the end of hostilities as incompatible with international law); DEBUF, *supra* note 88, at 85-86 (citing to an expert paper prepared by Louise Doswald-Beck, which states that the drafters have chosen the grounds of detention "on the basis of what is necessary. Conversely, what is unnecessary is not or no longer allowed." P. 2 "Background Paper" in Report of the Expert Meeting on the Supervision of the Lawfulness of Detention (2004) (fn. 252)).

A. The Obligation to Release in International Armed Conflict

1. Cessation of Active Hostilities

Article 118 GC III states unequivocally that prisoners of war must be “released and repatriated without delay after the cessation of active hostilities.”¹⁹⁹ In contrast to prior treaties on prisoners of war, the phrase “cessation of active hostilities” was to designate a factual point in time, where armed clashes had stopped more than just temporarily on both sides.²⁰⁰ For both Conventions, the drafters at the Diplomatic Conference wished to make the obligation to release prisoners of war and civilian internees independent of the political will of either party or the conclusion of a peace treaty.²⁰¹ The Diplomatic Conference rejected all proposals that would have delayed release and repatriation of prisoners of war beyond hostilities, whether for security concerns of the detaining authority, or “in the interest of detainees,” such as when the material conditions in the country of origin did not allow quick integration into the society.²⁰² The drafters’ insistence on a factual determination of

199. GC III, *supra* note 30, at art. 118.

200. See Horst Fischer, *Protection of Prisoners of War*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 367, 415 (Dieter Fleck 2d ed., 2009) (arguing that the question of whether hostilities are expected to resume should be solved according to objective criteria, and not according to the subjective interpretation of “the intentions of the adversary”); see also SHIELDS DELESSERT, *supra* note 29, at 72.

201. See GC III, *supra* note 30, art. 118 (stipulating release of prisoners of war only after the cessation of active hostilities); GC IV, *supra* note 31, art. 132-33 (setting release from internment after the close of hostilities or when the reasons necessitating internment no longer exist).

202. See Committee II, Summary Record of the Fifteenth Plenary Meeting, in II-A FINAL RECORD, *supra* note 104, at 295 (noting a statement of the ICRC delegate that “the question of repatriation [of prisoners of war] was related to that of the cessation of hostilities and no longer to that of the conclusion of peace. The text emphasized, therefore, that prisoners of war were to be repatriated immediately after the cessation of active hostilities.”). The representative of the United Kingdom found this not practical and proposed a delay in repatriation because of security concerns of the detaining power or adverse material conditions in the home country, but it was soundly rejected by a number of delegations. See Committee II, Special Committee, Summary Record of the Seventeenth Plenary Meeting, in II-A FINAL RECORD, *supra* note 104, at 450-51 (noting the debate and rejection of the amendment offered by the United Kingdom representative).

the cessation of hostilities is beyond question; the mere reference to Article 118 GC III, however, glosses over the difficulty to identify what constitutes factual “cessation of hostilities,” where there is no political agreement over the dispute that gave rise to the conflict.²⁰³ The drafting history shows it is the military nature, not the political nature of the cease-fire agreement which determines “cessation of hostilities.”²⁰⁴

The literature has proposed several formula how to determine when hostilities have ceased for the purposes of Article 118 GC III. Under the most restrictive view cessation of hostilities only gave rise to an obligation to release where the enemy was in a state of total defeat.²⁰⁵ Later scholars found this a too rigid requirement. The spirit of Article 118 GC III “signifies that the Parties are bound to release the prisoners of war held by them notwithstanding the potential danger of the resumption of hostilities and regardless of who stands to gain more from the exchange.”²⁰⁶ Prisoners of war have to be released “without delay,” even if both sides are not defeated at the moment of cessation of hostilities.²⁰⁷ Nevertheless, the mere signing of a ceasefire agreement would not trigger the obligation to release, unless circumstances indicated the termination, and

203. See Blank, *supra* note 1, at 1180-81 (noting that “[a]pplying these concepts in practice can be difficult even in traditional armed conflict situations”).

204. See *id.* at 1180 (noting that the Geneva Conventions sought to “eliminate pretexts” to avoid the release of prisoners of war and internees once hostilities have ceased).

205. Yoram Dinstein, *The Release of Prisoners of War in* STUDIES AND ESSAYS ON IHL AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 37, 44 (Christoph Swinarski ed., 1984) (citing to Sir Hersch Lauterpacht in *Opp. 2 Intl Law*, p. 613, 7th ed.).

206. *Id.*; see also Richard Baxter, *Preface in* SHIELDS DELESSERT, *supra* note 29, at 16 (1977) (“Humanity would dictate that prisoners should be released when each period of hostilities comes to an end, rather than held for a period that could run to some quarter of a century. The danger that such released prisoners may be able to fight again is outweighed by the consideration that captivity long prolonged can be cruel and can cause irreversible harm to the prisoner.”).

207. Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT’L L. STUDIES 416, 428 (1977).

not only the suspension of hostilities.²⁰⁸ The determinative question thus is whether there is a “good-faith” belief in the resumption of hostilities in the near future.²⁰⁹

To avoid abuses, another expert proposed it should be up to a neutral party to decide the “validity of the basis of such fear” of a resumption of hostilities, and whether prisoners have to be released.²¹⁰ The delays in release of prisoners of war after the conflicts between India and Pakistan in 1974 and Iran and Iraq in 1988 are both examples where States claimed a fear of resumption of hostilities.²¹¹ India argued that military maneuvers by Pakistan indicated its willingness to attack India again and that refusal by Pakistan to recognize Bangladesh, as well as the war crimes trials of Indian prisoners of war in Pakistan, justified delay.²¹² This is today seen as violation of Article 118 GC III.²¹³ In a similar vein, Iran argued in 1988 that

208. Yoram Dinstein has discussed the matter in somewhat inharmonious terms. Compare, for example: Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE* 54 (Cambridge University Press 5th ed., 2012) (“The correct interpretation of this stipulation is not free of doubt (since the phrase ‘cessation of active hostilities’ may be reconciled with both suspension and termination of war), but it appears that – by itself – the mere conclusion of a cease-fire does not automatically obligate the Parties to release prisoners of war. Consequently, if they desire to bring about such release, they must say so explicitly in the text of the cease-fire agreement.”) But see also Dinstein, *The Release of Prisoners of War*, *supra* note 191, at 44-45 (“All the same, if a long period of time follows the entry into force of the cease-fire – and it becomes clear that active hostilities have in fact ended – it is necessary to release all prisoners of war even before the termination of the war.”). Dinstein’s statements are not easily reconciled with each other. The best summary seems to be that unless two parties to a conflict mention release of prisoners in a cease-fire agreement, some amount of time needs to pass to determine whether the cease-fire is a mere suspension of hostilities or actual cessation of hostilities.

209. See Dinstein, *The Release of Prisoners of War*, *supra* note 191, at 44 (citing with approval to Professor Schwarzenberger’s formula (*MANUAL OF INT’L LAW*, 175 (6th ed. 1976)).

210. Levie, *supra* note 207, at 428.

211. *Id.* at 426-28.

212. Howard S. Levie, *Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India*, 67 *A.J.INT’L L.* 512, 513-14 (1973); Ary, *supra* note 185, at 218-19.

213. Levie, *supra* note 201, at 427 U.K. MIN. OF DEF., *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT* 205 n. 438 (2004) (noting the India-Pakistan example as a practice contrary to Article 118 GC III).

the continued occupation by Iraq of a small part of its territory meant hostilities had not ceased.²¹⁴ Even where a State initially has valid concerns that hostilities may resume, it shall not delay release of prisoners of war if there was no renewed fighting for some time after the cease-fire.²¹⁵

This is largely borne out by State practice.²¹⁶ One analysis concludes that post-1949 “State practice established by cease-fire agreements supports a broad norm of repatriation, independent of the regular or irregular status of the forces, and extending even to political prisoners.”²¹⁷ The conflicts of the late twentieth century certainly put Article 118 GC III to a harsh test: not all armed conflicts had a clear “last shot fired,”²¹⁸ and many did not end with the decisive defeat and surrender of one of the parties to the conflict, as did World War I and II.²¹⁹ Release practice in such complex cases, as for example the wars of attrition in the Middle East of the early 1970s, was not uniform, and often subject to complex negotiations over the

214. 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, 75 (1989).

215. See Levie, *supra* note 201, at 428 (“[I]f there are two undefeated belligerents when active hostilities cease, the repatriation of the prisoners of war held by both sides should take place without delay.”); Dinstein, *The Release of Prisoners of War*, *supra* note 191, at 44 (arguing for Professor Schwarzenberger’s formula “when, in good faith, neither side expects a resumption of hostility”); SHIELDS DELESSERT, *supra* note 29, at 72 (Art. 118 refers to the “complete end of the war, if not in a legal sense, at least in a material one with clearly no probability of resumption of hostilities in a near future”).

216. See, e.g., Pearlstein, *supra* note 21, at 629 (discussing the practice of release by the United States in the Korea War, the Vietnam War, the Gulf War 1991, and the Iraq War 2003).

217. See David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 919-20 (1996) (citing the Dutch-Indonesia wars, Egypt-Israel 1949, the Suez War, the Six-Day War and the 1973 October War as examples of speedy repatriation, and Iran-Iraq war as an exception).

218. See Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, in II-A FINAL RECORD, *supra* note 104, at 815 (explaining “that the conditions under which wars terminate have undergone a profound change,” with longer periods of occupation which made it necessary to continue the application of GC IV for one year after the close of hostilities).

219. Pearlstein, *supra* note 21, at 632, 638-39.

release not only of prisoners of war, but also political detainees and hostages.²²⁰

Yet, long delays in the release of prisoners of war and civilian internees after cessation of hostilities were understood to be a violation of IHL, not the formation of a new rule.²²¹ This was even the case where the lack of political settlement could result in further hostilities or had congealed in a situation of permanent occupation.²²² The interpretation of the Eritrea-Ethiopia Claims Commission, finding no breach in a delay of repatriation of almost two years because Eritrea had failed to respond to a question about missing Ethiopian soldiers, is arguably a misunderstanding of the intent of the drafters and the spirit of Article 118 GC III.²²³ The need to ensure that prisoners of war were not forcibly repatriated led to moderate delays, but even in such cases all prisoners were released within

220. Alexander Bligh, *The 1973 War and the Formation of Israeli POW Policy – A Watershed Line?*, in *THE 1973 YOM KIPPUR WAR AND THE RESHAPING OF ISRAELI CIVIL-MILITARY RELATIONS* 121, 130 (Udi Lebel & Eyal Lewin eds., 2015), (discussing the inconsistent treatment and repatriation of POWs between Israel and Arab states). SHIELDS DELESSERT, *supra* note 29, at 109, 114-18.

221. See AP I, *supra* note 32, art. 85(4) (adding to the list of grave breaches any “[u]njustifiable delay in the repatriation of prisoners of war or civilians,” in 1977, when States were well aware of the new type of drawn-out inter-State conflicts.).

222. See U.K. MIN. OF DEF., *supra* note 203, at n. 438 (2004) (noting the delay in the release of prisoners after the 1973 war between India and Pakistan as contrary to Article 118 GC III); S.C. Res. 1359, ¶ 5 (Jun. 21, 2001) (calling on Morocco and Western Sahara, who both held internees for over ten years after the cease-fire in 1991, “to abide by their obligations under international humanitarian law to release without further delay all those held since the start of the conflict.”); see also CrimA 6659/06, 1757/07, 8228/07, & 3261/08 A and B v. Israel 47(5) ILM 771 (2008) (Isr.) (rejecting that the Unlawful Combatant Law of 2002 authorized the detention of fighters beyond hostilities as “bargaining chips”).

223. See *Prisoners of War – Eritrea’s Claim 17 (Eri.-Eth.)*, Partial Award, ¶ 16 (Perm. Ct. Arb. 2003) (laying out Eritrea’s claims involving the failure to repatriate detainees after the end of hostilities); see also Mario Sassòli, *The Approach of the Eritrea–Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law*, in *THE 1990-2000 WAR BETWEEN ERITREA AND ETHIOPIA: AN INTERNATIONAL LEGAL PERSPECTIVE* 341, 344 (A. de Guttry et al. eds., 2009) (arguing that the decision of the Eritrea-Ethiopia Claims Commission was inconsistent with Article 118 GC III).

less than a year after the end of hostilities.²²⁴ The most accurate definition of “cessation of hostilities,” balancing the drafters’ intent and the realities of an end of conflict is found in the United Kingdom’s 2004 Army Manual: “Active hostilities have ceased where there is no immediate expectation of their resumption. Cessation is not affected by isolated and sporadic acts of violence.”²²⁵ The United States, in its 2015 Law of War Manual, puts forward a slightly more stringent formulation: “Hostilities generally would not be deemed to have ceased without an agreement, unless the conditions clearly indicate that they are not be resumed or there has been a lapse of time indicating the improbability of resumption.”²²⁶

2. “Close of Hostilities” & “General Close of Military Operations”

GC IV separates the endpoint of its application from the point in time when all security internees must be released.²²⁷ GC IV continues to apply on the territory of a party to a conflict after cessation of hostilities until the “general close of military operations,” and in the case of occupation, for one year after the general close of military operations.²²⁸ Because Article 133 GC IV states that security internees should be released “as soon as possible” after close of hostilities, this creates a temporal span between the end of active hostilities and the end of all military operations.²²⁹ The drafting history and the ICRC Commentary

224. See Pearlstein, *supra* note 21, at 642-57 (discussing repatriation efforts after the Korea War and the 1991 Gulf War).

225. U.K. MIN. OF DEF., *supra* note 212, at 205.

226. U.S. DEP’T OF DEF., *SUPRA* NOTE 130, AT 95.

227. GC IV, *supra* note 31, art. 6.

228. *Id.* See COMMENTARY GC IV, *supra* note 41, at 62 (specifying that, in the case of multiple parties to the conflict, the general close of military operations signify the end of fighting between all parties to the conflict); see also Milanović, *supra* note 28, at 11-14 (noting that the notion of “military operation” used in Commentary to AP I also included movement of troops and other military activities which go beyond the notion of “active hostilities”).

229. See COMMENTARY GC IV, *supra* note 41, at 514-15 (noting that the close of hostilities is a state of fact rather than a legal situation covered by laws fixing the date of cessation of hostilities).

clarify that this cannot normally be a basis for continued internment under the Fourth Geneva Convention until the general close of military operations.²³⁰ Rather, the close of hostilities marks the point in time when restrictive measures against enemy nationals – whether soldiers or civilians – should end.²³¹ The drafting history reveals a tension between the desire to extend the protection of IHL as long as necessary, without prolonging the extraordinary powers that States claim during armed conflict.

The drafters of GC IV understood very well the vulnerability of the territorial or occupying state to threats from individuals with enemy allegiance in the immediate post-conflict period. The ICRC representative at the Diplomatic Conference thought that it “would be difficult to ask a Power which occupied a territory after the end of hostilities not to intern persons whom it considered dangerous. Its right to do so might, however, be limited to, say, six months.”²³² The ICRC Commentary, with reference to a statement by the Rapporteur of the Third Committee at the Diplomatic Conference, notes that the formulation in Article 133 GC IV did not mean that “no one could be interned after the close of hostilities,”²³³ referring

230. See *id.* at 515 (explaining the drafting Committee’s viewpoint regarding the end of hostilities and continued internment under the Fourth Geneva Convention); GRIGNON, *supra* note 28, at 246-56 (concluding that independent of the phrasing used, the drafters wished to adopt a factual basis to prevent that States avoid application of IHL to persons who are still in need of its protection).

231. See Committee III, Summary Record of the Third Plenary Meeting, in II-A FINAL RECORD, *supra* note 104, at 625 (discussing the Italian representative’s viewpoint that the end of hostilities occurs at the close of military operations); GRIGNON, *supra* note 28, at 252 (noting that the Italian representative, who was present at the discussions to draft the Third Geneva Convention in 1947 and the Fourth Geneva Convention in 1949, remarked that the “conclusion of hostilities” signifies the end of restrictive measures under the Fourth Geneva Convention).

232. Committee III, Summary Record of the Twenty-Second Plenary Meeting, in II-A FINAL RECORD, *supra* note 104, at 689.

233. See COMMENTARY GC IV, *supra* note 41, at 271, 515 (noting that continued internment after the end of hostilities would be an “exceptional measure” only, and such internees would remain protected under GC IV); see also GC IV, *supra* note 31, art. 46 (“[R]estrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.”).

mainly to the “disorganization caused by war” and other impediments to a return to normal conditions.²³⁴ The drafting history on this point is opaque:²³⁵ The Chairman of the Third Committee, which discussed Article 122 (now Article 133 GC IV),²³⁶ expressed concern that the Liberated Power may decide against release of internees that were not its nationals if the Convention did not retain an obligation to release at the end of occupation.²³⁷ While his remark seems rather to speak for the wish to limit continued internment, the minutes do not reproduce the discussion in the Third Committee that led to its presentation of Article 122 to the Plenary.²³⁸ The ICRC Commentary concluded “there can be no question after hostilities have ended, of applying restrictive measures of this kind to enemy nationals who have not been subjected to them before.”²³⁹

Julia Grignon, in her detailed analysis of the Diplomatic Conference, assumes, not without reason, that an extension of applicability of the Convention would entail an affirmation of emergency powers beyond hostilities.²⁴⁰ The drafting history of Article 6 GC IV, defining the material scope of application of the Convention, shows that it was not the intent of the drafters to authorize internment beyond hostilities.²⁴¹ A debate between

234. See Blank, *supra* note 1, at 1180-81 (recognizing that the “disorganization caused by war” may delay the release of internees).

235. See COMMENTARY GC IV, *supra* note 41, at 515 (explaining reasons for a potential delay of release of internees at the end of hostilities).

236. See Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, in II-A FINAL RECORD, *supra* note 104, at 844 (referencing a statement by the Rapporteur of the Third Committee that the formulation did not mean to say nobody could be interned after the close of hostilities).

237. Cf. *ID.* at 736 (justifying the retention of the proposed phrase to be deleted in fear that internees may be detained after the close of hostilities).

238. Committee III, Summary Record of the Thirty-Fourth Plenary Meeting, in II-A FINAL RECORD, *supra* note 104, at 736; Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, in II-A FINAL RECORD, *supra* note 104, at 844.

239. COMMENTARY GC IV, *supra* note 41, at 61-62.

240. GRIGNON, *supra* note 28, at 252 (expressing fear of an extension of the broader powers to detain beyond the close of hostilities).

241. Cf. GC IV, *supra* note 31, art. 6:

the Soviet delegate and the British delegate illustrates the dilemma the drafters sought to confront: how to ensure protection of the Fourth Geneva Convention for those who remained at risk of the “mentality of war,” even after the end of hostilities, without providing a pretext for continued internment of (former) enemy civilians, whether on their territory or in occupation after the end of hostilities.²⁴² In the 24th Plenary Meeting, the Soviet delegate opposed the proposal by the United Kingdom to cease application of the Geneva Convention outside the context of occupation immediately with the close of hostilities.²⁴³ “The internment of protected persons can and must come to an end, even before the close of hostilities, as soon

In the territory of parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by [a list of enumerated provisions of GV IV]. Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

See also Blank, *supra* note 1, at 1180-81 (interpreting the language in the ICRC Commentary as a reference to residual internment of civilians during the first period of disorganization after hostilities end).

242. *See* Minutes of the Twenty-Fourth Plenary Meeting, *in* II-B FINAL RECORD, *supra* note 102, at 386-87 (discussing the debate between the Soviet and U.K. delegations); *see also* Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, *in* II-A FINAL RECORD, *SUPRA* NOTE 104, at 815:

In the first case, the Stockholm solution, namely, that application shall cease at the close of hostilities was abandoned, and it was decided that application should continue for an additional year. The mentality of war does not cease with the end of hostilities; the general excitement does not subside at once and acts of vengeance against a defenceless enemy are apt to be committed; there were many instances of this at the conclusion of the last war. There was no reason, on the other hand, to fear that the extension of application would serve as a pretext for prolonging internment or assigned residence, since Article 42 provides that such measures shall be brought to an end as soon as possible after the conclusion of hostilities.

243. *See* Minutes of the Twenty-Fourth Plenary Meeting, *in* II-B Final Record, *supra* note 102, at 386 (discussing the Soviet Delegation’s position to retain a provision that the Convention shall apply on the territory of a party to a conflict until one year after the close of military operations).

as the reasons for this measure cease to exist,”²⁴⁴ the Soviet delegate argued, but nationals of a former enemy belligerent were still in need of protection after the end of hostilities. The Convention should thus apply until one year after the close of general military operations. The British delegate replied that even if another article of the Convention stipulated release at close of hostilities, an extension of the application of the Convention would make it too easy for a former party to the conflict to refer to the continued application of the Convention to justify detention beyond the earlier date.²⁴⁵ With the draft amendment proposed by the United Kingdom, “that possibility would be entirely obviated.”²⁴⁶ The British amendment was adopted.²⁴⁷

In the context of the Fourth Geneva Convention, the operation of domestic law on enemy aliens on the territory of a party to the conflict added complexity compared to prisoners of war, whose status was a matter of inter-State relations.²⁴⁸ The Fourth Geneva Conventions was thus also a safeguard against abuses of enemy aliens under those domestic laws. Where some States chose, even after end of hostilities, to intern enemy aliens for security reasons, for example the United States with Italian civilians after the armistice of 1943,²⁴⁹ they would now face a presumption against continued internment on the basis of an armed conflict.

244. *Id.* at 387.

245. *See id.* (presenting the UK representative’s viewpoint that former enemy nationals on the home territory of a belligerent would be protected by those provisions of GC IV designed to extend protection after the end of hostilities and there was “no advantage” in extending the general applicability of the Convention).

246. *Id.*

247. *Id.* at 388.

248. *See* Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, *in* II-A FINAL RECORD, *SUPRA* NOTE 104, at 816 (discussing the broad category of persons protected by articles 11-23 GC IV and the concern about potential interference into the domestic affairs of a State).

249. *See* Jensen, *supra* note 18, at 498-99 (“None of these detainees were actual fighters, but were thought to be dangerous to U.S. interests and were not released or repatriated until the end of the overall war in Europe, well after the liberation of Italy.”).

The wording in the final text at each turn was chosen with a view of ensuring that the obligation to end restrictive measures would be triggered by the factual circumstances, not by an official declaration, administrative act, or law.²⁵⁰ The Third Committee discussed how to determine the “conclusion of active hostilities,” as the starting point for the one-year period of applicability of the Fourth Geneva Convention in occupied territory.²⁵¹ The United States representative said that May 1945, i.e. the surrender of Germany, would have been the relevant point in time with relation to the conflict with Germany.²⁵² This is particularly noteworthy in light of the fact that President Truman had declared the end of hostilities with Germany on December 31, 1946, more than 18 months later, while the “state of war” was terminated by a Joint Resolution of Congress in October 1951,²⁵³ and Japan, the last remaining enemy belligerent, only surrendered in August 1945.²⁵⁴ This confirms the drafters abandoned any recourse to political statements, and favored the earliest possible moment for an obligation to release under the Fourth Geneva Convention to attach.

It is unclear whether the drafters would have been less desirous of an extension of the protective aspects of the Conventions, had international human rights law been more developed at the time. The sparse reference to the Universal Declaration of Human Right and other emerging soft law indicates that some delegates already thought of a system of

250. See COMMENTARY GC IV, *supra* note 41, at 514.

251. See Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, in II-A FINAL RECORD, *SUPRA* NOTE 104, at 816 (discussing the span during which the Convention’s rules would apply).

252. See *id.* at 623-24.

253. See Pres. Proc. No. 2714, Proclamation 2714, 61 Stat. 1048-49 (“Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.”); BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., U.S. PERIODS OF WAR AND DATES OF RECENT CONFLICTS 3 (2015) (discussing the termination of the “state of war” with Germany in October 1951); DELESSERT, *supra* note 28, at 64 n. 82.

254. *V-J Day*, HISTORY.COM, <http://www.history.com/topics/world-war-ii/v-j-day> (last visited Aug. 30, 2015).

complementarity. This idea was certainly more developed at the time of the adoption of Additional Protocol I for international armed conflicts, while still in its infancy with regard to non-international armed conflicts.²⁵⁵ It is likely they would have been concerned about the possibility of States to circumvent their human rights treaty obligations, and still would have hesitated to deprive persons affected by the armed conflict, before and after the end of hostilities, from the protections of the (with one exception non-derogable) Geneva Conventions.²⁵⁶

The phrase “general close of military operations” appears broader than “cessation of active hostilities.”²⁵⁷ Yet, the language was initially chosen because the term “close of hostilities” under French law was dependent on a decree.²⁵⁸ The drafters clarified in this context that “the general conclusion of military operations means when the last shot has been fired.”²⁵⁹ The reference to the “last shot fired” suggests that at least in 1949, “general close of military operations” and “cessation of

255. See Minutes of the Thirteenth Plenary Meeting, in II-B FINAL RECORD, *supra* note 101, at 268 (discussing a debate between a U.K. and Dutch delegate in regards to who is protected by Article 3 of the Convention); see also OFFICIAL RECORDS, *supra* note 108, at 28 (discussing amendments to article 65 proposed by a Dutch delegate).

256. See GRIGNON, *supra* note 28, at 252 (arguing that the advent of international human rights law makes the extension of the Geneva Conventions beyond hostilities less necessary). *But see* Bellinger & Padmanabhan, *supra* note 21, at 213 (arguing that human rights law does not provide all the answers to solve unsettled questions in extraterritorial non-international armed conflicts).

257. See Weizmann, *supra* note 22 (discussing the “end of military operations” as a broader concept than “cessation of active hostilities”).

258. See Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, in II-A FINAL RECORD, *SUPRA* NOTE 104, at 816.

259. *Id.* at 815. This certainly seems narrower than the meaning of the phrase as interpreted in the Commentary to AP I. See COMMENTARY TO THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 8 JUNE 1977 68 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., 1987) [hereinafter COMMENTARY AP I] (“The general close of military operations may occur after the ‘cessation of active hostilities’”); *infra* note 253 and accompanying text (“The application of the Conventions and of this Protocol shall cease, in the territory of the Parties to the conflict, on the general close of military operations.”).

active hostilities” meant the same.²⁶⁰ Later developments have rather muddled the definition of “general close of military operations.” The ICRC Commentary interprets the term to mean the end of fighting between all of several belligerents.²⁶¹ Additional Protocol I limits the application of the Conventions and the Protocol with the end of “military operations.”²⁶² The ICRC Commentary notes in that regard that “‘military operations’ means the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat.”²⁶³ It affirms that “military operations” may end after “cessation of active hostilities,” but also thought that for the purposes of ending the applicability of the Third Geneva Convention, a “ceasefire, even a tacit ceasefire, may be sufficient.”²⁶⁴ This suggests a continued desire for a narrow frame to determine the end of status-based detention for prisoners of war, but is unfortunately silent on the situation of civilian internees under the Fourth Geneva Convention. Article 85(4) AP I adds to the grave breaches under the Geneva Conventions the “unjustified delay in repatriation of prisoners of war and civilians.”²⁶⁵ The Commentary clarified that this seeks to enforce the protections under Article 35 and 134 GC IV, which both maintain the right of civilians to leave the territory of the

260. See Blank, *supra* note 1, at 1179-80 (stating that internment must cease as soon as possible after the close of hostilities or the close of occupation).

261. COMMENTARY GC IV, *supra* note 41, at 62 (“the general close of military operations will be the final end of all fighting between all those concerned”). Milanović, *supra* note 28, at 12.

262.

Without prejudice to the provisions which are applicable at all times [. . .] 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 and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

AP I, *supra* note 32, art. 3.

263. COMMENTARY AP I, *supra* note 257, at 67.

264. *Id.* at 68.

265. AP I, *supra* note 32, art. 85(4).

High Contracting Party during the conflict, and obliges States “upon the close of hostilities or occupation” to return internees to their last place of residence or facilitate their repatriation, unless this is against the national interest.²⁶⁶ Once more, the close of hostilities or occupation triggers the obligation to end restrictive measures, and only exceptional circumstances can justify delays otherwise unlawful under IHL.

In *Gotovina*, the ICTY used “the general close of military operations” as the benchmark to define the end of the applicability of the Fourth Geneva Convention to acts committed during an international armed conflict.²⁶⁷ A bar to war crimes jurisdiction required a “sufficiently general, definitive, and effective termination” of the armed conflict.²⁶⁸ As evidence that the conflict between Croatia and Serbian forces did not end on August 8, 1995, when hostilities sharply dropped, but rather in mid-September 1995, the Tribunal listed a series of armed confrontations to prevent the armed forces of the adversary from moving across territory, or from regaining territory.²⁶⁹ Such armed encounters would likely fit the definition of “active hostilities,” while “military operations,” as defined by the Commentary of AP I, would also include military activities short of actual combat, but in view of specific combat operations.²⁷⁰

266. See GC IV, *supra* note 31, arts. 35 (discussing the right of protected persons within a territory to leave prior to or during a conflict, and have a refusal reviewed by an administrative board); *id.* art. 134 (obligation of a party to the conflict to return or repatriate internees at the close of hostilities).

267. See Prosecutor v. Gotovina, Case No. IT-06-90, Judgment, ¶ 1694 (Int’l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011) (finding that the conflict between Croatia and Serbian forces, under overall control by Serbia, was an international armed conflict, subsequently rejecting the defense’s argument that defendants could not be indicted for war crimes for conduct that happened after “a drastically decreased level of intensity, and/or level of organization of one of its participants, resulting in the non-applicability of the law of armed conflict . . .”).

268. *Id.*

269. See *id.* ¶¶ 1695-97 (recognizing continued confrontations between Serbia and Croatia after August 8, 1995, which had been urged as the date of the end of the armed conflict).

270. See COMMENTARY AP I, *supra* note, at 68 (noting that the general close of military operations may happen after the “cessation of active hostilities” with respect to article 118 GC III).

The ruling reflects the desire to extend obligations under IHL as long as necessary to protect victims of military force, and is thus in line with the Geneva Convention's aim to strengthen the protective force of IHL.²⁷¹

The ICRC has recently proposed, along similar lines, that IHL ceases to apply with the "general close of military operations."²⁷² It argued that due to the complex nature of contemporary international armed conflicts, the likelihood of a resumption of hostilities can reasonably be ruled out only where "military movements of a bellicose nature" have ceased.²⁷³ The ICRC affirmed that "□general close of military operations' goes beyond the mere cessation of active hostilities, as they do not necessarily include the "use of armed violence."²⁷⁴

While it makes sense to rely on the "general close of military operations" as an indicator for the end of application of IHL, this cannot entail a concomitant reliance on permissive rules on targeting and detention where hostilities have ended in fact. The Inter-American Commission has, for example, found a delay of "six to nine days after the cessation of hostilities without access to any review of the legality of their detention . . . not attributable to a situation of active hostilities or explained by other information on the record [and, thus,] incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention."²⁷⁵

This reference to Article 78 GC IV also recalls the important principle that that the end of hostilities is not the most important benchmark for release under the Fourth Geneva

271. See Lubell & Derejko, *supra* note 55, at 70 (noting the tendency by international war crimes tribunals to find for broad applicability of IHL, out of a "jurisdictional impetus").

272. ICRC Doc. 32IC/15/11, *supra* note 38, at 9.

273. *Id.*

274. *Id.*

275. Coard et al. v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II/106, doc. 6 rev. ¶ 57 (1999). Despite choosing Article 78 GC IV as point of reference, the Inter-American Commission did not explicitly discuss that the law of occupation applied in Grenada at the time, but referred on several occasions to rules related to the Occupying power or occupied territory. *Id.*, at ¶¶ 51-52, and fn. 24.

Convention.²⁷⁶ The Fourth Geneva Convention restricts the authority to detain civilians to exceptional circumstances where the security of the State makes it “absolutely necessary”²⁷⁷ and in occupation as long as those civilians have been determined to pose an “imperative threat to security”²⁷⁸ to the occupying power. The detaining authority must conduct a review of that assessment every six months.²⁷⁹ Once an individual no longer poses such a threat, he or she must be released, independent of whether the conflict has ended or not.²⁸⁰ Unlike prisoners of war, civilians would not be obliged under the domestic laws of their State of nationality to rejoin the fight; the Geneva Conventions therefore do not allow status-based internment for civilians until the end of hostilities.²⁸¹ This principle is even more pronounced in the rules of non-international armed conflict, discussed in the following section.

276. See GC IV, *supra* note 31, art. 132 (“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”).

277. See *id.* at art. 42 (“The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”).

278. See *id.* at art. 78 (“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at most, subject them to assigned residence or internment.”).

279. See *id.* (“If the Occupying Power considers it necessary, for imperative reasons of security . . . it shall be subject to periodical review if possible every six months, by a competent body set up by said Power.”).

280. See *id.* art. 132 (discussing release and repatriation of detainees as dependent on when the reason which necessitated interment no longer exists, before the close of hostilities); see also COMMENTARY GC IV, *supra* note 41, at 271 (“[T]he close of hostilities is to be regarded as the ultimate reason and general signal for the withdrawal of restrictive measures, but . . . they must be withdrawn before then if the reasons for imposing them no longer exist.”).

281. See COMMENTARY GC IV, *supra* note 41, at 270-71 (describing the meaning of “close of hostilities” and the Convention’s urgent recommendation to “hasten the cancellation of restrictive measures and to allow protected persons to return to their normal way of life”).

B. Obligation to Release in Non-International Armed Conflict

The ICRC Customary Law Study Rule 128.C on *Release and Return of Persons Deprived of Their Liberty* notes that “[p]ersons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.”²⁸² The phrase “reasons for their liberty cease to exist” is borrowed from Article 75(3) AP I and Article 9(2) ICCPR.²⁸³ The standard does not refer to the end of hostilities. It “is closer to that of Geneva Convention IV, whereby regardless of the duration of the conflict, the individual is to be released once the reasons necessitating the detention no longer exist.”²⁸⁴ Fighters in a non-international armed conflict bear closer resemblance to “the civilian fighter on the battlefield” which the drafters of Additional Protocol I ultimately found protected under the Fourth Geneva Convention.²⁸⁵ This cautions against an analogy to the Third Geneva Convention.²⁸⁶

During the debate on Additional Protocol I, delegates, in very similar terms as for Articles 6 and 133 GC IV, expressed the concern that adding the phrase “in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist” to Article 75(3) AP I “could not legitimately be used as a pretext for negating the requirement of release ‘with the minimum delay possible.’”²⁸⁷ The drafting history of

282. 1 JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451 (2009).

283. See AP I, *supra* note 32, art. 75 (requiring that persons be “released with the minimum delay possible and . . . as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”). See OFFICIAL RECORDS, *supra* note 109, at 28 (presentation of the draft article by the Dutch delegate, with reference to the language of the ICCPR).

284. 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, 1153 (2007).

285. See *supra* notes 109-112 and accompanying text (discussing comments by the drafters of AP I). See also Rona, *supra* note 79, at 38.

286. See *supra* note 117-119 and accompanying text (critiquing a scholarly defense of status-based internment in non-international armed conflict).

287. OFFICIAL RECORDS, *supra* note 101, at 461.

Article 2(2) AP II is enlightening only in its confirmation that the drafters thought regulation of detention in a (purely domestic) non-international armed conflict was the purview of national legislation and only subject to minimum rules on treatment that were to apply for the entire duration of captivity.²⁸⁸ The context of the debate indicates the drafters were thinking of (and mostly rejecting) international law limits to criminal prosecution and sentencing.²⁸⁹ Internment was not discussed at all, and would have been subject to domestic safeguards against detention without trial. A few years later, domestic laws regulating internment would also be subject to international human rights safeguards against arbitrary detention that require any deprivation of liberty to be appropriate and just.²⁹⁰ This raises the question to what extent the notion of “cessation of hostilities” provides guidance to define the endpoint of internment in a non-international armed conflict.

In a very influential article, Bradley and Goldsmith suggested that in the current conflict against a disaggregated, de-centralized network of Al Qaeda grouplets loosely connected by an ideology of jihad, “the question is not whether hostilities have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the *individual* because he no longer poses a substantial danger of rejoining hostilities.”²⁹¹ Following this reasoning, Adam Klein

288. See AP II, *supra* note 32, art. 2(2) (discussing protection afforded under the Convention to persons deprived of their liberty during conflict); Horowitz, *supra* note 77 (discussing the lack of treaty law regulating in non-international armed conflict). THE LAW OF NON-INTERNATIONAL ARMED CONFLICT. PROTOCOL II TO THE 1949 GENEVA CONVENTIONS, 95-101 Howard S. Levie ed., 1987) (summarizing the debate on AP II article by article).

289. See Horowitz, *supra* note 77 (reasoning that “any future international regulations relating to non-international armed conflicts must be based on recognition of, and respect for, the sovereign rights of each State within its boundaries”).

290. See *supra* note 90 and accompanying text (discussing the definition of “arbitrariness” in the jurisprudence of the UN Human Rights Committee on art. 9 ICCPR).

291. Bradley & Goldsmith, *supra* note 162, at 2125 (emphasis added). Al-Bihani raised this theory in his petition with the D.C. Circuit for en banc review, without

explains that individuals who are members of a government army should be released after the cessation of hostilities, “since the combatant’s hostile intent is presumed to expire with that of the sovereign.”²⁹² Following a detailed analysis of the Al Qaeda network, Klein concludes that “[o]nce the principal-agent assumption underlying the traditional law of war rule has broken down, the logical link between the ‘cessation of hostilities’ against the enemy organization and the length of detention of an individual combatant evaporates.”²⁹³

Klein would apply the principle of status-based detention to a “rigidly hierarchical, quasi-sovereign non-state actor like the Tamil Tigers.”²⁹⁴ This assumption of a “principal-agent” relation does not translate well into non-international armed conflict. There is a difference between a government soldier and the fighter for an armed opposition group, however well organized, that suggests an individual threat assessment is more appropriate than a global authority to intern until the cessation of hostilities. Unlike the soldier, a fighter in a non-international armed conflict can disengage from hostilities, and regain protection against military targeting, albeit not from criminal prosecution for having participated in hostilities.²⁹⁵ A fighter in a non-international armed conflict who is detained based on status can never disengage, because he remains frozen in his status at the time of capture, no matter the many permutations the group to whom he initially belonged is going through in the course of his internment.

As long as the “quasi-sovereign” nature of a non-state party to the conflict does not result in recognition of belligerency and

success. See *Al-Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009), *aff’d*, 590 F.3d 866 (D.C. Cir. 2010).

292. Adam Klein, *The End of al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1907–08 (2010) (discussing Bradley & Goldsmith, *supra* note 162, at 2125).

293. *Id.* at 1907.

294. *Id.*

295. See, e.g., Rona, *supra* note 79, at 38 (arguing that IHL does not prohibit direct participation in hostilities, but does not protect fighters from criminal prosecution for doing so); Hafetz, *supra* note 93, at 343 (joining a non-state armed group is a matter of choice, not of legal obligation).

thus combatant privilege, it is submitted that international law does not justify the automatic application of the status-based internment rules of the Third Geneva Convention. An individual threat assessment may very well take into account that an internee is not only likely to rejoin the fight, but would be coerced to do so based on the enforcement capacities of the non-state actor – ultimately, lesser forms of restriction of liberty, such as confinement to a region outside the reach of a non-state actor, may be sufficient to counter a threat of renewed recruitment in such cases.²⁹⁶

In a non-international armed conflict, therefore, an internee should be released when the government can no longer make a showing of necessity to the (independent and impartial) tribunal

296. See, e.g., the conditions for release of the five Taliban commanders from Guantánamo in June 2014 reflect the rule that the opposing party to a conflict and a potential host country may be required to give assurances that a released member would not be involved in activities harmful to the releasing authority. Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES (May 31, 2014), http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html?_r=0 (reporting that Qatar provided assurances to the United States that the transferees would not be allowed to leave Qatar for one year). On the overall effectiveness of such measures see U.S. Dir. Nat'l Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay* (Sep. 2015), http://www.dni.gov/files/documents/GTMO%20Sept_2015.pdf. To note that reengagement in terrorist activities, even if confirmed, is not the same as “return to the battlefield.” Notwithstanding the controversy over the recidivism rates, it is true that a state party to a conflict will often have few possibilities to obtain adequate assurances from the non-state party. This is where risk mitigation, conducted by the various review boards in the Iraq and Afghanistan war, and now the Periodic Review Board, comes in; they analyze the presence of the armed group in the area of return, its ability to exert pressure or influence on released former members, and the likelihood of civil leaders and family to support an individual's decision to refrain from interacting with the armed group. In Afghanistan, for example, the High Peace Council performs the function of an intermediary between individuals and the Taliban, as local leaders have to vouch for the peaceful behavior of an individual to be released from Bagram. See *Karzai Sets up Council for Peace Talks with Taliban*, BBC (Sept. 4, 2010), <http://www.bbc.com/news/world-south-asia-11188294>; Kay Johnson, *Complaints Persist as U.S. Frees Afghan Detainees*, THE WORLD POST (Mar. 11, 2010, 6:10 AM), <http://www.huffingtonpost.com/huff-wires/20100311/as-afghan-us-prison/> (describing the launch of a community-release program where tribal leaders vouch for detainees to be released from the Detention Facility in Parwan).

in charge of reviewing the continued lawfulness of detention.²⁹⁷ It follows that domestic authorizations of security detention in non-international armed conflict have to include an element of necessity. In its position paper on the draft General Comment No. 35 of the Human Rights Committee on Article 9 ICCPR, the United States has rejected this principle and argued that “in both international and non-international armed conflicts, a State may detain enemy combatants consistent with the law of armed conflict until the end of hostilities.”²⁹⁸ This assertion seems, however, an extrapolation of the domestic interpretation of the law of armed conflict that has been tailored to the situation at Guantánamo. Neither in Iraq nor in Afghanistan did the United States apply such a broad form of status-based detention.²⁹⁹ On the contrary, it has reviewed the necessity of continued internment on a periodic basis, in analogy to the Fourth Geneva Convention, and released internees where it found detention was not necessary.³⁰⁰ For Guantánamo, and in the 2014 Detainee Directive, discussed in Part I,³⁰¹ the Obama administration ultimately adopted a hybrid model of status-based detention: The military conducts threat

297. See Jelena Pejić, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 INT’L REV. RED CROSS 375 (2005); SIVAKUMARAN, *supra* note 55, at 302.

298. *Observations of the United States of America on the Human Rights Committee’s Draft General Comment 35: Article 9*, *supra* note 88, ¶ 22.

299. See Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, 86 INT’L L. STUD. 411, 420-21 (2010) (explaining the review process for internees held by the United States in Iraq, adapted from principles of the GC IV expressed in the Security Council Resolution authorizing internment in Iraq).

300. *Id.* at 411; see Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT’L L. 549, 554-55 (2011) (discussing continued operations in Iraq and guidance principles set forth for interning and releasing detainees; Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., JUNE 2010, AT 9, 10-11 (2010) (discussing the evolution of procedural safeguards afforded to persons held in U.S. internment in Afghanistan).

301. See *supra* notes 73-74, and accompanying text (discussing the criteria for lawful internment under the GC IV, which contain a necessity requirement).

assessments but no obligation to release attaches to a finding that a detainee poses no threat.³⁰²

This model does not capture the principle of absolute necessity of detention under GC IV and Customary Rule 128: Threat assessment is not a concession to an otherwise unfettered detaining authority until the end of hostilities, but a precondition for the lawfulness of the detention.³⁰³ The main effect of this current U.S. policy is insulation of the determination to release from judicial review and insulation from critique of continued internment where release proves difficult for reasons of domestic or foreign policy: IHL is indeed neutral as to whether a court or an administrative tribunal should conduct the review of detention.³⁰⁴ Yet, whichever the body of review, detention of non-prisoners-of-war becomes unlawful once a detainee has been found not to pose a threat. IHL may grant some margin of discretion to organize the logistics of release and repatriation or transfer to a third country;³⁰⁵ continued internment for years after clearance, as it happened for some third country nationals in Bagram, and in Guantánamo, is not justifiable under IHL. Bradley & Goldsmith's model of individual threat assessment is anything but an "anomalous paradigm for the detention of combatants in terms of the international law of armed conflict."³⁰⁶ The law of non-international armed conflict does not

302. See Hafetz, *supra* note 93, at 351-52 (describing the administrative review of Guantánamo detainees, and noting that a finding that a detainee no longer posed a threat appeared to have little effect on whether prisoners were released).

303. See Bovarnick, *supra* note 287, at 20-22 (discussing the grounds used as a threshold to detain a person on the battlefield as the exact same criteria used in determining continued internment).

304. See Bellinger & Padmanabhan, *supra* note 21, at 210 (discussing the requirement of judicial review under the ICCPR and the requirement of an independent tribunal under GC IV as contradictory rules that neither a *lex specialis* nor a complementarity theory can solve).

305. See GC III COMMENTARY, *supra* note 41, at 550 (noting that the requirement to repatriate prisoners of war "without delay" does not "affect the practical arrangements" necessary to ensure humane conditions of transfer) and COMMENTARY GC IV, *supra* note 41, at 515 (explaining that disorganization after a war may justify a delay of release of internees at the end of hostilities).

306. Klein, *supra* note 279, at 1908.

know “combatants” beyond the situation of recognition of belligerency, and preventive security detention is a common model for States to detain members of non-state armed groups, or individuals who pose a security risk outside of a situation of armed conflict.³⁰⁷ It is the legal framework of Guantánamo that is the anomaly, not individual threat assessment.

C. The Obligation to Release under Hamdi v. Rumsfeld

For the U.S. constitutional practice on the obligation to release, most relevant is the Supreme Court’s holding in *Hamdi v. Rumsfeld*.³⁰⁸ There, writing for a plurality, Justice O’Connor found in Article 118 GC III “a clearly established principle of the law of war that detention may last no longer than active hostilities.”³⁰⁹ In limiting the authority to detain with the “duration of the relevant conflict,” and more precisely, the end of “active hostilities,” the *Hamdi* plurality rejected the pre-1949 understanding of the obligation to release – an understanding of which the plurality was certainly aware, as Justice Thomas

307. See, e.g., Deeks, *supra* note 135, at 404 (describing the reasoning behind the different types of detention used by states); HAMILTON ET AL., *supra* note 127, at 45-49 (noting that most states have administrative detention regimes that permit the internment of child soldiers in non-international armed conflict). This is not to say that such detention is automatically lawful, but it is certainly not “anomalous.”

308. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

309. *Id.* at 520. It is not obvious what the other Justices thought of this. *Hamdi* was about the right to judicial review of non-criminal detention for U.S. citizens, held inside the United States, who are also enemy combatants. Two of the dissenters – Scalia and Stevens – rejected non-criminal detention for citizens except in very narrowly defined circumstances, and argued that government must suspend the writ of habeas corpus if it wishes to authorize such internment. *Id.* at 556-57. The third, separate, dissenter, Justice Thomas, argued that enemy combatants, even citizens, are due nothing but a good-faith determination by the Executive that their detention is necessary, and that this authority lasts beyond cessation of hostilities until the Executive proclaims the end of a state of war. *Id.* at 581. Finally, Justices Souter and Ginsburg dissented as to the plurality’s finding that the AUMF was a sufficiently clear statement of the authority to intern citizens, as required by 18 U.S.C. § 4001(a). *Id.* at 541.

discussed in his dissent.³¹⁰ *Hamdi* presents an important step forward, as it acknowledged that it is the factual termination of hostilities, not the end of the “state of war,” that ends authorities under the law of war.³¹¹

Ludecke v. Watkins and *In re Territo*, two cases decided before 1949, no longer reflect a correct understanding of the termination of war time powers under international law.³¹² The 1929 Geneva Convention on the Treatment of Prisoners of War, which applied during World War II, encouraged release at the end of hostilities, but imposed an obligation to release prisoners of war only at the conclusion of a peace agreement.³¹³ This gave the Allied powers a pretext to delay release and repatriation of millions of prisoners of war after the armistice with Italy in 1943 and the surrender of Germany in 1945.³¹⁴ The court deciding in 1946 on the petition to release Territo, an American-Italian prisoner of war, relied on the language of the

310. *Id.* at 520-21 (plurality opinion); *id.* 587-89 (Thomas, J., dissenting) (citing to post-Civil War and World War II cases for the proposition that the President need not release internees at the end of hostilities).

311. *See id.* at 536 (noting also, with reference to *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952), that a “state of war” is not a blank check for the President to disregard constitutional rights).

312. *Ludecke v. Watkins*, 335 U.S. 160, 167-69 (1948) (“War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. ‘The state of war’ may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act.”); *In re Territo*, 156 F.2d 142, 148 (9th Cir. 1946) (allowing for continued internment of an Italian prisoner of war three years after the armistice with Italy on the basis of the 1929 Geneva Convention).

313. *See Geneva Convention Relative to the Treatment of Prisoners of War art. 75*, July 27, 1929, 47 STAT. 2021, 118 L.N.T.S. 343 [HEREINAFTER 1929 GPW] (“[R]ecognizing that, in the extreme case of a war, it will be the duty of every Power to diminish, so far as possible, the unavoidable rigors thereof and to mitigate the fate of prisoners of war.”).

314. Churchill convinced Eisenhower to delay release of Italian prisoners of war after Italy became a co-belligerent of the Allied powers in 1943 because the U.K. economy depended on their labor. The Allied powers were quite aware this was a stretch even of the permissive 1929 Geneva Convention. *See Kent Fedorowich & Bob Moore, Co-Belligerency and Prisoners of War: Britain and Italy, 1943-1945*, 18 INT’L HIST. REV. 28, 34-41 (1996) (quoting from the diary of the naval aide to Eisenhower that Italy “as co-belligerents” had “reason to expect” the return of “all their prisoners”).

1929 Geneva Convention, and pointed to the lack of a peace agreement as a basis to reject the habeas petition.³¹⁵ The report of the Final Conference recognizes that the language of draft Article 108 (later 118) “profoundly modifies” the regime under the 1929 Geneva Conference.³¹⁶ Any authority relying on the 1949 Geneva Conventions does not continue until the domestic statute authorizing general war powers is repealed.³¹⁷ It exists as long as the factual conditions for the applicability of IHL are met.³¹⁸ Neither is the termination of such authorities under international law a “political act,” as the government asserted and the D.C. Circuit Court of Appeals accepted, in *Al-Bihani*.³¹⁹ Governments today may no longer delay release until the signing of a peace agreement or a domestic legal act where hostilities have ended. The “state of war,” i.e. the repeal or not of

315. Jensen does not sufficiently acknowledge this sharp change in international law when he explains the decision in *In re Territo* on the same basis as *Bihani* and *Ludecke*. See Jensen, *supra* note 21, at 504-05 (stating that the court in *Territo* did not second guess the political branches because the termination of hostilities was a political act).

316. Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva, in II-A FINAL RECORD, *supra* note 104, at 573.

317. See Robert Chesney, *Guest Post: The AUMF and IHL at the Inflection Point*, INTERCROSS BLOG (Apr. 8, 2014) <http://intercrossblog.icrc.org/blog/guest-post-the-aumf-and-ihl-at-the-inflection-point?rq=chesney#sthash.LZkiFmVX.dpbs=> (noting that neither passage nor repeal of the AUMF 2001 automatically triggered applicability of IHL).

318. The International Criminal Tribunal for the former Yugoslavia was thus amenable to judicial assessment of the existence of an armed conflict. Prosecutor v. Boškovski, Case No. IT-04-82-T, Judgment, ¶ 174 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 10, 2008) (“[T]he question of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial.”). See Pearlstein, *supra* note 21, at 146-47 (arguing that the evaluation of whether a situation of violence amounts to hostilities is not a political question exempt from the courts’ jurisdiction, in contrast to the decision whether it was justified to enter into hostilities).

319. *Al-Bihani v. Obama*, 590 F.3d 866, 87-95 (D.C. Cir. 2010) (citing the Supreme Court’s decision in *Ludecke v. Watkins*, 335 U.S. 160, 169 (1948)., which stated that the “termination [of a state of war] is a political act . . .”); David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 Pepp. L. Rev. 685, 711-12 (2014) (noting that *Ludecke* recognized that the (domestic) “state of war” could be ended with a presidential proclamation of the end of hostilities – not, however, through mere cessation of hostilities – signaling a shift in domestic practice following World War II).

the AUMF 2001, is irrelevant for the authority to detain under IHL.

Judge Lamberth, in his recent decision on Guantanamo detainee Al Warafi's habeas petition, correctly interpreted *Hamdi* to direct courts to "examine . . . whether active hostilities continue,"³²⁰ and found *Hamdi* and *Boumediene* overruled any contradictory language on the courts' power to review wartime detention derived from *Ludecke* and preceding case law.³²¹ He specifically rejected the government's contention that courts had to defer to the Executive's viewpoint on the endpoint of hostilities even if the determination of the end of active hostilities was not considered a political question barring jurisdiction:³²² "The Court's responsibility here is likewise to determine the existence or nonexistence of active hostilities using all relevant evidence."³²³ This understanding brings the U.S. domestic jurisprudence more in line with post-1949 IHL and the ICTY's understanding that courts can engage in classification of armed conflict.³²⁴ Judge Lamberth's concludes then, without further discussion, that "U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped" and detention authority under the AUMF 2001 therefore continues.³²⁵ This summary conclusion avoids precisely the analysis of what constitutes "active hostilities" for the purposes of "law-of-war" detention authority, a question discussed in Part IV of this article.

To summarize, after "cessation of hostilities" and after the "general close of military operations," the Third and Fourth Geneva Convention only apply to ensure continued protection of

320. *Al Warafi v. Obama*, Civ. No. 09-2368 (RCL), at 6 (D.D.C. Jul. 30, 2015).

321. *See id.* at 8.

322. *Id.* at 4.

323. *Id.* at 12.

324. *See* Andreas Paulus, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95, 99-100 (2009) (noting that in *Hamdan* the Supreme Court found that the minimum rules of Common Article 3 apply to a transnational conflict with a non-state actor and that the ICTY provided criteria to determine a non-international armed conflict as opposed to lower-level violence and banditry).

325. *Al Warafi*, Civ. No. 09-2368 (RCL), at 13.

those who remain interned or detained or otherwise in the hands of an enemy power.³²⁶ The same is valid for Additional Protocol I and Additional Protocol II.³²⁷ Hence, none of the sources of IHL can serve as a legal basis for internment after hostilities have ended. In addition, the Third and Fourth Geneva Conventions impose an obligation to release prisoners of war and internees at the latest where hostilities have ended without an “immediate expectation of resumption.”³²⁸

Treaty provisions in non-international armed conflict do not provide for an affirmative authority to detain and, therefore, do not spell out a positive obligation to release.³²⁹ Most cease-fire agreements in non-international armed conflicts, however, contain detailed Annexes about the release of detainees, indicating that State parties are willing to forego criminal prosecution for offenses not amounting to war crimes when a conflict comes to an end.³³⁰ While most peace agreements as

326. See, e.g., GC IV, *supra* note 31, art. 6 (providing also that “the Occupying Power shall be bound [by selected provisions of GC IV], for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory”). I thank Nathalie Weizmann for drawing my attention to this point.

327. See AP I, *supra* note 32, art. 3 (stating that “persons whose final release, repatriation or re-establishment . . . shall continue to benefit from the relevant provisions of the Conventions and this Protocol until their final release, repatriation or re-establishment”); AP II, *supra* note 32, art. 2 (stating that “[a]t the end of the armed conflict, all persons who have been deprived of their liberty . . . shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty”).

328. U.K. MIN. OF DEF., *supra* note 212, at 205. See GC III, *supra* note 20, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”); see also GC IV, *supra* note 31, art. 77 (“Protected persons . . . shall be handed over at the close of occupation . . .”).

329. They do, however, encourage amnesty at the end of the conflict. See AP I, *supra* note 32, art. 6(5) (stating that “the authorities in power shall endeavor to grant . . . amnesty” but without specifying that release must occur); HENCKAERTS & DOSWALD-BECK, *supra* note 269, at 611 (“Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.”).

330. For examples of such cease-fire agreements see Memorandum of Understanding Addendum to the Lusaka Protocol for the Cessation of Hostilities and the Resolution of the Outstanding Military Issues under the Lusaka Protocol, Angl.-National Union for the Total Independence of Angola, Annex 1/A ¶ 1.1, Apr. 4 2002 [hereinafter

such neither ended fighting nor led to a speedy release of all detainees, the actual end of hostilities did.³³¹ The following section discusses how to determine the end of hostilities in a non-international armed conflict.

Angola-UNITA Cease-Fire], <http://www.refworld.org/docid/3e81949e4.html> (mandating the release of members of foreign military forces with the cessation of hostilities); Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. XXI Jun. 3, 1999 <http://www.sierra-leone.org/lomeaccord.html> [hereinafter LOM. . . PEACE ACCORD] (“All political prisoners of war as well as all non-combatants shall be released immediately and unconditionally by both parties . . .”); Framework Agreement on the Bangsamoro, Annex on Normalization, Pt. H Jan. 25, 2014, http://peacemaker.un.org/sites/peacemaker.un.org/files/PH_140125_AnnexNormalization.pdf (creating a Transitional Justice and Reconciliation Commission to address grievances and human rights violations). For an analysis of the structure of cease-fire agreements see generally Luisa Vierucci, *IHL and Human Rights Rules in Regulating or Terminating an Internal Armed Conflict*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 416, 425-30 (Robert Kolb & Gloria Gaggioli eds., 2013).

331. Release does happen as a confidence-building measure prior to entering into negotiations, and applies to fighters and civilians alike. See Vierucci, *supra* note 330, at 425 (noting that no distinction is made between the release of civilian and military detainees, release usually concerns all detained persons). Sri Lanka’s centers to rehabilitate former LTTE members are a notable exception, but even here the government enacted new emergency provisions in order to continue security detention. The practice of long-term internment after the defeat of enemy forces is arguably incompatible with Art. 9(1) ICCPR. See, e.g., Int’l Commission of Jurists (ICJ) Submission to the Universal Periodic Review of Sri Lanka. Submitted April 2012. *U.N.H.R.C. 14th Sess. of the Working Group on the Universal Periodic Review 22 October to 5 November 2012* (2012) http://lib.ohchr.org/HRBodies/UPR/Documents/Session14/LK/ICJ-UPR_LKA_S14_2012_InternationalCommissionofJurists_E.pdf (calling attention to the serious human rights violations in Sri Lanka).

		International Armed Conflict		Non-International Armed Conflict	
		<i>Authority to Detain</i>	<i>Obligation to Release</i>	<i>Authority to Detain</i>	<i>Obligation to Release</i>
<i>Prisoners of War</i>		May be detained for the duration of the conflict, unless their health status makes them permanently unable to fight (Art. 110 GC III).	Release after cessation of active hostilities (Art. 118 GC III).	No combatant status or privilege Grounds for internment and procedures for review must be prescribed in domestic law.	
	<i>Security Internees</i>	May be detained as long as they pose an individual threat to the security of the Detaining Power; periodic review of the necessity of internment by an independent review body every six month.	Release when internment is no longer “absolutely necessary” for the security of the Detaining power, and “as soon as possible” after the close of hostilities (Art. 133 GC IV).	May be prosecuted for participation in the conflict, or interned in accordance with domestic laws, in full respect of the procedural guarantees customary to non-international armed conflict.	Must be released once the reasons for deprivation of liberty no longer exist, either because the individual poses no threat, or the end of active hostilities no longer justifies the departure from human rights law.
IHL cannot provide an explicit or implied authority to detain after the conditions for its application are no longer met, i.e. after the end of hostilities.					
		Except for those undergoing trial or serving a sentence.	State practice and expert commentary supports an analogy to GC IV’s threat-based assessment rather than GC III’s status-based internment.	Emerging practice on security detention suggest a maximum limit to the length of internment is the norm.	

Table 1

V. THE END OF HOSTILITIES IN NON-INTERNATIONAL ARMED CONFLICT

A. *The Pitfalls of Fact-based Conflict Classification*

Legal classification of armed conflict is one of the thorniest issues arising out of post-9/11 military operations. To determine the existence of a non-international armed conflict, and hence the applicability of IHL, the factual test developed for Common Article 3 and refined by the International Tribunal for the former Yugoslavia, involves a highly complex balancing of the need for the more permissible framework of IHL and the need for its protective force. The fact-based approach was developed in the face of often strong resistance by governments to accept the existence of an armed conflict, and hence applicability of IHL.³³² This question gained urgency, for the inverse reasons, in the course of counterterrorism operations against Al Qaeda after September 11th. IHL transformed from a protective legal framework into a tool that gave States greater leeway to use lethal force and detention against non-state actors than what would be allowed under human rights law.³³³

While IHL grants a larger margin of discretion to armed actors in their use of force and restrictive measures, it has two distinct advantages compared to human rights law: its protections are not derogable in a state of emergency, and its provisions constrain State and non-state parties to the conflict

332. David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272 (1978) (discussing the reluctance of States in the 1950s and 1960s to accept application of Common Article 3 to their fight against armed insurgencies, mainly in colonial territories).

333. See Milanović, *supra* note 28, at 165 (discussing the different motivations to find for or against the existence of an armed conflict); see also INT'L LAW ASS'N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW, 4-5 (2010), <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> (noting the sudden necessity to clarify the scope of armed conflict in response to the United States' assertion it was in a global armed conflict with Al Qaeda).

alike.³³⁴ Any proposal of classification needs to account for the reality of government decision-making in the face of armed violence, while limiting the assertion of overbroad powers and ensuring protection of those affected by violence, including through a real threat of international prosecution for war crimes.³³⁵ The tension between these goals becomes particularly pronounced at the beginning and end of a non-international armed conflict, and during low-intensity phases of non-international armed conflict.³³⁶ States should not be able to trigger or maintain the more permissive framework of IHL by engaging in unilateral armed action against individuals or a group that do not meet the definition of a non-state party to a conflict.³³⁷ This has to be distinguished from situations where IHL is indeed necessary to constrain military operations, such as the intensive bombing campaign launched in 2015 by

334. INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SIMILARITIES AND DIFFERENCES (2003), <https://www.icrc.org/en/download/file/1402/ihl-and-ihrl.pdf> (noting that IHL binds state and non-state actors, while human rights law regulates the conduct of governments towards individuals).

335. See, e.g., Geoffrey S. Corn & Tanweer Kaleemullah, *The Military Response to Criminal Violent Extremist Groups: Aligning Use of Force Presumptions with Threat Reality*, 47 ISR. L. REV. 253, 263, 275 (2014) (proposing a framework to allow ad-hoc and limited applicability of IHL targeting rules where government forces have to fight highly organized criminal gangs, without wholesale application of an armed conflict framework, to avoid "overzealous assertions of LOAC authority [such as internment] with insufficient distinctions as to where, when and to whom those authorities are genuinely applicable").

336. One commentator has suggested an explanation for the continued classification (since 1992) of armed violence in Somalia as a non-international armed conflict, despite dramatic drops in intensity and probable lack of organization of the armed actors: "It would seem that the duration, persistence and geographical expansion of armed violence may partly compensate for a lower level of intensity, perhaps even more so if despite relatively low or fluctuating levels of violence, repercussions on the civilian population are extremely severe." Robin Geiß, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 INT'L REV. RED CROSS 127, 136-37 (2009).

337. See Lubell & Derejko, *supra* note 55, at 78 (comparing unilateral drone strikes in the absence of actual fighting between the two entities elsewhere to a "situation in which state forces turn all of their firepower on a particular group within their borders, with no fighting occurring from the group itself").

Saudi-Arabia against armed groups in Yemen.³³⁸ International observers will ask whether law enforcement methods are unable to meet the threat, making the use of military force, and hence the application of IHL, necessary. At a certain moment, however, necessity considerations will give way to the need for the protective force of IHL, where use of force is of such intensity and duration that human rights law no longer provides adequate regulation and protection.

Academic commentators have noted that it was notoriously difficult to determine the end of a non-international armed conflict.³³⁹ This is even more complex in a situation as in Afghanistan, where a foreign government supporting the host government draws down its forces but the non-international armed conflict between the host government and the insurgency is likely to continue.³⁴⁰ To determine rights and obligations at the end of active hostilities, based on criteria of intensity of violence and organized capacity of the non-state armed actor, raises numerous challenges to reach a proper balance between the protective and the permissive aspects of IHL. A threat-based model of security internment is thus better suited to take account of the ebbs and flows of confrontations between government and non-state actors.

338. See, e.g., Human Rights Watch, *What Military Target Was in My Brother's House. Unlawful Coalition Airstrikes in Yemen* (Nov. 26, 2015), <https://www.hrw.org/report/2015/11/26/what-military-target-was-my-brothers-house/unlawful-coalition-airstrikes-yemen> (noting that around 2,500 civilians have died in Yemen as a result of an air campaign launched by Saudi-Arabia and its coalition partners in March 2015).

339. See Milanović, *supra* note 28, at 178; Robert Chesney, *Transatlantic Dialogue on International Law and Armed Conflict: When Does LOAC Cease to Apply?* LAWFARE (Sept. 3, 2014, 11:17 PM), <http://www.lawfareblog.com/2014/09/transatlantic-dialogue-on-international-law-and-armed-conflict-when-does-loac-cease-to-apply/>.

340. This article assumes that the Taliban have no political interest to strike the United States once it has completely withdrawn from Afghanistan, and that Al Qaeda does not, as of late 2015, have the capacity to conduct such hostilities, beyond the sporadic attack, or even conduct hostilities inside Afghanistan independent of local insurgent groups. The annual report by the National Intelligence Director to the U.S. Senate does not mention "core Al Qaeda" as a threat globally or within Afghanistan. James R. Clapper, Dir. of Nat'l Intelligence, *Worldwide Threat Assessment of the U.S. Intelligence Community, Sen. Select Comm. on Intelligence* (Feb. 9, 2016) <http://www.intelligence.senate.gov/sites/default/files/wwt2016.pdf>.

B. Decrease in Intensity and Fragmentation of Armed Group

Under the fact-based approach, two elements need to be present in order for IHL to apply to armed violence between a State and non-state actors: the violence has to reach a certain intensity of collective fighting (“hostilities”), and the non-state actor must have sufficient internal organization to plan and carry out military-style operations and to be able to ensure respect for IHL (organizational element).³⁴¹ Once both elements are present, IHL starts to apply.³⁴² In such circumstances, it is likely the government will see itself compelled to use military force rather than regular law enforcement methods.³⁴³ The two criteria also imply that existence of a non-international armed

341. See INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 3 (2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (noting that intensity of violence and a certain level of organization of the armed groups confronting each other are a prerequisite for the applicability of Common Article 3); Prosecutor v. Tadić, Case No. IT-94-1-I, DECISION ON Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (holding that IHL applies “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”). A requirement that a non-state actor be able to implement Common Article 3 has developed in ICTY jurisprudence. Compare Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 88–89 (Int’l Crim. Trib. for the Former Yugoslavia (Nov. 30, 2005) (rejecting the defense’s argument that a non-state actor must understand and be able to implement Common art. 3 of the Geneva Conventions); with Prosecutor v. Boškovski, Case No. IT-04-82-T, Judgment, ¶ 196 (Int’l Crim. Trib. For the Former Yugoslavia Jul. 10, 2008) (calling into question the decision in *Limaj* and finding that some degree of ability to implement Common Article 3 must be met for IHL to apply). See generally John F. Murphy, *Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts*, 88 INT’L L. STUD. 15, 18-19 (in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 400, 41 (Watkin & Norris eds., 2012) (noting that the International Criminal Tribunal for the Former Yugoslavia filled the gap of a missing definition of non-international armed conflict in treaty law).

342. See Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 492 (2006) (“Today, [the regimes of recognition of belligerency] have been replaced by compulsory rules of international humanitarian law which apply when the fighting reaches certain thresholds.”).

343. INT’L COMM. OF THE RED CROSS, *supra* note 352, at 3 (proposing that hostilities may meet the minimum level of intensity when they “are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces”).

conflict depends on the actual involvement in hostilities by the non-state actor.³⁴⁴ Unfortunately, there is yet little jurisprudence to guide us on classification of an armed conflict at the lower level of the intensity spectrum of violence, as the ICTY, which elaborated most of the relevant criteria, dealt with situations that clearly met the intensity threshold of armed conflict.³⁴⁵ As discussed above, contemporary conflict classification needs to find a realistic balance between the respective protective force of IHL and international human rights law.

The ICTY Appeals Chamber held in *Tadić* that the application of IHL “extends beyond the cessation of hostilities until . . . in the case of internal conflicts, a peaceful settlement is

344. The concept of “hostilities” in IHL is underdetermined. For an attempt at a definition see NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 275 (2008) (“[I]t appears to be generally recognized that, in essence, the concept of ‘hostilities’ comprises all violent and non-violent activities specifically designed to support one party to an armed conflict by *directly* causing harm of any quantitative degree to the military operations or military capacity of the other party.”); ROBERT KOLB, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 108-09 (2014) (proposing that “armed hostilities reaching the threshold of a collective social fight” would constitute armed conflict). See also SIVAKUMARAN, *supra* note 55, at 167-68 (describing intensity as a combination of several factors, notably the degree of violence, measured by number of people involved in fighting, number of victims, and type of equipment used, duration, and geographic spread); RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 263-64 (2005) (arguing that “sustained and concerted character of military operations [in Article 1 AP II] . . . underlines both the collective character of armed conflicts, in contrast to . . . isolated and sporadic acts . . . , and the fact that hostilities involving the use of weapons must be occurring in order for the conflict to be regulated by international humanitarian law.”).

345. In the case of Fatmir Limaj, for example, the ICTY Trial Chamber found the existence of an armed conflict where Serb government forces and an increasingly well-organized Kosovo Liberation Army (KLA) had engaged in fighting every “three to seven days over a widespread and expanding geographic area” in the course of a three months period. Limaj’s defense counsel also argued that “one-sided attacks” did not constitute an armed conflict. The ICTY judges, however, rejected his proposition, without further discussing its merits, because it found that the KLA had, under command of its General Staff, frequently attacked Serb forces and installments, sought to take control over Serb villages, and launched its first major offensive against a city during the relevant period. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 168-69 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

achieved.”³⁴⁶ Rogier Bartels has argued, with some reason, that the reliance on a peace agreement in *Tadić* contradicts the otherwise entirely factual determination for the existence of an armed conflict.³⁴⁷ He proposed that non-international armed conflicts should end when the factual conditions for the applicability of Common Article 3 or AP II are no longer given, i.e. the non-state actor is so fragmented that it can no longer exercise the command and control necessary to apply IHL or the intensity of fighting drops below the threshold necessary for IHL to apply.³⁴⁸ This is, as the beginning of armed conflict, a case-by-case analysis, depending on the “geographic and military circumstances”³⁴⁹ of the conflict. Subjective intent, declarations or the passage or repeal of domestic legislation are only relevant insofar as they translate into an actual end of collective fighting.³⁵⁰

Bartels’ proposal highlights the split in IHL between the applicability of its enabling and its protective elements. The

346. Prosecutor v. Tadić, Case No. IT-94-1-I, DECISION ON Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 68, 70.

347. Bartels, *supra* note 28, at 301.

348. *See id.* at 303 (stating “[s]imilarly, at the end of a NIAC, a certain amount of violence should be considered to be below the armed conflict level”).

349. Fischer, *supra* note 194, at 415.

350. The 2015 Law of War Manual of the U.S. Department of Defense refers to the following official statement by a U.S. government representative: *Reforming the Military Commissions Act of 2006 and Detainee Policy: Hearing Before the H. Committee on Armed Services*, 111th Cong. 76 (2010) [hereinafter *Reforming the MCA*] (statement of Assistant Att’y Gen. David Kris in response to questions submitted by members post-hearing).

At a minimum, we believe active hostilities will continue – and detention of enemy forces will be authorized – as long as the United States is involved in active combat operations against such forces. In reaching the determination that active hostilities have ceased, we would likely consider factors that have been recognized in international law as relevant to the existence of an armed conflict, including the frequency and level of intensity of any continuing violence generated by enemy forces; the degree to which they maintain an organizational structure and operate according to a plan; the enemy’s capacity to procure, transport and distribute arms; and the enemy’s intent to inflict violence.

See also SHIELDS DELESSERT, *supra* note 28, at 64 n. 82 (noting that declarations of the end of hostilities or the end of war are relevant for domestic law only).

Tadić court reacted to a challenge to its jurisdiction by the defense, and hence a potential weakening of the deterrent role of international criminal law; Bartels is concerned about an overexpansion of the permissive aspect of IHL to situations that a government could handle with a finer legal instrument.³⁵¹ The determination of the end of a non-international armed conflict needs to address the disadvantages of a “revolving door” scenario,³⁵² where the applicable law changes with the ebbs and flows in armed violence. This would confuse weapon bearers about the applicable rules. This brings us back to the question how the parties to the conflict and other stakeholders can assess the risk of resumption of hostilities. In a recent position paper, the ICRC explained its practice “has thus been to wait for the complete cessation of hostilities between the parties to a non-international armed conflict before assessing, based on the surrounding factual circumstances, whether there is a real risk of resumption of hostilities. If there is no such risk, the conclusion is drawn that the non-international armed conflict at issue has come to an end. The “risk of resumption” test helps ensure that the determination of the end of a non-international armed conflict is based not solely on the cessation of hostilities, which may be short-lived, but on an evaluation that related military operations of a hostile nature have also ended.”³⁵³ This formulation, is considerably stricter than the one adopted by the

351. While it is important to emphasize the factual determination of armed conflict, it is also a fact that governments will claim the existence of an armed conflict where this provides them with a wider range of tools to fight armed violence, while human rights organizations, counsel for detainees, and the ICRC will argue for the existence of an armed conflict where it provides more protection for persons affected by armed violence and against the existence of an armed conflict where human rights law provides more protection. See Milanović, *supra* note 28, at 165 (discussing the different motivations to find for or against the existence of an armed conflict).

352. Bartels, *supra* note 28, at 310 (referring to Gotovina, Case No. IT-06-90, at ¶ 1694. “Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability.”). See Milanović, *supra* note 28, at 171 (noting the same concern); Chesney, *supra* note 339 (noting that it is important to create legal certainty which rules apply on the battlefield, cautioning against a premature determination that a conflict has ended).

353. ICRC Doc. 32IC/15/11, *supra* note 38, at 11.

2004 UK Law of War Manual for “cessation of active hostilities.”³⁵⁴

While the ICRC approach avoids any confusion about the applicability of IHL, such certainty has its price in a non-international armed conflict: Classification of the applicable law needs to avoid the danger of either party overreaching in its reliance on permissive IHL rules.³⁵⁵ It is submitted that the threshold for the end of a non-international armed conflict will, thus, likely be lower than the intensity and organizational structure required to trigger applicability of IHL to violence between a State and a non-state actor in the first place. Given the intensity requirement, the threshold for the end of the applicability of the enabling aspects of IHL cannot be the cessation of any and all incidents of hostile acts.³⁵⁶

Bartels considers the organizational element more important than the fluctuating intensity element.³⁵⁷ Organizational capacity of the non-state actor presents its own challenges in evaluation, given the secrecy of most non-state armed groups and the incentive on both sides to exaggerate the capacity of and danger posed by the non-state actor. Often, intensity of hostilities and capacity will correlate, as a

354. See *supra* note 225.

355. Gabor Rona, *The Start, End, and Territorial Scope of Armed Conflict*, JUST SECURITY (Nov. 11, 2015 at 1:30 pm) <https://www.justsecurity.org/27543/start-end-territorial-scope-armed-conflict/> (cautioning against what he considers a risk of “premature booting” of IHL in the ICRC’s proposal).

356. Steve Vladeck, *Has the Government Conceded that Courts Can Review Detainees’ End-of-War Claims?* JUST SECURITY (April 30, 2015 at 1:11 PM), <https://www.justsecurity.org/22586/governments-implicit-concession-end-of-hostilities-claims-justiciable/> (noting that detention authority should not rely solely on the fact that “U.S. troops are periodically subject to sporadic attacks from Taliban fighters.”): Roger Bartels, *Temporal Scope of Application of IHL: When do Non-International Armed Conflicts End? Part 2*, OPINIO IURIS (Feb. 19, 2014) <http://opiniojuris.org/2014/02/19/guest-post-bartels-temporal-scope-application-ihl-non-international-armed-conflicts-end-part-2/> (arguing “to gradually move towards a law enforcement approach in the end stages of a NIAC,” once the two criteria for applicability of IHL are no longer met).

357. See Bartels *supra* note 28, at 304-05 (stating that out of the two criteria of intensity and organization, the latter is more relevant, as the military force of the government usually will be directed against the organizational structure of the non-state actor).

well-organized non-state actor will carry out sustained military attacks and be able to hold territory.³⁵⁸ Yet, strength may translate into a decrease in fighting where the non-state actor holds territory and the government decides not to attempt to retake the territory.³⁵⁹ Fragmentation may be the source of localized military strength: It makes a sustainable outcome of political negotiations impossible, leading to endlessly protracted conflicts with varying levels of intensity, but no real end of hostilities.³⁶⁰ The ability to ensure compliance with IHL, enter into negotiations and to speak with one voice is one of the elements characteristic of a non-state party to an armed conflict.³⁶¹ This is particularly important in the context of detention: a member of an organized armed group, once detained based on his status, would forever be at the mercy of the ability of the group to enforce a cease-fire, without the concomitant obligation under international law of the non-state

358. Although it was contested whether the Taliban controlled territory, the Taliban were able to conduct “sustained and concerted military operations,” as evidenced by the losses of Coalition and Afghan government forces. Annyssa Bellal et al., *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS 47, 57-58 (2011). If a non-state group can carry out ‘concerted’ military operations that “are agreed upon, planned and contrived, done in agreement according to a plan,” they can also carry out the provisions of AP II and are thus a party to the conflict in accordance with AP II. *Id.* However, it is noted that AP II only applies to the relationship between the Afghan government and non-state armed groups who control part of its territory. *Id.*

359. This scenario raises the question of how much time without actual combat needs to pass for the government to lose the right to lawfully target members of the non-state armed groups under IHL. *See, e.g.*, Bartels, *supra* note 28, at 309 (noting, for example, where “few military objects remain” and no military operations have occurred for a “prolonged period,” this would be an indication of the end of an armed conflict.).

360. For an excellent discussion of the organizational structure of insurgent groups see PAUL STANILAND, NETWORKS OF REBELLION: EXPLAINING INSURGENT COHESION AND COLLAPSE 39-41, 51-55 (ROBERT J. ART ET AL., EDS. 2014) (DISCUSSING THE DIFFERENT EFFECTS OF FRAGMENTATION OF INSURGENT GROUPS THROUGH COUNTERINSURGENCY STRATEGIES AND CONCLUDING THAT FRAGMENTATION USUALLY LEADS TO INCAPACITATION OF THE INSURGENT GROUP BUT THAT OCCASIONALLY “POWERFUL LOCAL ENCLAVES MAY STILL BE ABLE TO KEEP FIGHTING”).

361. *See* Thynne, *supra* note 4, at 170-71 (citing Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 95 (Int’l Crim. Trib. for the Former Yugoslavia (Nov. 30, 2005) for the proposition that the ability to negotiate is one of the indicators for a non-state party to an armed conflict).

group to negotiate release of its detained fighters. Once the non-state actor becomes so fragmented it no longer fulfills the organizational requirements for a party to a non-international armed conflict, the applicability of the enabling aspects of IHL ends.

Steven Haines, for the case of Northern Ireland, comes to a similar conclusion: he argues that based on the capacity of the Provisional Irish Republican Army (PIRA) and the intensity of violence, the situation in Northern Ireland had reached the threshold of a non-international armed conflict in 1972.³⁶² As to the termination of the conflict, he posits three possible points in time: organizational change of the PIRA at the end of 1974, rendering it factually unable to continue the insurgency, the cease-fire of the PIRA proclaimed in 1994 or the Good Friday Agreement of 1998. Haines opts for the earliest of these points in time, despite occasional bomb attacks attributed to the PIRA in the intervening period.³⁶³

In any case, peace agreements are not a satisfactory indicator for the end of a non-international armed conflict. In contrast to international armed conflicts, in most domestic armed conflicts, peace agreements are often concluded before the actual end of hostilities.³⁶⁴ Cease-fire agreements, often annexed to peace agreements, give an indication of what States and non-state parties to a non-international armed conflict would consider the end of hostilities: halting of all military operations and force movements, end of recruitment, disarmament of the

362. Steven Haines, *Northern Ireland 1968-1998*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 117, 134-35 (Elizabeth Wilmshurst ed., 2012).

363. Haines' exercise is of course a thought experiment, as the United Kingdom never recognized the existence of a non-international armed conflict in Northern Ireland.

364. The Angolan government and UNITA, for example, signed the Bicesse peace accords in 1991 (see Annex to S/22609, May 17, 1991), followed by a series of implementing protocols, such as the Lusaka Protocol in 1994, Annex to U.N. Doc. S/1994/1441 2 (Dec. 22, 1994) (noting the will to implement the Lisbon Acordos de Paz para Angola); Angola-UNITA Cease-Fire, *supra* note 330, Annex 1/A, ¶ 1.2. There may be situations where a peace treaty is signed but hostilities continue – it depends on the political and military environment. Milanović, *supra* note 28, at 172. However, in viewing a given situation as a whole, “it is the *fact* that hostilities have ended that ultimately matters, not the precise legal natures of the instrument in question.” *Id.*

non-state armed group, halting of attacks against and coercion of the civilian population, joint patrolling of contested areas, and the end of arrest operations are elements in cease-fire agreements in domestic conflicts.³⁶⁵ Some of those elements, such as the end of military movements and recruitment, come close to the definition in Additional Protocol I of “general close of military operations,”³⁶⁶ situating the end of the enabling aspects of IHL in non-international armed conflict at some point on the continuum between cessation of active hostilities and general close of military operations.

As in international armed conflict, parties to the conflict may be granted a reasonable, but limited period of time to test whether hostilities would resume, without violating the principle that release at the end of hostilities should happen without delay. Brief, sporadic fighting should not bar the conclusion that the conflict has ended, even though parties will, as a minimum, be bound by IHL during the conduct of such encounters.³⁶⁷ This being said, there will likely be disagreement what constitutes “sporadic fighting.” This is even more challenging when there are several parties to a conflict and one needs to determine the continued applicability of IHL to the relationship between only two of the actors, as in the case of non-international armed conflicts with the involvement of a foreign support force.

365. See, e.g., Angola-UNITA Cease-Fire, *supra* note 330; Implementing Operational Guidelines of the GRP-MILF Agreement on the General Cessation of Hostilities, Moro Islamic Liberation Front-Phil., Nov. 14, 1997, <http://opapp.gov.ph/resources/implementing-operational-guidelines-agreement-general-cessation-hostilities> (outlining prohibited hostile acts including: terrorist acts, aggressive action, establishment of checkpoints, display of MILF flag, providing criminals sanctuary, deployment of forces, public pronouncement undermining parties, or other dangerous activity); Implementing Guidelines on the Security Aspect of the GRP – MILF Tripoli Agreement on Peace of 2001, Moro Islamic Liberation Front-Phil., Aug. 7, 2001, http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/implement_guide_08072001.pdf (defining hostilities as “aggressive or offensive military action such as “aircraft bombing, artillery shelling, naval gunfire, attacks, raids . . . and other terroristic activities.”); see also Vierucci, *supra* note 330, at 424.

366. ICRC Doc. 32IC/15/11, *supra* note 38, at 9; see also *supra* notes 267-272, and accompanying text.

367. U.K. MIN. OF DEF., *supra* note 212, at 205 and accompanying text.

C. Non-International Armed Conflict with a Foreign Support Force

Examples from domestic insurgencies give only partial indicators for determining when a foreign State stops being a party to an ongoing non-international armed conflict. Foreign intervening forces usually do not need to make peace, but can leave the foreign territory, even though this might be more difficult in practice than in theory. The “geographic and military circumstances”³⁶⁸ would indicate hostilities will not resume once foreign forces have left the country. Withdrawal therefore usually would result in an end of the conflict between the non-state actor and that foreign army, even if the conflict between the domestic government and the insurgency continues. This also entails an obligation to release any internees the foreign State party to the conflict has held. It would have no authority under IHL to continue holding internees it believes would “return to the battle” to which the Detaining authority is no longer a party.³⁶⁹ Even where the foreign support force maintains presence on the territory of the host government, a change in posture may either render the support force unable to carry out military operations, or make it very difficult for the non-state actor to execute armed actions against it.³⁷⁰

The transnational nature of attacks does not change this analysis: unilateral drone strikes against non-state armed actors who plan to carry out attacks abroad at some future date are not “hostilities” that give rise to or maintain the applicability of

368. Fischer, *supra* note 194, at 415.

369. Jensen, *supra* note 21, at 507 (suggesting that continued internment should be permissible in such circumstances). The “Catch-22” of such a situation, as the U.K. Court of Appeals has aptly pointed out, is that transfer to a host government might constitute a violation of a withdrawing States non-refoulement obligations. It may then be indeed more protective to continue to hold an individual instead of transferring it to torture. But this does not in itself create a continuing detention authority under international law. *Serdar Mohammed v. Ministry of Defence* [2015] EWCA (Civ) 843 [153(x)], [213] (Eng.).

370. See *infra* note 411 and accompanying text (discussing the effect of the change in U.S. posture on operations by the Taliban).

IHL.³⁷¹ Nor do sporadic terrorist attacks.³⁷² Neither fulfills the requirement of intensity, unless they form part of a series of collective armed encounters in spatial and temporal proximity.³⁷³ The spatial proximity needs to be seen in the context of the “geographic and military circumstances,” and as a factor of temporality: where both parties rely exclusively on long-range missile strikes, or, in a maybe not so distant future, on strikes from drones hovering above each other’s territories, a non-international armed conflict could exist even without spatial proximity as long as such strikes occur with the required frequency and intensity.³⁷⁴ The response by either party still needs to conform to the principles of distinction, necessity and proportionality and linked to the existence of actual attacks, not to their mere possibility.³⁷⁵

The notion of a transnational global armed conflict with no anchor to a specific territory does not work without a theory of aggregation of violent acts carried out by different armed groups.³⁷⁶ If the intensity required by the armed conflict definition is only reachable through aggregation of multiple small groups dispersed in geographically far apart areas,

371. *But see* Vogel, *Ending the “Drone War,” supra* note 21, at 297-99 (arguing that the United States has the option to abandon the armed conflict paradigm and continue strikes against Al Qaeda under a doctrine of self-defense, or continue applying a liberal definition of armed conflict which subsumes any action against Al Qaeda as part of a global armed conflict).

372. Lubell, *supra* note 51, at 435-41.

373. For an excellent analysis see Lubell, *supra* note 51, at 435-41; Thynne, *supra* note 4, at 166-69. *See also* Adams, *supra* note 18, at 431 (arguing that an “infrequent number of discrete kinetic strikes undertaken in self-defense” would not suffice for continued application of IHL, but that defensive measures against a “continuing pattern of potentially lethal attacks by an organized enemy force” may give rise to such application).

374. Lubell, *supra* note 51, at 435-41.

375. *Id.*

376. Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429, 441 (2010) (“A major issue is one of aggregation,” the “functional relationship” between groups who are planning individual attacks on government targets in different parts of the world.); Michael J. Ellis, *Disaggregating Legal Strategies in the War on Terror*, 121 YALE L.J. 237, 244 (2011) (arguing that the drone strike against the leader of the Pakistani Taliban, or TTP, precipitated the first attack of the TTP against the United States).

without a single command coordinating their activities, the combined weight of this aggregation should not replace the careful analysis of the two factors required to trigger IHL.³⁷⁷ Historically, the ICRC and war crimes tribunals have argued against too high a threshold of violence to ensure IHL protections were available to persons affected by armed violence.³⁷⁸ This “liberal” interpretation of the applicability of IHL should not be misunderstood to trigger or maintain permissive IHL rules that allow a third party intervener to use lethal force or status-based detention independent of the pre-existing armed conflict between the host government and a

377. See SIVAKUMARAN, *supra* note 55, at 233 for the argument that only if Al Qaeda in different countries is a group operating under a single command, one can aggregate its actions to contribute to the intensity of a non-international armed conflict. If there are “different groups and affiliates, operating on different territories, albeit under the same name, then different situations exist and each would have to satisfy the requisite levels of intensity and organization to amount to non-international armed conflicts.” *Id.* In the case of Al Qaeda, analysts do not describe a command relationship between affiliates, but rather a network of advice, training, financing, and staff loan and transfer, and common ideological commitment that is translated into a local insurgency. See, e.g., KATHERINE ZIMMERMAN, AQAP’S ROLE IN THE AL QAEDA NETWORK 1 (2013), http://www.criticalthreats.org/sites/default/files/pdf_upload/analysis/Zimmerman_AQAPs_Role_in_the_al_Qaeda_Network_September_2013.pdf (noting that Al Qaeda groups which “operate[s] solely on the local level . . . strengthen the broader network” through “latticed connections”); Louise Arimatsu & Michael N. Schmitt, *Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape*, 53 *COL. J. TRANSNAT’L L. BULL.*, 1, 12 (2014) (stating that an “armed attack” implies more than isolated criminal acts against a State’s citizens): *but see* Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 5-6, *In Re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009) (arguing for the “oath of loyalty” to Al Qaeda as one criterion to assume a functional relationship between individuals and the organization).

378. See GC III COMMENTARY, *supra* note 41, at 36; see also David E. Graham, *Defining Non-International Armed Conflict: A Historically Difficult Task*, 88 *INT’L L. STUD.* 43, 48-49 (2012) (discussing the definition of “armed conflict,” and concluding that “it is apparent that a legitimate argument can be made that the *Tadić* formula may well have had the effect of lowering the threshold required for the recognition of a non-international armed conflict”); Kreß, *supra* note 53, at 260 (arguing that the *Tadić* decision has correlated the definition of non-international armed conflict with the threshold of Common Article 3).

non-state armed group.³⁷⁹ Some may regret the potential loss of the protective aspects of IHL and war crime jurisdiction for situations of serious armed violence.³⁸⁰ Yet, IHL is not the only applicable law in the context of violent confrontations: International human rights law does prohibit excessive force, which includes a duty to protect bystanders from the effects of use of force.³⁸¹ Even though this requires more restraint than IHL's proportionality analysis to avoid civilian casualties, it still allows the use of lethal force where this is absolutely necessary to prevent greater harm.³⁸²

379. See, e.g., Vogel, *supra* note 21, at 297-98 (relying on ICRC positions and ICTY jurisprudence to assume that the United States and Al Qaeda will remain in an armed conflict after the end of the conflict in Afghanistan).

380. See, e.g., Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition* 46 VANDERBILT J. TRANSN'L L. 693 (2013) (criticizing the hesitant approach of the Commission of Inquiry on Syria to find applicability of IHL to the violence there); see also Lubell & Derejko, *supra* note 55, at 70.

381. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba ¶ 5.b (1990) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>; GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 134 (2015) (noting that human rights law requires law enforcement operations to preserve human life to the greatest extent possible).

382. OBERLEITNER, *supra* note 381, at 133-36 (contrasting the rules on the use of lethal force in IHL and international human rights law). It goes beyond the scope of this article to discuss targeting standards. I also leave aside the obvious practical difficulty raised by the United States' resistance to extraterritorial application of international human rights treaties or constitutional obligations. The modified targeting standards for drone strikes "outside zones of active hostilities" are an indicator that at least the Obama administration thinks IHL cannot apply in a straightforward manner to isolated drone strikes, even though it is submitted that the question only poses itself because of a faulty classification of a situation as armed conflict in the first place. WHITE HOUSE, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>; U.S. Dep't of Justice, Memorandum for the Attorney General, Re: Applicability of Federal Criminal Law and Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 16 n.15 (July 16, 2010) (concluding that § 1119(b) "must be construed to incorporate the public authority justification, which can render lethal action carried out by a government official"); *New York Times v. U.S. Dept. of Justice*, 756 F.3d 100, 136 (2d Cir. 2014); see also Naz K.

Determining the end of a non-international armed conflict with a foreign intervening force, however, also poses difficulties where the foreign force withdraws only partially, and continues to provide support for the host government's operations, albeit at a lower degree of involvement. The closer the link to the harm inflicted on the non-state actor through the activities of the foreign support forces, the higher the likelihood they will remain a party to an ongoing conflict.³⁸³ IHL will apply to its conduct vis-à-vis the non-state actor.³⁸⁴

Given its importance to define authorities in non-international armed conflict, the term "hostilities" certainly deserves closer attention. Scholarship that defines "hostilities" as acts that are directly harmful to the enemy may answer who is a lawful target in an existing armed conflict,³⁸⁵ but create a certain circularity in defining the type of "hostilities" needed to mark the beginning and the end of the applicability of IHL in

Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225, 295-96 (2014) (arguing that the presidential policy guidance for drone strikes outside areas of active hostilities applies IHL-plus rules to situations that are not an armed conflict, hence lowers human rights law standards which would apply to such situations).

383. See Ferraro, *supra* note 30, at 585 ("[There] must be a close link between the action undertaken by multinational forces and the harm caused to one of the belligerents.").

384. See *id.* at 585-86 (analyzing the applicability of IHL to international peace-keeping forces). I thank Jonathan Horowitz for drawing my attention to this argument.

385. See MELZER, *supra* note 344, at 275-76, for a discussion on the criteria for the loss of protection against direct attack by a civilian who participates directly in hostilities, such as "combat actions designed to eliminate opposing armed forces and other military objectives." In addition, certain other actions may trigger such loss of protection, such as, "all violent and non-violent activities specifically designed to support one party to an armed conflict by directly causing harm of any quantitative degree to the military operations or military capacity of another party," including "power-cuts, interference with communication and the erection of roadblocks," but not "financing, military training, or the production of weapons," that have only an indirect effect on the military capacity of the adversary. *Id.*

the first place.³⁸⁶ Paradoxically, this seems easier to solve when it comes to targeting authorities, because of the temporal limitation of discrete armed encounters, than when it comes to detention authorities, which are potentially open-ended.³⁸⁷

This shows again the need for the correct balance between clear rules on targeting and the risk of overreaching detention authorities under IHL. A foreign force in possession of superior intelligence technology may provide a decisive military advantage for the military operations of the host government against a domestic insurgency, even though it is itself not engaged in combat anymore.³⁸⁸ This does not mean that any such support creates a justification under IHL for the State providing intelligence to detain members of the insurgent group, or extend detention of individuals who may have in the past joined the activities of the insurgent group. It is submitted that detention authority, where it does exist in IHL, is limited to the “shooting war,”³⁸⁹ that is a situation of actual and reciprocal hostilities, no matter the technology used to effect lethal strikes.³⁹⁰ Where the non-state actor chooses to continue the “shooting war” against a foreign force which has changed from an offensive to a defensive posture, it should expect the corollary detention authorities that go with it – as long as they have sufficient legal basis as discussed above. The principles of necessity and proportionality serve to ensure that a State party

386. *Id.* at 271 (noting the synonymous use of “military operations” and “hostilities” and that “where conventional IHL uses the term ‘military operations’ . . . it invariably refers to the conduct of hostilities within an armed conflict”).

387. See Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156 (1997) (finding that IHL applied in the course of a two-day intensive attack on a military base).

388. Ferraro, *supra* note 30, at 585-86 (discussing various types of support activities of a multinational intervening force in a pre-existing internal conflict).

389. See Levie, *supra* note 201, at 417-18, n. 113 (explaining that prisoners of war generally remain in detention until the end of active hostilities, and defining active hostilities as “the shooting war”); see also Fischer, *supra* note 194, at 415 (asserting that “the actual cessation of hostilities automatically effects the obligation to release prisoners of war” and that the possibility of hostilities resuming does not justify retaining prisoners of war).

390. Fischer, *supra* note 194, at 415.

to a conflict cannot claim detention authorities beyond what is justified in light of the nature of its involvement in the conflict. In addition, the host government must consent to any detention activity of the supporting force.³⁹¹ Once hostile encounters are so sporadic that they are rather an exception than the rule, neither party can rely on military necessity, and hence the rules of IHL.³⁹²

A State party to the conflict has therefore an obligation under IHL to release internees held with justification to the existence of a non-international armed conflict when (1) their internment is not absolutely necessary to contain a threat they pose to the Detaining power, even when hostilities have not ended, or (2) when IHL no longer applies because direct hostilities have dropped more than temporarily below the threshold that requires the use of military force, and/or the non-state party to the conflict has disintegrated to the point it can no longer carry out coordinated direct hostilities and ensure in principle respect for the rules of IHL.

391. See Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 155 (2013) (describing the circumstances in which *jus ad bellum* authorizes the use of military force, including detention). This is not only a matter of IHL, but more importantly a question of State sovereignty. It does concern IHL where a host government's domestic law does not allow for internment, but the foreign supporting force runs separate internment facilities based on a bilateral agreement. Cf. Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L. J. 1, 41-42, (2013) (discussing the implications of an acting state's failure to inquire about the host state's domestic laws on internment). This was the case in Afghanistan, and it is indeed unsettled law to what extent such an arrangement violates IHL or the human rights obligations of the host government vis-à-vis persons subject to its jurisdiction.

392. Cf. Ferraro, *supra* note 30 ("As long as UN forces are not engaged in an armed conflict, they are considered civilians for the purposes of IHL and benefit from the protection inherent to this status."). NATO forces, just as UN forces, may be asked to conduct a peace-keeping mission under a UN mandate, and could therefore benefit from a status as civilian. This may require the counter-intuitive understanding that regular armed forces acting as peace-keeping forces abroad may not be lawful targets under IHL if their involvement does not rise to the level of direct participation in hostilities in an ongoing conflict.

D. When Will Hostilities in Afghanistan End?

On January 1, 2015, the NATO combat mission of the International Security Assistance Force (ISAF) and the United States mission Operation Enduring Freedom transformed into the Operation Resolute Support and Operation Freedom's Sentinel, with a focus on supporting Afghan defense and security forces in their fight against the insurgency.³⁹³ The conflict of the Afghan government with the domestic insurgency continues unabated.³⁹⁴ The degree and type of involvement of the United States in those operations, and the type of direct confrontations with Afghan insurgents groups, will determine whether IHL continues to apply to its operations, and which kind of authority it may derive from it.

1. A Change in Mission: The Bilateral Security Agreement 2014

The bilateral security agreement (BSA) between the United States and Afghanistan regulates presence and activities of United States military forces until 2024.³⁹⁵ “Unless otherwise

393. See *Resolute Support Mission in Afghanistan*, NORTH ATLANTIC TREATY ORGANIZATION (Feb. 27, 2015), http://www.nato.int/cps/en/natohq/topics_113694.htm (discussing the functions of Operation Resolute Support).

394. UNITED NATIONS MISSION IN AFG. (UNAMA), AFGHANISTAN. MIDYEAR REPORT 2015: PROTECTION OF CIVILIANS IN ARMED CONFLICT 1-2 (2015) https://unama.unmissions.org/sites/default/files/unama_protection_of_civilians_armed_conflict_midyear_report_2015_final_august.pdf (noting that in the first half of 2015 more than 4,000 Afghan civilians were killed through direct attacks and in armed confrontations between the Afghan armed forces and insurgent groups, more than in comparative periods in previous years); see also, Sudarsan Raghavan, *As the U.S. Mission Winds Down, Afghan Insurgency Grows More Complex*, WASH. POST (Feb. 13, 2015), https://www.washingtonpost.com/world/asia_pacific/as-the-us-mission-winds-down-afghan-insurgency-grows-more-complex/2015/02/12/99eab761-d5f0-4046-86ee-7e757b65dd01_story.html (discussing the continuing conflict between Afghan government and the Taliban).

395. Security and Defense Cooperation Agreement Between the United States and the Islamic Republic of Afghanistan, Afg. U.S., art. 26, ¶ 1, (Sep. 30, 2014) [hereinafter BSA Afghanistan]; see also Charles Recknagel, *Explainer: Key Points in U.S.-Afghan Bilateral Security Agreement*, RADIO FREE EUROPE (Sep. 30, 2014), <http://www.rferl.org/content/explainer-bsa-afghan-us-security-agreement-bsa/26613884.html> (discussing the key points of the BSA Afghanistan).

mutually agreed, United States forces shall not conduct combat operations in Afghanistan,”³⁹⁶ but should assist through “advising, training, equipping, and sustaining”³⁹⁷ the Afghan security forces. As to “U.S. military operations to defeat al-Qaida and its affiliates,” the agreement emphasizes the importance of integrating them in the “common fight against terrorism [. . .] with the intention of protecting U.S. and Afghan national interests without unilateral U.S. military counter-terrorism operations, [. . .] with the goal of maintaining ANDSF lead.”³⁹⁸ Neither the bilateral agreement nor domestic Afghan law provide a basis for long-term detention operations by foreign forces.³⁹⁹

The language of the agreement is not decisive in determining whether indeed the United States will stop being a party to the conflict.⁴⁰⁰ While it may not conduct unilateral combat operations, it may do so upon request by the Afghan government.⁴⁰¹ Support activities may or may not render the U.S. a continuing party to the conflict, depending on whether the supporting force prepares the host government forces for

396. BSA Afghanistan, *supra* note 373, art. 2, ¶ 1.

397. *Id.*

398. *Id.* ¶ 4.

399. Christopher Rogers, *Key Issues in the U.S.–Afghan Bilateral Security Agreement*, OPEN SOCIETY FOUNDATIONS (Nov. 24, 2013), <https://www.opensocietyfoundations.org/voices/key-issues-us-afghan-bilateral-security-agreement> (discussing the unaddressed legality of the United States’ continued internment of detainees).

400. *See id.* (discussing the BSA Afghanistan, and arguing that the possible exceptions to the agreement may serve as a basis for continued U.S. operations). I thank Chris Rogers for pointing to the importance of the BSA. Still, IHL would apply where the factual situation meets the criteria of an armed conflict, notwithstanding the rules of engagement. *See supra* Part IV.A on the criteria to determine the existence of a non-international armed conflict.

401. BSA Afghanistan, *supra* note 371, art. 2 ¶ 1; *see also* Bryan Bender, *US Intensifies Afghan Airstrikes as Drawdown Nears*, BOSTON GLOBE (Oct. 8, 2014), <http://www.bostonglobe.com/news/nation/2014/10/07/with-focus-iraq-and-syria-air-war-heats-afghanistan-amid-drawdown/to9wunctlsgw8LV1dJ0XtL/story.html> (reporting that although the number of ground troops in Afghanistan has dropped, U.S. air strikes are still a “critical part of the support [provided to] the Afghan security force”).

specific combat missions, or accompanies it on such missions.⁴⁰² Certainly, the United States would not argue it is a party to a non-international armed conflict in the numerous countries where it provides training and assistance to the government's armed forces.⁴⁰³ There may, however, be few countries where it does so with a ground personnel of over 10,000 soldiers.⁴⁰⁴ At the time *Hamdi* was decided, 13,500 soldiers were deployed in Afghanistan.⁴⁰⁵ Yet, their type of mission had been very different.⁴⁰⁶ Under the new Rules of Engagement, U.S. forces

402.

The preparation and training of aircrews, air technicians and others with a view to the execution of a predetermined air or missile combat operation constitutes a measure preparatory to a specific hostile act and, therefore, amounts to direct participation in hostilities. This follows from the fact that the training needs to be for 'specific requirements of a particular air or missile combat operation'. Conversely, general preparation and training of aircrews, air technicians and others for unspecified military operations to be executed in the future may maintain or enhance the military capacity of a party to the conflict, but does not qualify as direct participation in hostilities.

PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY 123 (2010). For the advisory functions of the current U.S. forces in Afghanistan see U.S. Dep't of Def., Report on Enhancing Security and Stability in Afghanistan 13, 17-18 (June 2015) http://www.globalsecurity.org/military/library/report/2015/afghanistan-security-stability_20150616.pdf (describing the roles and functions of U.S. and NATO forces under Operational Resolute Support, mentioning a mix of direct support to prepare and conduct combat operations and technical, logistical and financial capacity-building).

403. The legal classification of whether support to a foreign armed force makes the supporting country a party to an ongoing conflict depends on the actual activities carried out, not on the labelling of the operation as "combat" or "train, advise and assist" mission. See, for example, the recent discussion of Department of Defense statements relating to the involvement of Special Operations Forces in a Kurdish Peshmerga mission to rescue hostages from an ISIS prison. Gayle Tzemach Lemmon, *Why It Matters That Carter Says Iraq Raid Isn't Combat, Then Says It Is*, DEFENSE ONE (Oct. 23, 2015) <http://www.defenseone.com/ideas/2015/10/when-combat-isnt-combat/123090/>.

404. See, e.g. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

405. *Hamdi*, 542 U.S. at 521 (2004).

406. See Pamela Constable, *U.S. Launches New Operation in Afghanistan*, WASH. POST (Mar. 14, 2004), <http://www.washingtonpost.com/archive/politics/2004/03/14/us-launches-new-operation-in-afghanistan/35324b35-439e-44c9-aafd-d5787d0faf1b/> (discussing a 2004 U.S. military operation in Afghanistan "aimed at 'destroying terrorist

may no longer carry out offensive operations.⁴⁰⁷ They may defend themselves and Coalition forces against an attack, conduct counter-terrorism operations against Al Qaeda and support the Afghan government with air strikes *in extremis*.⁴⁰⁸

The Bilateral Security Agreement and the new Rules of Engagement leave open the possibility of a more sustained engagement of U.S. military in hostilities against certain Taliban forces and Al Qaeda.⁴⁰⁹ If one measure of hostilities is, as the Assistant Attorney General told Congress in 2009, the “frequency and level of intensity of any continuing violence generated by enemy forces; the degree to which they maintain an organizational structure and operate according to a plan; the enemy’s capacity to procure, transport and distribute arms; and the enemy’s intent to inflict violence,”⁴¹⁰ one needs to look not only at United States involvement in military operations, but at the actions of the Taliban and Al Qaeda against United States forces.

2. The Armed Conflict with the Taliban

Unless the United States changes its defensive posture, the continuation of the armed conflict with the Taliban in the legal sense will largely depend on whether various Taliban groups see

organizations and infrastructure”); Michael M. Phillips, *Treading Line Between War and Peace, U.S. Special Forces Groom Afghan Troops*, WALL STREET J. (Aug. 28, 2015, 1:28 PM) <http://www.wsj.com/articles/treading-line-between-war-and-peace-u-s-special-forces-groom-afghan-troops-1440782892> (noting that the mission of U.S. soldiers remaining in Afghanistan in 2015 differs substantially from the previous years where they were involved in “constant skirmishes in Afghanistan’s mud villages, poppy fields and steep mountains,” and 2,300 Americans were killed in Afghanistan).

407. See BSA Afghanistan, *supra*, note 371, art. 2 ¶ 4 (“The Parties agree to continue their close cooperation and coordination toward those ends, with the intention of protecting U.S. and Afghan national interests without unilateral U.S. military counter-terrorism operations.”).

408. *Obama Quietly Broadens U.S. Mission in Afghanistan*, CBS/AP (Nov. 22, 2014, 5:02 PM), <http://www.cbsnews.com/news/obama-quietly-broadens-u-s-combat-mission-in-afghanistan/>.

409. See Rogers, *supra* note 399 (discussing the BSA Afghanistan and suggesting that the U.S. may argue that Article 2 leaves it room “to continuing conducting unilateral counter-terrorism operations under certain circumstances”).

410. See *Reforming the MCA*, *supra* note 350.

a political interest in attacking, or appearing to pose a direct threat to United States forces in Afghanistan.⁴¹¹ Yet, IHL will only remain fully applicable where the Taliban actually carry out such attacks and they result in “repeated but not necessarily continuous military operations conducted in self-defence” on the side of the U.S. forces.⁴¹²

The picture in 2015 was quite lopsided: the United States conducted regular airstrikes against Taliban forces, and more recently against ISIS, in support of the Afghan government, or for force protection, albeit at a much lower level than in 2014.⁴¹³ Most prominently, the United States intervened, reportedly upon request by the Afghan government, with air strikes against Taliban forces in Kunduz in October 2015, where it hit repeatedly the hospital run by the international NGO Doctors without Borders, killing and wounding dozens of doctors and

411. Recent statements by Taliban spokesmen indicate that there is at least a rhetorical interest to paint the new government as supportive of the foreign invaders. See, e.g., Lynne O'Donnell & Amir Shah, *Attacks in Kabul Raise Concerns About Security*, ASSOCIATED PRESS (Nov. 21, 2014, 2:08 PM), <http://news.yahoo.com/attacks-kabul-raise-concerns-security-131555299.html> (“Taliban spokesman Zabihullah Mujahid . . . described the BSA as ‘against the interests of the Afghan nation,’” saying that the “attacks in Kabul are aimed at breaking the backs of the foreign troops and the Afghan government; the fight will not stop . . .”). Such rhetoric, however, has to translate into actual attacks that provoke an armed response by the United States in order to prevent the phasing out of IHL in the relationship between the Taliban and the United States . . .”). U.S. DEP’T OF DEF., *supra* note 402, at 26 (noting that the absence of Coalition forces has deprived the Taliban of their campaign to end the foreign influence and that the group “now was fighting almost exclusively against their fellow Afghans.”).

412. Ferraro, *supra* note 30, at 578-79 and *supra* Part IV.B (discussing when the involvement of a foreign support force in a non-international armed conflict would give rise to detention authority under IHL).

413. See Joseph Goldstein, *U.S. Steps Up Airstrikes in Afghanistan, Even Targeting ISIS*, N.Y. TIMES (Jul. 15, 2015), http://www.nytimes.com/2015/07/16/world/asia/afghanistan-us-steps-airstrikes-isis.html?_r=0 (reporting a sharp increase in monthly airstrike numbers in June 2015 compared to previous months, and noting the emergence of ISIS as a new airstrike target); U.S. AIRFORCES CENT. COMMAND COMBINED AIR & SPACE OPERATIONS CTR., COMBINED FORCES AIR COMPONENT COMMANDER 2010-2015 STATISTICS (2015) (noting 1,961 close air support sorties in 2015 (12,978 in 2014) and 153 sorties with at least one weapon release, 106 of them in June 2015 (1,136 total sorties with at least one weapon release in 2014)).

patients.⁴¹⁴ That operation demonstrated that even under the new parameters of the Bilateral Security Agreement, the United States can be involved in use of force that clearly needs to be governed by IHL.⁴¹⁵ In contrast, there are only few reported incidents of direct attacks by the Taliban on U.S. or other coalition forces.⁴¹⁶ The government's reply brief in a habeas litigation in the first half of 2015 listed six incidents of "high-profile" attacks "in recent months."⁴¹⁷ Only two of them occurred in 2015.⁴¹⁸ There were other such incidents, such as the attack, unclaimed by any particular group at the time of finalizing this article, on a NATO base in Kabul in early August, bringing the number of Coalition soldiers killed since the beginning of 2015 to five.⁴¹⁹ The intensity of mutual hostilities thus has significantly decreased, with most of the United States airstrikes happening in support of Afghan operations, and only occasional, small-scale attacks by the Taliban on U.S. targets.⁴²⁰ IHL continues to govern targeting decisions in support of Afghan military operations, such as the attack on the MSF

414. Alissa J. Rubin, *Airstrike Hits Doctors Without Borders Hospital in Afghanistan*, N.Y. TIMES (Oct 3, 2015) <http://www.nytimes.com/2015/10/04/world/asia/afghanistan-bombing-hospital-doctors-without-borders-kunduz.html?>

415. Robert Chesney, *Why the Emphasis on Self-Defense? Putting the U.S. Air and Ground Operations in Kunduz in Legal and Policy Context*, LAWFARE (Oct. 2, 2015, 2:01 PM) <https://www.lawfareblog.com/why-emphasis-self-defense-putting-us-air-and-ground-operations-kunduz-legal-and-policy-context> (noting that IHL applied to the U.S. military operations in support of the Afghan government).

416. See e.g., Bender, *supra* note 378 ("American military casualties have dropped considerably as Afghan forces have taken on a more primary security role in the country . . .").

417. *Respondent's Opposition to Petitioner's Motion to Grant Petition for Writ of Habeas Corpus* at 14-15, Al Warafi v. Obama, No. CV 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015).

418. *Id.*

419. See Sune Engel Rasmussen, *Kabul: Death Toll Rises in Deadliest 24 Hours Afghan Capital Has Seen in Years*, GUARDIAN (Aug. 8, 2015, 5:57 PM), <http://www.theguardian.com/world/2015/aug/08/afghanistan-35-killed-in-deadliest-24-hours-capital-kabul-has-seen-in-years> (discussing the wave of attacks on Kabul by the Taliban).

420. See Rosenberg & Schmitt, *supra* note 15 (discussing the United States' increased role as a counterterrorist in Afghanistan as a response to the increased attacks over the past year).

hospital in Kunduz. Unless attacks by the Taliban against the United States increase, it is doubtful that independent of Afghan military operations, a law of armed conflict framework, including broad status-based detention authorities, is the most appropriate to govern the relation between the United States and the Taliban and other non-state armed groups.

A purely defensive stance to occasional attacks should not be sufficient to maintain or re-trigger a general applicability of IHL against the Taliban and other groups of a localized outreach. Very intensive fighting with heavy resistance may trigger short-time applicability of the IHL rules on targeting in accordance with the reasoning of the Inter-American Commission of Human Rights in *Tablada*.⁴²¹ Such fighting may also occur as part of “self-defense operations” limited in time.⁴²² This should give sufficient leeway to a supporting government to defend itself, without falling into the trap of “overbreadth” of applicability of IHL.⁴²³

The United States considers the current situation to constitute “active hostilities.”⁴²⁴ As discussed in the introduction to Part IV, those who believe the protective value in continued application of IHL outweighs the risk of overreach may agree, if not for the same reasons; supporters of the primacy of a human rights framework will consider a handful of pinprick attacks

421. See Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156 (1997) (explaining that brief violent clashes can trigger application of the IHL rules relevant to a non-international armed conflict); see also Adams, *supra* note 18, at 430-31 (arguing that an “infrequent number of discrete kinetic strikes undertaken in self-defense” would not suffice for continued application of IHL, but that defensive measures against a “*continuing pattern* of potentially lethal attacks by an organized enemy force” may give rise to such application) (emphasis added).

422. See Vogel, *supra* note 21, at 296-97 (arguing isolated acts of self-defense by the United States after hostilities in Afghanistan have ended would allow targeting of “dangerous militants” with lethal force).

423. See Corn & Kaleemullah, *supra* note 335, at 263, 275 (noting the importance of finding the proper balance between the need for robust force and “overzealous” application of IHL).

424. *Respondent’s Opposition to Petitioner’s Motion to Grant Petition for Writ of Habeas Corpus* at 14-15, Al Warafi v. Obama, No. CV 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015).

sporadic and indicative of an end of active hostilities. The most balanced solution appears to consist of a continuation of IHL targeting rules in the course of actual armed confrontations, tampered by rules of engagement based on self-defence, and a finding that active hostilities for the purpose of status-based detention have ended.⁴²⁵ This is also supported by an apparent shift in United States policy from status- to conduct-based targeting of members of the Taliban.⁴²⁶ While this departs from the framework model of IHL, where targeting and detention powers usually are triggered and ended at the same time,⁴²⁷ it also reflects current tendencies of more flexible application of IHL and IHRL rules in complex contexts.⁴²⁸

3. A Stand-Alone Armed Conflict with Al Qaeda?

Military operations against Al Qaeda and Pakistani groups in the Afghan-Pakistan borderland have consisted almost exclusively of drone strikes.⁴²⁹ While such operations are very likely to continue throughout 2015, it is doubtful that independent of an armed conflict against the Taliban they reach the threshold of intensity required for IHL to apply.⁴³⁰ There is

425. Accepting for the sake of argument the lawfulness of status-based internment in non-international armed conflict. See *supra* Part I.C.4 and Part III.D for a discussion of reasons to reject such an assumption.

426. See Mark Mazetti & Eric Schmitt, *In a Shift, Obama Extends U.S. Role in Afghan Combat*, N.Y. TIMES (Nov. 21, 2015), <http://www.nytimes.com/2014/11/22/us/politics/in-secret-obama-extends-us-role-in-afghan-combat.html> (discussing the United States' broadened role against the Taliban and shift in support of Afghan military).

427. This does not mean that the substantive rules on detention and targeting are the same. See Rona, *supra* note 79, at 43 ("There are also practical distinctions between targeting and detention that militate against construing the latter power as included within the former.").

428. See GLORIA GAGGIOLI, INT'L COMM. OF THE RED CROSS, *THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS* 13 (2013).

429. See *Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan*, Case No. 3 BJs 7/12-4, Decision to Terminate Proceedings, 157 I.L.R 722, 729-730 (Germany, Federal Prosecutor General Jul. 23, 2013) (discussing U.S. drone strikes in Pakistan against the Taliban).

430. See Bill Roggio, *Charting the Data for US Airstrikes in Pakistan, 2004-2014*, LONG WAR J. (Dec. 8, 2014), <http://www.longwarjournal.org/#ixzz301eBpSiZ> (splitting drone strikes between six different Pakistan Taliban groups, all of which are said to

also a dispute – unsolvable without access to independent information on the structure of Al Qaeda – as to whether the so-called core Al Qaeda in the Afghan and Pakistan border regions fulfills the organizational requirement necessary to be a party to an armed conflict.⁴³¹ The German Federal Prosecutor found, for the jurisdictional period of 2009 and 2010, that Al Qaeda did meet the relevant organizational criteria.⁴³²

The principle that the conflict would end when Al Qaeda is disintegrated and can no longer conduct independent military

“shelter al Qaeda and various other terror groups”); *id.* (discussing U.S. airstrikes targeting the Taliban in Pakistan and the four main Taliban groups attacking tribal areas); Ernesto Londoño & Kevin Sieff, *Afghan Officials Accuse U.S. of Snatching Pakistani Taliban Leader from Their Custody*, WASH. POST (Oct. 10, 2013), https://www.washingtonpost.com/world/national-security/afghan-officials-accuse-us-of-snatching-pakistani-taliban-leader-from-their-custody/2013/10/10/df93bdf6-31e9-11e3-89ae-16e186e117d8_story.html (discussing tension between the U.S. and Afghan officials resulting from the U.S. capture of a Taliban leader). The latest series of drone strikes in summer 2014 appears at least partially connected to the conflict between Pakistan and certain Taliban factions, but it is unclear whether targets are coordinated with the Pakistani government and would thus be covered under its non-international armed conflict, or whether the United States needs to establish an independent base for the applicability of IHL. Without the framework of an ongoing armed conflict, isolated armed attacks will not trigger the applicability of IHL.

431. See ALEX STRICK VAN LINSCHOTEN & FELIX KUEHN, AN ENEMY WE CREATED: THE MYTH OF THE TALIBAN-AL QAEDA MERGER IN AFGHANISTAN 300 (2012) (discussing attacks that could involve Al-Qaeda but which remain uncorroborated); Lubell, *supra* note 51, at 425-27 (citing sources which indicate Al Qaeda lacked organizational cohesion after 2001); Kreß, *supra* note 53, at 261 (arguing that even though Al Qaeda might have been a party to the conflict early on, but “this legal status would have been certainly lost, however, as a consequence of Al Qaeda’s subsequent transformation into a rather loosely connected network of terrorist cells”); DUFFY, THE ‘WAR ON TERROR’, *supra* note 26, at 399 (citing Kreß, *supra* note 44, with approval); See Paust, *supra* note 26, at 169 n. 5 (noting that many scholars have suggested that the United States cannot engage in armed conflict with al Qaeda because the group does not have an organized military force with a responsible command); *Contra Al-Qaeda in Afghanistan and Pakistan: An Enduring Threat: Hearing Before the Subcomm. on Terrorism, Nonproliferation, & Trade of the H. Comm. on Foreign Affairs*, 113th Cong. (2014) (statement of Thomas Joscelyn, Senior Fellow, Foundation for Defense of Democracies) (arguing that core Al Qaeda maintains a command structure in Afghanistan).

432. See *Aerial Drone Deployment on 4 October 2010*, 157 I.L.R. at 742-43. (“The attacks and military operations mounted by the parties to the conflict exhibit a high degree of organisation and sufficient capacities with regard to strategy, manpower, and military technology to carry out sustained and coordinated combat operations.”); see also CRAWFORD, *supra* note 57, at 119 (relying on a source published in 2007).

operations is also reflected in the notion of a “regional attack tipping point,” used by then General Counsel of the Department of Defense Jeh Johnson to designate the end of the conflict with Al Qaeda.⁴³³ As discussed above, aggregation of isolated attacks by groups not operating under a single command is not an appropriate way to trigger or maintain the applicability of IHL in operations against these groups.⁴³⁴ Arguably, “core Al Qaeda” stopped being an independent party to the conflict in Afghanistan at some point after 2001.⁴³⁵ This author is not aware of public reports as of late 2015 that Al Qaeda has carried out operations independent of other insurgent groups active in Afghanistan or Pakistan.⁴³⁶ The latest Department of Defense

433. See FRENCH & BRADSHAW, *supra* note 18, at 11-13 (quoting Jeh Johnson’s 2012 address at the Oxford Union, Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?* (Nov. 30, 2012)); see *id.* at 11-12. French & Bradshaw discuss the “strategic attack tipping point,” the loss of ability to strike in the United States, which would make armed conflict no longer necessary, the “regional tipping point,” where an armed actor can no longer carry out military attacks in a specific theater of war, and where any continued threat could be contained with law enforcement methods. *Id.* at 13. Furthermore, the “co-belligerent tipping point,” would render IHL inapplicable where an associated force no longer fights on behalf of a principal non-state party to the conflict in order for IHL to apply. *Id.*

434. See *supra* notes 51, 291-294 and accompanying text (discussing the weakness of a theory which seeks to aggregate the attacks conducted by a terrorist network in order to arrive at the threshold of intensity required for non-international armed conflict).

435. It is beyond the scope of this paper to determine the exact moment. While some authors believe it might have been as early as 2002-2003, a recent analysis of papers retrieved from Bin Laden’s compound in Abbottabad suggests that by 2010, drone strikes had effectively disrupted Al Qaeda’s internal communication system and its ability to carry out independent attacks. See sources cited *supra* note 431; Bergen, *supra* note 51. The German Federal Prosecutor notes that core Al Qaeda planned a series of failed attacks on Western targets and appears to factor those attacks into its assessment that Al Qaeda was a party to the conflict as of 2009. *Aerial Drone Deployment on 4 October 2010*, 157 I.L.R. at 732-33. This fails to properly acknowledge the implications of the rejection in the same ruling of a geographically unbound armed conflict, as well as the fact that apart from the United States, none of the states suffering terrorist attacks attributed to Al Qaeda considered itself in an armed conflict against the group.

436. The German Federal Prosecutor’s decision, relying on partially classified sources, states that Al Qaeda increased its capacity after 2005 but describes the function of Al Qaeda as recruiting, training, and financing individuals who join one of the myriad groups for attacks against Pakistani or Afghan government forces as well as ISAF. *Id.* at 732-33. Some of these activities may make those individuals legitimate targets of

report to Congress on the situation in Afghanistan noted that “Al Qaeda activities remained more focused on survival than on planning and facilitating future attacks.”⁴³⁷

Neither is it certain that current “counterterrorism operations” satisfy the intensity requirement for continuous applicability of IHL to the relationship between the United States and “Al Qaeda” groups in Afghanistan. Most of those operations were drone or air strikes against individuals. Despite the factual changes in the organizational capacity and structure of Al Qaeda, the U.S. government claims the group presents an “enduring threat.”⁴³⁸ On at least one occasion, in early October 2015, the United States and Afghan forces engaged in extended fighting with a group it associated with Al Qaeda, to dislodge two training camps the group had purportedly established in southern Afghanistan.⁴³⁹ While IHL rules may apply for the duration of such operations, their relative infrequency and the uncertainty surrounding the organizational structure of Al Qaeda raise serious doubts whether the United States and Al Qaeda remain parties to a conflict against each other in Afghanistan, and thus, whether IHL applies on a continuous basis.

Where the conditions for the applicability of IHL are not met, the United States cannot rely on the “law-of-war” to provide authority to detain individuals of these groups. In addition, *Hamdi* limited the authority to detain with the “duration of the relevant conflict,”⁴⁴⁰ which should be interpreted as reference to well-defined theaters of war. It is submitted here that unilateral strikes to prevent armed attacks,

attack insofar they participate directly in hostilities carried out by various insurgent groups that are a non-state party to a non-international armed conflict.

437. U.S. DEP’T OF DEF., *supra* note 402, at 25.

438. *Id.*

439. Josh Smith, *Joint US-Afghan Operation Targets Al-Qaida in Southern Afghanistan*, STARS & STRIPES (Oct. 13, 2015), <http://www.stripes.com/news/joint-us-afghan-operation-targets-al-qaida-in-southern-afghanistan-1.373063> (noting the five-day operation involved 200 Afghan and U.S. personnel and included 63 air strikes).

440. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (construing the AUMF to authorize detention for the “duration of the relevant conflict”).

even where lawful under the *ius ad bellum*, do not automatically trigger IHL rules on the use of lethal force.⁴⁴¹ It is unsettled whether monthly “pin-prick” attacks and two or three major operations with combined airstrikes and ground forces per year suffice to main the threshold of intensity necessary for armed conflict.⁴⁴² This article has argued that such violence is not sufficient for a “framework applicability” of IHL to all interactions between the foreign support force and the non-state actor, outside of the context of actual armed confrontations of sufficient intensity. Neither scenario would justify prolonged, status-based internment.⁴⁴³ In any case, the mere expectation of such operations could not on its own maintain the conditions for a continued detention authority of the United States under IHL.

VI. DOES IHL ALLOW INDEFINITE DETENTION?

Even if the facts on the ground in Afghanistan would not support a determination that hostilities have ended under international law, or one follows the United States position that its operations against Al Qaeda are part of a non-international armed conflict without geographical limitation, this does not mean that continued status-based detention at Guantánamo or in a transfer location inside or outside the United States would be lawful under IHL.⁴⁴⁴ IHL and international human rights law contain a strong presumption against indefinite

441. See Jelena Pejić, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, INT'L REV. RED CROSS 9 (2015) (arguing that the right to self-defense is a concept of the *jus ad bellum* and not a stand-alone legal regime governing the use of lethal force against individuals outside of armed conflict).

442. Akande, *supra* note 37, at 53 (arguing that occasional small attacks may give rise to applicability of IHL in a prolonged conflict).

443. See Vogel, *supra* note 21, at 296-97 (noting that acts of self-defense would not give rise to an authorization of “law of war detention”); see also Corn & Kaleemullah, *supra* note 335, at 264-65 (outlining military tactics that are permissible in the context of armed conflict, but that are impermissible within a law enforcement framework).

444. Under the principle of legality, internment of transferees in a third country would need a domestic source of authority in that country, and could not rely on IHL at all, unless that country is a party to a conflict with the relevant non-state actor. See *supra* note 85-88, and accompanying text.

detention.⁴⁴⁵ Article 110 GC III obliges State parties to release those prisoners whose illness or injury made them permanently unable to fight.⁴⁴⁶ Article 109 GC III also encourages parties to the conflict to release or intern in a neutral country able-bodied prisoners of war in “long captivity.”⁴⁴⁷ Article 72 of the 1929 Geneva Convention had contained a similar provision.⁴⁴⁸ In contrast to World War I, few countries were willing to entertain such an agreement during World War II.⁴⁴⁹ Yet, its adoption after World War II underlines the Third Geneva Convention’s aim to prevent very long periods of captivity.⁴⁵⁰

World Wars I and II lasted four years, considerably less than many non-international armed conflicts today, and less than a third of the current engagement of the United States in Afghanistan.⁴⁵¹ It is hard to believe that the Diplomatic Conference envisaged authorizing status-based internment in a conflict of more than ten years, against an enemy with whom no negotiations were envisaged or thought possible, and whose

445. See *International Law Prohibits Arbitrary Detention*, DETENTION WATCH NETWORK (last visited Jan. 24, 2016), <http://www.detentionwatchnetwork.org/prohibitionagainstarbitrarydetention> (describing various applicable human rights laws and policies against indefinite detention); Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 17 (2005) (discussing the universal norm against arbitrary deprivations of liberty).

446. See GC III, *supra* note 20, art. 110 (describing conditions for the repatriation of prisoners of war who are wounded and sick).

447. See GC III, *supra* note 20, art. 109 (describing the understanding between nations to make accommodations for sick and wounded prisoners).

448. See 1929 GPW, *supra* note 313, art. 72 (stating that during hostilities, belligerents “may conclude agreements with a view to the direct repatriation or hospitalization in a neutral county of able-bodied prisoners of war who have undergone a long period of captivity”).

449. See *generally* Pearlstein, *supra* note 21, at 638, n.72 (discussing consequences arising from several repatriation agreements between nations during World War II).

450. See Int’l Comm. of the Red Cross, *Analysis for the Use of National Red Cross Societies* 21 (1950) (describing GC III provisions regarding accommodation of prisoners in long term captivity); Pearlstein, *supra* note 21, at 649, n.145 (discussing the repatriation of injured prisoners of war during the U.S. military involvement in Vietnam).

451. See Vincent Bernard, *Editorial: Understanding Armed Groups and the Law*, 93 INT’L REV. RED CROSS 261, 261 (2011) (noting several non-international armed conflicts, including the conflict in Afghanistan, that have been ongoing for decades).

form shifted with the different phases of the conflict. An unlimited detention authority based on transnational hostilities against a network of non-state actors and their successors certainly presents an “unraveling” of the understanding under which the Geneva Conventions were created, and would thus be beyond the authority to detain implied in the AUMF.⁴⁵²

A similar presumption against indefinite detention prevails in non-international armed conflict.⁴⁵³ Most domestic security detention laws provide for periodic review and a maximum length of detention.⁴⁵⁴ In a recent survey of review procedures in 21 jurisdictions, conducted for the U.N. Special Rapporteur on Arbitrary Detention, the Oxford Faculty of Law concluded there was a “strong trend . . . toward setting a maximum time limit on detention” which “may support an argument for the emergence of a norm of customary international law forbidding administrative detention [for national security reasons] that has no maximum duration.”⁴⁵⁵ Likewise, U.S. constitutional law

452. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (“If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”); *see also Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (Breyer, J., respecting the denial of certiorari) (stating that the Supreme Court has not yet decided whether the AUMF or the U.S. Constitution limited the length of detention).

453. *See Deeks, supra* note 135, at 413 (discussing the scarcity of international rules on domestic conflict, where laws on detention are informed by human rights law. Parties to the ICCPR must ensure individuals are not subjected to unlawful detention) and 435 (arguing, against assumed State preference, that detainees should have more procedural rights the longer their confinement lasts).

454. *See id.* at 422-33 (giving examples of State practice providing access to administrative or judicial review of internment).

455. OXFORD PRO BONO PUBLICO, REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE A COURT: A COMPARATIVE AND ANALYTICAL REVIEW OF STATE PRACTICE 15 (2014); *see Deeks, supra* note 135, at 403-04 (noting that detention during armed conflict is generally governed by the GC III). The Israeli Emergency Powers Law of 1979 allows detention up to a total of 6 months, the Unlawful Combatant Detention Law of 2002 knows no time limit, but foresees judicial review every six months. *Id.* at 423-24. The Indian National Security Act foresees detention of maximum one year, the Jammu and Kashmir Public Safety Act up to 2 years. *Id.* at 426. The Sri Lankan Prevention of Terrorism Act of 1979 allows detention for up to 18 months, renewable every three months. *Id.* at 425-26. The United Kingdom provided the strongest judicial

disfavors indefinite detention. In *Zadvydas* and *Martinez*, two cases concerning the constitutional limit to the power to intern immigrants with a removal order, the U.S. Supreme Court found that the due process clause forbade detention beyond what was “reasonably necessary” for removal from the United States, and imposed a 6-month limit on detention where there is no prospect of removal.⁴⁵⁶ It did mention possible exceptions, notably concerns for public safety or national security if an alien is released.⁴⁵⁷ These are precisely the provisions under which the government purports to hold detainees from Guantánamo, once they have been transferred to the United States.⁴⁵⁸ While some lower courts have upheld a prolonged administrative detention authority in the immigration context, the U.S. Supreme Court has not yet ruled on such a case.⁴⁵⁹ Arguably, the U.S.

reprimand for indefinite detention in the 2004 judgment *A et al. v. Sec’y of State for the Home Dep’t*, Judgment, ¶ 74 (Dec. 16, 2004).

456. *Id.* at 699-701; *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (reasoning that indefinite detention of two admitted aliens, who were permanent residents with a removal order based on their conviction for aggravated felonies “would raise serious constitutional concerns”). *Clark v. Martinez*, 543 U.S. 371, 384-86 (2005) (holding that *Zadvydas* extends to aliens in removal proceedings who are inadmissible because of prior criminal convictions); Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (asserting the Administration would not impose indefinite military detention on American citizens).

457. *See Clark v. Martinez*, 543 U.S. at 386, n. 8 (noting certain exceptions set forth by Congress to the limited detention period set out in *Zadvydas*).

458. *See U.S. DEP’T OF JUSTICE*, *supra* note 68, at ¶ 4 (arguing that § 412 of the U.S.A. Patriot Act would provide authority to detain internees transferred from Guantánamo to the United States); McKeon, *supra* note 50, at 11 (“[I]n the event detainees were relocated to the United States, existing statutory safeguards and executive and congressional authorities provide robust protection of national security.”).

459. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1256-57 (10th Cir. 2008) (authorizing the prolonged detention of illegal immigrants who pose a threat to public safety); *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565, 566 (D. Md. 2010) (upholding the authority of Immigration & Customs Enforcement (ICE) to detain a Mariel Cuban convicted for an aggravated felony, finding her dangerous to the public due to her mental illness 19 years after the issuance of an exclusion order and 14 years in immigration detention). For a discussion of 8 C.F.R. § 241.14(c) *see* Catherine Wauters, Comment, *No Alien Left Detained? A Not So “Specially Dangerous” Exception to the Government’s Limited Detention Authority*, 21 GEO. MASON L. REV. 275, 277 (2013) (arguing that the due process afforded by the “specially dangerous exception” to release after 6 months for unremovable aliens are similar to those applied to U.S. citizens facing

Constitution requires in such cases judicial review of the necessity of continued detention, not only of the lawfulness of the initial detention authority.⁴⁶⁰ This may provide little protection against indefinite detention of detainees transferred to the United States from Guantánamo, as long as judges continue to grant extreme deference to the Executive and minimal due process to the detainees during the determination of dangerousness.⁴⁶¹ This is of obvious concern to those who wish to avoid the introduction of such a practice in United States domestic law, or its entrenchment in international law in general. Of equal concern is the effect United States' interpretation of IHL has on future detention in non-international armed conflict, whether waged by the United States or by other countries. As this article argues, IHL would not provide an authority to intern based on status alone until the end of hostilities, or indefinitely beyond the end of hostilities, and the AUMF 2001 or any subsequent force authorization should not be construed in that way.

VII. CONCLUSION

The end of active hostilities has two effects under international law: it triggers a positive obligation to release and, where necessary, repatriate prisoners of war and security internees in an international armed conflict.⁴⁶² Cessation of hostilities also ends the permissive aspects of IHL, such as detention authority and rules on the use of lethal force.⁴⁶³ Certain protective provisions of IHL continue to apply for persons who remain in detention or otherwise vulnerable

civil commitment under the Adam Walsh Act and thus constitutionally sufficient). *C.f.* Maria Sacchetti, *Cuba Deal Brings Deportation Questions*, BOS. GLOBE (Dec. 26, 2014), <http://www.bostonglobe.com/metro/2014/12/26/renewing-ties-with-cuba-raises-questions-about-deportees/582QN7xALGUqep0oL4Wd2L/story.html> (discussing the attempted repatriation of Cubans who are mentally or who have committed crimes).

460. See Wauters, *supra* note 431 (discussing the Constitutional requirements for *continued* detention).

461. Rona, *supra* note 68.

462. Levie, *supra* note 201, at 419.

463. See Fischer, *supra* note 194, at 415.

because of the armed conflict.⁴⁶⁴ But this does not mean that such continued detention is lawful under IHL. The lack of a proper definition of “hostilities” in international law, and the need for simple rules of targeting in non-international armed conflict, caution against the adoption of too complex criteria to determine when State armed forces become party to a pre-existing non-international armed conflict. This is particularly relevant when IHL rules are expected to phase out at the end of a non-international armed conflict with foreign intervening forces, as non-state actors will rarely be able to distinguish between soldiers from different coalition forces performing different roles in the post-combat mission.⁴⁶⁵ Even more important is it to limit detention authority in a non-international armed conflict to situations where internment is necessary and proportionate to the risk an individual poses to a foreign intervening force.

This article has argued that status-based detention in non-international armed conflict is not a correct interpretation of IHL norms and State practice before 2001. It is rather doubtful it could ever be justified under human rights law: there is no strong IHL rule that could displace the requirement of necessity for detention without trial in human rights law. Where status-based detention is asserted as an authority implied in IHL, release must happen at the end of active hostilities, either out of a positive treaty obligation to release and repatriate, or because IHL ceases to provide any authorities to intern once hostilities have ceased. A failure to release conflict-related detainees where continued detention is no longer necessary, or beyond applicability of IHL, violates the prohibition of arbitrary detention and the presumption against indefinite detention under international law.

464. For examples of protective provisions in the Geneva Conventions that apply after the end of an armed conflict see GC IV, *supra* note 31, art. 6; AP II, *supra* note 32, art. 2(2).

465. Dinstein, *supra* note 39, at 416 (noting that “from the perspective of the battlefield,” it may be hard to determine the moments of transition in the applicable law).

Where the authority to intern is based on, and linked to, the mere existence of ongoing hostilities, as is the case under the AUMF/NDAA 2012/habeas jurisprudence, “active hostilities” should be construed narrowly and be limited to concrete armed confrontations between two organized actors in a particular region. State practice, including the practice of the United States in active theaters of war related to 9/11, confirms that the status-based internment in Guantánamo is a distortion of the law on detention in non-international armed conflict and unsustainable as a matter of law and practice. It should thus not serve as a basis for customary rules on detention and release in such conflicts, and should not lead to a permanent erosion of human rights protection against indefinite detention.