THE CASE FOR STRATEGIC U.S. DETENTION POLICY

MAJOR ELISABETH GILMAN*

There is surprisingly little discussion in the policy or academic realms of precisely how detention fits within a broader U.S. and allied strategy to combat terrorism, or more specifically al Qaeda.[1]

I. Introduction—Capturing Osama bin Laden

On May 15, 2011, the United States launched a covert military operation to capture or kill Osama bin Laden.[2] Just after midnight,

---

* Judge Advocate, United States Army. Presently assigned as Deputy Staff Judge Advocate, Special Operations Command, Pacific, Camp H.M. Smith, Hawaii. LL.M., 2015, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2005, Quinnipiac University School of Law; B.A., 2001, Salisbury University, Salisbury Maryland. Previous assignments include Administrative Law Attorney, I Corps, Joint Base Lewis-McChord, Washington, 2013–2014; Senior Trial Counsel, I Corps, Joint Base Lewis-McChord, Washington, 2012–2013; Chief, Administrative Law and Detention Operations, Joint Special Operations Task Force, Afghanistan, 2011–2012; Trial Attorney, Contracts and Fiscal Law Division, U.S. Army Legal Service, Ballston, Virginia, 2009–2011, Defense Counsel/Senior Defense Counsel, Camp Victory, Iraq,2008–2009, Defense Counsel, Fort Polk, Louisiana 2007–2008; Chief, Legal Assistance, Camp Humphreys, Korea, 2006–2007; Member of the Bars of New York, Connecticut and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

[1] Matthew C. Waxman, *Administrative Detention of Terrorists, Why Detain, and Detain Whom*, 3 J. of Nat'l. Sec. Law and Pol'y 12 (2009).

[2] This purely fictional scenario is based in part on the following article: Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER, (Aug. 8, 2011), http://www.newyorker.com/magazine/2011/08/08/getting-bin-laden. *See generally Osama bin Laden Biography (1957-2011)*, BIOGRAPHY, http://www.biography.com/people/osama-bin-laden-37172#synopsis (last visited June 8, 2016).

> Osama bin Laden was born in Riyadh, Saudi Arabia, in 1957. When the Soviet Union invaded Afghanistan in 1979, bin Laden joined the Afghan resistance. After the Soviet withdrawal, bin Laden formed the al-Qaeda network which carried out global strikes against Western interests, culminating in the September 11, 2001, attacks on the World Trade Center and the Pentagon. On May 2, 2011, President Barack Obama announced that bin Laden had been killed in a terrorist compound in Abbottabad, Pakistan.

twelve elite military special operators boarded two MH-60 Blackhawk helicopters heading from eastern Afghanistan into neighboring Pakistan. Intelligence suggested bin Laden was living in a three-story home located in a middle-class neighborhood a mile from the entrance to a prestigious military academy in Abbotabad, Pakistan.

One of the operators, referred to here as "John," boarded his helicopter feeling uneasy. Notwithstanding dozens of kill/capture missions, pre-mission jitters never went away. That said, this mission was different; it felt more like a suicide mission than a capture/kill mission. Briefing the mission, even his troop commander seemed wary of the chances of success, never mind the chances of survival. If things went sideways, there was no quick reaction force to send in as back-up. John and the rest of his team knew if they were captured, the United States would deny the mission in an effort to preserve diplomatic relations with Pakistan and save face around the world. TSixteen Americans—twelve operators and four pilots—risked their lives during the early hours of May 15th to finally get the mastermind of 9/11. Dead or alive.

After a short and surprisingly uneventful flight across the border into Pakistan, under the cover of darkness, the two helicopters landed just a few blocks from the target compound seemingly undetected. Using ladders to scale the high walls of the compound, the special operators infiltrated. They were as prepared as they could be, but had no idea what to expect. Would the entire compound be rigged with explosives, ready to implode once the walls were breached? Would men with suicide vests hurl themselves at John and his teammates? Would snipers be waiting on the rooftop to pick them off one by one?

Luckily, the answer to those questions was "no." Instead the house was dark and quiet; so much so, he was skeptical they were in the right place—bin Laden would not let his guard down like this—or would he? Maybe bin Laden became complacent, or maybe the ambush would occur once they entered the house.

See also Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden, THE WHITE HOUSE (May 2, 2011, 12:03 AM), http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden.

After breaching the walls, John and his team entered the house through the rear entrance as the second team pulled security outside the compound leaving a small element behind to protect the helicopters. John was the second inside and was immediately confronted by a middle-aged man carrying an AK-47. As soon as the man raised his weapon, John knew they were in the right place. Instantly, John shot and killed him. Now the adrenaline was pumping and the jitters were gone. Room by room, John and his team cleared the first floor. On to the second floor, they found three young children sleeping. One more floor to go—John knew bin Laden was up there. His heart was pounding so hard, it felt like it was going to jump out of his chest. Positive that bin Laden would not be taken alive, John was expecting a fight.

The pre-mission briefing just prior to take-off was the first time John and his teammates were told that Osama bin Laden was the target. Rumors were floating around camp that it was bin Laden, but there were always rumors. After ten years of hunting for the most wanted terrorist in the world, John did not get his hopes up. The operators all received photos of bin Laden as well as the other individuals believed to be occupying the compound. The troop commander's order during the pre-mission briefing was to capture or kill Osama bin Laden.

John was the first man up the stairs to the third floor. As he began to scan and clear the room he saw an older, bearded man resembling Osama bin Laden in the left corner of the room next to a bed, crouching behind a young woman wearing a burka. John was sure she was loaded with explosives. Immediately, bin Laden began to stand; as he stood and got taller and taller, John knew it was him. Bin Laden was yelling something in Arabic as he began raising his hands. "He has a weapon," John thought. In a flash, John raised his weapon and aimed it at bin Laden. As he was about to fire, he heard his translator, Amil, yelling "stop" and "surrender." As John processed these words he saw that bin Laden was not holding a weapon, instead, he was raising his arms in an effort to surrender, along with the young woman he was using as a shield. John removed his finger from the trigger, keeping his weapon aimed center-mass at bin Laden.

Once the chaos subsided, John and his team gathered and searched all the occupants in the house. It turned out there were several men, women, and children hiding behind a false door underneath the stairwell. Neither bin Laden nor any of the other occupants were wearing suicide

vests, nor was the house rigged with explosives. Aside from a small arsenal of AK-47s and a few knives, no other weapons were recovered.

After quickly gathering anything of potential intelligence value, bin Laden was loaded onto John's helicopter. A few members of John's team briefly questioned the remaining occupants before leaving them behind. The two teams got out of there just in time. Locals were beginning to become curious and started surrounding the helicopters and asking questions.

As the aircraft lifted off the ground in Abbotabad, Pakistan, carrying all of the original passengers, plus one very important additional passenger, the sun began to peak behind the mountains. John looked over at bin Laden, his eyes blindfolded and his hands cuffed. For the first time, it really hit him: "We captured Osama bin Laden!" Then he paused and thought, "Now what the hell are we going to do with him?"

This fictional scenario illustrates the critical need for a strategic U.S. detention policy to temporarily detain and interrogate high-value Unprivileged Enemy Belligerents (UEBs).[3] The closure of detention

---

[3] The terms Unprivileged Enemy Belligerent (UEB) and Unlawful Enemy Combatant (UEC) are synonymous. For continuity and to reflect the current terminology used by Congress and the Department of Defense (DoD), this paper will use the term Unprivileged Enemy Belligerent. The Military Commissions Act of 2009, Pub. L. 111-84, div. A, title XVIII, Oct. 28, 2009, 123 Stat. 2574, § 948a [hereinafter MCA 2009]. The Military Commissions Act of 2009 defines UEB as

> [A]n individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

Id.; *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETAINEE OPERATIONS, at I-4 (13 Nov. 2014) [hereinafter JP 3-63]. Joint Publication 3-63 defines Unprivileged Enemy Belligerent as:

> [B]elligerents who do not qualify for the distinct privileges of combatant status (e.g., combatant immunity). Examples of unprivileged belligerents are:
> (a) Individuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non-state armed group in the conduct of hostilities, and

facilities in Iraq and Afghanistan, combined with restrictions on sending detainees to Guantánamo Bay, make it imperative for the United States to establish a workable, cohesive structure for detaining and interrogating terrorists and other dangerous foreign fighters who qualify as high-value UEBs, through policies consistent with the Law of Armed Conflict (LOAC).[4]

Part I of this article explores the development of detention operations under the LOAC in the United States since September 11, 2001 (9/11) and advocates for establishing a world-wide strategic detention capability. Part II of this paper examines why the United States needs a formal detention and interrogation policy.[5] Part III discusses the

---

> (b) Combatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines.

Id.; *but see* DEP'T OF ARMY, FIELD MANUAL 3-63, DETAINEE OPERATIONS (Apr. 2014) [hereinafter FM 3-63]; DEP'T OF ARMY FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS paras. 34-52 (2006) [hereinafter HUMAN INTEL. OPER.] (utilizing the term "enemy combatant").

[4] U.S. DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF WAR paras. 2, 4 (18 July 1956) [hereinafter LAW OF WAR].

> The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:
>
> a. Protecting both combatants and noncombatants from unnecessary suffering;
> b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
> c. Facilitating the restoration of peace.
>
> The law of war is derived from two principal sources:
> a. Lawmaking Treaties (or Conventions), such as the Hague and Geneva Conventions.
> b. Custom. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

Id.

[5] Although this paper focuses on the need to create a strategic detention and interrogation capability with respect to the armed conflict between the United States and al-Qaeda and associated forces, the proposed detention paradigm could also apply to other non-

evolution of detention and interrogation operations since 9/11. Finally, Part IV analyzes the legal framework that allows for a meaningful and effective detention and interrogation program and Part V provides a proposed LOAC detention and interrogation paradigm.

II. The Problem—Nowhere to Go

In the thirteen years since the United States declared a global "war on terror,"[6] the U.S. government has neglected to develop a cohesive national detention and interrogation policy capable of facilitating the detention and interrogation of terrorists and hostile foreign fighters.[7] Despite a stated preference for detention of UEBs,[8] the United States has failed to create a LOAC detention policy or designate an actual detention site. As a result of this inaction, detention is currently not a viable option

---

international armed conflicts between the United States and non-state actor terrorist organizations such as the Islamic State in the Levant (ISIL). There is currently a proposal for a new Authorization for Use of Military Force (AUMF) against ISIL. *See generally Joint Resolution to Authorize the Limited Use of the United States Armed Forces Against the Islamic State of Iraq and the Levant*, THE WHITE HOUSE, http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf (last visited June 8, 2016).

[6] *See generally Transcript of President Bush's Address to a Joint Session of Congress on Thursday Night, September 20, 2001*, CNN, (Sept. 21, 2001, 2:27 AM), http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/ (quoting President Bush declaring a "war on terror" before Congress on September 20, 2001, stating "Our war on terror begins with al Qaeda, but it does not end there."). *But see* Al Kamen, *The End of the Global War on Terror*, WASH. POST (Mar. 24, 2009), http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html. The Obama administration has replaced use of the term Global War on Terror (GWOT) with Overseas Contingency Operation (OCO). *Id. See also Remarks by the President at the National Defense University*, WHITE HOUSE (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("Beyond Afghanistan, we must define our effort not as a boundless global war on terror, but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.").

[7] *See, e.g.*, Enemy Belligerent, Interrogation Detention and Prosecution Act of 2010, S.3081, 111th Cong. (2010) (referred to the Committee on the Judiciary Mar. 4, 2010). This failed bill was never voted on by Congress. *Id.* It was "[A] bill to provide for the interrogation and detention of enemy belligerents who commit hostile acts against the United States, to establish certain limitations on the prosecution of such belligerents for such acts, and for other purposes." *Id.*

[8] *Remarks by the President at the National Defense University*, *supra* note 6 ("And that brings me to my final topic: the detention of terrorist suspects. I'm going to repeat one more time: As a matter of policy, the preference of the United States is to capture terrorist suspects. When we do detain a suspect, we interrogate them.").

for commanders conducting military operations. This status quo is untenable. Military commanders have the authority[9] and deserve the ability to detain under the LOAC. More importantly, the U.S. government should be afforded the opportunity to benefit from the strategic intelligence that can be gained through interrogating high-value UEBs.[10]

A. The Stigma

Unfortunately, the topics of detention and interrogation are taboo among Americans today. Since the fall-out over post-9/11 detainee abuses at Abu Ghraib,[11] CIA black sites,[12] and Guantánamo Bay,[13]

---

[9] See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (recognizing the importance of detention in an armed conflict:

> The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.

Id. (internal citations omitted). *See also* Bruce "Ossie" Oswald & Thomas Winkler, *The Copenhagen Process on the Handling of Detainees in International Military Operations*, *The Copenhagen Process: Principles and Guidelines* 16 AMER. SOC. INT'L. L. 39 (2012) ("Participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations.").

[10] *Remarks of John O. Brennan, Strengthening our Security by Adhering to our Values and Laws*, WHITE HOUSE (September 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an ("Intelligence disrupts terrorist plots and thwarts attacks. Intelligence saves lives. And one of our greatest sources of intelligence about al-Qa'ida, its plans, and its intentions has been the members of its network who have been taken into custody by the United States and our partners overseas.").

[11] *See generally Iraq Prison Abuse Scandal Fast Facts*, CNN (November 7, 2014, 12:41 PM), http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/ ("Abu Ghraib prison was a U.S. Army detention center for captured Iraqis from 2003 to 2006. The prison was located [twenty] miles west of Baghdad on 280 acres."). *See also* James R. Schlesinger et al., *Final Report of the Independent Panel to Review DoD Detention Operations* 11 (2004), http://www.defense.gov/news/aug2004/d20040824 finalreport.pdf ("Of the seventeen detention facilities in Iraq, the largest, Abu Ghraib, housed up to 7000 detainees in October 2003, with a guard force of only about [ninety] personnel from the 800th Military Police Brigade. Abu Ghraib was seriously overcrowded, under-resourced, and under continual attack."); *see also* Antiono M. Taguba, Army Regulation 15-6 Report of Investigation of the 800th Military Police Brigade (26 Feb. 2004) [hereinafter Taguba, AR 15-6 Investigation] (on file with author) ("[B]etween October and December 2003, at the Abu Ghraib Confinement Facility

Congress and the American people have largely ignored the need to create a LOAC detention capability because it is such an emotionally charged and politically divisive topic.

1. Abu Ghraib

Congress's reluctance to meaningfully address LOAC detention is understandable. In 2004, in the wake of the Abu Ghraib scandal, vivid images of horrific detainee abuses were plastered across television screens and newspapers around the world.[14] The photographs said it all:

> In one, Private England, a cigarette dangling from her mouth, is giving a jaunty thumbs-up sign and pointing at the genitals of a young Iraqi, who is naked except for a sandbag over his head, as he masturbates. Three other hooded and naked Iraqi prisoners are shown, hands reflexively crossed over their genitals. A fifth prisoner has his hands at his sides. In another, England stands

---

(BCCF) [The BCCF (Baghdad Central Confinement Facility) was also known as Abu Ghraib], numerous instances of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.").

[12] *See generally Committee Releases Study of the CIA's Detention and Interrogation Program* (Dec. 9, 2014), http://www.intelligence.senate.gov/study2014.html.

[13] *See generally Guantánamo Bay Naval Station Fast Facts*, CNN (Feb. 20, 2015), http://www.cnn.com/2013/09/09/world/Guantánamo-bay-naval-station-fast-facts/.

> In response to the 9/11 attacks in 2001, and subsequent military operations in Afghanistan, existing migrant detention facilities at Guantánamo were re-purposed to hold detainees in the "war on terror." During the administration of President George W. Bush (2001–2009), the [United States] claimed that Guantánamo Bay detainees were not on U.S. soil and therefore not covered by the U.S. [C]onstitution, and that "enemy combatant" status meant they could be denied some legal protections. Shortly after his inauguration in 2009, President Barack Obama signed an executive order to close the detention facilities within one year. However, the facilities are still open as of 2015. There are 122 detainees at Guantánamo Bay as of February 2015. The number of detainees held at Guantánamo since it opened exceeds 750. At least seven detainees have died in custody.

Id.

[14] Schlesinger et al., *supra* note 11, at 13. ("Concerning the abuses at Abu Ghraib, the impact was magnified by the fact the shocking photographs were aired throughout the world in April 2004.").

> arm in arm with Specialist Graner; both are grinning and giving the thumbs-up behind a cluster of perhaps seven naked Iraqis, knees bent, piled clumsily on top of each other in a pyramid . . . . Yet another photograph shows a kneeling, naked, unhooded male prisoner, head momentarily turned away from the camera, posed to make it appear that he is performing oral sex on another male prisoner, who is naked and hooded.[15]

These images shocked the conscious and are forever embedded in the minds of Americans. They brought shame on the United States and rallied enemies abroad.[16] The abuses were the subject of thorough and comprehensive investigations into the events leading up to and causing the detainee abuse,[17] resulting in the criminal prosecution of the soldiers responsible,[18] and the Department of Defense (DoD) overhauling the detainee treatment program.[19] Yet, the stigma from Abu Ghraib persists.[20]

---

[15] Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

[16] *See* Cheryl Benard et al., *The Battle Behind the Wire*, NAT'L DEF. RES. INST. 12 (2011), http://www.rand.org/content/dam/rand/pubs/monographs/ 2011/RAND_MG934.pdf ("The Abu Ghraib prisoner abuse scandal and its successful use by insurgents in propaganda against the United States is a powerful example of how detention operations are not a coincidental product of a conflict but are a central part of shaping the ongoing counterinsurgency campaign and post-conflict outcomes."); *see also 12 Dead in Attack on Paris Newspaper Charlie Hebdo*, N.Y. TIMES (Jan. 7, 2015, 11:09 PM), http://www.nytimes.com/aponline/2015/01/07/world/europe/ap-eu-france-newspaper-attack.html. Cherif Kouchi, one of the terrorists responsible for the attack on the Charlie Hebdo office in Paris was inspired in part by the Abu Ghraib prison abuse scandal. *Id.*

[17] *See, e.g.*, Schlesinger et al., *supra* note 11, at 11; Taguba AR 15-6 Investigation, *supra* note 11; Anthony R. Jones, Army Regulation 15-6 Report of Investigation of the Abu Ghraib Detention Facility and 20th Military Intelligence Brigade (n.d.) [hereinafter Jones AR 15-6 Investigation] (on file with author); George R. Fay, Army Regulation 15-6 Report of Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (n.d.) [hereinafter Fay AR 15-6 Investigation] (on file with author).

[18] *Iraq Prison Abuse Scandal Fast Facts*, *supra* note 13. Eleven soldiers were convicted at courts-martial. *Id.* Staff Sergeant Ivan "Chip" Fredrick II received eight years confinement, Private First Class Lynndie England received three years confinement and Specialist Charles Graner received ten years confinement. *Id.*

[19] Four pivotal documents established a new foundation for conducting U.S. detention operations: Detainee Treatment Act of 2005, Public Law No. 109-163, title XIV [hereinafter DTA 2005] (prohibiting "cruel, inhuman, or degrading treatment or punishment" and creating uniform interrogation standards); HUMAN INTEL. OPER., *supra* note 4 (providing "doctrinal guidance, techniques, and procedures governing the employment of human intelligence (HUMINT) collection . . . the only interrogation approaches and techniques that are authorized for use against any detainee . . . are those

2. Central Intelligence Agency "Black Sites"

More recently, the release of the Senate Select Committee on Intelligence's study of the CIA's Detention and Interrogation Program[21] forced America and the world to relive the dark days following 9/11.[22] The report found that "[Central Intelligence Agency] (CIA) personnel, aided by two outside contractors, decided to initiate a program of indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law, treaty obligations, and values."[23] The study covers the CIA's detention and interrogation program from late 2001 through 2009[24] and details abuse of detainees including water-boarding, sleep-deprivation, nudity, slamming detainees against walls, sensory deprivation, solitary confinement, and rectal rehydration.[25]

This report substantiated what many Americans and the rest of the world suspected about the CIA's treatment of detainees in the wake of

---

authorized and listed in this Field Manual"); U.S. DEP'T OF DEF., DIR. 2311.01E, LAW OF WAR PROGRAM (9 May 2006) [hereinafter LAW OF WAR PROGRAM] (mandating DoD compliance with the Law of War); and U.S. DEP'T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DETAINEE PROGRAM] (requiring humane treatment of detainees "in accordance with U.S. law, the law of war and applicable U.S. policy").

[20] *See* Benard et al., *supra* note 16, at xiii.

[21] *Committee Releases Study of the CIA's Detention and Interrogation Program*, *supra* note 13.

[22] *See also* Mark Mazzetti, *Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations*, N.Y. TIMES (Dec. 9, 2014), http://www.nytimes.com/2014/12/10/world/senate-intelligence-committee-cia-torture-report.html.

> Taken in its entirety, the report is a portrait of a spy agency that was wholly unprepared for its new mission as jailers and interrogators, but that embraced its assignment with vigor. The report chronicles millions of dollars in secret payments between 2002 and 2004 from the [Central Intelligence Agency (CIA)] to foreign officials, aimed at getting other governments to agree to host secret prisons.

Id.

[23] *Committee Releases Study of the CIA's Detention and Interrogation Program*, *supra* note 12, forward.

[24] *Id*. (finding the majority of the abuse discussed throughout the report occurred before 2004).

[25] *Id*. at Executive Summary 3.

9/11.[26] Allegations of rampant abuse, enhanced interrogation techniques, and extraordinary renditions were verified.[27] The report also called into question the effectiveness of the enhanced interrogation techniques and cast doubt as to whether they were successful in gathering actionable intelligence. [28] Unfortunately, this report also reinforced the misconception that U.S. detention operations are nefarious by nature and detainees in U.S. custody are treated in a manner that is both legally and morally reprehensible.

3. Guantánamo Bay Naval Base

Finally, detention at the Guantánamo Bay Naval Base[29] has raised serious concerns about both the legal protections afforded to detainees

---

[26] *See generally Reaction to the CIA Report*, USA TODAY (Dec. 10, 2014, 6:15 AM), http://www.usatoday.com/story/news/nation/2014/12/09/cia-torture-report-reaction/20153623/ (responding to the Senate Select Committee Report, President Obama reaffirmed his commitment against using enhanced interrogation techniques). "[T]hese techniques did significant damage to America's standing in the world and made it harder to pursue our interests with allies and partners. That is why I will continue to use my authority as President to make sure we never resort to those methods again." *Id.* ; *See also* Ray Sanchez, *World Reacts to U.S. Torture Report*, CNN (Dec. 11, 2014, 4:43 PM), http://www.cnn.com/2014/12/10/world/senate-torture-report-world-reaction/. (The CIA's actions were condemned by various nations around the world, to include leaders in Russia, China, Pakistan, and North Korea. *Id.* There were also calls for criminal prosecutions of the individuals responsible for the activities detailed in the report).

> [United Nations] Special Rapporteur on Counter Terrorism and Human Rights Ben Emmerson called on the [United States] to prosecute those responsible for crimes outlined in the report. Emmerson said the program was "a clear policy orchestrated at a high level within the Bush administration, which allowed . . . systematic crimes and gross violations of international human rights law.

Id.

[27] *Committee Releases Study of the CIA's Detention and Interrogation Program*, *supra* note 12.

[28] Mazzetti, *supra* note 22 ("The Intelligence Committee's report . . . present[s] [twenty] case studies that bolster its conclusion that the most extreme interrogation methods played no role in disrupting terrorism plots, capturing terrorist leaders, or even finding Bin Laden.").

[29] The debate over the proper disposition of the remaining detainees currently held at Guantánamo Bay is beyond the scope of this article. The purpose of this article is to advocate for the establishment of a strategic detention policy that will avoid the myriad of legal and ethical issues the United States is currently facing concerning what to do with the detainees held at Guantánamo Bay. *See* Robert Chesney, *Leaving Guantanamo: The*

and the treatment of detainees.[30] One detainee recently published a diary detailing the abuses he suffered at the hands of his interrogators.[31] In the diary, he recounted systematic abuses that included extended sleep deprivation, detention in a freezing cell, beatings, threats against his safety, and threats that his mother would be gang-raped.[32] Mistreatment of detainees at Guantánamo Bay,[33] combined with the failure to implement an effective long-term strategy for what to do with detainees held there, has undermined U.S. credibility[34] and soured Americans against the idea of military detention.[35]

4. Necessary Changes

Since 2005, the United States has significantly reformed its detention policies and practices.[36] One of the most important pieces of legislation pertaining to detention operations is the Detainee Treatment Act (DTA) of 2005[37] (DTA). This law prohibits "cruel, inhuman, or degrading treatment or punishment" of detainees "in the custody or physical

---

Law of International Detainee Transfers, SOCIAL SCI. RES. NETWORK (Oct. 25, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=.

[30] *Guantánamo Bay Naval Station Fast Facts, supra* note 13.

[31] MOHAMEDOU OULD SLAHI, GUANTÁNAMO DIARY (Larry Siems ed., 2015).

[32] *From Inside Prison, a Terrorism Suspect Shares His Diary 'Guantánamo Diary' by Mohamedou Ould Slahi*, N.Y. TIMES, (Jan. 25, 2015), http://www.nytimes.com/201501/26/arts/Guantánamo-diary-by-mohamedou-ould-slahi.html.

[33] *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, CENT. FOR CONST'L RIGHTS 15 (July 2006), http://ccrjustice.org/files/Report_ReportOnTorture.pdf ("Prisoners in Guantánamo have reported being exposed to extraordinary psychological and physical abuse. In addition to abusive interrogation practices, prisoners report harsh disciplinary measures.").

[34] Alyssa Fetini, *A Brief History of Gitmo*, TIME (Nov. 12, 2008), http://content.time.com/time/nation/article/0,8599,1858364,00.html (quoting Scott Silliman, a law professor at Duke University and director of the Center on Law, Ethics and National Security stating, "Guantánamo Bay, for most people, is a lightning rod for everything that's wrong with the United States.").

[35] Benard et al., *supra* note 16, at 1. ("'Guantánamo Bay' and 'Abu Ghraib' became provocative shorthand terms for examples of how detainee operations could go wrong if clear and current doctrine did not exist.").

[36] *See supra* note 19 and accompanying sources. *See also Executive Order 13,491–Ensuring Lawful Interrogation*, WHITE HOUSE (Jan. 2009), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/ (requiring closure of all CIA detention sites, limiting interrogation techniques for all detainees held in U.S. custody to those listed in Field Manual 2-22.3, and guaranteeing to the International Committee of the Red Cross (ICRC) "timely" access to all detainees in U.S. custody). *See also* HUMAN INTEL. OPER., *supra* note 19.

[37] 2005 DTA, *supra* note 19.

control" of the U.S. Government and requires compliance with the *Army Field Manual on Intelligence Interrogations* (essentially outlawing the use of enhanced interrogation techniques).[38]

As a result of the 2005 DTA, all individuals in U.S. custody regardless of status are treated humanely in accordance with Common Article 3 to the Geneva Conventions.[39] In fact, detainees in U.S. custody often receive treatment superior to the standards required under international law.[40] Despite undergoing a complete overhaul to ensure

---

[38] *See supra* note 19 and accompanying sources.

[39] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]. Common Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id.

[40] *See, e.g.*, Rebecca Mopper & Jacqueline Pimpinelli, *Confirmed U.S. Detention Facilities in Afghanistan*, N. Y. L. SCH., http://www.detainedbyus.org/detention/confirmed-sites/#_edn25 (last visited Mar. 17, 2016).

U.S. detention operations fully comply with both domestic and international law, LOAC detention outside a declared theater of active armed conflict (ODTAAC) remains nearly impossible, due to the failure of the U.S. government to enact a detention policy. If the United States is serious about its national security and keeping America and its allies safe, this must change.[41]

B. The Threat

Present day threats to the United States are real.[42] Al-Qaeda, its affiliates, and other transnational terrorist organizations[43] make the

---

> The Detention Facility in Parwan [DFIP] features certain amenities for the detainees to use. There are recreation areas, a family visitation center for families to use when they visit a detained family member, toys and a playground for children of families visiting detainees, a state of the art infirmary, and vocational training areas. Additionally, detainees can participate in Afghan Civics classes to learn about the Afghanistan government, the constitution and special reintegration programs. Detainees have more access than they had in the past to military tribunals. These military tribunals are "open to outsiders, including nonprofit groups and journalists." Moderate religious leaders are also present at the DFIP to "help refute insurgents" calls to violence couched in Islamic terms.

Id.

[41] Schlesinger et al., *supra* note 14, at 31.

> Today, the power to wage war can rest in the hands of a few dozen highly motivated people with cell phones and access to the internet. Going beyond simply terrorizing individual civilians, certain insurgents and terrorist organizations represent a higher level of threat, characterized by an ability and willingness to violate the political sovereignty and territorial integrity of sovereign nations. Essential to defeating terrorists and insurgents threats is the ability to locate cells, kill or detain key leader, and interdict operational and financial networks.

Id.

[42] *Remarks by the President at the National Defense University*, *supra* note 6.

> Unfortunately, Bin Laden's death, and the death and capture of many other al-Qa'ida leaders and operatives, does not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, al-Qa'ida, its affiliates and its adherents remain the preeminent security threat to our nation.

United States, its allies, and its interests both domestically and abroad vulnerable to attack.[44] Since 9/11, there have been at least sixty attempted terror attacks against the United States[45] and four successful attacks.[46]

In October 2003, then Secretary of Defense Donald Rumsfeld recognized that "we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?"[47] Twelve years later, these concerns persist. There remains an on-going armed conflict with al-Qaeda,[48] while new threats from splinter terrorist organizations

---

Id.

[43] *See, e.g.*, Patrick Cockburn, *Who are Isis? The rise of the Islamic State in Iraq and the Levant*, THE INDEPENDENT (16 June 2014), http://www.independent.co.uk/news/world/middle-east/who-are-isis-the-rise-of-theislamic-state-in-iraq-and-the-levant9541421.html.

[44] *See generally* James R. Clapper, *Statement for the Record, Worldwide Threat Assessment of the [U.S.] Intelligence Community*, OFF. OF THE DIR. OF NAT'L INTEL. (Feb. 9, 2016), http://www.dni.gov/index.php/newsroom/testimonies/217-congressional-testimonies-2016/1313-statement-for-the-record-worldwide-threat-assessment-of-the-u-s-ic-before-the-senate-armed-services-committee-2016; *See also* Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the* Jus ad Bellum, 176 MIL. L. REV. 374 (2003) ("Unfortunately, the world with which we will remain engaged is a dangerous one. Weak and failed States present fertile breeding grounds for transnational terrorists and criminals who may turn to destructive technologies in an asymmetrical struggle against the United States and other advanced States.").

[45] Jessica Zuckerman et. al., *60 Terrorist Plots Since 9/11: Continued Lessons in Domestic Counterterrorism*, HERITAGE FOUND. (July 22, 2013), http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism ("In each of these plots, the number one target was military facilities, followed closely by targets in New York City. The third most common target was mass gatherings . . . .").

[46] *Id*. The other successful attacks were:

> (1) [T]he intentional driving of a [sport utility vehicle] into a crowd of students at the University of North Carolina-Chapel Hill in 2006; (2) the shooting at an army recruitment office in Little Rock, Arkansas, in 2009; (3) the shooting by U.S. Army Major Nidal Hasan at Fort Hood, also in 2009; and (4) the bombings in Boston.

Id.

[47] Bernard et al, *supra* note 16, at 77.

[48] *See Remarks by the President at the National Defense University*, *supra* note 6.

like the Islamic State of Iraq and the Levant (ISIL)[49] are emerging and thriving by using increasingly sophisticated recruiting efforts.[50]

Detention and interrogation are legitimate tools to neutralize and potentially eliminate these threats because they provide a non-lethal mechanism for removing enemies from the battlefield, while simultaneously providing the opportunity to gain valuable intelligence. This intelligence could assist in thwarting future attacks, disrupting terrorist networks, and gaining valuable insight into effectively countering extremist ideologies.[51] Currently, LOAC detention on a global scale is not an option for the DoD; there is simply nowhere to place individuals captured ODTAAC. This limitation makes detention operations virtually impossible and forces military commanders to resort to other means of neutralizing enemies such as drone strikes,[52] ad hoc detention,[53] or worse, no action at all. The ability to detain and interrogate UEBs pursuant to the LOAC fills a critical gap that currently exists in the U.S. National Security Strategy.[54] Although the 2015 National Security Strategy recognizes the "persistent threat posed by terrorism" and the need to prioritize defeating organizations like al-

---

[49] Cockburn, *supra* note 43.

[50] Laurie Goodstein, *U.S. Muslims Take on ISIS' Recruiting Machine*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/20/us/muslim-leaders-in-us-seek-to-counter act-extremist-recruiters.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&_r=1; *see also* Ian Fisher, *In the Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES (Nov. 18, 2015), http://www.nytimes.com/2015/11/19/world/middleeast/in-rise-of-isis-no-single-missed-key-but-many-strands-of blame.html?rref=collection%2Fnewseventcollection %2Fattacks-in-aris&action=click&contentCollection=europe&region=rank&module =package&version=highlights&contentPlacement=2&pgtype=collection.

[51] Benard et al., *supra* note 16, at 81 ("Effective detainee operations can help degrade the enemy's ability to regenerate forces, disrupt his battle rhythm, attack his motivation and morale, and control information about the conflict.").

[52] Michelle Mallette-Piasecki, *Comment: Missing the Target: Where the Geneva Conventions Fall Short in the Context of Targeted Killing*, 76 ALB. L. REV. 262, 265 (2013). ("[U]nder the Obama administration, the number of [United States] drone strikes has steadily increased—122 were launched in Pakistan in 2010 alone—and show no sign of diminishing anytime soon.").

[53] *Ad hoc*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/ dictionary/ad%20hoc (defining ad hoc: "for the particular end or case at hand without consideration of wider application," (last visited Mar. 17, 2016). Here, the term "ad hoc detention" refers to the idea that a detention operation is created for the limited purpose of detaining one specific individual.

[54] *National Security Strategy*, WHITE HOUSE (Feb. 2015), http://www.whitehouse. gov/sites/default/files/docs/215_national_security_strategy.pdf.

Qaeda and ISIL, it lacks any discussion about developing a LOAC detention capability to assist in this fight.[55]

C. The Need for a Strategic Detention Policy[56]

The United States' detention operations in conflicts both of an international[57] and non-national character,[58] from World War II, to Korea, Vietnam, Iraq, and Afghanistan were largely reactionary.[59] Even today, after decades of conflict, the United States refuses to apply valuable lessons learned concerning detention operations.[60] What works? When? And why is it effective? How can the United States develop a detention and interrogation policy that will further U.S.

---

[55] *Id*. at 7; *see also* Charlie Savage & Benjamin Weiser, *How the U.S. Is Interrogating a Qaeda Suspect*, N.Y. TIMES (Oct. 7, 2013), http://www.nytimes.com/2013/10/08/world /africa/q-and-a-on-interrogation-of-libyan-suspect.html ("The Obama administration lacks a clear place to house newly captured Qaeda detainees for intelligence interrogations.").

[56] One example of the national security implications of the failure of the United States to implement a Law of Armed Conflict (LOAC) detention paradigm is the current conflict with the Islamic State in the Levant (ISIL) also commonly referred to as ISIS. *See also* Jeff Stein, *What will U.S. Forces do with ISIS Prisoners?*, NEWSWEEK (Sept. 19, 2014, 5:10 PM), http://www.newsweek.com/what-will-us-forces-do-isis-prisoners-271850.

> "It's a mess," said Dan O'Shea, a former counterinsurgency advisor to Marine Corps [General] John Allen, appointed last week to lead the charge against the Islamic State [(IS)]. "Special operations peers are voicing frustrations that they've gotten limited to no guidance from higher authorities" for degrading, much less destroying ISIS . . . . "If you can't hunt down, capture or interrogate IS captives, your options are limited. So for now, their hands are completely tied."

Id.

[57] Geneva Convention Relative to the Treatment of Prisoners of War (GC III) art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 2] (defining an international armed conflict (IAC) as "[A]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."). It also includes "partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." *Id.*

[58] Common Article 3, *supra* note 39 (defining a non-international armed conflict (NIAC) as "an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.").

[59] *See generally* Benard et al, *supra* note 16.

[60] *See* Waxman, *supra* note 1, at 12 ("At least within the public domain there appears to be no comprehensive effort by the U.S. government to review lessons learned to date about the strategic appropriateness of *whom* it has detained.").

security interests, comply with domestic and international law, and gain legitimacy from both the American public and the international community?[61] Despite the current lack of a strategic-detention paradigm, there are three mechanisms for detention that the United States has generally used that continue to evolve.

D. Three Primary Mechanisms for Detention

Post-9/11, the United States utilized three primary non-lethal mechanisms for handling terrorists: civilian criminal detention; military detention with an eye toward prosecution by military commission; and LOAC detention.[62] Each mechanism has its strengths and weakness.

Federal prosecutions of terrorists have resulted in high conviction rates and significant sentences but are criticized as posing a security risk, providing too many rights to accused terrorists, and being ineffective in

---

[61] *Remarks of John O. Brennan*, *supra* note 10.

> [W]hen we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they're more likely to join us in taking swift and decisive action against terrorists, and they're more likely to turn over suspected terrorists who are plotting to attack us, along with the evidence needed to prosecute them. When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the twisted worldview offered by al-Qa'ida. Where terrorists offer injustice, disorder and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.

Id.

[62] Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1079 (2008).

> The Bush administration has used three different mechanisms—traditional civil trials, military commissions, and military detentions—to justify the detention of terrorists, and not always in an obviously principled or coherent fashion . . . despite numerous reform proposals, Congress has declined to address . . . the proper relationship among the three detention mechanisms.

Id.

cases involving classified information.[63] Military commissions were supposed to cure the concerns with federal prosecutions,[64] however, prosecutions by military commissions have had minimal success.[65] The Commissions are rife with challenges to the legality of the proceedings and saddled with a public perception of unfairness.[66] Military detentions under LOAC removes the enemy from the battlefield and serves the legitimate and lawful purpose of gaining valuable intelligence through interrogation.[67] However, implementation has been significantly flawed—as evidenced by the current obstacles the United States faces concerning the remaining detainees held at Guantánamo Bay.[68] Perhaps the most fundamental weakness of all three detention mechanisms is the failure of the United States to adequately plan and employ a cohesive and

---

[63] Matt Apuzzo, *A Holder Legacy: Shifting Terror Cases to the Civilian Courts, and Winning*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/us/a-holder-legacy-shifting-terror-cases-to-the-courts-and-winning.html.

> In recent years, the Justice Department has won a guilty plea from a Somali national who admitted supporting the terrorist group the Shabab; sent Osama bin Laden's spokesman, Sulaiman Abu Ghaith, to prison for life; begun criminal proceedings against a Libyan suspect from Al-Qaeda; and, most recently, set a death penalty case in motion against Mr. Khattala.

Id.

[64] *See generally* OFF. OF THE MIL. COMM'NS, http://www.mc.mil/ABOUTUS.aspx (last visited Mar. 17, 2016).

[65] *Hicks's Military Commission Terrorism Conviction Overturned on Appeal*, HUMAN RIGHTS FIRST (Feb. 18, 2015), http://www.humanrightsfirst.org/press-release/hicks-s-military-commission-terrorism-conviction-overturned-appeal.

> [F]ederal courts have completed nearly 500 cases related to international terrorism since 9/11. Of those, at least [sixty-seven] cases have involved individuals captured overseas . . . . Meanwhile military commissions have convicted only eight individuals since 9/11 and, as of today, half of those convictions have been overturned on appeal.

Id.

[66] Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U. N.H. L. REV. 237 (2011).

[67] Benard et al, *supra* note 16, at 81. *See also supra* note 51 and accompanying text.

[68] Deb Riechmann, *Obama administration defends effort to close Guantanamo Bay prison, GOP senators wary*, U.S. NEWS AND WORLD REP. (Feb. 5, 2015, 6:01 PM), http://www.usnews.com/news/politics/articles/2015/02/05/dod-official-bill-would-block-effort-to-close-guantanamo.

deliberate long-term detention strategy designed to further U.S. interests from both a national security and rule of law perspective.[69]

III. An Overview of LOAC Detention Operations Since 9/11

Rather than develop a comprehensive approach to detention through deliberate and strategic planning, detention operations post-9/11 were largely implemented out of dire necessity.[70] As a result, the United States encountered several disastrous detention-related scandals that hurt its credibility and compromised its security.[71] The U.S. military operations in both Afghanistan and Iraq were riddled with systemic detention failures during the early phases of each operation.[72] These issues, detailed below, were the result of a lack of sound detention policies, combined with a lack of adequate resources and training.

A. Afghanistan

On September 11, 2001, al-Qaeda, a terrorist organization operating from a Taliban-enforced safe-haven in Afghanistan, attacked the United States.[73] In response, the United States invaded Afghanistan and declared war against al-Qaeda and associate forces.[74] Almost immediately, U.S. forces began capturing enemy fighters.[75]

---

[69] *See* Waxman, *supra* note 1.

[70] *Id.* at 12. *See supra* notes 47, 56 and accompanying text. *See also* Benard et al, *supra* note 16, at 81.

[71] *See, e.g.*, *supra* sections II.A.1–3 (discussing Abu Ghraib, CIA Black Site, and Guantánamo Bay).

[72] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, THE TIP OF THE SPEAR, 2010 SUPPLEMENT LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008 (Sept. 2010) [hereinafter THE TIP OF THE SPEAR] (providing an in-depth analysis of the operational lessons learned from Operation Enduring Freedom (OEF), Operation Iraqi Freedom (OIF), and the development of detention operations during these respective conflicts).

[73] Thomas H. Kean et al., *The 9/11 Commission Report*, http://www.9-11commission.gov/report/911Report.pdf (last visited June 8, 2017).

[74] *See generally* The Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter 2001 AUMF].

[75] Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT'L L. STUD. 346 (2009).

The Bush administration extensively debated the legal status of individuals captured in Afghanistan.[76] On February 7, 2002, President Bush issued a memorandum concerning the status and treatment of captured members of al-Qaeda and the Taliban.[77] The memorandum stated that none of the provisions of the Geneva Conventions[78] applied to al-Qaeda because al-Qaeda was not a high contracting party to Geneva.[79] Furthermore, members of the Taliban were not entitled to Prisoner of War (POW) status because they were "unlawful combatants."[80] Finally, the President determined that Common Article 3 was not applicable to members of either the Taliban or al-Qaeda, asserting Common Article 3 applied only in non-international armed conflicts.[81] The memorandum concluded by stating that although not legally required, "[A]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[82]

This memorandum put the world on notice that the United States would not apply the Geneva Conventions in the conflict with the Taliban and al-Qaeda but the United States would treat detainees humanely.[83] In addition to failing to define "unlawful combatant," the memorandum failed to provide a definition for "humane treatment."[84] What followed was a period of muddled detention and interrogation policies and confusion concerning the legal status of detainees captured in the "war on terror"[85] leading to both aberrant and systematic abuses of detainees.[86]

> While ostensibly protective, this directive also opened holes in the law of armed conflict's barriers. First, it

---

[76] *The Interrogation Documents: Debating U.S. Policy and Methods*, THE NAT'L SEC'Y ARCH. (July 13, 2004), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/.

[77] *See Humane Treatment of Taliban and al Qaeda Detainees*, WHITE HOUSE (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[78] *See* Common Article 3, *supra* note 39.

[79] *Id.*

[80] *Id*. *See also Humane Treatment*, *supra* note 77.

[81] *Humane Treatment*, *supra* note 77.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Transcript of President Bush's Address to a Joint Session of Congress*, *supra* note 6.

[86] Schlesinger et al, *supra* note 11. *See also The Road to Abu Ghraib*, HUMAN RIGHTS WATCH, http://www.hrw.org/reports/2004/usa0604/2.htm (last visited Mar. 17, 2016). ("There was a before-9/11 and an after-9/11 . . . . After 9/11 the gloves came off.") (quoting Cofer Black's testimony to congress as the former director of the CIA's counterterrorist unit).

> applied by its terms only to armed forces, hinting that intelligence services might not be similarly constrained. Second, by emphasizing humane treatment as a matter of policy, it suggested that humane treatment was not required as a matter of law. And, third, it suggested that the Geneva Conventions' principles could validly be compromised in pursuit of security requirements.[87]

The Bush administration's blanket status-determinations and the decision not to apply the 1949 Geneva Conventions drew criticism.[88] Allies of the United States, the United Nations, and non-governmental organizations expressed concern and outrage over the United States' policy.[89] Opponents suggested this policy "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."[90] The idea that the United States would suspend application of the Geneva Conventions to the conflict in Afghanistan was so controversial that then Secretary of State, Colin Powell, requested

---

[87] Waxman, *The Law of Armed Conflict*, *supra* note 75 at 346.

[88] *Id.*

> Many critics have attributed detainee abuses in Afghanistan to these foundational legal decisions. Critics of the [United States'] position consistently rejected the notion that unlawful combatants fall into a "legal gap" in protection. They asserted a range of alternatives, including that captured fighters (at least Taliban) were entitled to prisoner of war status; that all captured fighters are entitled at least to minimum protections of Common Article 3, Article 75 of the first Additional Protocol to the Geneva Conventions, and the customary law of armed conflict; and/or that any detainees are protected by international human rights law, including prohibitions on "cruel, inhuman and degrading" treatment.

Id.

[89] *See, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31367, REPORT FOR CONGRESS: TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM (2002) ("The U.N. High Commissioner on Human Rights . . . and some human rights organizations argue that all combatants captured on the battlefield are entitled to be treated as Prisoners of War (POW) until an independent tribunal has determined otherwise.").

[90] Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, U.S. Dep't of Justice (Jan. 22, 2002), [hereinafter Bybee Memo] https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf (regarding the "Application of Treaties and Laws to al Qaeda and Taliban Detainees").

President Bush reconsider.[91] Despite all of these concerns and criticisms, the Bush administration maintained its position that the Geneva Conventions did not apply to detainees in Afghanistan.[92]

As a result of the decision not to apply the Geneva Conventions to detainees in Afghanistan, interrogation techniques initially employed in Afghanistan included the use of stress positions, isolation for long periods of time, and sleep and light deprivation.[93] Over time, as U.S. detention policies evolved, conditions of confinement and treatment of detainees improved.[94] The Detention Facility in Parwan (DFIP) replaced the Bagram Theater Internment Facility[95] (BTIF). Unlike the BTIF, the DFIP operations were transparent with regular access by the International Committee of the Red Cross (ICRC) and the media.[96] Detainee Review Boards (DRBs) provided more extensive reviews to

---

[91] Draft Memorandum from Colin L. Powell, Secretary of State, to Alberto Gonzalez, Counsel to the President, (Jan. 25, 2002), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf (arguing that declaring the Geneva Convention inapplicable would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general").

[92] *See generally* Neil A. Lewis, *A Guide to the Memos on Torture*, N.Y. TIMES, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0 (last visited June 8, 2016).

[93] *See* Schlesinger et al, *supra* note 11, at 68. *See also* TAXI TO THE DARK SIDE (ThinkFilm 2007). *Taxi to the Dark Side* is a film "examination into the death of an Afghan taxi driver at Bagram Air Base from injuries inflicted by U.S. soldiers". *Overview: Taxi to the Dark Side*, TURNER CLASSIC MOVIES, http://www.tcm.com/tcmdb/title/684315/Taxi-to-the-Dark-Side/ (last visited Mar. 17, 2016).

[94] Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions*, WASH. POST (July 12, 2006), http://www.washingtonpost.com/wpdyn/content/article/2006/07/11/AR2006071100094.html.

[95] Alan Gomez, *How the U.S. Reshaped an Afghan Prison's Image*, USA TODAY (Aug. 5, 2010, 9:41 AM), http://usatoday30.usatoday.com/news/world/afghanistan/2010-08-04-1Aafghanprison04_CV_N.htm.

> Prison life at Bagram is far different today than the initial years of the war, say military officials . . . . Before Parwan, suspected Taliban militants, sympathizers and abettors were squeezed into a windowless Soviet airplane hangar known as Bagram Theater Internment Facility. The Red Cross complained about the rudimentary conditions. Groups such as the American Civil Liberties Union likened it to the infamous Abu Ghraib prison in Iraq, where inmates were abused by several U.S. troops.

Id.

[96] *Id. See also* Mopper & Pimpinelli, *supra* note 40.

determine whether continued detention was appropriate for each individual detainee.[97]

In December 2014, as combat operations concluded, the United States transferred all of the Afghan detainees housed at the DFIP to the Government of the Islamic Republic of Afghanistan (GIRoA).[98] Before giving full control of the facility to GIRoA, the United States transferred a Russian detainee, Irek Hamidullin, to the U.S. for prosecution in Federal District Court for leading a Taliban attack against U.S. forces.[99]

Unlike the debacle involving Ali Musa Daqduq detailed in section III. C. below, the United States successfully executed a strategic plan to ensure this high-value detainee faced prosecution for his crimes against the United States. The transfer of Hamidullin is an important example of how the United States can learn from past mistakes to further national security interests and the rule of law.[100] The detention facility in Guantánamo also provides a myriad of valuable lessons concerning how the United States can improve future LOAC detention operations.

B. Guantánamo Bay, Cuba[101]

The Guantánamo Bay detention facility is perhaps the most glaring example of the dangers associated with conducting ad hoc detention operations without establishing a comprehensive, long-term, strategic plan. The United States government began sending detainees from

---

[97] *See* Waxman, *The Law of Armed Conflict*, *supra* note 75, at 346. *See also*, Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9.

[98] Frank Jack Daniel, *U.S. Closes Bagram Prison, Says No More Detainees Held in Afghanistan*, REUTERS (Dec 11, 2014), http://www.reuters.com/article/2014/12/11/us-usa-cia-torture-bagram-idUSKBN0JO2B720141211?nl=nytnow&em_pos=large&emc=edit_nn_20141211.

[99] Larry O'Dell, *Russian Detainee from Afghanistan Pleads Not Guilty in Va.*, MILITARY TIMES (Nov. 7, 2014), http://www.militarytimes.com/story/military/pentagon/2014/11/07/russian-afghanistan-pleads-not-guilty/18646697/ ("Irek Hamidullin was arraigned on [twelve] counts, including providing material support to terrorists and trying to destroy U.S. military aircraft and conspiring to use a weapon of mass destruction.").

[100] *See supra* section III.C. It appears that the United States learned from the failures that resulted in the release of Daqduk and transferred Hamidullin to the United States to ensure he would be prosecuted.

[101] *See* Mark P. Denbeaux et al., *Guantánamo: America's Battle Lab*, SETON HALL UNIV. (Jan. 2015), http://law.shu.edu/policy-research/upload/guantanamo-americas-battle-lab-january-2015.pdf (analyzing detention operations at Guantánamo Bay, Cuba).

Bagram, Afghanistan, to Guantánamo Bay in January 2002.[102] Fierce debate ensued about both the detention and treatment of enemy combatants at Guantánamo Bay.[103] Thirteen years later, despite a dramatic improvement in the conditions of confinement, America still grapples with the moral, ethical, legal, and national security implications of what to do with both the facility and the detainees it houses.[104]

Initially, the United States characterized the detainees held at Guantánamo Bay as "the worst of the worst."[105] In 2003, then Secretary of Defense Donald Rumsfeld, authorized the use of enhanced-interrogation techniques for those held at Guantánamo Bay; these techniques were more severe than those allowed in the *Army Field*

---

[102] *See generally* ELSEA, *supra* note 89. *See also* Denbeaux et al, *supra* note 101, at 4. "The stated intended purpose of the Guantánamo Bay Detention Center (GTMO) was to house the most dangerous detainees captured in the course of the Global War on Terrorism." *Id.*

[103] Denbeaux et al, *supra* note 101, at 4. "The decision to transfer the prisoners to Guantánamo Bay has also been criticized as an effort to keep them 'beyond the rule of law.'" *Id.*

[104] *See* Reichmann, *supra* note 68. *See also Review of Department of Defense Compliance with President's Executive Order on Detainee Conditions of Confinement*, DEP'T OF DEF., http://www.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf.

> While we conclude that conditions at Guantánamo are in conformity with Common Article 3, from our review, it was apparent that the chain of command responsible for the detention mission at Guantánamo consistently seeks to go beyond a minimalist approach to compliance with Common Article 3, and endeavors to enhance conditions in a manner as humane as possible consistent with security concerns.

Id. at 4.

[105] Denbeaux et al., *supra* note 101, at 3 (quoting Thomas Berg, Staff Judge Advocate for Joint Task Force (JTF)160).

> I can understand why a lot of people were scraped up from the battlefield and brought to Gitmo, because we didn't know what we had, but we didn't have any real mechanisms to sort them out. And I think once we started sorting them out, we'd already stated publicly that we had "the worst of the worst." And it was a little hard to go against that and say, well, maybe some of them aren't quite the worst of the worst, and some of them are just the slowest guys off the battlefield.

Id.

Manual for interrogation operations.[106] As a result of a lack of guidance and cross-pollination of detention and interrogation personnel between the theaters, many of the enhanced interrogation techniques only intended for use at Guantánamo were also used in Iraq and Afghanistan.[107]

The decision to hold detainees in Guantánamo was seemingly made in an effort to create a permissive detention environment where detainees were afforded no rights and given no legal status or protections.[108] As enemy combatants detained outside the United States, the United States claimed they were not entitled to protections under Common Article 3, nor were they entitled to challenge their status or their detentions in federal court through petitions of writs of habeas corpus.[109] The Supreme Court held otherwise.[110]

One of the first significant cases concerning the rights afforded to detainees held at Guantánamo Bay was *Rasul v. Bush*.[111] In this landmark Supreme Court decision, the Court ruled that U.S. courts have jurisdiction to hear challenges to the legality of detention on behalf of foreign nationals held at Guantánamo Bay in connection with the war on terror.[112] This holding opened the floodgates for petitions challenging

---

[106] *Compare* Donald Rumsfeld, *Counter-Resistance Techniques in the War on Terrorism*, AIR UNIV. (Apr. 16, 2003), http://www.au.af.mil/au/awc/awcgate/dod/d20040622doc9.pdf *with* HUMAN INTEL. OPER., *supra* note 19.

[107] Schlesinger et al., *supra* note 11, at 68.

[108] Raha Wala, *What the Detention Policy Debate Really Is About*, LAWFARE (Jan. 26, 2015, 2:16 PM), http://www.lawfareblog.com/2015/01/what-the-detention-policy-debate-really-is-about/#more-42970 ("Guantánamo is importantly symbolic because it is a detention facility that was specifically designed to put a category of human beings beyond the rule of law.").

[109] *See* Bybee Memo, *supra* note 90; *see also* Waxman, *Administrative Detention*, *supra* note 1, at 7.

[110] Waxman, *Administrative Detention*, *supra* note 1, at 8.

> In *Hamdi* the Court held that due process requires a citizen detainee be given adequate notice of and opportunity to contest the claims against him, and in *Rasul* it held that statutory habeas rights (i.e., an opportunity to bring before a federal judge a challenge to detention) apply to detainees at Guantánamo. *Boumediene* then went a step further in holding that constitutional habeas rights also apply to Guantánamo detainees.

Id. *See also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[111] Rasul v. Bush, 542 U.S. 466 (2004).

[112] *Id*.

detention at Guantánamo Bay. The Supreme Court also acknowledged that the United States could legally detain narrowly-defined "enemy combatants," but ruled that a U.S. citizen-detainee is entitled to meaningfully challenge his detention.[113] Partially in response to these decisions, Congress passed, and President Bush signed the 2005 DTA,[114] establishing guidelines for treatment and interrogation of detainees.

In addition to creating significant protections for detainees held in U.S. custody, the 2005 DTA also limited a petitioner's ability to file a writ of habeas rights.[115] In 2006, the Supreme Court decided *Hamdan v. Rumsfeld*.[116] In *Hamdan*, the Supreme Court determined that detainees captured in Afghanistan pursuant to the global war on terror were entitled to the minimum protections afforded by Geneva Convention Common Article 3 and that the detainee review process established in the 2005 DTA was insufficient because it violated both the Uniform Code of Military Justice and Common Article 3.[117] Following this decision, the Deputy Secretary of Defense, Gordon England, issued a policy requiring treatment of detainees, including members of al-Qaeda, to comply with Common Article 3.[118]

In an effort to comply with the due process requirements established in *Hamdi*, the administration established Combatant Status Review Tribunals (CSRTs), providing detainees a forum to challenge their status as enemy combatants outside of federal court.[119] Next, Congress passed the Military Commissions Act (MCA) of 2006 [120] creating military commissions intended to comply with the requirements established in *Hamdan*, but also limiting the right to challenge detention in Federal Court. [121] In response, the Court held in *Boumediene v. Bush* that

---

[113] *Hamdi*, 542 U.S. at 507.
[114] *See* 2005 DTA, *supra* note 19.
[115] *Id*.
[116] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[117] *Id*.
[118] *See* Memorandum from Deputy Secretary of Defense Gordon England, *Application of Common Article 3 of the Geneva Conventions to the Treatment of detainees in the Department of Defense*, DEF.GOV (July 7, 2006), http://www.defense.gov/news/Aug 2006/d20060814comm3.pdf; *see also* Babington & Abramowitz, *supra* note 94.
[119] *See* Memorandum from Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunals*, LAW UNIV. TORONTO (July 7, 2004), https://www.law.utoronto.ca/documents/Mackin/MuneerAhmad_ExhibitV.pdf.
[120] The Military Commissions Act of 2006, Pub. L. 109-366, Oct. 17, 2006, 10 USC § 948a [hereinafter MCA 2006].
[121] *Id*.

prisoners held at Guantánamo Bay do have a constitutional right to habeas corpus and that the Military Commissions Act of 2006, insofar as it restricts that right, is unconstitutional.[122] It further held that the CSRTs were insufficient substitutions for habeas petitions.[123]

In early 2009, when President Obama took office, he initially sought to end military commissions.[124] He soon reversed this position and Congress passed, and President Obama signed, the Military Commissions Act (MCA) of 2009. The 2009 MCA amended the rules for conducting commissions in an effort to increase procedural protections for an accused and improve the perception of fairness.[125]

Despite efforts to reform conditions[126] and close the facility, the stigma associated with Guantánamo Bay persists.[127] President Obama has pledged to permanently close the Guantánamo Bay confinement facility,[128] while Congress has placed significant prohibitions on transferring detainees from the facility.[129] Since its establishment as a prison in 2002, approximately 780 individuals have been transferred to Guantánamo Bay. As of February 2015, approximately 122 remain in detention.[130] Although President Obama remains committed to closing

---

[122] Boumediene v. Bush, 553 U.S. 723 (2008).

[123] *Id*.

[124] Matthew Weaver, *Obama orders halt to Guantánamo Bay tribunals*, GUARDIAN (Jan. 21, 2009), http://www.theguardian.com/world/2009/jan/21/barack-obama-guantanamo-bay-tribunals.

[125] *See* MCA 2009, *supra* note 3. *See also* OFFICE OF THE MILITARY COMMISSIONS, *supra* note 64.

[126] *Review of Department of Defense*, *supra* note 104.

[127] Fentini, *supra* note 34.

[128] Michelle A. Vu, *Obama State of the Union 2015 Text Transcript and Full Video*, CHRISTIAN POST (Jan. 20, 2015), http://www.christianpost.com/news/obama-state-of-the-union-2015-text-transcript-and-full-video-132859/pageall.html.

> Americans, we have a profound commitment to justice—so it makes no sense to spend three million dollars per prisoner to keep open a prison that the world condemns and terrorists use to recruit. Since I've been President, we've worked responsibly to cut the population of GTMO in half. Now it's time to finish the job. And I will not relent in my determination to shut it down. It's not who we are.

Id.

[129] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1566–67 (2011) [hereinafter 2012 NDAA].

[130] Human Rights First, *Guantánamo by the Numbers* (June 3, 2016), http://www.human

the facility, he faces significant opposition from some members of Congress.[131] If the United States permanently closes the facility, the question remains, "What does the United States do with the detainees who pose a threat to the nation but whom the United States cannot prosecute?"[132]

Unfortunately, the systematic failures and outright atrocities associated with LOAC detention at the Baghram Theater Internment Facility and at Guantánamo Bay were not isolated to those theaters.[133] Instead, these issues quickly migrated to Iraq.[134]

C. Iraq

During the invasion and initial occupation of Iraq, detention operations were poorly planned, disorganized and under-resourced.[135] On the ground, confusion existed over how to treat detainees. A lack of training on proper treatment of detainees and minimal oversight from leaders compounded the confusion.[136] These factors set the conditions for detainee abuse.[137]

Despite the fact the United States was engaged in an International Armed Conflict with Iraq, detainees were not always treated in accordance with Geneva Convention Relative to the Treatment of Prisoners of War (GC III).[138] Rather than affording detainees the rights

---

rightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf ("[One hundred and five] detainees have been detained for more than [ten] years without a trial. There are currently [fifty-four] detainees approved for release. One detainee has been transferred to the U.S. for prosecution and [thirty-three] have been designated for trial or military commission by the Obama Administration").

131 David Jackson, *Obama Faces Challenges in Closing Gitmo*, USA TODAY (Dec. 30, 2014), http://www.usatoday.com/story/news/nation/2014/12/30/obama-guantanamo-bay-prison-terrorism/21043489/.

132 *Id*.

133 Schlesinger et al., *supra* note 12, at 107

134 *Id*.

135 Benard et al., *supra* note 17, at 28 ("The problems U.S. forces encountered conducting detainee operations in Iraq stemmed from two principal shortfalls: the lack of appropriate technical competencies and the lack of clear policy and doctrine. These problems were not unique to operations in Iraq.").

136 Schlesinger et al., *supra* note 12.

137 *Id*.

138 *Id.* at 82–83.

and protections of POW status, they were often treated inhumanely.[139] The confusion over detention policies and the rules that applied to interrogation operations, combined with a failure to adequately plan and resource detention operations in Iraq, all contributed to set the conditions for the abuses at Abu Ghraib prison.[140]

Over time, detention operations in Iraq improved and the United States implemented a sophisticated warrant-based detention program in Iraq that complied with both Iraqi domestic law and international law.[141] However, this evolution did not come easy. Instead, it was a lengthy process involving significant U.S. and Iraqi resources[142] as well as difficult lessons learned.[143]

One prime example of the national security implications of the failure to conduct strategic detention operations in Iraq is the release of Ali Musa Daqduq, a "senior Hezbollah operative who confessed to the torture and murder of American soldiers . . . Daqduq masterminded an ambush in Karbala, Iraq, kidnapping and killing five American soldiers. Captured later in 2007, by U.S. forces, Daqduq confessed to the raid and murders."[144] As the United States closed detention facilities in Iraq during its withdrawal, authorities transferred Daqduq to the Iraqi government for prosecution in an Iraqi court.[145] In November 2012, the

---

> Operation Iraqi Freedom is wholly different from Operation Enduring Freedom. It is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the very beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied. The message in the field, or the assumptions made in the field, at times lost sight of this underpinning . . . .

Id.

139 *Id*. at 68.

140 *See id*. at 68–69. *See also* Benard et al., *supra* note 17, at 28.

141 *See* Kevin H. Govern, *Warrant Based Targeting: Prosecution-Oriented Capture and Detention as Legal and Moral Alternatives to Targeted Killing*, 29 ARIZ. J. INT'L & COMP. L. 3 (2012) (published 2013) (providing an overview of warrant-based detention operation in Iraq).

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

143 Schlesinger et al., *supra* note 12.

144 *The Daqduq Fiasco*, WALL ST. J. (May 11, 2012), http://www.wsj.com/articles/SB10001424052702304203604577393883518448946.

145 *Id*.

Iraqi court dismissed the case and released Daqduk.[146] Upon his release, Daqduq fled to Lebanon.[147]

This colossal failure on the part of the United States to ensure the successful prosecution of Daqduq, a confessed killer of American Soldiers, exemplifies the dangers associated with the U.S. government's inability to establish a comprehensive and effective detention policy. Despite the fact that there is still no U.S. detention policy, the Department of Defense and the Department of Justice are leaning forward and finding ways to detain and interrogate high-value UEBs.

D. The Current State of Detention Operations

As of 2015, LOAC detention operations remain very difficult to conduct, notwithstanding the ongoing, armed conflict with al-Qaeda and associated forces.[148] Since there is no established policy or facility, members of the DoD must conduct ad hoc detainee operations in order to capture and detain a UEB.[149]

One example of how the United States is presently conducting LOAC detention operations, in spite of a lack of both policy and a detention facility, is the detention of Ahmed Abdulkadir Warsame.[150] On April 19, 2011, the United States captured Warsame, a Somali, in the Gulf of Aden, travelling from Yemen back to Somalia.[151] Warsame, a member of the terrorist organization al Shabaab,[152] went to Yemen to receive weapons and explosives training from members of al-Qaeda in

---

146 Suadad al-Salhyat al., *Iraq Releases Suspected Hezbollah Operative Daqduq*, REUTERS (Nov. 16, 2012), http://www.reuters.com/article/2012/11/16/us-iraq-daqduq-release-idUSBRE8AF0SS20121116.

147 *Id*.

148 *See* 2001 AUMF, *supra* note 74. *See also* Savage & Weiser, *supra* note 55.

149 *See Guilty Plea Unsealed in New York Involving Ahmed Warsame, a Senior Terrorist Leader and Liaison Between al Shabaab and al Qaeda in the Arabian Peninsula, for Providing Material Support to Both Terrorist Organizations*, FED. BUR. OF INV. (Mar. 25, 2013), http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shabaab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations. *See also* Ad hoc, *supra* note 53.

150 *Id*.

151 *Id*.

152 *Id.*

the Arabian Peninsula (AQAP) to share with members of al Shabaab.[153] The United States held Warsame on a boat and questioned him for more than two months for intelligence purposes before transferring him to the Southern District of New York where federal authorities questioned him for law enforcement purposes.[154] Reports indicate while held at sea, the ICRC visited Warsame.[155] According to Preet Bahara, the U.S. Attorney for the Southern District of New York,

> The capture of Ahmed Warsame and his lengthy interrogation for intelligence purposes, followed by his thorough questioning by law enforcement agents, was an intelligence watershed. The handling of Warsame represents a seamless orchestration by our military, intelligence, and law enforcement agencies that significantly furthered our ability to find, fight and apprehend those who wish to do us harm. Warsame's capture, cooperation, and prosecution is a major victory for the United States, for its citizens[,] and for justice.[156]

Warsame entered into a plea agreement with authorities in which he pled guilty to a nine-count indictment.[157] The charges included providing material support to two terrorist organizations.[158]

The Warsame model illustrates the potential for successful integration of LOAC detention and civilian-criminal detention.[159] By

---

[153] *Id*.
[154] *Id*.
[155] Peter Finn & Karen DeYoung, *In Somali Terror Suspect's Case, Administration Blends Military, Civilian Systems*, WASH. POST (July 6, 2011), http://www.washington post.com/national/national-security/in-somali-terror-suspects-case-administration-blends-military-civilian-systems/2011/07/06/gIQAQ4AJ1H_story.html (quoting Tom Malinowski, head of the Washington office of Human Rights Watch stating, "If the ICRC [International Committee of the Red Cross] was notified and given access, then this was not the kind of secret detention or disappearance that the Bush administration engaged in, and Obama's executive order requiring such access was respected.").
[156] *Guilty Plea Unsealed*, *supra* note 146.
[157] *Id*.
[158] *Id*.
[159] Peter Finn, *Somali's Case a Template for U.S. as it Seeks to Prosecute Terrorism Suspects in Federal Court*, WASH. POST (Mar. 30, 2013), http://www.washington post.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html. "For an administration that is determined not to add to the

using the two systems in concert, the United States accomplished both LOAC detention and intelligence questioning as well as criminal prosecution.[160] From start to finish, those involved executed the process seamlessly and skillfully to further both national security interests and the rule of law.[161]

A model whereby a terrorist is detained and questioned under the LOAC and then transferred to law enforcement, resulting in both intelligence gathering and criminal prosecution should be the goal. However, the problem with the Warsame model is that U.S. authorities had to create both the structure for detention and the actual detention facility.[162] The lack of both an existing detention policy and a standing facility forces U.S. authorities to create both the system and structure every time they capture a high-value UEB. More concerning, this system, or lack thereof, inevitably serves as a deterrent to LOAC detention, because it is difficult to patch together and because of the perception—fair or not—of unnecessary secrecy.[163] Congress can resolve this issue by passing meaningful legislation creating a LOAC detention policy and designating a detention facility. Fortunately, there is already an existing legal framework that allows for effective LOAC detention and interrogation that can be partnered with civilian-criminal prosecution.

III. The Legal Framework

A. Types of Detention

Criminal detention[164] and LOAC detention are the two primary mechanisms for detaining UEBs.[165] The main goals of criminal

---

detainee population at Guantanamo, the handling of the Somali's case has become something of a template for other terrorism suspects captured overseas." *Id.*

[160] Finn & DeYoung, *supra* note 155.

[161] Finn, *supra* note 159.

[162] *Id*.

[163] John Bellinger, *Do the Geneva Conventions Apply to the Detention of Al-Libi?*, LAWFARE (Oct. 7, 2013), http://www.lawfareblog.com/2013/10/do-the-geneva-conventions-apply-to-the-detention-of-al-libi/ ("As with its drone program, if the Administration wants domestic critics and U.S. allies to support unprecedented counter-terrorism policies, it should explain the legal rules it is applying, and why the combined law-of-war/criminal law enforcement model is permissible under international law.").

[164] There are both civilian criminal prosecutions and prosecutions by military tribunals however, this paper focuses on prosecutions by civilian criminal courts.

detention are prosecution and punishment, while the main goals of LOAC detention are security and intelligence gathering.[166]

1. Criminal Detention

Criminal detention involves the traditional arrest and detention of individuals accused of violating domestic criminal law. The criminal justice system provides defendants significant rights, including the right of confrontation, due process of the law, rules of evidence, an open and public trial and the right to counsel.[167] Criminal prosecutions play a vital role in combating terrorism by promoting the rule of law and punishing terrorists for their crimes.[168] By using existing federal crimes related to supporting terrorism[169] and the Classified Information Procedures Act[170] (CIPA), criminal prosecutions are effective and capable of keeping UEBs off the battlefield, while upholding U.S. values, the rule of law, and maintaining international legitimacy.[171] Since 9/11 there have been over 2,934 arrests and 2,568 convictions in the United States for terrorism-

---

[165] *See supra* notes 4–5 and accompanying text.

[166] *See* Chesney & Goldsmith, *supra* note 62 (discussing the goals of both detention models).

[167] *Id*. at 5.

[168] Apuzzo, *supra* note 63.

[169] *See, e.g.*, 18 U.S.C. § 2339A, Providing Material Support in Furtherance of a Terrorist Act; 18 U.S.C. § 2339B, Providing Material Support to Designated Terrorist Organizations; 18 U.S.C. § 2339C, Providing or Collecting Funds to Be Used in an Act of Terrorism; and 18 U.S.C. § 2339D, Receiving Military Training from a Designated Foreign Terrorist Organization.

[170] Classified Information Procedures Act, 18 U.S.C. §1–16 Appendix 3.

[171] Finn & DeYoung, *supra* note 155.

> [O]ther high-profile cases have followed, including that of Osama bin Laden's son-in-law Sulaiman Abu Ghaith, who was arrested in Jordan last month and proceeded to speak at length with U.S. investigators. European allies have also extradited suspects to the United States on the express condition that they be tried in federal court. These include Abu Hamza al-Masri, the radical preacher, who was extradited from Britain in 2012, and al-Qaeda veteran Ibrahim Suleiman Adnan Adam Harun, who has been held secretly in New York for months and has been cooperating with U.S. investigators since before he was extradited from Italy in October.

Id.

related crimes.[172] Moreover, federal prosecutors have successfully prosecuted sixty-seven terrorists captured overseas, many of whom cooperated with authorities.[173]

Although there are many virtues to the traditional criminal detention and prosecution model, there are also several limitations.[174] Using the criminal justice system as the sole mechanism to fight terror falls short in many respects; the most glaring are the abilities to capture and conduct intelligence questioning.[175] The criminal detention model is significantly limited in regards to its ability to actually gain physical custody of UEBs.[176] Currently, if an individual is located outside the territory of the United States and the United States is unable to negotiate extradition, the UEB may remain free to wage war against the United States if the United States is relying solely on the criminal detention model. Furthermore,

---

[172] Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted For Terror Offenses Since September 11 Attacks*, WORLD POST (Sept. 3, 2011, 2:52 PM), http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html.

[173] Finn & DeYoung, *supra* note 155.

> In the same period, there have been only seven convictions in the military commissions at Guantanamo Bay. Two of those have been overturned on appeal. Moreover, in military commissions, unlike federal courts, there is serious doubt about the viability of two of the charges most commonly used against terrorists—material support and conspiracy—as law-of-war charges in cases in which suspects cannot be tied to a specific act of violence.

Id.

[174] Chesney & Goldsmith, *supra* note 62, at 1096.

> The traditional criminal approach has several deficiencies besides its obvious failure to deter. It is often hard to apprehend individuals outside the United States. When the United States seeks to prosecute an individual located overseas, its practical alternatives for securing the defendant are limited. It may seek extradition if a treaty basis for doing so exists (though other states may be unwilling to comply in cases involving terrorism, as illustrated by Italy's cold reception to an American extradition request in connection with the Achille Lauro hijacking); it may persuade the host country to render the individual into U.S. custody without formal extradition procedures; or it may use trickery or force to seize the individual directly.

Id.

[175] *Id*.

[176] *Id*.

questioning in the context of a criminal investigation is conducted with different goals and for a different purpose than intelligence questioning.[177] Relying purely on criminal detention unnecessarily restricts the United States, leaving the nation vulnerable to attacks by al-Qaeda and other dangerous terrorist organizations because it limits the options for gaining custody of UEBs and does not allow for intelligence interrogations.

However, these limits certainly do not render criminal detention obsolete. Despite some limitations, the criminal justice system is a critical tool in the ongoing armed conflict between the United States and al-Qaeda and associated forces.[178] However, LOAC detention is also needed in this fight. Law of armed conflict detention compliments criminal prosecutions by providing more permissive capture options and allowing for intelligence interrogations.

2. Law of Armed Conflict Detention

Determining what laws of war apply in LOAC detention requires a determination of the type of armed conflict (international or non-international).[179] After establishing the type of armed conflict, officials can determine the status of the participants (i.e., combatant v. civilians).[180] This status determination is critical because it determines rights and protections under international law.[181]

B. Authority to Detain Under LOAC

1. Is There an Armed Conflict? If So, with Whom and What Kind?

In order for the LOAC to apply and be a basis for detention, an "armed conflict"[182] must exist. Under the LOAC, there are two types of

---

[177] Christian A. Meissner et al., *Criminal Versus HUMINT Interrogations: The Importance of Psychological Science to Improving Interrogative Practice*, 38 J. PSY. & L. 215, 249 (2010).
[178] Apuzzo, *supra* note 63.
[179] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 186 (2010).
[180] *Id*.
[181] *Id.*
[182] *Id*.

armed conflicts: international armed conflicts (IAC); and non-international armed conflicts (NIAC).[183]

> International armed conflicts exist whenever there is [a] resort to armed force between two or more States. Non-international armed conflicts are protracted[,] armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.[184]

The United States is currently engaged in an armed conflict with al-Qaeda and associated forces.[185] Pursuant to the right to self-defense under Article 51 of the Charter of the United Nations, the United States is authorized to use force against al-Qaeda and associated forces.[186] In addition to the international legal basis to use force, the 2001 Authorization for the Use of Military Force (AUMF) provides the President domestic authority to use force against al-Qaeda and associated forces.[187]

---

[183] *See How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT'L C. RED CROSS (Mar. 2008), https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.

[184] *See id.* at 5. *See also supra* notes 57–58, and accompanying text.

[185] *See* 2001 AUMF, *supra* note 74. The debate concerning whether the United States is still engaged in an non-international armed conflict (NIAC) with al-Qaeda after the end of combat operations in Afghanistan is beyond the scope of this paper.

[186] U.N. Charter art. 51 (stating "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

[187] *See* 2001 AUMF, *supra* note 74. The 2001 AUMF authorizes the president:

> [T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id. See also Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (finding that the use of force includes the authority to detain).

2. Detention Authority in a Non-International Armed Conflict

There are two main bodies of international law within the Geneva Conventions governing NIACs; Common Article 3 and the Additional Protocol II.[188] Both bodies of law are silent on the issue of whether detention is authorized in a NIAC.[189]

Opponents of detention in a NIAC argue for a plain-language reading of the governing bodies of law and claim that because there is no *explicit* authority for the taking of detainees, detention is not authorized during a NIAC.[190] Proponents of detention in a NIAC argue the omission of explicit detention authority does not foreclose detention because, by virtue of being engaged in an armed conflict, some form of detention authority may be necessary.[191] Taken to its logical conclusion, if the contrary view prevails and detention is prohibited during an NIAC,

---

[188] Although there is some limited discussion on the authority to detain in an international armed conflict (IAC), this paper is primarily focused on the legal authority to detain in a NIAC.

[189] Robert M. Chesney, *Who May be Held? Military Detention through the Habeas Lens*, 52 BOSTON. COLL. L. REV. 769, 795 (2011).

> The 1949 Geneva Conventions broke new ground by including a single article—so-called Common Article 3—imposing a handful of baseline humanitarian protections for persons in the hands of the enemy during such conflicts. Additional Protocol II (APII) subsequently expanded upon those protections (though the United States is not party to that instrument). Neither instrument explicitly confers substantive detention authority, nor does either purport to limit or deny such authority. The resulting opportunities for disagreement are considerable. Some construe the silence as fatal for any effort to rest the existence of detention authority on LOAC, let alone to use LOAC to define the scope of that authority . . . . Others, however, contend that the absence of affirmative constraint is equivalent to an authorization by omission, on the theory that LOAC on the whole is best understood to be a restraining body of law. On this view, anything that can be done in an international armed conflict *a fortiori* can be done as well during non-international armed conflict—including use of the detention principles noted above. Alternatively, some might take the position that some form of affirmative LOAC authority is needed, and that *customary* LOAC supplies it (again by analogy to the forms recognized by treaty in the international setting).

Id. (emphasis added).

[190] *Id*.

[191] *Id*.

killing is the only means permissible to defeat the enemy. This defies the stated goal of the LOAC; to promote humanity in war. [192] Notwithstanding, there is a strong argument that detention during a NIAC is Customary International Law, because both state actors and non-state actors commonly detain individuals during NIACs. [193] Additionally, there appears to be domestic legal support for the position that detention is authorized in a NIAC.[194] For these reasons, although Common Article 3 and AP II do not explicitly authorize detention, detention in a NIAC is a generally accepted practice.[195]

3. Detainee Status in an IAC and a NIAC

Status determinations of individuals detained by the United States pursuant to the LOAC are critical. Status determines the rights and treatment afforded to the individual.[196] According to the ICRC, there are two main categories of detainees in an IAC: Prisoners of War and civilians.[197] The ICRC asserts in an NIAC, there is only one status—civilian.[198]

---

[192] *See* LOAC, *supra* note 5.

[193] Chesney, *supra* note 189.

[194] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519–20 (2004). The court ruled that detention pursuant to the AUMF in an armed conflict is authorized without making a distinction between an IAC and a NIAC. *Id.* "[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long standing law-of-war principles." *Id.*

[195] Chesney & Goldsmith, *supra* note 62, at 1131.

> Some have questioned whether the laws of war also provide for military detention or preventive internment during non-international armed conflicts (NIACs). We think it clear that they do . . . state practice in the post-1949 era provides numerous examples in which international armed conflict-style detention frameworks have been used during NIAC.

Id.

[196] SOLIS, *supra* note 179.

[197] *See* Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (May 2009), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report res/$File/direct-participation-guidance-2009-icrc.pdf [hereinafter *Interpretive Guidance*].

[198] *Id.*

The U.S. position is that there is also a third category: Unprivileged Enemy Belligerent (UEB).[199] A UEB is essentially a combatant who is not entitled to the protections of POW status because they do not meet the requirements of GC III for Prisoner of War status under Article 4(2).[200] Under the U.S. view, UEBs can exist in both an IAC and a NIAC.[201] Under the position of the ICRC, this third category, UEB, is actually just a civilian who is directly participating in hostilities (DPHing).[202] A civilian loses protected status while DHPing.[203] The ICRC claims the loss of protected status can be either temporary or more permanent (if the individual is performing a continuous combat function).[204]

In the context of an IAC, one status is a Combatant Prisoner of War.[205] The terms POW and combatant are synonymous[206] in the sense they refer to lawful fighters entitled to specific protections under international law.[207] The United States recently adopted the term "belligerent" (lawful) in place of the term "combatant."[208] Generally, belligerents are members of an armed force of a party to an international armed conflict (also referred to as an "Article 2" conflict) under the Geneva Conventions and receive POW status.[209] One purpose of POW status is to incentivize compliance with the laws of war by granting combatant immunity for lawful acts of war.[210]

---

[199] *See* LAW OF WAR, *supra* note 4. *See also* SOLIS, *supra* note 179, at 206–07.
[200] Common Article 3, *supra* note 39.
[201] LAW OF WAR, *supra* note 4.
[202] *Interpretative Guidance*, *supra* note 195.
[203] *Id.*
[204] *Id*.
[205] *See* Common Article 3, *supra* note 39, art. 4A. (2)–(6). *See also* Solis, *supra* note 76 at 195.

> In common Article 2 conflicts, a combatant is a member of the armed force of a party to the conflict, wearing a uniform or other distinguishing sign. Although lawful combatants make up the greater number of POWs . . . the 1949 POW convention specifies six other groups that are also entitled to those protections.

[206] *Id*.
[207] SOLIS, *supra* note 179, at 187 ("The defining distinction of the lawful combatant's status is that upon capture he or she is entitled to the protections of POWs.").
[208] Common Article 3, *supra* note 4.
[209] *See id*. art. 4A(2)–(6). *See also* SOLIS, *supra* note 176, at 195.
[210] SOLIS, *supra* note 76, at 188 ("A lawful combatant enjoys the combatant's privilege, but is also a continuing lawful target.").

For purposes of this article, the status of combatants and POWs is relevant only to provide context. The individuals contemplated under this article's proposed detention regime would not enjoy the protection of POW status for two reasons. First, the armed conflict between the United States and al-Qaeda, and associated forces is not a Common Article 2 IAC, it is a Common Article 3 NIAC.[211] Second, even if the armed conflict were a Common Article 2 conflict, the members of al-Qaeda and its associated forces do not meet the criteria for combatant status established under GC III Article 4(2).[212] Like POWs, civilians also receive special protections under the Geneva Conventions.[213]

"Civilian" is another protected status under the LOAC.[214] Civilians are never lawful targets during armed conflict.[215] Furthermore, in an IAC, civilians in the hands of the enemy are "protected persons"[216] afforded special protections under GC IV.[217] However, in a NIAC, since only Common Article 3 applies, civilians[218] are not entitled to GC IV "protected person" status; instead, they only receive the protections of Common Article 3 and Article 75 of Additional Protocol I.[219]

Unlike the United States, which recognizes the status of UEBs in a NIAC, the ICRC asserts that in a NIAC, "civilian" is the only legal

---

[211] *How Is the Term "Armed Conflict" Defined?*, *supra* note 183.
[212] Common Article 3, *supra* note 39, art. 4A (2)–(6).
[213] Convention IV relative to the Treatment of Civilian Persons in Time of War, Geneva, Aug. 12, 1949 [hereinafter GC IV].
[214] *Id*.
[215] SOLIS, *supra* note 176, at 232.
[216] GC IV, *supra* note 213, art. 4 (defining protected person as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals").
[217] GC IV, *supra* note 213, art. 27.

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Id.
[218] SOLIS, *supra* note 176, at 202 ("In a non-international armed conflict, the term, 'civilian' takes on its usual meaning, a person not associated with the military.").
[219] *Id.* at 234. The United States is not a signatory to the Additional Protocol I, but considers certain provisions customary international law. *Id.*

status.[220] Under the ICRC view, the protected status of civilians is not absolute.[221] According to the ICRC, when civilians directly participate in hostilities[222] they forfeit their protected status and become lawful targets.[223] However, the loss of protection is not absolute. Under the ICRC view, civilians only lose their protections "for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function."[224] The ICRC asserts that it is not until civilians engage in a "continuous

---

[220] *See Interpretive Guidance*, *supra* note 197, at 24.

> For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

Id.

[221] *Id*.

[222] *Id*. part I, section V.

> In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:
>
> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

Id.

[223] *Id*. section IV ("The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.").

[224] *Id*. section VII.

combat function"[225] that they become persistent lawful targets.[226] Under the U.S. view however, these individuals are not civilians who have lost their protected status, they are UEBs, and they are always legitimate and lawful targets.[227]

The terms unlawful enemy combatant[228] (UEC) and UEB are synonymous.[229] The former was used by the United States in the early days following 9/11, the latter is now the preferred terminology.[230] Although the term UEB does not appear in any written LOAC body of law,[231] it is arguably gaining acceptance under international law.[232]

> There are traditionally two types of unlawful belligerents: combatants who may be authorized to fight by a legitimate party to a conflict but whose perfidious conduct disqualifies them from the privileges of a POW, and civilians who are not authorized as combatants but nevertheless participate in hostilities, but who do not thereby gain combatant status.[233]

Although the ICRC and the United States use different terms (DPHing or continuous combat function versus UEB) to describe unlawful combatants, both parties agree that these individuals, regardless of their monikers are, at a minimum, entitled to protections under Common Article 3.[234]

---

[225] *Id*.

[226] Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 44 (2010). There are several critics of the ICRC's interpretative guidance. "[I]t repeatedly takes positions that cannot possibly be characterized as an appropriate balance of the military needs of states with humanitarian concerns". *Id.*

[227] LAW OF WAR, *supra* note 4.

[228] Thomas E. Ayres, *"Six Floors" of Detainee Operations in the Post-9/11 World* PARAMETERS 32, 34 (2005), http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/05autumn/ayres.pdf ("U.S. classification of detainees in Afghanistan and Guantánamo Bay as 'unlawful combatants' has aroused voluminous and vociferous academic debate, complicated because there is no internationally accepted, clearly delineated detention and interrogation standard for treating unlawful combatants.").

[229] DETAINEE PROGRAM, *supra* note 19.

[230] *Id.*

[231] SOLIS, *supra* note 176, at 206–07.

[232] *Id*.

[233] ELSEA, *supra* note 89, at 11.

[234] DETAINEE PROGRAM, *supra* note 20.

4. Duration of Detention

As detailed earlier, there is limited guidance outlining the detaining party's responsibilities in conducting detention operations during a NIAC. Common Article 3, AP II, and CIL are the main bodies of law governing detention during a NIAC.[235] However, none of these authorities specifically address the issue of duration of detention in a NIAC.[236] During IACs, there are much more robust and comprehensive international laws concerning detention.[237] Under the law of armed conflict, in an IAC the authority to detain combatants lasts for the duration of the conflict.[238] This position is rooted in a traditional understanding of how conflicts operate and an assumption that there will be a conclusion to hostilities.[239] However, the protracted nature of the current conflict between the United States and al-Qaeda calls into question the modern applicability of this detention principle.[240] As a result, Detainee Review Boards (DRBs) were designed to safeguard against arbitrary indefinite detentions.[241]

---

[235] Common Article 3, *supra* note 39 and accompanying sources.

[236] *See supra* note 39 and accompanying sources.

[237] Common Article 3, *supra* note 39; GC IV, *supra* note 213 (providing detailed requirements for the treatment of POWs, retained persons and civilian internees).

[238] Common Article 3, *supra* note 39.

[239] Hamdi v. Rumsfeld, 542 U.S. 507, 519–20 (2004) (finding "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.").

[240] *See* Waxman, *Administrative Detention of Terrorists*, *supra* note 1, at 5.

> We are confronted not with a hostile foreign state whose fighters wear uniforms and abide by the laws of war themselves, but rather with a dispersed group of non-state terrorists who wear no uniforms and abide by neither laws nor the norms of civilization. And although wars traditionally have come to an end that is easy to identify, no one can predict when this one will end or even how we'll know it's over.

Id. *See also* SOLIS, *supra* note 176, at 106 ("In the 'war on terrorism' the Geneva Conventions are not an entirely comfortable fit.").

[241] Bovarnick, *supra* note 97.

5. Detainee Review

There is ongoing debate over the appropriate level of due process to afford detainees wishing to challenge their detention.[242] Views differ on the specific safeguards required to ensure only those individuals meeting detention criteria are held, and only for as long as necessary.[243] In an IAC, the Geneva Conventions provides some limited guidance concerning detainee review requirements.[244] However, in a NIAC, the LOAC is largely silent on the requirements for detainee review.[245]

Under U.S. domestic law, the Supreme Court established various rights afforded to LOAC detainees in U.S. custody through habeas

---

[242] *See, e.g.*, Daphne Eviatar, *Detained and Denied in Afghanistan, How to Make U.S. Detention Comply with the Law*, HUMAN RIGHTS FIRST (May 2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in Afghanistan.pdf.

[243] Waxman, *The Law of Armed Conflict*, *supra* note 75, at 449.

> The [ICRC] has developed a set of principles and safeguards that it argues should govern security detention in all circumstances, i.e., both in armed conflicts and outside of them. The guidelines are based on law of armed conflict and human rights treaty rules as well as on non-binding standards and best practice and are to be interpreted on a case-by-case basis. According to the ICRC guidelines detainees are entitled-among other things-to challenge the lawfulness of their detention and to have an independent and impartial body decide on continued detention or release.

Id.

[244] Chesney & Goldsmith, *supra* note 62, at 1089.

> [L]aw of war treaties mandate very few procedural protections for military detention. GC III and GC IV do not address the question of how to determine whether a captured person is in fact someone subject to detention rather than an innocent civilian detained by mistake. The closest they come is in GC III Article 5, which specifies that a "competent tribunal" must resolve "doubt" as to whether a person who has committed a "belligerent act" warrants POW status, but does not explain what constitutes a "competent tribunal" or what procedures the tribunal must employ. Additional Protocol I (API) also requires a "competent tribunal" to resolve POW status doubts, and additionally creates a rebuttable presumption that the detainee is in fact a POW. But it says nothing about the tribunal or (with the exception of the rebuttable presumption) its procedures.

Id.

[245] Chesney, *supra* note 189.

petitions, mainly stemming from detention at Guantánamo Bay.[246] While the United States has the domestic authority to detain under the 2001 AUMF,[247] that authority is subject to challenge on a case by case basis.[248] The Supreme Court has not detailed the exact requirements for what it considers adequate detention review.[249] During the latter part of the conflict in Afghanistan, the United States implemented a robust detainee review process it called detainee review boards (DRBs).[250]

The DRB process regularly reviewed LOAC detention and provided significant procedural protections for detainees to challenge their detention.[251] The process provided for an initial review conducted within sixty days of detention and subsequent reviews every six months by a three-officer panel to determine if the detainee met the criteria for continued detention.[252] Although not without its critics,[253] many perceive the DRB process as "a new model for security detention review processes for the world."[254] Through increased transparency and due process, the DRB process managed to achieve the goals of security detention discussed below while maintaining legitimacy.[255]

C. Goals of Detention

The main goal of LOAC detention is prevention.[256] In terms of prevention, the primary goal for detaining a UEB is to stop the individual

---

246 Waxman, *Administrative Detention*, *supra* note 1, at 8.
247 Hamdi v. Rumsfeld, 542 U.S. 507, 519–20 (2004).
248 Waxman, *Administrative Detention*, *supra* note 1, at 8.
249 *Id*.
250 *See* Bovarnick, *supra* note 97 (analyzing the Detainee Review Boards (DRBs)).
251 *Id*. at. 32. Detainee rights at the DRB include:

> [T]he right to be present at open sessions; the right to be represented by a personal representative; the right to testify or provide a written statement; and the right to present all reasonably available evidence related to whether the detainee meets the criteria for detention and whether continued detention is required.

Id.
252 *Id*. at 27–28.
253 *Id*. at 35–41.
254 *Id*. at 12.
255 *Id*.
256 Waxman, *Administrative Detention*, *supra* note 1, at 14.

from causing harm by removing him or her from the battlefield.[257] Notwithstanding, detention also serves other strategic goals related to prevention. For example, incapacitation by removing a critical element of an organization; deterrence by demonstrating to other members that if they continue to engage in armed conflict against the United States they will be deprived of liberty; and information-gathering by questioning detainees to help thwart future attacks and better understand the enemy.[258]

Detention fulfills all of these goals, which is why it is such an important tool for military commanders. Although the use of lethal force against enemies is effective, and often appropriate, it cannot and should not be a commander's only option for removing UEBs from the battlefield.[259] Detention and interrogation provide commanders the chance to neutralize the enemy while gaining insight into the enemy's operations through intelligence interrogations.[260] Information gathered through detention and interrogation is critical to dismantling future

---

[257] *Id*.

[258] *Id*.

[259] Matthew C. Waxman, *9/11 Lessons: Terrorist Detention Policy*, COUN. ON FOREIGN RELATIONS (Aug. 26, 2011), http://www.cfr.org/911-impact/911-lessons-terrorist-detention-policy/p25665.

> An important lesson since the 9/11 attacks is that detention decisions and practices have legal, political, diplomatic, operational, and other ripple effects across many aspects of counterterrorism policy, and across U.S. foreign policy more broadly. Those concerned that the United States is too aggressive in its detention policy should beware that constraining this tool adds pressure to rely on other tools, including lethal drone strikes or proxy detention by other governments.

Id.

[260] *See also* Waxman, *Administrative Detention*, *supra* note 1, at 15.

> Thwarting terrorist plots requires getting inside the heads of network members, to understand their intentions, capabilities, and modes of operations. Detention can facilitate such intelligence collection through most obviously interrogation, but also through monitoring conversations among prisoners or even "turning" terrorist's agents and sending them back out as government informants.

Id.

operations and defeating the enemy.[261] Commanders lose this capability if they simply kill the enemy. Creating and implementing a strategic detention policy will allow commanders to reap the operational benefits afforded by LOAC detention.[262]

IV. Striking a Balance—A Strategic Detention Paradigm

In the days following 9/11, the United States created a permissive LOAC detention regime focusing on indefinite detention and utilizing enhanced interrogation techniques to gain actionable intelligence to thwart future attacks.[263] This approach undermined U.S. credibility throughout the world, compromised its ability to successfully prosecute terrorists and has resulted in the quandary that is Guantánamo Bay.[264] Nevertheless, there is a real danger in completely abandoning LOAC detention in the fight against al-Qaeda and other associated forces. Detention for the sole purpose of criminal prosecution jeopardizes national security interests and forfeits critical intelligence.[265]

If the United States is serious about national security and defeating al-Qaeda and associated forces, Congress must enact a strategic detention policy that allows LOAC detention and criminal detention to work in concert. As illustrated by the capture, interrogation, and prosecution of Warsame,[266] this hybrid approach to detention is effective.

---

[261] Schlesinger et al., *supra* note 12, at 31 ("In sum, human intelligence is absolutely necessary, not just to fill these gaps in information derived from other sources, but also to provide clues and leads for the other sources to exploit.").

[262] Benard et al., *supra* note 17, at 83 ("[United States forces have generally treated POW and detainee operations as an afterthought, a perhaps inevitable but largely inconvenient collateral effect of military conflict. Such operations would be better considered as a central part of the successful prosecution of a conflict, particularly a counterinsurgency.").

[263] *See, e.g.*, Schlesinger et al., *supra* note 12; Rumsfeld, *supra* note 106; Wala *supra* note 108.

[264] *See supra* Section III.B.

[265] Apuzzo, *supra* note 63 ("If there is another terrorist attack, that's when this becomes very important," Mr. Graham said, "When we look back and say, 'Did we miss the opportunity to gather intelligence by criminalizing the war?'").

[266] *Guilty Plea Unsealed*, *supra* note 149.

A. A Holistic Hybrid Approach to LOAC Detention

1. Purpose

A holistic, hybrid approach paradigm enables the United States to further the legitimate goals of LOAC detention without compromising the future possibility of criminal prosecution. Importantly, this model strikes a critical balance between the competing interests and goals of the LOAC and criminal detention.[267] A short-term detention facility, to detain and question high-value individuals like Osama bin Laden, accomplishes these objectives without falling prey to the dangerous practice of indefinite detention.[268] Under this proposed paradigm, decisions to detain would be highly scrutinized. Authority to detain would be withheld to the Secretary of Defense or his designee. The goal of this proposed facility is to allow the United States to capitalize on the strategic benefits of LOAC detention and interrogation while promoting the rule of law through criminal prosecutions. This facility would allow the United States to defend itself from attack while maintaining legitimacy both domestically and internationally. This facility would be called the U.S. Strategic Detention Facility (SDF).

---

[267] Chesney & Goldsmith, supra note 62, at 1081.

> Potential models for terrorist detention span from the pure model of military detention at one extreme to the pure model of civilian criminal trial at the other . . . . Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.

Id.

[268] *Id.*

2. Process

With the approval of the President, and in accordance with domestic and international law, individuals classified as high-value UEBs could be captured and brought to the SDF for initial screening to determine whether they meet specific criteria.[269] Once screened, the individual would be released if he does not meet the criteria for detention. If he meets the criteria, detention would continue. The detainee would be interrogated in accordance with the *Human Intelligence Operations* field manual.[270] The restricted interrogation technique of separation may be also authorized, since only UEBs will be held at the facility.[271]

> The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; decreasing the detainee's resistance to interrogation. Separation, further described in paragraphs M-2 and M-28, is the only restricted interrogation technique that may be authorized for use. Separation will only be used during the interrogation of specific unlawful enemy combatants for whom proper approvals have been granted in accordance with this appendix.[272]

Because of the strategic nature of detainees held at the SDF, and the likelihood that they will provide critical intelligence, the United States would likely employ the restricted interrogation technique of separation on all of the detainees housed at the SDF.

Once intelligence questioning is complete, or the individual no longer meets criteria for detention, he will be transferred to the Department of Justice for criminal prosecution, to another nation for criminal prosecution, or be released. By design, the SDF is a short-term LOAC detention facility that only houses high-value UEBs. As such, the detainee population would be very limited. Only a very small number of

---

269 *See infra* Section 3 for a discussion of the criteria suggested. Discussion of the legal basis for capturing specific UEBs is beyond the scope of this paper.
270 *See* HUMAN INTEL. OPER., *supra* note 4.
271 *Id.* Appendix M.
272 *Id*.

individuals would face detention and based on operational factors, it is likely that the holding cells would often remain vacant.

3. Detention Criteria

Generally, the authority to detain is similar to the justification to target—status, conduct or a hybrid of both status and conduct.[273] The detention criteria[274] at the SDF would be a hybrid approach; it would allow for detention based on conduct (for example, engaging in hostilities against the United States), status (for example, membership in al-Qaeda) or a combination of both conduct and status. For example, Osama bin Laden could be detained based on his leadership role in al-Qaeda (status) or for his role in planning the attacks against the United States on 9/11 (conduct) or for both (a hybrid). History has shown that in the current asymmetrical conflict, a hybrid detention criteria that allows for detention based on both status and conduct is most effective.[275]

Establishing restrictive detention criteria is critical to ensure the strategic goals of this detention program are achieved.[276] The current

---

[273] *Id*. at 1082 ("Associational status and individual conduct each play some role as detention criteria in both the criminal and military contexts. Military detention traditionally emphasizes status more than conduct, however, while the reverse is true in the criminal justice system").

[274] Chesney & Goldsmith, *supra* note 62, at 1086–1087 ("It does not follow that the laws of war contemplate the use of any particular detention criteria during NIAC. On that issue, the laws of war seem silent, leaving the matter in the discretion of the state subject to any other applicable legal considerations.").

[275] *Id.* at 1099.

> The traditional model's emphasis on associational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al Qaeda. Beyond the leadership core, it is difficult to determine what degree of association with al Qaeda suffices to warrant status-based detention even if the facts can accurately be determined. The difficulty drops away if the suspect can be shown to have acted for al Qaeda on particular occasions, and where the person concedes his membership.

Id.

[276] Waxman, *Administrative Detention*, *supra* note 1, at 26 ("Historically, detention practices—especially those viewed as overbroad—have sometimes proven counterproductive in combating terrorism and radicalization, and consideration of administrative detention's strategic utility should weigh these dangers.").

conflict with al-Qaeda and associated forces does not support a mass detention program. Instead, the United States needs a worldwide detention capability to temporarily detain and interrogate select high-value UEBs.[277] The term "high-value" refers to individuals like Osama bin Laden but it also refers to other more innocuous UEBs deemed to have strategic importance by virtue of their placement or access in an organization or based on the particular threat they pose.[278] The Rules of Engagement (ROE), utilized by military forces in the particular operation would contain a more specific definition of "high-value." Although the SDF would remain transparent in many respects, not all of the operating procedures would be available to the public because that would compromise the effectiveness of the operation, by allowing the enemy to develop tactics, techniques and procedures (TTPs) to counter the detention program.

The proposed detention criteria at the SDF are: the detainee[279] engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or is a member of al-Qaeda or associated forces;[280] meets the definition of a "high-value" target; and reasonable grounds exist to believe the detainee possesses operationally significant intelligence.[281] Individuals would not be detained based solely on perceived intelligence value.

4. Location

The proposed facility would be located on the island of Guam, a U.S. territory located in the Pacific.[282] This location is ideal because there is

---

[277] Chesney & Goldsmith, *supra* note 62, at 1122 ("[T]he first, most fundamental, and in some senses most difficult task is to define the set of persons who are so dangerous that they ought to be detained in the first place.").

[278] *See, e.g.*, *supra* Section III.D. (discussing Warsame's detention).

[279] Although the criteria uses the term "he," both males and females could be detained at the secure detention facility (SDF).

[280] Another organization such as ISIL could be substituted for al-Qaeda to create a detention capability for a different NIAC. *See also supra* notes 6, 56 and accompanying sources.

[281] This criteria is based in part on the criteria established in the Military Commissions Act of 2009. MCA 2001, *supra* note 3.

[282] GUAM ON-LINE, http://www.guam-online.com/ (last visited June 8, 2016) ("Located approximately 3300 miles West of Hawaii, 1500 miles east of the Philippines and 1550

already a significant U.S. military presence on the island and the United States has a very strong relationship with Guam. At first glance this might resemble Guantánamo Bay. However, this facility would be vastly different from the Guantánamo Bay Confinement Facility. Applying the lessons learned from the past decade-and-a-half of conducting LOAC detention operations should avoid the legal and ethical issues associated with the detention operations at Guantánamo Bay.[283] Unlike Guantánamo Bay, placing the facility in Guam is not meant to skirt the laws of the U.S. but rather to establish a fixed facility in a location that provides transparency and security.

Guam's location in the Pacific provides geographic security. Furthermore, placing the facility outside the United States avoids the inevitable domestic political fallout that would occur if it were placed in the United States.[284] The goal is not to place the detainees beyond the rule of law.[285] To the contrary, the goal is to promote the rule of law—the SDF is designed for short-term LOAC detention, with built-in procedural protections, and full compliance with both domestic and international laws concerning detainee treatment. Therefore, the SDF would not be Guantánamo Bay II; it would be a means to facilitate strategic, short-term LOAC detention.

5. The Facility

The detention facility would be a fixed structure, continuously staffed by the DoD at all times, to house at least three detainees. The overall maximum capacity of the facility should be ten detainees and the facility could be fully staffed with as little as one week's notice. A joint command (meaning representatives from all of the military services) headed by an O-6 commander would operate the facility.

A military police company would serve as the guard force and a military intelligence company would serve as intelligence analysts. Several permanent-party interrogators and at least two judge advocates

---

miles South of Japan, the Island of Guam is the Western most territory of the United State.").

283 *See supra* Section III.B.

284 While there is no legal difference between a site on the mainland or a United States territory per se, location on a territoy may be more politically tolerable, as well as more tactical from a security perspective.

285 ELSEA *supra* note 89. *See supra* note 102 and accompanying text.

would also be assigned to the facility, along with a medical team replete with a doctor and a mental health care provider to treat the detainees. Since detainees would most likely be separated[286] while in the facility, there would be single cell units and several interrogation booths. Significant security would ensure the safety of both the detainees and the military personnel operating the facility.

6. Treatment

It is imperative that the United States apply the lessons learned since 9/11 and comply with both domestic and international law concerning the treatment of detainees.[287] At the facility, both detention and interrogations must comply with U.S and international law.[288] All interrogations must comply with field manual for human intelligence operations[289] and detainees would be treated in accordance with the requirements established in the *Human Intelligence Collector Operations* Directive.[290] Additionally, in accordance with the special status afforded to the ICRC, it would have access to detainees and have regular access to the facility in accordance with *Law of War Program*.[291] The facility would make religious accommodations as appropriate and operationally feasible.[292] All detainees would be notified that they are entitled to Common Article 3 protections.

7. Duration of Detention

This proposed detention facility is designed for temporary LOAC detention. As a matter of policy, indefinite detention would not be

---

[286] HUMAN INTEL. OPER., *supra* note 4, Appendix M.

[287] Solis, *supra* note 176, at 186 (stating that although the enemy may not follow Geneva, "one does not observe or disregard LOAC according to the enemy's conduct . . . . We respect [the] LOAC and customary law because they are the law, and because it is the right and honorable thing to do.").

[288] *Id*.

[289] HUMAN INTEL. OPER., *supra* note 4.

[290] DETAINEE PROGRAM, *supra* note 19.

[291] LAW OF WAR PROGRAM, *supra* note 19 at 7 ("The ICRC will be given access to all DoD detention facilities and the detainees housed therein, subject to reasons of imperative military necessity.").

[292] *Id.* at 2. Humane treatment includes "[f]ree exercise of religion, consistent with the requirements of detention." *Id.* For example, providing a Koran, a prayer rug and the direction to Mecca to Muslim detainees, or a Bible to Christian detainees. *Id.*

permissible at this facility.[293] Instead, strict and finite timelines governing the duration of detention directly overseen by the Secretary of Defense or his designee would be established. Although international law allows for LOAC detention until the end of hostilities, as a matter of policy, the United States should employ a more limited approach to the current conflict with al-Qaeda. Because of the indefinite quality of this conflict, and the desire to promote the rule of law through criminal prosecution once the goals of LOAC are met (namely prevention and intelligence gathering), a more limited approach is more likely to accomplish U.S. goals.

For operational reasons, the specific timelines for detention would not be publically disclosed. However, the ICRC would be privy to this information[294] and the total length of detention at the SDF could not exceed six months.[295] The Secretary of Defense or his designee would be the approval authority for initial detention as well as all extensions. Interrogation plans would be approved by the facility commander.

8. Procedural Protections—Detention Review

---

[293] Boumediene v.Bush, 553 US 723 (2008).

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

Id. at 69.

[294] *See Confidentiality: Key to the ICRC's Work but Not Unconditional*, ICRC RESOURCE CENT. (Sep. 20, 2010), https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm (ICRC communications are confidential).

[295] The six-month cap provides enough time to gain actionable intelligence through interrogations and also gives authorities time to coordinate the next step: federal prosecution, transfer to another nation for prosecution or release. The cap also ensures that detention at the facility is temporary. The six-month limit is based in part on the Geneva Convention Relative to the Treatment of Prisoners of War IV (GC IV) six-month detention review requirements. *See* GC IV, *supra* note 210.

The temporary nature of the detention facility limits the need for an extensive detention review structure. Individuals detained fewer than forty-five days would not be entitled to review because of the limited nature of the infringement on individual liberty. A panel of three military officers would review the status of any detainee held longer than forty-five days in the SDF. These detainees would be notified of the general nature of the basis for detention, and may provide a statement to the panel for consideration. The panel would make a recommendation to the Secretary of Defense whether to release the detainee, transfer him, or continue detention. The Secretary of Defense or his designee would make the final decision on all extensions, transfers and releases.[296]

9. Rules for Transfer and Release

Once intelligence questioning is complete, the detainee is assessed to no longer meet criteria, or six months is up, the detainee would be transferred[297] to either the Department of Justice, another country for criminal prosecution or released.[298] Generally, only individuals assessed as low or no threat would be released.[299] Although prosecution in U.S. federal court is most ideal, not every UEB can or should be prosecuted by the United States. Therefore, each detainee, along with the evidence

---

[296] The due process rights afforded a detainee at this facility would not be as robust as those provided at DRBs in Afghanistan because of the limited duration of detention.

[297] *See* DETAINEE PROGRAM, *supra* note 20, at 6. The Department of Defense's Instruction 2310.01E, *Land of War Program*, would govern all detainee transfers. *Id.* "No detainee will be transferred to the custody of another country when a competent authority has assessed that it is more likely than not that the detainee would be subjected to torture." *Id.*

[298] Critics will argue that a long-term, indefinite detention facility is needed in order to detain individuals that are a security threat to the United States, but whom it cannot effectively prosecute. Indefinite detention is not an option under this proposed model. Ideally, because the information gained through intelligence questioning will be in accordance with both domestic and international law, the United States will not encounter the suppression issues that it has encountered based on evidence obtained through enhanced interrogation techniques in Guantánamo Bay. *See, e.g.*, *Torture's Blowback*, N.Y. Times (Jan. 14, 2009, 9:42 PM), http://roomfordebate.blogs.nytimes.com /2009/01/14/tortures-blowback/?_r=0.

[299] Using the hybrid model of LOAC detention with an eye toward criminal prosecution would force authorities to build a criminal case in addition to building the case for LOAC detention. This would enable authorities to prosecute through the development of admissible evidence. Unfortunately, there may be some cases in which a detainee is assessed to be a continued threat but cannot be prosecuted. After six months of detention, he would be released.

available for prosecution, would be evaluated on a case-by-case basis to determine which of the three avenues is most appropriate.

B. Legal Authority under the LOAC and Domestic Law

Under domestic law, the United States is authorized to detain members of al-Qaeda and associated forces in accordance with the 2001 AUMF.[300] Additionally, under the War Powers Resolution, the President has the inherent authority to detain threats to the United States.[301] Under international law the United States is entitled to use force to defend itself against threats pursuant to the U.N. Charter.[302] A legal and legitimate exercise of that force is detention.[303] As such, detention of UEBs under the criteria discussed is authorized under both domestic and international law.

C. Policy—Transparency, Legality, and Legitimacy

Enacting a cohesive and clearly articulated U.S. LOAC detention paradigm will promote transparency and increase the perceived legitimacy of U.S. LOAC detention operations.[304] For operational reasons, some portion of the policies would not be publically available (such as certain detention timelines). However, the vast majority of the information about the general nature of the program would be publically available. By taking LOAC detention operations out of the shadows, publically acknowledging that they are conducted, that they are lawful, and are strategically critical to national security, the United States will garner support for LOAC detention operations and finally begin to regain the confidence lost by both the American people and the international community in the early days after 9/11.

---

[300] 2001 AUMF, *supra* note 74.
[301] 50 U.S.C. §§ 1541–48.
[302] *See* U.N. Charter art. 51. *See also* Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 535 (2003) ("[I]t is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack.").
[303] *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[304] Bellinger, *supra* note 163.

D. Dissenting Views

It is important to acknowledge critics. In light of the controversial nature of detention operations there will be opponents of this proposal. Some may claim this paradigm violates U.S. domestic law, the LOAC and IHL, human rights law, or maybe even all four bodies of law. It does not. This proposed detention policy is born of a recognition of past mistakes, a desire to lawfully utilize detention to defeat enemies engaged in armed conflict against the United States, and to end an armed conflict that all seemingly agree has endured for far too long.

VI. Conclusion

As the fictitious scenario concerning the capture of Osama bin Laden illustrates, it is imperative the United States implement a detention paradigm. The United States has been engaged in an armed conflict with al-Qaeda and associated forces for almost a decade and a half, and there is no end in sight.[305] Although indefinite detention through the duration of hostilities is arguably allowable, in the present NIAC with al-Qaeda and its associated forces, this position is untenable.

Establishing a comprehensive, thoroughly planned, and strategically-executed detention policy will provide the United States with a valuable mechanism to remove enemies from the battlefield, question them for intelligence purposes and then have them prosecuted for their crimes in civilian court. This holistic approach to detention operations provides a realistic, workable paradigm for removing UEBs from the battlefield to prevent attacks against the United States while gaining valuable intelligence critical to defeating the enemy. It is time for the United States to move past the stigma surrounding the dark days following 9/11 and implement a LOAC detention policy that keeps America safe and promotes our values.

---

[305] Chesney & Goldsmith, *supra* note 62, at 1100 ("The war against al-Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for negotiations leading to an agreed end to hostilities or an unconditional surrender.").