TAKING NO PRISONERS: THE NEED FOR AN ADDITIONAL PROTOCOL GOVERNING DETENTION IN NON-INTERNATIONAL ARMED CONFLICTS

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It is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible . . . . Human rights law must be realistic in the sense of not . . . otherwise making compliance with the law and victory in battle impossible to achieve at once.[1]

War appears to be as old as mankind, but peace is a modern invention.[2]

I. Introduction

The deprivation of liberty is a reality of armed conflict,[3] deeply

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[1] Willliam Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EURO. J. OF INT'L L. 750 (2005).

[2] HENRY SUMNER MAINE, INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE 8 (1888).

[3] *See* Int'l Comm. of the Red Cross, *Strengthening International Humanitarian Law Protecting Persons Deprived of Liberty: Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers*, 32IC/15/XX, at 10 (June, 2015) [hereinafter *Detention Concluding Report*] ("Torture, extra-judicial killing, forced disappearance, arbitrary or unlawful-detention, isolation and neglect are only a few of the harms that can result from abuse of this relationship or failure to live up to the obligations it entails.").

rooted in[4] the history of warfare.[5] This reality is an uncomfortable one, acknowledging the key role it plays in lawful military operations[6] while also recognizing the potential for abuse of those individuals detained.[7] Analysis of wartime detention is particularly complicated because it sits at the intersection between an understanding that individuals have the right to protection from arbitrary deprivation of liberty,[8] and an appreciation that detention is a "necessary, lawful and legitimate means of achieving the objectives of international military operations."[9]

The body of international law that governs armed conflict—International Humanitarian Law (IHL)—is a critical starting point to understanding the allowable scope of security detention in an armed conflict. However, scholars and international courts over the last half-century have questioned IHL's interplay with International Human Rights Law (IHRL). These two regimes are in tension in many ways, but even in tension, they share a common thread: both allow for the piercing of State sovereignty and regulation of State conduct, in certain circumstances, in order to promote global humanitarian aims.[10] The IHL realm concerns the

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[4] *See* Brief of Respondent at 14, Hamdi v. Rumsfeld, 542 U.S. 507 (2003) (No. 03-6696) (citing G. LEWIS & J. MEWHA, U.S. DEP'T OF ARMY, PAM. NO. 20-213, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945 (1955) [hereinafter DA PAM. 20-213]. Though the pamphlet largely focuses on the utilization of prisoners of war as a labor force, it carefully traces the history of such prisoners from the American Revolution. DA PAM. 20-213 at 1-40.

[5] *See* 1 ALEXANDER GILLESPIE, A HISTORY OF THE LAWS OF WAR (2011).

[6] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality) (calling detention a "fundamental and accepted" incident to war).

[7] *See Detention Concluding Report*, *supra* note 3, at 10.

[8] *See, e.g.*, International Covenant on Civil and Political Rights art. 9(1), Dec. 19, 1966, 999 U.N.T.S. 171, 175 [hereinafter ICCPR] ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").

[9] *See The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* ¶ 3 (2012), *reprinted in* 51 INT'L LEGAL MATERIALS 1368 (2012), http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/CopenhangenProcessPrinciplesandGuidelines.pdf [hereinafter *Copenhagen Process*].

[10] *See* discussion *infra* Section II.B; *see also* Louis Henkin, *Sibley Lecture, March 1994 Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 34 (1996).

> Thus, 1945 saw a small but clear, firm, bold step from state values toward human values, a small but clear derogation from state "sovereignty." The condition of human rights became a subject of international concern in principle, as well as, in fact, to an increasing extent. Slowly, imperceptibly, how any state treated any human being

"protection of human values even in the most inhuman environment of warfare,"[11] while IHRL focuses on ensuring a certain minimum standard of treatment of people by their own governments.[12] Though these legal principles were originally conceived as two separate rubrics for governing State action under fundamentally opposing circumstances—peacetime and armed conflict—the philosophical underpinnings of IHRL have increasingly been grafted onto analysis and interpretation of IHL norms.[13] Known as "convergence," this is the assumption that IHRL always applies to individuals in their relationships to the State and that it continues to apply during armed conflict, though it may be limited or refined by IHL.[14] Convergence as an analytical doctrine has an enormous impact on the perceived legitimacy of detention during non-international armed conflicts (NIACs). In particular, it has an impact that is keenly felt in some of the most recent international court decisions. These decisions, such as *Serdar Mohammed v. Secretary of State for Defence*,[15] have largely concerned themselves with searching for a State's authority to detain during NIACs under IHL and concluding that IHL itself does not provide positive authority to conduct detention operations.

In *Serdar Mohammed*, the United Kingdom's Court of Appeals upheld the lower court's judgment that the 110 days an alleged Taliban commander was held in a U.K detention facility in Afghanistan without being either released or transferred to Afghan authorities violated his rights under the European Convention on Human Rights (ECHR).[16]

> became, in principle and to some extent in fact, "of international concern," *everybody's* business. The international law of human rights penetrated the state monolith beyond repair.

Id.

[11] Christopher Greenwood, *Human Rights and Humanitarian Law—Conflict or Convergence*, 43 CASE W. RES. J. INT'L L. 491, 496 (2010).

[12] *See* GERALD DRAPER, REFLECTIONS ON LAW AND ARMED CONFLICTS 128 (Michael A. Meyer & Hilaire McCoubrey eds., 1998).

[13] *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 313 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC STUDY VOL. 1] (referencing IHRL treaties in explaining the customary international humanitarian law prohibition on murder).

[14] *See* Naz K. Modirzadeh, *The Dark Side of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. 349, 354 (2010).

[15] Serdar Mohammed v. Sec'y of State for Defence (2015) EWCA (Civ) 843.

[16] *Id.* at 9. In earlier cases, the European Convention on Human Rights (ECHR) was held to apply extraterritorially in three circumstances: (1) when a State exercises public power

Finding no authority under IHL for Mohammed's detention, the Court turned to IHRL, specifically Article 5 of the ECHR, for the applicable rule, concluding that because Afghan law and coalition policy required a detainee to be turned over to Afghan authorities within ninety-six hours of capture, detention past this timeframe violated Article 5's prohibition on arbitrary detention.[17] The United Kingdom's supreme court partially reversed this decision, holding that Serdar Mohammed's detention was authorized by the applicable United Nations Security Council Resolutions (UNSCR) for imperative reasons of security,[18] but finding a breach of the ECHR because detainees did not have an effective means to challenge their detention.[19] While the U.K. Supreme Court recognized that "detention is inherent in virtually all military operations of a sufficient

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normally reserved to a government or otherwise asserted authority over an individual under its control; (2) where a State exercises effective control over an area; or (3) where the territory of one Convention State is occupied by the armed forces of another Convention State. *See* Al-Skeini and Others v. The United Kingdom, App. No. 55721/07 Eur. Ct. H.R., at 134-42 (2011). Detention of individuals by the United Kingdom triggered application of the ECHR because U.K. soldiers exercised authority and control over them. *Id.*

[17] *See* Serdar Mohammed v. Sec'y of State for Defence (2015) EWCA (Civ) 843, at 9. A more full discussion and critique of the basis for the *Serdar Mohammed* decision both at the trial level, Serdar Mohammed v. Ministry of Defence (2014) EWHC (QB) 1369, and the U.K. Court of Appeals, will be found *infra* Section II.C.

[18] *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, at 30, 89; *see also* Shaheed Fatima Q.C., U.K. Supreme Court Judgment on Extra-Territorial Detention in Iraq and Afghanistan, JUST SEC'Y (Jan. 17, 2017, 7:58 AM), https://www.justsecurity.org/36407/uk-supreme-court-judgment-extra-territorial-detention-iraq-afghanistan/. As Shaheed Fatima writes in explanation of the Court's reasoning:

> The Iraq UNSCR (1546) identified, in the annexed letter of Colin Powell, the power to detain (internment) where necessary for imperative reasons of security. The Afghanistan UNSCRs (1386, 1510, 1890) were interpreted as including a similar power to detain, since the mandate of ISAF (the International Security Assistance Force) was to take "all necessary measures" to assist the Afghan authorities "in the maintenance of security"; it was apparent from recitals to UNSCR 1890 that the Security Council was particularly concerned about violence and terrorist activities and the mission for troop-contributing nations involved not just operations ancillary to ordinary law enforcement but also armed combat against an organised insurrection.

Id.

[19] *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 99-111.

duration and intensity to qualify as armed conflicts,"[20] its thorough and considered analysis depended on the premise that IHL is a source of positive law that confers onto States the right to detain.[21]

The analysis by the courts overlooks one fundamental premise: States have inherent authority to conduct security detentions in armed conflicts as part of their larger inherent authority to conduct hostilities.[22] This inherent authority allows a State to take whatever actions are necessary to successfully wage war, so long as its authority has not been explicitly restricted by IHL.[23] Far from providing a positive source of authority, IHL rules merely regulate a State's exercise of that inherent authority it already possesses.

The current misunderstanding of a State's authority to conduct security detentions in NIACs has left the state of the law fractured and unclear. This dissonance will severely hamper the United States' ability to conduct detention operations with coalition partners.[24] In order to address the lack of clarity, the international community should clarify IHL through an Additional Protocol to the Geneva Conventions. This new protocol would recognize States' inherent authority to conduct security detentions in NIACs.[25]

This article proceeds in four parts. Part I served as this introduction. Part II focuses on a thorough explanation of the IHRL and IHL regimes, as well as the debate over where each regime displaces the other; a discussion of legal frameworks that apply during NIACs under both IHL and IHRL; and an analysis of the current debate over the authority to detain in NIACs. This Part ultimately concludes that IHL does, in fact, reflect an

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[20] *Id.* at 15.
[21] *See, e.g.*, *id.* at 12-16.
[22] *See infra* Part II.D. for a thorough discussion of this inherent authority.
[23] *See infra* notes 99-103 and accompanying text.
[24] *See* Caroline Wyatt, *Legal claims 'could paralyse' armed forces*, BBC (Oct. 18, 2013), http://www.bbc.com/news/uk-24576547 (discussing a pamphlet published by the conservative think-tank Policy Exchange arguing that "the fog of law" has degraded British military ability); Charles Moore, *Civilian lawyers have put Britain and its Armed Forces in danger*, TELEGRAPH (Oct. 18, 2013, 8:08 PM), http://www.telegraph.co.uk/news/uknews/defence/10389075/Civilian-lawyers-have-put-Britain-and-its-Armed-Forces-in-danger.html (same).
[25] A discussion of the text of this proposed Additional Protocol IV (AP IV) can be found *infra* Section III. While drafting AP IV would be the full-time job of a team of diplomats, a suggested text for the provisions that such an instrument should contain may be found *infra* Appendix A.

authority to detain that displaces the application of IHRL, relying on both a structural analysis of the two bodies of law and pre-Geneva understanding of State authorities during armed conflict.

Part III recommends Additional Protocol IV (AP IV) to the Geneva Conventions governing security detentions in NIACs and discusses the provisions this additional protocol should contain. This Part offers that the most important provisions for this treaty are procedures for legal detention reviews, as well as procedures for the transfer of detained persons to sovereign authorites. Part IV considers several counterarguments to a treaty-based solution to the problem of security detentions in NIAC. Finally, Part V concludes with a proposal of a new additional protocol.

II. Background and Analysis

It is useful to evaluate the differences between and convergence of IHL and IHRL before examining the legal basis for detention in a NIAC. The distinctions between and triggering points for IACs and NIACs, and the types of security detentions that can occur in armed conflicts will also be examined. The laws applicable to detention in armed conflicts "of a non-international character" must also be evaluated for a thorough analysis.[26] This examination, particularly of the structure of IHL and IHRL, leads to the conclusion that these regimes are prohibitive and regulatory in design, and that States retain their inherent authorities during armed conflicts unless those authorities have been specifically taken away by operation of a treaty or customary international law.

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[26] This language is found, among other places, in Common Article 3 (CA3) of the Geneva Conventions. *See, e.g.*, 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 GC III]. Additional Protocol II (AP II) references CA3 in its preamble, but applies in slightly different circumstances. It applies "to all armed conflicts which are not covered by Article I of the Protocol Additional to the Geneva Convention of 12 August 1949" (i.e., International Armed Conflicts), but only when certain preconditions are met. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. A further discussion of the differences between the application of CA3 and AP II may be found *infra* Section II.B.2.

A. International Human Rights Law and International Humanitarian Law: A Framework

As commentators like Theodor Meron, the President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), have pointed out, "it has become common in some quarters to conflate human rights and the law of war/international humanitarian law,"[27] but IHRL and IHL arose from very different sets of historical circumstances[28] and have very different theoretical underpinnings[29] that often put the two in conflict.[30] Despite the tension inherent between the two systems, scholars, courts, and policymakers have increasingly intertwined the two over the last half-century as the pendulum has swung in favor of a robust international human rights framework.[31]

1. Basic Frames of Reference

These two bodies of public international law are intended to address conduct within two very different relationships: in IHRL, the individual's unequal relationship with the State; in IHL, the reciprocal relationship between co-belligerents.[32] Both legal corpuses consist of a series of relevant treaties as well as duties arising from consistent State practice combined with a sense of legal obligation, or what is known as customary

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[27] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000).

[28] *See* Karima Bennoune, *Towards a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 179-80 (2004); *see also* Major Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1 (2007) (explaining the development of IHRL as a response to the atrocities of World War II); Meron, *supra* note 27, at 242-47 (discussing the historical underpinnings of IHL and its roots in chivalric practice).

[29] *See* Meron, *supra* note 27, at 240.

[30] *See* Bennoune, *supra* note 28, at 179-81 (referencing commentators who oppose any intrusion of the norms of one system of law into the practice of the other). *But see* Greenwood, *supra* note 11, at 494-95 (arguing that commentators who believe the two systems are mutually exclusive are incorrect).

[31] *See* Bennoune, *supra* note 28, at 179-80 (discussing both the trend to "cross-pollinate" the two systems of law as well as the arguments for keeping them separate and distinct). Scholars have argued that it was the 1968 International Conference on Human Rights in Tehran that led to a "renaissance" and greater interaction between IHRL and IHL. *See, e.g.*, SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 86 (2014).

[32] *See* Meron, *supra* note 27, at 240.

international law.[33] While IHRL and IHL possess some similarities in the abstract,[34] commentators also point out that they have markedly divergent and often diametrically opposed core concepts and philosophies.[35] Though the degree to which IHRL and IHL are fundamentally at odds may be overstated in the literature,[36] a comparison of their core principles is a useful analytical starting point.

As discussed, IHRL is the body of international law designed to promote and protect human rights at the international, regional, and domestic levels.[37] Most generally, it is the body of law designed to protect individuals from the arbitrary actions of their own governments.[38] In considering IHRL, three principles are immediately apparent. The first principle is that IHRL provides the backdrop for international law,

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[33] *See* I RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 24, § 102(2) (1987).

[34] They have some purposes in common, as both bodies of law are concerned with "respect for, and dignity of, the human person." SIVAKUMARAN, *supra* note 31, at 86.

[35] As an example of scholarship that argues the two regimes are fundamentally opposed, G.I.A.D. Draper has written:

> [A]t the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions.

G.I.A.D. DRAPER, HUMANITARIAN LAW AND HUMAN RIGHTS, ACTA JURIDICA 193, 199 (1979), quoted in Bennoune, *supra* note 28, at 179-81.

[36] Sir Christopher Greenwood, a Judge on the International Court of Justice, has argued that IHRL and IHL, rather than being mutually exclusive, are actually mutually reinforcing:

> Let me put my cards on the table at the start and say that both these bodies of law are, in my view, part of international law as a whole. Neither is a self-contained entity and their keenest proponents do themselves a disservice by pretending that the two bodies of law are mutually exclusive and must always be in conflict. If you are a human rights lawyer—and I hope that all of you have aspirations to be a human rights lawyer—you should be a humanitarian lawyer as well. Similarly, if your subject is the laws of war and, in particular, if you are a military lawyer, you cannot today overlook the dimension of the international law of human rights. It's a matter of being a good lawyer rather than being a human rights lawyer or a humanitarian lawyer.

Greenwood, *supra* note 11, at 495.

[37] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 24-26 (2010).

[38] *See* SIVAKUMARAN, *supra* note 31, at 85.

sketching the basic—though in some cases aspirational[39]—parameters of an individual's relationship with the State. While IHRL as a component of international law is only as old as the second half of the 20th century,[40] the idea that human beings have rights that should be safeguarded both by and from governments is far older.[41] The adoption of the Universal Declaration of Human Rights (UDHR) in 1948, seen as the starting point for the development of human rights law as an *international* legal corpus,[42] represented a merging of various strands of democratic and liberal thought[43] that had been percolating among philosophical, legal, and moral thinkers for centuries.[44] The second principle is that IHRL, in providing content to fill in the contours of the Individual-State relationship, is fundamentally concerned with that relationship's balance of power.[45] Sir

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[39] The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 is often cited as the beginning of IHRL's ascension on the world stage. *See* SIVAKUMARAN, *supra* note 31, at 85. While unanimously understood at the time of its passage to be purely aspirational, *see, e.g.*, Myles S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 YALE L. J. 60, 69 (1949) (describing the Universal Declaration of Human Rights as a declaration of past achievement and future aspiration); Bennoune, *supra* note 28, at 200 (describing the initial U.S. position that the Universal Declaration of Human Rights was aspirational in nature), the UDHR's influence on modern IHRL instruments cannot be overstated. *See generally* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996).

[40] *See* Hansen, *supra* note 28, at 1 (discussing the development of IHRL as a response to the atrocities of World War II).

[41] *See* McDougal & Leighton, *supra* note 39, at 60. As McDougal and Leighton point out:

> It is for values such as these that men have always framed constitutions, established governments, and sought that delicate balancing of power and formulation of fundamental principle necessary to preserve human rights against all possible aggressors, governmental and other.

Id. at 61. Professor Radin, in his 1950 article on the sources of natural rights, summarized the scholarship on the subject going back four centuries. *See* Max Radin, *Natural Law and Natural Rights*, 59 YALE L.J. 214, 235-37 (1950).

[42] *See* Bennoune, *supra* note 28, at 199.

[43] *See, e.g.*, HUGO GROTIUS, DE JURE BELLI AC PACIS (Richard Tuck ed., trans., 2005) (1636); RICHARD CUMBERLAND, DE LEGIBUS NATURAE (John Parkin ed., trans., 2005) (1683-94); J.J. BURLAMAQUI, PRINCIPES DU DROIT NATUREL (Petter Korkman ed., Thomas Nugent trans., 2006) (1762); S. PUFENDORF, DE JURE NATURAE ET GENTIUM (Ian Hunter & David Saunders eds., Andrew Tooke trans., 2002) (1672).

[44] *See* McDougal & Leighton, *supra* note 39, at 60.

[45] *See* Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protections in National Security and Foreign Affairs*, 115 COL. L. REV. 1029, 1064 (2015).

Christopher Greenwood, a judge on the International Court of Justice, described the conceptual basis of IHRL this way:

> These human rights treaties represent a fundamental rejection of the notion that the way a state treats its own people, however bestial that treatment might be, is no business of anybody else and no business of international law.[46]

An individual in the hands of his or her government is in a vulnerable position given the respective disparities in power and authority.[47] Though this has been understood for centuries[48]—and in fact can be seen as one of the animating principles undergirding IHL protections for prisoners of war[49]—individual rights were, until mid-century, seen as national business.[50] What the UDHR and subsequent IHRL treaties have done is recognize a base set of rights that are fundamental to all people and,

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[46] Greenwood, *supra* note 11, at 497.

[47] As the court in Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), pointed out, "Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organized or state-sponsored violence." *Id.* at ¶ 520. Recognizing this risk to individuals is what informed the drafting of the U.S. Bill of Rights, particularly—and appropriately, given this article's purposes—the amendments concerning the rights of an accused. As Thomas Jefferson wrote to a friend upon learning that the newly proposed Constitution did not contain a bill of rights, these fundamental liberties were "fetters against doing evil, which no honest government should decline." Thomas Jefferson to Alexander Donald, Feb. 7, 1788, cited in RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 342 (2009).

[48] The right to a jury in particular—enshrined in three amendments to the U.S. Constitution—played a particular role in protected individuals against the specter of government overreach. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 84 (1998).

[49] *Cf.* Sandra Krahenmann, *Protection of Prisoners of War*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 359-77 (Dieter Fleck ed., 3d ed. 2013) (explaining the obligations on a State to safeguard prisoners of war and treat them humanely, contrasting the rules with historical examples of failures to protect prisoners or treat them humanely).

[50] *See* Henkin, *supra* note 10, at 32 (discussing this as a relic of state sovereignty). International law arose in order to govern the interactions between the independent members of the international community of States; the very idea that there may be binding customs of the law of nations is predicated upon the existence and recognition of State sovereignty and the legal equality between such sovereign States. *See* Amos S. Hershey, *The History of International Relations During Antiquity and the Middle Ages*, 5 AM. J. INT'L L. 901, 901 (1911).

through the adoption of the treaties themselves, made those rights affirmative obligations on States enforceable at the international level.[51]

The third principle is that IHRL is primarily prohibitive in nature, in that it bars States from acting to deprive individuals of certain fundamental freedoms. For what this article identifies as "fundamental rights"—life, liberty, property[52]—IHRL is not a source, but a guarantor.[53] It is a set of obligations placed on States to limit their sovereignty in order to protect particular fundamental rights that human beings inherently possess as a consequence of being human.[54] A State possesses these obligations regardless of whether it has consented to be bound by a particular IHRL instrument;[55] the source of the right is the dignity of the human person.[56] Fundamental rights are the irreducible core of IHRL protections. While many IHRL instruments contain provisions allowing States to assert sovereign power in times of emergency, there remains a core set of rights that are not disposable.[57] Relevant to this article's ultimate discussion of detention, these fundamental rights include the prohibition on arbitrary deprivation of life and on arbitrary detention, among others.[58] It is not a coincidence that these rights are present and protected under both IHRL and IHL, though the protections have different interpretations, depending on the legal regime at play.[59] These three principles inform the content

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[51] *See* Henkin, *supra* note 10, at 41-43 (discussing some of IHRL's enforcement mechanisms).

[52] These are the rights identified as fundamental during the debates on the ratification of the Fourteenth Amendment—rights which existed "anterior to and independently of all laws and Constitutions." *See* Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 684 n.7 (1997) (quoting Representative William Lawrence). This particular formulation of "absolute," or as used in this article, "fundamental," rights was widely accepted by Enlightenment jurists, particularly by John Locke and William Blackstone, both of whom were hugely influential on human rights theorists. *See id.* at 700-01.

[53] *See* Radin, *supra* note 41, at 219. Professor Radin pointed out, "Law originally does not create rights. It is merely the summation of a great number of miscellaneous rights that were created by life in the community." *Id.*

[54] International Committee of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (01/2003).

[55] *See* Henkin, *supra* note 10, at 38 (explaining how IHRL norms bind States even without their consent).

[56] *See* ICCPR, *supra* note 8, pmbl.

[57] *See* International Committee of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003). These are the rights found in Common Article 3 of the Geneva Conventions and Additional Protocol II, discussed *infra* Section II.B.2.a.

[58] *See* ICRC STUDY VOL. I, *supra* note 13, at 344.

[59] *See generally supra* note 40.

and contours of IHRL. International Humanitarian Law share some similarities and several distinct differences.

International Humanitarian Law, also known as the law of war (LOW) or the law of armed conflict (LOAC), is the legal framework applicable to situations of armed conflict and occupation.[60] As a set of rules governing both the act of going to war and the conduct of war itself, it aims to provide guidance for the military in order to mitigate the brutality of armed conflict.[61] Several guiding principles are immediately apparent. The first of which is also the first difference between IHL and the human rights regime: Because IHL's trigger is armed conflict, it applies in a narrower and more specialized set of circumstances than IHRL.[62] Thus, IHL is far older than IHRL; codes of law designed to govern the conduct of Soldiers on the battlefield go back millennia.[63] As Henry Sumner Maine wryly observed in his seminal Cambridge lecture series on international law, "Man has never been so ferocious or so stupid as to submit to such an evil as war without some effort to prevent it."[64] Up until the latter part of the 19th century, codes of conduct in war were largely *ad hoc*, taking the form of military regulations dictated by a sovereign to its own forces, such as the Lieber Code, [65] or short-term bilateral agreements between belligerents, such as the agreement between General George Washington and various British commanders concerning the treatment of prisoners captured during the Revolutionary War.[66] In the period following the

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[60] *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994) for a thorough accounting of the development of IHL—and a decided criticism thereof.

[61] *See* Greenwood, *supra* note 11, at 496; *Cf.* YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL LAW 3 (2014).

[62] This is known as the *lex specialis* principle, and will be further developed *infra* Section II.A.2.

[63] *See generally* Major Scott R. Morris, *The Laws of War: Rules for Warriors by Warriors*, ARMY LAW., DEC. 1997, at 4, for fascinating accounts of the historical development of the laws of war; GILLESPIE, *supra* note 5.

[64] *See* MAINE, *supra* note 2, at 11, quoted in Hershey, *supra* note 50, at 901 n.1.

[65] E. D. Townsend, Assistant Adjutant General, *General Orders No. 100, art. 14, Instructions for the Government of Armies of the United States in the Field*, Apr. 24, 1863, *reprinted in* INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office, 1898) [hereinafter Lieber Code]. The Lieber Code, officially titled General Order 100, was drafted by Dr. Francis Lieber on the order of President Lincoln when it became apparent that a code of regulations explaining the state of the law of war and governing the Union Army's conduct during hostilities was necessary. *See* JOHN FABIEN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

[66] *See* SIVAKUMARAN, *supra* note 31, at 23-29 (discussing the drafting of the Lieber Code as well as bilateral agreements executed between belligerents during the Revolutionary

United States' Civil War, a movement arose to regulate armed conflict at the international level through a series of conferences and treaties designed to diminish the effects of war on the victims of the hostilities, beginning with the 1864 Geneva Convention convened by the Swiss Federal Council.[67] While earlier bilateral agreements and diplomatic conventions had recognized the need to regulate NIACs,[68] the movement toward a more systematic regulation of NIACs began in earnest with the 1949 Geneva Conventions and the two 1977 Additional Protocols.[69] In addition to treaty law, customary international law[70] informs some of the basic principles of IHL.

This leads to IHL's second principle and second point of divergence from IHRL, the principle of equality of obligation.[71] Unlike IHRL, IHL is not solely concerned with protecting the individual from the overwhelming authority of the State.[72] International Humanitarian Law is

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War and the Columbian war of independence in 1820). One example of an *ad hoc* agreement concerning the treatment of prisoners of war is the series of letters exchanged between General George Washington and various commanders of the British Forces during the Revolutionary War. For example, on August 11, 1775, General Washington wrote to Lieutenant General Thomas Gage: "My duty now makes it necessary to apprize you, that for the future I shall regulate my Conduct toward those Gentlemen, who are or may be in our Possession, exactly by the Rule you shall observe towards those of ours, now in your Custody." LEWIS & MEWHA, *supra* note 4, at 2. In 1776, the Commander-in-Chief of the British forces, Sir James Robertson, wrote back urging both sides to agree to "prevent or punish any violations of the rules of war, each within the sphere of our command." *See* SIVAKUMARAN, *supra* note 31, at 25. This exchange demonstrates the principle of reciprocity at play at the time. *See generally* WITT, *supra* note 65 for a deep dive into the drafting of the Lieber Code, its influences, and its ultimate impact on IHL. *See* Mary Ellen O'Connell, *Historical Development and Legal Basis*, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 15-26 (Dieter Fleck ed., 3d ed. 2013) for a lengthy discussion of the development of IHL from the Lieber Code to the modern era.

[67] *See* SIVAKUMARAN, *supra* note 31, at 30-53, 85.

[68] *See id.* at 27, 40-53.

[69] *See* Bennoune, *supra* note 28, at 199.

[70] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. *See* I RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 24, § 102(2) (1987).

[71] This principle is perhaps the most important foundation of IHL. Its earliest appearance came in the writings of Hugo Grotius and Alberico Gentili, where they insisted that "the obligation to comply with some rules of warfare must be divorced from the justness of the war's cause, or, in other words, that the justness of the resort to force under jus ad bellum was immaterial to the just prosecution of the war under jus in bello." *See* Gabriella Blum, *On A Differential Law of War*, 52 HARV. INT'L L.J. 163, 168 (2011).

[72] This is, of course, a concern of IHL, as evidenced by the language in the Fourth Geneva Convention, which serves to regulate interactions between Parties to the Conflict (States) and individuals who find themselves "in the hands of a Party to the conflict." *See* Geneva

intended to govern relationships between co-belligerents while IHRL is designed to control a State's behavior with respect to those under its control.[73] This differing obligations on the actors—States or States/Co-Belligerents—is evidenced when one considers who is bound under each regime. Where IHRL's obligations are binding only on States, IHL's rules and principles are equally applicable to all parties to the conflict, whether they be State or non-State actors.[74]

There are four key norms in IHL that function as interlinked and reinforcing parts of a larger system: military necessity, humanity, proportionality, and distinction.[75] The Department of Defense Law of War Manual explains in brief how these norms interact to form a coherent whole:

> *Military necessity* justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible. Conversely, *humanity* forbids actions unnecessary to achieve that object. *Proportionality* requires that even when actions may be justified by *military necessity*, such actions not be unreasonable or excessive. *Distinction* underpins the parties' responsibility to comport their behavior with *military necessity*, *humanity*, and *proportionality* by requiring parties to a conflict to apply certain legal categories, principally the distinction between the armed forces and the civilian population.[76]

Some of these norms, particularly those to do with distinction, evince the same concerns for the rights of the individual under the control of a State as IHRL. The key difference between the two regimes is primarily in the interpretation of State obligations under each framework. Take the

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Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[73] *See* Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1273 (2013).

[74] *See* Ohlin, *supra* note 73, at 1332. The practical effect of this equality of obligation is that an adversary's violation of IHL does not justify the other side also disregarding the law. *See* O'Connell, *supra* note 66, at 12. The principle of equality of obligation is one of the foundational principles of IHL. *Id.*

[75] *See* U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL 51 (2015) [hereinafter DOD LOW MANUAL]. Distinction, or requiring that armies direct hostilities towards belligerents rather than civilian populations, was one of the first principles recognized by early writers on the law of war. *See* O'Connell, *supra* note 66, at 19-20 (describing the work of John-Jacques Rosseau in the mid-1700s as articulating this key norm).

[76] DOD LOW MANUAL, *supra* note 75, at 51-52.

non-derogable prohibition on arbitrary deprivation of life as an example, which under IHRL is the "supreme right on which all others are built."[77] This prohibition exists in IHL, but it is translated differently. Under IHL, the killing of combatants by the military arm of the State is privileged,[78] and even the killing of civilians under limited circumstances may be consonant with IHL's key norms.[79] Using IHRL's language, under the circumstances of IHL, these killings are not arbitrary.[80] This interpretive difference takes into account the relative power differentials of the parties. Under normal circumstances, a State may not bring the full weight of its authority down onto an individual absent specific protections for that individual;[81] under the abnormal circumstances of an armed conflict where the co-belligerents are presumed to exist on a plane of legal equality, killing in order to achieve victory over the armed forces of a State is privileged so long as it does not violate some other portion of IHL such as the requirement to protect those *hors de combat*.[82] Thus, unlike IHRL, IHL's concern for human dignity is tempered by the counterweight of military necessity.[83] It is important to note that the concept of necessity in

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[77] *See* SIVAKUMARAN, *supra* note 31, at 85.

[78] *Id.* This is known as combatant immunity. *See* DOD LOW MANUAL, *supra* note 75, at 108. This springs from the recognition—a conceptual revolution in law of war thinking—that the purpose of using force is to overcome an enemy State, and this force may be directed against combatants as the State's military representatives. *See* O'Connell, *supra* note 66, at 19-20.

[79] *See* SIVAKUMARAN, *supra* note 31, at 85.

[80] *See* David S. Goddard, *Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon*, 91 INT'L L. STUD. 402, 422 (2015); *Cf.* Advisory Opinion, The Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 25 (July 8)

> Thus[,] whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Advisory Opinion, para. 25.

[81] These protections are what render a particular deprivation of life non-arbitrary. Professor Bennoune notes that "much then turns on the international law meaning of the concept of 'arbitrary.'" Bennoune, *supra* note 28, at 208. One example of a non-arbitrary, peacetime deprivation of life would be the imposition of the death penalty following a fair judicial proceeding. *Id.*

[82] DOD LOW MANUAL, *supra* note 75, at 109-10. This combatant immunity arises out of a State's sovereignty, because only a State has the right to wage war. *Id.*

[83] Professor Naz Modirzadeh, Director of the Harvard Law School Program on International Law and Armed Conflict, calls this an "often brutal balance between military necessity and humanity." Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering*

IHL is not the same as the concept of necessity under IHRL. Under IHRL, necessity is wedded to the concept of self-defense, so that the use of lethal force by State actors is only permissible when "absolutely necessary."[84] Under IHL, military necessity is the principle that justifies the use of all measures—consistent with the laws of war—needed to defeat the enemy as quickly and efficiently as possible.[85] These differences are rooted in the relationships at issue under each rubric—State vs. Individual and State vs. Co-Belligerent.

The first and second principles of IHL illustrate some of its points of divergence from IHRL. The third principle of IHL, however, is where this legal corpus most resembles IHRL. Like IHRL, IHL is a largely restrictive schema of rules and principles that aims to preserve and protect human dignity to the greatest extent possible during armed conflict.[86] As Sir Hersch Lauterpacht, who later went on to be a judge at the International Court of Justice, once wrote,

> [A] very considerable part of the laws of war is an attempt to mitigate the unscrupulousness and brutality of force by such considerations of humanity, morality, and fairness as are possible and practicable in a relationship in which the

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and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance, 5 HARV. NAT'L SEC. J. 225, 228 (2014).

[84] This was part of the rationale for the decision in McCann v. United Kingdom, 21 Eur. Ct. H.R. (ser. A) (1995). In that case, the European Court of Human Rights found a violation of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms when U.K. soldiers used lethal force against three terrorism suspects in Gibralter when it was feasible to have detained them instead. Notably, the Rules of Engagement the soldiers were operating under said the following:

> You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this.

Id. ¶ 97.

[85] *See In re List, 11 War Crimes Comm'n, U.N. Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 759, 1253-54 (1950) ("Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.").

[86] *See* SIVAKUMARAN, *supra* note 31, at 86.

> triumph of physical violence is the supreme object and virtue.[87]

Ultimately, both IHRL and IHL are primarily regulatory regimes aimed squarely at restraining State sovereignty. A review of the structure of IHL illustrates this commonality. International Humanitarian Law encompasses two related concepts: *jus ad bellum*, which is the law concerning the resort to a use of force—i.e., pre-conflict, and *jus in bello*, which is the law of concerning the conduct of war—i.e., conflict.[88] Modern *jus ad bellum* is often viewed as a treaty-based source of positive authority to wage war, in that the use of force is only lawful in one of three circumstances: an authorization from the UN Security Council; a State's inherent right of self-defense; or consent from a State to conduct military operations within its territory.[89] A better way to look at it is as an example of the restriction of State sovereignty[90] through State consent. Historically, States understood that they had a right to wage war that arises out of their sovereignty,[91] a right voluntarily restricted through submission

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[87] Hersch Lauterpacht, *Preface to the Fifth Edition* of INTERNATIONAL LAW: A TREATISE BY L. OPPENHEIM (H. Lauterpacht ed., 5th ed. 1935), quoted in Greenwood, *supra* note 11, at 496.

[88] *See, e.g.*, WILLIAM O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 9 (1981) (defining *jus ad bellum* as the "doctrines concerning permissible recourse to war" and *jus in bello* as "the just conduct of war"); MICHAEL WALZER, JUST AND UNJUST WARS 21 (1977) ("Medieval writers made the difference a matter of prepositions, distinguishing *jus ad bellum*, the justice of war, from *jus in bello*, justice in war."), cited in DOD LOW MANUAL, *supra* note 75, at 39 n.179.

[89] *See* DOD LOW MANUAL, *supra* note 75, at 45. There may also be a use-of-force exception which would allow for State intervention for humanitarian purposes, but that is beyond the scope of this article. *See id.* at 45-46.

[90] The concept of sovereignty as this paper envisions it goes back to the Treaty of Westphalia and the rise of the modern nation-state. Westphalian sovereignty holds that within its boundaries, the state is master of its own affairs, exercising its inherent authority as a State. *See* Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 364 (2005)

[91] *See, e.g.*, Commander Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Intervention*, 154 MIL. L. REV. 27, 33 (1997) ("The right to conduct war, without regard to justice or distinctions between aggression and defense, was seen as an attribute of sovereignty."). The idea that States-as-sovereigns had the right to make war is an old one, reflected in the writings of early commentators such as Hugo Grotius and Emer de Vattel. *See* EMER DE VATTEL, THE LAW OF NATIONS 235 (Joseph Chitty ed., 1834) (1758) ("It is the sovereign power alone, therefore, which has the right to make war."); HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 97 (Stephen C. Neff ed., 2012) (1625) ("War may be waged only under the authority of him who holds the sovereign power in the state."). William Blackstone explained that individuals gave up their own natural right to make war to a sovereign once they entered society. 1 WILLIAM

to the UN charter and related treaties.[92] The whole of a State's sovereign power to go to war[93] was restricted via these instruments, leaving only the right of self-defense untouched.[94]

Similarly, with respect to the conduct of war under *jus in bello*, IHL is "prohibitive law" in the sense that is lays down a series of rules prohibiting certain "manifestations of force."[95] Prior to the rise of international treaties addressing *jus in bello*, the only limitation on a State's conduct of

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BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *249. In his commentaries on the Constitution, Justice Joseph Story called the war power "the highest sovereign prerogative." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570, at 410-11 (1987) (1833). State practice confirms the general recognition of this right. "Prior to World War I, States "regularly asserted their sovereign right to wage war, even if at times they couched their claims in the language of 'self-preservation and the related tangle of doctrine concerning necessity and intervention.'" Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 370 (2003) (quoting IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 48 (1963)).

[92] The first attempt at limiting a State's sovereign authority to go to war came with 1928's Kellogg-Briand Pact, which outlawed "aggressive" war. *See* Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 897 (2007) (adding that the Kellogg-Briand pact and the Nuremburg Tribunal were the two most important sources of pre-Charter limitations on a State's right to make war). The UN Charter supplemented the earlier Kellogg-Briand pact by restricting the ability of a State to wage war to one of several discrete circumstances. *See* Detlev Vagts, *International Law and the Use of Force by National Liberation Movements*, 84 AM. J. INT'L L. 981, 983 (1990) (explaining that the right to wage war was abolished by the UN Charter and force is prohibited except in self-defense); *see also* Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 957 (2004) (explaining the post-World War I movement to restrict State sovereignty arose out of the earlier "Just War" tradition).

[93] As Professor Michael Ramsay notes, there were some conceptual limitations on the sovereign's power to wage war even prior to the restrictions imposed by international instruments. For a war to be "just" it had to be undertaken for a just cause and under proper—read: sovereign—authority. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1572 (2002) ("By the late Middle Ages a war waged on the authority of the prince. . . was presumed to be a 'just war.'"). This theory lost some cache during the 18th and 19th centuries, when war itself was presumed to be legally neutral, and only the conduct of war subject to restriction. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 63 (2009).

[94] U.N. Charter art. 51. Self-defense as a concept predates even the rise of the law of nations; it was seen as springing from the medieval conception of natural law. *See* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 60-61 (2005).

[95] *See* Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. YEARBOOK OF INT'L L. 323, 324 (1951) ("The law of war is, in the descriptive words of a war crimes tribunal, 'prohibitive law' in the sense that it forbids rather than authorizes certain manifestations of force.") (quoting United States v. List, *et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1252)).

hostilities were concepts of chivalry and humanity,[96] reflected in the provisions of the Lieber Code,[97] which is generally understood to have embodied the customary law of war at the time of its drafting.[98] States began consenting to general, treaty-based limitations on the conduct of hostilities in the mid-19th century; additional limitations have further restricted State action in the conduct of hostilities over the last 150 years via treaties and the development of customary international law.[99] While some have argued that IHL instruments, such as the Geneva Conventions, must specifically authorize a particular action for a State to be able to take it, this argument gets it "exactly backwards."[100] Treaty-based *jus in bello* is not a source of positive authority to take action; rather, it restricts a State's inherent authority as a sovereign actor in the conduct of hostilities.[101] This concept of inherent authority to conduct hostilities is closely related to the concept of military necessity; once a State finds itself in an armed conflict, it has the inherent authority to take whatever actions

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[96] *See* O'Connell, *supra* note 66, at 1-41. Vattel argued in his treatise The Law of Nations that the natural law principle of necessity, which allowed all actions required for the defeat of the enemy and forbidding anything beyond that, was insufficient to govern conduct during hostilities. Nations must come together to create a code of conduct that would apply generally to both sides and would be independent of any consideration of the principle of necessity. *See* NEFF, *supra* note 94, at 62-65. This demonstrates an Enlightenment understanding that *jus in bello* was limited only by natural law principles absent restrictions imposed by treaty obligations. *Id.* at 131-40 (discussing the various theorists who espoused these views, such as Hobbes and Pufendorf).

[97] *See* Lieber Code, *supra* note 65, art. 30 ("the law of war imposes many limitations and restrictions on principles of justice, faith, and honor"). The Lieber Code, while generally understood to be incredibly important in the overall development of IHL, also expressed an exalted view of military necessity that allowed for such acts as the starvation of belligerents. *See* SIVAKUMARAN, *supra* note 31, at 23.

[98] *See* Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, INT'L REV. OF THE RED CROSS, No. 293, 94-113 (1993). These were seen primarily as moral rather than legal limitations—as Lieber himself announced: "The more vigorously wars are pursued, the better it is for humanity." WITT, *supra* note 65, at 12; Captain James G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1, 8 (1965) ("Custom, not convention, contained the rules at the time Lieber was writing.").

[99] *See* O'Connell, *supra* note 66, at 1-41.

[100] Gherebi v. Obama, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) (rejecting appellant's argument that his detention in a NIAC was impermissible because the Geneva Conventions did not explicitly provide a source of authority to detain in NIACs).

[101] *Cf.* Baxter, *supra* note 95, at 324. The main point here is that States have certain authorities to act inherent in the conduct of war—such as using lethal force, building operating bases, establishing supply lines, conducting intelligence gathering activities, and detention—that are available to the State unless those authorities have been restricted by IHL. The question of whether a State's actions are authorized by its own domestic law is a separate and parallel inquiry.

"are indispensable for securing the ends of war,"[102] as long as its authority has not been restricted by the rules and principles of IHL.[103] In this way, IHL and IHRL are similarly situated in that neither are sources of positive authority or individual rights though both act to protect certain fundamental rights through the restriction of State action.

Having considered the basic principles of IHRL and IHL and how those principles illustrate their similarities and differences, it is appropriate to consider how these two regimes interact in the context of an armed conflict.

2. Coordinating Principles—When Does Each Regime Apply?

The application of IHRL to armed conflicts is of relatively recent vintage.[104] The classical position—and the one for which the United States until very recently advocated—was the Displacement view, wherein IHL displaced IHRL entirely during times of armed conflict.[105] The idea was that IHRL was the "law of peace" and IHL was the "law of war," and the two operated in mutual exclusive spheres.[106] Under the Displacement view, IHRL cannot be applied in a context where a normal peacetime relationship between an individual and her State is disrupted by the mechanics of war.[107] During an ongoing war, IHL is the only

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[102] *See* Lieber Code, *supra* note 65, art. 14.

[103] Enlightenment theorists like Thomas Hobbes argued that war as a state could only be governed by natural law, and the sole natural law limitation was the principle of necessity. *See* NEFF, *supra* note 94, at 148. The nineteenth century understanding was that treaty-based codes of conduct would displace the principle of necessity with a list of specific rules. *See id.* at 186. This was the understanding that led to the Hague and Geneva Conventions. *Id.* at 186-91. As will be discussed below, IHRL plays a role in further restricting State sovereignty in the face of non-derogable human rights, such as prohibited the arbitrary deprivation of life.

[104] *See* SIVAKUMARAN, *supra* note 31, at 84.

[105] This view was once the prevailing one in the international community. *See* Modirzadeh, *supra* note 14, at 352. The George W. Bush Administration is generally held to have strongly advocated for the displacement view, while the Barack Obama Administration took a more moderate position. *See* Ashika Singh, *The United States, The Torture Convention, and Lex Specialis: The Quest for a Coherent Approach to the CAT in Armed Conflict*, 47 COLUM. HUMAN RIGHTS L. REV. 134, 134-47 (2016) (explaining the historical context for the shifting U.S. position on the application of IHRL, specifically the Convention Against Torture, to armed conflict).

[106] *See id.*

[107] *See id.* at 352.

framework regulating an individual's relationship to belligerent actors until hostilities end and peace is restored.[108]

In what has become the majority viewpoint among international law scholars and in the international court system, the Displacement view has been rejected.[109] In contrast, the doctrine of convergence holds that IHRL continues to apply even in times of armed conflict. Under the maxim *lex specialis derogat legi generali*,[110] convergence holds that IHRL may be limited by the application of IHL, but IHRL as a whole continues to apply unless it conflicts with a more specific rule from IHL.[111] A State is thus bound by all its IHRL treaty obligations during armed conflict, such as the United Nations Convention Against Torture (UNCAT) or the ICCPR, "except insofar as particular obligations are altered or limited by the function of IHL."[112] Even in cases where the IHL rule prevails, however, IHRL does not fall away entirely. It may be used as interpretive guidance for IHL rules that are unclear, and, in cases where IHL contains no guidance, IHRL operates to provide the rule.[113] As Professor Ohlin has argued, the application of one body of law over another is chiefly governed by the role a State is playing: Is the State acting as a sovereign, in which case the norms of IHRL should apply, or is the State acting as a belligerent,

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[108] *See id.* at 353-54.

[109] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, para. 106 ("the protection offered by humans rights conventions does not cease in the case of armed conflict") [hereinafter Wall Opinion].

[110] The basic point of the principle is to provide a basis for resolving any conflicts between two rules that deal with the same subject matter by holding that, when two rules regulating the same subject-matter conflict, priority is to be given to that which is more specific. *See* Silvia Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict*, *in* 46 IUS GENTIUM 265, 289 (Laura Pienschi ed., 2015).

[111] *See* Modirzadeh, *supra* note 14, at 353-54. This appears to command a majority view in the literature based on the International Court of Justice's (ICJ) reference to the principle of *lex specialis* in two advisory opinions. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 177-78 (July 9); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8). As several commentators have argued, however, the ICJ may not have intended to use the term *lex specialis* in that sense and that the maxim is the inappropriate conception for the interaction between the two regimes. *See* Borelli, *supra* note 110, at 289. Professor Sivakumarian argues that the entire corpus of IHL and IHRL are not *lex specialis* or *legi generali*; instead, the analysis must come down to the individual rule being applied. If that rule is more specific, it should apply, regardless of which body of law it is taken from. SIVAKUMARAN, *supra* note 31, at 91-92.

[112] *See* Modirzadeh, *supra* note 14, 353-54.

[113] *See* SIVAKUMARAN, *supra* note 31, at 87-90.

in which the State's conduct should be governed by IHL?[114] When in an armed conflict, and not merely an internal disturbance, a State is acting as a belligerent—thus, the State's detention regime will be regulated by IHL, unless IHL is silent or its guidance inadequate. As Professor Dinstein has written:

> When the [IHL] has gaps, it can only profit from their being filled by human rights law. . . . Yet the existence of a gap must be determined not only on the basis of treaty law (e.g., AP/II) but also in light of customary international law. . . . Once customary rules solidify, [IHL] no longer leaves the gate open for the application of inconsistent general norms of human rights law.[115]

The key question for detention is thus whether IHL, after considering all aspects of IHL in light of a State's inherent authority to conduct armed conflict, is silent or inadequate to a degree that it must be supplemented by IHRL in NIACs. More basically, one must determine whether IHL can answer the question of whether a detention is or is not arbitrary and, as will be discussed below, it can.

B. International Law and Non-International Armed Conflicts

This section aims to explain the laws from each applicable regime, IHL and IHRL, of relevance to any discussion of the authority to detain in NIACs. First, however, it is necessary to scope the dimensions of the problem by defining the conditions that separate peacetime from armed conflict, and IACs from NIACs.

1. Definitions

According to CA3 of the Geneva Conventions, a NIAC is an armed conflict "not of an international character."[116] Understanding what this

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[114] *See* Ohlin, *supra* note 73, at 1332-42.

[115] *See* DINSTEIN, *supra* note 61, at 229.

[116] *See* GC III, *supra* note 26, art. 3. There are at least three different types of NIACs—armed conflict between two non-state actors (NSA) in a particular State's territory; armed conflict between a State and an NSA; or armed conflict between a State and an NSA with a third State's intervention. *See* Els Debuf, *Expert Meeting on Procedural Safeguards for*

means is foundational to any analysis, but this phrase is undefined in the Geneva Conventions,[117] in large part because of State concerns about potential IHL regulation of entirely internal matters that would otherwise have been subject to State sovereignty.[118] Scholars have acknowledged that parsing this term can be extraordinarily difficult,[119] not in the least because it took until the *Prosecutor v. Tadić* 1995 decision in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) to get a working definition of "armed conflict." *Tadić* defined it thusly:

Security Detention in Noninternational Armed Conflict, 91 INT'L REVIEW OF THE RED CROSS 867 (2009), https://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf [hereinafter *Chatham House*].

[117] The Commentaries on the Geneva Conventions suggest that leaving this term vague was deliberate on the part of the drafters.

> What is meant by "armed conflict not of an international character"? That was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. The idea was finally abandoned—wisely, we think.

See INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD *in* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 49 (Jean S. Pictet ed., unknown trans. 1952).

[118] The Diplomatic Conference of 1949 exhaustively discussed the issue of NIACs, and while several States—including the United Kingdom—vociferously objected to the application of any IHL regulation to NIACs, ultimately, the vote to draft CA3 was nearly unanimous. *See* SIVAKUMARAN, *supra* note 31, at 40-41. The argument then became how to define a NIAC, and ultimately that question was unresolved as States could not agree on the appropriate level of belligerency, though discussions at the time indicate "the level of violence at issue was akin to the notion of an insurgency." *Id.* at 41. Though the terminology is somewhat opaque, a "rebellion," which would not fall within the ambit of IHL, is typically a relatively short-lived insurrection against the authority of the State, while an insurgency is a rebellion that has risen to the level of "sustained conflict" that is beyond the abilities of the State's police force to address. *See* ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 9 (2010).

[119] *See* SIVAKUMARAN, *supra* note 31, at 154.

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[120]

A NIAC sits somewhere between a purely internal conflict, where only domestic law applies,[121] and a fully international armed conflict, between two "High Contracting Parties," that triggers the full panoply of IHL rules and principles.[122] The *Tadic* definition focuses on two key criteria to distinguish a NIAC from internal disturbances like "banditry, unorganized or short-lived insurrection, or terrorism": the organization of the parties and the level of hostilities.[123] These terms have been subject to further refinement in the years since the decision was handed down,[124] but the definition laid out by the court has been widely accepted.[125] Importantly, commentators have suggested that the key criterion separating NIACs from purely internal conflicts is "recognition"[126] that the armed revolt has reached a level where the State is unable to "maintain public order and exercise authority,"[127] affecting the *de jure* government or a third party State's interests to such a degree that relations must be established with the insurgent group.[128] To recall Professor Ohlin's point in this context, a State's use of its armed forces rather than its law enforcement elements indicates that it has recognized the nature of the threat to its security and has stepped into the role of a belligerent rather

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

121 *See* DINSTEIN, *supra* note 61, at 23.

122 *See id.*

123 Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

124 For example, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008), considered what factors should be used to assess the intensity of the conflict, including the seriousness of attacks, the spread of clashes over territory and over a period of time, and any increase in the number of government forces. *Id.* Prosecutor v. Dordevic, Case No. IT-04-82-T, Judgment, ¶ 1526 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011), outlined the factors relevant to an assessment of an armed group's organization, including the presence of a command structure, organized operations, logistics, discipline and the ability to implement CA3, and the ability to speak with one voice. *Id.*

125 *See* SIVAKUMARAN, *supra* note 31, at 166.

126 Recognition is an indication that the recognizing State regards the insurgents as "legal contestents, and not as mere lawbreakers." HERSCH LAUTERPACT, RECOGNITION IN INTERNATIONAL LAW 270 (1947).

127 ERIK CASTREN, CIVIL WAR 212 (1966).

128 *See* CULLEN, *supra* note 118, at 11.

than a sovereign.[129] Any violence below this threshold would be classified as an internal disturbance outside the scope of IHL entirely.[130]

What separates a NIAC from an IAC is the identity of the parties to the conflict. This is the sole measure for determining whether an IAC is occurring or has occurred. Unlike a NIAC, there is no need to assess any of the factors listed in *Tadic* or subsequent cases. For an IAC, an armed conflict exists "whenever there is resort to armed force between States."[131] In a NIAC, by contrast, at least one of the parties to the conflict is a non-State actor.[132] The bulk of the historical development of IHL has surrounded IACs, but its essential principles are likewise relevant to NIACs: basic human dignity must be respected in order to mitigate the horrors of war for the victims of armed conflict.[133] To that end, a NIAC triggers CA3 of the Geneva Conventions and Additional Protocol II (AP II), which may be understood as essential baseline protections, though the scope of their application is not precisely equivalent.[134] The application of these two instruments to security detentions in NIACs will be further explored below. First, it is useful to analyze what is meant by the term "security detention."

There are three typical types of detentions that can occur during armed conflicts: status-based security detention; conduct-based security detention; or criminal detention. It is helpful to first define what is meant by "security detention." There is no official definition in existing international law instruments,[135] a generally agreed upon definition is an administrative measure taken to deprive an individual of his or her liberty,

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[129] *See* Ohlin, *supra* note 73, at 1332-42.

[130] *See* DINSTEIN, *supra* note 61, at 37.

[131] Prosecutor v. Tadic, Case No. IT-94-1-A, ¶ 70, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia 2 Oct. 1995). This definition is also somewhat simplistic, as there are three exceptions that would allow an armed conflict that would otherwise be classified as a NIAC to be subject to the fully panoply of IHL. The first is if the State government recognizes the belligerency; the second is if the conflict is a war of national liberation; and the last is if a third State intervenes on the side of the armed group against the State. *See* SIVAKUMARAN, *supra* note 31, at 234.

[132] *See* DINSTEIN, *supra* note 61, at 50-51.

[133] *See* Dieter Fleck, *The Law of Non-International Armed Conflict*, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 586 (Dieter Fleck ed., 3d ed. 2013).

[134] *See infra* Section II.B.2.

[135] One of the proposed terms for Additional Protocol IV (AP IV) is to incorporate the following definition, and to define what constitutes the beginning and the end of such a detention.

ordered by a State's executive branch rather than via judicial processes, for reasons of the State's security during an armed conflict.[136] As commentators have noted, security detention "is a preventive, rather than punitive, measure,"[137] taken only in "exceptional circumstances"[138] when an individual has been determined by an administrative process to represent a threat to the State.[139] Criminal detention, by contrast, is the detention via established judicial processes of a person who has broken the domestic laws of the host nation.[140] These two types of detention have distinct aims. Security detention's primary goal is to prevent an individual who has been determined to be a threat to the State during an armed conflict from engaging in future hostilities. Criminal detention's primary goals are condemnation of a bad actor and deterrence of future law breaking.[141] As Professors Robert Chesney and Jack Goldsmith have pointed out, the fundamental differences between these two types of detention lie in their triggering criteria and in their procedural safeguards, with criminal detention stricter on both than security detention.[142] These differences come from the legal frameworks applicable to each, which will be further developed below.

Security detention may be further broken down into two types: detention based on an individual's status and detention based on an individual's conduct. International Humanitarian Law traditionally prioritizes its protections as status-based over conduct-based detentions, as evidenced by the treatment of such detentions under IACs.[143] Under the Third Geneva Convention, for example, the definition of Prisoners-of-War (POW) is largely status-driven, hinging security detentions on such

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136 *See* Alice Debarre, *Security Detention: The Legal Uncertainties of an Underdeveloped Framework*, HUMANITY IN WAR BLOG (Apr. 1, 2015), http://humanityinwarblog.com/2015/04/01/security-detention-the-legal-uncertainties-of-an-underdeveloped-framework/; *see also Chatham House*, *supra* note 116, at 860. Requiring, as it does, the triggering condition of an armed conflict, this definition excludes the sort of administrative or preventative detention that occurs during situations that do not meet the criteria for an armed conflict. *See id.*

137 *See* Debarre, *supra* note 136.

138 *See id*.

139 *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082 (2008).

140 *See Chatham House*, *supra* note 116, at 860.

141 *See* Chesney & Goldsmith, *supra* note 139, at 1082.

142 *See id.* at 1080.

143 *See id.* at 1084; Ohlin, *supra* note 73, at 1270 ("Combatants open themselves up to the reciprocal risk of killing, and the lawfulness of killing combatants is based entirely on their status as combatants.").

criteria as membership in a State's armed forces.[144] In contrast, the Fourth Geneva Convention, while it was apparently intended to contemplate status-based detentions,[145] more explicitly allows for conduct-based detentions of otherwise protected persons. This Convention allows for detention of civilians if "the security of the Detaining Power makes it absolutely necessary,"[146] but notably, also allows for derogation from the rights and privileges accorded to otherwise protected persons "definitely suspected of or engaged in activities hostile to the security of the State."[147] The laws applicable to NIACs similarly parse differences between an individual's status and that individual's conduct by distinguishing between individuals who are members of an Organized Armed Group (OAG) and individuals directly participating in hostilities, or a civilian who has otherwise been determined to be a security threat under applicable law.[148]

The paper argues that a detention, for security purposes, during an armed conflict, of an individual determined to be a threat to the State via his or her status or conduct is an inherent power of a State involved in an armed conflict. This paper will now analyze the bodies of law applicable to NIACs and what each has to say about security detention in this context.

2. Applicable Law

As discussed above, IHL applies in narrower and more specialized circumstances than IHRL.[149] There are three components of IHL that are relevant to detention in a NIAC: CA3; AP II; and customary international law.[150] To the extent that IHRL applies, the relevant provisions of law

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[144] *See* Chesney & Goldsmith, *supra* note 139, at 1084. As Professors Chesney and Goldsmith explain, even in the context of civilian detentions under the Fourth Geneva Convention, the commentary to the Fourth Geneva Convention assumes that such detentions will in some cases be driven by the membership of such individuals in dangerous organizations. *See id.* at 1085.

[145] The commentary to the Fourth Geneva Convention assumes that such detentions will in some cases be driven by the membership of such individuals in dangerous organizations. *See* Chesney & Goldsmith, *supra* note 139, at 1085.

[146] *See* GC IV, *supra* note 72, art. 42.

[147] *Id.* art. 5.

[148] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 72 (2009) [hereinafter INTERPRETIVE GUIDANCE].

[149] *See supra* Section II.A.

[150] The United States is not a party to AP II but most of AP II's provisions are considered customary international law. *See* O'Connell, *supra* note 66, at 29.

come from the ICCPR and the ECHR. Each of these components will now be considered in turn.

Common Article 3 is the true baseline protection in an armed conflict, and was one of the most important provisions of the original Geneva Conventions[151] because it set out in black-letter law that a State must continue to respect the fundamental rights of the human person even during NIACs.[152] Often referred to as a "convention in miniature," it "ensures the application of the rules of humanity which are recognized as essential by civilized nations."[153] A review of the *travaux preparatoires* associated with the drafting of CA3 demonstrate that it was initially intended to have a narrower scope than it actually does in the modern era. At the time of the Diplomatic Conference, NIACs were understood to be essentially IACs in miniature, with armed forces engaged in hostilities entirely within a single State's territory.[154] This understanding has evolved and expanded beyond this original meaning to include all armed conflicts that meet the *Tadic* factors outlined above,[155] so CA3 is now viewed as a baseline set of protections that come into play once an armed conflict has been triggered.

By its terms, CA3 applies to persons detained in NIACs, as its jurisdictional paragraph explicitly demands humane treatment without adverse distinction for "[p]ersons taking no active part in the hostilities," a category that includes both members of armed forces who have laid down their arms, as well as those individuals who have been placed *hors de combat* by detention.[156] The concept of humane treatment is further fleshed out by a series of specific prohibitions on violence to life and

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[151] For an account of the drafting of CA3, see CULLEN, *supra* note 118, at 25-51.

[152] The applicability of the laws of war to what were then called "internal" conflicts was a topic of great debate following the 1864 Geneva Convention. The International Committee for the Red Cross (ICRC) initially considered its activities restricted to large-scale wars between European Powers. Beginning with the Ninth International Conference of the International Red Cross in 1912, however, the ICRC began advocating for formalized protections under IHL for victims of civil wars. Until the Diplomatic Conference of 1949, which led to the adoption of Common Article 3, these proposals were not favorably received. *See* SIVAKUMARAN, *supra* note 31, at 30-39 (discussing the various conferences and positions of the ICRC pre-1949).

[153] JEAN S. PICTET, VOL. 1 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 47 (1958).

[154] *See* CULLEN, *supra* note 118, at 50-51.

[155] *Id.*

[156] *See* GC III, *supra* note 26, art. 3(1). This indicates that the individual detained is not necessarily a member of an armed force.

person, which includes murder, cruel treatment, and torture; hostage taking; outrages upon personal dignity; and the passing of sentences and carrying out executions without a regularly constituted court judgment.[157] Aside from these specific prohibitions, CA3 is silent about the authority, basis, conditions, or procedures for security detention in NIAC.[158] This silence was, in part, a concession to the need during a NIAC to balance the protection of the rights of the individual—a main concern for the proponents of CA3—against the rights of a State.[159] These concerns were raised again in 1977 during a period of major revision and updating of the Geneva Conventions—the drafting and adoption of an additional protocol[160] intended to expand on the protections provided by CA3.[161]

Additional Protocol II was intended to put "flesh on the bare bones" of CA3, and was the first attempt to regulate the means and methods of war during NIACs.[162] It does elaborate on the rules applicable to NIACs, but as a threshold matter, AP II applies in more narrow circumstances than does the modern conception of CA3. Article 1 of AP II sets out the material field of application for the protocol, and states that the provisions of AP II apply to all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to

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157 *See id.* art. 3(1)(a)-(d).

158 *See Strengthening International Humanitarian Law Protecting Persons Deprived of Liberty in Non-International Armed Conflicts*, *Regional Consultations 2012-13, Background Paper*, INT'L. COMM. OF THE RED CROSS 8 (2013), https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf [hereinafter *Regional Consultations*].

159 It was originally proposed that all four Geneva Conventions apply in full, even in situations of a NIAC. *See* CULLEN, *supra* note 118, at 28 (citing the draft conventions prepared at the 1948 Stockholm conference in preparation for the 1949 Diplomatic Conference which led to the adoption of the four Geneva Conventions). This was seen by many of the delegates as "excessive," with the French Delegate stating, "It was impossible to carry the protection of individuals to the point of sacrificing the rights of States." FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, VOL. 11-B, SUMMARY RECORDS OF THE JOINT COMMITTEE, 1ST MEETING, 26 April 1949, at 10.

160 Additional Protocol I applied to IACs while AP II provides additional regulation for NIACs. *See* AP II, *supra* note 26, art. 1.

161 *See* CULLEN, *supra* note 118, at 87.

162 Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 3 (Helen Durham & Timothy McCormack eds., 1999).

implement this Protocol."[163] Additional Protocol II, then, does not apply to all NIACs, but only to those NIACs in which the parties to the conflict—OAGs[164]—sufficiently resemble a State's armed forces.[165] The required elements for an OAG[166] include: (1) responsible command; (2) control of territory; (3) sustained and concerted military operations; and (4) ability to implement the Protocol.[167] Element (4) appears to require an OAG both to control over territory and to exercise governmental authority over that territory. Article 4 of AP II requires, for example, care for children via education, medical examinations for detained persons,[168] which implies that an OAG must be able to provide those services via their effective control of a territory.

As an interpretive matter, there is some controversy over what is required for a group of individuals to be labeled an OAG. In its interpretive guidance on the concept of direct participation in hostilities, the ICRC analogizes OAGs with the armed forces of a State and states that individuals within the OAG must exert "a continuous combat function" (CCF) in order to lose civilian protections.[169] A CCF is further defined as involving the "preparation, execution, or command of acts or operations

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[163] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), art. 1, June 8, 1977, 611 U.N.T.S. 1751*, UNITED NATIONS, https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17513-english.pdf.

[164] The ICRC's interpretive guidance uses the term "organized armed group" to refer to both dissent armed forces as well as other organized armed groups. *See* INTERPRETIVE GUIDANCE, *supra* note 148, at 31.

[165] The eventual language of AP II's jurisdictional provision strongly resembles early proposals for differentiating a NIAC from an IAC, when countries like France and the United States set out proposed criteria which would have required a rebel group "to have asserted itself with enough strength and coherence to represent several of the features of a State." *See* FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, VOL. 11-B, SUMMARY RECORDS OF THE JOINT COMMITTEE, 1ST MEETING, 26 APRIL 1949, at 129, https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf; *see also* CULLEN, *supra* note 118, at 89.
State armed forces, moreover, are presumed to meet the required level of organization for application of AP II. *See* SIVAKUMARAN, *supra* note 31, at 170.

[166] Organized armed groups must, *a fortiori*, be organized. Sufficient indicia of organization the presence of a command structure, organized operations, logistics, discipline and the ability to implement CA3, and the ability to speak with one voice. *See* Prosecutor v. Dordevic, Case No. IT-04-82-T, Judgment, ¶ 1526 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011).

[167] *See* SIVAKUMARAN, *supra* note 31, at 184-92.

[168] *See* AP II, *supra* note 26, art. 1.

[169] *See* INTERPRETIVE GUIDANCE, *supra* note 148, at 20.

amounting to direct participation in hostilities."[170] With this definition, the ICRC explicitly equates an OAG as a whole as being a member of a belligerent State, and a person exercising CCF within that OAG as being a member of that belligerent pseudo-State's armed forces.[171] The whole of the OAG is a stand-in for the State, the OAG plus CCF is a stand-in for a State's armed forces, and only this stand-in for the armed forces is targetable. The United States, on the other hand, sees the OAG-as-a-whole as analogous to a State's military, and the OAG plus CCF as the combat arms portion of that military. Conceptually, the U.S. position makes more sense because a State's armed forces are made up of more than what is typically thought of as "combat arms"—infantry and armor—but also those who provide a combat support or combat service support function, such as logistics personnel, cooks, or administrative personnel.[172] These individuals would be targetable in an armed conflict were they members of a State's armed forces; it makes logical sense for individuals serving the same role in an OAG to be likewise targetable.[173]

In its narrower field of applicability, AP II discusses detention with slightly more specificity than CA3. With respect to the conditions of detention, AP II sets out both conditions which are to be respected at a minimum,[174] which include humane treatment, food and water, and religious practice, as well as conditions which are to be respected "within the limits" of the detaining entity's capabilities, such as housing women separately from men and under the supervision of women.[175] Like CA3, however, AP II is silent on the question of initial authority or basis to detain, as well as both grounds and procedures for security detention.[176] In considering whether IHL provides any additional clarity into detention in a NIAC, we turn now to customary international law.

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[170] *See id.* at 34.
[171] *See id.* at 20.
[172] *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 691 (2010).
[173] Of course, this question of status is separate and apart from the IHL requirement that these individuals be able to be distinguished from civilian personnel.
[174] Minimum conditions for detainees include protections for the wounded and sick; general terms about the provision of food and water, the safeguarding of health and hygiene, and protection against the armed conflict; terms regarding the receipt of individual or collective relief and religious practice, and, if they are made to work, working conditions and safeguards "similar to those enjoyed by the local civilian population." *See* AP II, *supra* note 26, art. 5.
[175] *See* SIVAKUMARAN, *supra* note 31, at 184-92.
[176] *See Regional Consultations*, *supra* note 158, at 12.

One of the most important roles for CIL in IHL is as a gap-filler.[177] The most authoritative statement of CIL is the ICRC's landmark 2005 study, which spent ten years evaluating State practice and outlining 161 different rules operative during armed conflict and recognized as CIL.[178] As commentators have noted, three critical rules of detention exist within this paradigm—the requirement for humane treatment, imported wholesale from CA3, AP II, and earlier writings on the laws of war;[179] the prohibition against arbitrary detention as expressed in Rule 99 of the ICRC study;[180] and the principle of non-refoulement, which prohibits a State from returning a detainee to a country where there are substantial grounds for believing he or she would be subject to torture.[181] Importantly, the first two of these CIL rules significantly flesh out the law with respect to the conditions[182] and procedures[183] of detention in a NIAC that were left vague in both CA3 and AP II.

Like CA3 and AP II, CIL, as expressed in the ICRC study, is silent on the source of the authority for or basis[184] of detention in a NIAC. Some

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[177] *See* Major Robert E. Barnsby, *Detention as Customary International Law*, 202 MIL. L. REV. 53, 60-61 (2009).

[178] *See generally* INTERPRETIVE GUIDANCE, *supra* note 148.

[179] *See supra* Section II.A.1. and Section II.B.2.

[180] *See* Barnsby, *supra* note 177, at 80-81; INTERPRETIVE GUIDANCE, *supra* note 148, at 344-52. The ICRC study explained that State practice confirmed humane treatment as CIL, citing both the Lieber Code and U.S. military manuals as evidence of such consistent practice. *Id.* at 307-08.

[181] *See* Barnsby, *supra* note 177, at 81-82.

[182] The ICRC Study includes several other provisions under this rubric of "humane treatment," including ICRC visits, the safeguarding of detainees in a combat zone, the segregation of both women and men, and children and adults, and the requirement to respect religious practices. *See* Barnsby, *supra* note 177, at 79; INTERPRETIVE GUIDANCE, *supra* note 148, at 428-51.

[183] The ICRC study identified the following procedural requirements for detention in a NIAC as CIL: (1) informing a detainee of the reasons for the detention; (2) providing the detainee with a lawyer; and (3) providing the detainee with an opportunity to challenge the lawfulness of the detention. *See* INTERPRETIVE GUIDANCE, *supra* note 148, at 349-52.

[184] Based on State practice, grounds for detention in a NIAC may include: posing a threat to the security of the military operation; participating in hostilities, or belonging to an enemy organized armed group. *See* DOD LOW MANUAL, *supra* note 75, at 503 n.94 (citing *Chairman's Commentary to the Copenhagen Process: Principles and Guidelines* ¶ 1.3). Between 2007 and 2012, the United States and twenty-three other States and international organizations participated in a collaborative process led by the Government of Denmark, intended to establish principles to guide the interpretation of existing obligations under international law for the treatment of detainees in military operations. *Id.* at 491; Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention Is Changing the Battlefield*, 6 HARV. NAT'L SEC. J. 255, 283-94 (2015). Though the Copenhagen Principles are drawn from international legal instruments and State practice and may, in

commentators have argued that the source of authority is itself CIL,[185] an argument which will be explored in more detail below, but now this article turns to evaluate key IHRL provisions on detention.

Two specific treaties are relevant to any discussion of detention in a NIAC: the ICCPR and ECHR, the ICCPR because the United States is a party, and the ECHR because most of our coalition partners belong to the European Union.[186] There are two main questions concerning the applicability of these IHRL treaties: the first is extraterritoriality, or "whether a given State carries its human rights obligations abroad on the backs of its military forces;"[187] and the second is if so, what level of control is required to be exerted over a particular territory before IHRL's applicability is triggered.[188] For the United States, both of these questions are moot points: the U.S. view is that the ICCPR is explicitly non-extraterritorial,[189] and as a non-European Union member the United States is obviously not a party to the ECHR. For our partner nations, however, the analysis is very different. Recent court decisions by international tribunals have affirmed the extraterritorial application of the ECHR,[190] and

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some cases, reflect CIL, mere inclusion of a principle in the document was not intended as a definitive statement that such a principle was itself CIL. *See* John Bellinger, *Completion of Copenhagen Process Principles and Guidelines on Detainees in International Military Operations*, LAWFARE (Dec. 3, 2012), http://perma.cc/3WN5-VCTX. The article argues instead that authority and basis to detain are intertwined in NIACs and that States have the inherent authority to detain for security purposes.

185 This argument was considered by the U.K. Supreme Court in the most recent *Serdar Mohammed* decision, *see* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 16, but ultimately remains undecided. The court in that case appears to believe that the authority to detain will eventually be a part of CIL, but that CIL does not yet contain such an authority. *Id.* As this article argues, the authority arises from a State's sovereignty rather than any particular branch of IHL. *See infra* notes 224-231 and accompanying text.

186 *See* DOD LOW MANUAL, *supra* note 75, at 51.

187 *See* Modirzadeh, *supra* note 14, at 355.

188 *See id*. A recent High Court of Justice of England and Wales decision, Al-Saadoon and Others v. Sec'y of State for Defence (2015) EWHC (Admin) 715, determined that the U.K.'s obligations under certain IHRL provisions—in this case, the ECHR—were triggered by the mere use by State agents of physical force against an individual.

189 Mary McLeod, *U.S. Department of State, Acting Legal Advisor, Statement to U.N. Human Rights Committee*, GENEVA (Mar. 13, 2014), https://geneva.usmission.gov/2014/03/13/u-s-opening-statement-at-presentation-of-the-fourth-periodic-report-of-the-u-s-on-implementation-of-the-iccpr/.

190 Al-Saadoon and Others v. Sec'y of State for Defence, (2015) EWHC (Admin) 715, https://www.judiciary.gov.uk/wp-content/uploads/2015/12/r-al-saadoon-v-secretary-of-state-for-defence-2015-ewhc-715-admin.pdf (affirming an ECHR is extraterritorial upon application of force by a State actor abroad against a particular person). This article does not have the room to fully discuss the arguments for and against the extraterritoriality of the ECHR or to opine on the reasoning evinced in the line of cases leading to this

the U.S. view with respect to the ICCPR has long been the minority view within the international community.[191]

As discussed earlier, both the ICCPR and the ECHR prohibit arbitrary detention.[192] If IHL rules are unclear as to security detention, which in the context of convergence means that IHL rules are unable to answer whether a particular detention is arbitrary, the question becomes whether IHRL provides adequate answers on both grounds and procedures for detention as *legi generali*. As to procedure, both the ICCPR and the ECHR specifically require that any deprivation of liberty be in accordance with procedures established by law.[193] As far as grounds, the ICCPR is open-ended, requiring only that the grounds for deprivation of liberty also be established by law in order to be non-arbitrary.[194] The ECHR, by contrast, lists out the acceptable grounds for detention, which has the effect of prohibiting deprivation of liberty for any reasons not listed.[195] Though the more open-ended provision of ICCPR leaves the door open for security detention in armed conflict, security detention is not among the enumerated grounds under the ECHR.[196]

The practical effect of these provisions is this: If IHL does not provide the necessary authorization for detention, then relying solely on IHRL, security detention in a NIAC would likely not be authorized.[197] This was the fundamental holding of *Serdar Mohammed*.

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conclusion, but the debate produced a great deal of very interesting commentary for the dedicated scholar to study. *See, e.g.*, Barbara Miltner, *Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons*, 33 MICH. J. INT'L L. 693, 695 (2012) (outlining the contours of the debate).

[191] *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (explaining that the ICCPR applies extraterritorially).

[192] *See* ICCPR, *supra* note 8, art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, *opened for signature* Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention].

[193] *See* ICCPR, *supra* note 8, at art. 9; European Convention, *supra* note 192, art. 5. This practically requires judicial supervision of detention and the right of *habeas corpus*. *See Regional Consultations*, *supra* note 158, at 12.

[194] *See* ICCPR, *supra* note 8, art. 9.

[195] *See Regional Consultations*, *supra* note 158, at 12.

[196] European Convention, *supra* note 192, art. 5

[197] In 2011, The European Court of Human Rights held that absent an overriding international legal obligation such as a UN Security Council Authorization mandating detention, or perhaps derogation under the applicable provisions of the ECHR, security detention was not authorized. *See* Al-Jedda v. The United Kingdom, App. No. 27021/08, July 7, 2011.

Having laid the foundation for the applicable law in a NIAC, the next section will discuss the various arguments for and against international legal authority to detain in a NIAC, ultimately concluding that the authority to detain in a NIAC comes from a State's sovereign authority to conduct hostilities.

C. Detention in NIACs

Some commentators have forcefully argued that IHL does not in and of itself provide authorization for a power to detain in NIACs and that any authority to detain must come from domestic law of the host nation or from a UN Security Council resolution authorizing the use of force.[198] Taking the opposing view, other commentators argue that the authority to detain is CIL or inherent in the authority to kill. For reasons discussed below, both of these views are incorrect for precisely opposite reasons: IHL is not a source of positive authority to detain though it does recognize that authority, which arises out of a State's inherent authority to conduct hostilities during a period of armed conflict.

1. The View That There Is No International Authority to Detain in a NIAC

Commentators who have come out against IHL authority to detain in a NIAC do so for two primary reasons: the first is an argument that IHL is too vague a framework to establish any positive authority for detention; and the second is an argument that if IHL authorizes detention, then because IHL is premised on equality of the parties, OAGs would have the right to detain as well. Ultimately, neither of these arguments is persuasive.

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[198] Serdar Mohammed v. Sec'y of State for Defence [2015] EWCA (Civ.) 843. *See also* Ryan Goodman, *Authorization Versus Regulation of Detention in Non-International Armed Conflicts*, 91 INT'L L. STUD. 155, 158-59 (2015). Professor Goodman argues that IHL does not prohibit detention in NIACs, it simply does not authorize it. *Id.* The authorization to detain must be found in some other specific grant of authority. In Professor Goodman's view, the entirely of IHL must be viewed as a prohibitory legal regime, and should not be understood as conferring affirmative authorization on States to take a particular action. *See id.* at 159-60. The author of this article agrees with this premise, but disagrees that the IHL must provide positive authority. As discussed in Section II, IHL is not a source of positive authority, and the positive authority to detain comes from a State's sovereignty. *See supra* Section II.

As the U.K court of appeals in *Serdar Mohammed* held, because CA3 and APII do not give any clear guidance as to "who may be detained, on what grounds, in accordance with what procedures, and for how long," they cannot fairly be interpreted as providing a power to detain.[199] To Professor Gabor Rona, a proponent of this position, this means that AP II and CA3 must presume that grounds and procedures for NIAC detention are purely a matter of affirmative domestic law.[200] This article takes the positions that there is no such presumption, and agrees with the critiques proposed by other commentators that the court in *Serdar Mohammed* conflated two related concepts, the *authorization* to detain, and the *regulation* of detention.[201]

As far as regulation, contrary to the U.K. court of appeals' holding of *Serdar Mohammed*, CA3, AP II, and CIL together create a framework that regulates detention.[202] As Professor Ryan Goodman has pointed out, the structure of IHL shows that the IHL in an IAC is the outer boundary of permissible state action. Simply put, if an action is lawful in an IAC, it is *a fortiori* lawful in a NIAC because the rules governing IACs are more restrictive than the rules that govern State action in internal conflicts. As NIAC is on a continuum between these two points, the rules governing it must be more restrictive than internal conflicts and less restrictive than IACs.[203] This question of regulation is a separate inquiry from the question of authorization. As this paper has argued, the structure of international law *in general* illustrates that IHL is a prohibitive, primarily regulatory regime that acts to restrict State authority rather than provide a positive source of it.[204]

The authorization for detention itself is inherent in IHL, which is reflected in the fact that both CA3 and AP II contain references to detention.[205] Much like self-defense is a carve-out from the overall prohibition on the use of force, a carve-out that arises from a State's

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[199] Serdar Mohammed v. Ministry of Defence (2014) EWHC (QB) 1369 ¶ 246.
[200] Gabor Rona, *Is there a Way Out of the Non-International Armed Conflict Detention Dilemma*, 91. INT'L L. STUD. 32, 37 (2015).
[201] *See generally* Goodman, *supra* note 198.
[202] *See id.* at 160-67.
[203] *See id.*
[204] *See* Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/.
[205] *See also* Chesney & Goldsmith, *supra* note 139, at 1085-87.

sovereign authority to act to protect itself, the authority to detain in armed conflicts is a right that States have as a fundamental and necessary part of armed conflict.[206] The fact that the applicable IHL provisions merely attempt to regulate the exercise of this detention authority is evidence that it, like self-defense, is a carve-out that has not been superseded by UN agreements. As discussed above, once an armed conflict exists, States have authority to "wage war" until that authority has been specifically restricted by their consent to a treaty or the development of CIL. Though it is true that, for example, the United States points to domestic law, particularly the 2001 Authorization for the Use of Military Force (AUMF), as a source of detention authority,[207] the AUMF does not explicitly authorize detention; it merely gives the President the power to use "all necessary and appropriate force."[208] If the main argument against finding a detention authority in IHL is the lack of specificity in IHL instruments, domestic law is no more helpful on that score.

Moreover, nothing in any of the Geneva Conventions explicitly grants the authority to detain even in IACs. Under the view of *Serdar Mohammed*, even in a declared war between two High Contracting parties, States would have to find the authority to detain in a UN Security Council Resolution or in domestic law. It does not appear that this was the intent of the drafters, and this reading of the Geneva Conventions is unduly restrictive. What this view does not take into account is that the prohibitions of IHL merely restricts traditional State power. If the authority has not been taken away from a State via treaty law, the State retains that authority in the appropriate circumstances (e.g., the ability to conduct security detentions as an essential part of armed conflicts). Furthermore, the fact that CIL fleshes out the detention rules referenced in CA3 and AP II demonstrates that IHL's guidance on security detention is not inadequate such that reference to IHRL rules would be required.

The second major argument typically raised as a reason why there is no affirmative authorization to detain in NIACs under IHL is the concern about the potential conferral of an equivalent power on OAGs. This argument is ultimately concerned with the possibility of recognizing a combatant's privilege for fighters associated with repudiated OAGs like

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[206] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2003) ("detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war").

[207] *See* Harold Hongju, *Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law*, DEP'T OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/ remarks/139119.htm).

[208] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

the Islamic State of Iraq and the Levant (ISIL) or Boko Haram,[209] and reflects the historical fears that the extension of IHL rules into internal conflicts would grant the appearance of legitimacy to criminals and terrorists.[210] Because this argument could be raised to object to the recognition of an inherent authority to detain during armed conflicts as well, it is addressed now. It is true that, as discussed above, IHL is fundamentally premised on equality of obligation between the parties.

Though this article takes the position that inherent authority to detain is an incident of State sovereignty, pre-existing any restrictions emplaced by the Geneva Conventions, it is at least arguable that the authority to detain may be inherent to belligerents regardless of whether they are States, so long as they are sufficiently "State-like."[211] For this reason, Professor Ohlin has argued that the combatant's privilege should be recognized as existing in those NIACs that functionally operate as IACs—in other words, "two independent entities engaged in a military contest,"[212] or perhaps more succinctly, the type of conflict to which APII applies. Historical practice suggests that Professor Ohlin's view is correct, at least so far as the criteria for "lawful belligerency"[213] were met, but even assuming that combatant's privilege operates in a NIAC between a State and an OAG, the privilege would be unavailable to the vast majority of OAGs that currently dominate the news cycle, such as ISIL and Boko

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[209] The Islamic State (ISIL) is a transnational Sunni Islamist insurgent and terrorist group that controls large areas of Iraq and Syria while also conducting terror attacks outside of this territory. *See* CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, ISLAMIC STATE AND U.S. POLICY 1 (Feb. 9, 2016). *Boko Haram* (meaning "Western education is forbidden") is the colloquial name for *Jama'a Ahl as-Sunna Li-da'wa wa-al Jihad* (roughly translated as "People Committed to the Propagation of the Prophet's Teachings and Jihad," a Sunni extremist group in Nigeria that pledged allegiance to ISIL in March 2015). *See id.* at 11-12. Like ISIL, Boko Haram is a foreign terrorist organization engaging in terror attacks against a mainly civilian population, though its activities are primarily focused on its home territory in northern Nigeria. *See generally* LAURA PLOCH BLANCHARD, CONG. RESEARCH SERV., R43558, NIGERIA'S BOKO HARAM: FREQUENTLY ASKED QUESTIONS (2014).

[210] *See* Rona, *supra* note 200, at 38.

[211] This would essentially be an analysis of whether the OAG met the conditions of lawful belligerency as this term was understood pre-Geneva. *See supra* notes 164-173 and accompanying text. *Cf.* Jens David Ohlin, *The Combatant's Privilege in Asymmetric and Covert Conflicts*, 40 YALE J. INT'L L. 337, 339-40 (2015).

[212] *See* Ohlin, *supra* note 211, at 339-40.

[213] The criteria for lawful belligerency as understood pre-Geneva are: a civil war accompanied by a state of general hostilities; occupation and administration of substantial territory by the armed group; observance of IHL by the armed group acting under responsible authority; and the need of third States to practically address the civil war. *See* SIVAKUMARAN, *supra* note 31, at 11 (internal quotations omitted).

Haram. These OAGs do not meet the requirements for lawful belligerency because they do not follow the laws of war:[214] among other violations, they use child soldiers,[215] they target civilians,[216] and they do not separate themselves from the civilian populace.[217] Even assuming that an inherent authority to detain during armed hostilities inures to all lawful belligerents, modern terrorist groups do not fit the necessary criteria.

2. The View That There is International Authority to Detain in a NIAC

Other commentators have looked at the silence on authorization in IHL and have raised two main arguments for why IHL does in fact authorize detention: first, the authorization to detain is CIL; and second, detention authority in a NIAC flows logically from the authority to kill. While these arguments mistakenly conclude that IHL is a source of positive authority to detain, both are correct to the extent that they implicitly rest on the inherent authority of States to detain during armed conflict.

Major Robert Barnsby argued in a 2009 *Military Law Review* article that the authorization to detain had risen to the level of CIL because it was the "logical predicate" of detention regulations identified as CIL by the ICRC in their 2005 study.[218] Pointing to State practices which appear to rest on the existence of an authority to detain in NIACs, Major Barnsby concluded that recognition of the authority to detain is supported by both State practice and *opinio juris* such that the authority itself was part of CIL.[219] Major Barnsby's ultimate conclusion is flawed, however, because the structure of IHL leads to the conclusion that it is not a source of positive authority for a State; nevertheless, it is indeed true that the existence of CIL rules regulating the conditions and procedures for

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[214] *See* Ohlin, *supra* note 211, at 370-71.

[215] *See, e.g.*, Louisa Loveluck, *English-Speaking Child beheads Syrian Rebel in Latest ISIL Video*, TELEGRAPH (Feb. 4, 2016), http://www.telegraph.co.uk/news/worldnews/islamic-state/12141368/English-speaking-child-beheads-Syrian-rebel-in-latest-Isil-video.html.

[216] *See, e.g.*, Andrew Walker, *What is Boko Haram?*, U.S. INST. PEACE (May 30, 2012), http://www.usip.org/publications/what-boko-haram (explaining that Boko Haram targets churches and schools as part of their efforts to establish an Islamic state).

[217] *See, e.g.*, U. N. Human Rights Council, Report of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68, at 7-8 (Feb. 11, 2016), http://www.ohchr.org/ Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-68.pdf.

[218] *See* Barnsby, *supra* note 177, at 60-61.

[219] *See id*.

detention lead to the conclusion that the authority to detain exists in NIACs.[220]

Another argument raised in favor of detention authority in a NIAC is the idea that detention authority flows logically from the authority to kill. The U.K. Court of Appeals in *Serdar Mohammed* rejects this reasoning because the category of those persons who may lawfully be detained is broader than the category of people who may be lawfully targeted with lethal force,[221] therefore the authority to detain is not a necessary subset of the authority to kill.[222] Sean Aughey and Aurel Sari challenge this assumption, arguing that there are two categories of persons who may be targeted in a NIAC—Civilians Directly Participating in Hostilities (DPH), and members of an OAG. As discussed *supra*, this latter group is functionally the armed forces of a non-state actor, such as ISIS, and are proper *status* rather than *conduct*-based targets.[223] Aughey and Sari conclude that the power to detain status-based targets is coextensive with the power to target them. While this makes intuitive sense, it is not necessary or advisable to conceptualize these two powers as concentric circles with one nested inside the other. The war power necessarily contains a whole host of powers aside from the authority to use deadly force against combatants.[224] The power to detain and the power to kill are two separate—though in some cases overlapping—components of a State's right to use force during armed conflict, and one is not dependent on the other for its existence.[225] Once a person has been identified as a

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[220] The U.K. supreme court in *Serdar Mohammed* considered but did not decide if CIL was a source of the authority to detain in a NIAC, "concluding that this was an evolving area of state practice, including the view that the Court did not want to unduly influence developments in this arena." Fionnuala Ní Aoláin, *To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed*, JUST SEC'Y (Feb. 2, 2017, 8:01 AM), https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/.

[221] *See* Goodman, *supra* note 198, at 169.

[222] Serdar Mohammed v. Sec'y of State for Defence (2015) EWCA Civ. 843 ¶ 253.

[223] *See* Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict:* Serdar Mohammed *and the Limits of Human Rights Convergence*, 91 INT'L L. STUD. 60, 105 (2015).

[224] *See* DEP'T OF THE ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS para. 1-7 (Nov. 2010) (discussing lethal and nonlethal methods of targeting); *cf.* Brig Amy Warwick, 67 U.S. 635, 670 (1863) (1862) (upholding President Lincoln's blockade of southern ports following the firing upon Fort Sumter and pointing out that "what degree of force the crises demands" will be determined by the facts and circumstances of the particular case).

[225] *Cf* Brief of Respondent at 14, Hamdi v. Rumsfeld, 542 U.S. 507 (2003) (No. 03-6696) (noting that the war power includes the ability to use the armed forces "in the manner [the

member of an OAG or as DPH, that person may be targeted for military force, which could mean, *inter alia*, lethal force or detention. The power to conduct war—to conduct military operations—is not merely the power to kill: it is the power to subdue the enemy.[226] That power is limited by the regulatory framework of IHL, and as discussed above, IHL is not intended to unduly restrict State sovereignty in this respect.[227] Because the power to detain in NIACs has not been explicitly taken away, States retain their inherent authority to detain those who are DPH or combatants during an armed conflict. The Court of Appeals in *Serdar Mohammed* considered and rejected the idea that the absence of a prohibition could be interpreted as positive authority to take a particular action,[228] and while it may overstate the case to argue that anything not prohibited by international law is *a fortiori* permitted,[229] that is not this article's argument. Restrictions on State authority should not be presumed absent explicit language,[230] but the State must possess the authority to act in the

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President] may deem most effectual to harass and conquer and subdue the enemy" (citing Fleming v. Page, 50 U.S. 603, 614)).

[226] JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at I-13 (25 Mar. 2013) [hereinafter JP 1] puts it this way:

> The ultimate purpose of the US Armed Forces is to fight and win the Nation's wars. Fundamentally, the military instrument is coercive in nature, to include the integral aspect of military capability that opposes external coercion. Coercion generates effects through the application of force (to include the threat of force) to compel an adversary or prevent our being compelled.

Id.

[227] A 1922 treatise on foreign relations agreed that the power to conduct war was limited only by international law. David M. Golove, *The Commander in Chief and the Laws of War*, 99 PROC., AM. SOC. INT'L. L. 198, 200 (2005) (citing QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 169, 169 n.47, 85 n.59 (1922)).

[228] Serdar Mohammed v. Sec'y of State for Defence [2015] EWCA Civ. 843 [¶ 195-97].

[229] This is generally known as the *Lotus* principle, after a famous Permanent International Court of Justice case from 1927, which held that states generally enjoy in their exercise of powers a "wide measure of discretion, which is only limited in some cases by prohibitive rule." *See* S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A). No 10 (Sept. 7, 1927) at 18-19. This principle has received some criticism for being overbroad. *See, e.g.*, Hugh Handeyside, Note, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71, 72-73 (2007). *But see, e.g.*, Yuval Shany, *Toward A General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 940 (2005).

[230] *See* S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A). No 10 (Sept. 7, 1927) at 18-19.

first place—in the case of detention, States possess the authority to act pursuant to their sovereign authority to conduct war.[231]

Not only is the contrary view entrenched in the high courts of our coalition partners, but merely finding the source of authority will be insufficient to allow partner nations, bound by the ECHR, to avoid violations of that Convention. It is also necessary to enact a standardized set of procedures "to specify the conditions on which [a State's] armed forces may detain people in the course of an armed conflict and to make adequate means available to detainees to challenge the lawfulness of their detention under [that State's] own law."[232] Because multinational operations are a feature of the modern battlefield,[233] and because clarity is vital to the application of the law, the United States must enact a treaty in order to ensure the ongoing effectiveness of military operations in a multinational context.[234]

III. Proposal for Additional Protocol IV

The ICRC noted in 2009 that a treaty-based solution would be the most authoritative fix for the ambiguities in IHL's application to detention in NIACs.[235] Such an instrument would set standards that would be "beyond dispute" in future conflicts involving ratifying States.

A. The Material Field of Application—NIACS Like IACs

This paragraph limits the application of AP IV to those NIACs that are sufficiently IAC-like, in order to address only those circumstances where the State is detaining as a belligerent party to a conflict.[236] As with the material field of application limitation in AP II, AP IV's field of application should be "precisely limited [so] that it could only be invoked

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[231] The contours of the authority have been limited by CA3, AP II, and CIL, but the existence of the authority itself has not been altered. *See supra* Section II.B.2.

[232] Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 67.

[233] *See* U.S. DEP'T OF DEF., JOINT PUB. 3-16, MULTINATIONAL OPERATIONS I-1 (July 16, 2013) ("U.S. commanders should expect to conduct military operations as part of a multinational force (MNF).").

[234] *See supra* note 24 and accompanying text.

[235] *See Regional Consultations*, *supra* note 158, at 17.

[236] As opposed to those scenarios where a State is detaining pursuant to a violation of domestic criminal law, or where a State chooses to respond to unrest with its police rather than its armed forces. *See supra* note 114 and accompanying text.

in clearly defined civil conflicts."[237] Additionally, the terms used in this paragraph are defined so as to provide maximum clarity to the circumstances in which AP IV will apply.[238] Article 1 of AP IV will read:

> This Protocol shall apply to all non-international armed conflicts taking place between State armed forces and other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, to exercise some measure of governmental authority, and to implement this Protocol.[239]

Several features of AP IV are immediately apparent. First, rather than taking the approach of CA3 and AP II and defining application of this protocol in the negative,[240] AP IV explicitly applies to NIACs and goes on to incorporate the definition for such conflicts laid down by the *Tadic* judgment,[241] which focuses on the intensity of the conflict[242] and the organization of the parties. Additional Protocol IV deletes APII's requirement for the armed conflict to occur in the territory of a High Contracting Party; this is intended to demonstrate that AP IV's requirements apply in transnational and cross-border NIACs and that the requirements of AP IV attach to State military action regardless of where it takes place.

Second, because the inherent authority to detain flows from State sovereignty during armed conflicts, government forces must be involved

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[237] HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 3 (1987).

[238] While defining terms may lead to increased resistance on the part of States to the adoption of this proposal, during the diplomatic conferences that led to the adoption of AP II, States complained about the difficulty in parsing the meaning of various terms in CA3 and requested that the terms in AP II be defined. *See* LEVIE, *supra* note 237, at 34-35 (1987). The purpose of AP IV is to lend clarity to a confusing area of the law, thus definitions are proposed. In order to ensure that these definitions are acceptable to the States, they have been taken from relatively settled case law of respected international tribunals.

[239] *See infra* Appendix A, at A-1.

[240] Common Article 3 and AP II define the scope of their application by reference to the definition of an IAC contained either in Article 2 of the articles common to the Geneva Conventions of 1949 or to Article 1 of AP I.

[241] *See supra* notes 120-125 and accompanying text.

[242] *See supra* notes 126-128 and accompanying text.

in the armed conflict for AP IV to apply.[243] Unlike AP II, however, there is no requirement that the government forces be the forces of the State in whose territory the armed conflict occurs.[244] The requirement of organization and responsible command, territorial control so as to enable sustained military operations,[245] to exercise some measure of governmental authority, and the ability to implement the protocol will require OAGs to be sufficiently "State-like" in order to fall under this protocol instead of IHRL.[246] This is appropriate if one thinks of NIAC-related IHL as a series of layers of increasing complexity depending on the goal of the instrument. Common Article 3 operates as a general baseline intended to protect all victims of armed conflict at all times, regardless of any additional instruments in place. Additional Protocol II increases the obligations on the Parties to the conflict in a measure commensurate with the intensity of the conflict and the organization of the parties and, as with CA3 these obligations are primarily intended to address *civilian* victims of the conflict. Finally, AP IV acts as a measure primarily focused on protections for the representatives of the Parties themselves; in this way it is more similar to the Third Geneva Convention than it is to either CA3 or AP II.

B. The Basis for Detention—Security

Article 3 of AP IV addresses the authority and basis for detention, and, as such, is the most critical piece of the proposed Protocol. It is here that the Protocol acknowledges that the authority to detain arises from a State's inherent authority to conduct hostilities during an armed conflict. This Article also defines security detention as an administrative measure taken for reasons of the State's security during an armed conflict. This is intended to demonstrate that detention is not intended to punish the

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[243] *See supra* notes 100-103 and accompanying text.

[244] This is intended to cover transnational and cross-border conflicts.

[245] The phrasing "such control over a part of its territory as to enable them to carry out sustained and concerted military operations" is a reflection of the seriousness and intensity of the conflict rather than a quantitative measure of the amount of territory the OAG controls. This mirrors the language from AP II and the interpretations of that language by commentators. *See* SIVAKUMARAN, *supra* note 31, at 185-87.

[246] Despite mirroring the standard for lawful belligerency, the language of AP IV intentionally falls short of that definition. *See supra* notes 211-213 and accompanying text. The intention here is to avoid conferring legitimate status on an OAG. This concern is also addressed by Article 2 of AP IV, which states that nothing in the Protocol is intended to affect the legal status of the belligerents. *See* Appendix A, at A-3.

individual for a past act and must be explicitly non-punitive in character.[247] Moreover, detention under this Protocol must be necessary for security reasons; detention for intelligence gathering or the mere convenience of the detaining authority would be impermissible.[248] This limitation on security detention is well recognized by both States and international bodies like the ICRC.[249] As the ICRC persuasively argued,

> [A]rticulation of the acceptable grounds for internment must be broad enough to allow internment where necessary to prevent future imperative threats from materializing, but narrow enough to exclude internment of persons whose detention would go beyond what is militarily necessary.[250]

It is clear that in order for this instrument to be able to answer the fundamental question of whether a particular detention is arbitrary, it must explicitly outline the acceptable bases for detention under this Protocol. Too wide of a definition could lead to abuse; too narrow would render the Protocol useless to the Parties. For this reason, Article 3 of AP IV states the following: "Security detention may be undertaken if necessary for imperative reasons of security directly related to the armed conflict."[251]

This language was modified from the general agreement during the Chatham House initiative of the appropriate standard for detention in a NIAC, given the "exceptional nature" of internment under both IHL and IHRL.[252] This definition also avoids distinguishing between "status-based" detainees and "conduct-based" detainees; this is to avoid any conflict between States' differing interpretations of these terms as well as to recognize that both types of detainees can present a security threat to a State during armed conflict.

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[247] *See Detention Concluding Report*, *supra* note 3, at 29.

[248] *Chatham House*, *supra* note 116, at 865. Note the U.K. supreme court likewise concluded that detention for intelligence gathering purposes would be impermissible. *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 80 (citing various cases from the European Court of Human Rights).

[249] *Id.* ("What is clear is that internment must be necessary for security reasons, and not just convenient or useful for the interning power. A concrete example is that internment for the sole purpose of obtaining intelligence is impermissible.").

[250] *Detention Concluding Report*, *supra* note 3, at 27.

[251] *See* Appendix A, at A-3. This is consonant with the U.K. supreme court's holding in *Serdar Mohammed*. *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 44, 65.

[252] *Chatham House*, *supra* note 116, at 863.

C. The Conditions of Detention—Humane Treatment Is the Standard

Article 4 and Article 5 of AP IV concern fundamental guarantees for detainees and the standards of detention. Article 4 is intended to supplement the requirements of CA3 and AP II, both of which continue to apply under an AP IV regime. The fundamental guarantees listed in AP IV are protections from the types of abuses to which detainees are particularly vulnerable: violence, torture, corporal punishment, forced disappearances, extrajudicial killings, sexual violence, and threats to commit these acts.

At a minimum, the provisions of Article 5 require compliance with the standards of both CA3 and AP II. Article 5 makes detaining authorities responsible for providing "adequate conditions of detention," including food and drinking water, clean and serviceable clothing, and protection against the climate. As this Article makes clear: What will be "adequate" will, by necessity, depend on the resources available in the area, the standard of living of the local populace, and the local cultural context including relevant religious considerations.[253]

Article 5 also mandates the application of established medical triage principles to wounded and sick detainees. Article 4 and Article 5 are not intended to provide an exhaustive list of standards in the care and protection of detainees, but rather are intended to reinforce and reference the minimum standards in CA3, AP II, and CIL by creating a floor upon which States are free to improve.

D. Review of Detention—The Right to Challenge

The major issues addressed by this portion of the proposed Protocol are the right to be informed promptly of the basis for detention, legal assistance for detainees, legal review of the basis for detention, and the right to challenge the legal and factual basis of continued detention. Of note, these key elements were identified as among those which are "essential to any fair process of adjudication" by the U.K. Supreme Court in *Serdar Mohammed*.[254] Articles 6-8 govern these provisions, and will

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[253] *See* Appendix at A-3.

[254] *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 107. The failure of the British Army's detention process to include these provisions formed the basis of that court's opinion in favor of Mr. Mohammed. *Id.* at 99-109.

ensure that the need to protect intelligence gathering sources is balanced with a detainee's right to see the information forming the basis for the detention. The review process consists of two steps: the first is an administrative review of the necessity for continued detention, conducted at least every sixth months, while the second is a challenge of the legal and factual basis for the detention argued before a competent tribunal.[255] The essential rationale for the process is to ensure maximum flexibility for battlefield review while also acknowledging the need for effective oversight of such detentions.[256]

E. Transfer of Detainees—Non-Refoulement

This portion of AP IV is concerned with the transfer of detainees to another authority, and in order to comply with principle of non-refoulement specifically prohibits transfer of a detainee to another State or power that may subject that detainee to torture or persecution. This section of AP IV requires that all transfers be registered and reported to the ICRC, and allows for the challenge of transfers by the detainee before a competent tribunal.

Additional Protocol IV is intended to clarify the source of the detention authority during armed conflicts and adopt provisions of CIL to provide a regulatory framework for such detentions. In order to strike a balance between respect for State sovereignty and cabining that sovereignty in order to protect individuals, AP IV intentionally does not address every aspect of detainee treatment, administration, or procedure. In this way, the proposed Protocol provides the baseline guidance upon which additional *ad hoc* agreements, several of which are discussed below,

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[255] Review by this "competent tribunal" is intended to mirror *habeas*-type review by a judicial body. The UN Working Group on Arbitrary Detention considers *habeas* review a non-derogable right under IHRL instruments like the ICCPR. *See* UN Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 21-25, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf [hereinafter Working Group Report]. The wording using in AP IV recognizes that not all jurisdictions agree with the UN Working Group's interpretation. *See, e.g.*, Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that "the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in executive detention in the Bagram detention facility in the Afghan theater of war"). The wording of AP IV mandates the availability of a procedure to challenge the detention but does not require that this challenge take place via the particular pathway of *habeas* review.

[256] *Detention Concluding Report*, *supra* note 3, at 50-52.

may build. While a treaty-based solution as outlined in the proposed Protocol would be the most appropriate method for addressing the confusion in the law, there have been several counterarguments raised by commentators and international bodies which this paper will now address.

IV. Counterarguments

The main arguments against the enactment of an international instrument governing detention are a belief that the political will is insufficient to get such an instrument through the treaty process; the belief that *ad hoc* legal instruments such as UN Security Council Resolutions or bilateral agreements are sufficient to authorize detention during NIACs; and the belief that States should rely on domestic law in order to detain during NIACs. Ultimately these arguments are unpersuasive.

A. Treaties Are Too Hard

The idea that international political obstacles are currently too great to pass a new treaty or Protocol is the main argument against this article's proposal.[257] Some commentators argue that the political obstacles to passing such a treaty would be enormous, and further speculate that any attempt to do so could disrupt the balance between IHL and IHRL.[258] The problem with this viewpoint is that the balance between IHL and IHRL has already been fundamentally disrupted by recent court decisions.[259] The increasing convergence of IHL and IHRL, and the grafting of IHRL norms onto an IHL framework, has drawn criticism from experts who are concerned at the impact such a persistent linkage will have on the interpretation of both bodies of law.[260] In order to ensure continued respect for the very idea of "law in war,"[261] the obligations of IHRL must not be read to so frustrate the operation of IHL during armed conflict that the effective conduct of military operations is impeded.[262] Given the

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[257] *See Detention Concluding Report*, *supra* note 3, at 10 ("However, in light of the feedback given during the consultations, there appears to be a lack of sufficient political support for embarking on a treaty negotiation process at this stage.").
[258] *See* Rona, *supra* note 200, at 37.
[259] *See* Aughey & Sari, *supra* note 223, at 65-66.
[260] *See* Bennoune, *supra* note 28, at 180-81 (discussing the objections from both camps).
[261] *See* Aughey & Sari, *supra* note 223, at 65-66.
[262] *Id*.

recent spate of decisions from courts and international bodies[263] and the escalating calls for a multinational military ground intervention against ISIL,[264] the need for an international instrument confirming a State's inherent power to detain during armed conflict is more apparent than ever. Unlike *ad hoc* legal instruments, moreover, a general Protocol would be enacted before a particular conflict escalates tensions to the point of creating political deadlock.

B. Reliance on *Ad Hoc* Legal Instruments

Commentators and court decisions have suggested that the authorization and regulation of detention should be sought in *ad hoc* legal instruments like a UN Security Council Resolution or a bilateral agreement between States. The U.K. supreme court's *Serdar Mohammed* decision, for example, found the authority to detain implicit in the language of various UN Security Council Resolutions allowing members to take "all necessary measures" to fulfil the UN Security Council Resolution's mandate.[265] Early commentary on this decision suggests that this will encourage reliance on the implied powers contained in such resolutions, while also noting that if UN Security Council Resolutions are a source of authority to detain, they are silent on the very procedural safeguards deemed vital to compliance with Article 5 of the ECHR.[266] For a variety of reasons, relying on UN Security Council Resolutions or other agreements is hardly an effective solution, as such instruments would only be effective for the duration of a particular conflict or operation, and would require States to renegotiate procedures every time military operations are contemplated. Even assuming that the vagaries of the political processes

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[263] *See, e.g.*, Serdar Mohammed v. Ministry of Defense (2015) EWCA Civ. 843; Working Group Report, *supra* note 255, ¶ 21-25. As Professor Michael Schmitt points out, these bodies are not neutral in their interpretation of IHL, often lack military experience, and often give short shrift to the principle of military necessity in assessing military operations that result in civilian casualties or other types of collateral damage. *See* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 824 (2010).

[264] *See, e.g.*, Josh Wood, *Turkey Calls for International Coalition to Intervene on Ground in Syria*, NAT'L (Feb. 16, 2016), http://www.thenational.ae/world/middle-east/turkey-calls-for-international-coalition-to-intervene-on-ground-in-syria.

[265] Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 21–25.

[266] Fionnuala Ní Aoláin, *To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed*, JUST SEC'Y (Feb. 2, 2017, 8:01 AM), https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/.

at the level of the Security Council[267] or between States would allow for such negotiations as active conflicts are taking place within their territories, such a course of action would make setting consistent policy very difficult as the rules would change with each conflict. Matters become even more complicated in the case of transnational NIACs where operations might cross borders. This would insert a lack of predictability into the process—the protections for a detained individual should not change, depending on the hands in which the individual finds him or herself.

C. Reliance on Domestic Law

Several questions are immediately apparent, the most complicated being which State's domestic law could provide the authority to detain—the sending nation or the host nation? From a sovereignty perspective, it would seem that only the host nation's law could authorize such detentions as very few domestic laws are given extraterritorial application. The problem, however, is the same as for the *ad hoc* legal instruments. When dealing with an OAG like ISIL, whose operations cross borders from Iraq to Syria, would a coalition attempting to conduct detention operations as part of military intervention against ISIL need to rely on the domestic law of the nation in which a particular combatant was captured? If so, the protections for a detained individual would again depend on where he or she was captured, which would inject a great deal of uncertainty into these types of operations. Several commentators, including Professor Rona, advocate for the amendment of domestic law to seat the protections against arbitrary detention within the derogation framework of IHRL itself.[268] This would attempt to create a minimum floor of protections against arbitrary detention, much in the same way that this article's proposed AP IV is intended to operate. That said, attempts to pass identical domestic legislation in each of the over 180 separate States would suffer from the same political difficulties as negotiating on an *ad hoc* basis as with bilateral agreements.

While certainly difficult, passing the proposed Protocol, which outlines only those baseline protections States have already largely recognized and

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[267] *See id.* (calling the UN Security Council "an often dysfunctional, highly partisan body").
[268] *See* Rona, *supra* note 200, at 58.

agreed on,[269] allows for a degree of uniformity and predictability in the age of multinational coalitions that other methods for addressing the problem do not possess.

V. Conclusion

Historical practice and pre-Geneva understanding of States' sovereignty demonstrates that States have inherent authority to conduct security detentions during military operations in armed conflicts. Far from providing a positive source of authority, IHL rules merely regulate a State's exercise of that inherent authority it already possesses. The power to wage war consists of several components that are separate and apart from each other—the power to detain is a power that must be considered separately from the power to kill, but it is a power that is a fundamental part of a State's sovereign authority to wage war. Absent a specific prohibition on the basis for or conduct of detention, the authority to conduct detention operations for security purposes remains and is regulated by CA3, AP II, and CIL. Because IHL is able to answer the questions of whether are particular security detention in a NIAC is or is not arbitrary, there is no need to look to IHRL to provide the applicable rules.

As States themselves recognize, detentions are necessary and legitimate components of armed conflict that assist in the achievement of lawful military objectives while ultimately saving lives.[270] The current misunderstanding of a State's authority to conduct such detentions requires an international instrument, such as this paper's proposed AP IV, to ensure the appropriate balance between military and operational necessity and the rights of the detained individual. Without the clarity that such an instrument would provide, the United States is likely to stand alone as the sole detaining authority during multinational military operations. The political obstacles standing in the way of AP IV are surmountable in light of the very real benefits such an instrument would bring in terms of clarity to the grounds and procedures for security detentions in NIACs.

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[269] *See supra* notes 235-257 and accompanying text.
[270] *See Copenhagen Process*, *supra* note 9.

Appendix A.
Text of Proposed Additional Protocol IV

Preamble

The High Contracting Parties,

Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Reiterating that international humanitarian law remains as relevant today as ever in non-international armed conflict (NIAC) and continues to provide protection for all persons deprived of their liberty in relation to such conflicts;

Emphasizing the need to ensure humane and uniform treatment for those individuals detained in armed conflicts not of an international character;

Recognizing that the authority to conduct security detentions in armed conflict is a fundamental incident of waging war;

Have agreed on the following:

Part I: Scope of this Protocol

Article 1—Material Field of Application

1. This Protocol shall apply to all armed conflicts not of an international character taking place between armed forces and other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, to exercise some measure of governmental authority, and to implement this Protocol.

2. The following definitions apply to the terms used in this protocol:

(a) "Armed conflict not of an international character" means protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[271]

(b) "Armed forces" means all the armed forces of a State, including those which under some national systems might not be called regular forces, constituted in accordance with national legislation under some national systems. This term does not refer to other government agencies who may be armed, such as the police, customs, or similar organizations, unless they are formally or functionally incorporated into the armed forces.[272]

(c) "Organized armed group" means armed forces belonging to a non-State party to an armed conflict. This term includes dissident armed forces under responsible command that have taken up arms against the legitimate government. A finding that an organized armed group "belongs to" a non-State party to the conflict requires at least a *de facto* relationship between the non-State party and the organized armed group as indicated by the fact that the organized armed group carries out hostilities on behalf of the non-State party and with its agreement.[273]

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[271] This is the *Tadic* definition. *See supra* note 127 and accompanying text.

[272] This definition is taken and synthesized from various proposals during the diplomatic conferences and working groups prior to the adoption of AP II. *See* HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 67-71 (1987). The requirement that the police be formally or functionally incorporated into the armed forces takes into account situations where police forces fight alongside regular military forces.

[273] This definition comes in part from the ICRC DPH study. Whether a group is sufficiently organized has been expanded further by case law, but it is not advisable to put discrete indicia of organization into AP IV. This will ensure maximum flexibility for application of the Protocol. The elements "sustained and concerted military operations" and "some measure of governmental authority" place qualitative limitations on this principle; not every OAG will meet these criteria. Organization of the group is an important factor because it indicates the violence being carried out is of a "collective character" rather than acts carried out by isolated or random individuals; this differentiates the violence from criminal or terrorist activities. *See* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1999. The tribunal in Boskoski determined that in order to be "organized," an armed group needed "some hierarchical structure and its leadership requires the capacity to exert authority over its members." *See* Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 195 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

(d) "Responsible command" means that the organized armed group is subject to effective authority and control,[274] which indicates a sufficiently firm discipline that will ensure respect, in the conduct of the hostilities, of the provisions laid down in the Protocol.[275]

(e) "Sustained and concerted military operations" refers to continuous and planned hostilities in support of a unified objective.[276]

(f) "Some measure of governmental authority" refers to an attempt by the organized armed group to conduct orderly administration of controlled territory.[277]

3. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

4. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of 12 August 1949 or the conditions governing the application of Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II).

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[274] This language mirrors Article 28 of the Rome Statute, which describes the responsibilities of commanders and subordinates for criminal acts committed by their subordinates.

[275] This comes from the ICRC commentary on the draft Additional Protocol. *See* SIVAKUMARAN, *supra* note 31, at 174. This is not intended to imply a hierarchical structure like in the military, though military structure would certainly fit the definition of responsible command. This is intended to require only that there be some sort of relationship between individual A and individual B whereby B may direct, prevent, or punish A's acts. *See id.* at 175.

[276] This language is taken from Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 626, (Int'l Crim. Trib. for Rwanda 2 Sep. 1998). This is intended to be an evaluation of the intensity of the conflict. Based on case law, this evaluation includes an analysis of the number of individuals involved, the types of weapons used, and the geographical spread of the violence. *See, e.g.*, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 214-34 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008). As with the indicia of organization, it is not advisable to spell out these indicia in AP IV itself.

[277] This concept is also taken from nineteenth-century requirements for recognition of belligerency. From a modern perspective, this also relates to the organization of the armed group and differentiates such a group from a loose configuration of individuals carrying out isolated or random acts of violence.

Article 2—Legal Status of the Parties to the Conflict

The application of this Protocol shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of this Protocol shall affect the legal status of the territory in question.[278] Neither the detention of an individual nor the application of this Protocol shall affect a State's ability to apply its domestic criminal law to the conduct in question.

Article 3—Basis for Detention

1. States have inherent authority to conduct security detentions during armed conflict. This authority arises from a State's sovereign ability to conduct hostilities during armed conflict.

2. Security detention is an administrative measure taken to deprive an individual of his or her liberty, ordered by a State's executive branch rather than via judicial processes, for reasons of the State's security during an armed conflict.[279]

3. Security detention may be undertaken if necessary for imperative reasons of security directly related to the armed conflict.[280]

Part II: Humane Treatment

Article 4—Fundamental Guarantees

1. All detained persons are entitled to respect for their person, honor, convictions, and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

2. The following acts against detained persons are and shall remain prohibited at any time and in any place whatsoever:

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[278] This is modified from a similar provision in AP I, art. 4.

[279] *See* Debarre, *supra* note 136; *see also Chatham* House, *supra* note 116, at 860. Requiring as it does the triggering condition of an armed conflict, this definition excludes the sort of administrative or preventative detention that occurs during situations that do not meet the criteria for an armed conflict.

[280] This language was modified from the general agreement during the Chatham House initiative of the appropriate standard for detention in a NIAC, given the "exceptional nature" of internment under both IHL and IHRL. *See Chatham House*, *supra* note 116, at 863.

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) forced disappearances;

(c) extrajudicial killings;

(d) sexual violence, in particular rape, enforced prostitution and any form of indecent assault;

(e) threats to commit any of the foregoing acts.

Article 5—Conditions of Detention

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict:

(a) The minimum standards of detention must comport with those requirements laid out in Article 3 common to all the Geneva Conventions of 1949, Article 5 of the Protocols Additional to the Geneva Conventions of 1949 (Protocol II), and customary international law.

(b) Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene including clean and serviceable clothing appropriate for the climate, and protection against the rigors of the climate and the dangers of military activities. What will be "adequate" will, by necessity, depend on the resources available in the area, the standard of living of the local populace, and the local cultural context including relevant religious considerations. Detaining authorities are responsible for safeguarding the physical and psychological health of detainees.[281]

(c) Wounded and sick detainees are to receive to the fullest extent practicable under the circumstances and with the least possible delay, the medical care and attention required by their condition, without any

[281] This language is adapted from section 9 of the Copenhagen Process. *See Copenhagen Process*, *supra* note 9, at 14.

distinction among them except on medical grounds based on generally accepted medical ethical standards.[282]

(d) Persons detained shall be promptly registered and, to the extent feasible, their next of kin will be notified.[283] Registration includes notification of the International Committee of the Red Cross and other impartial humanitarian organizations as relevant.

(e) All detaining authority are to provide the ICRC with access to the detainees. This requirement does not prevent a detaining authority from taking action to ensure the security and good order and discipline of the detention facility, such as requiring physical searches of all visitors.

2. To the extent feasible and within the limits of their capabilities, detaining authorities will respect the following provisions:

(a) Detained persons are to have contact with the outside world as soon as reasonably practical. Such contact includes the sending and receipt of mail and in-person visits at the detention facility.

(b) This contact includes, as appropriate under the circumstances, family members, legal advisors, spiritual advisors, and impartial humanitarian organizations. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.

Part III: Procedures for Detention

Article 6—Procedures for Detention

1. As soon as practicable after initial capture or apprehension a commander is to promptly make a decision as to whether to hold, release or transfer the detainee.

2. A person detained under this Protocol must be promptly informed, in a language he or she understands, of the reasons for the detention, the consequences he or she might face, and the procedures for challenging that detention. The information provided on the reasons for the detention must

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[282] This language is a modification of Article 7, AP II.
[283] Registration of detainees guards against allegations of secret detentions.

be sufficient to allow the detainee to meaningfully challenge the legality of his or her internment and its continued necessity.

2. A person detained under this Protocol must, where feasible, be provided access to legal counsel for assistance. If necessary, this will include access to an interpreter.

Article 7—Review of Detention[284]

1. As soon as practicable following the initiation of detention, a competent tribunal must conduct an independent and impartial review of the basis of and the necessity for the detention.[285]

2. On a periodic basis no less than twice per year, the tribunal must review the basis for the detention and any additional information presented to it to determine whether continued detention is warranted for imperative reasons of security related to the armed conflict.

3. A detainee should, to the greatest extent practicable, be given the opportunity for personal appearance before the tribunal.

Article 8—Challenge of Detention[286]

1. A detainee must be given the opportunity to challenge legal sufficiency and factual basis of his or her detention before a tribunal competent to adjudicate such challenges.

2. To the extent practicable, this challenge should be via the mechanism of *habeas corpus* review by a judicial body in the civil courts of the detaining authority.

3. A detainee should, to the greatest extent practicable, be given the opportunity for personal appearance before the tribunal.

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[284] This is intended to be a review by an administrative tribunal.

[285] As the Chatham House experts agreed, "Independent and impartial review of the necessity of internment is the most important procedural safeguard against arbitrary detention." *See Chatham House*, *supra* note 116, at 877.

[286] *See supra* note 255 and accompanying text.

Article 9—Transfers of Detainees

1. Transfers of detainees shall be carried out humanely. As a general rule, such transfer shall be carried out by rail or other means of transport, and under conditions at least equal to those used by the forces of the detaining authority in their changes of station. The detaining authority shall take all suitable precautions to safeguard their health and safety during transfer. All transfers shall be registered and reported to the ICRC.

2. Sick, wounded or infirm detainees shall not be transferred if the journey would be seriously detrimental to them, unless their safety or security imperatively demands.

3. A detaining authority must ensure that any transfer is carried out in accordance with its obligations under international law. Transfer is precluded where there are substantial grounds for believing that the detainee would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Where appropriate, transfers should be monitored by the ICRC or other neutral international organization.

4. The detainee may challenge the basis for transfer before a competent tribunal.

Part IV: Final Provisions

[Omitted; administrative provisions intended to be identical to those following AP II]