Detention of Terrorists in the Twenty-first Century

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I. Introduction

Of all the instruments of power that may be employed to further national interests, none yields collateral consequences that are more difficult to predict than the unleashing of military force. And with respect to the past decade’s use of that instrument, no consequence has engendered more debate, confusion or passion than U.S. detention policy. This article attempts to clarify the reasons for the controversy surrounding the policy—explaining it primarily as a function of the nature of twenty-first-century warfare, as opposed to competing political or ideological perspectives, as many claim. It then proffers a vision for moving past the controversy.

At first, few recognized the juridical stressors associated with a twenty-first-century armed conflict steeped in terrorism; most simply looked to old laws to address this new type of conflict. In this context a rift began to form and grew ever wider with the years of conflict. Today, even many nations willing to share with the United States the burdens of armed conflict have expressed significant discomfort with U.S. legal endeavors related to detention. This dissonance and the

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disquiet among our allies have impeded the United States’ implementation of its plans, diminished its effectiveness in fighting terrorism and stymied the important work that must be done to establish an effective legal regime for the longer conflict ahead. It is not much of a stretch to assert that the manner in which the United States and its allies take up these challenges may very well reflect the most enduring impact of the 9/11 attacks. Indeed, history teaches that changes in the law often rank among the most noteworthy consequences of war. The goal, then, should be first to diagnose correctly the problem confronting the United States and then to identify the prescription that will yield a principled, credible and sustainable detention policy.

The thesis is simple. Authority to detain and regulation of the conditions of detention in the context of armed conflict derive most appropriately from the law of war. As such, the general rules should be uncontroversial—armies have captured and detained enemy fighters for years. But today’s war is different: the enemy is not a State, its fighters are not lawful combatants and the end of this conflict is not easily discerned. Extant law of war was not written for today’s conflict, and an analysis of it therefore exposes gaps that offend our twenty-first-century sensibilities. Foremost among the lacunae is the absence of appropriate processes for determining who can and should be detained and for how long. The solution, then, is found in today’s efforts to identify the process that best ensures that we detain only those we lawfully can detain and, even then, only those whose threat is so substantial that it can be mitigated only by detention.

II. Identifying the Paradigm

The most fundamental component of controversy associated with the post-9/11 armed conflict is the confluence of legal regimes available to guide detentions. Soon after 9/11, President George W. Bush made clear that he viewed al Qaeda’s attack as an act of war, the response to which would include military force. What became known as the “global war on terror” had begun. When President Barack H. Obama took office, he distanced himself from some of the more controversial policies of his predecessor, and he discarded from the conflict’s lexicon the terms “global” and “terror.” But he did not abandon the legal framework of armed conflict. President Obama, with deliberate clarity, still used the vocabulary of war when describing the conflict with al Qaeda, including in his Nobel Peace Prize acceptance speech, where he explained why peace-loving nations sometimes have a duty to engage in armed conflict. Fundamental to understanding U.S. detention policy over the past decade is the comprehension that authority for detention flows from the nature of warfare and the law of war that regulates it.
As such, one would anticipate that anyone captured during an armed conflict would be dealt with as a prisoner of war, without substantial debate. For centuries, armies have captured and detained enemy fighters; few, if any, anticipated the dissonance that would accompany the practice today. Indeed, on 9/11, the office held by this author (Detainee Policy) did not exist; basic humanitarian norms associated with wartime detention were well understood by the United States’ highly trained armed forces and a deputy assistant secretary—level position to oversee detention policy would have seemed like substantial overkill.

There are several explanations for the adverse global reaction to such a fundamental and heretofore uncontroversial component of warfighting, but the primary one is that the very status of this conflict as a “war” has been an issue of debate. The clarion call to war discussed above has not always been discernible amid the cacophony of other instruments at work—most notably, that of law enforcement. In addition to his call to arms, President Bush’s first post-9/11 speech included the promise that terrorists would be brought to justice. President Obama’s 2009 Archives speech similarly suggested a preference for criminal judicial processes. Indeed, prior to 9/11, law enforcement had traditionally been the tool of choice for addressing terrorism, both domestically and in the international realm. Many continue to adhere to the view that law enforcement is the “right” paradigm for the conflict today.

This article takes the view that, both in 2001 and today, war was and is the correct paradigm to apply in characterizing the conflict itself and in addressing the issue of detention. On September 12, 2001, the United Nations Security Council passed a resolution expressly recognizing the United States’ right to self-defense. Days later, the North Atlantic Treaty Organization (NATO) took the unprecedented step of passing a collective defense resolution, citing Article 5 of the NATO Charter. ANZUS and Rio Pact nations passed similar resolutions, and the U.S. Congress, on September 13, enacted a joint resolution authorizing the President to use “all necessary and appropriate force against those involved in the terrorist attacks of 9/11.” In the early days after 9/11, there seemed to be an almost universal recognition that the felling of New York’s tallest buildings and a section of the nation’s military headquarters had ignited an armed conflict in the truest sense. But acceptance of that paradigm waned as the population at Guantánamo grew.

Indeed, criticism of the “war” paradigm emerged in 2002 as a collateral ramification of criticism of wartime detention policies. First came the Bush administration’s decision that captured combatants would not be considered prisoners of war. The apparent limitless geographic reach of the United States’ war-making authorities (“global”), as well as the absence of a clear delineation of the enemy (“terror”), caused substantial concern in the international community that the rule of law itself was at risk. And yet, although there are substantial flaws in the
sylllogism that leads from discomfort with current policies to denial of the existence of a war, the suggestion that this can be treated as a law enforcement problem is not without sound precedent.

First, there is the simple fact that the citizenry of the United States have not been witness to long-term law of war detention of enemy prisoners since World War II. Both the Korean and Vietnam wars involved prisoners detained by our local allies. Prisoners of war were held for only brief periods of time in the first Gulf War, and detention periods were even shorter in the more limited conflicts that punctuated the interludes.

More important, prior to 9/11 the principal means for dealing with terrorist attacks—at least those without a clear State sponsor—was that of law enforcement. In 1988, 259 people aboard the plane and 11 on the ground were killed in the bombing of Pan American Flight 103. The first Bush administration treated the problem of apprehending suspects as one of diplomacy and extradition; it was clearly a law enforcement matter. In the 1993 World Trade Center bombing, six people were killed and more than one thousand injured. Law enforcement officials conducted an extensive investigation, resulting ultimately in the apprehension, extradition, trial and conviction in U.S. District Court of most of the suspects in the bombing, including Sheik Omar Abdel Rahman. Again, we observe an unquestionably law enforcement response.

The 1998 embassy bombings in Nairobi, Kenya and Dar es Salaam, Tanzania claimed the lives of twelve Americans and more than two hundred Kenyans and Tanzanians. The United States conducted a one-strike military response, and issued indictments against fifteen individuals, four of whom were apprehended by foreign governments, extradited to the United States, and tried and convicted in U.S. District Court. Despite the mixed military and law enforcement response, law enforcement efforts appear to have been both primary and sustained, while the military component was less significant and transitory.

In recent years, international efforts to address the law as it relates to terrorism have yielded a number of international agreements relevant to countering the terrorist threat. As with domestic legislation, however, these conventions also reflect a predisposition toward law enforcement. The United States responded to the attack on the Khobar Towers complex housing U.S. military personnel in Saudi Arabia both by launching a law enforcement investigation and by commencing an international initiative that ultimately resulted in the negotiation and entry into force of the Terrorist Bombing Convention. Through the United Nations, the United States has attempted to shore up weaknesses in the law enforcement model through treaties establishing a regime of aut dedere aut punire (extradite or prosecute) for terrorism offenses. Other examples of the campaign to reinforce the
law enforcement archetype in countering transnational armed groups include U.S. support for the Terrorist Financing Convention and efforts toward a Nuclear Terrorism Convention.26

Internationally, other countries traditionally rely on law enforcement to combat terrorism as well. Numerous countries, including Canada, France, Germany, Israel, Colombia, Russia and the United Kingdom, have established programs to combat terrorism that, while markedly different in organization and process, share striking similarities: each vests primary responsibility for response to terrorist incidents in a designated central authority, typically its national or local police; each embraces a national counterterrorism policy involving a variety of strategies, including intelligence collection, police presence and various physical security measures; and each primarily relies on its general criminal laws to prosecute terrorists, although most also have specific terrorism-related laws that allow for special investigation or prosecution modalities and increased penalties. Taken together, these components evidence an across-the-board, unambiguous reliance on the law enforcement paradigm in countering terrorism.27 The respective British and Spanish responses to terrorist-sponsored suicide bombings in the London subway and Madrid’s rail system confirmed Europe’s staunch reliance on the law enforcement model to fight terrorism.28 And India’s response to the Mumbai attack is indicative of the paradigm’s favored status even in conflict-torn South Asia. In the same vein, the United States’ choice of fora in which to prosecute persons accused in the first few years after 9/11 was limited solely to the federal criminal court system.29

The fact that law enforcement was used in the past is not a compelling argument for its post-9/11 prevalence, however. The predominant global perspective immediately after 9/11 appears to have manifested itself as an acknowledgment that law enforcement had failed. Generally, civilizations prefer to live in peace, addressing minor, disruptive violence with law enforcement tools designed for a peaceful state of existence. But no one was interested in status quo after 9/11. Al Qaeda had been at war with the United States for years, but its attack of 2001 changed the way that conflict was viewed by others.

One could explain the United States’ relatively unique post-9/11 shift as a function of its relatively unique victimization at the time. But such a reading of history would miss the mark. The United States still approaches terrorism as a law enforcement matter; it is the distinct conflict with al Qaeda that is viewed differently. In the fall of 2001, the United States went to war with al Qaeda, a transnational terrorist organization with global reach, and its territorial sponsors, the Taliban. In hindsight, having substantially degraded the organization and collected massive amounts of intelligence revealing al Qaeda’s objectives and
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capabilities, it can be seen that only the massive effort that amounted to an armed conflict could have brought down Osama bin Laden.

III. Identifying the Problem

Acknowledging the confluence of legal regimes, we turn to the law governing armed conflict, the lex specialis, which recognizes that in time of war there has been a disruption of the peacetime legal regime. Because warfare is not new to human experience, and the capture of enemy forces is certainly not unfamiliar to warfare, one would expect that traditional detention modalities might naturally prevail without fanfare. But al Qaeda’s war with the United States and its allies continues to challenge both the initial choice-of-law question and the limits of the constitutive tenets of the relevant bodies of law—tenets that largely defined international and domestic orders throughout the last half of the twentieth century. Soon after the United States put boots on the ground in Afghanistan, it became apparent that many of the most familiar jus in bello precepts were simply inapplicable to, or inadequate for, armed conflict of this type—armed conflict with a transnational non-State organization employing terrorism as its modus operandi.

A graphic may assist in understanding and explaining the legal regimes in play with respect to terrorist detention. This chart, artificial in that it does not exist in any positive statement of international law, is nonetheless useful in reflecting the disparate nature of applicable legal regimes that attend the detention of terrorists.

![Diagram of legal regimes](image-url)
The left side of the chart depicts the *lex generalis* of a peacetime society, labeled “law of peace.” On the right side is the *lex specialis* of the law of war. As one continues down the left side, human rights law is identified as most relevant to detention issues. And, more important, crossing the line into domestic implementation of international norms, criminal procedure is depicted as the body of law that provided authority for terrorist criminal detention throughout most of the twentieth century. It represents the body of law applicable to any criminal trial (whether by federal court or military commission). It is the body of law to which habeas judges naturally first looked in their initial Guantanamo cases, and it is the only body of law on this chart that is constituent in the curriculum of every American law student. Even a law student who elects to study international law is more likely to focus on *lex generalis* than its less frequently utilitarian wartime counterpart. Moreover, at least in previous generations, *jus in bello* was likely to get short shrift relative to its more engaging counterpart, *jus ad bellum*. That is changing, but the point is that throughout most of the past decade, lawyers both in the United States and abroad intuitively devolved to the criminal law model when seeking lawful justification for the detention of terrorists.

Conversely, in the days following the establishment of the Guantanamo detention facility, very few even seemed to be aware that a wartime model for terrorist detention existed. Historically, the United States has not used the law of war model for the detention of terrorists; the law enforcement model was the focus of counterterrorism policies for the better part of the last half century. Few looked to the law of armed conflict. And, as the empty boxes more significantly designate, even were one to consult that body of law, one would find a paucity of domestic implementing legislation associated with the authority to detain. Indeed, even a direct application of Geneva law yields no applicable positive authority to capture and detain. Authority to capture is inferred, and while the Third Convention recognizes the propriety of internment for prisoners of war in international armed conflict, such positive authority is absent for non-international armed conflict.

Finally, and most relevant to the international lawyer, a review of the law of war standards applicable to this particular conflict reveals significant omissions. Geneva law, especially as it pertains to detention, is focused on the treatment of prisoners of war—a category principally constituted by members of the armed forces of a State that is party to the Conventions, in conflict with another State party to the Conventions. Rules applicable to a conflict “not of an international character,” if that even accurately describes a conflict halfway around the world in which the United States is joined by the armed forces of more than forty other countries, are scant to say the least.
At its essence, the United States’ first and most essential armed conflict at present is that against al Qaeda, a transnational armed group in which none of the members qualify for prisoner of war status. Thus, it is no surprise that few turned to the law of war as the appropriate paradigm for the post-9/11 detention of terrorists. And, even if the polity were completely immersed in the finer points of *jus in bello*, we would find little positive authority or guidance for the detention of an enemy that does not qualify for prisoner of war protections under even the most expansive reading of the Third Geneva Convention, yet is indisputably the primary adversary in the conflict. There are no “privileged belligerents” among those whom the United States opposes.

Because of these unique circumstances, criticism of U.S. detention policies—memorialized in iconic photographs from the early days of Guantanamo Bay—was initially embodied in a claim that the United States was “violating” the Geneva Conventions. These claims morphed into the slightly more defensible assertion that this “global war on terror” was not even a war because the law of war did not extend to this type of undefined conflict. Indeed, President Bush’s moniker fueled recrimination as the geographically unbounded nature of the term “global war on terror” disquieted those already uncomfortable with U.S. assertions of *jus ad bellum* authority to use the military instrument. That the target of the application of force was a common noun—terror—only further distanced the endeavor from more traditional armed conflict.

Nevertheless, we have had two U.S. presidents—separated by wide ideological differences—similarly conclude that U.S. national security interests necessitate an armed conflict with a transnational armed terrorist organization. To jump then to the conclusion that a radically different—and inherently unsuitable—peacetime detention paradigm will work to bridge *jus in bello*’s gaps, although conceptually attractive to a litigious society happily governed by the rule of law, is simply not sustainable.

Proof of this is found in the Obama administration’s attempt to close Guantanamo Bay and its focused effort to scrutinize thoroughly the case of each Guantanamo detainee. The U.S. government made every effort to diminish the population of detainees at Guantanamo by identifying criminals for prosecution, as well as candidates for release or transfer to another country. And yet, despite these truly unprecedented efforts, the senior-most members of the President’s national security team determined *unanimously* that at least forty-eight detainees could be neither prosecuted nor transferred. As President Obama described them in his Archives speech, “[t]hese are people who, in effect, remain at war with the United States.”

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Some who cling to the polemic of past years may claim that the lot of these forty-eight detainees is simply a function of evidence so tainted by misdirected interrogation techniques that a successful prosecution option was rendered impossible. But such an argument fails to further the effort to solve this complex problem, and it fails to recognize the radically different purposes and circumstances that attend the two disparate detention paradigms.

Looking to the legal regime associated with criminal procedure, the starting point is liberty. In the United States, citizens walk freely in the streets unless arrested based on a police officer’s probable cause belief that a crime has been committed and the individual to be detained committed it. Within forty-eight hours, the arresting officer must convince an independent magistrate of that probable cause; to avoid release on bail pending disposition of charges, a convincing case of dangerousness or flight risk must be made, a lawyer must be provided, Miranda rights must be read and a speedy trial clock begins to tick. In order to convict a pretrial detainee of the underlying offense that led to his or her detention, a prosecutor must prove to a jury beyond a reasonable doubt every element of an offense for which the individual is charged. Once this occurs, the sentencing authority can decide whether to set the individual free, or whether further detention (incarceration) of the individual is warranted. This is what human rights law provides in the United States. Our domestic implementation is far more refined and nuanced than the antecedent human rights law.

But in war, the starting point is radically different. A member of the enemy force in armed conflict is free only to the extent that he or she can avoid death or capture by the adversary. To a U.S. soldier, the enemy’s starting point may be as a target. Under the law of war, combatants may be lawfully shot dead simply for being a member of the enemy force—there is no requirement for proof beyond a reasonable doubt that some past offense was committed.

In certain circumstances, that target might, as a discretionary matter, be captured rather than killed. Were that to occur, it would make no sense suddenly to “turn off” the wartime paradigm and switch to that of law enforcement, providing all the process associated with criminal procedure. To do so would be the equivalent of telling the nineteen-year-old recruit, “You have legal authority to kill another human being, but if you capture him instead, you had better collect enough evidence to prove him guilty of a crime in a courtroom.” Making it more complex to capture a person in combat by adding additional obligations could incentivize killing—ironically and perversely—in the name of human rights.

One might conclude that the answer is simply applying the law of war, but that in turn provides very little regulation and permits indefinite detention with no readily foreseeable end. Unlike the State-on-State conflict for which the 1949
Geneva Conventions were written, in the current conflict, combatants are more difficult to recognize and the “end” of hostilities is anything but easily identified or predicted. At the end of World War II, more than four hundred thousand enemy soldiers were incarcerated within the continental United States in a state of indefinite detention, yet all knew that the war and their concomitant detention would end upon surrender. Enemy soldiers at that time, mostly conscripted, could be released to return to their former lives. The end of today’s conflict, however, will be far more difficult to identify, both in timing and in circumstance. And instead of conscripts, al Qaeda is manned by a highly committed volunteer force. When does this conflict end? When all senior al Qaeda leaders are killed or surrender?

The Geneva Conventions, written more than a half century ago, simply were not designed for the present conflict. And even if they had been, the past sixty years have witnessed countless enhancements to criminal procedure on the human rights side of the chart, but almost no refinements to the law of war side. Were we to reconfigure the law of war to address today’s conflict, we would condition the date and time of release of the detainees on some criteria other than the “end of hostilities.” We would be forced to come to grips with some sort of individualized assessment as to when hostilities have ended for each individual detainee.

This body of law associated with the conduct of warfare is naturally far less developed than that attending law enforcement. Its constituting documents were drafted in the 1940s, before the nature of the present conflict was even envisaged. It is natural that jurists would initially look to the far more refined and nuanced criminal procedure to address issues of detention. Indeed, some who have grasped the paradigmatic disparity have claimed that the fact that the law of war does not more fully address relevant detention issues means that human rights norms must apply as a matter of law.

But the dearth of applicable guidance does not necessarily militate in favor of shifting to lex generalis; the normative gaps are not related to the authority to detain itself. No one questions kinetic targeting authority in non-international armed conflict, and a corollary must be that such authority subsumes the authority to capture and detain. Human rights law applicable to detention is clearly oriented toward the steady-state peacetime regime internal to a State’s borders. To apply these rules to overseas wartime circumstances is the equivalent of applying a highway speed limit to an aircraft. That there is no agreed speed limit for aircraft is certainly not a cogent argument to demand application of automobile limits; the circumstances are plainly different.

The fact is, however, that human rights norms are far more relevant to wartime detention than is the speed limit analogy above—but not as a legal requirement. Regardless of whether there exists an applicable regulatory scheme, we have
learned that our more refined twenty-first-century sensibilities would accord a detainee far more process than would have been deemed sufficient in another era. Even if appropriate norms had not evolved in favor of process—and they have—unique aspects of this conflict, likely lack of certainty with respect to the status of persons captured and ambiguity attending the end of the hostilities in which they are taking part, all point to the need for a process to provide the missing clarity. For those who believe such a process should be dictated as a matter of law, one would have to conclude that the law of war itself is in need of attention.

The complexity at the joinder of detention policy and law is self-evident as a function of political history. But before leaving the subject a few more observations are apropos. It is worth noting that the controversy is most fundamentally premised on this dissonance in the available legal regimes and not in the political policy differences that have, unfortunately, captured headlines for the better part of a decade. In today’s counterterrorism conflict, the United States is dealing with persons who are, at once, members of the enemy force in war and criminals involved in heinous acts of terrorism. The underlying basis for detention is substantially—but subtly—different for each regime. The law enforcement model is oriented toward punishment for a prior crime; the law of war model serves to protect against a future threat. Under the law of war, the newly minted recruit is legally just as deserving of capture and detention as is the experienced war criminal. But only the latter may be worthy of prosecution. One paradigm results in punishment and then only after the adjudication of proof beyond a reasonable doubt of culpability for past acts. The other detains as a protective measure after a showing of future threat, most likely imputed from affiliation.

This confluence of applicable bases for detention and attendant legal paradigms is the primary complicating factor in twenty-first-century detention policy. It resounds in the application of old laws to new wars—the counterterrorism conflict that pits the United States against an enemy dedicated to killing its citizens and eradicating the American way of life, an enemy whose members, if captured in a traditional State-on-State conflict, would be characterized as prisoners of war. The detention authority derives from their status as belligerents—the same status that would have justified targeting them for kinetic strike had they not been fortunate enough to have been captured in the alternative. Each is held because of the threat he poses if released, not as punishment for anything he may have done. Although this amounts to the principal point of confusion in recent years, U.S. detention policy is further complicated by the multiplicity of conflicts in which it is presently engaged.

The war against al Qaeda is not the only one by which the detention landscape of the past decade has been colored. Further complicating the scene are the counterinsurgency that we would like to believe is at its denouement in Iraq and
the non-international armed conflict in Afghanistan that is conceived of differently by the more than forty allies who battle at the side of the United States. Even Additional Protocol II,\textsuperscript{56} were it applicable, would offer a paucity of guidance for regulating detention in non-international armed conflict.

More important, the existence of a non-international armed conflict may itself be a matter of controversy. Very few countries have or will concede that their internal security issues amount to internal armed conflicts. To do so is to call into question the very ability of an executive to govern his or her nation. And the end-state goal of any counterinsurgency is transition to the \textit{lex generalis}, or law of peace, which provides for detention of terrorist insurgents only as a matter of law enforcement. In States like Iraq the executive is unlikely ever to concede there to be a conflict that would justify law of war detention. If al Qaeda were based in New Mexico, the Federal Bureau of Investigation most likely would be handling detention policy as a law enforcement matter. Foreign armed forces normally are deemed to be engaged in armed conflict or occupation only if acting outside of the parameters of the domestic laws and consent of the host State.

Further, the nature of counterinsurgency is such that success means ultimately winning the hearts and minds of insurgent sympathizers because, unlike the expulsion of foreign attackers, the end state of any successful suppression of insurgency involves peaceful coexistence with the previous adversary. As a consequence, for any number of reasons, it is most useful to shift as quickly as possible to a law enforcement regime that treats insurgent combatants as criminals to be dealt with by a peacetime criminal justice system.

This was reflected by U.S. policy toward, and eventually the legal authorities associated with, the conflict in Iraq. As a general rule, capture and detention that took place during the latter portion of the U.S. presence in Iraq was conducted under a warrant-based program that accorded fully with Iraqi domestic law. Similarly, current initiatives in Afghanistan are taking the conflict, perhaps inextricably, in the direction of a law enforcement paradigm that may or may not serve counterinsurgency interests depending on how it is implemented—a challenge commanders must resolve on the ground. But for purposes of this discussion, the point is that the movement toward law enforcement operations is a function of the peculiarities of the military mission; it is not required by the rule of law even though it has the unfortunate collateral effect of furthering the confusion associated with the disparate legal regimes.

If Iraq sits on the law enforcement side of the chart depicting the various paradigms for the detention of terrorists, with Guantanamo firmly occupying the position on the law of war side (except for the individual cases of criminals who may be brought to justice through criminal proceedings), then Afghanistan sits between
the two. Law of war authorities are presently employed to capture terrorists, but ultimately the peacetime society for which Afghans yearn will need to rely on the law enforcement model.

And, as a final complicating factor supplementing those mentioned above—the historic preference for addressing terrorism through the law enforcement paradigm, gaps in the law of war and the unique mandates of counterinsurgency—it cannot be forgotten that the world’s perceptions of these evolving policies have been immeasurably impacted by Abu Ghraib and the inevitable association of the reprehensible crimes that took place there with the detention of terrorists at Guantanamo and with every other aspect of U.S. detention policy. This is truly an instance of bad facts putting the United States at risk for bad law. The President’s actions in clearly prohibiting certain inappropriate interrogation practices and affirming a commitment to transparency in detention operations are steps in the right direction. International lawyers must be careful not to confuse these matters, which need attention in every armed conflict, with the more recondite developments that characterize twenty-first-century armed conflict with transnational terrorist organizations.

IV. Identifying the Solution

If the taint associated with U.S. detention policy were merely an issue of previous missteps or failed policies, it could have been corrected long ago. But too many have sought a quick answer, either by misapplying the law of war or inappropriately looking to a peacetime legal regime to justify all detention practices—filling regulatory gaps with an entirely different body of law that was drafted for radically different circumstances. If war is the correct paradigm, but extant law of war does not fit the current conflict, it follows that the law of war should be adjusted to fit present circumstances.

An adjustment to the law may follow logically, but it is not necessarily the only solution. Some would argue that international “law” is not always needed if sufficient principles exist to guide nations into morally responsible behavior that appropriately balances military and humanitarian interests. This article takes no position on the advisability of changing the law of war. Instead, it assumes that regardless of the future legal requirements, the first step is to identify and implement policies that fit the current circumstances and, assuming a law-making exercise or development of custom could follow, can usefully inform that future.

The starting point for this discussion is a speech by President Obama in May of 2009 regarding detention policies in the most controversial location—Guantanamo Bay. The fundamental theme of the President’s remarks was his
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affirmation that U.S. detention policies are, and will be, guided by the rule of law and American values. He asserted the importance of American leadership in the international community and in the development of principled legal authorities to guide the evolution of international law.

Applying American values to the new circumstances of twenty-first-century armed conflict, law of war detention is a valid and morally necessary component of the warfighting effort. That authority cannot be encumbered by a requirement to detain only when a criminal case for past acts can be proven. On the other hand, indefinite detention cannot proceed with the simplicity that accompanies the detention of conventional prisoners of war. This conflict suffers from lack of clarity regarding both the “who” and “when” for long-term detention. That weakness, then, is best rectified by the establishment of a clear process from which both the government and the detainee can benefit.

This understanding is not completely new. In prior years Combatant Status Review Tribunals have been used to assess the basis of Guantanamo detentions case by case and Administrative Review Boards have been used to assess the continuing necessity of detention on the basis of threat. Both processes had weaknesses, and as a consequence, both have been discarded, the gap having been partially filled with habeas litigation and Periodic Review Boards. Similarly, experience has led to significant developments that have radically improved the review processes for both Iraq and Afghanistan.

Today, newly captured individuals are submitted to a Detainee Review Board. The Board, comprised of three field-grade military officers, reviews each individual’s detention for both legality and necessity of continued detention. The detainee receives expert assistance from a U.S. officer who is authorized access to all reasonably available information pertaining to that detainee. This review is repeated periodically after the initial hearing, which must take place within sixty days of arrival at the internment facility. Similar improvements are forthcoming in Guantanamo. The President’s 2009 executive order lays out an even more robust process oriented toward assessing the continued threat of those detained at Guantanamo who already have received access to habeas review in federal courts.

Although some may prefer the certainty associated with a legally imposed review requirement, today the United States benefits from the ability to address the issue as a policy matter—learning from experience that never could have been accurately predicted. Experience is necessary because it is so important to preserve the requisite yet delicate equipoise between military necessity and humanitarian interests. Skewing that equipoise undermines the entire purpose of the law of war. International humanitarian law serves humanitarian interests only if adhered to, and only if adherence serves humanitarian goals. Failing to detain and detaining
for too short or too long a period miss both the humanitarian and military necessity marks. The correct process can guide us to those objectives, however.

The fact that the subject of U.S. detention policy has provided fodder for so much discussion among lawyers, policymakers and the public, as well as active involvement by the White House, the courts and Congress, is testament to its continued timeliness and paramount importance. The legal/policy regime that emerges from this era will likely forever alter the way nation-states apply the rule of law in combating external or transnational terrorist threats. If properly nuanced, this framework could effectively maximize the likelihood of success in combating terrorism, while preserving and protecting the human rights and civil liberties that define civilized society.

Sadly, to some, the fits and starts that have thus far characterized this regime’s birth and infancy portend neither counterterrorism success nor preservation of civil liberties. U.S. policy with respect to the detention of terrorists has been confused for nearly a decade. It has resulted in criticism from adversaries and allies alike. It has been the focus of heated debate within the national polity. And it was one of the first matters on which President Obama took action after his inauguration. But for these very reasons, there may be hope.

The last ten years have not only provided the clarity of hindsight to identify the need for change; they have provided the benefit of time and impetus for the pendulum to swing in both directions. The United States has been accused of holding innocents in legal black holes and of prematurely releasing terrorists so they can return again to attack. It has been accused both of abusing detainees and of coddling them.

Optimism should not derive from a new discovery, or a political cure easily administered after an election shifts the polity in one direction or the other. But, at its heart, this is not a political issue; it is one benefitted by years of experience in trying to find the right answer. Oliver Wendell Holmes once said, “[T]he life of the law has not been logic; [but] experience.” International lawyers need not only the creativity, energy and persistence that have so well served this nation as it tackled problems in the past—and all of those are needed; also needed is the kind of wisdom that in some cases derives from experience alone. After nearly a decade of trial and error, as the beneficiary of that experience that reaches beyond the limits of human logic, the United States is now better situated than ever to get this right.

**V. Conclusion**

Anyone who claims the detainee policy problem to be easy does not understand it. Past policies have not always served U.S. interests, but the problem is not a binary
one, where one failed solution isolates its antithesis as “the” right answer. But there are principles, honed in the crucible of the last decade, to which one can look for guidance. Twenty-first-century sensibilities will not stomach indefinite detention without process. But if the military instrument is used as a function of armed conflict, kinetic targeting authorities cannot and should not be disconnected from detention authorities. Countries that defer to a requirement for criminal proof in making targeting decisions in war are unlikely to be on the winning side.

The war against al Qaeda and its affiliates is not yet at an end, and it cannot be allowed to proceed without a principled, sustainable and credible detention policy, one that will serve as an example for the international community as well. In September 2010, President Jakob Kellenberger of the International Committee of the Red Cross delivered a speech in Geneva in which he announced an initiative to update the Geneva Conventions.\(^63\) The law of war is indeed in transition—perhaps even to a degree evoking the era of post-Westphalian peace\(^64\) or the order emerging from the chaos of World War II.\(^65\) It goes without saying that lawyers should consciously and conscientiously seek to impact this change.

A failure to participate thoughtfully and deliberately in fashioning the legal norms that are being developed—norms that will guide the global community for the next century—would constitute a missed opportunity of substantial moment. As former British Defence Minister John Reid asserted in April of 2006,

> we owe it to ourselves, to our people, to our forces, and to the cause of international order to constantly reappraise and update the relationship between our underlying values, the legal instruments which apply them to the world of conflict, and the historical circumstances in which they are to be applied or "we risk continuing to fight a 21st century conflict with 20th century rules."\(^66\)

The terrorist attacks of 9/11 thrust the United States into a crisis of historic proportion. In such crises, leaders seize on international lawyers to analyze courses of action with a view to determining their legality. Lawyers are charged to identify, apply and distinguish norms relevant to the situation. Such norms are frequently of long-standing pedigree, their principles having been established in code and treaty and evolved over decades through critical assessment and practical application.

On rare occasions, however, the international lawyer’s skill must be exercised not only in the interpretation and application of extant law, but also in the conception and establishment of new law. And, on yet rarer occasions—watersheds of history—national and global interests rise or fall on the establishment of that new normative construct, rendering the legal exercise in itself the object of national
strategy and perhaps even an imperative component of international order. At these seminal divides, lawyers must be poised not only to advise on what may be legally permissible, but also to envision what is legally necessary and desirable, both in the day at hand and in the new epoch. Now is such a watershed moment.

Notes


2. See, e.g., Letter from Brad Davis, Executive Director, Asia Division, Human Rights Watch, to the Secretary General of the North Atlantic Treaty Organization (NATO), Nov. 28, 2006, available at http://hrw.org/english/docs/2006/11/28/afghan14684.txt.htm (asserting that substantial disagreements among members of NATO regarding detention policies in Afghanistan are the consequence of the United States’ failure to comply with international legal standards).


8. Obama, supra note 5.

9. For example, the Clinton administration relied primarily on law enforcement tools to combat terrorism throughout the 1990s, including in its response to the 1993 World Trade Center bombing by terrorists.


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17. See Nejla Sammakia, Libya Starts Parliamentary Process That Could Give Gadhafi Way Out, ASSOCIATED PRESS, May 8, 1992, available at 1992 WL 5296910 (reporting that the UN had instituted sanctions on Libya that would continue until two Libyan suspects in the Pan Am bombing were turned over to either the United States or the United Kingdom).

18. Death Toll From Bomb Rises to 6; Searchers Sifting the Wreckage at World Trade Center Uncover the Body of a Missing Man, ORLANDO SENTINEL, Mar. 16, 1993.


20. See President William Clinton, Remarks at the Ceremony Honoring the Men and Women Who Lost Their Lives in the Bombings of the Embassies in Kenya and Tanzania, Andrews Air Force Base, Maryland, The White House, Office of the Press Secretary (Aug. 13, 1998) ("The 12 Americans and the 245 Kenyans and Tanzanians were taken from us in a violent moment by those who traffic in terror and rejoice in the agony of their victims. We pledge here today that neither time, nor distance can bend or break our resolve to bring to justice those who have committed these unspeakable acts of cowardice and horror. We will not rest. We will never retreat from this mission.").


23. One aspect of the law enforcement model for addressing the terrorist threat involves immigration controls and enforcement. This area of law is particularly relevant when addressing questions associated with enemy combatants who may be U.S. citizens, are captured outside a traditional battlefield, or are detained in circumstances not clearly related to an armed conflict. Though significant, concerns raised by these circumstances and concerns associated with the employment of immigration law tools are beyond the purview of this article. Similarly, this article does not discuss areas of potential congressional prerogative as they relate to presidential authority when engaging in a military response. For a discussion of these matters, see generally

25. Id., art. 4 ("Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article."); id., art. 8 (Providing that States in whose territory a person is present who has committed or is alleged to have committed an offense under the Convention agree to investigate his involvement in the offense, and, if appropriate, take such person into custody for the purpose of prosecution or extradition. If a State does not extradite the person, it is obliged, without exception whatsoever, to prosecute him.").


27. See generally U.S. GENERAL ACCOUNTING OFFICE, GAO/NSIAD-00-8, COMBATING TERRORISM: HOW FIVE FOREIGN COUNTRIES ARE ORGANIZED TO COMBAT TERRORISM (2000).

28. British Police Hunt for Subway Bombing Ring Leaders, VOICE OF AMERICA NEWS, Aug. 1, 2005, http://www.voanews.com/burmese/archive/2005-08/2005-08-01-voa1.cfm (reporting that British law enforcement was searching for the suspected ringleaders who had provided support to the July subway bombings in London, which killed fifty-six persons on July 7. Three alleged bombers were in British custody at the time; a fourth was arrested in Italy and was fighting extradition); Kevin Sullivan & Karla Adam, Trial Opens in London Transit Bombing Plot; Good Fortune Spared Travelers Two Weeks After Attacks That Killed 52, Jury Is Told, WASHINGTON POST, Jan. 16, 2007, at A12; Elaine Scioli, 10 Bombs Shatter Trains in Madrid, Killing 192, NEW YORK TIMES, Mar. 12, 2004, at A1 (reporting on Spain’s massive manhunt for perpetrators of the deadly March 1, 2004 attack that left 192 dead and more than 1,400 injured).

29. Criminal Terrorism Enforcement in the United States during the Five Years Since the 9/11/01 Attacks, http://trac.syr.edu/tracreports/terrorism/169/ (From September 11, 2001 through May 2006, federal investigative agencies referred for prosecution 1,391 individuals whom the Justice Department classified as international terrorists. Prosecutions were filed against 335 of these individuals, 213 were convicted (by trial or plea) and 123 were sentenced to prison.). See also Phil Hirschhorn, Jury Spares 9/11 Plotter Moussaoui, CNN JUSTICE (May 3, 2006), http://articles.cnn.com/2006-05-03/justice/moussaoui.verdict_1_zacarias-moussaoui-french-man-of-moroccan-heritage-penalty-phase?_s=PM:LAW (reporting that a federal jury had sentenced al Qaeda terrorist Zacarias Moussaoui to life in prison for his role in the September 11, 2001, attacks on the United States.).

30. A brief comment on terminology is appropriate. This article uses the terms “law of war,” “international law of armed conflict,” “laws and customs of war,” and “international humanitarian law” as synonymous. While international lawyers most frequently claim them to be so, the terms often embody subtle distinctions worthy of note. Most publications refer to the law of war
and international law of armed conflict as having the same meaning. One could say that the latter term is broader in that it captures the concept of internal armed conflict as well. In the case of both terms, they are sometimes used to refer to both \textit{jus ad bellum} and \textit{jus in bello}, and sometimes to refer only to \textit{jus in bello}. The term "international humanitarian law" is not normally used by the United States, because to do so is said to encourage a failure to distinguish adequately between the law of war and human rights law. Indeed, the terminology is frequently misused. The International Committee of the Red Cross (ICRC), however, which together with European countries prefers the term "international humanitarian law," has asserted it to be synonymous with the international law of armed conflict, which both the ICRC and European countries concede is distinct from human rights law. Treating it as a synonym, however, can be misleading. For example, the International Criminal Court's jurisdiction is said to encompass international humanitarian law. However, that treaty, in addition to addressing war crimes (\textit{jus in bello}) and aggression (\textit{jus ad bellum}) also subsumes crimes against humanity and genocide within its subject matter jurisdiction, both of which can be committed in periods of peace and war. Both of these arenas of criminality can be said to have evolved out of the law of war, but while the term "international humanitarian law" is deemed unproblematic when referring to them collectively, the term "law of war" might be seen as inapplicable to crimes against humanity and crimes of genocide committed during peacetime.

31. See supra text accompanying notes 16--23. In addition to the embassy bombings, there are numerous examples of past U.S. law enforcement responses to terrorist acts. The first Bush administration treated the problem of apprehending suspects after the 1998 bombing of Pan American Flight 103 as one of diplomacy and extradition, clearly a law enforcement matter. See Sammakia, supra note 17. After the 1993 World Trade Center bombing, law enforcement tools were employed to investigate, apprehend, extradite, try and convict the perpetrators of the bombing. See Neumeister, supra note 19.


33. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
   (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
   (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
      (a) that of being commanded by a person responsible for his subordinates;
      (b) that of having a fixed distinctive sign recognizable at a distance;
      (c) that of carrying arms openly;
      (d) that of conducting their operations in accordance with the laws and customs of war.
   (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
   (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the
armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58–67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

Id., art. 4.

34. Id., art. 3.

35. "Conflicts not of an international character" (or "non-international armed conflicts") are governed only by Common Article 3 of the Geneva Conventions, custom, and, to those that are party, the second Additional Protocol to the Geneva Conventions (Protocol II). The United States signed Protocol II and submitted it to the Senate for advice and consent in 1987, where it remains before Senate subcommittees. Many have asserted that certain provisions in Protocol II have achieved the status of custom. In particular, Articles 4–6, outlining fundamental guarantees for detainees, protections and process requirements for prosecutions, are typically regarded in the international community as reflecting custom. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, reprinted in 16 INTERNATIONAL LEGAL MATERIALS 1442 (1977) [hereinafter Additional Protocol II].

36. A combatant must meet the criteria outlined in GC III, supra note 32, Article 4 in order to be designated as a prisoner of war. See supra note 33. Al Qaeda is not a State party to the Convention and its members do not meet the criteria for militias and volunteer corps as described in Article 4(A)(2).
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37. GC III, supra note 32, art. 4(A).
38. See, e.g., Roy Gutman, Christopher Dickey & Sami Yousafzai, Guantanamo Justice?, NEWSWEEK, July 8, 2002, at 34.
39. It is worth noting that AUMF did not impose geographic or temporal limitations on the President’s use of force. Instead it provides the President authority to use force against specific targets—those “nations, groups, or persons” that the President determines “planned, authorized, committed, or aided” the terrorist attacks on 9/11, as well as those who “harbored such organizations or persons.” AUMF, supra note 14. See also MOHAMMED-MAHMOUD OULD MOHAMEDOU, NON-LINEARITY OF ENGAGEMENT, TRANSNATIONAL ARMED GROUPS, INTERNATIONAL LAW AND THE CONFLICT BETWEEN AL QAEDA AND THE UNITED STATES (2005), available at http://www.hpcrrresearch.org/sites/default/files/publications/Non-Linearity_of_Engagement.pdf (discussing the evolutionary nature of warfare as it relates to transnational groups like al Qaeda).
40. However, while the government described the conflict as a “war on terror,” it clearly did not intend to engage in conflict with all terrorists anywhere in the world. Instead, the government conducted a war against the armed groups responsible for the attacks of 9/11 (al Qaeda, the Taliban and their associates), as prescribed by the AUMF, and mostly within the territory of Afghanistan.
41. See supra text accompanying notes 3–6.
43. Id.
44. Obama, supra note 5.
52. See Yoram Dinstein, The System of Groups in International Humanitarian Law, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT IPSEN 145, 148 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (“As far as ordinary combatants are concerned, it must be perceived that they are running a risque du métier. They can be attacked (and killed) wherever they are, in and out of uniform: even when they are not on active duty. There is no prohibition either of opening fire on retreating troops (who have not surrendered) or of targeting individual combatants.”). See also MICHAEL WALZER, JUST AND UNJUST WARS 143 (4th ed. 2006).
53. Unless the target is hors de combat, the law of war never requires taking less than lethal force against a lawful target. However, if a target might just as easily be captured and detained, commanders may elect in certain circumstances a non-lethal course of action to preserve intelligence collection.
55. There are some exceptions to this dearth of new rules in the law of war, including the adoption of international agreements related to specific weapons and the development of the
1977 Protocols (I and II) Additional to the Geneva Conventions of 1949. The United States is not party to either of the Additional Protocols. Although the government has consistently supported joining Protocol II, it has been very critical of some provisions of Additional Protocol I since its creation.

56. Additional Protocol II, supra note 35.
58. Obama, supra note 5.
59. Supra note 57.
64. Peace Treaty between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, available at http://www.yale.edu/lawweb/avalon/westphal.htm. Ending the Eighty Years' War between Spain and the Dutch, and the German phase of the Thirty Years' War, the Peace of Westphalia recognized the full territorial sovereignty of the member states of the Holy Roman Empire, rendering the princes of the empire absolute sovereigns in their own dominions. See Encyclopaedia Britannica, 2002.
65. In 1945, World War II drawing to an end, representatives of fifty countries met in San Francisco at the United Nations Conference on International Organization to draw up the United Nations Charter. Those delegates deliberated on the basis of proposals worked out by the representatives of China, the Soviet Union, the United Kingdom and the United States at Dumbarton Oaks, United States in August–October 1944. The Charter was signed on June 26, 1945 by the representatives of the fifty countries. Poland, which was not represented at the Conference, later signed the Charter and became one of the original fifty-one member States. The United Nations officially came into existence on October 24, 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom and the United States and by a majority of other signatories. See The United Nations, About the United Nations/History, http://www.un.org/aboutun/history.htm (last visited Oct. 26, 2011). The creation of the United Nations is widely recognized as one of the most important events of the post–World War II period. That the delegates were influenced substantially by the war is reflected in the preamble to the United Nations Charter, which provides, "We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . ." U.N. Charter pmbl. The fundamental purpose of the Charter is the maintenance of international peace and security. Id., art. 1, para. 1. See RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS, THE ROLE OF THE UNITED STATES 1940–1945, at 964 (providing an in-depth description of the formation of the Charter).