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WITHDRAWAL FROM AFGHANISTAN MARKS GUANTÁNAMO'S ENDPOINT

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INTRODUCTION

The events of September 11, 2001 (9/11) represented a profound shock to both the American public and a world legal order in which states effectively monopolize the legitimate use of force. For the first time a terrorist group – traditionally regarded as criminals – committed violence of sufficient magnitude to be considered an armed attack which could allow the United States to legally exercise the right of self-defense in response.[1]

President George W. Bush quickly termed 9/11 an act of war, and Congress at least implicitly agreed. The Authorization for the Use of Military Force (AUMF) let the president use "all necessary and appropriate force" against those who "planned, authorized, committed or aided the

[1] *See*, *e.g.*, Lord Robertson, Secretary General, NATO, Statement of NATO's Position on 9/11 Attack Against U.S. (Oct. 2, 2001) (transcript available at http://www.nato.int/docu/speech/2001/s011002a.htm).

[9/11] attacks...or harbored such organization or persons."[2] But while the U.S. public focus has always been on al Qaeda, in reality they controlled no territory where an armed conflict could be contested, and an immediate U.S. intervention would have constituted aggression against Afghanistan. The Bush administration thus pursued a more sophisticated legal approach, demanding that the Taliban hand over Osama bin Laden and deny refuge to al Qaeda, which it refused to do.[3] Only then did the U.S. government announce that it was exercising its inherent right of self-defense against al-Qaeda *and* the Taliban which continued to allow its territory to serve as a base of operations to "target United States nationals and interests."[4]

U.S. combat operations in Afghanistan began in early October 2001 and by December the Taliban had lost control of the country.[5] But there would be no happy ending. The Taliban was displaced, but not defeated. And the opportunity to wrap-up al-Qaeda leadership at Tora Bora was squandered, letting bin Laden flee into Pakistan.[6] For the next two decades U.S. forces were enmeshed in our longest conflict – against the Taliban.[7] The sporadic drone strikes against scattered al Qaeda remnants, and manned raid to kill Osama bin Laden in the sovereign territory of "neutral" Pakistan would legally have to be justified as individual acts of self-defense.[8]

Many wondered if this conflict would have a clear endpoint. But after President Donald Trump reached a "peace agreement" with the Taliban, and his successor, Joe Biden, concluded that continued U.S. combat presence in the "graveyard of empires" was futile, events moved at breakneck speed.[9]

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[2] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. III 2003)) (hereinafter "AUMF").

[3] *See* Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L. Q. 401, 406-410 (2002).

[4] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946.

[5] Council on Foreign Relations, Timeline: The U.S. War in Afghanistan, 1999-2021, https://www.cfr.org/timeline/us-war-afghanistan.authorize.

[6] See YANIV BARZILAI, 102 DAYS OF WAR (2013).

[7] *See*, e.g., CARTER MALKASIAN, THE AMERICAN WAR IN AFGHANISTAN (2021) (detailing the history of the conflict through 2020).

[8] This result is mandated by international legal principles the United States exposited in the aftermath of the 1837 Caroline incident. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENSE 268-77 (5th ed. 2011).

[9] *See e.g.*, Amber Phillips, *Trump's Deal With the Taliban, Explained*, THE WASHINGTON POST, Aug. 26, 2021, https://www.washingtonpost.com/politics/2021/08/20/trump-peace-deal-taliban/; Milton Beardon, *Afghanistan, Graveyard of Empires*, FOREIGN AFFAIRS, Nov./Dec. 2001 (article by former U.S. CIA station chief in Pakistan presciently explaining why a U.S. military intervention in Afghanistan would ultimately fail); The White House, Statement by President Joe Biden on Afghanistan, Aug. 14, 2021,

Afghan government forces crumpled more quickly than the Taliban had twenty years earlier, handing them an easy victory.

The events of August 2021 answered the question of *when* the hostilities launched in 2001 would end. But *what* are the legal consequences of that end for the Guantánamo detention facility, the flailing military commissions, and the thirty-nine men still languishing there? [10] Those questions are the subject of this Article.

The AUMF did more than just allow the application of combat power. As the Supreme Court confirmed in its 2004 *Hamdi v. Rumsfeld* decision, it also implicitly approved U.S. government exercise of the "fundamental incidents" of war, including preventive detention.[11] President George W. Bush cited AUMF authority in a November 2001 military order directing military detention and trials for non-citizen members of al-Qaeda and those aiding or abetting terrorism.[12] Guantánamo received its first arrivals from Afghanistan in January 2002; 779 men and boys have been held there.[13]

Guantánamo has fueled global controversy since the public first saw the notorious photos of blindfolded, masked, and shackled orange jump-suit clad detainees kneeling in wire cages. The Pentagon purposely released the images, naively thinking they would "reassure the world that its evolving detention strategy was humane."[14] Things only went downhill from there as one public relations debacle followed another. Revelations of detainee mistreatment, hunger strikes, suicides, crassly manipulated detention reviews, and flawed military commission proceedings have provided a steady stream of negative headlines ever since.[15] It did not help that it was soon clear that the detainees were not the "worst of the worst" as the administration proclaimed. Many were unfortunate foreigners handed over

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https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/14/statement-by-president-joe-biden-on-afghanistan/ (explaining his rationale for military departure).

[10] The New York Times, The Guantánamo Docket, Jul. 19, 2021, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html

[11] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

[12] George W. Bush, Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism 66 Fed. Reg. 57,831 (Nov. 16, 2001).

[13] JESS BRAVIN, THE TERROR COURTS 74-78 (2013); ACLU, Guantánamo by the Numbers, May 2018, https://www.aclu.org/issues/national-security/detention/guantanamo-numbers.

[14] Carol Rosenberg, *Sailor's Photos Became Icons of Guantánamo*, McClatchey Newspapers, Jan. 13, 2008, https://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/sailors-photos-became-icons-of-guantanamo.

[15] Ben Fox, Guantánamo Bay Prison Remains an Unresolved Legacy of 9/11, Associated Press, Sept. 9, 2021 available at https://www.pbs.org/newshour/politics/guantanamo-bay-prison-remains-an-unresolved-legacy-of-9-11

by locals for cash bounties.[16] Controversy over the facility's existence led Bush to say as early as May 2006 that he would like to see the camp shuttered; 532 detainees had been released by the end of his presidency. [17]

The 2008 presidential campaign saw Barack Obama pledge to close Guantánamo, but he failed to do so in the post-election window of opportunity before a hardened opposition manifested itself.[18] His tenure did see the release of 197 more prisoners.[19] Trump took the opposite tack, committing to "load up" Guantánamo with "some bad dudes."[20] But he was no more successful at fulfilling his promise than his predecessor had been; his term saw one detainee released and none added.[21] Even Trump conceded that the reported $13 million annual cost per detainee of Guantánamo detention was "crazy."[22] Biden repeated Obama's campaign promise but his first nine months in office also saw only one release.

One reason Guantánamo detention has been controversial is the shoddy characterization of the conflict as an open-ended "war on terror" and failure to recognize legal constraints imposed by either the AUMF's text or the law of war. Commentators worried it would lack any endpoint; some described it as "generational."[23] But law of war detention has finite limits, despite the disappointing lack of public discussion of their application to Guantanamo. This Article argues that U.S. detention authority technically ended by 2005, when the conflict in Afghanistan lost its international character. But even if U.S. courts are unlikely to overrule the political branches based on such a "fine point" of international law, Trump's agreement with the Taliban

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[16] Individuals were still being detained based on misinformation more than a decade after 9/11. See, e.g., Human Rights First, The Flawed Guantánamo Assessment Files, Dec. 21, 2016, https://www.humanrightsfirst.org/resource/flawed-guantanamo-assessment-files

[17] Human Rights First, Guantánamo by the Numbers, Oct. 10, 2018, https://www.humanrightsfirst.org/resource/guantanamo-numbers; ACLU *supra* note 13; CBS News, Bush Says He Wants To Close Guantánamo, May 8, 2006, https://www.cbsnews.com/news/bush-says-he-wants-to-close-guantanamo/.

[18] BRAVIN, *supra* note 13, 361.

[19] *See. e.g*., Rebecca Kheel, Guantanamo Population Isn't Growing, and Prison Shows No Signs of Closing, THE HILL, Oct. 25, 2020, https://thehill.com/policy/defense/522543-guantanamo-population-isnt-growing-and-prison-shows-no-signs-of-closing.

[20] *Id*.

[21] See, e.g., Sacha Pfieffer, Biden Administration Transfers First Detainee Out Of Guantánamo, NPR, July 19, 2021 6:48 pm, https://www.npr.org/ 2021/07/19/ 1017883509/ biden-administration-transfers-first-detainee-out-of-guantanamo

[22] E.g., Death Penalty Information Center, Former Guantánamo Officials Blast Waste and Mismanagement As Costs To Taxpayers Top $6 Billion, Sep. 23, 2019, https://deathpenaltyinfo.org/news/former-guantánamo-officials-blast-waste-and-mismanagement- as-costs-to-taxpayers-top-6-billion.

[23] *See, e.g*., Amos N. Guiora & Laurie R. Blank, *Don't Deny Detainees Their Day in Court*, op-ed, L.A. TIMES, Jan. 4, 2011, available at http://articles.latimes.com/2011/jan/04/opinion/la-oe-guiora-detention-20110104.

provided a second distinct endpoint that should have had domestic legal effect. And in any event, the final U.S. withdrawal and Taliban victory, which clearly ended all hostilities, *must* mark the end of the conflict by *any* standard. The Supreme Court made it clear in *Hamdi* that U.S. detention authority only existed because:

> Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.[24]

The American withdrawal from Afghanistan means that those "active combat" operations are now definitively over. And while the AUMF also authorized using force against al Qaeda, its remnants have long lacked the organizational structure, and its operations the requisite intensity, for it to legally constitute a party to an armed conflict. So Biden's announcement that the United States longest war is over necessarily marks the end of the authority recognized by the Court in Hamdi, *if* it had not previously expired.

While Guantánamo detention gets most of the attention, the military commissions have sporadically proceeded in its shadow. They got off to an abortive start; the Supreme Court halted them in its 2006 *Hamdan v. Rumsfeld* decision finding their procedures fatally deficient.[25] Although Congress made tangible improvements while providing a statutory foundation if the 2006, and subsequent 2009, Military Commissions Acts (MCA)[26] they have still only rendered eight judgments; six by plea deals, and the most frequently used charge – providing material support to terrorism – was overruled by the D.C Circuit Court of Appeals.[27] As of September 2021, just four more cases, involving ten defendants, had gotten past the arraignment stage, but all are still at least a year away from trial, denying victims of the Cole bombing and 9/11 long-overdue justice.[28]

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[24] Hamdi, 542 U.S. at 521 (citations omitted).

[25] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[26] JONATHAN MAHLER, THE CHALLENGE 298 (2008)

[27] David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Militay Commissions*, 75 OHIO ST. L. REV. 903, 911 (2014); Human Rights Watch, The Guantánamo Trials, https://www.hrw.org/guantanamo-trials#.

[28] *See, e.g.*, Carol Rosenberg, *Proceedings in 9/11 Case Resume, and Then Are Delayed Again*, N.Y.Times Sep. 7, 2021 https://www.nytimes.com/2021/09/07/us/politics/911-guantanamo-case-delay.html.

This Article examines the legal consequences of the Afghan conflict's termination on Guantánamo detention and the military commissions in four parts. Because both were justified as exercises law of war authority, Part I provides background context by explicating relevant international law. Part II considers how those rules make Guantánamo detention authority a dead letter. It argues that under relevant law of war rules that likely happened by 2005; again with the maturation of Trump's 2020 Taliban deal; and in any event the 2021 U.S. withdrawal and Taliban victory provided the coup de grâce. Part III then examines legal impact of the conflict's end on the Guantánamo military commissions, arguing that higher peacetime standards under both international and U.S. constitutional law now makes their use impermissible. Finally Part IV makes recommendations for the disposition of the last thirty-nine individuals held at Guantánamo.

One cannot help but note the irony that the U.S. withdrawal and subsequent Taliban victory grants Bush, Obama, and Biden their wishes; Guantánamo detention has reached its legal endpoint. But this is really in the United States' national interest. The costs of keeping Guantánamo open and continued use of the flawed military commissions – whether viewed from a fiscal, legal, moral, or political perspective – have long outweighed any practical benefits.

I. THE LAW OF WAR FOUNDATION FOR GUANTÁNAMO DETENTION AND TRIALS

The initial decision to treat 9/11 as an armed attack, rather than crime, was unprecedented, but not unjustified, given the level of violence. Adopting the war paradigm made sense considering al-Qaeda's remote Afghan location, number of fighters at its disposal, and close relationship with the Taliban. And it offered practical benefits by permitting exercise of "fundamental incidents" of war, including preventative detention, interrogation outside criminal procedure constraints, and ability to prosecute some conduct as war crimes.[29] Unfortunately, subsequent U.S. conduct seemed to claim law of war authority while ignoring its constraints.

American military leaders starting with George Washington have advocated faithful compliance with the rules governing hostilities, but in his day they were professional customs rather than actual law.[30] The 1785 Treaty of Amity and Commerce between Prussia and the United States, which hedged its bets by addressing treatment of prisoners "if war should

[29] See David Glazier, *Playing by the Rules: Combating Al-Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 960, 965-979 (2009). But contrary to post-9/11 U.S. practice, the law does *not* permit coercive interrogations. *Id*. at 1027-31.

[30] *See*, e.g., GARY D. SOLIS, THE LAW OF ARMED CONFLICT 13 (2010).

arise" between them, marked an initial legal step.[31] Key provisions anticipated Geneva Convention rules adopted 144 years later, including requirements that prisoners be held in camps "open & extensive enough for air & exercise, and lodged in barracks as roomy & good as are provided by the [detaining power's] own troops."[32] Formal multi-lateral law of war codification only began in the mid-nineteenth century, however, and many key developments post-date World War II.[33]

1. Key Early Developments - The Lieber Code and Geneva Convention

Professor Francis Lieber wrote the first practical explication of the "customs and usages of war," commonly known as the "Lieber Code," to guide the Union Army in 1863.[34] It was widely copied by European states, and made a seminal contribution to subsequent legal codification.[35] It was particularly influential in the development of POW law and delineated who was entitled to that status – including soldiers, civilians "attached to the army," and those taking up arms against an approaching invader.[36] Lieber made clear that the legitimacy of the cause had no bearing on POW entitlement, and that "any violence against prisoners in order to extort [] desired information or to punish them for having given false information" was forbidden.[37] He also declared that POWs could be tried for pre-capture crimes "against the captor's army or people."[38]

While Lieber's opus was progressing in the United States, Henry Dunant and four other leading Swiss nationals privately formed what became the International Committee of the Red Cross (ICRC), and

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[31] Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America; September 10, 1785, arts. 23-24 at https://avalon.law.yale.edu/18th_ century/prus1785.asp

[32] *Compare id.*, art. 24 with Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, arts. 9-12, 23, 36-37. The 1785 language still protected U.S. and German POWs during World War I. ROBERT C. DOYLE, THE ENEMY IN OUR HANDS 167 (2010).,

[33] Gary D. Solis, 107 AM. J. INT'L L. 279, 281 (2013) (reviewing JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012)). crimes, crimes against humanity, and genocide. *See, e.g.*, U.K. MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT, ¶¶ 1.28-1.38.1(2004).

[34] U.K. MINISTRY OF DEFENCE, supra note 33, ¶1.20

[35] SOLIS, *supra* note 30, 39-41 (2010).

[36] DOYLE, *supra* note 32, 111; Francis Lieber, Instructions for the Government of Armies of the United States in the Field, Issued as General Orders No. 100, arts. 49-51 (1863) available at https://avalon.law.yale.edu/ 19th_century/ lieber.asp#sec3 [hereinafter Lieber Code].

[37] *Id*., arts. 67, 80.

[38] *Id*., art. 59

convinced the Swiss government to invite states to an 1864 diplomatic conference that produced the initial Geneva Convention.[39] This concise humanitarian treaty established wartime safeguards for the wounded and medical facilities, and made the red cross a protective emblem.[40]

2. The Hague Land Warfare Regulations

Thirty-five years later the 1899 Hague Peace Conference produced six agreements; the most important being detailed pragmatic rules for ground combat.[41] The Hague Land Warfare Regulations included formal criteria for belligerents entitled to participate in hostilities and POW protections.[42] A follow-on 1907 conference very modestly updated the land warfare rules.[43] When the Hague Conventions were concluded, war was a discretionary policy choice for states. The 1907 Conference thus adopted a treaty about how states would declare war, and the Land Warfare Regulations mandated POW release "as quickly as possible" "[a]fter the conclusion of peace."[44]

3. The Geneva Conventions of 1929 and 1949

A diplomatic conference convened in Switzerland in 1929 produced modestly updated rules protecting the sick and wounded,[45] but more significantly, adopted a new POW Convention expanding on Hague rules.[46] It, too, barred coercive interrogation, mandated prisoner housing be equivalent to the detaining forces' troops, and provided for the repatriation

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[39] SOLIS, *supra* note 30, 46-49. Dunant would later share the first Nobel Peace Prize for his key role in this process. *Id*. at 49.

[40] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22. 1864, 22 Stat. 940.

[41] *See* JAMES BROWN SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 at vii-ix, 25-26 (1915).

[42] The 1907 Hague Land Warfare Regulations are annexed to Convention (IV) Respecting the Laws and Customs of War on Land [hereinafter Hague Land Warfare Regulations]. *See id*., Arts. 1-2, 4-20, 23,

[43] SCOTT, *supra* note 41 at vii-ix, 25-26. This work helpfully prints the 1899 and 1907 versions of the convention side-by-side, permitting ready identification of the changes, along with a list of the states which had ratified each version. *Id*. at 100-131

[44] Hague Convention (III) Relative to the Opening of Hostilies; Land Warfare Regulations, *supra* note 42, art. 20.

[45] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929, arts. 18, 28-29; available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/300-420026?OpenDocument.

[46] ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR, 243 (3rd ed. 2004).

or transfer to a neutral power of individuals whose health was impaired.[47] It relied on neutral "protecting Powers" to aid in its execution, as well as the ICRC.[48] Still focused on interstate conflicts, it only required that POWs be released with the "least possible delay after the conclusion of peace."[49]

The International Military Tribunal at Nuremberg's 1946 judgment held that both the 1907 Hague Land Warfare Regulations and key 1929 Geneva Convention rules had become customary law by 1939.[50] States can thus draw on this authority, but are also constrained by its limits, even in situations where the four 1949 Geneva Conventions, might not apply. Those post-war agreements are now the world's most widely ratified treaties with 196 state parties.[51] Detention related matters, including fair trial standards, are addressed in the Third Convention, covering prisoners of war; and the Fourth Convention, protecting civilians.[52]

One key 1949 innovation was an identically worded provision in each Convention, known as "Common Article 3," providing the first agreed limits on non-international armed conflict: minimum standards of treatment for anyone not actively participating in hostilities.[53] It applies to "conflict not of an international character occurring in the territory of one of the High Contracting Parties."[54] Previously, law of war rules applied only to conflicts between states; governments reserved the right to deal with rebels and other non-state actors with whatever means their national laws allowed, absent a formal "recognition of belligerency."[55] But it makes no difference to

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[47] Convention of July 27, 1929, Relative to the Treatment of Prisoners Of War, 47 Stat. 2021, arts. 5, 10, 68-74 [hereinafter 1929 POW Convention].

[48] *Id.*, arts. 86-88.

[49] *Id.*, art. 75

[50] *See, e.g.*, ROBERTS & GUELFF, *supra* note 46 at 68.

[51] Imogen Foulkes, Geneva Conventions Law of War 'Need Fixing,' BBC, Dec. 8, 2015, https://www.bbc.com/news/world-europe-35023029. In comparison, the UN has 193 members. *See* United Nations, Growth in United Nations Membership, https://www.un.org/en/about-us/growth-in-un-membership.

[52] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 [herein-after Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Geneva IV] [hereinafter, collectively, 1949 Geneva Conventions].

[53] LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT, 30 (2002).

[54] 1949 Geneva Conventions, *supra* note 52, Art. 3.

[55] The international law of war could apply to non-international conflicts reaching a level of sufficient scale and intensity that either the contesting state, or third nations desiring to maintain a position of neutrality towards both the non-state adversary and the

victims how a conflict is classified. From a humanitarian perspective the international - non international distinction thus makes little sense, so the 1949 Conventions were drafted to apply to all conflicts. But after many nations, including the United States, strongly objected, Common Article 3's modest limits were adopted as a compromise.[56]

The 1949 Conventions broke ground in identifying specific abuses of those they protect, such as "wilful killing, torture or inhuman treatment," as "grave breaches."[57] States must either prosecute, or extradite, perpetrators regardless of nationality, effectively creating universal jurisdiction.[58]

The proliferation of non-international conflicts and guerilla warfare during the next few decades, coupled with the codification of international human rights law, raised questions about how existing rules applied.[59] States therefore reconvened in Geneva in 1977 and concluded two supplemental agreements. Additional Protocol I updates international armed conflict rules in all four 1949 conventions.[60] The much shorter Additional Protocol II just expands Common Article 3 protections applicable to non-international conflicts and establishes threshold conditions for distinguishing between riots and isolated violence and actual armed conflict, which are now almost certainly customary law as well.[61]

The two Protocols are widely ratified – Additional Protocol I has 174 parties, including most key U.S. allies, China, and Russia; Additional

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contesting state, recognized the insurgents as "belligerents." *See,e.g.,* MOIR *supra* note 53 at 4-18.

[56] ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW, 27-49 (2010).

[57] *See, e.g*., First Geneva Convention, *supra* note 52, art. 50 (identifying grave breaches of that agreement).

[58] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION, §§ 2824, 2846 (2016). It may be plausibly argued that these were not truly war crimes at the time, since the Convention drafters elected not to use the term and the treaties' facial language can fairly be read to call for states to prosecute under national, rather than international law. Paola Gaeta, *War Crimes and Other International 'Core Crimes'*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 737, 739 (Andrew Claphm & Paola Gaeta, eds. 2014). But that point is now moot given that Additional Geneva Protocol I of 1977 explicitly declares breaches of both that Protocol and the 1949 Conventions to be "war crimes." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art 85, ¶ 5, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

[59] ROBERTS & GUELFF, *supra* note 46 at 419-20.

[60] *Id*. at 420-21; Additional Protocol I supra note 58.

[61] 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, 16 I.L.M. 1442, 1125 U.N.T.S 609-99 [hereinafter Additional Protocol II]; ROBERTS & GUELFF, supra note 41 at 481-82; Moir, *supra* note 53 at 160, 166-67.

Protocol II has 169. But the United States has not ratified either protocol, nor comprehensively stated which rules it considers customary law.[62]

B. International versus Non-International Armed Conflict

The legal distinctions between international and non-international conflict go well beyond the differing level of regulation, there are also fundamental differences in the way that their very existence is determined. Historically, "war" was a legal state of affairs between nations, initiated with a formal declaration and concluded with a peace agreement.[63] A state of war could exist for extended periods between those mileposts without any actual violence taking place. The UN Charter's proscription of the discretionary resort to force has made declarations of war obsolete, but any armed confrontations between states more substantial than minor frontier incidents constitute an international armed conflict to which the law of war applies. Combat is not required – occupation of foreign territory not met with armed resistance qualifies.[64] Nor does it require mutual agreement; the Geneva Conventions apply "even if the state of war is not recognized by one of them."[65] A low threshold makes sense given the robust humanitarian protections the law of war provides, the criminal sanctions for violations, and the reluctance of many states (including the United States) to acknowledge that human rights obligations apply extra-territorially.[66]

Criteria for invoking application of the international law governing non-international conflict are more stringent. When regulation was first considered in 1949, states wanted a high threshold to preserve maximum flexibility in dealing with internal disorder under national law.[67] Today, however, the intervening development of more restrictive human rights law limits the prior discretion states had to deal with internal violence with a free hand. So the ironic impact of a higher standard for invocation is that it now raises the bar states must clear to use lethal military force domestically. It is widely agreed that a situation can only be an armed conflict if the non-state party has a substantial degree of organization, and the violence a

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[62] David Glazier et al., *Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual*, 42 YALE J. INT'L L. 215, 271-74 (2017).

[63] *See* DINSTEIN, *supra* note 8, 9 (5th ed. 2011).

[64] UK MINISTRY OF DEFENCE, *supra* note 33, ¶¶ 3.2-3.2.3.

[65] 1949 Geneva Conventions, *supra* note 52, Art. 2.

[66] GENERAL COUNSEL OF THE DEP'T. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.6.3.3 (2016) [hereinafter DoD Law of War Manual].

[67] *See, e.g.*, EVE LA HAYE, WAR CRIMES IN INTERNAL CONFLICTS, 7 (2008).

sustained level of intensity.[68] Although international courts do not "make" law – their decisions are "subsidiary means for the determination of rules of law"[69] – the International Criminal Tribunal for the Former Yugoslavia's holdings in its initial Tadic case are frequently cited for this proposition.[70] What is legally dispositive is the acceptance of this principle by states, who frequently refer to Tadic and subsequent decisions.[71] Nathalie Weizmann, a former ICRC and current United Nations legal officer, has helpfully summarized the common understanding of the violence component:

> Determining the intensity of the violence requires an assessment of the facts on the ground. Intensity of fighting can be determined by several indicators, including the number, duration, and intensity of armed confrontations, whether the fighting is widespread, the types of weapons and equipment used, the number and caliber of munitions fired, the number of fighters and type of forces participating in the fighting, the number of military and civilian casualties, the extent of material destruction, and the number of civilians fleeing combat zones.[72]

Neither sporadic terrorist attacks, nor "targeted killings" by government forces, satisfy the requisite intensity threshold necessary for the continued existence of an armed conflict.

There is also general agreement that a "non state" party must have a "sufficient" degree of "organization," but less clarity about what that requires. Factors that courts have applied include the (1) existence of a multi-level command structure; (2) ability to conduct organized operations; (3) logistical capabilities including supply and recruiting functions, (4) internal discipline and training and ability to comply with Common Article 3; and (5) ability to speak with one voice and engage in political

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[68] *See, e.g.*, YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 20-36 (2014).

[69] Statute of the International Court of Justice, art. 38 ¶ 1.d.

[70] This is true of both academic commentary, *see, e.g.*, CULLEN, *supra* note 56 at 122; and actual state publications, *see, e.g.*, UK MINISTRY OF DEFENCE, supra note 33, § 15.3.1.

[71] *See e.g.*, UK MINISTRY OF DEFENCE, supra note 33, § 15.3.1. (quoting Tadic), and the Joint U.S. Army & Marine Corps publication, The Commander's Handbook on the Law of Land Warfare, FM 6-27/MCTP 11-10C (stating intensity and organization requirements).

[72] Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF,* 47 Colum. Hum. Rts. L. Rev. 204, 211 (2015-16).

negotiations.[73] It is debated whether these criteria are "indicative" factors to be generally weighed, or a "determinative" checklist that must be met.[74] But there is little dispute that the minimum requirement is a functional hierarchical structure letting it "assert authority over its members."[75]

C. Detention Duration in International Armed Conflict

States engaged in an international conflict can conduct preventive detention under two regimes: that of POWs, and less well-known rules for civilians posing a serious threat to the detaining power. Details are expounded in the Third and Fourth Geneva Conventions respectively.[76] The core rules are almost certainly customary law, applicable to any person or situation in an international conflict even if some of the fine details might not be.[77] This detention is non-punitive, justified only for security reasons and the rules balance state protection against limiting detainee hardship.

Law of war detention is "indefinite" in that it cannot be known ex-ante how long active hostilities will last. Unfortunately, that term can also connote a lack of limits. But the law imposes meaningful constraints on who can be held, when they must be released, and what process is required.

1. Detention of Prisoners of War

POW status is primarily granted to persons the law of war recognizes as "combatants."[78] They get "belligerent immunity" from domestic laws for their conduct during hostilities, but at a price. The combatant may be killed on sight unless *hors de combat* (out of action due to sickness, wounds, or having been captured) and detained for the duration of hostilities just based on their status with the enemy's forces.[79] This can normally be done without any formal process; a uniform or possession of military

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[73] *See* Jann K. Kleffner, *The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict*, 95 Int'l L. Stud. 161, 164-67 (2019)

[74] *Id.* at 168-69.

[75] *See id*. (quoting ICTY decision in *Boškoski & Tarčulovski*, Case No. IT-04-82-T, Judgment, ¶ 195).

[76] Geneva III and Geneva IV, *supra* note 52.

[77] *E.g*., Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. INT'L. CRIM. JUST. 683, 685-87 (2009).

[78] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 35 (2016).

[79] *Id*. at 34-35.

identification suffices. Those accompanying an armed force, including logisticians and accredited correspondents, are also liable to detention.[80] Where there is doubt about an individual's status, presumptive classification as a POW is required until a "competent tribunal" can resolve it, but there are no mandates for their composition or procedure.[81] The United States has traditionally used a three-officer panel near the field of capture to resolve these questions.[82]

There are also some limits on the duration of detention. Since the sole legal purpose is to keep captured individuals from rejoining the fight, release is required when an individual no longer poses a credible threat of doing so.[83] POWs *must* be repatriated, for example, if they are:

> 1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
> 2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
> 3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.[84]

These decisions are not entrusted to the detaining power. Treaty rules call for "mixed medical commissions," comprised of two neutral members and one from the detaining state, making decisions by majority vote.[85] Repatriation can thus be required over the detaining power's objections. Transfer to a neutral country is permitted for POWs whose health would benefit, and direct repatriation or neutral transfer is even encouraged for "able-bodied prisoners who have undergone a long period of captivity."[86] The latter does not mean outright release; the neutral is expected to intern them to keep them out of the fight, just as international conflict rules require neutrals to disarm and secure belligerents seeking refuge in their territory.[87]

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[80] *See id*.

[81] Geneva III, *supra* note 52, art. 5.

[82] SOLIS, *supra* note 35 228-31; Brian J. Bill, *Detention Operations in Iraq: A View From the Ground*, 86 Int'l L. Stud. 411, 412-13 (2010).

[83] ICRC Commentary of 2020 on the Third Geneva Convention §4444

[84] Geneva III, *supra* note 52, Art. 110.

[85] *Id.* arts. 112-13, Annex II.

[86] *Id*. arts. 109-10, Annex I.

[87] *See, e.g*., UK MINISTRY OF DEFENCE, *supra* note 33, § 1.42-43, 8.147-50, 8.156-158. POWs escaping into neutral territory get more lenient treatment. *See id*., § 8.160-61.

The Third 1949 Convention reinforces the non-punitive nature of POW detention in detailed mandates about camp conditions, exercise facilities, encouragement of "intellectual, education and recreational pursuits," etc.[88] It prohibits "close confinement" unless necessary to safeguard the POW's own health or when serving disciplinary punishment.[89]

International law provides an alternative means to keep individuals out of the fight while avoiding the costs of captivity for both the state and the POW – "parole." Under the law of war, parole is a release from preventive detention subject to a strict agreement not to engage in hostilities towards the capturing state. Parole ends at the end of the conflict, or if the parolee is "exchanged" for a POW held by the other side[90]. If a parole violator is recaptured, they are liable to trial and potentially execution.[91] Parole has not been used in recent conflicts but is still recognized as a legal option by the Third Geneva Convention which requires both paroled individuals and their own military to faithfully honor their obligation to stay out of the conflict.[92]

A concern often expressed by Guantánamo critics, never anticipating Trump's Taliban deal, was that the conflict would not end in a peace agreement. That would have historically been an issue; many Axis POWs were held for several years after WWII fighting ended pending actual peace treaties. But states redressed this in 1949; the Third Convention now mandates POW release "without delay at the end of *active hostilities,*"[93] replacing earlier references to the conclusion of peace. This obligation is unilateral – not contingent upon reciprocal behavior – and its application is determined by "facts on the ground," not political agreement.[94]

There is an exception to the release requirement. Individuals who have been criminally charged, or convicted, need not be repatriated until the completion of judicial proceedings, and, if applicable, their sentence.[95]
Eligibility for POW status is specified in Article 4 of the Third Convention.[96] Since al-Qaeda and Taliban fighters both generally lacked

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[88] *Id.*, arts. 25-38.

[89] *Id.*, arts. 21, 88-90, 95.

[90] This can be a paper transaction, as representative of the parties "balance the books."

[91] *See* George Shepard, *Parole* in ENCYCLOPEDIA OF PRISONERS OF WAR AND INTERNMENT, 297, 297-99 (Jonathan Vance, ed. 2nd ed. 2006).

[92] Geneva III, *supra* note 52, art. 21.

[93] *Id*., art. 118 (emphasis added).

[94] ICRC Commentary, *supra* note 83 §§ 4452-4458.

[95] Geneva III, *supra* note 52 Art. 119.

[96] Art. 4, ¶ A of Geneva III, *supra* note 52, defines those persons who are entitled to POW status:

> (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

distinguishing marks,[97] a commitment to obey the law of war, and al Qaeda has no established command structure, the United States had no obligation to accord them status as combatants or POWs. It *could* logically have elected to do so, however, given past practices in conflicts such as Indian Wars, the Civil War, Philippine Insurrection, and Vietnam, if it concluded that the practical benefits outweighed the costs in terms of legitimating attacks on U.S. forces and limiting prosecutions to actual war crimes.[98]

If the United States did not want to accord these adversaries POW status, an alternate detention authority is codified for civilians in the Fourth Geneva Convention. Although the government asserted that the "illegal combatants" detained at Guantánamo fell into gaps between the Third and Fourth Conventions, the opposite position is far more credible.[99]

2. Detention of Civilians During International Armed Conflict

Although it sounds odd to term enemy fighters "civilians," the current law of war is widely acknowledged as classifying anyone not a member of a recognized armed force or otherwise entitled to belligerent immunity in that

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> those of organized resistance movements, belonging to a Party to the conflict… provided that [they]fulfil 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) [conduct] 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, [etc.]… provided that they have received authorization from the armed forces which they accompany….
> (5) Members of crews…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.

[97] Images of one al Qaeda unit, the 055 brigade, show fighters in distinctive masks wearing military gear and openly carrying weapons; that combination should satisfy LOW requirements that fighters distinguish themselves from the civilian population.

[98] For a more detailed discussion of this option, *see* Glazier, *supra* note 29 at 998-1002. *See also* SOLIS, *supra* note 35 229 (discussing treatment of Viet Cong as POWs).

[99] *See* Bill, *supra* note 82 at 413-17 (articulating the gapless approach and demonstrating its application in U.S. detention operations in Iraq).

category.[100] Contrary to popular belief, participation in hostilities by individuals lacking belligerent immunity is *not* a war crime.[101] But their lack of immunity leaves them liable to prosecution under ordinary criminal law for *any* violent acts they commit.[102] They can also be tried for actual war crimes, such as killing prisoners. The general prohibition against targeting civilians does not apply to those "directly participating in hostilities."[103] So the civilian categorization is not as limiting as might be assumed., and there is a compelling legal argument that this is the correct classification for "unprivileged belligerents."[104]

The Fourth Convention provides extensive rules addressing treatment of civilians during armed conflict. While it is correctly perceived as focusing on humanitarian protections, it nevertheless provides authority for the preventive internment of civilians under physical conditions almost identical to those mandated for POWs by the Third Convention.[105]

There are several important distinctions between the two categories. Whereas POW detention can last for the duration of hostilities based just on organizational status, civilian internment requires individual dangerousness determinations. It must be established that "the security of the Detaining Power makes it *absolutely necessary*,"[106] or in occupied territory, that it is necessary for "*imperative* reasons of security,"[107] to justify internment. Individual POW detentions are reviewed only in cases of doubt, but the Fourth Convention requires that detained civilians have "such action reconsidered as soon as possible by an appropriate court or administrative board" and that there must be follow-on reviews "twice yearly . . . with a view to the favourable amendment of the initial decision, if circumstances permit."[108] The Bush administration asserted that an annual review of Guantánamo detentions would provide "more procedural protections than

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[100] This rule is codified in Article 50 of Additional Protocol I, supra note 58 defining anyone not qualifying for POW status as a civilian. Israel is also not a party to this treaty, but its Supreme Court held the rule was applicable to its Palestinian conflict in Public Committee v. Govt of Israel (2006).

[101] DINSTEIN, *supra* note 78 at 37.

[102] *Id* at 37.

[103] The ICRC has offered interpretative guidance on what constitutes "direct participation" resulting in forfeiture of normal civilian immunity. NILS MELZER, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES (2009).

[104] *E.g*., Knut Dörman, *Unlawful Combatants* in OXFORD HANDBOOK, *supra* note 58, 605, 606-13.

[105] Compare Articles 25-38 of GIII, *supra* note 52 with Articles 85-94 of GIV, *supra* note 52.

[106] Geneva IV, *supra* note 52, Art. 42 (emphasis added).

[107] *Id*. Art. 78 (emphasis added).

[108] *Id*. Art. 43.

any other captured enemy combatants in the history of warfare."[109] But that would only be true if applied to individuals granted POW status. Israel detains Palestinians it considers to be unlawful combatants under procedures consistent with the Fourth Convention, even while formally denying its applicability.[110]

Civilian detainees must be released "as soon as the reasons which necessitated [ ] internment no longer exist" and in any event, "as soon as possible after the close of hostilities."[111] As with POWs, there is an exception for those convicted of, or facing, criminal charges.[112]

A primary advantage of treating non-state adversaries as civilians is that it avoids conferring on them the right to engage in hostilities, leaving them liable to prosecution under the local state's law for any violence they commit, as well as under the law of war for any actual war crimes.

3. Detention During Non-International Armed Conflict

While the law of war defines the roles of combatants and civilians in international armed conflicts and provides authority for their detention, it just sets minimum treatment standards for those not actively participating in non-international hostilities. These consist of Common Article 3's minimalist "humane treatment" standard applicable to any non-international conflict, and more specific rules in Additional Protocol II which has a higher application threshold. The Protocol only applies to conflicts that:

> 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 implement this Protocol.[113]

Neither Common Article 3 nor Additional Protocol II provide detention authority, assiduously avoiding use of legally significant terms like "combatant," or "prisoner of war." Any necessary definitions, and provision of the requisite authority, are thus left to the law of the state where the

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[109] Farah Stockman, Some Cleared Guantánamo Inmates Stay in Custody, Boston.com, Nov. 19, 2007 http://archive.boston.com/news/nation/articles/2007/11/19/some_cleared_guantanamo_inmates_stay_in_custody/ (quoting U.S. government court filing).

[110] *See* Dörman, *supra* note 104, 619-20 (describing 2008 Israeli detention law).

[111] *Id*. Arts. 132-33.

[112] *Id*. Art. 133-43.

[113] AP II, supra note , art. 1.

conflict is taking place.[114] This is deliberate; states want flexibility to treat those engaged in internal hostilities as they decide best suits their interests under the circumstances, including the option to prosecute as common criminals, or even traitors, under their regular domestic law.[115]

When an outside third state's forces join the fight on the side of the local state, the conflict remains non-international as the states are both on the same side combatting one or more non-state adversaries. The legal authority for any detention remains the domestic law of the state where the conflict is occurring. The foreign state thus has no independent detention authority and anyone it captures should be handed over to the local state for disposition in accordance with its national law.[116]

States engaged in non-international conflicts have sometimes chosen to assert authority from international conflicts, such as POW rules or naval blockade rights, particularly when the non-state group controls significant territory, or has captured large numbers of government soldiers. In these cases a "recognition of belligerency" (either explicit or implicit) can initiate even-handed application of international conflict rules to both sides.[117]

Some thoughtful officials now suggest this would have been the best way for the U.S. to have proceeded after 9/11. For example then-U.S. Deputy Secretary of Defense for Detainee Affairs, William Lietzau, opined in 2013 that the U.S. should have designated the detainees as POWs and applied at least customary international law rules to them. And he presciently suggested that the most effective way to close Guantánamo would be to recognize the end of the armed conflict.[118]

D. Trials Under the Law of War

Although the Lieber Code recognized the authority to try POWs, it said nothing about what standards those trials had to meet, nor did the Hague Land Warfare Regulations which prohibited the punishment of spies "without previous trial."[119] The 1929 Geneva POW Convention provided more substantive protection, specifically limiting trials to "the same courts" and "same procedure" as the detaining authority's own military

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[114] *E.g*., U.K. MINISTRY OF DEFENSE, *supra* note 33, §§ 15.6.1-6.3; Knut Dörmann, *Detention in Non-International Armed Conflicts,* 88 INT'L L. STUD. 347 353 (2012).

[115] *See* DINSTEIN, *supra* note 68 at 220.

[116] *Id*. at 87-88.

[117] *Id*. at 108-109. Third states could recognize belligerency when their interests were best served by maintaining a formal neutrality towards both sides. *Id*. at 109-111.

[118] Benjamin Wittes, A "Jaw-Dropping U-Turn" Story that Isn't, Lawfare Blog, Aug. 7, 2013, https://www.lawfareblog.com/jaw-dropping-u-turn-story-isnt.

[119] Hague Land Warfare Regulations, *supra* note 42, art. 30.

personnel.[120] Unfortunately this rule was undermined by the U.S. WWII trials of Axis personnel before military commissions that took judicial shortcuts as compared to the courts-martial used to try American service personnel.[121] Somewhat perversely, the Supreme Court upheld this departure through a questionable treaty interpretation, holding that the "same courts" rule only applied to POWs tried for *post-capture* offenses, and not for war crimes committed prior to falling into U.S. hands.[122]

This unilateral U.S. interpretation was repudiated by the 1949 update of the Geneva POW Convention, as the Court itself acknowledged in *Hamdan*.[123] The 1929 language about trials by the same courts was retained, but a new Article 85 expressly declares that POWs prosecuted for pre-capture offenses retain the rights provided by the Convention.[124] ICRC commentary makes it clear that this wording was deliberately chosen in awareness of the Supreme Court decision; "retaining the rights" of a POW includes the limitation on lawful trial forums.[125]

The Fourth Convention provides more specific fair trial standards for the civilians it protects. Occupying powers are expected to keep local courts open, but trials by "non-political military courts" are permitted if they sit in the occupied territory.[126] But it enumerates an extensive set of fair trial mandates applicable to any court trying a protected civilian. These include, inter alia, to be promptly informed of criminal charges, representation by counsel, a speedy trial, an acceptable interpreter, and a right to appeal or petition for clemency.[127] Since the UN had only adopted the aspirational Universal Declaration of Human Rights the previous year, the Fourth Geneva Convention can fairly be considered the first actual codification of human rights in a global treaty. Both the Third and Fourth Conventions make depriving individuals they protect of a "fair and regular trial" grave breaches.[128] Both also require that time spent in confinement, rather than as part of a general camp population, while awaiting trial must be deducted from any sentence awarded.[129]

A core feature of both 1977 Additional Protocols is the incorporation of human rights protections, including fair trial standards. Article 75 of

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[120] 1929 POW Convention *supra* note 47, Arts. 63, 87.

[121] *See* David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2053-59 (2003).

[122] In re Yamashita, 327 U.S. 1, 20-24 (1946).

[123] 548 U.S. at 619-20.

[124] Geneva III, *supra* note 52, arts. 85, 102.

[125] ICRC Commentary of 2020 on the Third Geneva Convention §3623-27.

[126] Geneva IV, *supra* note 52, arts. 64, 66.

[127] *Id*. arts. 71-75

[128] Geneva III, *supra* note 52, arts. 129-30; Geneva IV, *supra* note 52, arts. 146-47.

[129] Geneva III, *supra* note 52, art. 103; Geneva IV, *supra* note 52, art. 69.

Additional Protocol I establishes baseline treatment standards for anyone not already given specific protections by the Conventions, while Additional Protocol II's Article 6 provides equivalent rules for anyone being tried in a non-international conflict.[130] Both also mandate that no one can be punished for "any act or omission which did not constitute a criminal offense . . . at the time when it was committed."[131] The Obama administration announced in 2011 that Article 75 was recognized as binding customary law.[132]

II. THE IMPACT OF THE END OF THE AFGHAN CONFLICT ON GUANTÁNAMO DETENTION

The September 2001 AUMF empowered the president to use "all necessary and appropriate force against those nations, organizations, or persons [who] plann*ed*, authoriz*ed*, committ*ed* or aid*ed* the [9/11] attacks... or harbor*ed* such organization or persons.[133] Factually (and hence legally) that was just al Qaeda and the Afghan Taliban. Subsequent assertions of a "Global War on Terror" exceed the clear statutory language expressed in the past tense; it is limited to those responsible for completed acts.[134]

Military operations in Afghanistan began October 7, 2001.[135] The Bush administration concurrently began planning for military detention and trials. Critical decisions were made by a small cabal drafting key documents at the behest of Vice President Dick Cheney.[136] He persuaded Bush to sign a controversial "military order," based on Franklin D. Roosevelt's 1942 Nazi saboteur trial directive, giving DoD broad authority for preventive detention

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[130] Additional Protocol I *supra* note 58 art 75; AP II art 6.

[131] AP I, *supra* note 58, Art. 75, ¶ 4. (c).; AP II, *supra* note 61, Art. 6 ¶ 2.(c).

[132] Hillary Rodham Clinton, Press Statement, *Reaffirming America's Commitment to Humane Treatment of Detainees*, Mar. 7, 2011, https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/03/157827.htm .

[133] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. III 2003)) (hereinafter "AUMF").

[134] Glazier, *supra* note 29 at 987-88. *See id.,* the operative paragraph, § 2. (a) reads in its entirety:

> (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

[135] Council on Foreign Relations, *supra* note 5.

[136] See, e.g., James P. Pfiffner, Policy Making in the Bush White House, 21 ISSUES IN GOVERNANCE STUD. 6-12 (Oct. 2008)

and military trials while purporting to deny detainees *any* judicial access.[137] No al-Qaeda or Taliban members were yet in custody, and ideas about who would be captured or what charges they might face were still purely conjectural. But Cheney, his counsel David Addington, and Justice Department lawyer John Yoo advocated "rough justice" from military tribunals as good enough for U.S. enemies.[138] They sought to expedite trials by denying the due process provided in Article III courts or courts-martial. Guantánamo Bay was selected as the site for detention and military trials in the hope that it would be beyond the reach of U.S. federal courts.[139]

The vision failed to pan out. Recycling FDR's purported denial of judicial access was legally indefensible; the Supreme Court had categorically rejected it by convening a special July term to hear Ex parte *Quirin*, a constitutional challenge to the Nazi saboteur trial.[140] It would now weigh in against some of the more extreme Bush administration efforts. By the end of his second term, the Court had:

(1) given conditional approval to the exercise of law of war detention (*Hamdi v. Rumsfeld*);[141] but had also,

(2) determined that Guantánamo detainees could bring habeas challenges to their detention in federal court (*Rasul v. Bush*);[142]

(3) overturned the initial military commission process (*Hamdan v. Rumsfeld*);[143] and,

(4) decided that Guantánamo detainees had a constitutional right to seek habeas review in U.S. courts when Congress endeavored to overturn Rasul by statute (*Boumediene v. Bush*).[144]

Hamdan was not decided on constitutional grounds, so it was amenable to statutory rectification. Bush responded quickly, announcing the transfer of "high value" detainees from previously secret CIA "black sites" to Guantánamo, and demanding Congress immediately authorize their trial.[145] The resulting Military Commissions Act of 2006 codified the tribunals'

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[137] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3. C.F.R. 918 (2002).

[138] *See* BRAVIN, *supra* note 13, 6-7, 40-47.

[139] *See, id., 74-76*.

[140] *See Ex parte* Quirin, 317 U.S. 1 (1942).

[141] Hamdi, 542 U.S. 507.

[142] Rasul v. Bush, 542 U.S. 466 (2204)

[143] Hamdan, 548 U.S. 557 (holding that the commissions failed to meet the minimum standards Common Article 3 and that the administration had not adequately justified departing from the UCMJ's procedural rules for courts-martial).

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

[145] Press Release, The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (Sept. 6, 2006), http://georgewbush-whitehouse.archives.gov/ news/releases.html, archived at http://perma.cc/XXV7-C25M.

jurisdiction and procedure, and the offenses they could try.[146] It also attempted to deprive Guantánamo detainees of access to habeas review, but that effort was repudiated by the Court's Boumediene decision.[147] It was reenacted with modest improvement in 2009 following President Obama's decision to continue commission use.[148]

Although the initial invocation of law of war authority was likely legitimate, the continued use of detention authority is problematic; there is real reason to believe it ended well before the final U.S. withdrawal began. A key issue is the classification of the Afghan conflict as events unfolded beyond the initial intervention – it can change as events unfold – and is an essential element in determining detention authority, what war crimes can be prosecuted, and even the endpoint for law of war application.

This Part now turns to assessing the Afghan conflict classification over time; it then examines the resulting limits on, and endpoint of, U.S. law of war authority; As will be seen, it is likely that U.S. detention authority should have legally ended with the unacknowledged transition of the Afghan conflict from international to non-international at least by mid-2005. It concludes by examining the ramifications that the war's ultimate end has on Guantánamo detention.

Part III then considers the impact of the end of hostilities on military commission prosecutions. As a sovereign nation, the United States logically enjoys the rights and authority granted by international law even if those powers are not explicitly enumerated in the Constitution. But the Supreme Court has held that the exercise of authority derived from international law is subject to any constraints that law imposes.[149]

A. Classification of the Afghan Conflict

While the Taliban's precise legal status in 2001 is debated, they were at least the *de facto* government of Afghanistan, and the U.S. intervention launched an international conflict. President Bush personally acknowledged that was the correct classification and that both the United States and Afghanistan were parties to the 1949 Geneva Conventions. But he declared in a February 2002 memo that the conventions failed to protect either al

[146] Military Commissions Act of 2006, 10 U.S.C. §§ 948a et seq. (2006).

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

[148] Military Commissions Act of 2009, 10 U.S.C. §§ 948a et seq. (2009).f

[149] U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (holding that the "operations of the nation in [foreign territory] must be governed by treaties, international understandings and compacts, and the principles of international law").

Qaeda, which was not a state and thus could not be a treaty party, or the Taliban fighters who were "unlawful combatants."[150]

That memo was arguably the high point of clarity in the U.S. government's approach – by any of three branches. Even for those disputing its conclusions, it at least clearly stated what the administration thought the law was. When the Supreme Court considered the government's detention authority in its 2004 *Hamdi* decision, the discussion of detention authority was less explicit but still logically based on the law of international armed conflict. This can be inferred both from the substantive content of the discussion and in citations to international law sources including the text of the Third Geneva Convention.[151] Unfortunately the Court induced significant uncertainty two years later in *Hamdan*, halting the military commissions. That holding is partly based on finding that the Guantánamo tribunals failed to qualify as the "regularly constituted courts" mandated by Common Article 3, and further suggested that conflict with a non-state adversary like al-Qaeda must literally be "not of an international character."[152]

It is possible that the Court is applying Common Article 3 as a minimum legal standard applicable to any hostilities, rather than definitively holding this conflict is non-international, so that it "need not decide the merits" of whether the full Conventions protect him.[153] But it subsequently became common practice to describe the conflict as non-international and the Obama administration would take full advantage, making a public relations show of having officials verify Guantánamo detention complied with Common Article 3.[154] That was really a largely meaningless effort given its minimalist requirement of "humane" treatment; a standard more suitable for assessing animal shelters than human detention.

The fundamental problem with treating the conflict as non-international is that it undermines U.S. claims to draw detention authority from the law of war as all three branches purport to do. IF the *Hamdan* Court really held the

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[150] George W. Bush, Memorandum for the Vice President, et al., Subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at https://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. But even if the Geneva Conventions are facially inapplicable to a conflict, most provisions are binding as customary law. *See, e.g.,* GARY SOLIS, THE LAW OF ARMED CONFLICT 81-82 (2010).

[151] Hamdi, 542 U.S. at, 518-21.

[152] Hamdan, 547 U.S. at 630-33.

[153] *Id*. at 629.

[154] *See, e.g*., Departement of Defense, Review of Department Compliance With President's Executive Order on Detainee Conditions of Confinement, https://archive.defense.gov/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf

conflict was non-international, they undercut the validity of the detention authority they upheld two years previously in Hamdi. The Obama Justice Department alluded to this contradiction in a 2009 federal court filing:

> Principles derived from law-of-war rules governing *international armed conflicts*, therefore, *must* inform the interpretation of the detention authority Congress has authorized for the current armed conflict. Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.[155]

There are two flaws in this approach. First, if international armed conflict rules provided the underlying authority, they should not have just "informed" detention policy, they should have regulated it.[156] That would mean respecting rules like the prohibitions against prison-based facilities and coercive interrogation.[157] But military officials proudly proclaimed that Guantánamo's original open-air cages were replaced with a modern civilian maximum security prison design and many well-documented interrogation practices were both illegal and ultimately counterproductive.[158] And the military has plans for hospice care and wheelchair ramps at Guantánamo despite legal mandates that individuals whose health is declining must be released.[159] Drawing authority from a *corpus juris* without complying with the concurrent restrictions it imposes mocks the notion of law.

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[155] Respondents' Memorandum Regarding The Government's Detention Authority Relative To Detainees Held At Guantanamo Bay, *In re* Guantánamo Bay Detainee Litigation, Misc. No. 08-442 (D.D.C. 2009)(emphasis added).

[156] *See. e.g*., Department of State, The Obama Administration and International Law, Harold Hongju Koh Speech to Am. Soc. Of In'tl Law, Mar. 25, 2010 at https://2009-2017.state.gov/s/l/releases/remarks/139119.htm

[157] *See id*.

[158] *See, e.g*., Carol Rosenberg, *Military Closes Failing Facility at Guantánamo Bay to Consolidate Prisoners*, N.Y. Times, Jul. 19, 2021 at https://www.nytimes.com/2021/04/04/us/politics/guantanamo-bay-prisoners.html. The experiences of Britain, Germany, and the United States during World War II all supported the use non-coercive means as the key to obtaining viable intelligence. See discussion and supporting citations in Glazier, *supra* note 29, 1027-31.

[159] *See* Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES, Apr. 27, 2019,

A second issue is even more important for the subject of this Article; how long after its Afghan intervention was the United States still justified in treating the conflict as an international armed conflict? The most fundamental U.S. legal error was arguably continuing unilateral detention operations well after it lost that authority.

1. Iraq as a model for understanding conflict classification

Afghanistan was not the only protracted U.S. conflict during this period. The 2003 invasion of Iraq lacked UN authorization, was based on false premises, and is now widely recognized as a *jus ad bellum* violation.[160] But despite the high-profile Abu Ghraib abuses, the government did a much better job of identifying the applicable conflict classification and conforming its detention policies to international law there than it did in Afghanistan.

There is no dispute that the Iraq invasion launched an international armed conflict. The United States detained Iraqi military personal as POWs while holding other individuals "for imperative reasons of security" under Article 78 of the Fourth Convention during the initial period of hostilities.[161] U.S. leaders in Washington sought to portray the American role as one of "liberators" rather than "occupiers" and deliberately avoided the latter term.[162] Nevertheless, the United States established the Coalition Provisional Authority (CPA) to govern Iraq after the initial fighting ended, and continued to apply international armed conflict rules, including the 1949 Conventions, which remain applicable to military occupation.[163]

The CPA exercised governmental authority for a year, until a new UN-recognized Iraqi government resumed the exercise of sovereignty in June 2004. The residual conflict, combatting a growing insurgency then legally became a non-international conflict. In this singular case, however, U.S. forces uniquely retained independent detention authority for several more years, but *only* because the UN Security Council recognition of restored Iraqi sovereignty granted this exception at Iraq's request.[164] Its resolution

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https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html

[160] *E.g*., Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, The Guardian, Sep. 15, 2004, https://www.theguardian.com/world/2004/sep/16/iraq.iraq

[161] *See* Bill, *supra* note 82 at 412-14.

[162] Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 Rutgers L. Rev, 121, 188-89 (2005).

[163] Bill, *supra* note 82 at 414-15.

[164] Alexandra Perina*, Legal Bases for Coalition Combat Operations in Iraq, May 2003 – Present*, 86 INT'L L. STUD. 81, 86-87 (2010); S.C. Res. 1546, ¶¶ 9-10 (June 8, 2004))

1546 authorized the U.S.-led multinational force "to take *all necessary measures* to contribute to the maintenance of security and stability in Iraq."[165] Any doubt as to whether these included detention is resolved by the resolution's specific reference to attached letters from Iraqi and U.S. officials explaining that the U.S. role would include both combat operations and internment.[166] The threats the U.S. confronted were from non-state entities fairly classified as "unprivileged belligerents," but throughout this period U.S. detention decision processes effectively conformed to the Fourth Convention rules for civilian internment.[167]

After several extensions, the UN mandate ended on the last day of 2008; at that point detention reverted to a traditional non-international conflict scheme "based on criminal detention overseen by the Iraqi judiciary."[168] U.S. forces in Iraq continued to hold some prisoners until 2010.[169] But it was based on a bilateral agreement providing that "No detention or arrest may be carried out by the United States Forces [other than of Americans] except through an Iraqi decision issued in accordance with Iraqi law."[170]

2. Afghanistan – The Factual and Legal Situation

The conflict in Afghanistan must logically have undergone a similar transition to that of Iraq, becoming non-international following the creation of a new sovereign Afghan government. But the precise timing is less clear. The Taliban had already suffered a series of significant defeats by mid-November 2001 when UN Security Council Resolution 1378 called for a "transitional administration" as a first step towards the creation of a new "broad-based, multi-ethnic, and fully representative" government.[171] Following the Taliban's loss of the capital, Kabul, a UN conference in Bonn Germany secured agreement to establish an "Interim Administration" as of December 22, 2001, which would be the effective government and represent Afghanistan in external affairs. This was to be short-term measure, however. The agreement called for an Emergency Loya Jirga to meet within

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[165] S.C. Res. 1546, ¶¶ 9-10 (June 8, 2004)

[166] Id., ¶¶ 9-11; Letter from Colin Powell, U.S. Sec. State, to Lauro L. Baja, Jr., Pres. UN Security Council (June 5, 2004) (annexed to *id*.)

[167] *See* Bill, *supra* note 82 at 418-35 (describing U.S. detention review procedures).

[168] *Id.* at 416-17.

[169] Jim Loney, *U.S. Transfers Prison, 2,900 ex-Insurgents to Iraq*, REUTERS, Mar. 15, 2010, https://www.reuters.com/article/us-iraq-usa-detainees/u-s-transfers-prison-2900-ex-insurgents-to-iraq-idUSTRE62E36520100315

[170] Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Nov. 17m 2008, Art. 22, ¶ 1.

[171] Council on Foreign Relations, *supra* note 5; S.C. Res. 1378, ¶ 1 (Nov. 14, 2001)

six months to decide on a "Transitional Authority" to serve up to two more years, "until such time as a fully representative government can be elected through free and fair elections."[172] The Bonn Agreement was endorsed by UN Security Council resolution 1383 the next day.[173] Two weeks later the Council approved the creation of an International Security Assistance Force to support the Interim Authority in maintaining security in the capital environs, approving use of all necessary measures" to fulfill its mandate.[174] While this might be read to include detention, it extended only to what was then a very geographically constrained, European-led, force; the Security Council never granted the same authorization to U.S. forces.

The emergency jirga met in June 2002, selecting Hamid Karzai to head the Transitional Authority. This development was "welcomed" by the Security Council which identified Karzai as the "Head of State," but it consistently referred to the "Transitional Authority" for the next few years, declining to call it the "Government of Afghanistan."[175]

ICRC legal expert Knut Dörman considers these events sufficient to mark the legal transition from international to non-international conflict in 2002.[176] Recognition of an Afghan head of state and assumption of functional government authority by Afghani nationals support this conclusion. But it can also be argued that the lack of an Afghan constitution and deliberate Security Council choice not to term the interim authority as the "Government" indicate that Afghanistan still lacked the necessary domestic legal structure to support a conflict transition at that point.

Subsequent events clearly evidence a conflict transition taking place at least by mid-decade. On May 1, 2003, U.S. Defense Secretary Donald Rumsfeld announced that "major combat" was over in Afghanistan.[177] In January 2004 a new Afghan constitution was adopted and in October Karzai was elected president in the first national election held since 1969; parliamentary elections took place the next year.[178] The Security Council dropped its use of "interim authority" and began referring exclusively to the "Government of Afghanistan" in its resolutions in March 2005.[179] On May

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[172] *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions,* UN Doc. S/2001/1154, 5 Dec. 2001

[173] S.C. Res. 1383, ¶ 1 (Dec. 6, 2001)(endorsing the Bonn Agreement).

[174] S.C. Res. 1386, ¶ 1 (Dec. 20, 2001)(authorizing establishment of the ISAF).

[175] S.C. Res. 1419, ¶ 2 (Jun. 26, 2002). *See also, e.g.*, S.C. Res. 1471 (Mar. 28, 2003); S.C. Res. 1536, (Mar. 26, 2004);

[176] Dörmann, supra note 114 at 354.

[177] Council on Foreign Relations, *supra* note5.

[178] *Id*.

[179] S. C. Res. 1589, ¶¶ 3, 4, 6-7, 12 (March 24, 2005), and all subsequent resolutions on Afghanistan use the term "Government of Afghanistan" when referring to the central authority..

23 of that year Bush and Karzai publicly issued a Joint Declaration defining the U.S.-Afghan strategic partnership. It confirmed that U.S. forces would have continued access to Bagram Air Base and have the "freedom of action required to conduct appropriate military operations based on consultations and pre-agreed procedures."[180] The language is consistent with U.S. forces operating by invitation in support of an Afghan government-led non-international conflict. The only reference to detention authority is a statement that "the Afghan Government intends to maintain capabilities for the detention, as appropriate, of persons apprehended in the War on Terror."[181] There is no mention of *any* independent U.S. detention authority, implicitly confirming that it no longer existed at that time.

B. Trump's Agreement With the Taliban as an Alternate Endpoint

While it initially seemed inconceivable that a conflict against Al Qaeda or the Taliban would see a peace agreement, the Trump administration did in fact strike a unilateral deal with the latter group. In a February 29, 2020 agreement concluded in Doha, Qatar on, the United States agreed to:

1. Withdraw all U.S. and coalition military forces and supporting civilians from Afghanistan within fourteen months – i.e., by May 2021;[182]
2. Have "up to" 5,000 Taliban prisoners released by March 10, 2020 in exchange for "up to" 1,000 government personnel held by the Taliban;[183]
3. Review U.S. sanctions against the Taliban with a goal of removing them by August 27, 2020;[184]
4. Engage in diplomatic efforts to get UN Security Council sanctions against the members of the Taliban ended by May 29, 2020;[185] and,
5. "Refrain from the threat or the use of force against the territorial integrity or political independence of Afghanistan or intervening in its domestic affairs."[186]

In exchange for the U.S. ending outside participation in the war and directing a prisoner exchange favoring it by a 5:1 ratio, the Taliban just promised "to prevent any group or individual, including al-Qa'ida, from

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[180] George W. Bush & Hamid Karzai, Joint Declaration of the United States-Afghanistan Strategic Partnership, 41 WCPD 863, 864, May 23, 2005, https://www.govinfo.gov/content/pkg/WCPD-2005-05-30/pdf/WCPD-2005-05-30-Pg863.pdf

[181] Id.

[182] Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America, Doha, Feb. 29, 2020, Part One B.

[183] *Id*., Part One C.

[184] *Id*., Part One D.

[185] *Id*., Part One E.

[186] *Id*., Part One F.

using the soil of Afghanistan to threaten the security of the United States and its allies."[187]

The Supreme Court has recognized presidential authority to legally bind the United States by reaching non-treaty "executive agreements" with foreign states based on his constitutionally implied "lead" role in foreign policy.[188] Although the Taliban was not a state – as the 2020 agreement plainly declares – Article II's explicit conferral of the Commander-in-Chief power on the president suggests an agreement of this type should be squarely within executive authority.[189]

The 1972 Case-Zablocki Act recognized presidential authority to conclude binding non-treaty agreements, just requiring that the Secretary of State:

> transmit to the Congress the text of any international agreement… other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.[190]

New York Times reporting suggests that the Trump administration promptly provided the agreement to Congress, including classified annexes spelling out the criteria for assessing Taliban compliance.[191] Further confirmation that the Trump administration had reported the agreement is found in the text of a proposed amendment to the 2021 National Defense Authorization Act. Drafted by Democratic Senator Robert Menendez and Republican Todd Young, it called upon the administration "to *continue* to

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[187] *Id*., Part Two.

[188] *See, e.g*., Dames & Moore v. Regan, 453 U.S. 654; Am. Ins. Assoc. v. Garamendi, 539 U.S. 396 (2003)

[189] See Agreement, supra note 182; U.S. CONST., Art. II, § 2, cl. 1.

[190] 1 U.S.C. § 112b(a).

[191] David E. Sanger et al., *U.S. Lawmakers Balk Over Secret Benchmarks Within Taliban Peace Accord*, N.Y. TIMES, Mar. 9, 2020, at A6.

submit…materials relevant to the February 29 agreement" to the "appropriate congressional committees."[192]

If the earlier transition from an international to a non-international conflict in Afghanistan somehow failed to end AUMF-derived detention authority, this agreement would logically have established the endpoint as being the timeframe that the U.S. was committed to cease all participation in Afghan hostilities – i.e., May 2020.

C. Constitutional Limits on Law of War Detention

There is no international mechanism able to compel U.S. compliance with law of war detention constraints. The United States no longer accepts the compulsory jurisdiction of the International Court of Justice and has previously ignored adverse decisions anyway.[193] Realistically, it thus would take a decision by one of the three U.S. government branches to produce that result. Congress could terminate the AUMF authority that provides the legal basis for detention, or use its power over the purse to cut off funding for Guantánamo.[194] The president could reach a peace accord as an executive agreement (as Trump seems to have done) or recognize the obvious facts on the ground and determine that the conflict had transitioned to a non-international status, or ended (as Biden did). In either case it would then be their responsibility as chief executive/commander-in-chief to order the end of detention in compliance with their constitutional mandate to "take care that the laws be faithfully executed" (as neither did).[195] In a conflict against an actual sovereign state, the president could negotiate, and the senate give its advice and consent to, an actual peace treaty. Alternatively, the federal courts could rule – most likely in response to a habeas challenge to a Guantánamo detention or military commission trial – that the previously recognized detention authority had run its course.

The presidential and congressional options would be political choices; and either Trump's 2020 deal with the Taliban or Biden's August 31, 2021 proclamation that "[l]ast night in Kabul, the United States ended 20 years of war in Afghanistan – the longest war in American history" should be

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[192] CONG. REC. S3229-30 (daily ed. June 24, 2020 (text of SA 1704) (emphasis added). Apparently no floor action on the admendment ever took place. *See* https://www.congress.gov/amendment/116th-congress/senate-amendment/1704.

[193] Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, in THE SWORD AND THE SCALES 46, 46 (Cesare Romano ed., 2009)

[194] *Id*., art I, § 9, cl. 7 (requiring congressional appropriations for federal expenditures); art I, § 8, cl. 11 (giving Congress the power to declare war). *See also* Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (discussing congressional authority and the AUMF's legal significance).

[195] *See* U.S. Const., art II, § 1, cl. 1; § 2, cl. 1; § 3.

considered dispositive.[196] This section, however, focuses on the basis for a judicial determination that detention authority has expired applying the limits identified by the Court in its 2004 *Hamdi v. Rumsfeld* decision.

This case had unique aspects. The detainee, Yaser Esam Hamdi, was a U.S. citizen by virtue of having been born in Louisiana. He was raised in Saudi Arabia before travelling to Afghanistan where he was captured – reportedly with rifle in hand – by the Northern Alliance, turned over to U.S. forces, and brought to Guantánamo in January 2002. After discovering he was an American, the military transferred him to the United States, where he ended up in the Navy brig in Charleston, South Carolina.[197]

Hamdi's citizenship and presence in the country required addressal of the "Non-Detention Act" providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[198] The result was a divided decision. Justice Thomas would have given the government essentially carte blanche to detain Hamdi without judicial review based on its unilateral determination that he was an enemy combatant.[199] At the other extreme, a joint dissent by Justices Scalia and Stevens argued that the government must either bring criminal charges, or suspend the writ of habeas corpus, to detain an American in the United States.[200] Justices Souter and Ginsberg took a more moderate approach, arguing Hamdi's detention was troublesome given the lack of explicit detention authority in the AUMF's and the U.S. failure to treat him as a POW in compliance with the Third Geneva Convention.[201]

But it was Justice O'Connor's plurality opinion became the opinion of the Court given Justice Thomas' concession of even broader detention authority. It held that the authorization of military force against the Taliban and al Qaeda included implied authority for the detention of opposing fighters which "'by universal agreement and practice' are 'important incidents of war.'"[202] The opinion noted that it was entirely non-punitive; serving only to prevent the detainee from further participation in hostilities.

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[196] The White House, Remarks by President Biden on the End of the War in Afghanistan, Aug. 31, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/ remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/.

[197] *Hamdi*, 542 U.S. at 510.

[198] 18 U.S.C. § 4001.

[199] *Id*. at 592-93 (Thomas, J., dissenting).

[200] *Id*. at 554 (Scalia, J., dissenting).

[201] *Id*. at xxx (Souter, J. concurring in part, dissenting in part, and concurring in the judgment).

[202] *Id*. at 518 (O'Connor, J. plurality opinion for the Court, quoting ex parte Quirin)

It stated that detained must be "treated humanely, and in time exchanged, repatriated or otherwise released"[203]

The opinion responded directly to concerns about "indefinite detention" becoming generational since the government acknowledged that the conflict "was unlikely to end with a formal cease-fire agreement."[204] The Court declared that "[i]t is a clearly established principle of the law of war that detention may last no longer than *active hostilities*," adopting the 1949 Geneva standard.[205] The Court thus held that as long as U.S. "troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."[206]

None of the justices took a very sophisticated approach to the law of war; no opinion addressed the distinctions between international and non-international conflict, or the impact that a transition would have on U.S. detention authority. But that transition almost certainly took place soon after Hamdi was decided, *if* it had not already done so.[207]

Federal courts might be reluctant to faithfully apply international law and recognize that unilateral U.S. Guantánamo detention authority ended at least fifteen years ago.[208] But as of August 2021, a presidentially authorized "peace agreement" had been concluded, and U.S. troops are no longer engaged in combat in Afghanistan. Moreover, the total collapse of the U.S.-supported Afghan government has ended the conflict entirely.[209] So by Hamdi's plain language, U.S. detention authority under the AUMF has now come to an absolute end.

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[203] *Id*. at 518-19 (O'Connor, J. plurality opinion for the Court, quoting *In re Territo*, 156 F.2d 142, 145 (C.A.9 1946)).

[204] *Id*. at 519-20 (O'Connor, J. plurality opinion for the Court, quoting the Brief for Respondents).

[205] *Id*. at 520, (O'Connor, J. plurality opinion for the Court, citing the Third Geneva Convention) (emphasis added).

[206] *Id*. at 521 (O'Connor, J. plurality opinion for the Court),

[207] *See* discussion in Part II A. 1. *supra*.

[208] A three judge panel of the D.C. Circuit Court of Appeals held in a 2010 case, Al-Bihani v. Obama, 590 F.3d 866, 871 (2010) that the "international laws of war" do not "act as extra-textual limiting principles for the President's war powers under the AUMF." a decision that seems to conflict with a multitude of Supreme Court cases dating back to the earliest days of the republic, but most relevantly two Supreme Court decisions related directly to post 9/11 detention and trials under the AUMF, *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) and *Hamdan v Rumsfeld,548 U.S. 557* (2006).

[209] E.g., David Zucchino et al., Kabul's Sudden Fall to Taliban Ends U.S. Era in Afghanistan, N.Y. Times, Aug. 16, 2021, https://www.nytimes.com/2021/08/15/world/asia/afghanistan-taliban-kabul-surrender.html?campaign.

D. Could There Be Separate Ongoing Conflicts Against Al-Qaeda et al

It may be tempting to argue that Guantánamo detention can continue beyond the end of active combat operations in Afghanistan because one or more separate U.S. conflict(s) remain ongoing. But that approach is flawed as a matter of both international and U.S. constitutional law.

1. International law precludes the existence of a U.S. v. al Qaeda conflict

The classic concept of Westphalian sovereignty is still the defining feature of international law in the twenty-first century, reflected in its bifurcation of armed conflicts into international and non-international. With only two exceptions inapplicable to al Qaeda – wars of national liberation or the recognition of belligerency – an international conflict requires at least one sovereign state on each side.[210] The "theater of war" is the national territory of the warring parties, and international waters and airspace. Principles of sovereignty bar conducting hostilities in the territory of non-participating states, absent a truly compelling self-defense justification; in that exceptional case limited interventions may be individually justified.[211] Modern conflicts are often complex, frequently involving one or more non-state parties in addition to the principal sovereign belligerents. But that does not alter the core requirement that there be states on both sides. The initial U.S. invasion of Afghanistan constituted an international conflict, which could be characterized as the U.S. v Afghanistan (the Taliban) + al Qaeda as an associated force. But since al-Qaeda is not a state, the United States cannot be in an international conflict against that group alone.[212]

Sovereignty also plays a core function in the law governing non-international conflicts. Common Article 3 of the 1949 Geneva Conventions, applies to conflict "in the territory of *one* of the High Contracting Parties."[213] It may be tempting to read that as "at least one," implying that a

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[210] *See e.g.*, SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, 10-20, 212-222 (2012) (discussing recognition of belligerency and wars of national liberation).

[211] The legality of self-defense interventions are determined by a separate body of law, the *jus ad bellum*, governing the resort to the use of force. *See, e.g.*, DINSTEIN, *supra* note 8.

[212] President Bush's February 2002 memo on the applicability of the Geneva Conventions, supra note 150, implied the existence of separate international conflicts against the Taliban and al-Qaeda. But that cannot have been correct as it says that al-Qaeda was not a state and thus could not be party to the treaties, which also means it cannot be a "party" to an international conflict, at most it might be able to participate alongside a co-belligerent state.

[213] 1949 Geneva Conventions, *supra* note 52, art. 3 (emphasis added).

non-international conflict can be transnational, but that would be inconsistent with the law's foundation. A defining feature of non-international conflicts is their situs in the sovereign territory of a state which enjoys a monopoly over the right to regulate the use of violence there. Whether the conflict is between that state and a non-state opponent – insurgents, rebels, dissident armed forces, etc.; or non-state groups battling each other – the local state's domestic law governs. It has the sole legal authority to determine who is authorized to use force, and how it wants to deal with the participants. It can decide, based on its own constitution and domestic legislation, whether to grant them full amnesty, preventatively detain them, detain and prosecute them as common criminals, or try them for treason.

This understanding is confirmed by Additional Protocol II's more recent language declaring its applicability to conflicts "which take place in the territory of *a* High Contracting Party" against an armed group that exercises control over part of its territory.[214] This again confirms the centrality of the state's sovereignty over its territory as an essential factor for the existence of a non-international conflict. Unless al-Qaeda or other non-state militant groups relocated to the United States, at best U.S. forces could be partners in a conflict against them with the country where they are found.[215] And the intervention must be with the permission of the local state, or else it would constitutes an act of aggression against it.[216] American efforts against al-Shabaab in Somalia, for example, make it a participant in a local conflict alongside that state, but cannot constitute a source of unilateral U.S. detention authority.[217]

International law poses a second distinct barrier to considering the United States to be in a non-international conflict against al Qaeda – the capabilities and actions of that group no longer reach the level at which it can be considered to be a participant in an armed conflict at all. Since the group was driven out of its Afghan camps and its leadership subjected to a series of "decapitation" strikes, it lacks the requisite degree of organization to qualify as a conflict participant. President Biden specifically declared in his remarks announcing the end of U.S. involvement in Afghanistan that "[a]l Qaeda was decimated" after the killing of Osama bin Laden a decade

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[214] AP II, *supra* note 61, art. 1, ¶ 1 (emphasis added). ,

[215] *See* Andrew Beshai, *The Boundless War: Challenging the Notion of a Global Armed Conflict Against al-Qaeda and Its Affiliates*, 48 LOY. L.A. L. REV. 829 (2015).

[216] Cite to discussion of the crime of aggression

[217] *See* Rob Wise, CSIS Case Study: Al Shabaab (2011), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110715_Wise_AlShabaab_ AQAM%20Futures%20Case%20Study_WEB.pdf (detailing the history of Al Shabaab and efforts to combat it

earlier.[218] Moreover, the group has failed to sustain the level of ongoing hostilities necessary to satisfy the continuing violence threshold for a non-international conflict either. It would lack credibly to assert that the United States could unilaterally bootstrap itself into a continuing armed conflict by periodically conducting aerial strikes with complete impunity on relatively ineffectual al Qaeda remnants.

2. U.S. constitutional considerations also preclude a separate conflict

Although the Cheney-led group providing the intellectual firepower for the launch of operations in Afghanistan and Iraq asserted an extraordinarily broad view of executive authority, President Bush exercised relative restraint. At the end of the day he sought, and received, explicit congressional authorizations for both interventions, consistent with the constitutional mandate that Congress has the power over deciding when and where the United States may use military force.[219]

It is thus ironic that his more liberal successor, and former constitutional law professor, Barack Obama, was responsible for more substantial expansions of U.S. use of force beyond its congressionally authorized limits.[220] The AUMF only authorizes military force against those responsible for 9/11 and those who harbored them.[221] If there was any initial doubt as to who it covered, that only meant more detective work might be required. It cannot fairly be read to allow future expansion to groups – like Al Shabaab, al Qaeda in the Arabian Peninsula, or ISIS – which did not exist on 9/11, let alone play any role. Since the "core" al-Qaeda is no longer capable of constituting an armed conflict adversary, the Constitution compels the same conclusion as international law does. Any residual law of war authority under the AUMF, including preventive detention, has ended with the end of the conflict in Afghanistan.

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[218] The White House, *supra* note 196.

[219] AUMF, *supra* note 2, Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. 107-243, 116 Stat. 1498; , Bradley & Goldsmith, *supra* note 194.

[220] *See* Charlie Savage, Eric Schmitt & Mark Mazzetti, *Obama Expands War With Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES Nov. 27, 2016 https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html.

[221] The operative paragraph, § 2. (a) reads in its entirety:

> (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organiza- tions, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

After considering the impact of the conflict's end on military commission trials in the next Part, Part IV will consider disposition options for the thirty-nine individuals remaining in Guantánamo detention at the time this Article was written.

III. THE IMPACT OF THE END OF THE AFGHAN CONFLICT ON THE GUANTÁNAMO MILITARY COMMISSION TRIALS

By any objective measure, the Guantánamo military commissions have not been a success.[222] In 2006 the Supreme Court found that their initial procedures failed to meet minimal law of war standards and halted them in *Hamdan v. Rumsfeld* before a single case had reached judgment.[223] Bush responded by transferring "high value" detainees to Cuba from previously undisclosed CIA "black sites" and demanding Congress authorize their trial, which it did in the 2006 Military Commissions Act (MCA).[224] But just three bit players were "convicted" over the next two years, and most of their charges would be invalidated by the D.C Circuit Court of Appeals.[225]
Obama was highly critical of the commissions, declaring that federal courts could better bring 'swift and sure justice to terrorists," so his election predicted their imminent demise. But he unexpectedly reinvigorated them, getting Congress to enact an updated 2009 MCA.[226] Five more cases were resolved during his tenure; all via plea deals.[227] As of September 2021, just four more cases, involving ten defendants, had gotten past the arraignment stage.[228]

The Office of Military Commission's annual budget appropriation now exceeds $130 million dollars a year – exclusive of military personnel costs which are borne by the parent services.[229] With only ten individuals facing charges, the commissions alone – not including detention costs – thus consume well over $13 million *per year per defendant*. And the five 9/11

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[222] *See, e.g*., Steve Vladeck, *It's Time to Admit That the Military Commissions Have Failed*, LAWFARE, Apr. 16, 2019, https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed

[223] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[224] JONATHAN MAHLER, THE CHALLENGE 298 (2008)

[225] Glazier, *supra* note 27, 911; Human Rights Watch, The Guantánamo Trials, https://www.hrw.org/guantanamo-trials#.

[226] BRAVIN*, supra* note 13 at 352-58 (describing Obama's commission decisions).

[227] Glazier, *supra* note 27, 911-12.

[228] Rosenberg, *supra* note 28

[229] Department of Defense, Fiscal Year 2022 President's Budget, Defense Legal Services Agency, 3-4 (May 2021). The FY 2022 request was for $130,324,000; the actual appropriation for FY 2020 was $131,142,000, and $106,666,000 for FY 2021 – a year in which the COVID-19 pandemic largely curtailed proceedings.

defendants have already been in the system for a decade and are still mired in pre-trial proceedings. The total price tag for two decades of commission operations must now be approaching $2 billion, for which they can show initial "convictions" for just eight defendants; six by plea agreement, and all the charges against four of them have now been repudiated by the D.C. Circuit Court of Appeals.[230] It thus seems odd that anyone would seriously advocate their continued use, particularly when better options exist for any cases that may legitimately be prosecuted.

U.S. federal courts, for example, can prosecute a range of war crimes, and actual terrorism offenses, with an American victim or perpetrator, including conspiracies and providing material support to terrorism (if the conduct took place in the United States after 1996, or abroad after 2004).[231] Although rarely, if ever, employed to date, the Uniform Code of Military Justice includes "any person who by the law of war is subject to trial by a military tribunal" within general court-martial jurisdiction.[232] So their use is theoretically possible for conduct constituting war crimes, although subject to the concerns discussed below in subpart C. 2.

Foreign courts should also have equivalent authority to that of the United States to prosecute offenses under international law– more if they adopt universal jurisdiction where that law permits. Moreover, any act of violence committed by an individual lacking belligerent immunity should be prosecutable as an ordinary crime under the law of the state where it took place and may also be triable by outside states depending on the nationality of the perpetrator or victim. The U.S. government thus may have significant extradition options in many cases, in addition to its own ability to prosecute. There are thus unlikely to be any actual crimes that a Guantánamo commission defendant might have committed that would not also be triable in at least one other more credible forum.

If practical considerations are insufficient reason for the United States to finally move on from the Guantánamo commissions process, the legal issues assessed in this Part should be. While the commissions' legitimacy was subject to question even while the Afghan conflict continued, their post-hostilities legality is far more dubious under both international and U.S. law. This Article focuses on the impact of the end of hostilities on Guantánamo detention and trials. The author stands by previous arguments that the commissions fail to meet key domestic and international legal requirements for wartime trials, and potentially constitute the actual war

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[230] New York City Bar, Converting Guantánamo Bay Military Commissions Into an Article III Court, May 2020.

[231] See 18 U.S.C. § 2441 (codifying war crimes); 18 U.S.C. xxx-xxx (add cites to terrorism crimes).

[232] 10 U.S.C. § 818.

crime of "denial of a fair trial."[233] This Part considers only *additional* issues posed by the end of active hostilities and detention authority.

As discussed in Part II, a state's detention authority can end even before actual hostilities do. This can happen with respect to specific individuals no longer posing the requisite threat, or across the board due to a change in conflict classification, shifting detention authority from the law of war to the local state's domestic law. This Part first examines the legal impact that loss of law of war detention authority should have on wartime trials, before considering the additional ramifications that the overall end of hostilities has for the Guantánamo commissions.

It is worth reiterating that authority to prosecute serious wartime misconduct does not end with the termination of law of war-based preventive detention. The Third Geneva Convention states that even an actual POW need not be repatriated for either medical considerations, or at the end of active hostilities, *if* criminal proceedings are "pending," or they have been convicted of "an indictable offense" and have not completed serving their sentence.[234] The ICRC's commentary explains that the treaty language was deliberately chosen. Pending means prosecution efforts must actually be underway; an individual cannot be retained to face charges yet to be brought.[235] And the use of the term "indictable offense" serves to exclude minor crimes; e.g., what Americans would call a misdemeanor.[236] But there are significant ramifications in terms of how those trials may be conducted and what legal standards are used to judge them.

A. Extradition as an Alternative to U.S. Post-Hostilities Trials

If an individual is retained for prosecution after non-punitive law of war detention authority has ceased to apply, it logically follows that there must be a fundamental transformation of the legal regime they are held under to that of criminal law. This explains the requirement for prosecution efforts to actually be underway – there would be no legal basis to detain someone on

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[233] *See generally* Glazier, *supra* note 27 (providing a comprehensive critique of the post-MCA 2009 commission shortcomings).

[234] Geneva III, *supra* note 53, arts. 115 (addressing POWs otherwise eligible for repatriation or transfer on medical grounds), 119 (addressing POWs at the close of hostilities).

[235] International Committee of the Red Cross, Commentary on the Third Geneva Convention, § 4513 (2020). Although the word pending can imply something that is going to happen in colloquial use, Black's Law Dictionary defines it as "Begun, but not yet completed ; unsettled; undetermined ; in process of settlement or adjustment. Thus, an action or suit is said to be "pending" from its inception until the rendition of final judgment." The Law Dictionary, https://thelawdictionary.org/pending/

[236] *Id*., § 4511.

mere suspicion, or possibility of future charges. Unless the detaining power has actual authority to transfer the individual to its criminal jurisdiction and hold them under national law, the law of war requires their repatriation.[237]

There is another possibility not specifically addressed in law of war rules, however. If a detainee is wanted for criminal prosecution by a third country, and the power holding them has the necessary legal authority to extradite to that requesting state, it could arguably overcome the default obligation to repatriate the detainee. The Third Geneva Convention language addressing retention for post-hostilities trials does not explicitly limit that authority to the detaining state.[238] So it should not be a categorical bar to extradition if charges are actually pending.[239]

The Third Convention does mandate that its protections apply until a prisoner's "final release and repatriation."[240] But Article 12 allows for POW transfer if the destination state is a Convention party and agrees to apply it. Articles 103 and 108 explain what that means for individuals detained to face pending charges and those already serving a sentence, respectively. The former must be held in a POW camp or jail; they cannot be sent to an actual prison or penitentiary; the latter are to be confined in "the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power."[241] In either case the detainee retains the right to make complaints about their treatment, to be visited by the Protecting Power or ICRC, and to send and receive letters.[242]

A country would be on the strongest footing extraditing rather than repatriating a detainee when complying with a treaty imposing a specific obligation to prosecute or extradite (*aut dedere aut judicare*). Examples of the these agreements include the 1984 Convention Against Torture and the 1997 International Convention for the Suppression of Terrorist Bombings.[243] In these cases there is a very strong argument that the legal

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[237] There would be no legal barrier to seeking their extradition back once charges had been lodged, *if* erstwhile enemies were willing to cooperate.

[238] Geneva III, *supra* note 53, art. 119.

[239] This issue arose in the case of Panamanian General Manuel Noreiga, captured during the 1989 U.S. invasion, brought to the United States, and convicted of drug offenses. The U.S. acknowledged his claim to POW status, but extradited him to France to face criminal charges there rather than repatriating him to Panama.at the end of his federal sentence. *See* Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009).

[240] Geneva III, *supra* note 53, art. 5.

[241] Geneva III, *supra* note 53, arts. 103, 108. In the United States, that could be a military correctional custody facility, the United States Disciplinary Barracks at Fort Leavenworth, or a regular federal prison, depending on the time to be served.

[242] Geneva III, *supra* note 53, arts. 78, 98, 108, 126.

[243] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 TIAS 94-1120, 1465 U.N.T.S. 85; International convention for

principle that a law governing "a specific subject matter overrides a law that only governs general matters" (*lex specialis derogat legi generali,* or *lex specialis* for short) applies.[244] The extradition obligation for the crime(s) addressed in the applicable treaty is arguably a more specialized rule, taking precedence over the general law of war mandate for detainee release at the end of hostilities.

Regardless of where an individual is tried after their detention has transitioned to post-conflict authority, additional fair trial mandates will predictably come into play.

B. Additional Legal Constraints on Post-Hostilities Trials

The 1949 Geneva Conventions were ahead of their time in providing fair trial standards while human rights law was still aspirational. It thus made sense that both POWs and civilian protected persons were covered by the treaties until their final release.[245] This ensured states could not gain unfair advantage by transferring them from law of war detention to a domestic law regime outside any international legal regulation.[246]

Today, however, human rights law offers at least equivalent, and often greater, protections than the law of war; and it is logically now the *lex specialis* when an individual is retained to face post-hostilities prosecution under national criminal law processes. Since Geneva rules will continue to apply to many persons in this situation, their fair trial standards should provide a floor – minimum standards that any prosecution must meet. But states should *also* have to satisfy any higher standards found in international human rights law or the domestic law being used to conduct the trial.

The transformation of detention authority to a criminal law-based scheme would have substantial impact on the Guantánamo commissions. Both international law and U.S. constitutional standards imposing additional legal constraints on government conduct would come into play.

1. Speedy Trial Considerations

The initial vision of military commissions providing expeditious trials has proven to be a cruel hoax. In September 2006 Bush bemoaned that families of 9/11 victims had waited five years for justice and insisted that

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the suppression of terrorist bombings. Adopted at New York December 15, 1997, entered into force May 23, 2001, for the United States July 26, 2002, TIAS 02-726.

[244] *See, e.*g, U.S. Legal, Lex Specialis Law and Legal Definition, https://definitions.uslegal.com/l/lex-specialis/

[245] Geneva III, *supra* note 53, art. 5; Geneva IV, *supra* note 53, art. 6..

[246] *See* International Committee of the Red Cross, supra note 235, § 1105.

they "should have to wait no longer."[247] But continued reliance on a glacial military commission process has left them still waiting – twenty years after their losses – to see an actual trial![248]

There has been less concern about any rights that defendants might have. From a practical perspective, there has been little reason to date for any defense objections to delays. When the conflict lacked any discernable endpoint, it was senseless for those facing serious charges to be in any hurry to see their trials completed. Moreover, the defense teams have had to litigate fundamental issues about the commissions' fairness, contest prosecution efforts to admit torture-tainted evidence, and compel the production of required disclosures. The prosecution must thus bear substantial responsibility for these delays.[249]

The MCA exempts the commissions from the "speedy trial" mandates for courts-martial.[250] This may not violate international law; while the Third Geneva Convention requires that POW "trial[s] shall take place as soon as possible," the U.S. denies that Guantánamo detainees qualify for its protections. Fair trial standards in the Additional Protocols *are* more likely to apply, but, neither actually mandate speedy trials.[251]

Once detention is decoupled from the law of war regime, however, timing becomes more significant. A prompt trial is now a core human right, reflected in the maxim, "justice delayed is justice denied."[252] The United

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[247] The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sep. 6, 2006, archived at https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

[248] A Pacific Council report based on live Guantánamo observations over a number of years evidences a number of causes for the delays, and notes how the anticipated trial dates have continuously failed to pan out. Pacific Council on International Policy, Up to Speed, 7- 11, Feb. 2016, (including a quote from the Los Angeles Times that "Neither side seems all the eager to go to trial)
https://www.pacificcouncil.org/sites/default/files/related_resources_ Files /Up%20to%20Speed%20-%20GTMO%20Task%20Force%20report%20-%20Feb% 202016_0.pdf

[249] *See, e.g*., ABA, Federal Government Unsuccessfully Seeks to Reinstate Rulings in al-Nashiri Military Commissions Proceeding, Dec. 1, 2019, https://www.americanbar.org/ groups/committees/death_penalty_representation/project_press/2019/year-end-2019/ federal- government-unsuccessfully-seeks-to-reinstate-rulings-in-/; see also See, e.g., Amos N. Guiora & Laurie R. Blank, *Don't Deny Detainees Their Day in Court*, op-ed, L.A. TIMES, Jan. 4, 2011, available at http://articles.latimes.com/2011/jan/04/opinion/la-oe-guiora-detention-20110104.

[250] MCA 2009; § 948b. (d) (A).

[251] Additional Protocol I, *supra* note 58, art. 75; Additional Protocol II, *supra* note 61 art. 6.

[252] AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW, Chapter 6, § 1, fn 1 (attributing the quote to W. E. Gladstone, British Prime Minister in the late 1800s.)

States was a global leader, enshrining the right to a "speedy and public trial" in the Sixth Amendment 230 years ago.[253] The 1996 International Covenant on Civil and Political Rights (ICCPR) declared that anyone "detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release."[254] Similar language is now found in regional American, European, and African accords as well as "in the statutes of the ICC and other international criminal courts and tribunals."[255] Although U.S. officials argue that the ICCPR does not apply to Guantánamo based on a quirky treaty construction, the speedy trial right is now almost certainly customary international law which would.[256] European human rights bodies were willing to find that the plodding Guantánamo commission process constituted fair trial violations even during the preventive detention era.[257] It now becomes much more likely that U.S. courts would also do so.

The Inter-American Court of Human Rights has held that victim's relatives also have a right to exert speedy trial claims.[258] That could add a new layer of litigation to a process already hopelessly bogged down and give rise to defense counter claims if proceedings were rushed to their detriment; international law gives fairness precedence over timing;[259] So the ironic consequence of recognizing speedy trial rights might be to further slow commission proceedings.

It is widely agreed that speedy trials are more critical when defendants are held in pre-trial detention. International criminal tribunals are infamous for the time necessary to complete their complex trials but do seriously consider speedy trial challenges.[260] The Appeals Chamber of the International Criminal Tribunal for Rwanda has even ordered the

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[253] U.S. CONST., amend. VI,

[254] International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]., art. 9, ¶ 3

[255] CLOONEY & WEBB, *supra* note 252, Chapter 6, § 3.

[256] *See, e.g*., Judge Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 BERKELEY J. INT'L L. PUBLICIST 1, 4-5 (2009)(highlighting, inter alia, that Art. 14 of the ICCPR is now CIL; ¶ 3. (c) provides the right "to be tried without undue delay."). CLOONEY & WEBB, *supra* note 252, Chapter 6.

[257] CLOONEY & WEBB, *supra* note 252, Chapter 6, 5.1.2.2.

[258] *Id*., Chapter 6, § 4.2.

[259] *Id*., Chapter 6, § 6.

[260] *See* Jean Galbraith, THE PACE OF INTERNATIONAL CRIMINAL JUSTICE, 31 Mich. J. Int'l L. 79 (2009) (analyzing international criminal tribunal case timing); CLOONEY & WEBB, *supra* note 252, Chapter 6, § 3 (discussing speedy trial issues at recent international tribunals).

"unconditional immediate release" of an accused genocidaire because his core "rights were violated by his prolonged detention without trial."[261]

2. Pre-trial release consideration

Although the idea of encountering an individual charged with a serious crime enjoying a hamburger at the Guantánamo McDonald's or sunning at a community pool seems farfetched, anyone held under a criminal law regime has a right to be considered for pre-trial release. This is implied in the Constitution's prohibition against excessive bail and explicit in U.S. Code.[262] It is recognized in U.S. military law where pre-trial detention is at least formally the exception.[263] And it is mandated in human rights treaties; the ICCPR, for example, provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.[264]

Even at the ICC, established to try "the most serious crimes of international concern," defendants have the "right to apply for interim release pending trial."[265] Several requests have been granted for individuals charged with offenses related to obstruction of justice, although not for anyone charged with the serious substantive offenses to date.[266] It may not have previously been necessary for commission judges to consider pre-trial release requests. But this is now logically a requirement for any post-hostilities trials.

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[261] International Criminal Tribunal for Rwanda, Press Release, *Appeals Chamber Orders Release of Accused Barayagwiza*, Nov. 4, 1999, available at https://unictr.irmct.org/en/news/appeals-chamber-orders-release-accused-barayagwiza

[262] U.S. CONST., amend. 8; 18 U.S.C. § 3142.

[263] *See, e.g.*, DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE § 5.9 (8th ed. 2012)

[264] ICCPR, *supra* note , art. 9 ¶ 3.

[265] Rome Statute, supra note , arts. 1, 60 ¶ 1.

[266] *See, e.g.*, International Criminal Court, Press Release, ICC Pre-Trial Chamber A Grants Interim Release to Paul Gicheru, Jan. 29, 2021, https://www.icc-cpi.int/Pages/item.aspx?name=pr1562; Diletta Marchesi & Chiara Fusari, *"To Release or not to Release, that is the Question": Detention Pending Trial at the International Criminal Court after the Gicheru Case*, EJIL Talk, Mar. 8, 2021, https://www.ejiltalk.org/to-release-or-not-to-release-that-is-the-question-detention-pending-trial-at-the-international-criminal-court-after-the-gicheru-case/.

3. Right to consular access

The law of war assumes the absence of diplomatic relations between international conflict parties and thus relies on neutral third states ("Protecting Powers") and ICRC representatives as intermediaries between belligerent states and to monitor detainee matters.[267] The "war on terror," is unique in that the non-state adversaries represented a broad spectrum of nationalities, and the United States has normal diplomatic relations with almost all of them. Citizens of 47 different countries have been detained at Guantánamo; including nationals of Australia, Belgium, Britain, Canada, China, Denmark, France, Russia, and Spain.[268] The 39 still held in 2021 included nationals of a dozen countries plus one stateless Rohingyan.[269]

While the U.S. ultimately elected to allow ICRC access to Guantánamo detainees, it has restricted state contact while showing unique favor to its closest allies, including Australia, Britain, and Canada.[270] The Inter-American Commission on Human Rights reports that at least one Saudi detainee has been denied communication with his government which both that state and the detainee want.[271]

The right of a state to protect its nationals is a fundamental principal of international law.[272] The Vienna Convention on Consular Relations recognizes the *right* of consular officials "to visit a national . . . in prison, custody or detention . . . and to arrange for his legal representation."[273] It goes on to recognize a consular right to visit nationals "in prison, custody or detention *in their district* in pursuance of a judgment."[274] But there is no geographic restriction concerning pre-trial access, so there is a strong argument for mandatory foreign state access to their nationals facing post-hostilities trials, even if they take place at Guantánamo.

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[267] *See, e.g.* UK MINISTRY OF DEFENCE, *supra* note 33, §§ 16.11 – 13.1.

[268] *See* N.Y. Times, *supra* note 10.

[269] *See* N.Y. TIMES, *supra* note 10.

[270] *See, e.g.*, Leigh Sales, Detainee 002: the Case of David Hicks (2007) (describing Australian government access to its national); Timeline: Guantánamo Bay Britons, BBC, Jan 27, 2205, http://news.bbc.co.uk/2/hi/uk_news/3545709.stm. State access has not always been in the detainee's actual interests. Ian Austen, *Canada Apologizes and Pays Millions to Citizen Held at Guantánamo Bay* Jul. 7, 2017, https://www.nytimes.com/2017/07/07/world/canada/omar-khadr-apology-guantanamo-bay.html

[271] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, TOWARDS THE CLOSURE OF GUANTÁNAMO, ¶ 248 (2015)

[272] Add cite to treatise

[273] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, art. 36 ¶ 1. (c).

[274] *Id*.

4. Credit for time spent in pre-trial detention

The unique nature of the Guantánamo military commissions leaves both lawyers and judges grappling with what rules should apply. One area of particular uncertainty has been time spent in pre-trial detention. The first commission case, David Hick's plea deal, saw a sentence of seven years with six years and three months "suspended," but no credit for time served despite prolonged isolated confinement.[275] In the first contested trial, that of Salim Hamdan, the judge decided that his initial two years were law of war detention, but gave him credit for the subsequent sixty-one months of confinement after being charged.[276] The panel then sentenced him to a total of sixty-six months, leaving just five months to serve, but the judge conceded that he didn't know if Hamdan would actually be released at the end of his sentence or returned to preventive detention.[277]

The MCA is silent on this issue, but the amplifying Manual for Military Commissions has barred credit for time served since at least 2010.[278] But both the Third and Fourth Geneva Conventions mandate credit for any time spent actually confined, as compared to being held in communal camp living, before trial. The 2019 Manual at least lets the defense raise "the nature and length of pretrial detention as a matter in mitigation." [279] This is helpful given the horrendous treatment many Guantánamo detainees – particularly those held by the CIA – were subjected to before ever being

[275] *See* SALES, supra note 270, 152-54 (discussing detention conditions); 275 (reprinting plea agreement including provision that all pre-trial time was law of armed conflict and not criminal detention).

[276] BRAVIN, *supra* note 13, 340-41 (2013).

[277] *Id*. at 342-43. To the government's credit, Hamdan was subsequently repatriated to Yemen in time to serve the final month of his sentence there. Carol Rosenberg, *Hamdan, bin Laden's Driver, Makes It Back to Yemen*, Nov. 26, 2008 at https://www.mcclatchydc.com/news/nation-world/world/article24512221.html. On the other side of the coin, the sole charge he was convicted on – providing material support to terrorism – was subsequently invalidated by a Republican-appointed three judge panel of the D.C. Circuit Court of Appeals in an opinion written by Judge Brett Kavanaugh. BRAVIN, *supra* note 13, 377-80. So he should not have served *any* time.

[278] See Stevie Moreno Haire, Comment, *No Way Out: The Current Military Commissions Mess at Guantánamo*, 50 Seton Hall L. Rev 855, 859 (2020) (quoting 2010 Manual for Military Commissions but incorrectly identifying it as a congressional enactment).

[279] *See* Department of Defense, Manual for Military Commissions, II-131(2019).

charged.[280] And one commission judge decided that they can award sentence credit for detainee maltreatment *per se*.[281]

Post-conflict trials should be *mandated* by domestic and international law to give credit for pre-trial detention.[282] Time spent in actual preventative law of war detention need not be credited under a literal reading of most applicable law. But Guantánamo was effectively a prison rather than a "camp" for all detainees initially, and for the "non-compliant" after that.[283] Courts should therefore give sentence credit for *any* time a detainee was held in an individual cell, and all time in CIA custody, rather than just the time after charges were lodged. Additional credit is logically appropriate as mitigation for documented abuse as well.

5. Mandatory release upon acquittal or sentence completion

The fact that Hamdan's judge was unsure if he would be released reflects the fact that international law treats preventative detention and criminal punishment as separate matters. Since the government resolved most cases via plea bargains, delivering on repatriation promises was essential to motivate other detainees to accept deals. But it is perfectly lawful for a POW or civilian internee to be subjected to disciplinary, or judicially imposed, confinement for specific wrongdoing and then returned to a communal preventive detention camp if hostilities are still ongoing and the individual is fairly considered to remain a threat. But the end of hostilities obviously now mandates prompt release upon an acquittal or dismissal of charges, and at the end of any criminal sentence.

6. Equality Before the Law

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[280] *See, e.g.*, Carol Rosenberg, *What the C.I.A.'s Torture Program Looked Like to the Tortured*, N.Y. TIMES, Dec. 4, 2019 https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html.

[281] Carol Rosenberg & Julian E. Barnes, Guantánamo Detainee Agrees to Drop Call for C.I.A. Testimony, N.Y TIMES, May 14, 2021, https://www.nytimes.com/2021/05/14/us/politics/guantanamo-detainee-cia-testimony.html. The detainee who received this ruling, Majid Khan, agreed to have it vacated in exchange for a plea deal. *See* John Ryan, *Guantánamo Detainee Majid Khan Poised for Sentencing and Release After July Hearing*, LAWDRAGON, Aug. 4, 2021 https://www.lawdragon.com/news-features/2021-08-04-guantanamo-detainee-khan-poised-for-sentencing-and-release-after-july-hearing..

[282] *E.g.*, 18 U.S.C. § 3585 ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences [as a result of pending charges]"); Rome Statute, supra note , art. 78, ¶ 2..

[283] Ben Fox, Guantánamo Detainees Are Given Chance To Garden, AP, Mar. 11, 2007 (reporting just 35 out of 385 detainees were living in communal camp conditions).

The Guantánamo commissions' role – dispensing a lower standard of justice suitable only for foreigners should be a fatal defect in the post-hostilities era. Despite making some improvements in the two MCAs, Congress has still limited their jurisdiction to "alien unprivileged enemy belligerent[s],"[284] implying their "rough justice" is too substandard for either Americans or ordinary criminals.

This approach is ahistorical; the military commission was created in 1846 by General Winfield Scott in order to gain jurisdiction over American military offenders in Mexico for common crimes outside the court-martial's statutory jurisdiction.[285] All prior iterations could try Americans, and the Supreme Court specifically upheld both their law of war and military government jurisdiction over U.S. citizens in World War II era decisions.[286] For wartime trials the commissions' restriction to non-citizens would be an immediate showstopper if the defendants were POWs since the Third Geneva Convention explicitly limits their trial to "the same courts according to the same procedure" used to try the state's own personnel.[287]

International human rights law, however, calls many commission aspects, including particularly disparate treatment based on nationality, into serious question. The principle of equality before the law dates back at least to Magna Carta in England (1215) and the Treaty of Arbroath in Scotland in 1320.[288] The first modern human rights document is the May 1948 American Declaration of the Rights and Duties of Man, predatings the better known Universal Declaration of Human Rights by seven months.[289] In its resolution adopting the Declaration, the Ninth International Conference of American States noted that "[we] have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality. . . ."[290] The Declaration's preamble begins "All men are born free and equal" while Article II declares that "[a]ll persons are equal before the law." Although disputed by the U.S. Government,:

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[284] 10 U.S.C. § 948c.

[285] Glazier, *supra* note 121, 2027-32.

[286] Ex parte *Quirin*, 317 U.S. 1 (1942) (upholding law of war jurisdiction over a U.S. citizen; *Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding military government court jurisdiction over U.S. civilian for murdering her husband in occupied Germany).

[287] Geneva III, *supra* note 52, art. 102. This is not a specific requirement for trying civilians of those covered by Additional Protocol I's Article 75, however.

[288] Judge Patrick Robinson, The Right to a Fair Trial in International Law, With Specific Reference to the Work of the ICTY, 3 BERKELY J. L INT'L L. PUBLICIST 1, 2 (2009).

[289] *See id*. at 4.

1. [290] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *available at* http://hrlibrary.umn.edu/oasinstr/zoas2dec.htm.

> According to the well-established and long standing jurisprudence and practice of the inter-American system . . . the American Declaration is recognized as constituting a source of legal obligation for [Organization of American States (OAS)] member states, including in particular those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of Member States under the OAS charter.[291]

The U.S. is an OAS member state that has not ratified the American Convention and the Inter-American Commission on Human Rights has used this interpretation to call out the United States for its disparate treatment of the Guantánamo detainees, including specifically the use of the discriminatory military commissions, as Declaration violations.[292]

This concept of equality was also incorporated in the Universal Declaration on Human Rights. [293] And it is now codified in the legally binding ICCPR, which proclaims "All persons shall be equal before the courts and tribunals."[294]

Experts debate the applicability of human rights law to armed conflict; most seem to agree that it should at least apply where there are gaps in specific law of war rule coverage. Those questions should now be moot with respect to Guantánamo, however, as the end of active hostilities in Afghanistan leaves no relevant conflict for law of war rules to apply to. At most that leaves room only for the residual post-conflict application of the Third and Fourth Geneva Convention provisions previously discussed, *if* they applied to the Guantánamo detainees – which the government denies.[295] International human rights law thus logically now constitutes the *lex specialis* by which the legality of any detention and trials should be judged. And by that law, the commissions' unequal application only to non-citizens should be fatal to their legitimacy.

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[291] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 271, ¶ 18 (2015)

[292] Id., ¶¶ 213-250; Inter-American Commission on Human Rights, Press Release, IACHR Publishes Report: "Towards the Closure of Guantánamo," Aug. 5, 2015, https://www.oas.org/en/ iachr/media_center/PReleases/2015/085.asp.

[293] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html. Article 7 declares "All are equal before the law and are entitled without any discrimination to equal protection of the law" while Article 10 proclaims "Everyone is entitled in full equality to a fair and public hearing . . . of any criminal charge against him."

[294] ICCPR, *supra* note , art. 14 ¶ 1.

[295] *See, e.g.*, Bush, *supra* note 150.

C. Constitutional Considerations and Post-War Criminal Trials

The Constitution provides only two vehicles for criminal trials. Article III establishes federal courts, explicitly providing for jury trials of crimes.[296] Article I lets Congress "make Rules for the Government …of the Land and Naval forces," implicitly authorizing courts-martial given their Revolutionary War use.[297] Although the Continental Congress largely copied the proven British Articles of War, a 1776 enactment expanded U.S. court-martial jurisdiction to include foreigners "lurking as spies."[298] Spying is a unique wartime offense wholly distinct from the federal crime of espionage; the perpetrator must be caught in the act, successfully rejoining their own forces confers complete immunity.[299] Congress copied the Revolutionary War language into the Articles of War (and ultimately the Uniform Code of Military Justice) reenacted under the Constitution, so this use is presumably "grandfathered."[300]

The same cannot be said of the military commission since they were only created during the 1846 Mexican War; they are thus "exceptional" tribunals, outside the scope of normal constitutional criminal trial authority.[301] They were invented as jurisdictional gap-fillers, allowing commanders to try crimes, and in some cases perpetrators, outside the statutory jurisdiction of any regular tribunal.[302] Determining their underlying constitutional authority is complicated by the fact that they have been used in three distinct roles: (1) as occupation law, or military government, courts in foreign territory; (2) as law of war tribunals; and, (3) as martial law courts in national territory.[303]

Guantánamo is leased from Cuba and not under wartime occupation, so that rules out the first use. And it is not under martial law, but in any event

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[296] U.S. CONST. art III, § 1, § 2 cl. 3.

[297] *Id*., art. I, § 8, cl. 14.

[298] Resolution of the Continental Congress (Aug. 21, 1776), in 5 JOURNALS OF THE AMERICAN CONGRESS 1774 TO 1779 693 (1906).

[299] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, 241-45. (2010). Espionage offenses are found with general federal crimes in Chapter 37 of U.S. Code Title 18; 18 U.S.C. §§ 792-99. Spying, as the concept is defined by the law of war, is addressed in UCMJ punitive article 103, 10 U.S.C. § 903 which applies to "Any person," not just those ordinarily subject to U.S. military law, but its application is only explicitly limited to "time of war.".

[300] *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission,* 46 VA J. INT'L L. 5, 20-23 (2005) (providing history of court-martial authority to try spies).

[301] Hamdan, 548 U.S. 590-91.

[302] *See* Glazier, supra note 121, 210.

[303] *See* David Glazier, *The Misuse of History, Conspiracy and the Guantánamo Military Commissions,* 66 Baylor L. Rev. 295, 300-301 (2014).

Ex parte Milligan held that the Constitution prohibited this use when U.S. civil courts were open.[304] The legitimacy of the Guantánamo trials thus depends on their qualifying as law of war tribunals, a role considered by key Supreme Court decisions discussed below. This section will sequentially examine the legitimacy of using law of war military commissions, courts-martial, and regular federal courts for post-hostilities trials of individuals currently held at Guantánamo.

1. Post-hostility use of military commissions to try Guantánamo Detainees

Military commission use to try law of war violations was considered in several World War II-era cases establishing relevant precedent. The first stemmed from the June 1942 landing of eight Nazi saboteurs on the U.S. East Coast. Coming before American victory was assured, news of the arrests provoked public outrage.[305] Although federal courts were open, there was no law that could result in more than a few years in prison.[306] Roosevelt wanted death sentences and Attorney General Francis Biddle – despite his reputation as a civil libertarian – proposed trial by a military commission making its own procedural rules.[307] As Cheney would later do with Bush, Biddle communicated directly with Roosevelt, getting him to sign a military order convening the commission and purportedly barring judicial review.[308]

Despite (or perhaps because of) the effort to deny its authority, the Supreme Court assembled during its summer recess just to hear this case. It upheld the trial as an "important incident to the conduct of war" authorized by congressional war powers, coupled with its authority over military law, and the define and punish clause.[309] But the Court held that its validity required that a recognized law of war violation be charged, and dedicated several pages to demonstrating that the saboteurs conduct qualified.[310] Quirin also held that the commission could try a U.S. citizen since association with the enemy made them belligerents subject to the law of war.[311] So at least it did not discriminate based on nationality.

The approval of a trial taking judicial shortcuts has not fared well historically; Justice Scalia observed that Quirin "was not this Court's finest

[304] *Ex p*arte Milligan 71 U.S. (4 Wall.) 2 (1866).
[305] MICHAEL DOBBS, SABOTEURS 221-24 (2004)
[306] *Id*. at 200.
[307] *Id*. at 199-200.
[308] *Id*. at 203-05
[309] Quirin, 317 U.S. at 10-11.
[310] Id. at 12 – 15.
[311] See id. at 15-16.

hour."[312] But by confirming judicial authority in defiance of the presidential order, it laid the essential foundation for post-9/11 consideration of *Hamdi* and *Hamdan*.

The 1945 U.S. trial of the last Japanese commander in the Philippines, General Tomoyuki Yamashita, was also highly controversial.[313] Japanese forces committed horrific atrocities in the final months of the war, and Yamashita was condemned to hang after Japan's surrender for having failed to suppress them.[314] Although upholding the verdict, the Court again confirmed clear limits on military commission use, holding that the trial was only authorized if "the charge preferred against him is of a violation of the law of war."[315] Together with Quirin, the decision suggests that the "define and punish" clause is limited by the actual content of international law. *Yamashita* held that a law of war commission could only be appointed by a "field commander, or by any commander competent to appoint a general court martial" – casting doubt on Guantánamo's civilian appointing authorities.[316] The most significant new holding responded to defense challenges to conducting a law of war trial after the Japanese surrender.[317] The Court agreed that law of war tribunals were limited to wartime, but – consistent with the international law of that day – held that a state of war existed from "its declaration until peace is proclaimed."[318] This made eminent sense when POWs could be detained until formal conclusion of a peace agreement; it would be perverse if the U.S. military could detain a war criminal in a camp but could not prosecute them and send them to a prison. But today Yamashita's limit of jurisdiction to time of war should equate to that authority ending with the close of active hostilities, just like detention authority.

The Hamdan Court confirmed that the military commission is not a penal tribunal contemplated by the Constitution, and can be supported only – if at all – based on "powers granted jointly to the President and Congress *in time of war.*"[319] It surely offends the Constitution to allow exceptional military courts to conduct trials when human rights and regular domestic law are fully applicable, and federal criminal law now provides fully adequate – indeed legally superior – authority to do what is needed.

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[312] Hamdi, 542 U.S. (Scalia, J. dissenting)

[313] *See* ALAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY (2012); *In re* Yamashita, 327 U.S. 1 (1946).

[314] U.K. Ministry of Defence, supra note , ¶¶ 16.36 – 36.6.

[315] 327 U.S. 13-18.

[316] I*d*. at 10; *see* Glazier *supra* note 27 at 925-28.

[317] 327 U.S. at 6.

[318] *Id*. at 12.

[319] Hamdan, 548 U.S. at 591 (emphasis added).

2. Courts-martial as a potential forum for Guantánamo detainees

In 1913 Congress moved beyond just spies and adopted language drafted by Army Judge Advocate General Enoch Crowder placing "any person who by the law of war is subject to trial by a military tribunal" within the jurisdiction of a general court-martial.[320] That language has carried over into the current Uniform Code of Military Justice (UCMJ) so it could remain an option today. It has rarely been used, however and the wording does not specify whether it is limited to wartime or not. But since the law of war can only authorize military trials while it is applicable – i.e., during wartime, and the impetus for the language was its author's Philippine Insurrection experience, a wartime limitation is surely implied.[321] Given U.S. courts-martial's authority to try war crimes, and the Third Geneva Convention's mandate for POW trials "by the same courts" as the country's own troops,[322] they initially seemed to be a viable commission alternative. Their selection after 9/11 might have headed off most subsequent criticism. It would have been hard for Americans to argue that "terrorists" deserved more due process than our own military personnel. And their implicit Geneva Convention endorsement would similarly have chilled international criticism. Before we knew who would be facing trial, many commentators, including this author, advocated their use, or military commissions fully compliant with their procedures, rather than allowing the judicial shortcuts favored by the administration.[323]

There would now be two significant issues with their post-conflict employment *if* the UCMJ was read to permit it. The first, and most damning, is that most charges levied against Guantánamo defendants have not reflected actual war crimes. Some charges, like "conspiracy," are ordinary federal crimes but have never been recognized as law of war violations.[324] Other conduct, like the 2000 USS Cole bombing, took place outside the legitimate scope of any armed conflict.[325] These would be fatal defects for law of war-based courts-martial. They should be fatal for

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[320] *See* Glazier, *supra* note 300 at 55-58.

[321] *Id*. at 55-60 (detailing the history of the statutory language).

[322] Third Geneva Convention, *supra* note , art. 102

[323] See, e.g., Human Rights Watch, Court-Martial Code Offers a Fair Way to Try Terrorist Suspects, Dec. 28, 2001, at https://www.hrw.org/news/2001/12/28/court-martial-code-offers-fair-way-try-terrorist-suspects; Glazier, supra note 121, at 2092-93.

[324] Charlie Savage, *Guantánamo Detainee's Conspiracy Conviction Upheld, but Legal Issue Lingers*, N.Y. TIMES, Oct. 20, 2016 https://www.nytimes.com/2016/10/21/us/guantanamo-detainees-conspiracy-conviction-upheld-but-legal-issue-lingers.html

[325] Human Rights First, *Retired Military Leaders Submit Brief in al-Nashiri Supreme Court Case*, June 1, 2017, https://www.humanrightsfirst.org/press-release/retired-military-leaders-submit-brief-al-nashiri-supreme-court-case

military commissions too; but that will likely still take years of litigation to resolve given their glacial progress, and general reluctance of U.S. courts to intervene in trials. The government can at least argue that it has flexibility in the commissions given MCA language purporting to allow prosecution of both law of war violations "*and* other offenses triable by military commission."[326] There is no comparable UCMJ language that could rationalize court-martial jurisdiction in similar cases, however.

The second issue would stem from their use in a post-conflict era in which human rights provides the *lex specialis* by which their legitimacy would be assessed. Although Americans typically assume U.S. courts-martial meet modern judicial standards, this is not accurate. U.S. courts-martial retain elements of direct command involvement largely unchanged from the original British model that the Founders copied in 1776. The United Kingdom was forced to substantially revamp its military justice procedures by the European Court of Human Rights due to their failure to meet contemporary human rights standards standards.[327] And the other primary heirs of British law, Australia and Canada had similar experiences. Australia's legislature recognized the need for modernization and unilaterally made improvements. Nevertheless, Australian courts subsequently determined that even the improved version fell short of contemporary legal standards and mandated further enhancements.[328] Canadian courts-martial were also deemed inadequate by the Supreme Court of Canada, applying language from that country's Charter of Rights and Freedom, which was in turn based on the language of the ICCPR.[329] So reasonable outside observers would have real cause to question the legitimacy of court-martial use for trying any foreign conduct outside of a period of actual hostilities.

If the United States now used courts-martial for post-hostilities trials of high-profile Guantánamo defendants, the resulting international public scrutiny would undoubtedly result in widespread criticism of American military justice. This would likely then have significant second order effects with respect to Status of Forces Agreement (SOFA) compliance wherever American personnel are based. An American service person committing an offense subject to U.S. jurisdiction could likely invoke the host nation's human rights obligations as a bar to their surrender to military custody. And countries might even refuse to permit the U.S. military to conduct courts-martial on their territory entirely. Aside from the negative publicity this

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[326] 10 U.S.C. § 948b (emphasis added).

[327] *Findlay v. The United Kingdom* (1997) 24 E.H.R.R. 221

[328] See generally, Alison Duxbury, The Curous Case of the Australian Military Court, 10 OXFORD U. COMMW. L.J. 155 (2010).

[329] *R. v. Généreux* [1992] 1 S.C.R. 259

would generate, it could adversely impact good order and discipline among U.S. personnel – a high cost to pay for a few Guantánamo prosecutions.

3. Federal Court Jurisdiction Over Offenses by Guantánamo Detainees

Congress codified a number of law of war violations as federal crimes in the War Crimes Act of 1996.[330] But the difficulties that Guantánamo prosecutors are facing contorting law of war rules to justify military trials highlights the fact that federal terrorism offenses are actually much better suited for prosecuting detainees. Federal law now includes fifty-seven different "crimes of terrorism."[331] Although the widely used charge of providing material support to terrorism, 18 U.S.C. 2339B, cannot be used against most Guantánamo detainees because extraterritorial reach was only after most detainees were already in U.S. custody, the overall body of terrorism crimes is well suited for that purpose. [332]

Federal courts are not a panacea; they have not been immune from pressures to return convictions and harsh sentences for comparatively minor crimes.[333] But that should actually be an argument favoring their use by those more concerned about security than true justice. Their basic procedural safeguards should comply with international human rights standards, as well as any residual application of LOW rules. And unlike the problematic military commissions and untried courts-martial, Article III courts have a successful track record in conducting terrorism prosecutions – at least 660 since 9/11, including:

> Osama bin Laden's son-in-law and al Qaeda spokesman Sulaiman Abu Ghaith, who was convicted of multiple terrorism offenses and sentenced to life imprisonment; Ahmed Khalfan Ghailani, an al Qaeda operative who was convicted for his role in the 1998 bombings of the U.S. embassies in East Africa and sentenced to life imprisonment; Ibrahim Suleiman Adnan Adam Harun, an al Qaeda operative who was convicted for his participation in attacks on U.S. and coalition troops in Afghanistan and for conspiring to bomb the U.S. embassy in Nigeria; Ahmed Abdulkadir Warsame, an al Shabaab operative who pleaded guilty to multiple terrorism

[330] 18 U.S.C. § 2441.

[331] Eric Halliday & Rachel Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism* Lawfare Feb. 16, 2021, https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism.

[332] Robert Chesney, What Title 18 Charges Could Have Been Brought Against al-Nashiri, Lawfare, Apr. 21, 2011, https://www.lawfareblog.com/what-title-18-charges-could-have-been-brought-against-al-nashiri.

[333] *See generally* WADIE E. SAID, CRIMES OF TERROR (2015).

offenses; and Saddiq Al -Abbadi and Ali Alvi Al-Hamidi, al Qaeda members who engaged in attacks against U.S. military forces in Afghanistan.[334]

Ghailani's prosecution is particularly relevant as he was held in CIA custody, subjected to "enhanced interrogation techniques," and held at Guantánamo before being sent to the United States for trial. Despite these complications, it took just nineteen months from his initial appearance in federal court until he was convicted and sentenced to a life term he is now serving in the "unescapable" supermax prison in Florence Colorado. [335]

IV. DISPOSITION RECOMMENDATIONS FOR REMAINING DETAINEES

The end of active hostilities requires the prompt "repatriation" of those remaining in preventive Guantánamo detention, except for those (1) serving a post-conviction sentence; (2) facing U.S. charges; or, (3) being held for extradition to a third state. The thirty-nine individuals still held fall into one of four categories:

(1) Currently facing military commission charges (10 detainees)

(2) Previously "convicted" by a military commission (2 detainees)

(3) Held in law of war detention but recommended for transfer "if security conditions met" (10 detainees)

(4) Held in law of war detention and not recommended for transfer (17 detainees).[336]

This Part sequentially examines each category, offering disposition recommendations for the associated detainees. The names are based on the New York Times "Guantánamo Docket," an online resource listing every individual known to have been held in Guantánamo since January 2002.[337]

A. Detainees Currently Facing Military Commission Charges

As a result of an arraignment held on August 31, 2021 (the day *after* the final U.S. withdrawal from Afghanistan) ten detainees are now facing commissions in four separate pre-trial phase proceedings.[338] The most

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[334] New York City Bar, supra note 230, 3-4.

[335] *See* Ghailani v. United States, 733 F.3d 29, 38-41 (2d Cir. 2013) cert denied, 139 S. Ct. 115 (2018); Alfred E. Neuman, Famous Prisoners at ADX Florence Facility, Feb. 22, 2021, https://www.ranker.com/list/famous-prisoners-at-adx-florence-facility/treadlightly.

[336] See N.Y. TIMES, *supra* note 10.

[337] *See id*.

[338] *See* Human Rights Watch, The Guantánamo Trials, https://www.hrw.org/guantanamo-trials#; Carol Rosenberg, Three Guantánamo Detainees

prominent case is that of accused 9/11 planner Khalid Shaikh Mohammed and four co-conspirators. The second most visible is alleged USS Cole bombing "mastermind," Abd al-Rahim al-Nashiri. A third, more obscure, case involves Abd al Hadi al-Iraqi, a resistance leader who opposed the allied intervention in Afghanistan. The most recent commission developments saw Indonesian detainee Encep Nurjaman, and two Malaysian co-defendants arraigned on charges related to the October 2002 Bali nightclub bombings and later attack on a Marriott hotel in Jakarta.[339] While less familiar to Americans, the Bali bombing is widely remembered around the world, particularly in Australia, Indonesia, and the UK.[340]

The commission process has been fraught with problems since its inception, unable to deliver timely or credible justice, and extremely expensive, undermining its legitimacy and globally damaging U.S. credibility. And the fact that every individual now facing commission charges has previously been held in CIA custody, coupled with the censorship of trial proceedings, fuels perceptions that they are part of an ongoing torture coverup.[341] Closing the Office of Military Commissions and seeking other prosecution venues would serve the best interests of the government, and certainly those who have already waited two decades to see justice for the USS Cole, 9/11, and Bali attacks.

1. Khalid Shaikh Mohammed (KSM) and his alleged 9/11 co-conspirators

This case has the most clear-cut prosecution alternative of any of the pending cases. The defendants have been indicted in the Southern District of New York (SDNY) – a federal jurisdiction with an impressive record of complex terrorism prosecutions dating back to the first World Trade Center bombing in 1993.[342] The district physically encompasses the epicenter of the 9/11 attack. The Obama administration slated the defendants for trial

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Charged in 2002 Bali Bombing; N.Y. Times, Sep. 2, 2021, https://www.nytimes.com/2021/08/31/us/politics/guantanamo-bali-bombing.html?.

[339] Rosenberg, *supra* note 338.

[340] *See, e.g*., Luh de Suriyani, *Prayers, Candles to Remember Bali Victims*, REUTERS Oct. 11, 2008, https://www.reuters.com/article/us-indonesia-commemoration/prayers-candles-to-remember-bali-bomb-victims-idUSTRE49B0VR20081012.

[341] N.Y. Times, supra note , identifies all detainees previously held in CIA custody with an asterisk. *See, e*.g, Dror Ladin, *There's So Much We Still Don't Know About the CIA's Torture Program. Here's How the Government Is Keeping the Full Story a Secret*, TIME, Feb. 7, 2020 at https://time.com/5779579/cia-torture-secrecy/ (discussing the commissions' use to cover up CIA malfeasance).

[342] *See* Department of Justice, Fact Sheet Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System, Jun. 9, 2009, https://archives.fbi.gov/archives/news/pressrel/press-releases/fact-sheet-prosecuting-and-detaining-terror-suspects-in-the-u.s.-criminal-justice-system

there before bowing to political pressures and returning the case to the fitfully plodding commissions.[343] NBC journalist Ken Dilian has recently detailed this commission's shortcomings, noting that its *forty-second* preliminary hearing was held in Guantánamo on September 7, 2021 with no trial in sight; one expert warned that it might still be a decade away.[344]

Characterizing 9/11 as an armed attack and trying the case before a law of war tribunal significantly complicates the legal issues beyond the obvious challenges of using untested procedures. The DoD Law of War Manual claims "economic support" may be legally attacked, opening the door to defense arguments that the World Trade Center was a lawful target.[345] And since both airlines whose planes were hijacked are part of the Civil Reserve Air Fleet – and supported the August 2021 withdrawal from Afghanistan – there is an even stronger argument that they were legal targets.[346] And of course there is no doubt that the Pentagon was an actual military object. As painful as this will be for victims to hear, the defense will necessarily argue that the lives lost on 9/11 were "collateral damage," not murders.[347] A former commission official estimates that the complexity of these issues, coupled with as-yet untested aspects of the commission process, will result in ten to fifteen years of appellate litigation, at a potential cost of $1.5 billion, if the 9/11 trial results in guilty verdicts.[348]

These arguments are entirely irrelevant if the defendants are charged with regular terrorism crimes. Since federal charges are "pending," there are no international legal barriers to transferring these defendants to Department of Justice (DOJ) custody and proceeding with a regular criminal trial. There is, however, a potential U.S. domestic law obstacle in

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[343] BRAVIN, supra note 13, 359-68.

[344] Ken Dilanian, *20 Years After 9/11, Mastermind Khalid Sheikh Mohammed Still Awaits Trial. What Went Wrong*? NBC NEWS, Sep. 7, 2021 https://www.nbcnews.com/politics/national-security/20-years-after-9-11-mastermind Khalid- sheikh-mohammed-still-n1278592.

[345] *See* Glazier, *supra* note 27, 961-62.

[346] Department of Defense, Release: Department of Defense Activates Civil Reserve Air Fleet to Assist With Afghanistan Efforts, Aug. 22, 2021, https://www.defense.gov/Newsroom/Releases/Release/Article/2741564/department-of-defense-activates-civil-reserve-air-fleet-to-assist-with-afghanis/

[347] DoD defines "collateral damage" as ". . . unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time." DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 36 (2021), available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf.

[348] Sacha Pfeiffer, *Guantánamo Has Cost Billions; Whistleblower Alleges 'Gross' Waste*, NPR, Sep. 11, 2019, https://www.npr.org/2019/09/11/759523615/guant-namo-court-and-prison-have-cost-billions-whistleblower-alleges-gross-waste.

the form of annual National Defense Authorization Act prohibitions against detainee transfers to the United States.[349]

There are two potential solutions. First, Congress can repeal or amend that prohibition and authorize transfers to the U.S. mainland for trial; there may now be some congressional openness to doing this.[350] A more expensive, but perhaps politically easier, approach would be to authorize SDNY proceedings to be held in Guantánamo Bay. This was suggested in a 2020 New York City Bar report envisioning that:

> 1. Congress would amend 28 U.S.C. § 112 (which divides New York State into separate judicial districts) to temporarily expand the jurisdiction of the Southern District of New York to encompass the U.S. Naval Base at Guantánamo and designate Guantánamo as a place of holding court for limited purposes.
> 2. The cases presently pending before the military commissions would be assigned to judges sitting within the Southern District of New York….
> 3. The judges would hold case management hearings and set paths forward for proceeding to trial and final judgment.[351]

The end of law of war detention authority would suggest one additional step would now be appropriate – the Justice Department should assume control of the defendants' detention site.

Judicial experience conducting remote business during the COVID-19 pandemic should make federal trials at Guantánamo even more viable now. Preliminary matters not involving confrontation clause rights could be handled remotely, potentially even initial juror screening, to reduce the number of persons requiring transportation to Guantánamo. Final jury selection and all actual trial sessions should take place in the defendants' physical presence, however, to minimize potential grounds for appeal.

To make this happen, President Biden would have to display the same fortitude that Bush did fifteen years ago, putting the onus on Congress to either promptly enact legislation authorizing federal trial in one of those two locations, or bear responsibility for KSM's release. But the end of Afghan

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[349] The current prohibition was included as § 1401 of the FY 2021 NDAA, H.R. 6395, enacted as 116 P.L. 283, 134 Stat. 3388.

[350] *See, e.g.*, H.R. Rep. No. 117-118, at 559 (2021) (Reporting House Armed Services Committee vote declining to extend the ban by a 31-28 vote).

[351] New York City Bar, Converting Guantánamo Bay Military Commission Into an Article III Court, May 2020 https://s3.amazonaws.com/documents.nycbar.org/files/2020668-GuantanamoBayArticleIIICourts.pdf

hostilities, and fifteen more years of commission failures, should give him a stronger hand now than the one Bush successfully played in 2006.

2. Accused USS Cole bombing "mastermind" Abd al-Rahim al-Nashiri

Al-Nashiri's prosecution is even more disadvantaged by trial as a law of war offense than the 9/11 case, as well as by serious government legal gaffes. In April, 2019 a unanimous D.C. Circuit Court of Appeals panel invalidated "every single pre-trial order issued over the past three-and-a-half years" due to the military judge's conflict of interest issues.[352] Although the government always blames the defense for slowing progress, Judge David Tatel's opinion noted:

> criminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri's defense counsel, all elements of the military commission system—from the prosecution team to the Justice Department to the [United States Court of Military Commission Review] to the judge himself—failed to live up to that responsibility.[353]

This setback, coupled with legal issues which should ultimately defeat a military prosecution – if not at trial, then on appeal – suggest a final outcome is still years away. A key problem is that the law of war only applies to times of hostilities. No one in the military (the author commanded a Navy frigate at the time) believed we were at war, and the U.S. response relied solely on peacetime measures and criminal law processes. [354]

Even if the case somehow clears that hurdle, a warship exemplifies a lawful wartime target so the attack must be proven to be perfidious. But sailors need not wear uniforms, and enemy vessels may be approached in disguise. Commission proceedings will put the Cole crew on trial – did the terrorists treacherously delude them, or benefit from the ship's readiness gaps? The Navy's investigation showed the Cole failed to fully comply with peacetime anti-terrorism mandates, so it will be difficult to prove the requisite treachery to constitute a war crime.[355]

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[352] Steve Vladek, Al-Nashiri III: A No Good, Very Bad Day for U.S. Military Commissions, Just Security, Apr. 16, 2019, https://www.justsecurity.org/63663/al-nashiri-iii-a-no-good-very-bad-day-for-u-s-military-commissions/.

[353] *In re* al-Nashiri, 921 F.3d 224, 239-40.

[354] Human Rights First brief, Why Nashiri can't be tried by military commission: https://www.humanrightsfirst.org/sites/default/files/Nashiri-Brief.pdf

[355] *See, e.g.*, House Armed Services Committee Staff, The Investigation Into the Attack on the U.S.S. Cole, May 2001 at 14 (noting that the ship did not carry out 31 of 62 required force protection measures).

These issues are irrelevant in a federal trial. The attack took place in peacetime. No law allowed it; the crew enjoyed the same right to life all other humans do. Striking the Cole with a massive boat-borne bomb was a clear-cut crime with no possible legal justification. As Professor Bobby Chesney has articulated, the most straightforward charge would be violation of 18 U.S.C. § 2332a – "Use of weapons of mass destruction," enacted six years before the attack.[356] If al-Nashiri can just be tied to the explosion by admissible evidence, conviction should be virtually assured.

Since the crime took place abroad, Article III permits its trial at "such Place…as the Congress by Law may have directed."[357] Two others accused in the incident were indicted in the SDNY in 2003. Al-Nashiri, who was in CIA custody at the time, was named as a co-conspirator but apparently not charged to avoid any obligation to produce him in a U.S. court.[358] It now seems essential, however, that the government quickly produce an indictment to justify his continued detention. Depending on how Congress authorizes detainee prosecutions; i.e., removing transfer restrictions or letting a federal court sit in Guantánamo, options for al-Nashiri could include prosecution in the SDNY or Eastern District of Virginia. The latter venue would facilitate victim attendance while avoiding New York congestion. And that district has successfully handled more terrorism (and Somali pirate) prosecutions than any other U.S. jurisdiction.[359]

3. Afghanistan Resistance Leader Abd al-Hadi al-Iraqi (Hadi)

Hadi's situation is unique for a several reasons. He is the only professionally trained soldier to face a Guantánamo commission, having served in Saddam Hussein's army before travelling to Afghanistan, and his charges, other than an extremely broad "conspiracy" allegation, reflect his

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[356] Robert F. Chesney, What Title 18 Charges Could Have Been Brought Against al-Nashiri, Lawfare, Apr. 21, 2011 https://www.lawfareblog.com/what-title-18-charges-could-have-been-brought-against-al-nashiri.

[357] U.S. CONST. Art. III, § 2, cl. 3.

[358] *See* Pete Erickson et al, *Twenty Years After the USS Cole Attack: The Search for Justice*, 13 Combating Terrorism Center Sentinel n.h, Oct. 2020, https://ctc.usma.edu/twenty-years-after-the-uss-cole-attack-the-search-for-justice/

[359] In data reported through 2016, the Eastern District of Virginia had been the site of more terrorism prosecutions than any other district in the country; SDNY came in 7th with less than one-fourth the number of cases prosecuted in the Virginia jurisdiction. See TRAC, One in Five International Terrorism Prosecutions in Eastern Virginia, Aug. 8, 2016, https://trac.syr.edu/tracreports/crim/431/. See also, Rick Schmitt, The Pirate Trials, Pomona College Magazine, Fall 2011, 20-25 (describing pirate trials in the Eastern District of Virginia as part of a story about a Pomona alum slain by Somalia pirates).

role as a resistance leader rather than terrorist.[360] Hadi's backstory is helpfully summarized by the N.Y. Times' Guantánamo Docket:

> Mr. Hadi, a citizen of Iraq, was charged before a military commission for allegedly commanding Qaeda or Taliban forces in Afghanistan that were accused of war crimes against U.S. and allied forces around 2002-2004. He was captured in Turkey in 2006 and held by the Central Intelligence Agency as a "high-value detainee," then transferred to U.S. military custody at Guantánamo Bay on April 26, 2007. He says his real name is Nashwan al-Tamir. He has degenerative disc disease, has undergone repeated surgery in military custody and has used a wheelchair and hospital bed in court.[361]

But for the pending charges, Hadi's medical condition should have resulted in release years ago. He already had back issues when captured and is now reportedly unable to walk.[362] His prosecution makes little sense in the overall context of the Afghan conflict. The charges are based on relatively minor incidents in a war that saw 2,448 U.S. and 1,144 allied service personnel die (not to mention the staggering Afghan death toll) and *far* bigger fish were released at Obama and Trump's behest.[363] Although the core charges' reflect actual war crimes, they are inadequately drafted to provide fair notice to the defense, and the government will have difficulty satisfying required elements of proof.[364]

The most concerning allegations in his charge sheet are paragraphs 54-56 alleging that he facilitated operations by al Qaeda in Iraq in 2005-06. If true, that could be serious grounds for a criminal prosecution, but the proper authority would be the government of Iraq since the fight there had already become a non-international conflict by then.

Conveniently, Hadi is an Iraqi national, and the combination of his physical deterioration and end of the Afghan conflict effectively preclude him from harming the United States. The most logical disposition would be to repatriate him to Iraq and let that government decide how to handle him.

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[360] *Cite to Hadi bio info*.

[361] N.Y. TIMES, *supra* note 10.

[362] Carol Rosenberg, *Iraqi Detainee Reported Suffering Paralysis at Guantánamo*, N.Y. Times, Sep. 10, 2021

[363] Jerry Dunleavy, *From Prison to Power: Taliban Leaders Go From Jail, to Negotiating Table, to Kabul*, YAHOO, Aug. 18, 2021, https://www.yahoo.com/now/prison-power-taliban-leaders-jail-110000033.html.

[364] The author is currently working on a separate assessment of al-Iraqi's case. This footnote will be updated with a link when a draft of that project is available on SSRN.

4. Indonesian Bombing suspect Encep Nurjaman and two co-conspirators

The last three detainees identified as possible commission defendants, Encep Nurjaman (alias Hambali), Mohammed Farik Bin Amin (Zubair), and Mohammed Nazir Bin Lep (Lillie) were arraigned at Guantánamo August 31, 2021. The session was plagued by translation problems and took place the day after U.S. participation in the Afghan war ended."[365] The Office of Military Commissions website summarizes the charges:

> Encep Nurjaman; Mohammed Nazir Bin Lep; and Mohammed Farik Bin Amin are charged jointly in connection with their alleged roles in the bombing of nightclubs in Bali, Indonesia in 2002 and the bombing of a J.W. Marriott hotel in Jakarta, Indonesia in 2003. The charges include conspiracy, murder, attempted murder, intentionally causing serious bodily injury, terrorism, attacking civilians, attacking civilian objects, destruction of property, and accessory after the fact, all in violation of the law of war.[366]

The charge sheets provide more detail. Hambali, as Nurjaman is called in nine pages of "common allegations," is said to have been a jihadist who fought the Soviets in Afghanistan before becoming a regional leader for "the Southeast Asian terrorist organization Jemaah Islamiya (JI)."[367] JI leadership "agreed to partner with al Qaeda in jihad" and Hambali is said to have received funds from them to conduct attacks in several countries; the only successful bombings were in Indonesia between 2000-03.[368] The most significant were the 2002 Bali nightclub blasts, which killed 202 people from 22 countries, including 88 Australians and 7 Americans;, and a 2003 attack on the J.W. Marriot hotel in Jakarta which killed eleven (all Dutch or Indonesian) and wounded three Americans.[369]

Even if all the allegations are true, JI appears to have lacked sufficient organization, and the sporadic acts the sustained intensity, required to constitute an armed conflict, and there is no indication any country recognized it as such.[370] Despite al Qaeda' financial support and training, the allegations show JI acted with sufficient autonomy that its actions

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[365] The White House, *supra* note 196.

[366] Office of Military Commissions, Cases, Encep Nurjaman et al., https://www.mc.mil/CASES.aspx

[367] Office of Military Commissions, Charge Sheet: Encep Nurjamen, unnumbered Continuation Sheet – MC Form 458, Block II ¶ 1.

[368] Id., ¶¶ 2, 18-34, 40-60.

[369] *Id*., ¶¶ 46, 60.

[370] *See id*., ¶¶ 17-60.

cannot credibly be considered part of a U.S. conflict with them.[371] The bombings lack the requisite connection to *any* armed conflict to constitute war crimes, and there is no credible legal authority to justify the eighteen-year U.S. pre-arraignment detention of these accused in the first place.

With victims and their families in more than twenty countries already frustrated by delayed justice, trying a flawed case in a flawed system that will takes years to conclude, with real prospect of ultimate failure, does no one any favors.[372] And it will subject the commissions to fresh global scrutiny, further tarnishing U.S. credibility. Since Americans were victims of both attacks, federal prosecution is possible.[373] But given the geographic location of the bombings, and much greater numbers of their nationals who were victims, either Indonesia or Australia are more appropriate trial venues.

Both countries and the United States are parties to the 1997 Convention for the Suppression of Terrorist Bombings which includes an *aut dedere aut judicare* obligation and may be used as the basis for extradition by states requiring treaty authority to do so.[374] The U.S. extradition statute generally requires an actual bilateral agreement, which the United States has with Australia, but not with Indonesia.[375] But that statute allows the extradition of foreign nationals without a treaty if the conduct would have been a crime in this country and U.S. nationals were victims.[376] These detainees can thus be extradited to either country, and it would be in the U.S. national interest to select one, with federal criminal trial as a fallback option.

B. Detainees Previously Convicted by a Military Commission

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[371] *See id*.

[372] *See, e.g*., Stephanie March & Roscoe Whalan, *Bali bombing survivor 'dumbfounded' alleged mastermind Hambali yet to face trial after 15 years in custody*, Aaustralian Broadcasting Corp., Feb. 12, 2018, https://www.abc.net.au/news/2018-02-13/alleged-bali-bombing-mastermind-hambali-yet-to-face-trial/9421738 (reporting victim frustration and concerns about U.S. commission proceedings).

[373] For example, 18 U.S.C. §§ 2332(a) (homicide), 2332(b) (attempt or conspiracy with respect to homicide), and 2332a (use of weapons of mass destruction) each apply to crimes committed against Americans "outside of the United States," giving federal courts jurisdiction over both the Bali and Jakarta bombings.

[374] International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, arts. 6, 9, https://treaties.un.org/doc/Treaties/1997/12/19971215%2007-07%20AM/ch_XVIII_ 9p.pdf

[375] 18 U.S.C. § 3181 (a) states "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government; the associated notes provide a list of current U.S. bilateral extradition treaties.

[376] 18 U.S.C. § 3181 (b).

The two detainees in this category *should* be easy dispositions Even the Geneva Conventions permit continued detention of persons they protect to serve out judicial sentences.[377] But there are several factors to consider.

The first is simply where to detain them once Guantánamo is closed. At most it may require getting Congress to modify the detainee transfer ban allowing their move to a stateside prison; some authorities argue that the president has inherent executive authority to do this unilaterally.[378] MCA §949u permits confinement in any facility under U.S. control.[379] They could be held in any DoD site used for post-conviction inmates or a Justice Department facility such as the Colorado "supermax" prison which houses convicted terrorists under more punitive conditions than Guantánamo.[380]

A second consideration stems from the commissions problematic handling of both men. Guantánamo habeas challenges are all heard in the D.C. Circuit. Relocation to a U.S. site opens the door to new actions in the district(s) where they are sent. That could result in less favorable outcomes for the government and more adverse publicity, suggesting it could be more advantageous to release them instead.

1. Majid Shoukat Khan

The New York Times "Guantánamo Docket" summarizes Khan's story:

> Mr. Khan, a citizen of Pakistan who attended high school in Maryland, was captured in Pakistan in 2003. He was transferred to Guantánamo in September 2006 as a "high-value detainee" after 1,200 days in the custody of the Central Intelligence Agency. In February 2012, he pleaded guilty to war crimes for serving as a courier of Qaeda funds from Khalid Shaikh Mohammed to a Qaeda affiliate in Southeast Asia that participated in a terrorist bombing in Indonesia after his capture. His sentencing was postponed in a

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[377] Geneva III, *supra* note 53, art. 119; Geneva IV, *supra* note 53, art. ..

[378] *See, e.g.*, Gregory B. Craig & Cliff Sloan, The president doesn't need Congress's permission to close Guantánamo, Opinion, The Washington Post, Nov. 6, 2015, https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839_story.html.

[379] Codified at 10 U.S.C. §950i, . Confinement in a facility under the control of U.S. "allies" is also permitted, but it is unlikely that any actual U.S. treaty partners would be willing to incarcerate individuals convicted by the military commissions, and even if they did initially, national courts would likely order their release before the end of any sentence, as a Canadian court did with Omar Khadr.

[380] Robert Windram, NBC NEWS, Apr. 19, 2016, https://www.nbcnews.com/news/us-news/new-prison-would-be-safer-harsher-much-colder-guantanamo-n542741.

> cooperation deal with the U.S. government. In 2020, an Army judge ruled that he could receive credit for mistreatment he suffered as a C.I.A. or U.S. military detainee.[381]

The government apparently did not want the abuse aired in court, so it offered Khan an 11 to 14-year sentence, running from the 2012 plea, in exchange for vacating the mistreatment credit ruling and waiving a hearing about his torture. It now plans to go through a charade of having a panel of officers directed to sentence him to 25 to 40 years, which the convening authority will then reduce to 11 to 14 years. The precise length will be based on an assessment of Khan's cooperation since his initial plea.[382]

Press accounts say he has been fully cooperative, will get eleven years, have one year of that credited as a sanction for government discovery violations, and be released in early 2022.[383] This does not include any allowance for pretrial detention, which included more than three years in CIA hands.[384] The government would be best served to just release him after the sentencing rather than opening a door to further discussion, or even litigation, about his torture and the failure to provide credit for time served.

2. Ali Hamza Ahmad Suliman al-Bahlul

The Guantánamo Docket provides this summary of al-Bahlul's history:

> Mr. Bahlul, a citizen of Yemen, is serving a life sentence imposed by the Guantánamo military commissions system. He was captured by Pakistani forces near the border with Afghanistan in December 2001 and was among the first batch of detainees brought to Guantánamo on the day the prison opened the following month. Accused of being a propaganda chief for Al Qaeda and a media secretary for Osama bin Laden, he refused to participate in his 2008 military trial and mostly sat mute beside an Air Force lawyer who was assigned to defend him. A panel of U.S. military officers convicted him of three terrorism-related charges on Nov. 3, 2008. Two of the convictions were subsequently *overturned for technical reasons*. For example, an appeals court ruled that "providing material support for terrorism," one of his charges, was not a

[381] N.Y. TIMES, *supra* note 10.
[382] Rosenberg & Barnes, *supra* note 281.
[383] Ryan, *supra* note 281.
[384] *See* subpart III. B. 4. *supra*.

recognized war crime and so could not be brought before a military tribunal.[385]

Transferring al-Bahlul to a stateside prison for the rest of his life seems an obvious solution. He is not a terrorist per se; as he announced during his trial "you are prosecuting a media man . . . you are not prosecuting an al Qaeda member who is about to do an operation."[386] He is hardly a physical threat, which should minimize public objection to this approach. But it would be unjust due to fundamental flaws in his "conviction."

Al-Bahlul did not want to boycott his trial; he wanted representation by co-national counsel he could trust.[387] But that was barred by commission rules even though it is allowed in courts-martial and supported by U.S. and foreign practice in prosecuting international law violations since World War II.[388] So there is a strong argument that customary international law now provides this right.[389] Al-Bahlul's fallback was self-representation, which *was* authorized by the MCA.[390] But that right was denied in a way that suggested lack of government good faith. The judge then forced Air Force judge advocate David Frakt to defend him. As Frakt later explained, "Unable to represent himself and unwilling to be represented by a U.S. military officer, someone whom he considered to be an enemy, Mr. Al Bahlul mounted no defense."[391] This issue was not raised on appeal.[392]

A second key issue is that none of the charges al-Bahlul was convicted of: conspiracy, solicitation, or providing material support to terrorism, are recognized war crimes. A D.C. Circuit Court of Appeals opinion by Judge (now Justice) Brett Kavanaugh invalidated the material support charge in Hamdan's appeal.[393] The government acknowledged that the same logic applied to solicitation and conspiracy and the D.C. Circuit obliged with a

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[385] N.Y. TIMES, *supra* note 10

[386] Michael J. Lebowitz, '*Terrorist Speech': Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 First Amend. L. Rev. 573, 575 (2011)

[387] David Glazier, *The Misuse of History: Conspiracy and the Guantánamo Military Commissions*, 66 BAYLOR L. REV. 295, 306 (2014);

[388] *See* Glazier, *supra* note 27, 931-32.

[389] *See id*., 928-33 (discussing issues with denying detainees representation by counsel of their own choosing, including particularly co-nationals). See also ICCPR, supra note , art. 14 ¶ 3. (b) (providing the right "to communicate with counsel of his own choosing.")

[390] Glazier, *supra* note 387, 306 (2014); 10 U.S.C. § 949a(b)(2)(D).

[391] David J. R. Frakt, Guest Post: David J. R. Frakt on the Al-Bahlul Amicus Brief, Opinio Juris, http://opiniojuris.org/2013/07/28/guest-post-david-j-r-frakt-on-the-al-bahlul-amicus-brief/.

[392] I*d*.

[393] Hamdan v. United States, 696 F.3d 1238, 1240-41 (D.C. Cir. 2012)

terse per curiam decision overruling all of al-Bahlul's convictions.[394] But a convoluted multi-stage appellate process ultimately ended in a fractured 2016 en banc decision letting the conspiracy conviction stand. Four of the nine judges thought Congress could let a commission try conspiracy even if not a recognized war crime, one held al-Bahlul was not actually convicted of the inchoate crime of conspiracy, and a sixth believed they were only reviewing for plain error and did not need to make a fine legal judgment. [395] This is not just a question of charge nomenclature or mode of liability. The larger issue is that Al Bahlul's actions do not constitute war crimes no matter *how* they are charged, and are outside the jurisdiction of a law of war tribunal. One of the prosecutors later colorfully described al-Bahlul's role:

> Al-Bahlul was certainly a devoted and trained al Qaeda member, but his role in the terrorist organization was anything but typical. Instead of dabbling directly in bombs and kidnappings, al-Bahlul dealt with video production equipment, cameras, and video-editing software. This is because al- Bahlul was the head of As-Sahaab, al Qaeda's in-house media foundation. Tasked directly by Osama bin Laden, al-Bahlul produced propaganda and recruiting videos while essentially serving as bin Laden's "Public Relations Secretary." As such, al-Bahlul was more Sean McManus (head of CBS News) than Khalid Shaykh Muhammad (purported 9/11 mastermind) as he performed his duties in a manner more akin to Michael Moore (controversial documentary filmmaker). But despite the First Amendment protections offered to U.S. citizens, it was these media activities that ultimately served to condemn al-Bahlul to life in U.S. military custody as a convicted war criminal. (citations omitted)[396]

The First Amendment is a red herring; while it may determine whether conduct can be prosecuted under U.S. domestic law, what ultimately matters here is that neither propagandizing or recruiting constitute war crimes. This prosecution is thus effectively based on the notion that al-Bahlul was acting on behalf of the wrong side, but the law of war rules are entirely divorced from the legitimacy of the cause fought for.[397]

Al-Bahlul is nearing twenty years in U.S. custody – the normal maximum term for material support to terrorism, the most likely federal

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[394] Al Bahlul v. United States, 2013 WL 297726 (D.C. Cir) rev'd en banc, 767 F.3d 1 (2014).

[395] Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016), *cert denied* 138 S. Ct. 313 (2017).

[396] Lebowitz, *supra* note 386, 573-74.

[397] *See, e.g.*, DINSTEIN, *supra* note 78, at 3-4.

crime he could have been convicted of *if* it had extraterritorial application to a non-citizen at the time of his conduct – and more time than the "American Taliban," John Walker Lindh, served.[398] Rather than invite renewed litigation, and international criticism, a more pragmatic approach would be a conditional release tantamount to parole. Manual for Military Commission rule 1108 allows full or partial suspension of a sentence, effectively "grant[ing] the accused a probationary period" after which "the suspended part of the sentence shall be remitted."[399] This would provide an articulable legal basis for imposing post-release conditions upon his future conduct.

C. Held in Law of War Detention But Recommended For Transfer "If Security Conditions Met"

The disposition of eight of the ten men in this category is *actually* easy. Unlike al-Bahlul, they have not been charged or convicted; the only basis for holding them was preventive law of law detention. But the war is over, so that authority has ended and they must be promptly repatriated, period.

This classification should always have been troubling. First, the standard employed by the Periodic Review Boards used by the Obama Administration – that detention is justified if an individual poses "a continuing significant threat to the security of the United States" is too low. It falls well below the Fourth Geneva Convention's requirement that detention be "absolutely necessary" or for "imperative reasons of security."[400] Moreover, in the human rights era it is hard to fathom where other states found legal authority to honor U.S. requests to restrict the liberty of individuals never convicted of any crime. Although the ICCPR allows some liberty restrictions in the interests of a state's own national security, they must be grounded in actual domestic law and subject to judicial review.[401] Not surprisingly, leading U.S. allies seemed to reject this approach; detainees transferred to the UK, for example, were quickly released after only an absolutely minimalist show of deference to U.S. concerns.[402] And it is presumably why Australian David Hicks and Canadian Omar Khadr had to plead guilty, allowing their repatriation under agreements calling for completion of their "sentences," rather than subject to release "conditions." But the United States got many less influential

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[398] E.g., Matthew Bakarat, "American Taliban" John Walker Lindh is Released From Prison, AP, May 23, 2019, https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-in-state-wire-24e30be3a75949b7aa3b30946703140d;

[399] Department of Defense, *supra* note 279, Rule 1108.

[400] *See* discussion Part I.C.2. *supr*a.

[401] *See* ICCPR, *supra* note 254, art. 9, 12, 19, 21.

[402] *See, e.g.*, MOAZZAM BEGG, ENEMY COMBATANT, 356-64.

countries to impose restrictions on detainees who never faced charges. The end of the conflict makes this issue moot. Although some recent public discussion continues to suggest making transfers with security conditions attached, none identify any actual legal authority for doing so.[403]

The two detainees in this category who might pose a challenge, Ridah Bin Saleh al-Yazidi and Muieen Abd al Sattar, have each been in this classification for over a decade, but have not cooperated with efforts to find a country willing to accept them on U.S. terms. Al-Yazidi is a Tunisian who has declined to meet with officials of his government, while al Sattar is a stateless Rohingyan who has no country to return to. Both are reportedly "too profoundly damaged – either mentally ill or accustomed to their institutionalization – to try to seek a way out."[404] While Yazidi might simply be returned to Tunisia even if he prefers to stay at Guantanamo, it will take more effort to find a place to send al Sattar. Both should be easier resolve, however, once it is acknowledged that a destination state cannot be obligated to satisfy U.S. security demands.

D. Held in Law of War Detention and Not Recommended For Transfer

The seventeen individuals in this category, previously termed "forever detainees,"[405] also have an easy legal answer. The war is over and their preventive detention must likewise end. There is no post-conflict "bad dude" exception; unless they can be charged with a federal crime, or extradited to face pending charges, the law requires their repatriation.

The politics may be harder – pundits were still arguing that the Taliban's resurgence called for keeping Guantánamo open beyond the date Trump's agreement set as the end of U.S. participation in hostilities.[406] And despite the Taliban victory some continue to discuss options like negotiated release conditions lacking a clear legal basis.[407] Even hardcore enemy soldiers are entitled to unconditional release at war's end, and the president is charged by the Constitution to "take care that the laws be faithfully

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[403] See, e.g., Ian Moss, *There is a Way to Close Guantánamo*, JUST SECURITY, Sept. 10, 2021, https://www.justsecurity.org/78166/there-is-a-way-to-close-guantanamo/.

[404] Carol Rosenberg, *5 Were Cleared to Leave Guantánamo. Then Trump Was Elected*, N.Y.TIMES, Oct. 9, 2020,

[405] *See, e.g.*, Kelsey Vlamis, 'Forever Prisoners': 39 Remain at Guantanamo Bay 20 Years After 9/11, Including Some Who Have Never Been Charged, BUSINESS INSIDER, Aug. 28, 2021 https://www.businessinsider.com/guantanamo-bay-9-11-how-many-prisoners-charges-details-history-2021-8

[406] Sacha Pfeiffer, The Talibans's Rise is Complicating Biden's Efforts to Close Guantánamo's Prison, NPR, Aug. 23, 2021, https://www.npr.org/2021/08/23/1030177682/the-talibans-rise-is-complicating-bidens-efforts-to-close-guantanamos-prison

[407] *See, e.g.*, Moss, *supra* note 403

executed."[408] It should not matter whether that includes international law or not; the Supreme Court determined that detention authorized by the AUMF ends with the close of active hostilities in Afghanistan.[409] But it would still be politically prudent for the administration to articulate why the public should not lose sleep over the release of these seventeen detainees.

First, of course, this number is wholly insignificant compared to the 532 released by the Bush administration, 197 under Obama, and the 5,000 Taliban freed at Trump's direction. While reported detainee recidivism has attracted considerable attention, the "facts" documented by a 2019 Director of National Intelligence (DNI) report are not all that alarming, and it likely errs on the side of over-statement.[410] The report states that the "confirmed re-engagement" rate was 21.6% for Bush administration releases, but just 4.6% for those later freed under Obama, with another 15.4% of Bush and 10.2% of Obama releasees "suspected" of having done so.[411]. This seems counterintuitive given that the Obama releasees should have had multiple reviews during the Bush years and been vetted for continued detention each time, so on average they should have been expected to be more dangerous.

Two factors likely explain the differences. First, initial Guantánamo releases were apparently not well screened.[412] This is supported by anecdotal evidence that while Hamdan was on trial for being *a* bodyguard for Osama bin Laden, his *chief* bodyguard had been released and was back in Morocco.[413] It may also reflect the impact of extended captivity. War is a young man's game. Those released after close to a decade in U.S. captivity would predictably be more physically and mentally worn down than early releases, and less enthused about militancy. They also would have had fewer remaining ties with groups engaged in ongoing conflicts, particularly one featuring U.S. targeted killing of the leaders they might have known. Detainees who have now been held for two decades should predictably be much less likely – or able – still to "reengage."

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[408] U.S. Const., art. II, § 3.

[409] Hamdi, 542 U.S. at 521.

[410] Human Rights Watch, *Q&A: Guantanamo Bay, US Detentions, and the Trump Administration*, June 27, 2018 12:01 am, https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration#q5.

[411] DNI, Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Nov. 25, 2019 2-3. https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2019/item/2079-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay-cuba.

[412] *See* Human Rights Watch, *supra* note 410; Mark Denbeaux et al., *Profile of Released Guantánamo Detainees: The Governments Story Then and Now*, Aug. 8, 2008 http://ssrn.com/abstract=1985701.

[413] *See* BRAVIN, *supra* note 13 at 330-31; N.Y. TIMES *supra* note 10, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#detainee-56.

Even *if* the remaining "forever" detainees reengaged at the same rate as those freed under Obama (a minimum of five years earlier), that would only equate to a handful of recidivists. Moreover, "reengagement" has only involved participation in a regional insurgency or conflict, no former detainee has conducted an attack in the United States. With much improved U.S. security measures implemented since 9/11, and an international no-fly list of well over a million names, they are extremely unlikely to be able to do so successfully now even *if* any still had sufficient motivation and resilience.[414] This level of risk would hardly justify spending a half billion dollars a year to keep Guantánamo open (if that *was* a legal option) when the most significant dangers Americans face today are domestic threats.[415]

The "forever" detainee whose release may be most controversial is Saudi national Mohammed al-Qahtani, believed to have been an intended 9/11 participant (the "twentieth hijacker') until he was denied entry to the United States.[416] Al-Qahtani was brought to Guantánamo in February 2002 and subjected to a sustained abuse in which he was "deprived of sleep and water, kept nude and was menaced by dogs."[417] He was earmarked for trial with KSM, but the convening authority, Cheney protégé Susan Crawford, refused to approve charges after determining that his treatment constituted torture.[418] Al-Qahtani has had mental health issues since suffering a traumatic brain injury at age eight and now suffers from severe schizophrenia. In March 2020 a federal judge ordered his evaluation by a mixed medical commission – which would have been a Guantánamo first. The order was based on an Army detention directive rather than the Third Geneva Convention *per se,* and Trump's Secretary of the Army revised it in his last week in office to specify it did not apply to Guantánamo.[419] The examination has apparently never taken place as the Biden administration has debated whether or not to contest the order.[420] The logical disposition for al-Qahtani is repatriation to Saudi Arabia to receive appropriate mental

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[414] Cite to post 9/11 security enhancements

[415] Department of Homeland Security, *Summary of Terrorism Threat to the U.S. Homeland*, Aug. 13, 2021 2:00 pm, https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-august-13-2021

[416] Daniel A. Medina, *He is one of only 39 detainees left at Guantanamo. Once tortured, prisoner's case is a test of larger political realities at play*, CNN Aug. 5, 2021, https://www.cnn.com/2021/08/05/politics/guantanamo-detainee-qahtani-biden-invs/index.html.

[417] Carol Rosenberg, Pentagon Moves to Block Exam of Tortured Guantánamo Prisoner, N.Y. TIMES, Jan. 15, 2021,

[418] Andy Worthington, *Bush Era Ends With Guantánamo Trial Chief's Torture Confession*, Jan. 20, 2009, http://www.andyworthington.co.uk/2009/01/20/bush-era-ends-with-guantanamo-trial-chiefs-torture-confession/.

[419] Medina, *supra* note 416.

[420] *Id*.

health care, which could legally include physical restrictions if he is validly determined to be a physical risk to himself or others.

CONCLUSION

The Guantánamo detention facility has been a magnet for global criticism since its January 2002 opening, dissipating the almost universal goodwill the United States enjoyed in the wake of the 9/11 attacks. Its monetary costs have now likely reached $7 billion.[421] The moral and political damage to U.S. global standing, and the recruiting boost to U.S. adversaries, evidenced by ISIS videos with its victims dressed in orange jumpsuits, are incalculable,[422] Bush, Obama, and Biden all openly declared their support for ending Guantánamo detention; only Trump dissented but even he was scathingly critical of the financial costs.

U.S. domestic politics are the ultimate reason Guantánamo is still open; the late Senator John McCain was virtually the only senior Republican supporting closure, and even many Democrats were less than enthusiastic about it.[423] But today law provides not only the opportunity, but the mandate, to do what politics could not achieve, and shutter the facility. As problematic as many aspects of Guantánamo have been, the law of war's preventive detention authority provided a veneer of legality which has now been peeled away. With the end of the war in Afghanistan, it is now beyond the pale to even try to justify continued indefinite detention; the remaining detainees must be promptly charged, extradited to a state which can prosecute them, or repatriated.

Similarly, it is past time to recognize that the military commissions have been a legal and practical failure, and colossal waste of U.S. tax dollars. Moreover, they have denied the victims, and their families, of both the USS Cole and 9/11, the justice they have awaited for two full decades, and could readily have received in federal courts in just a fraction of that time. Both Guantánamo detention, and the commissions, should now have reached their final endpoint.

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[421] The total cost reportedly reached $6 billion by 2019, with recurring annual expenses of $380 million *plus* the personnel costs for the 1,800 strong guard force. *See* Pfeiffer, supra *note* 348; the author estimates that adds at least another $100 million a year.

[422] Molly O'Toole, *President Obama Has Begun His Final Push To Close The Offshore Prison. But America's Bigger Challenge Is Deciding What To Do With Tomorrow's Prisoners In A War Without End.* Defense One, undated, https://www.defenseone.com/feature/beyond-guantanamo/

[423] *Id.*