AVOIDING AN INTERNATIONAL LAW FIX FOR TERRORIST DETENTION

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In a widely reported lecture at the University of Oxford in late 2007, U.S. State Department Legal Adviser John Bellinger—the Administration’s senior authority on the law of war—spoke of the Geneva Conventions’ inadequacy as an international legal framework for the detention of individuals caught up in armed conflict involving transnational terrorist organizations.¹ “The bottom line, as an increasing number of legal experts now acknowledge,” according to Bellinger, “is that the legal framework for conflicts with transnational terrorists like al Qaida is not clear.”²

Bellinger’s is perhaps the most definitive statement of the United States’ current view of the law of war (also called international humanitarian law or “IHL”). But he is hardly alone in expressing frustration with existing IHL as a means of regulating the detention of terrorist suspects. Former head of the Justice Department’s Office of Legal Counsel, Jack Goldsmith, and presidential candidate John McCain, have both recently called for a “new international understanding on the disposition of dangerous detainees under our control.”³ The British House of Commons Foreign Affairs Committee likewise issued a report last year concluding that “the Geneva Conventions . . . lack clarity and are out of date,” and recommending, among other things, that “the Government work with other signatories to the Geneva Conventions . . . to update the Conventions in a way that deals more satisfactorily with asymmetric warfare, with international terrorism, with the status of irregular combatants, and with the treatment of detain-

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1. John B. Bellinger, III, U.S. Dep’t of State Legal Advisor, Lecture at the University of Oxford, Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007), available at http://london.usembassy.gov/ukpapress72.html ("[T]he Geneva Conventions were designed for traditional armed conflicts between States and their uniformed military forces, and do not provide all the answers for detention of persons in conflicts between a State and a transnational terrorist group.").

2. Id.

And indeed, the Final Report of the National Commission on Terrorist Attacks upon the United States (the 9/11 Commission) recommended in 2004 that the United States "engage its [international] friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists," a policy position that, on its face, is arguably consistent with the calls for new law.\textsuperscript{5}

To some extent, the latest calls for a new international legal effort are motivated by the now pressing need to resolve the dilemma posed by existing U.S. detention policy, particularly involving the several hundred detainees still held at the U.S. Naval Base at Guantanamo Bay, Cuba. While U.S. leaders, including the President, have indicated a desire to close the detention camp at Guantanamo, they have also signaled the need for international cooperation in taking back returning detainees, either for release or continued detention.\textsuperscript{6} In addition, U.S. advocates for a new international legal framework for terrorist detention appear to be motivated by a policy interest of more lasting significance. In particular, they argue that conflicts with international terrorist organizations are here to stay, and the Geneva regime provides only general guidance on who may be detained in such conflicts, and on what procedural protections detainees must be afforded. Agreed-upon standards are essential in this realm not, as Goldsmith puts it, "because of a squishy commitment to internationalism, but because an international consensus on how to treat detainees
would foster deeper international cooperation crucial in thwarting terrorists.\footnote{Goldsmith, supra note 3. See also Bellinger, supra note 1 (emphasizing the need to work toward a common international approach on terrorist detention).}

There is little question that international cooperation in counterterrorism efforts is essential, and similarly little question that U.S. detention operations have been hamstrung by ongoing international objections about their legal legitimacy.\footnote{The British, for example, were recently led to withdraw from previously planned covert operations with the CIA after the United States failed to offer adequate assurances against inhumane treatment and rendition of detainees. See Raymond Bonner & Jane Perlez, \textit{British Report Criticizes U.S. Treatment of Terror Suspects}, \textit{N.Y. Times}, July 28, 2007 available at http://www.nytimes.com/2007/07/28/world/europe/28 rendition.html?scp=1&sq=british+report+criticizes&st=nyt ("Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment."); Intelligence and Security Committee, \textit{Rendition 2007}, cm. 717, available at http://www.cabinetoffice.gov.uk/intelligence/-/media/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final%20pdf.ashx (providing the full report).} But the position that the United States should now undertake efforts to develop a new international legal framework for the detention of terrorist suspects is problematic, in my view, for two primary reasons. First, key "gaps" in IHL that Mr. Bellinger and others see in international laws regulating state detention of terrorist suspects were left with the understanding that they would be filled in by other existing bodies of national and international law, including domestic criminal law. The existence of multiple, potentially relevant bodies of law governing different aspects of state action against terrorism is not of itself a problem; indeed, different governing laws usefully afford states a meaningful array of different policy options in responding to different degrees of terrorist threat.

Second, to the extent IHL is unclear on key questions surrounding detention—and there are indeed a few areas that reasonably fit this description—a U.S.-driven effort to negotiate a new formal (or informal) international understanding of these topics is unlikely to satisfy the interests of many U.S. proponents of a revised international framework, and otherwise unlikely to succeed anytime soon. Indeed, the next administration may well conclude the particular "clarifications" current proponents have in mind are not helpful to the security interests of the United States. Any engagement with international partners on these matters should be preceded by a strategic reassessment of the role of detention in U.S. counterterrorism policies. It may be that the outcome of this project will render moot the enormous task of international re-negotiation of core ideas in the law of war.
In this Essay, I explore reasons why the next U.S. administration should think twice before undertaking to pursue as a first option an international legal solution to current terrorism detention dilemmas.

I. INSPECTING THE GAPS

Among the arguments in favor of a new international legal framework on terrorist detention, the most significant involve claims that current IHL leaves two important issues unresolved: who may be detained during an “armed conflict” as defined by IHL, and what procedural protections must they be afforded.9 Consider first the matter of who may be detained. There is little question that a state involved in an “armed conflict” against another state is permitted to detain a variety of individuals, including combatants wearing the uniform of a party to the conflict,10 anyone who takes a “direct part in hostilities” (whether uniformed or not, military or civilian),11 and broadly, anyone who the detaining power believes is “absolutely necessary” to hold “for imperative reasons of security.”12

Despite such broad existing authority, critics of the current regime focus primarily on Geneva’s apparent omission from contemplated detention powers the internment of individuals who, in the context of counterterrorism, a state might well want to detain. In particular, critics question the legal status of: (1) individuals who engage in wrongdoing but are not involved in an “armed conflict” within the generally accepted IHL understanding of the term (for example, a

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11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol 1]. See also 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19-24 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (recognizing that this rule is now a matter of customary international law). To be clear, this provision of the Geneva regime speaks most particularly to military targeting decisions made by states – not necessarily to detention. But many have understood these provisions as elucidating, at least implicitly, the definition of “combatancy” for broader purposes including detention. See, e.g., Matthew Waxman, Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists, 109 COLUM. L. REV. (forthcoming 2008) (manuscript at 14-15, on file with author).
12. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”); Id. at art. 42 (“The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”).
member of a terrorist organization who is believed to have participated in a past bombing and is detained on the streets of Prague), and (2) civilians who may not take a "direct part" in any armed hostilities, but who materially contribute to terrorism nonetheless (for example, a terrorist money launderer or religious leader who inspires violence). I consider the existence of a gap with respect to Category (1) detainees here; issues associated with Category (2) detainees are addressed in Part II below.

First, the position that it is a problem to leave IHL silent or ambiguous on all issues related to detention is premised on a faulty assumption—that IHL must provide an answer to all questions about the legal regulation of international counterterrorism. But IHL is not, nor should it be, the only body of law empowering or constraining government action in this realm. IHL exists against a broad array of domestic and international criminal laws (as well as immigration, civil commitment, and related government powers) that both authorize detention, and regulate its appropriate use. There is now broad consensus that the United States should deploy its full range of instruments of national power—including economic, diplomatic, cultural, and, where appropriate, military—as part of a unified strategy to address the threat of terrorism. It would seem strange indeed to overlook the criminal law in particular as one of the many important instruments in this collection for securing the long-term detention of those engaged in terrorist activity.

In this light, it should become clear that an individual in Category (1) above—who engages in wrongdoing but is not necessarily involved in an "armed conflict" as traditionally defined by IHL—is not undetainable or without legal protection. He is a criminal, and subject to domestic and/or international criminal law. Particularly since the attacks of September 11th, the United States among other nations has significantly expanded its already broad array of criminal prohibitions

13. See, e.g., Bellinger, supra note 9 (describing security threat posed by individuals not engaged directly in combat, such as terrorist financiers, weapons designers, and religious leaders); Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 33 YALE J. INT'L L. (forthcoming 2008) (manuscript at 8-9, 48, on file with author).

against engagement in terrorist activity, or activities that contribute to terrorism. These laws subject individuals to U.S. federal criminal jurisdiction even if their offenses occur outside the territorial borders of the United States, and even if their crimes exist only in inchoate form. To the extent IHL is silent on Category (1) detainees, it is because the criminal law exists.

An advocate for new international law in this realm might nonetheless respond by allowing that it may be fine to have some bad acts covered by IHL, and some by criminal law, but the border between IHL and criminal law is indeterminate because the precise meaning of "armed conflict" is unclear under the law of war. And as long as such indeterminacy remains, U.S. detention operations worldwide will be subject to challenges of legitimacy. Indeed, although there is broad agreement about the meaning of "international armed conflict," under the Geneva Conventions (a classic state-against-state war), there is far less consensus on what kinds of conflicts "not of an international character" (paradigmatically, a civil war) are covered under the Geneva regime. Does a terrorist campaign of sufficient scope count as such a Geneva "non-international armed conflict?" As it stands, the existence of a non-international armed conflict turns on a case-by-case assessment of the participants' intentions; their level of organization; and the intensity and duration of the violence—a standard whose outcome in any given setting may be substantially uncertain.

Here, the interests of those seeking clarification become relevant. If the interest is purely to clarify the definition of armed conflict without regard to the end result—any definition that rejects this flexible standard in favor of any more certain rule—or indeed, to strengthen procedural protections for detainees, then there is little persuasive way on the merits to object to such a plan on human rights grounds (although as we will see there may be political or other reasons that may prove dispositive). But many of those who advocate for clarification are also interested in developing a legally sanctioned way to detain suspected terrorists for extended periods without having to


16. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794-96 (2006) (concluding that the term "non-international" conflict in Common Article 3 of the Geneva Conventions should be interpreted as broadly as possible to ensure that no individual is without some legal protection under IHL).

demonstrate individual wrongdoing under the criminal trial. As a general matter, IHL contemplates that detainees may be held until the end of "active hostilities." A "clarification" of "non-international armed conflict" to include some version of a "global war against terror" would amount to a law of war that recognizes a nation's authority to arrest an individual suspected of involvement with terrorism anywhere on the planet and hold him until the terrorist threat (however defined) is no longer active. As many have pointed out, because it is likely impossible to determine when the tactic of terrorism is no longer a threat, such a reading of IHL would amount to a power to hold terrorist suspects indefinitely.

While this approach would thus allow the exceptional law of war to swallow the general law of human rights, it is unlikely to afford U.S. terrorism detention operations the certain international legitimacy advocates seek. So long as the criminal law still exists, there will always be cases where criminal and IHL jurisdiction overlap; a country in any given case will still have a choice of which law to apply. And that choice will almost always be subject to criticism or praise by the international community—a community that has regularly treated terrorist attacks as a subject of criminal law. Coupled with the concerns of policy and politics explored below, a clarification of this nature seems a poor response to current U.S. counterterrorism interests.

19. Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities." (citations omitted)).
20. See, e.g., Gabor Rona, Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools, 5 CHI. J. INT'L L. 499, 503 (2005) (describing impossibility of identifying a defined end to a conflict against "terrorism"). To be clear, while the U.S. administration has left the full breadth of the meaning of a "war on terror" undefined, scholars such as Goldsmith and Chesney have defined the relevant non-international armed conflict more narrowly so as to suggest some more identifiable limits on the scope and duration of the conflict. See Chesney et al., supra note 18.
21. See TIMOTHY J. NAPTALI, BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM 202-21 (2005) (describing, for example, the international police investigation following the 1988 terrorist bombing of Pan Am Airlines Flight 103 over Scotland). The argument that many terrorism cases can be effectively handled by the criminal law should not be mistaken for the argument that the criminal law is the sole means any nation should employ for combating a terrorist threat. As noted above, there is now broad consensus that the United States should deploy a range of tools against international terrorism. See supra note 14. Rather, it is to say that when a state believes that individuals are identifiable responsible for a terrorist act that is in the works or that has already been committed, the criminal law provides a powerful tool for securing that individual's legitimate, long-term detention.
22. See infra Part II.
What, then, of the second set of asserted gaps—the procedural protections due to a civilian detainee caught up in armed conflict and detained, for example, "for imperative reasons of security?" Here, advocates of new international law are again not without justification in urging that the primary provisions governing the detention of civilians in armed conflict offer only relatively broad guidance. To the extent the Geneva Conventions address the rights of civilian detainees, it is principally in Article 3 common to all four Conventions (the so-called "Common Article 3"), and in the Fourth Geneva Convention (respecting the rights of civilians) in Article 43. Common Article 3 provides, in part, that detainees shall at all times be treated humanely, and that with respect to actual prosecution, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."23 With regard to detention for reasons other than prosecution, Article 43 somewhat more usefully explains that detainees "shall be entitled to have . . . [their detention] reconsidered as soon as possible by an appropriate court or administrative board designated" by their captor, and that that court "shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit."24 Beyond this, the principal Geneva Conventions make no mention of whether and to what extent detainees may have the right to representation in such proceedings, to gather and present evidence, to view the evidence that is the basis of their detention, or even (assuming a pro-

23. See, e.g., Geneva Convention III, supra note 10, at art. 3. Common Article 3(1) provides as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Id. at art. 3(1).

longed "armed conflict" within the meaning Geneva contemplates) how long such security detention might continue.\textsuperscript{25}

Yet here, too, it is wrong to assume that the law of war is the sole available guidance on the procedural requirements for states pursuing security-related detention of civilians. For example, there is significant agreement that the general protections of international human rights law (including the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is party) apply to fill in such gaps where the specialized law of war is silent.\textsuperscript{26} The ICCPR

\textsuperscript{25} It should be noted that a protocol additional to the Geneva Conventions sheds further light on the nature of procedural protections states must provide detainees. See Protocol I, supra note 11, at art. 75(3) ("Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."). Although the United States has not formally ratified the Additional Protocol, Article 75 in particular has been understood as "either legally binding as customary international law or acceptable practice though not legally binding." International and Operational Law Department, U.S. Army, Operational Law Handbook 11 (Jeanne M. Meyer & Brian J. Bill eds., 2002). See also William H. Taft, IV, The Law of Armed Conflict after 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 322 (2003) ("While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.").

\textsuperscript{26} See, e.g., Michael Bothe, Karl Joseph Partsch & Waldemar A. Solf, New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 619 (1982) ("[I]t cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international conflicts."); Theodore Meron, The Humanization of Humanitarian Law, 94 Am. J. Int'l L. 239, 266 (2000) ("[T]o the extent that the Fourth Geneva Convention cannot adequately resolve problems of modern occupation, especially, as Adam Roberts has demonstrated, in the case of prolonged military occupation, the applicable human rights protection should be invoked to fill the void."). Both U.S. and international courts have agreed that international human rights law and IHL both apply in situations of armed conflict. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 242-45 (2d Cir. 1995) (applying aspects of both IHL and international human rights law in resolving plaintiffs' claims); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 160 (July 9) (considering that "the protection offered by human rights conventions does not cease in case of armed conflict."); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) ("[T]he protection of the [ICCPR] does not cease in times of war."); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, O.A.S. OEA/Ser.L/V/II.116, doc. 5 rev. ¶ 42, 1 corr. (Oct. 22, 2002) ("[T]he international human rights commitments of states apply at all times, whether in situations of peace or situations of war."). Despite this degree of consensus, it must be noted that the current U.S. State Department has taken the position that IHL, and not international human rights law, governs its current operations against "al Qaida, the Taliban, and their supporters." United States Responses to Selected Recommendations of the Human Rights Committee (Oct. 10, 2007), http://www.state.gov/documents/organization/100845.pdf.
makes clear that detainees are entitled to, among other things, protection against "arbitrary arrest or detention." Moreover:

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law . . . . Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him . . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

While such rules also leave some room for differing interpretations among states, they do settle some questions—for example, that detention may not be arbitrary, that it must be based on some grounds already set down by law and must similarly be reviewable according to some regular procedure (rather than merely as a matter of discretion), and that a court of some sort must be available to challenge the legality of detention.

As a matter of clarity, such provisions are hardly more vague that the U.S. Constitution’s provision protecting individuals against arbitrary deprivations of liberty without “due process of law.” Further, for the United States at the very least, the meaning of such strictures may also readily be filled in by a broad and deep body of statutory and decisional law setting forth the procedural protections that must attend different kinds of detention under U.S. law for the regime to survive due process scrutiny. Whether or not one believes that such rules apply as a matter of law to a U.S.-run security detention operation conducted outside the territorial United States, the United States has a rich set of examples from its own law on which to draw for developing a set of procedural protections broadly recognized as


28. Id.

29. U.S. CONST. amend V.


fair by the international community. The International Committee of the Red Cross ("ICRC") has also issued detailed principles based in existing international law and best practice for procedural protections that should apply in cases of security detention.\(^3\) It may be that U.S. advocates of new international law dislike the procedural standards these many sources offer for protecting individual rights in security detention. But there is certainly nothing preventing the United States from drawing on any of these models in order to enhance the perceived international legitimacy of its operations, or simply to further clarify the contours of international human rights law applicable to the security detention it pursues. Put differently, lack of law per se is not the problem.

Instead, because the United States has expressed a disinclination to pursue existing models of procedural protection for suspected terrorist detainees—believing these rules not applicable as a matter of law and not suitable as a matter of policy—it seems more reasonable to understand U.S. calls for a new international understanding in this area to be seeking international agreement on diminished procedural protections for at least a certain set of security detainees.\(^3\) Apart from the obvious human rights concerns that any diminution would raise, I believe such a position is also a reflection of the idiosyncratic understanding of U.S. national security interests that has characterized U.S. detention operations since September 11, 2001. A more sensible strategic vision of counterterrorism may show such an approach to be both unwise as matter of counterterrorism policy and decreasingly likely to succeed on an international stage. I turn to these topics next.

II. POLITICS AND POLICY IN INTERNATIONAL COUNTERTERRORISM LAW

For more than a decade, UN member states have been working to develop a Comprehensive Convention on International Terrorism, intended to be "a technical, legal, criminal law instrument that would facilitate police and judicial cooperation in matters of extradition and

\(^3\) See Jelena Pejic, Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence, 87 INT'L REV. RED CROSS 375, 384-91 (2005) (proposing a set of minimum procedural principles and safeguards for application in all cases of security detention).
mutual assistance." The Convention does not aim to address the definition of "armed conflict," or clarify the meaning of "direct participation" in hostilities. But it does depend centrally on the parties coming to terms on an issue that would almost certainly attend any such international discussion of those matters in a post-9/11 context—namely, the definition of a "terrorist act" or "terrorism." On that question, prospects for a Comprehensive Convention have badly foundered.35

I do not wish to overstate the significance of the international community's failure to come to terms in developing a comprehensive convention against terrorism. Those who advocate clarifying the aspects of IHL discussed here might well be satisfied by an instrument far less formal than a new treaty or optional protocol. They might also be satisfied with an agreement solely among allied nations—the nations to which the United States most frequently turns for support in its international counterterrorism operations—which are of like mind on the definitional issues that have divided the international community as a whole. At the same time, there should be no illusion that, no matter what the instrument, international agreement on the rules applicable to global counterterrorism will be readily achieved. This caution seems particularly acute in contemplating a near-term U.S.-led effort to clarify IHL. U.S. practice over the past seven years has badly damaged its relations with its allies, and has left the United States in an exceedingly weak position to champion the clarifications to IHL advocates seek.36

It is in this context that we must consider the wisdom of pursuing international clarification of the aspects of the law advocates identify. Return now to the apparent IHL uncertainty surrounding the regulation of Category (2) detainees discussed above, those detained in circumstances where the existence of "armed conflict" is agreed, but the


35. UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 51-52 (2004). The key stumbling blocks to consensus on a definition are whether state use of armed force against civilians should ever be counted as "terrorism," and whether terrorism (as violence against civilians) should be prohibited even by people mounting a resistance to foreign occupation. Id.

36. See, e.g., Guantanam's Shadow, ATLANTIC MONTHLY, Oct. 2007, at 40 (reporting the results of a poll of a bipartisan group of U.S. experts in international law and politics) ("Nothing has hurt America's image and standing in the world [more]—and nothing has undermined the global effort to combat nihilistic terrorism—than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands; if its behavior descends to the level employed by the terrorists, then we have all become them instead of us.").
degree of an individual’s participation is either attenuated or not clear. Those who seek greater clarity in the Geneva regime are, here too, justified in identifying an existing problem in defining what amounts to “direct participation” in hostilities (such that a civilian may be targeted, or (by arguable analogy) detained). While it is broadly accepted that a civilian who, for example, attacks enemy forces, lays mines, takes captives, and the like is a “direct” participant, and a civilian who, for example, works in a cafe that serves food to combatants is not, there are ample cases between these polar examples (such as a civilian transporting weapons through a combat zone) that remain the subject of much debate.

In the face of this uncertainty, the ICRC in 2003 launched an international effort to clarify the definition of “direct participation.” It brought together a diverse group of international legal experts representing the military, government and academia, as well as international and non-governmental organizations, for a series of meetings on the subject, with a view to producing interpretive guidance for Geneva member states. The project addressed, among other matters, an issue close to the heart of the clarifiers’ concerns: whether mere membership in an organized armed group could open an individual to military targeting, even if the member has taken no active part in violent activities. While the project has produced useful insights, and may yet continue, there has been significant disagreement over whether such a membership test is appropriate. Moreover, there was early “agreement among the experts that it was not feasible to come up with an abstract definition that would cover all conceivable instances of ‘direct participation in hostilities,’ whether or not it was accompanied by a non-exhaustive list of examples.” Such a conclusion by this distinguished international group does not, of course, necessitate that all international efforts to fully clarify the meaning of “direct participation” will reach a similar result. But it does mean that any new initiative will be undertaken in an environment where consensus on this issue has already been sought and, at least to a degree, abandoned.


40. Id. at 85.
By comparison, international agreement on more detailed procedural rules applicable to security detainees (in whatever context they are held) may seem easier to reach. Indeed, in principle, there is no reason to object to a more detailed international statement of what IHL and international human rights law mean in rejecting detention on arbitrary grounds. But it is a misapprehension to view statements calling for clarification like that of the British House of Commons Foreign Affairs Committee above, which Bellinger and others have trumpeted, as a sign that the international community is moving closer to the current U.S. administration's views. Quite the contrary, the British Foreign Affairs Committee statement comes in the context of a report deeply critical of U.S. detention operations at Guantanamo Bay. The British may wish to clarify Geneva’s procedural protections, but their interest appears principally in securing greater, not diminished, protection for the individuals detained.41

This returns us necessarily to the topic of what U.S. interests are in pursuing an international law fix. For Messrs. Bellinger, Goldsmith, and other advocates associated with the current administration, the interest in clarification of terms like “direct participation” and “armed conflict” seem to be geared toward an international legal regime that contemplates the detention of more people, in more circumstances, and with fewer procedural protections than under current international law. But it is not at all clear that it is in the United States’ strategic counterterrorism interests to detain those it suspects of terrorism (but as to whom it has no evidence of criminal wrongdoing) captured in a non-battlefield setting for indefinite periods of time. An example I have discussed elsewhere seems relevant.

Imagine that [a captured detainee] looks forward to the day when he “has the chance to kill innocent civilians” [but] has not yet (to our knowledge) involved himself in a plot underway. Releasing him might allow intelligence to track him, and gain otherwise unavailable information about any such plot if it exists. Detaining him, on the other hand, might prevent him from participating in any particular plot. But if security analyses of the nature of al Qaeda and associated jihadist threats are to be believed, the whole problem is that men like this grow on the proverbial trees. He is replaceable. Worse, if we detain too many such men, or detain the wrong

41. See Bellinger, supra note 38 (referencing House of Commons report). In concluding the Geneva regime lacked clarity, the report expressly stated that clarity would be helpful in order to “ensure that it affords the maximum protection to those vulnerable to the effects of armed conflict, that it restricts the means and methods of conflict, and that it delivers justice to all.” FOREIGN AFFAIRS COMMITTEE, VISIT TO GUANTANAMO BAY, SECOND REPORT, 2006-07, H.C. 44, at 27, available at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf.
men, or detain men under a system believed to be illegitimate—we trade his particular incapacitation for the need to incapacitate many more. What this vision describes is an approach to detention that fails ultimately to prevent an attack, but that succeeds in enhancing terrorist recruiting efforts overall. Whatever law might make doable, it cannot explain why this is something we should want done.42

Before the United States embarks on any IHL "clarification" initiative, it must first define for itself its strategic posture in combating terrorism worldwide. The next administration may or may not embrace the strategic view this example reflects. But its approach to existing international law in the field must flow first from a clear assessment of strategic vision, not the other way around. Because I do subscribe to this strategic view, I believe the United States' first moves to address its international legitimacy deficit in security detention must be unilateral. And these moves should be geared toward restoring the United States' national reputation as a model for the defense of human rights.

III. CONCLUSION

Nothing in the foregoing is intended to call into question the need for the United States to work diligently with its international partners in moving forward in global counterterrorism efforts, or in finally resolving the status of the detainees held now for years at Guantanamo Bay. Particularly if Guantanamo is closed, the detainees must go somewhere. And some combination of release, repatriation, or return to another country for continued detention is undoubtedly among the likely dispositions for many. There is no path to the closure of Guantanamo Bay that does not depend centrally on the cooperation of the broader community of nations.

But the situation faced by the United States in what to do in light of past policies is in many respects sui generis. The Guantanamo dilemma, for instance, is the result of a series of now years-old, but unprecedented decisions by the United States to deny the Guantanamo detainees the initial status hearings to which they were entitled under the Geneva Conventions, to transport them far from the field of battle, to delay any inquiry into the detainees' status until time and distance from evidence about the circumstances of their capture made a meaningful hearing all but impossible, and to subject at least some of them to treatment in violation of even the most basic obligations set forth

under Common Article 3 of the Conventions. Any steps to remedy the situation there are freighted with the disadvantages attending facts already on the ground. Given this, Guantanamo is not, and should not form, the baseline against which all future international detention practice should be judged. Honest questions of policy and law remain regarding the best approach to ensure lawful and effective human intelligence gathering, detention, and trial of terrorism suspects. But in answering them honestly, we would do well to begin by not letting the hard case of recent practice make bad law for future work.

43. See Lawyers Committee for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States 52-56 (Fiona Doherty & Deborah Pearlstein eds., 2003), available at http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf (summarizing status of Guantanamo detainees); see, e.g., Neil A. Lewis & David Johnston, New F.B.I. Files Describe Abuse of Iraq Inmates, N.Y. Times, Dec. 21, 2004, at A1 (recounting July 2004 F.B.I. agent report describing Guantanamo detainees chained to the floor for eighteen to twenty-four hours or more without food or water, left to soil themselves, and others subject to freezing temperatures, or temperatures “well over 100 degrees”); Neil A. Lewis, F.B.I. Memos Criticized Practices at Guantanamo, N.Y. Times, Dec. 7, 2004, at A19 (reporting cases confirmed by Army and F.B.I. spokespersons in which a female interrogator squeezed one male detainee’s genitals and bent back his thumbs; a prisoner was “gagged with duct tape that covered much of his head,” and a dog was used to intimidate a detainee); Josh White & John Mintz, Red Cross Cites ‘Inhumane’ Treatment at Guantanamo, WASH. POST, Dec. 1, 2004, at A10 (describing a July 2004 Red Cross report to the Pentagon finding use of forced nudity, severe temperatures, and other incidents of psychological and physical abuse at Guantanamo).

44. See N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law.”).