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Rationales for Detention: Security Threats and Intelligence Value

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In the armed conflict with Al Qaeda inside and outside Afghanistan,¹ the US government has had to grapple with difficult legal issues concerning who can be detained. In this brief essay, I discuss whether US practices have been consistent with the law of armed conflict (LOAC). Three specific issues are considered. The first is a threshold question: Does LOAC regulate who can be detained in a non-international armed conflict? After concluding that it does, I address two questions that implicate the substantive criteria for detention. First, is it lawful to detain civilians who have not directly participated in hostilities? Second, is it lawful to detain individuals for a long or indefinite period for the purpose of gathering intelligence? Since September 11, the US government has adjusted its detention practices to overcome various legal defects. These three issues remain among the fundamental challenges to the detention regime.

It is not obvious that LOAC regulates the substantive grounds for detention in non-international armed conflict. Neither Common Article 3 nor Additional Protocol II explicitly addresses the subject. They contain no language expressly prohibiting arbitrary detention or unlawful confinement. Similarly, the Rome Statute for the International Criminal Court includes “unlawful confinement” in a list of war crimes in international armed conflict.² Unlawful confinement, however, is

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conspicuously absent from the Statute's list of war crimes in non-international armed conflict. Additionally, a 2004 expert meeting—which included Louise Doswald-Beck, Knut Dörmann, Robert Goldman, Walter Kälin, Judge Theodore Meron, Sir Nigel Rodley and Jelena Pejic—concludes that LOAC does not contain rules precluding unlawful confinement in non-international armed conflicts:

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The experts noted that there are no provisions requiring certain reasons for detention, nor any procedures to prevent unnecessary detention. It was further observed that there are no specific supervisory mechanisms other than the minimal requirement that the ICRC [International Committee of the Red Cross] be allowed to offer its services. It was stated, therefore, that only national law is relevant, as well as international human rights law.³

Some legal advisers at the International Committee of the Red Cross (ICRC) have helped support this view. A presentation at the 2004 meeting by Dörmann, Deputy Head of the Legal Division of the ICRC, states: “International humanitarian law applicable to non-international armed conflicts contains no provisions requiring certain grounds for detention/internment nor are there any procedures defined to check the need for such detention.”⁴ An important article in the *International Review of the Red Cross* by Jelena Pejic, Legal Adviser in the ICRC Legal Division, is more equivocal. She states:

In non-international armed conflicts there is even less clarity as to how administrative detention is to be organized. Article 3 common to the Geneva Conventions, which is applicable as a minimum standard to all non-international armed conflicts, contains no provisions regulating internment, i.e. administrative detention for security reasons, apart from the requirement of humane treatment.⁵

Pejic does not elaborate whether or to what extent the requirement of humane treatment might directly regulate the use of security rationales or other grounds for confinement.

Many of these experts find some solace in the notion that gaps in LOAC are intolerable (else a legal black hole) and that those gaps would be filled by international human rights law. The 2004 expert meeting, in which Pejic, Dörmann and others participated, concludes:

The experts stated that as IHL does not provide procedural guarantees to persons detained during non-international armed conflict, human rights standards must always apply The general view was that instead of trying to amend humanitarian

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law to remedy its failings, the standards applicable to non-international armed conflict should be those of human rights law and subject to human rights remedies.⁶

International human rights law, however, is not accorded the same legal (or symbolic) weight in US law and practice as the Geneva Conventions or customary international humanitarian law. Hence, the exclusion of LOAC from this domain would leave a substantial void in the definition and regulation of impermissible behavior.

According to the weight of legal authority, however, no such gap exists. Unlawful confinement is prohibited by Common Article 3 (e.g., as a form of inhumane treatment) and by customary international humanitarian law. Under the framework set forth in Common Article 3, the power to detain is subject to a number of substantive constraints. First, individuals cannot be detained on discriminatory grounds such as “race, color, religion or faith, sex, birth or wealth, or any other similar criteria.”⁷ Second, parties to a conflict are prohibited from taking hostages. According to the ICRC *Commentary*, that prohibition is based on a fundamental principle of justice:

The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish.⁸

In other words, if a person does not bear individual responsibility for a security threat to the State, he should not be deprived of his liberty, even if confining him could prevent the threat from materializing. Third, Common Article 3 prohibits the passing of a sentence without affording fundamental judicial guarantees, and that provision implicitly restricts the use of administrative detention for punitive purposes.

More generally, unlawful confinement is prohibited by a broad-based obligation under Common Article 3: *hors de combat* “shall in all circumstances be treated humanely.”⁹ Indeed, the recent 2005 ICRC study on customary international humanitarian law states that, as a matter of treaty law, “arbitrary deprivation of liberty is not compatible” with humane treatment under Common Article 3.¹⁰ Joanna Dingwall argues persuasively that Common Article 3 prohibits unlawful confinement as a form of “cruel treatment.”¹¹ And, the overriding obligation of humane treatment is even more clearly and directly connected to the sources that Dingwall invokes.¹² As an analytic matter, these interpretations of humane treatment are not precluded by the existence of text explicitly prohibiting unlawful confinement in international conflicts, but the absence of text referring to unlawful

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confinement in Common Article 3. Rape is not explicitly prohibited by Common Article 3 either; yet it is well understood that rape is covered by the article.¹³ The protections codified in Common Article 3 are simply written in broader terms.

International authorities also suggest that unlawful confinement is prohibited in non-international armed conflict as a matter of customary international law. In considering the practices of armed opposition groups in Colombia's civil war, the Inter-American Commission on Human Rights stated: "International humanitarian law also prohibits the detention or internment of civilians except where necessary for imperative reasons of security."¹⁴ Liesbeth Zegveld also reports that the UN Commission on Human Rights drew from international humanitarian law applicable to international armed conflicts in demanding armed opposition groups refrain from arbitrary detention in Afghanistan (1993) and in the Sudan (1995).¹⁵ In addition, Article 3 of the Turku Declaration of Minimum Humanitarian Standards proscribes the disappearance of individuals, "including their abduction or unacknowledged detention."¹⁶ And Article 11 of the Turku Declaration includes an implicit restriction on substantive grounds for detention: "If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law"¹⁷

Once the question whether LOAC prohibits arbitrary detention is resolved in the affirmative, a second-order question is whether LOAC permits the administrative detention of civilians, including civilians who do not directly participate in hostilities.¹⁸ That question has arisen in recent litigation, and federal judges have been divided on the issue.¹⁹ The Fourth Geneva Convention rules on internment are the most directly relevant in this regard.²⁰ And, in accordance with Articles 5, 27, 41–43 and 78 of the Civilians Convention, States are permitted to detain not only civilians who directly participate in hostilities (e.g., unlawful combatants) but also civilians whose *indirect* participation in hostilities poses a security threat. At first blush, US practices in the conflict with Al Qaeda do not necessitate making such distinctions. The US government has formally claimed the authority, in legislation²¹ and in executive action,²² to detain only "unlawful *combatants*." However, the government's peculiar definition of "combatants" and its actual detention decisions betray a contrary policy of detaining civilians who have, at most, indirectly participated in hostilities.²³

Although LOAC does not forbid the detention of this broader class of civilians, domestic law might. For example, an important constitutional distinction may exist with respect to classes of individuals who can be subject to military jurisdiction. The constitutional line may be drawn between "combatants" (including direct participants in hostilities) and civilians, and LOAC should help define the

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boundaries of those groups for constitutional purposes. Indeed, if the government wishes to detain individuals in the latter group, it may be required to adopt laws explicitly subjecting “civilians” to detention. The basis for that clear statement rule would derive from domestic law, however, and not LOAC itself.

A remaining question is whether the United States can detain individuals, on a long-term or indefinite basis, for the purpose of gathering intelligence. Before analyzing that question of law, first consider the record of US detention practices following September 11. The government has used intelligence value as a ground for initial internment decisions, as well as for denying release. Former Deputy Assistant Secretary of Defense for Detainee Affairs Professor Matthew Waxman recently wrote: “Intelligence gathering through questioning of those in custody constitutes another important reason for detention in warfare, and especially in fighting terrorist networks.”²⁴ With respect to the global sphere of operations, the 2006 *Counterinsurgency Field Manual* states that information gathering provides a reason for detaining two classes of individuals: (1) “persons who have engaged in, or assisted those who engage in, terrorist or insurgent activities” and (2) “persons who have incidentally obtained knowledge regarding insurgent and terrorist activity, but who are not guilty of associating with such groups.”²⁵ Notably, information gathering appears to be an independent basis for detaining the first category of individuals even if they no longer pose a security threat.²⁶ However, for the second category, the *Counterinsurgency* manual states: “Since persons in the second category have not engaged in criminal or insurgent activities, they must be released, even if they refuse to provide information.”²⁷ It stands to reason that individuals in the first category could be denied release if they refuse to provide information. As another component of global operations, President George Bush announced that under the CIA’s secret detention program “[m]any are released after questioning, or turned over to local authorities—if we determine that they do not pose a continuing threat and no longer have significant intelligence value.”²⁸

With respect to detention in Guantanamo specifically, in determining whether a detainee should be transferred to the base, US military screening teams and the combatant commander must consider “the possible intelligence that may be gained from the detainee.”²⁹ And administrative review boards (ARB) may consider whether a detainee “is of continuing intelligence value” in deciding whether to recommend release.³⁰ That standard appears to regularize practices that predated the ARB process.³¹ Although stated in a summary fashion, a joint report by UN human rights officials concerning Guantanamo concludes “that the objective of the ongoing detention is not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaeda network.”³²

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Within the United States, the cases of individuals such as José Padilla and Ali Saleh Kahlah al-Marri suggest that intelligence value may constitute a dominant rationale for detention. In Padilla's case, the Solicitor General argued before the Supreme Court that "[t]he detention of enemy combatants serves two vital purposes directly connected to prosecuting the war. First, detention prevents captured combatants from rejoining the enemy and continuing the fight. Second, detention enables the military to gather critical intelligence from captured combatants concerning the capabilities and intentions of the enemy."³³ For the latter proposition, the Solicitor General cited and included, as an appendix to his brief, a declaration by Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency.³⁴ The Jacoby Declaration focuses on the need to obtain information from the detainee as the basis for military confinement outside of the criminal justice system.³⁵ In al-Marri's case, federal judges expressed concern over the apparent interrogation-based reasons for transferring the petitioner from criminal jurisdiction to military administrative detention:

[N]ot only has the Government offered no other explanation [than interrogation purposes] for abandoning al-Marri's prosecution, it has even propounded an affidavit in support of al-Marri's continued military detention, stating that he "possesses information of high intelligence value." *See* Rapp. Declaration. Moreover, former Attorney General John Ashcroft has explained that the Government decided to declare al-Marri an enemy combatant only after he became a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information." John Ashcroft, *Never Again: Securing America and Restoring Justice* 168-69 (2006).³⁶

Professor Marty Lederman, a leading expert on US detention policy since September 11, summarizes his view of the overall scheme: "Unlike in past conflicts, when the purpose of detention was incapacitation of actual combatants so that they could not fight against us, the dominant purpose of this detention regime is intelligence-gathering."³⁷

It is important to recognize that intelligence value has also constituted an independent basis for administrative detention in Iraq.³⁸ Consider Lieutenant Andru Wall's account of detainee operations:

Officially, individuals could be detained for their intelligence value for no more than 72 hours; however, anecdotal evidence suggested that longer intelligence detentions were common. The argument in favor of intelligence detentions was that, for example, if an individual knew who was responsible for carrying out attacks on Coalition Forces . . . then withholding [this information] constituted an imperative threat to the security of Coalition Forces The argument against such detentions was that the individual himself did not pose an imperative security threat³⁹

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Other reports also find that intelligence value constituted a—formal and informal—ground for detention in Iraq.⁴⁰

Three arguments might be raised to support the legality of US practice. First, the Geneva Conventions contain no express prohibition on the use of detention for intelligence-gathering purposes. Second, detention is permitted if obtaining the relevant information serves an imperative security interest. Third, if a State has the authority to detain an individual until the cessation of hostilities, the State has the prerogative to release her earlier if she provides valuable intelligence information.

At the outset in addressing these arguments we should note that an express provision of the Geneva Conventions may not be necessary if the regime implicitly contemplates that the only basis for detention is to prevent individuals returning to the fight. A customary norm may also suffice if treaties do not. And, even if LOAC permits interrogation incidental to detention, it does not necessarily permit detention for the purpose of interrogation. Nor does it permit coercive interrogation. Let's turn to an elaboration of some of these points and other points as well.

First, all three arguments are contradicted by legal authorities that have addressed the subject with respect to the general LOAC regime. The ICRC publicly criticized the use of Guantanamo for interrogation purposes.⁴¹ The joint report of UN officials declared: "The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions."⁴² And a plurality of the US Supreme Court stated in dicta: "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized."⁴³ Some commentators have suggested that the plurality's statement is conclusory and without citation to legal authority. However, in earlier passages, the opinion references authorities suggesting that detention is permitted exclusively to prevent individuals returning to the battlefield.⁴⁴ US policy, accordingly, thwarts the collective judgment of the US Supreme Court (in a plurality opinion), the ICRC and UN human rights officials.

Second, other provisions of the Geneva Conventions indirectly support the conclusion that indefinite or long-term detention is permitted only to prevent individuals returning to the battlefield. In general, detaining powers argue against early release of prisoners of war on the ground that the individuals might return to the fight. However, some detainees are too sick or wounded to return to the battlefield.⁴⁵ A valuable question for our purposes is whether the detaining power could nevertheless hold the individual to gather intelligence. The Prisoner of War (POW) Convention is clear; it places a categorical obligation to repatriate such individuals to their home countries.⁴⁶ There is no exception for detaining or precluding release of individuals on any other grounds such as intelligence value.

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Third, the most relevant rules may not be found directly in provisions regulating detention. The most relevant source may be found in rules governing interrogation. And those interrogation rules preclude the initial decision to detain an individual, as well as the purported prerogative to order release of a detainee who provides information. More specifically, the use of intelligence value violates Article 17 of the POW Convention and Article 31 of the Civilians Convention. Both articles strictly prohibit physical and moral coercion to obtain information from detainees.⁴⁷ Accordingly, individuals who are interrogated should not receive better treatment (release from detention) or worse treatment (continued confinement) on the basis of whether they provide or withhold information. In short, the relevant LOAC rules are found more directly in provisions regulating methods of interrogations, rather than provisions regulating grounds for detention. Notably, the former constitutes an independent basis for the application of LOAC in non-international armed conflicts. That is, even if LOAC does not regulate unlawful confinement in non-international armed conflict, it undoubtedly regulates coercive interrogations.

Fourth, an individual's possession of information does not constitute a valid security rationale for internment under the Civilians Convention. According to the ICRC *Commentary*, States have significant discretion to define activities that threaten their security.⁴⁸ The *Commentary*, however, also suggests that the individuals must themselves directly pose the threat. The paradigmatic examples provided by the *Commentary* include "[s]ubversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power."⁴⁹ More specific examples include "members of organizations whose object is to cause disturbances, or . . . [individuals who] may seriously prejudice its security by other means, such as sabotage or espionage."⁵⁰ Moreover, as described above, various authorities, including the ICRC, UN human rights officials and the Supreme Court, have repudiated intelligence-based grounds for detention. Those rejections were absolute and were issued in the context of security-based reasons for gathering intelligence.

Finally, the implications of allowing intelligence value as an independent ground for long-term or indefinite detention are intolerable. Doing so might permit the confinement of individuals, such as the children or other family members of combatants, who have no engagement in hostilities but have personal knowledge about the combatants. It might also permit the confinement of innocent detainees who do not have information themselves but are held as bargaining chips to coerce other individuals to provide information. And, a further implication is suggested by the declaration of Admiral Jacoby. He argues that "the intelligence cycle is continuous. This dynamic is especially important in the War on Terrorism.

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There is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods.”⁵¹ That justification essentially provides for continuing to hold individuals even if they have exhausted their current intelligence value. In sum, it is not too much of a stretch to suggest that “detaining individuals on the basis of what they were believed to know could be a slippery slope leading to mass, unwarranted detentions.”⁵²

Since September 11, the United States has adjusted its detention practices in response to powerful objections. Some of the remaining objections are valid and others not. As a threshold matter, an important point is that the laws of war prohibit unlawful confinement in non-international armed conflict. The Obama administration provides a new opportunity to reassess detention policy through that legal framework.

Notes

1. I work with the assumption that since September 11, 2001, the United States has been engaged in an armed conflict with Al Qaeda—a proposition that all three branches of the US government now accept. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006); Memorandum from Gordon England, Deputy Secretary of Defense, to the Secretaries of the Military Departments et al., Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006), <http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060711.html>; Military Commissions Act of 2006 § 948a(1), Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified in 10 USC 47(A)). *See also* Derek Jinks, *September 11 and the Laws of War*, 28 YALE JOURNAL OF INTERNATIONAL LAW 1 (2003).

2. Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

3. EXPERT MEETING ON THE SUPERVISION OF THE LAWFULNESS OF DETENTION DURING ARMED CONFLICT 17 (The Graduate Institute of International Studies, 2004), *available at* http://www.ruig-ian.org/ressources/communication_colloque_rapport04.pdf [hereinafter 2004 Expert Meeting].

4. *Id.* at 15.

5. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 INTERNATIONAL REVIEW OF THE RED CROSS 375 (2005).

6. 2004 Expert Meeting, *supra* note 3, at 41.

7. Convention Relative to the Protection of Civilian Persons in Time of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter *Civilians Convention*].

8. COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE TREATMENT OF CIVILIANS IN TIME OF WAR 39 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY IV].

9. *Civilians Convention*, *supra* note 7, art. 3(1).

10. I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 344 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); cf. James G. Stewart, *Rethinking Guantánamo: Unlawful*

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Confinement as Applied in International Criminal Law, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 12 (2006); ICRC, *US Detention Related to the Events of 11 September 2001 and Its Aftermath—The Role of the ICRC*, July 30, 2008, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument> [hereinafter Role of the ICRC].

11. Joanna Dingwall, *Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 133 (2004).

12. *Id.* For an argument that Article 5 of the Civilians Convention provides evidence that “humane treatment” includes a prohibition on unlawful confinement, see DEREK JINKS, *THE RULES OF WAR: THE GENEVA CONVENTIONS IN THE AGE OF TERROR* (forthcoming 2009).

13. Dingwall, *supra* note 11, at 159.

14. Inter-American Commission on Human Rights, Third Special Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9, rev. 1 (1999), ¶ 122; *id.*, ¶¶ 128–29 (“The Commission notes that the vast majority of these detentions relating to the election boycott constituted breaches of international humanitarian law. The armed dissident groups repeatedly captured and held civilians, although they did not pose any direct threat to the military operations of the guerrillas Armed dissident groups are also responsible for arbitrary deprivations of liberty carried out against civilians, outside of the context of the elections.”).

15. See LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 65–66 (2002); see also I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, at 348–49.

16. Turku Declaration, art. 3, U.N. Doc. E/CN.4/Sub.2/1991/55 (1990).

17. *Id.*, art. 11.

18. See Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW (forthcoming 2009).

19. See, e.g., *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *cert. granted*, 77 U.S.L.W. 3148 (U.S. Dec. 5, 2008) (No. 08-368).

20. One reason to examine the rules that apply in international conflict is due to their use as an analogy. It is commonplace for commentators to draw implicitly and explicitly on the Third and Fourth Conventions in discussing the conflict with Al Qaeda (e.g., with respect to detaining fighters and holding them until the cessation of hostilities). We must, therefore, understand the referent—the rules governing international conflict—simply to assess those types of claims. A stronger reason is that the Fourth Geneva Convention, indeed, generally constitutes the most closely analogous rules concerning detention of civilians. It thus provides the best approximation of LOAC rules when interpretive gaps arise.

More fundamentally, LOAC in international armed conflict is directly relevant because it establishes an outer boundary of permissive action. If States have authority to engage in particular actions in an international armed conflict, they a fortiori possess the authority to engage in those actions in non-international conflict. That proposition results from the general relationship between State sovereignty and international law. And LOAC is no exception. The scope of LOAC is uniformly less restrictive in internal armed conflicts (where State sovereignty is stronger) than in international armed conflicts (where State sovereignty is weaker). Hence, if LOAC permits States to detain civilians in an international armed conflict, LOAC surely permits States to take those actions in non-international conflicts.

21. Military Commissions Act of 2006 § 948 a(1), Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified in 10 USC 47(A)).

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22. Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals 1 (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

23. Department of Defense, Fact Sheet: Guantanamo Detainees 2 (Feb. 13, 2004) (including among “representative examples” of detained combatants individuals “involved in terrorist financing,” “with links to a financier of the September 11th plots,” and “who served as an al Qaida translator and managed operating funds”), *available at* <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf>; *see also* News Release, Office of the Assistant Secretary of Defense (Public Affairs), Guantanamo Provides Valuable Information (June 12, 2005), *available at* www.defenselink.mil/releases/release.aspx?releaseid=8583 (“Guantanamo houses enemy combatants ranging from terrorist trainers and recruiters to bomb makers, would-be suicide bombers and terrorist financiers”). Also consider the principal charges against individuals held at Guantanamo and later designated for prosecution before military commissions. According to the initial charge sheets, one detainee allegedly served as an “accountant and treasurer” and “provided logistical support such as food, shelter and clothing;” he also “assisted in loading and transporting” weapons and ammunition. Charge Sheet at 3–4, *United States v. al Qosi* (US Military Commission), *available at* <http://www.defenselink.mil/news/Feb2008/d20080208qosi.pdf> (last visited Feb. 10, 2009). A second detainee “created several instructional and motivational recruiting video tapes.” Charge Sheet at 3, *United States v. al Bahlul* (US Military Commission), *available at* <http://www.defenselink.mil/news/Jun2004/d20040629ABCO.pdf> (last visited Feb. 10, 2009). These allegations alone clearly would not support a finding of “direct participation” under LOAC. Instead, these facts fall squarely within expressly identified examples of indirect participation or nonparticipation. *See* MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 672 (1982) (noting that “transporting supplies, serving as messengers or disseminating propaganda” does not constitute direct participation). *See also* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terror*, 118 *HARVARD LAW REVIEW* 2653 (2005).

24. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 *COLUMBIA LAW REVIEW* 1365, 1375 (2008).

25. Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, *Counterinsurgency* ¶ 7-40 (2006).

26. *See also* Department of Defense, Fact Sheet: Guantanamo Detainees, *supra* note 23, at 6 (“The commander of US Southern Command, or his designee, then makes a recommendation in each individual case Continued detention of enemy combatants is appropriate not only when a detainee is identified as posing a significant threat if released, but also when . . . there is a substantial law enforcement or intelligence interest”).

27. *Counterinsurgency*, *supra* note 25.

28. President George W. Bush, Remarks on the War on Terror, 42 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 1569 (Sept. 6, 2006); *see also id.* at 1573 (“[O]nce we’ve determined that the terrorists held by the CIA have little or no additional intelligence value, many of them have been returned to their home countries for prosecution or detention by their governments”).

29. Deputy Secretary of Defense Paul Wolfowitz, OSD Order 06942-04, *Administrative Review Procedures for Enemy Combatants in the Control of the Dep’t of Def. at Guantánamo Bay, Cuba* (May 11, 2004), at 1-2, *available at* <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

30. Administrative Review Board Process § 3(f)(1)(c) (attached to Memorandum from Gordon England, Deputy Secretary of Defense, to the Secretary of State et al., Implementation of

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Administrative Review Procedures for Enemy Combatants Detained at US Naval Base Guantanamo Bay, Cuba (Sept. 14, 2004), *available at* <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

31. General Tommy Franks, Press Conference in Tampa, Florida (Jan. 18, 2002), <http://www.globalsecurity.org/military/library/news/2002/01/mil-020118-dod01.htm> (“When we have them in Guantanamo Bay, that sort of interrogation will continue, and then determinations will be made as to whether these—a given detainee may be retained for intelligence value or may be handed over for prosecution within legal channels”); Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, NEW YORK TIMES, Oct. 10, 2003, at A1 (“General [Geoffrey] Miller[, Commander of Joint Task Force Guantanamo Bay,] said the inmates had been kept in custody because they had valuable information to impart.”).

32. U.N. Economic and Social Counsel, Commission on Human Rights, Situation of Detainees at Guantanamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, ¶ 23, U.N. Doc. E/CN.4/2006/120 (Feb. 2006), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement> [hereinafter Joint Report on Situation of Detainees at Guantanamo Bay].

33. Brief for the Petitioner at 28–29, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027).

34. Declaration of Vice Admiral Lowell E. Jacoby, *id.*, *available at* http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

35. For further analysis on this point, see Marty Lederman, *The Rosetta Stone of the Detention/Interrogation Scandal*, <http://balkin.blogspot.com/2007/08/rosetta-stone-of-detentioninterrogation.html> (Aug. 14, 2007, 11:32 EDT).

36. *al-Marri v. Pucciarelli*, 534 F.3d 213, 237 n.19 (2008) (Motz, J., concurring in part and dissenting in part).

37. Lederman, *supra* note 35.

38. On the theory that the US conflict with Al Qaeda extends into Iraq, US detention practices in that area are relevant to our discussion.

39. See Andru E. Wall, *Civilian Detentions in Iraq*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 413, 431 (Michael N. Schmitt & Jelena Pejic eds., 2007).

40. See, e.g., JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DETENTION OPERATIONS 60 (2004), *available at* <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf> (“The security detainees were either held for their intelligence value or presented a continuing threat to Coalition Forces”); *id.* at 61 (“Interviews indicated area commanders were reluctant to concur with release decisions out of concern that potential combatants would be reintroduced into the areas of operation or that the detainees had continuing intelligence value.”).

41. Lewis, *supra* note 31 (Christophe Girod, senior Red Cross official in Washington, “said that it was intolerable that the [Guantanamo] complex was used as ‘an investigation center, not a detention center.’”).

42. Joint Report on Situation of Detainees at Guantanamo Bay, *supra* note 32, ¶ 23; cf. Role of the ICRC, *supra* note 10 (“Persons detained in relation to an armed conflict may be detained for either imperative reasons of security or on suspicion of having committed a crime.”).

43. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

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44. *Id.* at 518.

45. COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 515 (Jean S. Pictet ed., 1960) (explaining in similar terms the categorical obligation to repatriate).

46. Convention Relative to the Treatment of Prisoners of War art. 110, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 7, at 244.

47. *Id.*, art. 17(3) (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”); Civilians Convention, *supra* note 7, art. 31 (“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”).

48. ICRC COMMENTARY IV, *supra* note 8, at 257.

49. *Id.* There is a possible exception with respect to information, but of a wholly different character. An individual may possess information which makes her a danger to the detaining power (e.g., knowledge of vulnerabilities in the detaining power’s defense system). A plausible reading of *Commentary IV* would permit the employment of administrative detention—if it is absolutely necessary—to prevent her directly assisting the enemy with that type of knowledge. *See id.* at 258 (“To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security”).

50. *Id.* at 258. *See also* Prosecutor v. Delalic et al., ICTY Trial Chamber, Case No. IT-96-21, Judgment, ¶ 568 (Nov. 16, 1998), upheld by Prosecutor v. Delalic et al., ICTY Appeals Chamber, Case No. IT-96-21-A, Judgment (Feb. 20, 2001); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 280 (Feb. 26, 2001), upheld by Prosecutor v. Kordic and Cerkez, ICTY Appeals Chamber, Case No. IT-95-14/2-A, Judgment, ¶¶ 72–73, 620 (Dec. 17, 2004).

51. Declaration of Vice Admiral Jacoby, *supra* note 34, at 5.

52. Wall, *supra* note 39, at 431.