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GUANTÁNAMO HABEAS REVIEW: ARE THE D.C. DISTRICT COURT'S DECISIONS CONSISTENT WITH IHL INTERNMENT STANDARDS?

Laura M. Olson*

*After the Supreme Court ruled in 2008 in *Boumediene v. Bush* that the detainees at the Guantánamo Bay detention facility are entitled to the privilege of habeas corpus to challenge the legality of their detention, the D.C. District Court started to take action on the hundreds of petitions filed. In these habeas proceedings, the court has faced the threshold legal question of the scope of the government's authority to detain pursuant to the Authorization for Use of Military Force as informed by the law of war. This article reviews how the court has delimited the permissible bounds of the government's detention authority, specifically focusing on whether the court's decisions are consistent with the internment standards under the law of war, international humanitarian law (IHL). This analysis seeks to assess whether the court's application of the Bush Administration's definition of "enemy combatant" or the new definition provided by the Obama Administration is broader or narrower than the IHL standards.*

I. INTRODUCTION

After the Supreme Court held in *Rasul v. Bush* that statutory habeas jurisdiction extended to Guantánamo,¹ those detained at the Guantánamo Bay detention facility filed hundreds of petitions. No action, however, was taken on the petitions until the Supreme Court ruled in 2008 in *Boumediene v. Bush* that Guantánamo detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention."² As of this writing, the D.C. District Court has ruled on thirty-five petitions, granting twenty-nine, under both the Bush and Obama Administrations.³

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¹ See 542 U.S. 466, 473 (2004) (citing 28 U.S.C. § 2241(a), (c)(3) (2006)).

² 128 S. Ct. 2229, 2262 (2008).

³ See Carol Rosenberg, *Judge Orders Release of Yemeni From Guantánamo*, MIAMI HERALD, Aug. 18, 2009, available at <http://www.miamiherald.com/news/americas/guantanamo/story/1191864.html> (reporting that "Kessler's ruling raised to 29 the number of long-held Guantánamo captives that federal judges have ordered released . . . compared with the six whose detentions that judges have upheld."). An additional petition was denied just as this article was submitted, thus, that case is not included in this analysis: Al Odah, et al. v.

In these habeas proceedings, the D.C. District Court has faced the threshold legal question: “what is the scope of the government’s authority to detain these, and other, detainees pursuant to the Authorization for Use of Military Force . . . , as informed by the law of war?”⁴ This article reviews how the District Court has delimited “[t]he permissible bounds’ of the government’s detention authority ‘as subsequent cases are presented to them.’”⁵ Specifically, the focus is on whether the D.C. District Court’s decisions are consistent with the internment standards under the law of war, international humanitarian law (IHL). As internment,⁶ the deprivation of a person’s liberty without criminal charge as a preventive security measure, is an extreme measure even in armed conflict, IHL set limits on its use. This analysis seeks to assess whether application by the D.C. District Court of the Bush Administration’s definition of “enemy combatant” or the new definition provided by the Obama Administration is broader or narrower than the IHL standards.

The applicable conventional IHL rules vary depending upon whether an armed conflict is international or non-international. There exist fewer rules applicable to non-international armed conflict and, in contrast to IHL applicable to international armed conflict, there are no conventional IHL rules providing a basis for internment in non-international armed conflicts. The Supreme Court in *Hamdan v. Rumsfeld* concluded that, at the very least, Article 3 common to the four Geneva Conventions applies to the U.S. conflict with al-Qaeda because it is a “conflict *not* of an international character.”⁷ Many of the individuals currently held at Guantánamo were de-

United States et al., Civil Action No. 02-828 (CKK), 2009 WL 2730489, at *1 (D.D.C. Aug. 24, 2009) (denying Al Odah’s petition—the oldest of the pending Guantánamo Bay habeas cases).

⁴ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 66 (D.D.C. 2009).

⁵ *Id.* at 66 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004)).

⁶ In this article, the term “internment” and occasionally the more general term “detention” will be used to refer to preventive detention without charge or what is also called security or administration detention.

⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–31 (2006) (citing Article 3 common to the four Geneva Conventions, *see* First Geneva Convention, *infra* note 10, art. 3) (emphasis added). The armed conflict in Afghanistan demonstrates how conflicts can evolve. It is generally agreed that an international armed conflict in Afghanistan began on October 7, 2001 between U.S. and coalition forces and the Taliban and its allied forces (i.e., al-Qaeda). While it has not always been agreed, experts have contended that this international armed conflict ended on June 19, 2002 (with the convening of the Loya Jirga that established the Interim Government of Afghanistan). *See, e.g.*, Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT’L L. 71, 76–77 (2004). After June 19, 2002, the conflict then transformed into a non-international armed conflict, internationalized by the presence of the United States and coalition forces, between the Taliban and al-Qaeda and Afghanistan (supported by the United States and coalition forces). *Id.* at 82. The United States has claimed that an armed conflict has been ongoing prior to September 11, 2001—since the

tained in relation to that conflict. Thus, much of the discussion on internment in this article concerns the extent to which analogous application of IHL internment standards applicable to international armed conflict is appropriate in non-international armed conflict and, if so, in which form.⁸

The first section of this article provides background by briefly describing the bases for internment under conventional IHL and explaining how IHL of international armed conflict could be analogously applied to non-international armed conflicts in order to address internment. The following section discusses the executive branch's practice of internment at Guantánamo, assessing both the asserted legal bases for internment and the various internment standards in relation to IHL. The third section reviews the D.C. District Court's interpretation of the executive's internment standards to see if the court's decisions are consistent with IHL internment standards. This review and accompanying analysis modestly seeks to present some initial reflections on these issues and by no means intends to be exhaustive.

II. INTERNMENT DURING ARMED CONFLICT UNDER IHL

In peacetime, as during armed conflict, persons may be detained awaiting trial for a crime or based upon conviction for a crime. For the individual non-state actor, participation in the conflict generally constitutes a crime under the domestic law of the state affected by the conflict. This sec-

bombings of the U.S. embassies (August 7, 1998) in the East African capital cities of Dar es Salaam, Tanzania, and Nairobi, Kenya and the U.S.S. Cole (October 12, 2000) in Yemen. The Supreme Court in *Hamdan* did not question the U.S. assertion that an armed conflict with al-Qaeda began on September 11, 2001, however, the Court did *not* assert that it began prior to that date. Without explicitly stating the classification of the conflict, the Court found that Common Article 3 applied. *Hamdan*, 548 U.S. at 630–31. The Court rejected the Bush Administration's argument that the conflict with al-Qaeda was an international armed conflict based on the reasoning that an international armed conflict can only be between states. *Id.* *But see* First Additional Protocol, *infra* note 27, art. 1(4). The Supreme Court also rejected the argument that a non-international armed conflict can only occur within the territory of a single state. *Hamdan*, 548 U.S. at 631. Thus, the Court appears to have concluded that the conflict with al-Qaeda *in Afghanistan* is a non-international armed conflict as understood for application of Common Article 3.

⁸ “According to the government, then, because the law of war has evolved primarily in the context of international armed conflicts between nations, the President has the authority to detain ‘those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.’” *Hamlily v. Obama*, 616 F. Supp. 2d 63, 67 (D.D.C. May 19, 2009) (citing Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.C. Cir. March 13, 2009), *available at* <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> [hereinafter March 13 Memo]).

tion focuses on that which is more unique to armed conflicts—internment of enemies without criminal charge as a preventive security measure, specifically the internment of prisoners of war and, under certain circumstances, civilians. This section describes the possible bases under IHL for this particular form of deprivation of liberty in international and non-international armed conflict.

A. *IHL Bases for Internment: When to Hold and When to Release*⁹

IHL provides grounds for possible internment in international armed conflict under certain conditions for specific categories of protected persons. The First and Second Geneva Conventions regulate the retention of medical and religious personnel “only in so far as the state of health, the spiritual needs and the number of prisoners of war require.”¹⁰ The Third Geneva Convention stipulates that “[t]he Detaining Power may subject prisoners of war to internment.”¹¹ Concerning civilians, the Fourth Geneva Convention provides that—as to aliens in the territory of a party to the conflict—“[t]he internment or placing in assigned residence of protected persons may be ordered only if the *security* of the Detaining Power makes it *absolutely necessary*.”¹² In an occupied territory, “[i]f the Occupying Power considers it necessary, for *imperative reasons of security*, to take safety

⁹ Material for this section has been substantially based on text written by this author. See Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-international Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437, 439–42 (2009); Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 617–18 (2008).

¹⁰ Geneva Convention for the Amelioration of the Conditions of Wounded and Sick in Armed Forces in the Field art. 28, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; see also *id.* arts. 30, 32; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 36–37, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention].

¹¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 152 [hereinafter Third Geneva Convention]. Article 4 of the Third Geneva Convention defines prisoner of war. Prisoners of war are not limited to members of the armed force but also include, for example, “[p]ersons *accompanying the armed forces without actually being members thereof*, such as civilian members of military aircraft crews, war correspondents, and supply contractors.” *Id.* art. 4(A)(4) (emphasis added).

¹² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (emphasis added).

measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”¹³

In contrast, conventional IHL applicable to non-international armed conflict provides no specific grounds for internment. Yet, conventional IHL contemplates that internment occurs in non-international armed conflict, as demonstrated by the references to internment found in Articles 5 and 6 of the Second Additional Protocol to the Geneva Conventions,¹⁴ which regulate—to a certain extent—internment. Article 3 common to the four Geneva Conventions makes no reference to internment.

In order to explain the absence of a legal basis for internment in IHL applicable to non-international armed conflict, a parallel will be drawn to the issue of the legality of non-state actors taking up arms against the state—that is, engaging in armed conflict. This is not a matter regulated by IHL, but by domestic law,¹⁵ and it is hard to imagine domestic legislation doing anything but prohibiting such action.¹⁶ Thus, while a non-state actor by the mere fact of engaging in armed conflict violates domestic law, it does not violate IHL. IHL addresses the reality that non-international armed conflict exists—and that internment will occur during it—“by regulating it to ensure a minimum of humanity in this . . . illegal situation.”¹⁷

In addition to providing guidance on when internment may occur or begin, IHL applicable to international armed conflict also stipulates when the captivity must end—further clarifying the boundaries of permissible internment. Retention of medical and religious personnel must cease if prisoners of war are not in need.¹⁸ According to the Third Geneva Convention, repatriation of prisoners of war takes place due to medical reasons *during* the conflict,¹⁹ and release and repatriation for all, without delay, must occur

¹³ *Id.* art. 78 (emphasis added).

¹⁴ *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5, *adopted* June 8, 1977, 1125 U.N.T.S. 609, 612 (providing that “the following provisions shall be respected as a minimum with regard to persons deprived of liberty for reasons related to the armed conflict, whether they are interned or detained . . .”) [hereinafter Second Additional Protocol].

¹⁵ The use of force between states (international armed conflict) is a matter regulated by international law, i.e., *jus ad bellum* (distinct from *jus in bello*).

¹⁶ This explains the incorporation of Article 6(5) into the Second Additional Protocol. *See* Second Additional Protocol, *supra* note 14, art. 6(5) (stating that at the end of hostilities authorities should grant broad amnesty to armed conflict participants and those deprived of liberty in relation to the armed conflict). Without amnesty, non-state actors may be reluctant to put down their arms because they likely violated domestic criminal law by their participation in hostilities.

¹⁷ MARCO SASSÒLI ET AL., 1 HOW DOES LAW PROTECT IN WAR? 102–03 (2006).

¹⁸ *See* First Geneva Convention, *supra* note 10, art. 28; Second Geneva Convention, *supra* note 10, art. 37.

¹⁹ *See* Third Geneva Convention, *supra* note 11, arts. 109–17.

after the cessation of active hostilities.²⁰ Unlike prisoners of war (with no medical reason requiring release), civilian internees may not necessarily be interned until the end of the conflict. The Fourth Geneva Convention provides that a civilian must be released “as soon as the reasons which necessitated his internment no longer exist”;²¹ this may be during the conflict. If, however, civilians remain interned for the duration of the conflict, “[i]nternment shall cease as soon as possible after the close of hostilities.”²²

Captured combatants, simply because they are opposing combatants, are interned in order to prevent them from returning to the battlefield. Except when doubt arises as to whether the person is entitled to prisoner-of-war status,²³ there is no need for an individual review, as the internment is not based on any particular individual characteristic but on mere formal membership in the state’s armed forces (or formally accompanying the armed forces) and would run counter to the IHL objective for interning of prisoners of war.²⁴ As the reasoning behind the basis for internment of prisoners of war under IHL is unique, the reasoning does not extend to interned civilians in an international armed conflict or persons interned in a non-international armed conflict.

Thus, generally only the basis for interning a civilian requires an assessment,²⁵ as civilians—unlike combatants who are captured and become prisoners of war—may only be interned if and for as long as they pose an imperative security threat. The Fourth Geneva Convention applicable to international armed conflicts provides internment review procedures applicable to civilian internees, giving some detail regarding the type of body and timing of review.²⁶ The First Additional Protocol to the Geneva Conventions introduces an additional safeguard to the process.²⁷ Finally, it

²⁰ *Id.* art. 118; *But see id.* art. 119(5).

²¹ Fourth Geneva Convention, *supra* note 12, art. 132.

²² *Id.* art. 133.

²³ *See* Third Geneva Convention, *supra* note 11, art. 5.

²⁴ *See* Marco Sassòli, *Le Droit International Humanitaire, Une Lex Specialis par Rapport aux Droits Humains?*, in *LE DROITS DE L’HOMME ET LA CONSTITUTION, ETUDES EN L’HONNEUR DU PROFESSEUR GIORGIO MALINVERNI* 375, 386–87 (2007). *See* SASSÒLI ET AL., *supra* note 17, at 154–55. *See also* Gloria Gaggioli and Robert Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, 37 *ISR. Y.B. HUM. RTS.* 115, 122 (2007) (Thus, this “gap” in IHL is instead an intentional omission, a “qualified silence”).

²⁵ Reviews of medical reasons for the release of prisoners of war also take place. *See* Third Geneva Convention, *supra* note 11, arts. 109–17.

²⁶ *See* Fourth Geneva Convention, *supra* note 12, arts. 43, 78(2).

²⁷ The person interned is to “be informed promptly, in a language he understands, of the reasons why these measures were taken.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts art. 75(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol].

should be noted that unlawful confinement is a grave breach of the Fourth Geneva Convention.²⁸

The Second Additional Protocol applicable in non-international armed conflict briefly mentions internment²⁹ but provides no guidance regarding procedures either to assess the decision to intern or to terminate captivity. Again, Common Article 3 does not speak to the issue.

B. Internment of Civilians During International Armed Conflict: The Meaning of “Imperative Reasons of Security”

A civilian may be interned based on an individual determination that it is absolutely necessary for “imperative reasons of security”—rather than on mere formal membership in the state’s armed forces as for prisoners of war. Thus, understanding the meaning and scope of “imperative reasons of security” is critical to appropriately applying IHL and ensuring no arbitrary deprivation of liberty takes place.

As the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated, “[t]he confinement of civilians during armed conflict may be permissible in limited cases, but has in any event to be in compliance with the provisions of . . . Geneva Convention IV.”³⁰ In that regard, it is crucial to understand what is meant by the following language in the Fourth Geneva Convention, which stipulates the legal basis for internment: “if the *security* of the Detaining Power makes it *absolutely necessary*”³¹ or, in occupied territory, “*imperative reasons of security*”.³²

This legal basis requires that, for purposes of internment, persons must represent a real threat to the state’s security in the present or in the future. The Commentary on the Fourth Geneva Convention explains “[i]t did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the

²⁸ See Fourth Geneva Convention, *supra* note 12, art. 147. See also Rome Statute of the International Criminal Court art. 8(2)(a)(vii), July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 2(g), May 25, 1993, 32 I.L.M. 1192.

²⁹ The Second Additional Protocol only states that “[i]f it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.” Second Additional Protocol, *supra* note 14, art. 5(4). In the Second Additional Protocol’s suggestion to grant amnesty for participation in hostilities, internment is mentioned: “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are *interned* or detained.” *Id.* art. 6(5) (emphasis added).

³⁰ Prosecutor v. Delaić, Case No. IT-96-21-T, Judgment, ¶ 578 (Nov. 16, 1998).

³¹ Fourth Geneva Convention, *supra* note 12, art. 42 (emphasis added).

³² *Id.* art. 78 (emphasis added).

State which justifies internment or assigned residence.”³³ The ICTY agrees with the assertion that “the decision of whether a civilian constitutes a threat to the security of the State is largely left to its discretion”;³⁴ however, this does not mean that no parameters exist on this discretion.

In the *Delalić* case, the ICTY found the accused guilty of unlawful confinement of civilians—grave breaches of the Fourth Geneva Convention.³⁵ The ICTY “interpreted Article 42 [of the Fourth Geneva Convention] as permitting internment only if there are ‘serious and legitimate reasons’ to think that the interned persons may seriously prejudice the security of the detaining power by means such as sabotage or espionage.”³⁶ The ICTY Trial Chamber held:

Clearly, internment is only permitted when absolutely necessary. Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.

On the other hand, the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, the party 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.³⁷

The Trial Chamber also stated:

The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security. Thus, if these measures were inspired by other considerations, the re-

³³ 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 257 (Jean S. Pictet ed., 1958) (regarding Article 42); *see also id.* at 368 (regarding Article 78 and reiterating that “[i]n any case, such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.”) [hereinafter COMMENTARY].

³⁴ Prosecutor v. Delaić, Case No. IT-96-21-T, Judgment, ¶ 583 (Nov. 16, 1998). *See also* Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶¶ 282–85 (Feb. 26, 2001).

³⁵ *See Delalić*, IT-96-21-T, at Part IV.

³⁶ 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 345 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (citing *Delalić*, IT-96-21-T, ¶ 576). *See also id.* ¶ 582 (referencing Article 78 of the Fourth Geneva, applicable to occupied territory, as also safeguarding the rights of interned persons).

³⁷ Prosecutor v. Delaić, Case No. IT-96-21-T, Judgment, ¶¶ 576–77 (Nov. 16, 1998) (emphasis in original).

viewing body would be bound to vacate them. Clearly, the procedures established in Geneva Convention IV itself are a minimum and the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands.³⁸

The International Committee of the Red Cross (ICRC)³⁹ and the ICTY agree that “it must be borne in mind that the measure of internment for reasons of security is an exceptional one and can never be taken on a collective basis”,⁴⁰ i.e., that there must be an individual nexus.⁴¹ The ICRC asserts “that internment . . . for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.”⁴² The U.S. Supreme Court agrees; a plurality of the Court interpreted the 2001 Authorization for Use of Military Force (AUMF) as implicitly including the power to detain, under certain circumstances, al-Qaeda and Taliban fighters captured in Afghanistan. However, the Court noted that “[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”⁴³ The ICRC also points out that

³⁸ *Id.* ¶ 581.

³⁹ ICRC institutional guidelines: “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 11, 30IC/07/8.4 (Oct. 2007), Annex 1 (originally published as 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, 381 (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p375/\\$File/irrc_858_Pejic.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p375/$File/irrc_858_Pejic.pdf)) [hereinafter ICRC Guidelines].

⁴⁰ *Prosecutor v. Delaić*, Case No. IT-96-21-T, Judgment, ¶ 583 (Nov. 16, 1998). *See also* *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 285 (Feb. 26, 2001).

⁴¹ *See* COMMENTARY, *supra* note 33, at 367 (regarding Article 78 and stating that “there can be no question of taking collective measures: each case must be decided separately”).

⁴² ICRC Guidelines, *supra* note 39, at 380.

⁴³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality). *See* Matthew Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT’L SEC. L & POL’Y 1, 15–16 (2009) (citations omitted):

[N]o doubt information-gathering was at the forefront of the Bush administration’s detention policies, as demonstrated by the lengths to which that Administration went to defend permissive interrogation standards and CIA detention programs. “These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks,” explained President Bush in September 2006, in disclosing publicly the CIA secret detention program. “The security of our nation and the lives of our citizens depend on our ability to learn what those terrorists know.”

Id. at 16 (citing President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/>. *See also* Remarks by Attorney General Michael B. Mukasey,

“interning or administratively detaining persons for the purpose of using them as ‘bargaining chips’ is also not justifiable as a reason for internment. Such deprivation of liberty would in fact amount to hostage-taking, which is prohibited.”⁴⁴

“Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power”⁴⁵ meets the threshold of “imperative reasons of security.”⁴⁶ Providing logistical support, analogous to that described in the Third Geneva Convention⁴⁷ for persons “accompanying” the armed forces rather than being part of them, can be considered direct assistance. Merely having political sympathy or political affiliation with the enemy cannot constitute “imperative reasons of security” for internment purposes.

Furthermore, given the discussion below on U.S. internment standards, it is important to emphasize that this standard of “imperative reasons of security” is distinct from that of “direct participation in hostilities.”⁴⁸

Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008) (“Detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy.”). *See also* DEP’T OF ARMY, COUNTERINSURGENCY (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

In COIN environments, distinguishing an insurgent from a civilian is difficult and often impossible. Treating a civilian like an insurgent, however, is a sure recipe for failure. Individuals suspected of insurgent or terrorist activity may be detained for two reasons:

- To prevent them from conducting further attacks.
- To gather information to prevent other insurgents and terrorists from conducting attacks.

These reasons allow for two classes of persons to be detained and interrogated:

- Persons who have engaged in, or assisted those who engage in, terrorist or insurgent activities.
- Persons who have incidentally obtained knowledge regarding insurgent and terrorist activity, but who are not guilty of associating with such groups.

People engaging in insurgent activities may be detained as enemies. Persons not guilty of associating with insurgent or terrorist groups may be detained and questioned for specific information. However, since these people have not—by virtue of their activities—represented a threat, they may be detained only long enough to obtain the relevant information. 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.

Id. ¶ 7-40.

⁴⁴ ICRC Guidelines, *supra* note 39, at 380 n.20.

⁴⁵ *See* COMMENTARY, *supra* note 33, at 258 (regarding Article 42).

⁴⁶ *See* Fourth Geneva Convention, *supra* note 12, art. 78.

⁴⁷ Third Geneva Convention, *supra* note 11, art. 4(A)(4).

⁴⁸ *See generally* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48 (2009) (addressing the improper conflation between the authority to target and

First, these standards serve different purposes. The latter determines whether a civilian loses his or her presumptive⁴⁹ immunity from attack and may thus be directly targeted during that period⁵⁰ and the former determines whether a civilian during an international armed conflict may be interned. Second, their scopes of coverage differ. While the standard of “direct participation in hostilities” can—in rough terms—be considered an authorization to kill, the standard of “imperative reasons of security” merely initiates a temporary deprivation of a person’s liberty; the latter standard is broader in scope. There is overlap only in that a civilian “directly participating in hostilities” would certainly meet the standard of “imperative reasons of security” for purposes of internment; the reverse is not automatically true.

the authority to intern, particularly the distinction between civilians “directly participating in hostilities” and civilians not having done so but yet posing an imperative security threat).

⁴⁹ “In case of doubt whether a person is a civilian, that person shall be considered a civilian.” First Additional Protocol, *supra* note 27, art. 50(1).

⁵⁰ Despite mention of the standard of “direct participation in hostilities” in IHL treaty law, applicable to international and non-international armed conflicts, no definition of it exists in treaty law, state practice, or jurisprudence. *See, e.g.*, First Geneva Convention, *supra* note 10, art. 3 (also known as “Common Article 3”); Second Additional Protocol, *supra* note 14, art. 13; First Additional Protocol, *supra* note 27, art. 51(3). The Israeli Supreme Court is the only court to have addressed this notion in some detail. *See* Pub. Comm. Against Torture in Isr. v. Gov’t of Isr., HCJ 769/02 (Dec. 14, 2006). Lack of criteria to distinguish between peaceful civilians who cannot be directly attacked and civilians “directly participating in hostilities” who may be attacked for such time as that they directly participate in hostilities led the ICRC to engage a process, involving experts, to clarify the notion of “direct participation in hostilities” under IHL. The importance of this clarification has dramatically increased in parallel with the growing involvement of civilians in the conduct of hostilities in both international and non-international armed conflicts. The outcome of this process was released in the form of “interpretative guidance” in mid-2009. NILS MELZER, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (May 2009), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/SODA-7TJP5H/\\$file/ICRC_002_0990.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/SODA-7TJP5H/$file/ICRC_002_0990.pdf?openelement) [hereinafter ICRC INTERPRETIVE GUIDANCE].

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Id. at 46 (emphasis in original).

C. *What To Do During Non-International Armed Conflicts Where IHL Provides No Basis for Internment?*⁵¹

In response to the fact that IHL of non-international armed conflict (such as currently taking place in Afghanistan⁵²) only indicates that internment occurs in non-international conflicts but contains no indication of how it is to be regulated,⁵³ the U.S. Administration and courts have applied IHL of international armed conflict by analogy. How they have done so is discussed in more detail later. However, this section explains in general how IHL of international armed conflict could be analogously applied to non-international armed conflicts in order to address internment. The implications—both positive and negative—of doing so are also addressed.

As mentioned, the provisions regulating internment in international armed conflict, unlike for non-international armed conflict, are set out according to protected person categories—for example, prisoners of war or civilians. However, this does not prevent application of those provisions to non-international armed conflict because “no fundamental difference between the regimes applicable to the two situations prohibits the application of those same” provisions, as long as the rules are applied according to the person’s function rather than status.⁵⁴ This is particularly relevant as the status of combatants formally exists only in international armed conflicts.⁵⁵

Applied by analogy, IHL of international armed conflict would provide bases for internment. Thus, the standards of the Fourth Geneva Convention would apply to civilians and those of the Third Geneva Convention to persons designated as “combatants”.⁵⁶ Whether fighters in a non-international armed conflict can be analogized to “combatants” or remain civilians, who may be targeted when directly participating in hostilities, remains unsettled.⁵⁷ However, making the distinction between “combatants” and civilians in non-international armed conflict would appear consistent with current discussions by experts on the use of the “membership approach” to interpret “direct participation in hostilities” in such conflicts.⁵⁸

⁵¹ Material for this section has been substantially based on text written by this author in Sassòli & Olson, *supra* note 9, at 623–25.

⁵² See *supra* text accompany note 7.

⁵³ See ICRC Guidelines, *supra* note 39, at 377.

⁵⁴ “[T]he law of non-international armed conflict does not protect according to the status of a person but according to his or her actual activities.” SASSÒLI ET AL., *supra* note 17, at 258.

⁵⁵ “The main feature of [combatant] status in international armed conflicts is that they have the right to directly participate in hostilities.” *Id.* at 149.

⁵⁶ See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 36, at 352.

⁵⁷ Sassòli & Olson, *supra* note 9, at 607–08. See also ICRC INTERPRETIVE GUIDANCE, *supra* note 50, at 27–30.

⁵⁸ See ICRC INTERPRETIVE GUIDANCE, *supra* note 50, at 25.

The “membership approach” considers an individual who fulfills a combat function—a function requiring direct participation in hostilities—to be a “member” of an armed group, such that that individual may be directly targeted until he or she disengages from that function or is placed *hors de combat*.⁵⁹ This is analogous to being a “combatant” in an international armed conflict. Applying this approach to internment, the “members” of an armed group could be held on the same (analogous) basis as combatants who are interned as prisoners of war in international armed conflict.

As analogous application does not confer combatant status, there would still, for example, be no combatant immunity. The Geneva Conventions, while allowing for internment, would therefore not prevent the repression of acts prohibited by domestic law. Nor would application by analogy of the Third Geneva Convention to members of armed forces and groups entitle them to any review procedure; such procedural regulation could only be found in the Fourth Geneva Convention.

The question arises, however, as to whether the analogous application of the law of international armed conflicts sufficiently considers the fundamental distinction between that law and the law of non-international armed conflict—that is, that the rules applicable to international armed conflict generally⁶⁰ apply only to protected person categories, such as prisoners of war or enemy civilians, and that no such categories exist in non-international armed conflict. Even if the distinction in non-international armed conflict could be made by function rather than status, on which criteria should the assessment of a civilian or “combatant” be based? Should “combatants” be measured against the criteria in Article 4 of the Third Geneva Convention or Article 44 of the First Additional Protocol, or perhaps through the “membership approach”?⁶¹ Would Article 5-type tribunals⁶² need to be instituted in non-international armed conflicts to make the determination?

If the Third Geneva Convention is applied by analogy, a participant in hostilities could be detained without any individual periodic review for the whole duration of the conflict.⁶³ However, it is much more difficult in

⁵⁹ “Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . , and lose protection against direct attack, for as long as they assume their continuous combat function.” *Id.* at 70.

⁶⁰ An exception is, for example, Article 75 of the First Additional Protocol. *See* First Additional Protocol, *supra* note 27, art. 75.

⁶¹ *See supra* text accompanying note 59.

⁶² *See* Third Geneva Convention, *supra* note 11, art. 5.

⁶³ For a standpoint rejecting such an analogy, *see* Comm’n on Human Rights, *Situation of Detainees at Guantánamo Bay*, ¶ 24, 62d Sess., U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

non-international conflicts than in international armed conflicts to determine who is actually a fighter.⁶⁴ Such a determination must therefore be made on an individual basis. It is also much harder to determine the actual end of hostilities in a non-international armed conflict than in an international armed conflict between states, which may conclude a ceasefire or surrender. All this may support application, if at all, of the law of international armed conflict to non-international armed conflict by analogy to the Fourth Geneva Convention alone, as there are no combatants and hence no concomitant prisoner-of-war status in non-international armed conflicts. Furthermore, analogy to the Fourth Geneva Convention could be founded on a determination of the *lex specialis* according to the overall systemic purposes of the international legal order.⁶⁵ In a non-international armed conflict, analogy to the Fourth Geneva Convention would avoid internment of persons without review or possible release⁶⁶ for the duration of the conflict. Application of the Fourth Geneva Convention, however, brings with it an internment standard—“imperative reasons of security”—that is broader in scope than that for determining combatancy.⁶⁷

III. U.S. PRACTICE REGARDING INTERNMENT OF PERSONS HELD AT GUANTÁNAMO

A. *U.S.-asserted Legal Bases for Internment*

The Bush Administration based its authority to intern on Executive power and the AUMF passed by Congress on September 18, 2001.⁶⁸ Congress passed the AUMF in response to the September 11, 2001 attacks, authorizing the President to:

[U]se 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 internation-

⁶⁴ See Sassòli & Olson, *supra* note 9, at 607–08, 613–16.

⁶⁵ For a fuller discussion on *lex specialis*, see Olson, *supra* note 9, at 445–49; Sassòli & Olson, *supra* note 9, at 603–04.

⁶⁶ *But see* Third Geneva Convention, *supra* note 11, arts. 109–17 (referring to repatriation of prisoners of war *during* the conflict for medical reasons).

⁶⁷ See *id.* art. 4; First Additional Protocol, *supra* note 27, art. 44. See also ICRC INTERPRETIVE GUIDANCE, *supra* note 50, at 25 (the “membership approach” using direct participation in hostilities).

⁶⁸ “The Government argues that petitioners are lawfully detained because they are ‘enemy combatants,’ who can be held pursuant to the Authorization for the Use of Military Force and the President’s powers as Commander in Chief.” *Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (D.D.C. Nov. 20, 2008).

al terrorism against the United States by such nations, organizations or persons.⁶⁹

An AUMF must be distinguished from a declaration of war—of which there have only been eleven.⁷⁰ In particular, the domestic law ramifications of an AUMF differ substantially from declarations of war.⁷¹ The language employed in AUMFs varies—each AUMF being drafted to the contours of a specific situation.⁷² The AUMF passed by Congress in 2001 is quite broad. Unlike previous AUMFs, the 2001 AUMF authorizes the use of military force not only against states connected to the September 11, 2001 attacks but also against organizations and persons. This extension to organizations and persons is unprecedented in U.S. history.⁷³

While the full scope of the 2001 AUMF's reach remains to be determined, it is clear that the Bush Administration interpreted this AUMF broadly, "confirm[ing] the President's authority as Commander-in-Chief to conduct antiterrorism operations anywhere in the world, including within the United States."⁷⁴ The Bush Administration has cited the AUMF as authorizing measures incident to "warfighting", including internment. The Administration also asserted authority to conduct electronic surveillance of

⁶⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001).

⁷⁰ JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CRS REPORT FOR CONGRESS, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1 (March 8, 2007), available at <http://fas.org/sgp/crs/natsec/RL31133.pdf>. These eleven declarations of war encompassed five different wars: The War of 1812 with Great Britain, the War with Mexico in 1846, the War with Spain in 1898, the WWI, and WWII. *Id.* at 1–2.

⁷¹ Elsea's and Grimmet's report declares:

With respect to domestic law, a declaration of war automatically triggers many standby statutory authorities conferring special powers on the President with respect to the military, foreign trade, transportation, communications, manufacturing, alien enemies, etc. In contrast, no standby authorities appear to be triggered automatically by an authorization for the use of force. Most standby authorities do not require a declaration of war to be actualized but can be triggered by a declaration of national emergency or simply by the existence of a state of war. Declarations of war and authorizations for the use of force waive the time limitations otherwise applicable to the use of force imposed by the War Powers Resolution.

Id. at Summary. For a list of the statutes triggered by a declaration of war, a declaration of national emergency, and/or the existence of a state of war, see *id.* at 45–76.

⁷² For the text of key AUMFs, see *id.* app. II.

⁷³ *Id.* at 17.

⁷⁴ *Id.* at 18.

communications within the United States without following procedures laid out in the Federal Intelligence Surveillance Act.⁷⁵

While the Obama Administration has not asserted Executive power for its authority to intern but rather said it would rely on authority already provided by Congress through the AUMF, the Obama Administration continues to justify internment because of the existence of an armed conflict, stating that the AUMF is to be “informed by principle of the laws of war.”⁷⁶ In fact, it appears that the Obama Administration follows the preceding Administration’s view that the United States is involved in a “novel” type of armed conflict.⁷⁷

The Obama Administration’s specific reference to the law of war in interpreting the AUMF is a positive step in that it ensures application of IHL, which was not always the case during the previous Administration.⁷⁸ However, if there is no armed conflict, the AUMF must not be informed by IHL, but by other applicable law: international human rights law and domestic law.

A plurality of the Supreme Court in *Hamdi* determined that the use of force authorized by the AUMF includes the authority to intern individuals who are a part of Taliban and al-Qaeda forces in the context of an armed conflict:

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an *incident to war* as to be

⁷⁵ See U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>.

⁷⁶ March 13 Memo, *supra* note 8, at 1.

⁷⁷ *Id.*

⁷⁸ “I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.” Memorandum from President George W. Bush to National Security Advisors, *Humane Treatment of al Qaeda and Taliban Detainees*, ¶ 2(a) (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. “I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’” *Id.* at 2(c).

an exercise of the “necessary and appropriate force” Congress has authorized the President to use.⁷⁹

The Supreme Court’s analysis in *Hamdi* specifically focuses on armed conflict:

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant’s return to the battlefield is a fundamental *incident of waging war*, in permitting the use of “necessary and appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.⁸⁰

The Court did not address specifically whether the AUMF provides the basis to intern “*non-combatants*” or whether the AUMF provides the basis to intern in situations *not* rising to the level of armed conflict. These issues remain to be explicitly addressed. However, following the Court’s reasoning, the identical conclusion could be reached for “peacetime” operations, i.e., law enforcement operations: If detention “is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force,’”⁸¹ then certainly detention should also be similarly considered in law enforcement operations where permissible use of deadly force is much more circumscribed than is its use by and against combatants in an armed conflict.

District Court Judge Ellen Huvelle’s recent opinion indicated a limitation on the Executive’s authority to intern. She wrote “the AUMF, which defines the Executive’s detention authority in plain and unambiguous language, speaks *only* to the prevention of ‘*future* acts of international terrorism against the United States.’”⁸² While prevention of future acts could be interpreted quite broadly, Judge Huvelle points out that:

[The AUMF] does not authorize unlimited, unreviewable detention. Instead, the AUMF requires some nexus between the force (*i.e.*, detention) and its purpose (*i.e.*, preventing individuals from rejoining the enemy to commit hostile acts). Accordingly, the AUMF does not authorize detention of individuals beyond that which is necessary to prevent those individuals

⁷⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (emphasis added) (plurality).

⁸⁰ *Id.* at 519 (emphasis added).

⁸¹ *Id.* at 518.

⁸² *Basardh v. Obama*, Civil Action No. 05-889 (ESH), at 8 (D.D.C. Apr. 15, 2008), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0889-136 (emphasis added) (citing Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001)).

from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained.⁸³

B. The Initial U.S. Standard(s) for Internment: Creation of the “(Unlawful) Enemy Combatant” Category

This section looks at the internment standards employed by the United States and compares them to the IHL internment standards, thus providing the background necessary for discussion of the D.C. District Court’s application of these standards that follows. First, the various definitions of “unlawful enemy combatant” employed under the Bush Administration are discussed. After which, the new standard provided by the Obama Administration will be compared and contrasted to IHL internment standards as well as the Bush Administration’s definitions.

1. U.S. definitions of “enemy combatant” and “unlawful enemy combatant”

Through the use of the definitions “enemy combatant” and “unlawful enemy combatant”, the United States has created a category of persons not found in IHL, resulting in unfortunate consequences for the protective features of IHL. The Bush Administration⁸⁴ and Congress have over time utilized various definitions of “enemy combatant”.

In *Hamdi*, the U.S. Government offered a definition of “enemy combatant” that more closely tracked the “direct participation in hostilities” standard than would subsequent definitions: “an individual who . . . was ‘part of or supporting forces hostile to the United States and its coalition partners’ in Afghanistan *and who* ‘engaged in an armed conflict against the

⁸³ *Basardh*, Civil Action No. 05-889 (ESH), at 8.

⁸⁴ The Military Order in 2001 gave a first indication of whom the U.S. planned to intern: [A]ny individual who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.

Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, at 57,834 (Nov. 13, 2001).

United States' there."⁸⁵ As mentioned above, the standard of "direct participation in hostilities" in IHL is not an internment standard; rather, it determines when a civilian loses his or her protection against direct attack.⁸⁶

After *Hamdi*, the Order Establishing the Combatant Status Review Tribunals (CSRTs) broadened the definition of "enemy combatant". The Order provided that an "enemy combatant" is:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁸⁷

According to this definition, anyone who merely supports the Taliban or al-Qaeda is deemed a "combatant". However, mere support of the war effort does not constitute combatancy.⁸⁸ The concern with this standard

⁸⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (emphasis added) (citing Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), available at http://www.abanet.org/publiced/preview/briefs/pdfs_03/03-6696Resp.pdf).

⁸⁶ See *supra* text accompanying notes 48–50 (regarding direct participation in hostilities) and 56–59 (regarding analogous application).

⁸⁷ Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, at 1 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter July 7 Memo].

⁸⁸ The ICRC Interpretive Guidance provides:

The treaty terminology of taking a "direct" part in hostilities, which describes civilian conduct entailing loss of protection against direct attack, implies that there can also be "indirect" participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.

Generally speaking, beyond the actual conduct of hostilities, the general war effort could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations), while war-sustaining activities would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods).

Admittedly, both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities. Some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause—i.e. bring about the materialization of—the re-

is that it establishes “guilt” by association, that is simply being a group member—regardless of one’s contribution—makes one an “enemy combatant”.

Through the Military Commissions Act of 2006 (MCA), Congress endorsed the Administration’s CSRT definition,⁸⁹ as well as added a definition of “unlawful enemy combatant”. Some differences exist between these definitions. The MCA defines “*unlawful* enemy combatant” as follows:

[A] person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or a person who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.⁹⁰

Like the CSRT definition, this definition includes as “combatants” persons who have only supported, but not directly participated in hostilities. However, the MCA definition of “unlawful enemy combatant” may be somewhat narrower than the CSRT definition of “enemy combatant”. For example, the U.S. Government had acknowledged that the CSRT definition of “enemy combatant” might include a “little old lady in Switzerland” sending money to support a charity which, unbeknownst to her, turned out to be a front for al-Qaeda.⁹¹ Such a person would appear to fall outside the MCA definition, as the person must have “*purposefully* and materially supported hostilities.”⁹² Nevertheless, even the inclusion of “hostilities” in relation to “support” does not prevent this definition from being applied over broadly—possibly extending outside the scope of armed conflict.

2. Why the “category” of “(unlawful) enemy combatant” is problematic from an IHL perspective

As discussed above, the rules of IHL of non-international armed conflict are less elaborate than those applicable to international armed conflict. Thus, it may be appropriate to analogize to IHL of international armed

quired harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm.

ICRC INTERPRETIVE GUIDANCE, *supra* note 50, at 51–52 (citations omitted).

⁸⁹ Military Commissions Act of 2006, 10 U.S.C. § 948a(1)(ii) (2006).

⁹⁰ *Id.* § 948a(1)(i).

⁹¹ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The Government backed off this extreme view. See *Al Marri v. Pucciarelli*, 534 F.3d 213, 226 (4th Cir. 2008) (Motz, J., concurring).

⁹² See Military Commissions Act of 2006, 10 U.S.C. § 948a(1)(i) (2006).

conflict.⁹³ Here, with respect to internment, analogy to the Third and Fourth Geneva Conventions or only to the Fourth Geneva Convention could be appropriate. It would be inappropriate, however, given the ramifications, to analogize merely to the Third Geneva Convention, if such analogy merges “fighters” and “civilians” into that single category. This, however, is what the U.S. “(unlawful) enemy combatant” category effectively does.⁹⁴

The U.S. category inappropriately merges the concept of “combatants” and civilians who pose an imperative threat to security because the definition of “enemy combatant” is broader than the corresponding definition of prisoner of war found in the Third Geneva Convention.⁹⁵ The U.S. category adds elements of the “imperative-reasons-of-security” standard for interning civilians during international armed conflict with some elements possibly even sweeping broader than that standard.⁹⁶ This designation of “enemy combatant” is particularly dangerous for the protection of persons in armed conflict as it confuses the authority to intern with the authority to kill. In creation of this designation, it appears that the United States has analogized solely to the Third Geneva Convention—and expanded its personal scope of application. Thus, if a person is determined to be an “enemy combatant” this would not only mean that the person may be interned as a prisoner of war for the duration of hostilities without periodic review, but may also be directly targeted as a combatant (and tried by a military court⁹⁷ as demonstrated by the MCA⁹⁸).

⁹³ See *supra* text accompanying notes 51–67.

⁹⁴ The statements coming from the Government referred simply to combatants.

Because the United States [is] in an armed conflict with al Qaida and the Taliban, it [is] proper for the United States and its allies to detain individuals who [are] fighting in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities.

John B. Bellinger, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), available at <http://www.state.gov/s/l/2006/98861.htm>.

⁹⁵ See Third Geneva Convention, *supra* note 11, art. 4. Article 44 of the First Additional Protocol is not referenced here as the United States is not a party to that treaty and that article’s content is not generally considered customary. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 36, at 387–89; Jean Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT’L REV. RED CROSS 473, 481 (2007). See also SASSÒLI ET AL., *supra* note 17, at 149–50 (providing an outline of who is a combatant).

⁹⁶ Its application also extends potentially beyond association with any armed conflict to police enforcement operations.

⁹⁷ The Third Geneva Convention states that prisoners of war are to be tried by “the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power” Third Geneva Convention, *supra* note 11, art. 102. See also *id.* art. 84.

⁹⁸ It has been asserted that the definition of “unlawful enemy combatant” in the MCA is solely for the purposes of determining personal jurisdiction for the military commissions.

This new definition of “enemy combatant” also affects the treatment to which individuals are entitled once captured. The incorporation of the notion of “unlawful enemy combatant” in, for example, the revised Army Field Manual on Human Intelligence Collector Operations, FM 2-22.3 (FM 34-52) confusingly overlaps with other “protected person categories.”⁹⁹ According to the Field Manual, only “unlawful enemy combatants” may be subjected to the restricted interrogation technique of “separation.”¹⁰⁰

Finally, application of such a category to members of terrorist organizations that generally attempt to hide their identities and blend into the civilian population will be extremely difficult. This raises the chances of misidentifying an individual as an “enemy combatant” with all its ramifications.¹⁰¹

C. *The Obama Administration’s Internment Standard for Those Held at Guantánamo: Denouncing the “Enemy Combatant” Category?*

While the new Administration has abandoned the term “enemy combatant”, it remains to be seen whether it has actually abandoned the category. The specific purpose for the definition provided in the Government’s memorandum filed on March 13, 2009¹⁰² may indicate that criticism that the Administration’s definition is “really a case of old wine in new bottles”¹⁰³ is premature.

However, other sections of the MCA regarding detention refer to the statute’s definition. *See, e.g.*, 28 U.S.C. § 2241 (2006). *See also* Goodman, *supra* note 48, at 61 n.68.

⁹⁹ The Army Field Manual states:

Unlawful enemy combatants: Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term “unlawful enemy combatant” is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.

DEP’T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FIELD MANUAL 2-22.3 (FM 34-52), ¶ 6-18 (2006), available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>. *See also id.* ¶ 6-19 (making a further distinction between an “unlawful enemy combatant” or an individual “associated with or supporting the unlawful enemy combatants”). This field manual on interrogation replaces the 1992 field manual, and this revised version was publicly released on September 6, 2006.

¹⁰⁰ *See id.* app. M.

¹⁰¹ *See supra* text accompanying notes 60–65. *See also* Sassòli & Olson, *supra* note 9, at 606–10.

¹⁰² “[T]he Government is refining its position with respect to its *authority to detain* those persons who are now being *held at Guantánamo Bay*.” March 13 Memo, *supra* note 8, at 1 (emphasis added).

¹⁰³ Press Release, Ctr. For Constitutional Rights, Obama Administration Offers Essentially Same Definition of Enemy Combatant Without Using the Term (Mar. 13, 2009), available at

The Government pointed out in its memorandum that it is “refining its position with respect to its *authority to detain* those persons who are now being held *at Guantánamo Bay*”,¹⁰⁴ not “to define the contours of authority for military operations generally, or detention in other contexts.”¹⁰⁵ Thus, this is an internment standard, not a targeting standard nor a determination of personal jurisdiction for use of military tribunals. If use of this definition remains limited solely as an internment standard, many of the concerns related to the “enemy combatant” category discussed above do not arise. If it does not, the refinements made to the definition are insufficient to alleviate those concerns.

As development of a comprehensive detention policy, which may introduce further changes, is underway at the time of this writing,¹⁰⁶ the focus here must be on what can be evaluated at this time—whether this new definition in the March 13 memorandum comports with the requirements of IHL as relates to internment. Prior to doing so, however, it must be repeated that, if no armed conflict exists, the Government’s basis for its authority to intern (i.e., the AUMF) should not be “*necessarily informed by the principles of the laws of war.*”¹⁰⁷ Rather, the AUMF would need to be informed by relevant international human rights law and domestic law.

The March 13 memorandum provides the following definitional framework for review of the habeas petitions:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a

<http://www.ccrjustice.org/newsroom/press-releases/obama-administration-offers-essentially-same-definition-enemy-combatant-with>.

¹⁰⁴ March 13 Memo, *supra* note 8, at 1 (emphasis added).

¹⁰⁵ *Id.* at 2.

¹⁰⁶ See Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009); Executive Order; Declaration of Attorney General Eric H. Holder, Jr., *In re* Guantanamo Bay Detainee Litigation, ¶¶ 3, 11 (March 13, 2009), available at <http://www.humanrightsfirst.org/pdf/090313-LS-ag-declaration.pdf>. See Memorandum from Brad Wiegmann and Col. Mark Martins to the Attorney General and Secretary of Defense Regarding the Preliminary Report of the Detention Policy Task Force (July 20, 2009), available at http://a.abcnews.go.com/images/Politics/Preliminary_Report_Detention_Policy_Task_Force.pdf.

¹⁰⁷ See March 13 Memo, *supra* note 8, at 1 (emphasis added) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality)).

belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.¹⁰⁸

The March 13 memorandum makes clear that the U.S. Government analogizes to IHL, particularly “from traditional international armed conflicts.”¹⁰⁹ The Government’s preference for the Third Geneva Convention over the Fourth Geneva Convention becomes evident in its response to the petitioner’s assertion that the U.S. authority to intern is limited to those “directly participating in hostilities.”¹¹⁰ The Government is correct that its authority to intern under IHL applicable to international armed conflict is broader (even as under the Third Geneva Convention with regard to those accompanying the armed forces¹¹¹) and the Government could simply have referred by analogy to the Fourth Geneva Convention.¹¹² Instead, the March 13 memorandum refers to the “law-of-war principle of military necessity”¹¹³ and the language of Common Article 3 and Articles 1(1) and 13 of the Second Additional Protocol, which reference “armed groups.”¹¹⁴

It must be recalled that Common Article 3 and Articles 1(1) and 13 of the Second Additional Protocol apply to non-international armed conflict in which a non-State actor is a party to the conflict, hence the reference to “armed groups.”¹¹⁵ The Government’s reference to these provisions focusing on “armed groups” seems unnecessary and confusing and would seem to indicate that the United States believes it may only intern members of a fighting force, albeit it would consider such a fighting force to be defined more broadly than those persons covered by Article 4 of the Third Geneva Convention, i.e., those entitled to prisoner-of-war status.¹¹⁶ If that is the correct reading of the U.S. position, the March 13 memorandum’s analysis raises a red flag that concerns could arise similar to those regarding the “enemy combatant” category, particularly if the definitional framework is applied beyond the purposes stated in the memorandum, e.g., for targeting purposes and not merely internment.

In analyzing whether the above definitional framework is consistent with IHL standards for internment, its two sentences will be addressed separately. The first sentence of the March 13 memorandum states:

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 8, 9.

¹¹¹ *See* Third Geneva Convention, *supra* note 11, art. 4(A)(4).

¹¹² *See* Fourth Geneva Convention, *supra* note 12, arts. 42, 78.

¹¹³ March 13 Memo, *supra* note 8, at 8–9.

¹¹⁴ *See id.* (discussing Common Article 3 and the Second Additional Protocol).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 8.

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks.¹¹⁷

This sentence, while appearing to track the language of the AUMF, omits an important clause—a clause limiting the Executive’s authority to intern. That clause from the AUMF is the following: “in order to prevent any *future* acts of international terrorism against the United States by such nations, organizations or persons.”¹¹⁸ By its plain language, the AUMF does not permit the use of force against these specific persons *unless* it is to *prevent future* terrorist acts. Criminal law enforcement is the appropriate means for addressing criminal acts that have been committed.

IHL may only inform this internment standard *if* armed conflict occurred *and* continued after September 11, 2001 such that IHL applies. The U.S. Government considers that an armed conflict did continue, but others consider that, if an armed conflict took place on September 11, 2001,¹¹⁹ that particular conflict ended with the later conflict in Afghanistan being a separate conflict (Operation Enduring Freedom was launched in October 2001). If the conflict (began and) ended on September 11, 2001, IHL (even if applied by analogy) provides no basis for internment of persons *after* that date, and IHL requires release of those interned in relation to the September 11, 2001 conflict unless the persons are held on criminal charges for violations of the laws of war, such as war crimes.

Assuming that the armed conflict was ongoing from September 11, 2001 such that IHL continued to apply to those captured after that date, it must be recalled from the discussion above that the only bases for internment would be if a person is a member of the fighting force (an analogy to the Third Geneva Convention) or if reasons of security make it imperative to do so (an analogy to the Fourth Geneva Convention). Past acts alone do not meet either standard. Thus, while a person who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”¹²⁰ may certainly be held on criminal charges, he or she may only be captured and interned (under IHL) after September 11, 2001 if he or she *continues* to be a member of the fighting force or *continues* to pose an imperative security threat in the present or in the future.

The second sentence of the March 13 memorandum states that:

¹¹⁷ *Id.* at 2.

¹¹⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001) (emphasis added).

¹¹⁹ That is, if an armed conflict occurred, rather than a horrific criminal act.

¹²⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001).

The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.¹²¹

As just mentioned, according to IHL a person may be interned if that person is a member of the fighting force (an analogy to the Third Geneva Convention) or if that person poses an imperative security threat in the *present or in the future* (an analogy to the Fourth Geneva Convention). Preventive security detention is forward looking. Past acts alone may be the basis for criminal charges but alone are insufficient for internment. Hence the definitional framework's use of the past tense, for example, "*were* part of", "*has* committed", or "*supported*", could be cause for concern. However, the choice of past tense language may merely reflect the fact that the habeas review provided by the Supreme Court in *Boumediene* has, until recently,¹²² been understood by the D.C. District Court to be a limited review of only the *initial* determination for internment;¹²³ hence, the review is backward looking. The court is reviewing whether the *initial* decision to intern was valid, not whether the *continued* internment is justified (as required for civilian internees under the Fourth Geneva Convention).

Turning to the specific language of the second sentence of the definitional framework, the new definition requires a demonstration of "substantial" support of Taliban or al-Qaeda forces or associated forces engaged in hostilities against the United States and its coalition partners, while the CSRT definition of "enemy combatant" required only "support" of those forces. Clearly, the new definition mandates passing a higher threshold than the CSRT definition to justify internment. However, it is not clear whether the new definition is better than the MCA definition of "unlawful enemy combatant", which focused on involvement in the hostilities ("purposefully and materially supported hostilities") rather than on how one supported a particular group.

¹²¹ March 13 Memo, *supra* note 8, at 2.

¹²² See *Basardh v. Obama*, Civil Action No. 05-889 (ESH) (D.D.C. Apr. 15, 2008), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0889-136. See also *infra* text accompanying notes 147–57.

¹²³ *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008). The Supreme Court mandated that those interned at Guantánamo receive access to U.S. federal courts empowered to correct errors after "meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 2269. The Court made clear that it was "not address[ing] the content of the law that governs petitioners' detention." *Id.* at 2277. The Court also delegated to lower courts resolution of procedural issues in relation to the habeas petitions. *Id.* at 2276.

Furthermore, the significance of the additional word “substantial” was left unclear by the Government, as it refrained from defining it in its memorandum:

It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of “substantial support,” or the precise characteristics of “associated forces,” that are or would be sufficient to bring persons and organizations within the foregoing framework. Although the concept of “substantial support,” for example, does not justify the detention at Guantanamo Bay of those who provide unwitting or insignificant support to the organizations identified in the AUMF, and the Government is not asserting that it can detain anyone at Guantanamo on such grounds, the particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts. Accordingly, the contours of the “substantial support” and “associated forces” bases of detention will need to be further developed in their application to concrete facts in individual cases.¹²⁴

This new standard—as with the former—still includes individuals who were “*part of* . . . Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.” Thus, it appears that membership alone is grounds for internment. Depending upon how being “part of” is understood, this standard could be very broad indeed. A person who is sympathetic to the objectives of al-Qaeda and carries a membership card could meet this definition. Such a standard is broader than that foreseen by either the Third or Fourth Geneva Conventions. That “associated forces” is modified by reference to engagement in hostilities—language usually reserved for armed conflicts—should help to restrain application only to situations rising to the level of armed conflict.¹²⁵ Also the March 13 Memorandum mentions that being “part of” may depend on a “formal or functional analysis of the individual’s role.”¹²⁶ This too indicates that membership may not be defined (or applied) too broadly, as it is similar to the “membership approach” taken in determining who permanently directly participates in hostilities.¹²⁷

The U.S. Government has indicated that this definitional framework may evolve as the executive branch develops its comprehensive detention policy.¹²⁸ And, the Executive Order specifically concerning disposition of

¹²⁴ March 13 Memo, *supra* note 8, at 2.

¹²⁵ *But see* Exec. Order No. 13,493, *supra* note 106, at 4901 (mentioning “in connection with armed conflict *and* counter-terrorism operations” (emphasis added)).

¹²⁶ March 13 Memo, *supra* note 8, at 6.

¹²⁷ *See supra* text accompanying notes 57–59.

¹²⁸ *See* March 13 Memo, *supra* note 8, at 2. *See generally* Exec. Order No. 13,493, *supra* note 106; Declaration of Attorney General Eric H. Holder, Jr., *supra* note 106.

those interned at Guantánamo makes explicit reference to consideration of the “interests of justice”¹²⁹ in such determinations. While that is positive, ensuring that a standard of internment does not sweep too broadly should not rest on such discretion alone.

IV. HABEAS REVIEW OF DETENTION AT GUANTÁNAMO: THE D.C. DISTRICT COURT’S INTERPRETATION OF THE INTERNMENT STANDARDS

As of this writing, the D.C. District Court has ruled on thirty-five petitions under both the Bush and Obama Administrations.¹³⁰ In twenty-nine of those cases, the judges have decided that the Government has failed to establish “by a preponderance of the evidence”¹³¹ that it had justification in holding those individuals and thus, ordered their release.¹³²

This section reviews some of these cases in order to assess whether the D.C. District Court’s decisions are consistent with IHL internment standards. This analysis will look to see whether application of the Bush Administration’s definition of “enemy combatant” or the new definition provided by the Obama Administration extend, in particular, beyond the Fourth Geneva Convention standard of “imperative reasons of security”, as this standard is broader in scope than that found in the Third Geneva Convention. If this is the case, then individuals are not being held in compliance with IHL. In addition, this analysis will look at whether the court applies the Government’s standards more restrictively than IHL permits. If that is so, the bases for this determination will be examined. It is one thing for the Government to apply a detention standard more narrowly than permitted under IHL, as no detaining authority is required to hold all individuals for which IHL authorizes internment. It is quite a different thing for the court to interpret the IHL internment standards more narrowly than traditionally understood. An overly narrow interpretation could significantly impact “warfighting” and the protective aims of IHL.¹³³

This review remains limited to the court’s interpretation of the internment standards, including the factors that the court considers meet the

¹²⁹ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). *See also* Exec. Order No. 13,493, *supra* note 106, at 4901.

¹³⁰ Rosenberg, *supra* note 3. *See also supra* note 3.

¹³¹ *See, e.g.*, Case Management Order at 3, *Boumediene v. Bush*, Civil Action No. 04-CV-1166 (D.D.C. Aug. 27, 2008).

¹³² *See* Rosenberg, *supra* note 3.

¹³³ Narrowing the scope of whom IHL permits to be interned shifts the balance of interests at stake. The purpose of internment is not to punish, but only to hinder the individuals’ direct involvement in the armed conflict and/or to protect them. “The protection by [IHL] constitutes a compromise between the interest of the detaining power, the interest of the power on which the prisoner depends, and the prisoner’s own interests.” SASSÒLI ET AL., *supra* note 17, at 155.

standards. This section does not analyze either the court's procedures or how the court assesses the evidence.¹³⁴ Of course, even this limited review is hampered by the fact that much of the information on which the decisions are based remains classified and is either excluded or redacted from the judgments. Despite this hindrance, a few observations can be made.

A. *What Is Being Reviewed?*

Until mid-March 2009,¹³⁵ all judges employed the Bush Administration's definition of "enemy combatant".¹³⁶ In reviewing the habeas petitions, all judges of the D.C. District Court, with the exception of Judge Huvelle,¹³⁷ have *not* been providing a periodic review as to whether there exist factors that justified the internee's *continued* internment, as required, for example, by the Fourth Geneva Convention with respect to the internment of civilians in an international armed conflict. Rather, most judges are reviewing whether the *initial* decision to intern the individual was correct,

¹³⁴ See, e.g., *Ahmed v. Obama*, 613 F. Supp. 2d 51, 55 (D.D.C. 2009) (rejecting a presumption of accuracy for the Government's evidence and holding that "the accuracy of much of the factual material contained in [the Government's] exhibits is hotly contested for a host of different reasons . . ." but employing "the mosaic theory" rather than proving directly that the internee was a terrorist); *Al-Adahi v. Obama*, Civil Action No. 05-280 (GK) (D.D.C. Aug. 17, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/08/Al-Adahi-opinion-8-21-09.pdf> (memorandum decision discussing the "mosaic theory" and circumstantial evidence); *Bostan v. Obama*, Civil Action No. 05-883 (RBW), 2009 U.S. Dist. LEXIS 73583 *1 (D.D.C. Aug. 19, 2009) (memorandum decision addressing relatively strictly the admissibility of hearsay); *Kahn v. Obama*, Civil Action No. 08-1101 (JDB), 2009 U.S. Dist. LEXIS 73025 *1 (D.D.C. Aug. 18, 2009) (memorandum decision addressing how judges should address evidence in the form of intelligence reports).

¹³⁵ Judge Bates did not follow Judge Leon's employment of the Bush Administration's definition of "enemy combatant". Instead, he requested clarification from the Obama Administration. See *supra* text accompanying notes 102–134 (regarding the Obama Administration's response in its March 13 filing).

¹³⁶ On October 23, 2008, the court heard oral arguments from the parties regarding the appropriate definition of "enemy combatant" to be employed in these hearings. *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. Oct. 27, 2008). Four days later, the court issued a Memorandum Order adopting the definition which had been drafted by the Department of Defense in 2004 for the type of Combatant Status Review Tribunal proceedings that these detainees were given. *Id.* at 135. The following definition of "enemy combatant" governs the proceedings:

An "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id.

¹³⁷ See *Basardh v. Obama*, No. 05-889 (ESH) (D.D.C. Apr. 15, 2008), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0889-136. See *infra* notes 166–75 and accompanying text.

thus permitting internment until the end of hostilities. And, while “acknowledg[ing] the power of Judge Huvelle’s argument,”¹³⁸ Judge James Robertson declares that it “is not for me to decide. Combat operations in Afghanistan continue to this day and—in my view—the President’s ‘authority to detain for the duration of the relevant conflict’ which is ‘based on longstanding law-of-war principles’ has yet to ‘unravel.’”¹³⁹

Judge Richard Leon explains “the question before this Court is whether the Government has shown by a preponderance of the evidence that each petitioner is being lawfully detained”¹⁴⁰ and thus may remain interned. This type of review is more akin to an Article 5 Tribunal¹⁴¹ used to determine, when in doubt, whether someone in an international armed conflict is a prisoner of war and can be interned for the duration of hostilities. However, as discussed above, the definition of “enemy combatant” does not comport with the definition of “prisoner of war” found in the Third Geneva Convention.¹⁴² Judge Huvelle’s contrasting approach to review is discussed in more detail below.¹⁴³

B. Application of the Bush Administration’s “Enemy Combatant” Standard

Despite the concerns raised above that the “enemy combatant” standard sweeps more broadly than IHL standards,¹⁴⁴ Judge Leon—using the Bush Administration’s definition¹⁴⁵—has granted writs of habeas,¹⁴⁶ which could indicate that this standard is being applied *in practice* in such a way that it does not reach beyond the permissible bases to intern under IHL. The following section provides a more in depth review to see if this is true.

¹³⁸ *Awad v. Obama*, Civil Action No. 05-CV-2379, U.S. Dist. LEXIS 75374 *1, *9 (D.D.C. Aug. 19, 2009).

¹³⁹ *Id.* at 8 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004)).

¹⁴⁰ *Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (D.D.C. Nov. 20, 2008) (employing the “enemy combatant” definition). Judge Bates did not follow Judge Leon’s employment of the Bush Administration’s definition of “enemy combatant”. Instead, he requested clarification from the Obama Administration. *See infra* text accompanying notes 198–221.

¹⁴¹ *See* Third Geneva Convention, *supra* note 11, art. 5.

¹⁴² *Id.* art. 4. For concerns regarding the over-inclusive nature of “enemy combatant”, *see supra* text accompanying notes 93–101.

¹⁴³ *See infra* text accompanying notes 168–177.

¹⁴⁴ *See supra* text accompanying notes 93–101.

¹⁴⁵ *See Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (D.D.C. Nov. 20, 2008).

¹⁴⁶ *See, e.g., id.* (granting the petitions and ordering the release of Lakhdar Boumediene, Mohamed Nechlas, Hadj Boudella, Mustafa Alt Idir, and Saber Lahmar); *El Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. Jan. 14, 2009); *Al Gincio v. Obama*, Civil Action No. 05-1310 (RJL) (D.D.C. June 22, 2009), available at http://s3.amazonaws.com/propublica/assets/detention/gitmo/janko_unclassified_release_order.pdf.

In most of the cases in which Judge Leon denies the writ, he lists multiple actions by the petitioner to demonstrate that the petitioner was “part of or supporting Taliban or al Qaeda forces” and, thus, an “enemy combatant”. For example, in *Sliti v. Bush*,¹⁴⁷ Judge Leon found it “more probable than not that the petitioner traveled to Afghanistan as an al Qaeda recruit and trained at the local military training camp”¹⁴⁸ He based his conclusion on evidence that the petitioner had traveled to Afghanistan with financial support from extremists with ties to al-Qaeda, spent time during the trip with close associates of al-Qaeda, stayed free of charge at a guest-house in Afghanistan frequented by individuals with close ties to terrorist organizations, and admitted knowledge of the location of the local al-Qaeda military camp and its code words.¹⁴⁹ Judge Leon has indicated that he considers that “facilitating the travel of others to join the fight against the United States in Afghanistan constitutes direct support to al-Qaida”¹⁵⁰ However, under IHL simply facilitating travel does not make one a combatant, but, depending upon the directness of the involvement, could demonstrate the necessity for “imperative reasons of security” to intern the individual. It remains to be seen which other specific, single acts Judge Leon will consider as the minimum for “support”. In other words, which one act will be found sufficient in and of itself to establish an individual as an “enemy combatant”? Will this “bottom line”, for example, stray below the threshold set by the IHL standards if analogously applied to non-international armed conflict?

Judge Leon, in denying the petition for writ, made clear in *Al Alwi v. Bush* that “the Government does *not* need to prove [that the petitioner actually took up arms against the United States or coalitional forces] in order for the petitioner to be classified as an enemy combatant”¹⁵¹ IHL also does not require such a showing for a civilian to be considered an imperative threat to security, nor necessarily to be a “combatant”, if, for example, the individual, not taking up arms directly, commanded operations. Judge Leon also specified that “participation in a battle against U.S. and allied forces would be . . . strong evidence of enemy combatancy”,¹⁵² as would be attendance at an al-Qaeda-affiliated training camp, acting as a courier for certain senior al-Qaeda operatives, and membership in an al-Qaeda cell.¹⁵³ Also, under IHL these factors *could* be evidence of comba-

¹⁴⁷ 592 F. Supp. 2d 46 (D.D.C. Dec. 30, 2008).

¹⁴⁸ *Id.* at 51.

¹⁴⁹ *Id.* at 50–51.

¹⁵⁰ *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. Nov. 20, 2008).

¹⁵¹ *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 28 (D.D.C. Dec. 30, 2008) (emphasis in original).

¹⁵² *El Gharani v. Bush*, 593 F. Supp. 2d 144, 148 (D.D.C. Jan. 14, 2009).

¹⁵³ *Id.*

tancy or at minimum an imperative threat to security. In a later case, Judge Leon denied the writ, agreeing with the Government that the petitioner had fought against U.S. and Afghan forces at the battle of Tora Bora,¹⁵⁴ making him an “enemy combatant” because he was “part of or supporting al Qaeda or Taliban forces.”¹⁵⁵ The fact of taking up arms could justify internment under IHL under either the Third Geneva Convention or, if he remained a threat at the time of his capture or in the future, the Fourth Geneva Convention.

Judge Leon’s denial of Al Bihani’s petition gained attention¹⁵⁶ when he wrote that:

[F]aithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient “support” to meet this Court’s definition. After all, as Napoleon himself was fond of pointing out: “an army marches on its stomach.”¹⁵⁷

Such a statement raises concerns as to the extent that “war sustaining” efforts are going to be considered “support” by the D.C. District Court for purposes of internment. Are farmers selling their crops to feed al-Qaeda fighters or ammunition factory workers also “enemy combatants”? General war sustaining efforts fail to meet the standard of internment for civilians under the Fourth Geneva Convention (“imperative reasons of security”) and certainly do not make one a “combatant”.¹⁵⁸

While Judge Leon’s particular statement gives pause, review of the complete facts of this case may lessen concern. Taking a closer look at *Al Bihani v. Obama*, it appears that Al Bihani was not merely a cook but was also issued a weapon while serving under an al-Qaeda military commander.¹⁵⁹ Thus, it would appear that Al Bihani could be called to combat if

¹⁵⁴ See Hammamy v. Obama, Civil Action No. 05-429 (RJL) (D.D.C. Apr. 2, 2009), available at <http://ccrjustice.org/files/2009-04-02%20Hedi%20Hammamy%20habeas%20denied.pdf> (memorandum order denying Hammamy’s petition for writ of habeas corpus). The writ was denied based on an intelligence report that Hammamy’s papers were found after the Battle of Tora Bora in the al-Qaeda cave complex, and Hammamy’s conduct in Italy, where he was under investigation for involvement in an Islamic terrorist cell, just prior to his arrival in Afghanistan and Pakistan. *Id.* at 7–8. Despite this order being issued subsequent to the Obama Administration’s announcement of a revised standard for the detention of individuals at Guantanamo, Judge Leon held that the “definition of ‘enemy combatant’ previously adopted by this Court in the *Boumediene* cases, governs the[se] proceedings.” *Id.* at 5.

¹⁵⁵ *Id.* at 6.

¹⁵⁶ See, e.g., Del Quentin Wilber, *U.S. Can Continue Yemeni’s Detention*, WASH. POST, Jan. 29, 2009, at A4.

¹⁵⁷ *Al Bihani v. Obama*, 594 F. Supp. 2d 35, 40 (D.D.C. Jan. 28, 2009).

¹⁵⁸ See *supra* text accompanying notes 31–50.

¹⁵⁹ *Al Bihani*, 594 F. Supp. 2d at 39–40.

needed. This is analogous to a member of a State's armed forces, who may serve as a cook but is also trained for combat. Finally, it should be recalled that the Third Geneva Convention permits the internment of civilians who accompany the armed forces providing services; however, such individuals are *not* combatants.¹⁶⁰

More recently, in *Al Gingo v. Obama*,¹⁶¹ Judge Leon made clear that even if it is established that an individual had been "part of" the Taliban or al-Qaeda that does not make one an "enemy combatant" permanently. Judge Leon looked at a variety of factors and determined, in granting the petitioner's writ, that the pre-existing relationship had sufficiently been eroded over a sustained period of time¹⁶² prior to Al Gingo's internment by the United States.¹⁶³ In so doing, Judge Leon implied that staying at a guesthouse or going to a training camp alone or in combination are not necessarily sufficient factors to make one an "enemy combatant": "[F]ive days at a guesthouse in Kabul combined with eighteen days at a training camp does not add up to a longstanding bond of brotherhood."¹⁶⁴ This is consistent with an IHL analysis.

While Judge Leon, in granting Al Gingo's petition, recognized that a new standard had been presented by the Obama Administration, he did not reach the question of whether to adopt the Government's new definition in this case because "[t]he Government's theory of lawful detention here is not based on 'support' to either the Taliban or al Qaeda, but rather petitioner's being 'part of' the Taliban or al Qaeda when he was taken into custody."¹⁶⁵ Other judges of the D.C. District Court have addressed the new standard

¹⁶⁰ Third Geneva Convention, *supra* note 11, art. 4(A)(4). As such persons working closely with the armed forces risked capture and should not be excluded from protection, they were included in the Third Geneva Convention because their "position when captured had given rise to difficulties during the Second World War." 3 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 64 (Jean S. Pictet ed., 1958) (regarding Article 4(A)(4)).

¹⁶¹ *Al Gingo v. Obama*, Civil Action No. 05-1310 (RJL) (D.D.C. June 22, 2009), available at http://s3.amazonaws.com/publicassets/detention/gitmo/janko_unclassified_release_order.pdf (memorandum order granting Al Gingo's petition for writ of habeas corpus).

¹⁶² *Id.* at 10–12.

¹⁶³ Judge Leon explains:

[C]ombining the limited and brief nature of Janko's relationship with al Qaeda (and/or the Taliban), with the extreme conduct by his captors over a prolonged period of time, the conclusion is inescapable that his preexisting relationship, such as it was, was sufficiently vitiated that he was no longer "part of" al Qaeda (or the Taliban) at the time he was taken into custody

Id. at 12.

¹⁶⁴ *Id.* at 11.

¹⁶⁵ *Id.* at 6.

presented by the Obama Administration. Those opinions are discussed below.

C. *Interpreting the Obama Administration's New Internment Standard*

At the time of this writing, six decisions on petitions for habeas corpus have been handed down based on this new standard. Five¹⁶⁶ have been granted, and one denied.¹⁶⁷ Judge Huvelle, in her opinion of April 15, 2009 granting Basardh's habeas petition, provided the first interpretation of the new standard. She wrote that "the only issue before the Court is a narrow one—what, if any, relevance does Basardh's [REDACTED] have to a determination of the lawfulness of his *continued* detention?"¹⁶⁸ Judge Huvelle based her review on the lawfulness of Basardh's *continued* detention—rather than the *initial* decision to detain—on the language of the AUMF, as the Executive now rests its authority on the AUMF as "informed by principle of the laws of war."¹⁶⁹ She wrote: "The statutory language of the AUMF, which defines the Executive's detention authority in plain and unambiguous terms, speaks only to the prevention of *future* acts of international terrorism against the United States."¹⁷⁰

Thus, Judge Huvelle concluded that "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained."¹⁷¹ She points to the Supreme Court decision in *Hamdi* as recognizing the Executive's

¹⁶⁶ See *Basardh v. Obama*, Civil Action No. 05-889 (ESH) (D.D.C. Apr. 15, 2008), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0889-136; *Bacha v. Obama*, Civil Action No. 05-2385 (ESH), 2009 WL 2365846 (D.D.C. July 30, 2009); *Al Mutairi v. United States*, Civil Action No. 02-828 (CKK), 2009 WL 2364173 (D.D.C. July 29, 2009); *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. May 11, 2009); *Al-Adahi v. Obama*, Civil Action No. 05-280 (GK) (D.D.C. Aug. 17, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/08/Al-Adahi-opinion-8-21-09.pdf>.

¹⁶⁷ See *Awad v. Obama*, Civil Action No. 05-CV-2379 (D.D.C. Aug. 12, 2009), available at http://s3.amazonaws.com/publicassets/detention/gitmo/Mohammed_Ali_Awad_Trial_Court_Decision.pdf. An additional petition was denied just as this article was submitted, thus, it is not included in this analysis. See *Al Odah v. United States*, Civil Action No. 02-828 (CKK) (D.D.C. Aug. 24, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/08/Al-Odah-ruling-by-CKK-8-24-091.pdf>.

¹⁶⁸ *Basardh*, Civil Action No. 05-889 (ESH), at 2–3 (emphasis added).

¹⁶⁹ March 13 Memo, *supra* note 8, at 1 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality)).

¹⁷⁰ March 13 Memo, *supra* note 8, at 8 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001) (emphasis added in memorandum)).

¹⁷¹ March 13 Memo, *supra* note 8, at 8.

authority to “detain combatants for a limited purpose only”¹⁷²—“to prevent the captured individuals from returning to the field of battle and taking up arms again.”¹⁷³ In addition, Judge Huvelle pointed out that:

[T]his limitation on the Executive’s detention authority is consistent with the administrative procedures that the government adopted in 2004 for the CSRT and Administrative Review Board proceedings for determining whether continued detention of a detainee is justified. In both sets of rules, the government is obligated to perform ongoing threat assessments of detainees based upon the detainee’s current status.¹⁷⁴

Judge Huvelle’s approach to habeas review is analogous to the periodic review required for civilians under the Fourth Geneva Convention.¹⁷⁵ As of this writing only Judge Huvelle has adopted this approach.

The primary factor in Judge Huvelle’s decision to grant Basardh’s writ was that the petitioner’s cooperation while at Guantánamo—for which he suffered physical attacks and credible death threats from other internees¹⁷⁶—was publicly known, thus severing any ties with the enemy and foreclosing any risk that he could rejoin the enemy. Hence, Judge Huvelle concluded “that the government has failed to meet its burden of establishing that Basardh’s continued detention is authorized under the AUMF’s directive that such force be used ‘in order to prevent future acts of international terrorism.’”¹⁷⁷ This result is consistent with that which should be reached if the internment standard found in the Fourth Geneva Convention, pertaining to civilians, were employed. Internment of such an individual could *no longer* be deemed necessary “for imperative reasons of security”.

In late July 2009, Judge Huvelle granted another petition.¹⁷⁸ As Judge Huvelle’s opinion on this case is unavailable at the time of this writ-

¹⁷² *Id.*

¹⁷³ *Id.* at 9 (citing *Hamdi*, 542 U.S. at 518).

¹⁷⁴ *Id.* at 9. See July 7 Memo, *supra* note 87, ¶ 13(i); Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and the Chairman of the Joint Chiefs of Staff, at enclosure 3 (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

¹⁷⁵ See Fourth Geneva Convention, *supra* note 12, arts. 43, 78(2).

¹⁷⁶ *Basardh v. Obama*, Civil Action No. 05-889 (ESH), at 4 (D.D.C. Apr. 15, 2008), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv0889-136.

¹⁷⁷ *Id.* at 10 (footnote omitted).

¹⁷⁸ *Bacha v. Obama*, Civil Action No. 05-2385 (ESH), 2009 WL 2365846 (D.D.C. July 30, 2009) (granting *Bacha*’s petition for writ of habeas corpus). This case received attention due to Judge Huvelle’s expressed outrage at the flimsiness of Government’s case, based primarily on statements the petitioner made as a result of torture. See, e.g., William Glaberson, *U.S. Judge Challenges Evidence on a Detainee*, N.Y. TIMES, July 23, 2009, at A22, available at http://www.nytimes.com/2009/07/23/us/23gitmo.html?_r=1; Evan Perez & Jess Bravin, *U.S. Plans to Free an Afghan Detainee*, WALL ST. J., July 30, 2009, at A6, available at <http://online.wsj.com/article/SB124892208846392665.html>. See also Transcript of Hearing

ing, it remains to be seen what further insight it may provide on the factors she considers meet the Government's new standard authorizing *continued* detention.

Just a few days after Judge Huvelle's decision in *Basardh v. Bush*,¹⁷⁹ Judge Reggie Walton provided a detailed opinion on the Obama Administration's refined internment standard.¹⁸⁰ First, Judge Walton addressed whether the AUMF authorizes the detention of individuals in a *non-international* armed conflict between the United States and al-Qaeda. He determined that this issue must be addressed as he had concluded that IHL applicable to international and non-international armed conflicts provides no such authority.¹⁸¹ When Judge Walton speaks of detention, he does not speak to the IHL distinction between penal or disciplinary sanction (detention) versus preventive detention (internment); rather, he discusses battlefield capture.¹⁸² In that regard, IHL provides no explicit authority to capture combatants on the battlefield, in the same way that it does not explicitly provide a right, but merely does not prohibit, killing combatants on the battlefield.

Judge Walton concluded that authorization for detention must be found elsewhere.¹⁸³ He concluded that the Supreme Court decisions in *Hamdi v. Rumsfeld*¹⁸⁴ and *Hamdan v. Rumsfeld*¹⁸⁵ already determined that the AUMF authorizes detention.¹⁸⁶ In *Hamdi* and *Hamdan*, the Supreme Court respectively held that the AUMF extends to detention under the applicable IHL and that the United States is engaged in a non-international armed conflict in Afghanistan.¹⁸⁷ No court has yet addressed whether the AUMF authorizes preventive detention *outside* of armed conflict.

Before The Honorable Ellen Segal Huvelle, *Bacha v. Obama*, Civil Action No. 05-2385 (ESH) (D.D.C. July 30, 2009), *available at* <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/jawad-hearing-7-16-09.pdf>.

¹⁷⁹ *Basardh v. Bush*, Civil Action No. 05-cv-889 (ESH), 2009 WL 856345 (D.D.C. March 31, 2009) (final judgment granting Basardh's petition for writ of habeas corpus).

¹⁸⁰ *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. Apr. 22, 2009).

¹⁸¹ *See id.* at 59–61.

¹⁸² *See generally id.*

¹⁸³ *See generally id.* at 61.

¹⁸⁴ 542 U.S. 507 (2004).

¹⁸⁵ 548 U.S. 557 (2006).

¹⁸⁶ *See, e.g., Gherebi v. Obama*, 609 F. Supp. 2d 43, 55 (D.D.C. Apr. 22, 2009).

¹⁸⁷ In relation to Afghanistan, the Supreme Court in *Hamdi v. Rumsfeld* held:

[W]e understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. *But that is not the situation we face as of this date. Active combat operations*

Having determined that the AUMF authorizes detention, Judge Walton then addressed the standard for such detention. He correctly rejected the petitioner's argument that only persons who directly participate in hostilities can be detained.¹⁸⁸ He concluded that the detention standard is broader.

First, he explained that the detention standard covers those persons who are members of a fighting force that permanently directly participate in hostilities.¹⁸⁹ In order to determine membership in the fighting forces of the enemy, the court:

[A]gree[ed] with the government that the criteria set forth in Article 4 of the Third Geneva Convention and Article 43 of the Additional Protocol I^[190] should inform the Court's assessment as to whether an individual qualifies as a member of the "armed forces" of an enemy organization like al-Qaeda.¹⁹¹

Judge Walton provided examples:

Thus, mere sympathy for or association with an enemy organization does not render an individual a member of that enemy organization's armed forces. Instead, the individual must have some sort of "structured" role in the "hierarchy" of the enemy force Sympathizers, propagandists, and financiers who have no involvement with this "command structure," while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy's "armed forces"¹⁹²

Second, he considered the standard to also cover those persons who are not analogous to combatants but are nevertheless part of the armed forces. Judge Walton clarified:

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.

542 U.S. 507, 521 (2004) (citation omitted) (emphasis added). And, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court confirmed the U.S. position that there existed an armed conflict at that time, although the Court did not specify the type of armed conflict. *Id.* at 470. *But see supra* text accompanying note 7.

¹⁸⁸ *Gherebi*, 609 F. Supp. 2d at 65–67.

¹⁸⁹ *See id.* at 63–67. *See* discussion *supra* accompanying notes 58–61 (regarding the "membership approach").

¹⁹⁰ The United States is not party to the First Additional Protocol.

¹⁹¹ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. Apr. 22, 2009).

¹⁹² *Id.* at 68–69.

The key question is whether an individual “receive[s] and execute[s] orders” from the enemy force’s combat apparatus, not whether he is an al-Qaeda fighter. Thus, an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda’s chain of command.¹⁹³

Judge Walton, in fact, analogized to those persons who are not combatants and yet are still entitled to prisoner-of-war status, that is civilians formally accompanying a State’s armed forces but are not members of it.¹⁹⁴ To this limited extent then,

the Court conclude[d] as a matter of law that, in addition to the authority conferred upon him by the plain language of the AUMF, the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, *provided that the terms “substantially supported” and “part of” are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.*¹⁹⁵

The court’s understanding of the internment standard directly parallels Article 4 of the Third Geneva Convention.¹⁹⁶ No mention, however, is made of the standard of internment contained in the Fourth Geneva Convention,¹⁹⁷ which is broader in scope but does not necessarily permit internment until the end of hostilities. Judge Walton’s interpretation of the new deten-

¹⁹³ *Id.* at 69 (alterations in original).

¹⁹⁴ See Third Geneva Convention, *supra* note 11, at 4(A)(4). IHL treaty provisions stipulate that persons accompanying the armed forces, such as “supply contractors [and] members of labour units or of services responsible for the welfare of the armed forces”, are not combatants, as medical and religious personnel are not. Third Geneva Convention, *supra* note 11, arts. 4(A)(4), 33. “Also excluded in the case of conflicts involving irregularly constituted armed groups are ‘political and religious leaders . . . [and] financial contributors, informants, collaborators and other service providers without fighting function [who] may support or belong to an opposition movement or an insurgency as a whole, but can hardly be regarded as members of its ‘armed forces’ in the functional sense underlying IHL.’” Goodman, *supra* note 48, at 53, (citing NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 320 (2008)).

¹⁹⁵ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70–71 (D.D.C. Apr. 22, 2009) (footnote omitted) (emphasis added).

¹⁹⁶ See Third Geneva Convention, *supra* note 11, art. 4.

¹⁹⁷ See Fourth Geneva Convention, *supra* note 12, arts. 42, 78.

tion standard is narrower than the previously applied “enemy combatant” standard and probably narrower than the Obama Administration intended.

Originally, the Obama Administration submitted the Government’s new position with respect to its authority to intern the individuals held at Guantánamo Bay in response to an order from Judge John Bates.¹⁹⁸ In *Ham-lily v. Obama*,¹⁹⁹ Judge Bates reviewed the Government’s refinements. Judge Bates accepted the Government’s authority to detain as stated in the first sentence of the Government’s position. He wrote:

The first sentence of the government’s proposal is taken almost verbatim from the AUMF itself and concerns the President’s authority to use force against, and hence to detain under *Hamdi*, 542 U.S. at 521, those individuals who (i) were responsible for the September 11 attacks or (ii) harbored those who were responsible for the attacks. There is no debate that the President has authority to detain such individuals.²⁰⁰

Judge Bates, however, did not accept the Government’s framework in its entirety.²⁰¹ He wrote that:

[The Court] rejects the concept of “substantial support” as an independent basis for detention. . . . [and] finds that “directly support[ing] hostilities” is not a proper basis for detention. In short, the Court can find no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of “support” as a valid ground for detention.²⁰²

As discussed above, application of the first sentence of the Government’s standard could be problematic under IHL.²⁰³ The concerns previously raised²⁰⁴ with regard to the second sentence, particularly the concern of “substantial support” being defined over-broadly, are eliminated by Judge Bates’s rejection of the concept of “substantial support,” with the Government having provided very little justification for its inclusion.²⁰⁵

¹⁹⁸ See *Ham-lily v. Obama*, Civil Action No. 05-0763 (JDB) (D.D.C. Jan. 22, 2009) (order requesting the Government to submit any refinement of their position on the appropriate definition of “enemy combatant”), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005ev2378-175.

¹⁹⁹ 616 F. Supp. 2d 63 (D.D.C. May 19, 2009).

²⁰⁰ *Id.* at 67 n.5.

²⁰¹ *Id.* at 69.

²⁰² *Id.*

²⁰³ See *supra* text accompanying notes 119–20.

²⁰⁴ See *supra* text accompanying notes 122–27.

²⁰⁵ See *Ham-lily v. Obama*, 616 F. Supp. 2d 63, 76 (D.D.C. May 19, 2009). The *Ham-lily* opinion states that:

After repeated attempts by the Court to elicit a more definitive justification for the “substantial support” concept in the law of war, it became clear that the government has none. Nevertheless, the government asserted that “substantial support” is

However, Judge Bates is wrong when he asserts that “directly supporting hostilities” could provide no basis for internment under IHL. Of course, the validity of Judge Bates’s assertion depends upon how that phrase is defined. Nevertheless, it must be recalled that an individual need not “directly participate in hostilities” for internment to be authorized under the Fourth Geneva Convention for “imperative reasons of security.”²⁰⁶ For example, providing intelligence to the enemy that seriously prejudices the state’s security would constitute direct support justifying internment, as an “imperative reason of security”. While the Government can always choose to apply a more restrictive standard, it would be incorrect to declare that under no circumstances does IHL provide authorization for such internment.

In determining that the Government has authority to intern “persons who were part of . . . Taliban or al-Qaida forces or associated forces”,²⁰⁷ Judge Bates entered into a controversial area of IHL. On whether this governmental focus on “membership” in organizations responsible for the September 11, 2001 attacks is consistent with IHL applicable to non-international armed conflicts, which provides for no combatant status, Judge Bates concluded that:

[T]he lack of combatant status in non-international armed conflicts does not, by default, result in civilian status for all, even those who are members of enemy “organizations” like al Qaeda. Moreover, the Government’s claimed authority to detain those who were “part of” those organizations is entirely consistent with the law of war principles that govern non-international armed conflicts. Common Article 3, by its very terms, contemplates the “detention” of “[p]ersons taking no active part in hostilities, including members of the armed forces who have laid down their weapons and those placed hors de combat,” At a minimum, this restriction establishes that States engaged in non-international armed conflict can detain those who are “part of” enemy armed groups.²⁰⁸

intended to cover those individuals “who are not technically part of al-Qaeda,” but who have some meaningful connection to the organization by, for example, providing financing. . . . [A] detention authority that sweeps so broadly is simply beyond what the law of war will support. The government’s approach in this respect evidences an importation of principles from the criminal law context.

Id.

²⁰⁶ See *supra* text accompanying notes 31–50. It should also be recalled that persons accompanying the armed forces without being combatants may be interned as prisoner of war. Third Geneva Convention, *supra* note 11, art. 4(A)(4).

²⁰⁷ See March 13 Memo, *supra* note 8, at 2.

²⁰⁸ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 73 (D.D.C. May 19, 2009) (citing Third Geneva Convention, *supra* note 11, art. 3(1)). See also *Gherebi v. Obama*, 609 F. Supp. 2d 43, 52–53 (D.D.C. Apr. 22, 2009).

This issue, however, remains debated.²⁰⁹ While Judge Bates determined that this approach is consistent with IHL, he recognized that “the government’s position cannot be said to reflect customary international law because, candidly, none exists on this issue.”²¹⁰

In addition, Judge Bates concluded that the authority to intern includes persons who were members of “associated forces”, which he interpreted to mean “‘co-belligerents’ as that term is understood under the law of war.”²¹¹ Judge Bates clarified that “[a]ssociated forces’ do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda—there must be an actual association in the current conflict with al Qaeda or the Taliban.”²¹² This interpretation should assist in ensuring that application of the standard is not overbroad—limited to those groups actively participating in hostilities—and, thus, in a manner consistent with being a “party” to an armed conflict under IHL.²¹³

The critical question then remains as to how one determines being “part of” an armed group. Judge Bates described his approach as functional rather than formal. While he appears to be in agreement with Judge Walton’s conclusions in *Gherebi v. Obama*,²¹⁴ Judge Bates provides less reasoning behind his delimitations. He did, however, list some non-exclusive factors—on their face not inconsistent with IHL—for making the determination:

“[M]ere sympathy for or association with an enemy organization does not render an individual a member” of that enemy organization. . . . The key inquiry, then, is not necessarily whether one self-identifies as a member of the organization (although this could be relevant in some cases), but whether the individual functions or participates within or under the command structure of the organization—*i.e.*, whether he receives and executes orders or directions. . . . Thus, as *Gherebi* observed, this could include an individual “tasked with housing, feeding, or transporting al-Qaeda fighters . . . but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, [is likely not detainable] as-

²⁰⁹ See *supra* text accompanying note 56.

²¹⁰ *Hamlily*, 616 F. Supp. 2d at 74 (citing Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 190 (2005) (“[I]t is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are liable to attack as such.”).

²¹¹ *Hamlily*, 616 F. Supp. 2d at 70.

²¹² *Id.* at 75 n.17.

²¹³ See MELZER, *supra* note 194, at 248–50 (describing the quality of a “party” to an international armed conflict); *id.* at 254 (discussing how non-State actors qualify as a “party” to a non-international armed conflict).

²¹⁴ 609 F. Supp. 2d 43 (D.D.C. Apr. 22, 2009).

suming such individuals had no independent role in al-Qaeda's chain of command." . . . Moreover, as the government conceded at oral argument, its framework does not encompass those individuals who unwittingly become part of the al Qaeda apparatus—some level of knowledge or intent is required.²¹⁵

Finally, Judge Bates agreed that the Government's authority also includes "any person who has committed a belligerent act", but he understood this to be "any person who has directly participated in hostilities."²¹⁶ While the standard of "direct participation in hostilities" under conventional IHL is used to assess when a civilian loses his or her protection against direct attack,²¹⁷ not his or her internment, it could, as discussed above,²¹⁸ be a possible approach when analogizing to the Third Geneva Convention to determine who is a "fighter" in non-international armed conflict. Judge Bates acknowledged that the definition of "direct participation in hostilities" is at present unsettled, not being defined in treaty law,²¹⁹ thus he identified aspects of the standard that he considered settled and on which the court would rely:

[L]ittle doubt exists that a civilian carrying out an attack would be directly participating in hostilities. In the same vein, legal experts seem to agree that civilians preparing or returning from combat are still considered to be directly participating in hostilities, although the precise indication as to when preparation begins and return ends remains controversial.²²⁰

This is minimal guidance indeed. It remains to be seen how this standard will be developed through the court's application. As Judge Bates stated, "further refinement of the concept of 'direct participation' will await examination of particular cases."²²¹

Judges Walton's and Bates' interpretations of the internment standard differ in that Judge Walton did not reject outright, as did Judge Bates, the "'support'-based elements." Nevertheless, there appears to be a certain consistency between them, as "[w]ith the exception of these two 'support'-

²¹⁵ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. May 19, 2009) (citing *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68–69 (D.D.C. Apr. 22, 2009)).

²¹⁶ *Id.* at 70, 77.

²¹⁷ See First Additional Protocol, *supra* note 27, art. 51(3); Second Additional Protocol, *supra* note 14, art. 13(3).

²¹⁸ See *supra* text accompany notes 48–50.

²¹⁹ See *Hamlily*, 616 F. Supp. 2d at 72 n.14 (citing Int'l Comm. of the Red Cross, Report: Direct Participation in Hostilities (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2005-09-report-dph-2005-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2005-09-report-dph-2005-icrc.pdf)).

²²⁰ *Hamlily*, 616 F. Supp. 2d at 77 (citing Int'l Comm. of the Red Cross, Report: Direct Participation in Hostilities, *supra* note 219).

²²¹ *Hamlily*, 616 F. Supp. 2d at 77.

based elements, . . . [Judge Bates] adopt[ed] the government’s proposed framework, largely for the reasons explained [by Judge Walton] in *Gherebi*.²²² In particular, Judge Bates recognized that Judge Walton adopted the Government’s framework *subject to* a comprehensive interpretation of that standard.²²³ Thus, these two approaches may not result in significant differences in practice, particularly as Judge Bates indicated that:

[W]hile the Court concludes that the concepts of “substantial support” and “direct support” are not, under the law of war, independent bases for detention, evidence tending to demonstrate that a petitioner provided significant “support” is relevant in assessing whether he was “part of” a covered organization (through membership or otherwise) or “committed a belligerent act” (through direct participation in hostilities).²²⁴

In *Mattan v. Obama*, Judge Royce Lamberth adopted Judge Bates’ approach.²²⁵ Also, Judge Colleen Kollar-Kotelly in *Al Mutairi v. United States*²²⁶ accepted the reasoning set forth in Judge Bates’ decision in *Hamli-ly v. Obama*, “partially adopt[ing] the Government’s proposed definition of its detention authority.”²²⁷ In applying that standard, Judge Kollar-Kotelly granted the petitioner’s writ, deciding that:

[T]he Government has at best shown that some of Al Mutairi’s conduct is consistent with persons who may become part of al Wafa or al Qaida, but there is nothing in the record beyond speculation that Al Mutairi

²²² *Id.* at 69.

²²³ *Id.* at 69 n.11.

²²⁴ *Id.* at 70.

²²⁵ See *Mattan v. Obama*, 618 F. Supp. 2d 24 (D.D.C. May 21, 2009).

Accordingly, the Court will adopt respondents’ proposed definition except for the two “support”-related elements described above. However, the Court will still consider support of Taliban, al Qaeda, or associated enemy forces in determining whether a detainee should be considered “part of” those forces. Such consideration of “support” factors is consistent with the Judge Bates’ opinion and, as Judge Bates noted, is not inconsistent with Judge Walton’s opinion . . . as applied.

Id. at 26 (footnote omitted).

²²⁶ Civil Action No. 02-828 (CKK) (D.D.C. July 29, 2009) (classified memorandum opinion explaining decision to grant habeas to detainee), available at http://s3.amazonaws.com/publica/assets/detention/gitmo/al_mutairi_unclassified_court_opinion.pdf.

²²⁷ *Id.* at 7–8 (footnote omitted). The memorandum opinion further states that:

The Court agrees that the President has the authority to detain individuals who are “part of” the Taliban, al Qaeda, or associated enemy forces, but rejects the Government’s definition insofar as it asserts the authority to detain individuals who only “substantially supported” enemy forces or who have “directly supported hostilities” in aid of enemy forces. While evidence of such support is undoubtedly probative of whether an individual is part of the enemy force, it may not by itself provide the grounds for detention.

Id. at 8. See *Mattan*, 618 F. Supp. 2d at 26.

did, in fact, train with or otherwise become part of either or both organizations. . . .²²⁸

She considered that, “[i]n the context of this definition, the ‘key inquiry’ for determining whether an individual has become ‘part of’ one or more of these organizations is ‘whether the individual functions or participates within or under the command structure of the organization—i.e., whether he receives and executes orders or directions.’”²²⁹

Judge Robertson also adopted Judge Bates’ approach, in *Awad v. Obama*.²³⁰ Unfortunately, as the opinion is so heavily redacted, it does not provide much insight as to which factors met the internment standard, such that the petitioner’s writ was denied. However, Judge Robertson indicated that “it appears more likely than not that Awad was, for some period of time, ‘part of’ al Qaida”²³¹ because:

At the very least Awad’s confessed reasons for traveling to Afghanistan and the correlation of names on a list [REDACTED] clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade [at the hospital].²³²

As Judge Robertson pointed out this “case against Awad is gossamer thin.”²³³ The fact that the standard can be met with such minimal evidence stresses the importance of being clear as to what this standard determines. There are very different ramifications for the individual if the standard determines who may be interned, targeted, or subjected to trial by military commission.²³⁴ Judge Bates correctly assessed that “[t]he evidence is of a kind fit *only for these unique proceedings* . . . [as it] has very little weight.”²³⁵

In *Ahmed v. Obama*, Judge Gladys Kessler applied the Obama Administration standard without qualification.²³⁶ Despite the much redacted

²²⁸ *Al Mutairi*, Civil Action No. 02-828 at 32.

²²⁹ *Al Odah v. United States*, Civil Action No. 02-828 (CKK), 2009 WL 2730489 *1, *17-*18 (D.D.C. Aug. 24, 2009) (citing *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. May 19, 2009)).

²³⁰ Civil Action No. 05-CV-2379, at 5 (D.D.C. Aug. 12, 2009), available at http://s3.amazonaws.com/publica/assets/detention/gitmo/Mohammed_Ali_Awad_Trial_Court_Decision.pdf.

²³¹ *Id.* at 21.

²³² *Id.*

²³³ *Id.* at 20.

²³⁴ See *supra* text accompanying notes 95–98.

²³⁵ *Awad v. Obama*, Civil Action No. 05-CV-2379, at 20–21 (D.D.C. Aug. 12, 2009), available at http://s3.amazonaws.com/publica/assets/detention/gitmo/Mohammed_Ali_Awad_Trial_Court_Decision.pdf (emphasis added).

²³⁶ See *Ahmed v. Obama*, 613 F. Supp. 2d 51, 53–54 (D.D.C. 2009).

opinion, it is possible to glean factors that Judge Kessler considered do and do not meet the standard. She granted the petitioner's writ because the proof did not convince her that Ahmed "fought for the Taliban", received military training, traveled in Afghanistan "with terrorists fleeing from the scene of war", or demonstrated by a stay at a guesthouse that he "was a supporter of al-Qaida."²³⁷ Judge Kessler did not consider "travel[ing] around Afghanistan in 2001 and 2002 in the company of terrorist fighters fleeing the battlefield"²³⁸ to constitute substantial support.²³⁹ However, she held that if the Government could prove that Ahmed had joined al-Qaeda and/or the Taliban in battle against the United States and/or coalition forces, "this fact alone would almost certainly justify . . . detention."²⁴⁰ As concerns the Government's offer of evidence that Ahmed stayed at a guesthouse to establish that he is "a substantial supporter of al-Qaida and/or Taliban, as well as a trainee and fighter for one or both groups",²⁴¹ Judge Kessler pointed out that "[t]he validity of this argument rests in large part on a guilt-by-association theory"²⁴² Judge Kessler required "solid evidence that Ali Ahmed engaged in, or planned, any future wrongdoing while"²⁴³ there. She did not accept guilt by association.

More recently, Judge Kessler adopted Judge Walton's approach to the standard of review.²⁴⁴ Judge Kessler concluded that "Judge Walton's opinion presented a clearer approach [than Judge Bates']"²⁴⁵ In granting Al-Adahi's petition, she determined that "[u]nable to prove the more serious allegation of actual participation in combat, the Government cannot rely solely on what is only associational evidence about Al-Ahadi's stay at [REDACTED] and arrest in the company of individuals rumored to be part of the Taliban."²⁴⁶ Referring to the AUMF and the standards in *Gherebi*,²⁴⁷

²³⁷ *Id.* at 66.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 59.

²⁴¹ *Id.* at 66.

²⁴² *Id.* at 63.

²⁴³ *Id.* at 64.

²⁴⁴ See *Al-Adahi v. Obama*, Civil Action No. 05-280 (GK) (D.D.C. Aug. 17, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/08/Al-Adahi-opinion-8-21-09.pdf>.

²⁴⁵ *Id.* at 6.

²⁴⁶ *Id.* at 38.

²⁴⁷ See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68–69 (D.D.C. Apr. 22, 2009) (stating that individuals must occupy "some sort of 'structured' role in the 'hierarchy' of the enemy force" and "'receive[] and execute[] orders' from the enemy force's combat apparatus"); *id.* at 70–71 (stating that the President has the authority to detain persons who are members of al-Qaeda's armed forces).

Judge Kessler concluded that the petitioner's brief attendance at a training camp (the Government's strongest allegation) and eventual expulsion from it²⁴⁸ "do not bring him within the ambit of the Executive's power to detain."²⁴⁹ Judge Kessler's refusal to accept guilt by association is consistent with the IHL requirement that individual determinations must be undertaken to assess whether there is an individual nexus.²⁵⁰

V. CONCLUSION

This analysis indicates that the D.C. District Court's application of the Bush Administration's definition of "enemy combatant" and the refined standard provided by the Obama Administration is in some ways narrower and in other ways potentially broader than the IHL standards. Thus, the consistency of the D.C. District Court's decisions with the internment standards under IHL is mixed. Nevertheless, the court has done an admirable job in handling certain complicated and unsettled issues under IHL, such as the meaning of "direct participation in hostilities" and the analogous application of "combatancy" to non-international armed conflicts.

Both the Bush and Obama Administrations and the court analogize to IHL of international armed conflicts in determining the internment standard to be applied. However, while it may be acceptable to apply the IHL standards of international armed conflict by analogy to non-international armed conflict, they do not apply to "counter-terrorism" operations not passing over the threshold into armed conflict. Thus, for any of those individuals at Guantánamo who are not interned in relation to an armed conflict, an IHL standard remains the wrong starting point for an internment determination.

In their analogous application of IHL, both the Administrations and the court analogize solely to the Third Geneva Convention. No mention is made of the Fourth Geneva Convention. As a result, individuals meeting the designated standard may be interned for the duration of hostilities regardless of a change in circumstances. The one exception is Judge Huvelle, who conducts reviews on the necessity of *continued* internment. While the "combatant" standards are applied here to assess authorized internment, other effects result under IHL if one is designated as a "combatant", namely that one may be directly targeted in hostilities. Thus, how the court inter-

²⁴⁸ See *Al Gincio v. Obama*, Civil Action No. 05-1310 (RJL), at 7, 11 (D.D.C. June 22, 2009), available at http://s3.amazonaws.com/propublica/assets/detention/gitmo/janko_unclassified_release_order.pdf.

²⁴⁹ *Al-Adahi v. Obama*, Civil Action No. 05-280 (GK), at 41 (D.D.C. Aug. 17, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/08/Al-Adahi-opinion-8-21-09.pdf>.

²⁵⁰ See *supra* text accompanying notes 40–41.

prets the scope of IHL here can have serious ramifications for IHL and “warfighting” beyond internment.

Analogy limited to the Third Geneva Convention can be attributed in part to the AUMF, which through its authorization of military force creates an inherent nexus to combat operations. The Government may certainly choose not to exercise its full authority under IHL and thus decide to intern only “combatants” even if the Fourth Geneva Convention applicable to civilians provides a broader internment standard. However, if the Government wishes to comply with IHL, it cannot also extend the definition of “combatant” beyond that provided in IHL. To some extent, the AUMF’s expansive language opened the door to this inappropriate stretching of the IHL standards. The D.C. District Court, however, has thus far reined in the Administration’s standards in a manner more consistent with the definition of “combatant” as understood under IHL.

The D.C. District Court has, as of this writing, only ruled upon few of the numerous habeas petitions filed. While some of the factors that the judges determined established “combatancy” raise concern of being beyond the scope of factors acceptable under IHL, the variation in evidence as well as much of it being classified makes it difficult to review and compare the judges’ decisions. Additional decisions will, of course, further illuminate the extent to which the court’s application is consistent with IHL. More particularly, how the court’s various interpretations of the current internment standard—provided by the Obama Administration—will be reconciled also remains to be seen, as no court of appeals has yet clarified a standard.²⁵¹

²⁵¹ One appeals court tried to do so. *See* *Al Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *cited in* *Hamlily v. Obama*, 616 F. Supp. 2d 63, 67 (D.D.C. 2009).