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# International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide

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**INTERNATIONAL STANDARDS FOR DETAINING TERRORISM SUSPECTS:  
MOVING BEYOND THE ARMED CONFLICT-CRIMINAL DIVIDE\***

*Monica Hakimi*<sup>†</sup>

I. INTRODUCTION .....	594
II. A TRIPOLAR PARADIGM .....	600
<i>A. Armed Conflict?</i> .....	602
<i>B. Detention Under the Law of Armed Conflict</i> .....	605
<i>C. Detention Under Human Rights Law</i> .....	609
1. Criminal Detention.....	610
2. Administrative Detention .....	614
III. EXAMINING ADMINISTRATIVE DETENTION .....	617
<i>A. Detention Predicated on Criminal or Immigration Proceedings</i> ..	618
<i>B. Pure Security-Based Detention</i> .....	621
IV. INTERNATIONAL PRACTICE: GROPING FOR ALTERNATIVES .....	624
<i>A. Rejecting the Armed-Conflict Approach</i> .....	626
<i>B. But Evading the Criminal Process Discreetly</i> .....	628
<i>C. . . . And Through Administrative Detention</i> .....	631
1. Detention Predicated on Criminal or Immigration Proceedings .....	632
2. Pure Security-Based Detention .....	635
V. DEVELOPING COHERENT STANDARDS .....	640
<i>A. Prompt and Meaningful Legal Process</i> .....	641
<i>B. Non-Arbitrariness</i> .....	643
<i>C. Form of Administrative Detention</i> .....	647
<i>D. Relationship to the Criminal Law</i> .....	648
VI. CONCLUSION .....	649

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## I. INTRODUCTION

Although sometimes described as war, the fight against transnational jihadi groups (referred to for shorthand as the “fight against terrorism”) largely takes place away from any recognizable battlefield. Terrorism suspects are captured in houses, on street corners, and at border crossings around the globe. Khalid Shaikh Mohammed, the high-level Qaeda operative who planned the September 11 attacks, was captured by the Pakistani government in a residence in Pakistan.<sup>1</sup> Abu Omar, a radical Muslim imam, was apparently abducted by U.S. and Italian agents off the streets of Milan.<sup>2</sup> And Abu Baker Bashir, the spiritual leader of the Qaeda-affiliated group responsible for the 2002 Bali bombings, was arrested in a hospital in Indonesia.<sup>3</sup> Once captured, these suspects face a host of possible futures: they might be deported to their states of nationality; they might be criminally prosecuted for offenses under national law; they might be transferred to a foreign state for detention and interrogation; or they might be detained for extended periods in national detention facilities, like the U.S. facility at Guantánamo Bay, Cuba.

From an international legal perspective, the critical question with respect to terrorism suspects who are not captured on a recognizable battlefield (referred to here as “non-battlefield detainees”) is whether they have any rights not available to detainees picked up in a theater of combat. Much of the legal discussion on terrorism detainees has uncritically lumped non-battlefield detainees together with those captured on a recognizable battlefield, but the context of the capture is significant. International law historically differentiates between detentions that occur in states at peace and those that occur during war. In peacetime, international human rights law imposes procedural and substantive constraints on a state’s authority to detain. For instance, any detention must be grounded in law, must not be arbitrary, and must be subject to judicial review.<sup>4</sup> In wartime, the law of armed conflict generally applies as the *lex specialis* and permits states to detain persons reasonably suspected of threatening state security, without affording

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<sup>1</sup> See Erik Eckholm & David Johnston, *Qaeda Suspect Sound Asleep at Trail’s End*, N.Y. TIMES, Mar. 3, 2003, at A1.

<sup>2</sup> See Richard Owen, CIA Agents Must Be Charged Over “Kidnap and Torture,” Says Judge, TIMES (U.K.), Feb. 17, 2007, at 39.

<sup>3</sup> See Dinda Jouhana & Richard C. Paddock, *Top Indonesian Suspect Leaves Jail*, L.A. TIMES, June 14, 2006, at A21, available at 2006 WLNR 10159088; Richard Paddock, *Indonesia Arrests Cleric in Bombings*, L.A. TIMES, Oct. 20, 2002, at A3.

<sup>4</sup> See *infra* Section II.C.

them judicial guarantees.<sup>5</sup> That expansive authority to detain reflects the understanding that, during war, the balance between security and liberty shifts. The state's security interests become paramount, so the liberty costs of detaining and thereby incapacitating the enemy are tolerated.

Since the September 11 terrorist attacks, two dominant strands of thought have emerged on the international law that governs non-battlefield detentions. One strand asserts that states are at war with al Qaeda and other transnational jihadi groups, and that the law of armed conflict thus applies to permit the detention of terrorism suspects captured anywhere in the world for as long as necessary or until "hostilities" cease.<sup>6</sup> The poster child for this position is Khalid Shaikh Mohammed, who the U.S. government first detained at a secret prison operated by the CIA, and then at Guantánamo Bay.<sup>7</sup> Khalid Shaikh Mohammed views himself as a soldier fighting a war against the United States and its allies.<sup>8</sup> And by U.S. government accounts, his detention and the detention of other high-level terrorist operatives have been invaluable to preventing terrorist attacks and saving innocent lives.<sup>9</sup> Like

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<sup>5</sup> See *infra* Section II.B.

<sup>6</sup> See, e.g., Thomas Hemingway, *Wartime Detention of Enemy Combatants: What If There Were a War and No One Could Be Detained Without an Attorney?*, 34 DENV. J. INT'L L. & POL'Y 63 (2006) (applying the law of armed conflict to the detention of terrorism suspects and not distinguishing between suspects captured on or off the battlefield); John B. Bellinger, III, Legal Advisor to the U.S. Dep't of State, Legal Issues in the War on Terrorism, Speech at the London School of Economics 7-8 (Oct. 31, 2006) [hereinafter Bellinger Speech], available at [http://www.lse.ac.uk/collections/LSEPublicLecturesandEvents/pdf/20061031\\_JohnBellinger.pdf](http://www.lse.ac.uk/collections/LSEPublicLecturesandEvents/pdf/20061031_JohnBellinger.pdf) ("Al Qaida's operations against the United States and its allies continue not only in and around Afghanistan but also in other parts of the world. And because we remain in a continued state of armed conflict with al Qaida, we are legally justified in continuing to detain al Qaida members captured in this conflict."); Press Release, U.S. Dep't of State, Remarks of Secretary Condoleezza Rice upon Her Departure for Europe (Dec. 5, 2005), available at <http://www.state.gov/secretary/rm/2005/57602.htm>; John B. Bellinger, III, *Armed Conflict with Al Qaida?*, OPINIOJURIS, Jan. 15, 2007, <http://www.opiniojuris.org/posts/1168811565.shtml>. The U.S. government's position on obtaining custody over detainees appears to have evolved. The U.S. government no longer asserts that it has the authority to use its coercive powers to capture suspects all over the world without the consent of the territorial state. See Bellinger Speech, *supra*, at 10-11. Nevertheless, the U.S. government continues to assert the authority to detain, based on the law of armed conflict, non-battlefield suspects who find themselves in U.S. hands.

<sup>7</sup> See Eckholm & Johnston, *supra* note 1; Mark Mazzetti, *Pentagon Revises Its Rules on Prosecution of Terrorists*, N.Y. TIMES, Jan. 19, 2007, at A18.

<sup>8</sup> See Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024, at 21, Mar. 10, 2007, available at [http://www.defenselink.mil/news/transcript\\_ISN10024.pdf](http://www.defenselink.mil/news/transcript_ISN10024.pdf) (transcript of Khalid Shaikh Mohammed's hearing at Guantánamo Bay); see also Mark Mazzetti & Margot Williams, *In Tribunal Statement, Confessed Plotter of Sept. 11 Burnishes Image as a Soldier*, N.Y. TIMES, Mar. 16, 2007, at A15.

<sup>9</sup> See George W. Bush, President of the U.S., President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006) [hereinafter President's Speech on Military Commissions], available at <http://www.whitehouse.gov/news/releases/2006/09>

armed-conflict detentions, then, counterterrorism detentions are not necessarily intended to punish for prior wrongdoing,<sup>10</sup> but to prevent terrorist operatives from planning or engaging in further attacks and, if possible, to obtain from them information for use in future military, intelligence, or law enforcement operations. Advocates of the armed-conflict approach assert that these goals cannot always be achieved through the criminal process.<sup>11</sup>

The second, competing strand of thought rejects the application of the law of armed conflict and asserts that international human rights law applies to prohibit the detention of non-battlefield suspects except through the criminal process.<sup>12</sup> Advocates of this position point to the inadequacy of the controls under the law of armed conflict, to the very real possibility that detainees will be held for life without legal process, and to the known incidents of mistake. Individuals wrongfully suspected of terrorism have been captured in the course of their everyday lives and then detained for extended periods without any judicial oversight, and often without communication with the outside world. In one case, a German national (named Khaled el-Masri) was arrested by Macedonian officials, transferred to the CIA for detention and interrogation, and then released five months later in rural Albania after U.S. officials determined that he had been mistakenly identified as a terrorism suspect.<sup>13</sup> This and similar cases demonstrate the problem

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/20060906-3.html (describing the CIA detention program as “one of the most vital tools in our war against the terrorists”).

<sup>10</sup> International and U.S. law both recognize that detention on the grounds of danger to the community is not always punitive. For the international law, see Subsection II.C.2. For a distillation of U.S. law, see *U.S. v. Salerno*, 481 U.S. 739, 748-49 (1987).

<sup>11</sup> See, e.g., GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 255 (2007) (“I believe that none of these successes would have happened if we had to treat KSM [Khalid Shaikh Mohammed] like a white-collar criminal—read him his Miranda rights and get him a lawyer who surely would have insisted that his client shut up.”).

<sup>12</sup> See, e.g., Joan Fitzpatrick, *Sovereignty, Territoriality and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 303-04 (2002) (asserting that the United States has pursued “a highly problematic armed conflict alternative to the criminal law paradigm, which is readily available to combat terrorist acts and threats”); Avril McDonald, *Terrorism, Counter-Terrorism, and the Jus in Bello*, in TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 57, 62 (Michael N. Schmitt & Gian Luca Beruto eds., 2002) (“Al Qaeda and other terrorist organizations must be defeated for the most part by detection (good intelligence) and by prosecution . . . under domestic criminal legislation.”); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS J. 123, 136 (2006) (arguing that the detention of non-battlefield terrorism suspects not formally convicted of a crime violates human rights law); Michael Ratner, Letter to the Editor, N.Y. TIMES, July 15, 2007, at A12 (“No domestic or international law permits preventative detention [in the fight against terrorism].”).

<sup>13</sup> See Council of Eur., Comm. on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, at 25-29, EUR. PARL. DOC. 10957 (June 12, 2006) (prepared by Dick Marty) [herei-

with applying the law of armed conflict without sufficient checks and in the absence of any geographic or temporal constraints: it comes to displace human rights law, such that anyone who is merely *suspected* of terrorism may be picked up anywhere in the world and detained indefinitely, without judicial guarantees.<sup>14</sup> The criminal process, by contrast, is a fair and transparent mechanism for determining that those who are suspected of terrorism are in fact dangerous, based on their prior conduct.

This debate is important, but it has become both sterile and divorced from reality. In fact, neither strand of thought tracks international law and practice. International human rights law recognizes that, even in peacetime, those who threaten state security may be detained outside the criminal process and instead through calibrated systems of administrative detention. The option of administrative detention, however, has been neglected in the international legal debate on non-battlefield detentions.<sup>15</sup> This has been to our detriment. International practice demonstrates that states—and particularly western democracies that take seriously their human rights obligations, but also face a real threat from transnational jihadi terrorism—perceive an occasional but serious need to detain non-battlefield terrorism suspects outside the criminal process. In the absence of a clear legal framework for satisfying that need, these states have resorted to a variety of ad hoc or uncontrolled measures. Thus, although all western democracies continue to rely heavily on the criminal process to prosecute and detain non-battlefield suspects,<sup>16</sup> many have also acted outside that process. The bipolar

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nafter COE Report]; Neil A. Lewis, *Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit*, N.Y. TIMES, Nov. 29, 2006, at A15.

<sup>14</sup> Cf. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004) (describing the blurring of boundaries between war and peace in the fight against terrorism); Steven Ratner, *Are the Geneva Conventions Out of Date?*, 48 L. QUADRANGLE NOTES 66, 70 (2005) (“The conflict with Al Qaeda needs to have boundaries beyond which the . . . law of war . . . do[es] not apply.”).

<sup>15</sup> Although neglected in the international legal debate, U.S. lawyers have begun advocating for the United States to detain terrorism suspects administratively. See, e.g., Benjamin Wittes, *Terrorism, the Military, and the Courts*, 143 POL’Y REV. 21 (2007); Jack Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19; Michael Mukasey, Editorial, *Jose Padilla Makes Bad Law*, WALL. ST. J., Aug. 22, 2007, at A15; Stuart Taylor, *Terrorism Suspects and the Law*, NAT’L J., May 12, 2007, at 17; George J. Terwilliger, III, “*Domestic Unlawful Combatants*”: *A Proposal to Adjudicate Constitutional Detentions*, ENGAGE, Oct. 2006, at 55.

<sup>16</sup> For a sample of cases in which the United States has criminally prosecuted non-battlefield suspects, see *United States v. Siraj*, 468 F. Supp. 2d 408, 413-14 (E.D.N.Y. 2007), concerning a conspiracy to bomb a New York City subway station; *United States v. Ali*, 396 F. Supp. 2d 703 (E.D.N.Y. 2005), concerning membership in al Qaeda and participation in a plan to carry out terrorist attacks in the United States; and Ralph Blumenthal, *American Said to Have Ties to Al Qaeda Is Denied Bail*, N.Y. TIMES, Feb. 22, 2007, at A20, reporting that at least fifteen Americans have been charged with aiding al Qaeda. For examples in other west-

paradigm for thinking about non-battlefield detentions—as armed-conflict or criminal—fails to reflect international law and is increasingly out of step with international practice.

This Article takes that international practice seriously in order to move the conversation beyond the stale armed-conflict or criminal divide. Part II reviews the current debate and argues that international law actually presents us with three—not two—broad models for detention in the fight against terrorism: the armed-conflict model and, under human rights law, the criminal and administrative models. Part II demonstrates that international law is ambiguous as to which of these three models properly governs non-battlefield detentions, but that both the armed-conflict model and exclusive reliance on the criminal model carry significant costs. Administrative detention thus is a potentially appealing alternative for incapacitating non-battlefield suspects before they strike.

Part III, however, argues that the legal parameters of administrative detention are poorly developed or unworkable in the security context. This renders administrative detention insufficiently constrained and easily subject to abuse. Indeed, several states have resorted to administrative detention in the fight against terrorism and have failed to administer adequate controls. States have also engaged in other, even less palatable measures. The United States consistently has asserted the authority to detain non-battlefield suspects based on the law of armed conflict, and even though most other states publicly reject that practice, several have discreetly participated in it.<sup>17</sup> Several have also sought to deport terrorism suspects, despite the risk of mistreatment in their home countries, in order to reduce the more proximate threat these suspects pose in the deporting states' own territories.<sup>18</sup> Part IV reviews that practice to demonstrate that states perceive a real need to contain the threat from non-battlefield suspects without resort to the criminal process, and that they have employed a range of ad hoc or uncontrolled measures to satisfy that need.

In light of that practice, Part V argues that international law should continue to allow states to detain non-battlefield suspects outside the criminal process, but that it must better regulate such detention to protect against abuse. The oft-overlooked administrative model is best suited to accomplish

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ern democracies, see Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 EUR. J. INT'L L. 989 (2004) (Europe); Alan Cowell, *British Antiterrorism Chief Warns of More Severe Qaeda Attacks*, N.Y. TIMES, Apr. 26, 2007, at A5 (United Kingdom); Renwick McLean, *Trial Opens in Madrid for 24 Accused of Aiding Qaeda Cell*, N.Y. TIMES, Apr. 23, 2005, at A10 (Spain); Elaine Sciolino & Helene Fouquet, *Belgium Is Trying to Unravel the Threads of a Terror Web*, N.Y. TIMES, Oct. 10, 2005, at A1 (Belgium); and Craig S. Smith, *6 Former Guantánamo Detainees on Trial in Paris*, N.Y. TIMES, July 4, 2006, at A8 (France).

<sup>17</sup> See *infra* Sections III.A, III.B.

<sup>18</sup> See *infra* Section III.B.

these goals, if the law on administrative detention is developed to better balance the liberty and security interests as they arise in the fight against terrorism. Toward that end, Part V outlines four policy goals to inform the development of law in this area. First, detainees must be afforded prompt and meaningful legal process. Second, extended administrative detention should be permitted only in narrowly defined circumstances: where the detainee himself poses a serious security threat, where detention is necessary to contain that threat, and where detention lasts no longer than necessary. Third, in those circumstances, security-based administrative detention should be permitted even if not tied to other legal proceedings, such as future criminal charges or deportation. And finally, any state that employs a system of administrative detention must define the boundaries between it and the criminal process. With these constraints in place, administrative detention may prove an effective way to navigate between the at times opposing shoals of liberty and security that make the legal response to non-battlefield detention at once so vexing and so vital.

Before proceeding with that argument, three clarifying points are in order. First, it is important to establish at the outset the parameters of each of the three models for detention examined in this Article. The armed-conflict model broadly permits detention, without judicial guarantees, until the circumstances justifying it cease to exist. As this Article explains in Section II.B, the law of armed conflict is, in fact, more nuanced. It recognizes different detention regimes, depending on whether the conflict is international or non-international, and if the former, whether the detainee is a combatant or a civilian. Nevertheless, the broad strokes of the armed-conflict model (as just described) are constant across the various detention regimes.<sup>19</sup> The criminal model, by contrast, is more restrictive. It permits detention in essentially two circumstances: (1) where the person has been charged with a criminal offense and is awaiting a criminal adjudication; and (2) where the person is being punished after a criminal conviction. This Article acknowledges that other forms of detention may also be used to advance the interests of the criminal process—for instance, to prevent flight before filing criminal charges, or to preserve a material witness for use during a criminal trial.<sup>20</sup> Yet it does not understand those forms of detention to be “through” the criminal process or under the criminal model. To the contrary, such detention is understood to be administrative. Generally speaking,

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<sup>19</sup> Note that detentions based on the armed-conflict model may nevertheless be inconsistent with particular aspects of the law of armed conflict. The purpose of this Article is not to condemn such inconsistencies, but rather to examine the antecedent question of whether the armed-conflict model is even a suitable one for non-battlefield detentions.

<sup>20</sup> See, e.g., 18 U.S.C. § 3144 (2000) (U.S. material witness statute); *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003) (interpreting the material witness statute to permit the detention of witnesses for criminal proceedings relating to the September 11 attacks).



the administrative model encompasses detentions designed to satisfy strong public interests other than punishment or condemnation for proscribed, prior conduct.

Second, this Article addresses the legal standards that govern detention itself, and not the conditions of confinement or the treatment of detainees. Those latter issues have been addressed comprehensively in the legal literature,<sup>21</sup> and this Article assumes that, under all models of detention, controls may be established (consistent with the applicable legal prescriptions) to protect detainees against mistreatment.

Finally, this Article focuses on the detention options available to states that are targeted by transnational jihadi groups like al Qaeda.<sup>22</sup> That focus is appropriate because, as explained in Part II, the fight against such groups has attributes of an armed conflict that justify the use of detention options outside the criminal process, but also attributes that make it unlike other armed conflicts, and that render inadequate the detention options under the law of armed conflict. Despite the particular focus on transnational jihadi groups, however, this Article has obvious implications for states seeking to detain members of other kinds of terrorist or insurgent groups. Whether security-based administrative detention is justifiable in those other contexts ultimately depends on the nature of the fight and the security threat posed. In order for such detention to be viable, however, its parameters must be refined.

## II. A TRIPOLAR PARADIGM

International lawyers have vigorously debated which legal regime—the law of armed conflict or human rights law—governs measures taken in the fight against terrorism. The focal point of debate has been whether terrorist acts and the varied counterterrorism measures taken in response may properly be characterized as an “armed conflict” so as to trigger the application of the law of armed conflict. If we are engaged in a global armed conflict against transnational jihadi groups, then (the reasoning goes) the law of armed conflict governs all or most measures that target

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<sup>21</sup> See, e.g., David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61 (2005); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005); Jack Balkin, *The Anti-Torture Memos*, BALKINIZATION, Dec. 22, 2006, <http://balkin.blogspot.com/2006/12/anti-torture-memos.html> (compilation of posts on civil liberties in the so-called “War on Terror”).

<sup>22</sup> For a coded map of countries recently attacked by such groups, see *World Under Fire, Radical Islamic Incidents Across the World*, <http://www.worldunderfire.com> (last visited March 31, 2008).

such groups, including the detention of non-battlefield terrorism suspects.<sup>23</sup> By contrast, if we are not engaged in a global armed conflict, then the law of armed conflict applies only in those regions where hostilities remain ongoing, and human rights law applies without specification everywhere else (i.e., to all detentions taken outside a theater of combat).<sup>24</sup> The predominant assumption is that, where human rights law applies, it permits detention only through the criminal process.<sup>25</sup>

This Part of the Article argues that international law is indeterminate on the question of whether the fight against terrorism constitutes an armed conflict, and that the focus on that question has obscured more fundamental questions concerning the suitability of the existing legal regimes to govern particular counterterrorism measures.<sup>26</sup> In the context of non-

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<sup>23</sup> For general arguments that the law of armed conflict governs, see, for example, OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 389-93 (2006); and Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165, 169 (2005), concluding that the law of armed conflict governs "some aspects of the GWOT." For arguments that the law of armed conflict governs the detention of non-battlefield terrorism suspects, see sources cited *supra* note 6.

<sup>24</sup> For general arguments that the law of armed conflict does not govern, see, for example, Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE. W. RES. J. INT'L L. 349, 350 (2004); and Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 8 n.16 (2001).

<sup>25</sup> See sources cited *supra* note 12. For evidence that this bipolar paradigm exists, see, for example, Sean O. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants,"* 75 GEO. WASH. L. REV. 1105, 1151, which states that "if al Qaeda suspects picked up in places other than the battlefield . . . are not regarded as combatants under the laws of war, then they . . . could be arrested and tried in regular courts for transnational crime, or they could be closely monitored by law enforcement authorities"; and Int'l Comm. of the Red Cross, *US Detention Related to the Events of 11 September 2001 and Its Aftermath—the Role of the ICRC*, (Sept. 5, 2006), <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/85C5BCF85E7A57A4C12570D5002E6889>, stating that, "There are currently two broad strands of legal thinking: according to one, detainees in the 'global war on terror' are all criminal suspects and should be treated as such. According to the other, they are all prisoners of war and should be treated as such."

<sup>26</sup> Some scholars have argued that the existing legal regimes are insufficient in the fight against terrorism and that the international community must therefore develop new rules to govern that fight. See, e.g., Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 GEO. J. INT'L L. 669, 677-78 (2005); Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 314 (2005). But see Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499, 499 (2005) ("[W]e should be skeptical of the view that the complementary frameworks of criminal law, human rights law, the web of multilateral and bilateral arrangements for interstate cooperation in police work and judicial assistance, and the law of armed conflict fail to provide tools necessary to combat terrorism."). These scholars, however, have

battlefield detentions, international law offers three—not two—broad models for detention: the armed-conflict model, and under human rights law, the criminal and administrative models. Neither the armed-conflict model nor the criminal model is particularly well-suited for such detentions, so administrative detention is a potentially appealing alternative. Its appeal, however, depends largely on how it is implemented—a question to which this Article turns in Part III.

A. *Armed Conflict?*

International law provides no clear guidance on when, in the absence of sustained interstate hostilities, an “armed conflict” exists so as to trigger the application of the law of armed conflict.<sup>27</sup> Under international law, the existence of an armed conflict turns on a qualitative assessment of: (1) the participants’ own understandings and intentions; (2) their level of organization; and (3) the intensity and duration of the violence.<sup>28</sup> This test is indeterminate in the fight against terrorism.

That fight certainly has some attributes of an armed conflict. Participants have been engaged in “hot” zones of combat for over six years, and at least two participants—al Qaeda and the United States—understand themselves to be at war with each other.<sup>29</sup> In addition, terrorist attacks have the

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not addressed the particular context of non-battlefield detentions and have not attempted to specify the rules that should govern in this area.

<sup>27</sup> See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT*, 31-34 (2002).

<sup>28</sup> See, e.g., *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) (asserting that an “armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups”); MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 628 n.9 (1982) (quoting ICRC understandings that armed conflicts do not include riots “not directed by a leader and hav[ing] no concerted intent,” but do include “military operations carried out by armed forces or organized armed groups”); THEODOR MERON, *HUMAN RIGHTS IN INTERNATIONAL STRIFE: THEIR INTERNATIONAL PROTECTION* 76 (1987) (explaining that armed conflicts are distinguished from mere internal tensions and disturbances based on the level of organization of the actors, their intent, and the duration and intensity of the conflict).

<sup>29</sup> See, e.g., *Bin Laden Still Alive, Aide Says*, WASH. POST, Dec. 7, 2005, at A20 (reporting on an al Qaeda statement that it is still engaged in a war against the West); Selig S. Harrison, *A New Hub for Terrorism? In Bangladesh, an Islamic Movement with Al-Qaeda Ties Is on the Rise*, WASH. POST, Aug. 2, 2006, at A15 (referring to Osama Bin Laden’s first declaration of war against the United States, made on February 23, 1998); Press Release, U.S. Dep’t of Def., *DOD Responds to ABA Enemy Combatant Report* (Oct. 2, 2002), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=3492> (asserting that “the United States is currently in a state of war with al Qaeda”); cf. STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 388 (2005) (quoting a high-level British official as asserting that Britain is “at war with terrorism”).

potential for extraordinary violence, especially if they involve the use of chemical, nuclear, or biological weapons.<sup>30</sup> These attacks thus may challenge national sovereignty and inflict human casualties in ways that are paradigmatic of wartime battles.<sup>31</sup>

Yet the fight against terrorism also has attributes that indicate that it is *not* an armed conflict. For instance, although terrorist attacks have the potential for extreme violence, the violence to date has been somewhat episodic. In the ten-year period since al Qaeda first declared war, it and its affiliates have committed only a handful of attacks against the United States outside recognizable theaters of combat. The attacks against U.S. allies have been similarly intermittent. Moreover, even though these groups have some organizational structure—in that their leaderships are identifiable and provide operational, financial, or ideological support for adherents—their levels of organization do not compare to that of a state's armed forces or an armed insurgency. Group “members” are geographically dispersed; they act in independent and compartmentalized units, rather than as a coordinated whole; their immediate agendas vary; and many have only loose (or no) connections to an organizational base.<sup>32</sup> The “parties” to the conflict thus cannot be identified except in broad and abstract terms.<sup>33</sup>

Unfortunately, this indeterminacy on whether the global fight against terrorism constitutes an armed conflict cannot be resolved by reference to the current law of armed conflict. The 1949 Geneva Conventions and their Additional Protocols identify essentially two categories of armed

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<sup>30</sup> Cf. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE & NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE U.S. HOMELAND 6 (2007) (“We assess that al-Qa’ida will continue to try to acquire and employ chemical, biological, radiological, or nuclear material in attacks and would not hesitate to use them if it develops what it deems is sufficient capability.”).

<sup>31</sup> See Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L. J. 1029, 1037 (2004).

<sup>32</sup> See, e.g., *Combating Al Qaeda and the Militant Jihadist Threat: Hearing Before the Terrorism, Unconventional Threats and Capabilities Subcomm. of the H. Armed Servs. Comm.*, 109th Cong. 3 (2006) (statement of Dr. Bruce Hoffman, Chair in Counterterrorism and Counterinsurgency, RAND) (describing al Qaeda as having a core leadership but as being a “loosely organized and connected movement that mixes and matches organizational and operational styles”); Wyn Rees, *European and Asian Responses to the US-Led “War on Terror,”* 20 CAMBRIDGE REV. INT'L AFF. 215, 216 (2007) (describing the loosely networked nature of jihadi terrorist groups); Roula Khalaf & Stephen Fidler, *From Frontline Attack to Terror by Franchise*, FIN. TIMES (U.K.), July 5, 2007, at 8 (“[A]n al-Qaeda core . . . provid[es] logistic support and training to some; and offer[s] nothing more than inspiration to others.”).

<sup>33</sup> See Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55, 60 (2003) (“The concept of a ‘party’ suggests a minimum level of organization required to enable the entity to carry out the obligations of law. There can be no assessment of rights and responsibilities under humanitarian law in a war without identifiable parties.”).

conflict.<sup>34</sup> The first category—international armed conflicts—includes conflicts between states, and under Additional Protocol I, conflicts “in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination . . . in accordance with the Charter of the United Nations.”<sup>35</sup> The fight against terrorism is neither. It is not predominantly between states and is not a fight for self-determination within the terms of Additional Protocol I.<sup>36</sup>

The second category—conflicts “not of an international character”—is undefined and arguably could be interpreted to cover the fight against terrorism.<sup>37</sup> But doing so requires a significant conceptual leap (characterizing as “non-international” a conflict that is fought across the globe) and results in the application of a legal regime that was developed with an entirely different kind of conflict in mind.<sup>38</sup> The regime applicable to non-

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<sup>34</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 603 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 610 [hereinafter Additional Protocol II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] [Geneva Conventions I-IV hereinafter referred to collectively as Geneva Conventions].

<sup>35</sup> Additional Protocol I, *supra* note 34, art. 1, ¶ 4; *see also* Geneva Conventions, *supra* note 34, art. 2.

<sup>36</sup> *See* Murphy, *supra* note 25, at 1118. Even if the fight against terrorism could be characterized as a fight for self-determination under Additional Protocol I, al Qaeda and its affiliates have not made the requisite unilateral declaration seeking status and assuming rights and obligations under Article 96 of that Protocol. *Id.* It thus would not apply by its terms.

<sup>37</sup> Geneva Conventions, *supra* note 34, art. 3. For arguments that the fight against terrorism is a non-international armed conflict, *see*, for example, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006); Anthony Dworkin, *Military Necessity and Due Process: The Place of Human Rights in the War on Terror*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 53 (David Wippman & Matthew Evangelista eds., 2005); and Derek Jinks, *September 11 and the Laws of War*, 28 *YALE J. INT'L L.* 1 (2003).

<sup>38</sup> The regime applicable in non-international armed conflicts is set forth in Article 3 (common to all four Geneva Conventions) and expanded on in Additional Protocol II. Geneva Conventions, *supra* note 34, art. 3; Additional Protocol II, *supra* note 34. Although the drafters of Common Article 3 had an internal armed conflict in mind, the text of that Article permits an interpretation that applies to conflicts between states, on the one hand, and armed sub-state actors not falling within the terms of Additional Protocol I, on the other hand. This appears to be the approach adopted by the U.S. Supreme Court in *Hamdan*, 126 S. Ct. at 2795.

international armed conflicts was developed to temper the extraordinary brutality of intrastate conflicts, which, at the time, were not amenable to extensive international regulation.<sup>39</sup> These conflicts were relentlessly violent and geographically concentrated, not episodically violent and geographically diffuse like the fight against terrorism.

In short, the armed-conflict classification is an inadequate trigger for identifying whether the law of armed conflict does or should apply in the fight against terrorism. That fight has only some of the attributes of an armed conflict. And even if it might reasonably be classified as a non-international armed conflict, that classification does not by itself justify the application of a legal regime designed to govern completely different kinds of conflicts. That classification also fails to resolve the question of what the law requires. As this Article explains in the next Section, there is some ambiguity on whether, and if so how, the law of armed conflict and human rights law apply concurrently during non-international armed conflicts.<sup>40</sup> The better approach, therefore, is not to ask whether the fight against terrorism constitutes an armed conflict and then to mechanically apply or reject the law of armed conflict based on that classification, but to ask whether, among the available legal regimes, the law of armed conflict best balances the international community's interests in the context of particular counterterrorism measures. In the context of non-battlefield detentions, the balance is between preventing terrorist attacks on the one hand, and respecting the liberty interests of potential detainees on the other hand.

### *B. Detention Under the Law of Armed Conflict*

There are obvious reasons why states would want to invoke the law of armed conflict to detain terrorism suspects. That law grants states expansive detention authority on the understanding that the associated liberty costs must be tolerated during wartime in the interests of state security. Detention in this context is not about punishment; it is about incapacitating

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<sup>39</sup> See, e.g., INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 27-34 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY: IV GENEVA CONVENTION] (describing the history of Common Article 3); *id.* at 36 (asserting that Common Article 3 conflicts "take place within the confines of a single country"); see also INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1319 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS] ("[A] non-international armed conflict is distinct from an international armed conflict because . . . the parties to the conflict are not sovereign states, but the government of a single state in conflict with one or more armed factions within its territory.").

<sup>40</sup> See *infra* notes 47-49 and accompanying text.

persons and thereby containing the security threat they pose.<sup>41</sup> This is conceptually consistent with the goals of detention in the fight against terrorism. States looking to detain non-battlefield terrorism suspects are primarily interested, not in punishing them (although states may believe that punishment is desirable), but in preventing them from committing future attacks, and if possible, obtaining from them actionable intelligence. Yet detaining such suspects under the law of armed conflict imposes substantially higher liberty costs than would be tolerated in a more conventional armed conflict.

The fight against terrorism is not, technically, an international armed conflict.<sup>42</sup> If it nevertheless is treated as one for purposes of applying a detention regime, the law would permit states to detain anyone reasonably suspected of posing a security threat until the circumstances justifying detention cease to exist, or until the end of hostilities.<sup>43</sup> This regime was designed for conflicts between states that would end after several years and in which combatants could be clearly identified.<sup>44</sup> The fight against terrorism is not so geographically or temporally contained. It takes place across the globe and likely will continue for decades without any clear indicia of victory or defeat. Applying the law of armed conflict in this context would mean that states could detain, potentially for life, persons captured anywhere in the world based only on the reasonable suspicion that they pose some sort of security threat.<sup>45</sup>

Moreover, such detention need not be accompanied by meaningful legal process, in that detainees need not be afforded the opportunity to contest before a judicial body the circumstances giving rise to detention.<sup>46</sup> In

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<sup>41</sup> In the parlance of the Geneva Conventions, the term “detention” has penal connotations. The Conventions use the term “internment” to refer to non-penal deprivations of liberty. *See, e.g.,* Horst Fischer, *Protection of Prisoners of War*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 321, 326 (Dieter Fleck ed., 1995).

<sup>42</sup> *See supra* notes 34-36 and accompanying text.

<sup>43</sup> *See* Geneva Convention III, *supra* note 34, arts. 21, 118 (permitting detention of combatants in an international armed conflict until the cessation of hostilities); Geneva Convention IV, *supra* note 34, art. 42 (same for protected civilians so long as “absolutely necessary”); COMMENTARY: IV GENEVA CONVENTION, *supra* note 39, at 257 (explaining that states have broad discretion to define the scope of activity that renders civilian detentions necessary).

<sup>44</sup> *See* Geneva Conventions, *supra* note 34, art. 2; Geneva Convention III, *supra* note 34, art. 4; W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* 41 (1992).

<sup>45</sup> Even under the most protective regime for armed-conflict detentions—the regime governing the detention of protected civilians in enemy territory—a state has broad discretion to detain where it has “good reason to think” the suspect poses a real security threat (for instance, that he is engaged in sabotage or is a member of an organization whose object is to cause disturbances). *See* COMMENTARY: IV GENEVA CONVENTION, *supra* note 39, at 258.

<sup>46</sup> *See* Geneva Convention III, *supra* note 34, arts. 21, 118 (presuming that combatants may be detained without legal process until the end of hostilities); Geneva Convention IV, *supra* note 34, art. 43 (permitting the detention of civilians with minimal legal process); INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE

conventional wars, the availability of such process is less critical because the risk of detaining innocents is less pronounced. The Geneva Conventions contemplate that the majority of detainees will be combatants who identify themselves as such and who therefore have no basis for contesting their detention. Terrorists, by contrast, operate by blending into the general population. This creates a substantial risk that any counterterrorism detention regime will capture a disproportionately high number of innocents. Unlike in international armed conflicts, then, there is a heightened need in the fight against terrorism for some mechanism to ensure that detention in each case is objectively necessary, or that the detainees are in fact dangerous.

If the fight against terrorism is instead treated as a non-international armed conflict, then the rules governing detention are more ambiguous. The law of armed conflict does not itself establish a scheme for detention in such conflicts. The applicable provisions of the Geneva Conventions—set forth at Common Article 3—assume that a state has broad discretion to detain,<sup>47</sup> but (unlike the provisions governing detention in international armed conflicts) they do not purport to occupy the field in this area. The rules for detention historically have been found in the state's domestic law,<sup>48</sup> as marginally constrained by the baseline protections of customary international law. The customary law of armed conflict recognizes that states have broad discretion to detain persons until “the circumstances justifying . . . detention . . . have ceased to exist.”<sup>49</sup> This rule is akin to the one applicable in international armed conflicts, and the problems with applying it to the fight against terrorism are the same: extended detention is permitted based only on the reasonable suspicion of a threat and without any judicial guarantees.

Yet the dominant modern position is that the authority to detain during non-international armed conflicts is further constrained by the concurrent application of human rights law.<sup>50</sup> If one accepts that position, and the

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TREATMENT OF PRISONERS OF WAR 546-47 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY: III GENEVA CONVENTION]; COMMENTARY: IV GENEVA CONVENTION, *supra* note 39, at 260-61 (describing that process as an independent but rudimentary second-stage review of whether detention is necessary for state security).

<sup>47</sup> Geneva Conventions, *supra* note 34, art. 3.

<sup>48</sup> See COMMENTARY: III GENEVA CONVENTION, *supra* note 46, at 39-40 (explaining that Common Article 3 requires that persons be treated humanely but does not restrict the measures that a state may take to contain a security threat).

<sup>49</sup> Additional Protocol I, *supra* note 34, art. 75. For evidence that Common Article 3 and Article 75 of Additional Protocol I reflect customary international law applicable in all armed conflicts, see I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 299-383 (2005); and Michael J. Matheson, *Continuity and Change in the Law of War: 1975 to 2005: Detainees and POWs*, 38 GEO. WASH. INT'L L. REV. 543, 547 (2006).

<sup>50</sup> Additional Protocol II, drafted in the 1970s to enhance the minimalist provisions of Common Article 3, clearly contemplates the continued application of human rights law during non-international armed conflicts. See Additional Protocol II, *supra* note 34, pmb1. (“Re-



state has not derogated from its human rights obligations on detention,<sup>51</sup> then the law permits both administrative detention and detention through the criminal process. This technically is detention under human rights law (not under the law of armed conflict) and is examined in Section II.C below. The point here is that, in non-international armed conflicts governed by human rights law, states have the discretion to detain persons who pose a security threat either through a system of administrative detention or through the criminal process.<sup>52</sup> States have that discretion, even though detainees in

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calling furthermore that international instruments relating to human rights offer a basic protection to the human person . . . ."); BOTHE, PARTSCH & SOLF, *supra* note 28, at 636 ("[P]rovisions of the [International Covenant on Civil and Political Rights] which have not been reproduced in the Protocol or which provide for a higher standard of protection than the Protocol should be regarded as applicable . . . ."). For other evidence that human rights law continues to apply during non-international armed conflicts, see, for example, BOTHE, PARTSCH & SOLF, *supra* note 28, at 619, stating that "it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international conflicts"; and COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 39, at 1340, which notes that "Human rights continue to apply concurrently in time of armed conflict." See also Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 226-27 (2004); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266-73 (2000). Note that many international lawyers also understand human rights law to apply during international armed conflicts. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 225, ¶ 25 (July 8). Yet the application of human rights law during an international armed conflict would not alter the governing detention regimes because the elaborate regimes of the Geneva Conventions would continue to govern as the *lex specialis*.

<sup>51</sup> Most human rights instruments permit states to derogate from certain human rights obligations, including the obligations relating to detention, during declared national emergencies. See Organization of American States, American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 4, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200 (Dec. 16, 1966), 999 U.N.T.S. 172 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. *But see* Organization of African Unity, African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5 [hereinafter African Charter] (containing no explicit provision for derogation). Although the texts of these instruments permit derogation from the obligations relating to detention, human rights bodies have asserted that no derogation is permitted from the obligation not to engage in arbitrary detention or from the obligation to subject detention to judicial review. See, e.g., Human Rights Comm., *General Comment 29: States of Emergency (Article 4)*, ¶¶ 11, 16 n.9, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter *General Comment 29*]. For a discussion on the law governing detention during national emergencies, see generally GROSS & NÍ ALOÁIN, *supra* note 23.

<sup>52</sup> See Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc A/HRC/C/17/Add. 3 (Oct. 25, 2007) (*prepared by* Martin Scheinin); 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, 377 (2005).

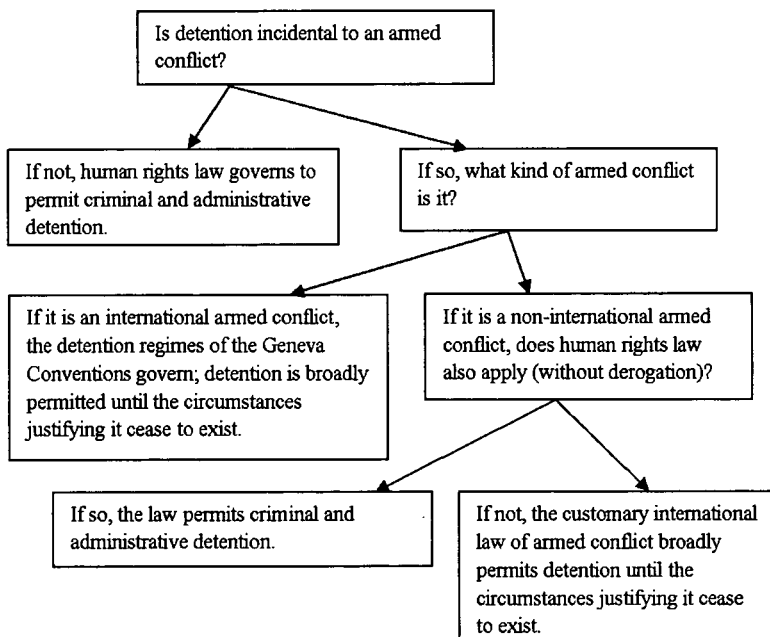
non-international armed conflicts generally are suspected criminals (not privileged combatants) alleged to have committed criminal acts.<sup>53</sup> Administrative detention remains an option because such detention may be best suited to prevent continued fighting, and because states engaged in such conflicts are not expected to devote their law enforcement and other security resources primarily to the process of criminal prosecution and conviction.<sup>54</sup>

### C. *Detention Under Human Rights Law*

The reflexive response to the problems with detaining non-battlefield terrorism suspects under the law of armed conflict has been to invoke the criminal law—i.e., to assert that the fight against terrorism is not an armed conflict, and that human rights law governs to permit detention exclusively through the criminal process.<sup>55</sup> There is no question that the criminal process is a relatively fair and transparent mechanism for detaining terrorism suspects, and that in many circumstances it may also be effective, in that it may permit states to detain for extended periods persons who have committed past criminal acts and who continue to threaten state security.

<sup>53</sup> See COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 39, at 1344.

<sup>54</sup> As described in the text, the decision process for identifying the governing detention regime is as follows:



<sup>55</sup> See *supra* notes 12, 24.

The question, however, is whether human rights law does or should require states that face a serious threat from transnational jihadi terrorism to detain non-battlefield suspects exclusively through the criminal process. This Section argues, contrary to the predominant assumption, that human rights law also permits states to detain at least some such suspects administratively, in order to protect the public from future attacks. Before examining the current law on administrative detention, however, this Section explores why states might legitimately seek an alternative to the criminal process for containing the threat that non-battlefield terrorism suspects may pose.

### 1. Criminal Detention

The criminal process is not quite the right model for detention in the fight against terrorism: its focus is retrospective, rather than prospective; it is maladroit for transnational operation; and it often fails to accommodate the tools used and evidence available in terrorism cases. Because of these incompatibilities, states that face a real threat from transnational terrorism but detain exclusively through the criminal process will absorb certain costs. Most of these costs go to the state's security interests, because the criminal process will obstruct efforts to detain suspects until after they participate in an attack (if ever). Yet states that rely exclusively on the criminal process also may undermine certain liberty interests. These states will face tremendous pressure to adjust their criminal laws to make them more effective in terrorism cases. They therefore risk contaminating the law as it applies to more ordinary offenses. Moreover, reliance on the criminal process may enable these states to detain suspects for rather lengthy periods before trial and thus without any determination that detention is necessary.<sup>56</sup> This Section elaborates on the incompatibilities between the criminal process and non-battlefield detention in order to explain why states might reasonably seek alternative options for detention in the fight against terrorism.

First, the criminal process is conceptually incongruous with the preventative goals of non-battlefield detention, because it is retrospective in focus. Condemnation and punishment are appropriate only after the suspect has committed a proscribed act. By contrast, detentions in the fight against terrorism are predominantly prospective, focused not on punishing for a prior act, but on preventing future ones. To be sure, most criminal justice systems have mechanisms for moderating that retrospective focus and using the law proactively. For instance, states may proscribe preparatory and supporting acts or may rely more heavily on inchoate offenses, like attempts

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<sup>56</sup> See generally Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1 (2006) (demonstrating that pretrial detention is permitted in the United States without any evidentiary showing that the detainee committed a wrongful act).

and conspiracy.<sup>57</sup> Ordinarily, however, the retrospective nature of the criminal law continues to express itself through graded punishment schemes and limiting legal doctrines that constrain the scope of application of the criminal proscription—for example, by requiring that a person charged with attempt be “dangerously close” to committing the crime, or that a person act with purpose for a conviction of criminal conspiracy. These safeguards are integral to the overall balance of a criminal justice system. Western democracies generally are willing to accept a certain level of criminal activity in exchange for the assurance that individuals will not be criminally convicted based on premature or indeterminate evidence.

Yet those same safeguards weaken the proactive force of the criminal law in the fight against terrorism, where the costs of accepting that level of criminal activity may be substantially higher. States that rely exclusively on the criminal process to detain non-battlefield suspects thus face an unenviable choice: They may maintain the ordinary safeguards of the criminal process and accept that some terrorism suspects identified by law enforcement or intelligence officials will not be detained until after they participate in an attack. Or they may adjust the criminal process in ways that undermine its safeguards but enable them to more effectively capture suspects who have not yet but still might commit an attack.<sup>58</sup> States will face significant pressure to choose the latter option, but doing so carries the potential cost of contaminating the criminal process. Doctrines or interpretations developed in the terrorism context—and with transnational jihadi terrorists in mind—may migrate outside that context to affect other areas of the criminal law.<sup>59</sup>

Second, the criminal process is ill-equipped for the transnational nature of the fight against terrorism.<sup>60</sup> The criminal process depends for its

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<sup>57</sup> Many states have strengthened their criminal laws in these ways. See GROSS & AOLÁIN, *supra* note 23, at 402-04; Kent Roach, *The Criminal Law and Terrorism*, in GLOBAL ANTI-TERRORISM LAW & POLICY 129, 131-36 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005).

<sup>58</sup> For a further discussion on the adjustments made to U.S. criminal law to facilitate terrorism prosecutions, see Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. (forthcoming 2008) (manuscript at 23-32), available at <http://ssrn.com/abstract=1055501>. “[P]rosecutors have responded to the prevention mandate with creative interpretations of existing statutes to establish criminal liability . . .” *Id.* at 23.

<sup>59</sup> See generally GROSS & AOLÁIN, *supra* note 23, at 238-42 (demonstrating that generally applicable legal rules may mutate in response to emergency related precedents and concerns); Roach, *supra* note 57, at 139 (“One danger is that extraordinary powers may be introduced and justified in the anti-terrorism context but then spread to other parts of the criminal law.”).

<sup>60</sup> Cf. Dominic D. McAlea, *Post Westphalian Crime*, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 111, 119-20 (David Wippman & Matthew Evangelista eds., 2005) (discussing the transnational nature of terrorism).

success on effective and available law enforcement, but terrorists often take harbor in states that lack the capability or political will to frustrate terrorism-related conduct in their territories. Some host states decline even to investigate known terrorists.<sup>61</sup> In these sorts of political environments, the prospects for cooperative law enforcement are slim. The host governments are unwilling to exercise their own law enforcement capabilities and are unlikely to agree to the open exercise of law enforcement powers by a foreign state. In other instances, a host state may be willing to prosecute a known terrorist but may be encumbered by ineffective tools of law enforcement. For instance, Abu Baker Bashir is widely believed to have participated in at least three major terrorist attacks and two foiled plots in Southeast Asia since December 2000.<sup>62</sup> Yet Indonesia, which has twice tried Bashir, has been unable to sustain a conviction even for one terrorism-related offense.<sup>63</sup>

What if, then, instead of prosecuting Bashir itself, Indonesia offered to render him to the United States? This proposition is not entirely improbable. States that inadequately employ the tools of law enforcement may operate quite effectively through intelligence channels, because they may be willing to do surreptitiously that which, for domestic political or legal reasons, they are unwilling or unable to do publicly. Indonesia itself has rendered at least two terrorism suspects to the United States, and the CIA reportedly sought to obtain custody of Bashir.<sup>64</sup> U.S. officials, however, would have a difficult time prosecuting Bashir in U.S. courts. The hurdles to collecting and amassing evidence in a foreign state are substantial and sometimes insurmountable. This is especially the case where the foreign state obstructs (for domestic political or state sovereignty reasons) any joint or unilateral law enforcement operation in its territory,<sup>65</sup> or where the investi-

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<sup>61</sup> See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 115, 121-26 (2004) (describing the failure of Afghanistan and Pakistan to pursue Osama bin Laden); David Blair, *Al-Qaeda Regroups in the Border Lands and Prepares for a New Wave of Terror*, DAILY TELEGRAPH (U.K.), May 31, 2007, at 20 (reporting that Pakistan declined to conduct any police or military operations in its Waziristan region despite the common understanding that al Qaeda's leadership had reconstituted itself there).

<sup>62</sup> See Paddock, *supra* note 3.

<sup>63</sup> See Shawn Donnan & Taufan Hidayat, *Jailed Indonesian to Be Freed*, FIN. TIMES (U.K.), Mar. 10, 2004, at 11 (reporting that, in the first trial, Bashir was convicted only of a minor immigration offense); Stephen Fitzpatrick & Natalie O'Brien, *Hambali Could Have Kept JI Leader in Jail*, WEEKEND AUSTRALIAN, Dec. 23, 2006, at 8 (reporting that, in the second trial, Bashir was convicted of a terrorism-related offense but that that conviction was overturned).

<sup>64</sup> See Richard C. Paddock, *Bashir Guilty in Bali Blasts*, L.A. TIMES, Mar. 3, 2005, at A6 (reporting that the United States sought to detain Bashir in the CIA program); Farah Stockman, *Cleric's Trial Tests US Antiterror Fight*, BOSTON GLOBE, Mar. 2, 2005, at A1.

<sup>65</sup> Cf. Jim Hoagland, *Accountability and the Cole Attack*, WASH. POST, Jan. 14, 2001, at B7 ("FBI investigators [into the U.S.S. Cole bombing] have been hamstrung by Yemenis.");

gation concerns preparatory or supporting acts, in anticipation of a not-yet-completed attack. Terrorism suspects who reside in states without effective tools of law enforcement thus will be largely beyond the reach of the criminal law, at least until after they commit an attack.

Finally, the criminal process may require the application of domestic laws or procedures that, although perhaps appropriate for more ordinary criminals, fail to accommodate the sorts of tools used and evidence available in terrorism cases. Terrorism cases rely heavily on intelligence information that states are averse to sharing in public fora, including judicial proceedings, for fear of exposing sources or methods.<sup>66</sup> In the criminal cases against Bashir, Indonesian prosecutors sought to use intelligence information or sources from the United States and Australia—two countries with a particularly strong interest in Bashir being detained—but, in both cases, those countries declined to share the evidence.<sup>67</sup> The United States also refused to share such evidence with German officials prosecuting an accomplice to the September 11 attacks. In the German case, the conviction of the 9/11 accomplice was overturned on the ground that, although the government had made its case, the defendant could not adequately develop his defense without an intelligence source that the United States refused to share.<sup>68</sup>

Further, even where a state does share such information, it may be inadmissible in court or may fail to satisfy the heightened burdens of proof of a criminal trial. Intelligence operations are designed to obtain information as quickly and surreptitiously as possible; they are not, like law enforcement operations, designed to meticulously accumulate evidence in ways that can withstand challenges to admissibility in court.<sup>69</sup> In the United States, intelligence evidence may be inadmissible if it is hearsay or was obtained without a warrant. In the Netherlands, prosecutors have lost at least two major

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David A. Vise & Vernon Loeb, *U.S. Team May Face Difficulties in Probe*, WASH. POST, Oct. 14, 2000, at A18 (describing the bulky U.S. criminal investigation in Yemen and the practical difficulties of investigating there).

<sup>66</sup> See Christoph J.M. Safferling, *Terror and Law: German Responses to 9/11*, 4 J. INT'L CRIM. JUST. 1152, 1162 (2006).

<sup>67</sup> See *id.*; Raymond Bonner, *Indonesia Brings New Case Against Cleric Tied to Terror*, N.Y. TIMES, Oct. 29, 2004, at A7; Raymond Bonner, *Indonesians Answer Critics of Trial Verdict*, N.Y. TIMES, Sept. 7, 2003, at A17.

<sup>68</sup> Craig Whitlock, *Terror Suspects Beating Charges Filed in Europe*, WASH. POST, May 31, 2004, at A1. The defendant in that case, a Moroccan man named Mounir el-Motassadeq, was retried and convicted in January 2007 for being an accessory in the murders of the airplane passengers who died in the attacks, but not in the other murders of the day. See Mark Landler, *9/11 Associate Is Sentenced in Germany to 15 Years*, N.Y. TIMES, Jan. 9, 2007, at A10.

<sup>69</sup> See Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 327-40 (2003).

terrorism cases after judges ruled that evidence obtained by intelligence agencies was inadmissible.<sup>70</sup> And in Bashir's case, video-link evidence from Singapore could not be used because it did not comply with rules designed to prevent tampering with witnesses.<sup>71</sup>

The criminal process thus is conceptually and sometimes operationally inapt to detain non-battlefield terrorism suspects before they strike. Some states may choose to live with these problems. After all, states that readily discard the safeguards of the criminal process risk detaining arbitrarily or without sufficient controls. Yet states that detain non-battlefield suspects exclusively through this process risk contaminating their criminal justice systems and hamstringing themselves against preventing future attacks.

## 2. Administrative Detention

Other states may decide that, for certain non-battlefield terrorism suspects, the criminal process strikes the wrong balance between liberty and security. These states already have an alternative option for detention under international human rights law. Human rights law permits states to detain persons who pose a serious security threat—just as it permits states to detain persons who are awaiting deportation or who endanger public safety due to mental illness—not only through the criminal process, but also through calibrated systems of administrative detention.<sup>72</sup> The option of administrative

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<sup>70</sup> See Whitlock, *supra* note 68.

<sup>71</sup> See Tim Lindsey & Jeremy Kingsley, Letter, *Voice with a Different Message*, HERALD SUN (Austl.), Dec. 25, 2006, at 17, available at 2006 WLNR 22459924.

<sup>72</sup> Human rights actors regularly acknowledge that security-based administrative detention may be lawful. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Report on the Practice of Administrative Detention*, ¶ 17, U.N. Doc. E/CN.4/Sub.2/1990/29 (July 24, 1990) (*prepared by Louis Joinet*) [hereinafter *Joinet Report*] (“[A]dministrative detention is not banned on principle under international rules . . . .”); Human Rights Comm’n, *Report of the Working Group on Arbitrary Detention*, ¶¶ 84-85, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) (acknowledging that administrative detention may be appropriate in the counterterrorism context); Human Rights Comm., *General Comment 8, Right to Liberty and Security of Persons (Article 9)* (June 30, 1982), reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 8, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) [hereinafter *General Comment 8*] (acknowledging that administrative detention is sometimes lawful); Human Rights Comm., *Communication No. 66/1980: Uruguay*, ¶ 18.1, U.N. Doc. CCPR/C/17/D/66/1980 (Oct. 12, 1982) [hereinafter Human Rights Comm., *Schweizer v. Uruguay*] (“[A]dministrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner . . . .”); Helena Cook, *Preventive Detention—International Standards and the Protection of the Individual*, in PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 1, 1 (Stanislaw Frankowski & Dinah Shelton eds., 1992) (“In some circumstances preventive detention may be a legitimate means of social protection and control.”); Int’l Comm. of the Red Cross, *supra* note 25 (asserting that states may detain persons outside the armed-conflict and criminal models “for imperative reasons of security”).

detention, however, has been overlooked in the international legal debate on non-battlefield detentions.

Human rights law establishes both procedural and substantive constraints on administrative detention to protect against abuse. The procedural constraints are designed as safeguards against mistaken, unlawful, or arbitrary detentions. Any detention must be grounded in law,<sup>73</sup> meaning that states must prescribe in advance the permissible bases for detention and then follow their own laws.<sup>74</sup> Moreover, states must inform a detainee immediately of the reasons for his detention,<sup>75</sup> and must afford him the opportunity for prompt judicial review.<sup>76</sup> These constraints are intended to induce institutional checks and balances and perform critical backstopping functions. The decision to detain may not be made by one person or institution, but must instead be based on the prior reflection and deliberation of the legislature (or, in a common law system, the courts) and subject to the oversight of an independent and impartial judiciary. The procedural constraints, therefore, are critical to preventing abuse. Yet, because they ultimately may be satisfied by reference to a state's own laws, they are not always suffi-

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Although human rights actors regularly acknowledge that security-based administrative detention may be lawful, they have repeatedly failed to establish meaningful parameters for it, except to assert that it should be used only in exceptional cases. *See, e.g.*, Joint Report, *supra* at 4 (“[G]overnments might at the very least might be expected to use [administrative detentions] only in truly exceptional cases . . . .”); Human Rights Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*, ¶ 21, U.N. Doc. CCPR/C/79/Add.44 (Nov. 23, 1994) (recommending to Morocco “that measures of administrative detention and incommunicado detention be restricted to very limited and exceptional cases”); INT’L COMM’N OF JURISTS, ICJ MEMORANDUM ON INT’L LEGAL FRAMEWORK ON ADMINISTRATIVE DETENTION AND COUNTER-TERRORISM, at 11-12, 18 (Dec. 2005) [hereinafter ICJ MEMO].

<sup>73</sup> *See* African Charter, *supra* note 51, art. 6 (prohibiting detentions that are not prescribed by law); American Convention, *supra* note 51, art. 7(2)-(3) (same); ICCPR, *supra* note 51, art. 9(1) (same); ECHR, *supra* note 51, art. 5 (same).

<sup>74</sup> *See* Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 114, 130-31 (Louis Henkin ed., 1981).

<sup>75</sup> *See* African Charter, *supra* note 51, art. 7(2); ICCPR, *supra* note 51, art. 9(2); ECHR, *supra* note 51, art. 5(2); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 cmt. h (1986) (asserting that, under customary law, a detention will be arbitrary if “not accompanied by a notice of charges”); *see also* *General Comment 8*, *supra* note 72, at 8-9 (asserting that Article 9(2) of the ICCPR requires states to inform administrative detainees, and not just criminal detainees, of the reasons for detention).

<sup>76</sup> *See* African Charter, *supra* note 51, art. 7(1)(a); American Convention, *supra* note 51, art. 7(5); ICCPR, *supra* note 51, art. 9(4); ECHR, *supra* note 51, art. 5(4). Some international actors have suggested that human rights law also requires that any detainee be provided with access to legal counsel. *See, e.g.*, Human Rights Comm., *Concluding Observations: Israel*, ¶ 13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) [hereinafter Human Rights Comm., *Concluding Observations: Israel 2003*]; Louise Arbour, *In Our Name and on Our Behalf*, 55 INT’L & COMP. L.Q. 511, 519 (2006).



cient. For example, an overzealous state may satisfy the procedural constraints on detention by passing legislation permitting the detention of political dissidents and then affording suspected dissidents judicial review on the determination that they are dissidents. If the state's substantive law permits such detention, then judicial review and the other procedural safeguards will not protect against it.

Human rights law addresses that concern by imposing separate, substantive constraints designed to restrict the circumstances under which detention is lawful. These substantive constraints vary based on the source of law. Customary and most conventional law prohibits "arbitrary" detention without specifying the circumstances that render a detention arbitrary.<sup>77</sup> The test of arbitrariness that has developed in international law is fact-specific: whether a particular detention is reasonably necessary to satisfy a legitimate government interest.<sup>78</sup> In the example of the overzealous state, the government interest—silencing or reeducating political dissidents—would almost certainly be considered illegitimate, and the detention unlawful for arbitrariness.

The European Convention on Human Rights (ECHR) takes a slightly different approach from the other human rights instruments. Instead of specifically prohibiting arbitrary detentions,<sup>79</sup> it delineates an exhaustive list of the circumstances in which detention is permitted. The ECHR specifically permits detention, inter alia, for noncompliance with a lawful court order, for immigration control, of persons "of unsound mind," to bring a person before a competent legal authority on reasonable suspicion that he

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<sup>77</sup> See African Charter, *supra* note 51, art. 6 (prohibiting detentions that are arbitrary); American Convention, *supra* note 51, art. 7(2)-(3) (same); ICCPR, *supra* note 51, art. 9(1) (same); Universal Declaration of Human Rights, G.A. Res. 217A, art. 9, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (reflecting the customary international rule that "[n]o one shall be subjected to arbitrary . . . detention"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702(e) (1990) ("A State violates [customary] international law if, as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention.").

<sup>78</sup> See, e.g., Human Rights Comm., *Communication No. 1324/2004: Australia*, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) [hereinafter Human Rights Comm., *Shafiq v. Australia*] (detention could be arbitrary if "not necessary in all the circumstances of the case and proportionate to the ends sought"); Human Rights Comm., *Communication No. 560/1993: Australia*, ¶ 7.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) [hereinafter Human Rights Comm., *A. v. Australia*] (same if "not necessary in all the circumstances of the case"); Human Rights Comm., *Communication No. 305/1988: Netherlands*, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (same if not "reasonable in all the circumstances"); see also Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 507 (2003).

<sup>79</sup> The European Court of Human Rights has interpreted the ECHR to contain an implicit requirement of non-arbitrariness, see *Winterwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A) at 17-18 (1979), but that requirement may be satisfied procedurally, see *infra* notes 88-90 and accompanying text.

has committed a criminal offense, or when reasonably necessary, to prevent him from committing such an offense.<sup>80</sup> States parties to the ECHR must fit any administrative detention within one of these categories for which detention has been deemed justifiable.

The human rights instruments thus outline a structure for administrative detention that, when used for reasons of national security, falls somewhere between armed-conflict detention and criminal detention. Like detention under the law of armed conflict, administrative detention is preventative. Its focus is on incapacitating persons who pose a future security threat, not on punishing them for past harms. Moreover, because administrative detention is outside the criminal process, it need not be subject to country-specific rules of criminal law or procedure that, although perhaps appropriate for more ordinary criminals, may strike the wrong balance between liberty and security in the context of particular terrorism suspects. Yet, as with criminal detention, administrative detention must be objectively necessary or justified and must be subject to meaningful judicial review. Given the inadequacies of the armed-conflict and criminal models, and given the nature of the fight against terrorism—in that it has some but not other attributes of an armed conflict—administrative detention presents a potentially appealing legal framework for detaining non-battlefield terrorism suspects. Its appeal, however, depends largely on how it is implemented.

### III. EXAMINING ADMINISTRATIVE DETENTION

Where administrative detention is used for reasons of national security, it tends to be implemented in one of three ways: (1) detention prior to filing criminal charges; (2) detention pending deportation; and (3) “pure” security-based detention premised only on the interest in containing the security threat. At first blush, it might appear to be relatively uncomplicated to assess, on a case-by-case basis, the legality of such detentions by reference to the procedural and substantive constraints described above. In practice, however, the substantive constraints that international law imposes on detention have proven insufficient in the security context. Thus, although the law permits security-based administrative detention, it currently is inadequate to govern non-battlefield detentions in the fight against terrorism.

This Part demonstrates the insufficiency of the existing substantive constraints on administrative detention by reviewing the jurisprudence of two prominent human rights bodies: the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR) and the European Court of Human Rights under the ECHR.<sup>81</sup> The Human Rights Committee reviews administrative detentions under a standard of non-

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<sup>80</sup> See ECHR, *supra* note 51, art. 5(1).

<sup>81</sup> See also sources cited *supra* note 72.

arbitrariness, which it has interpreted to mean that detention must be reasonably necessary to satisfy a legitimate government interest.<sup>82</sup> That test is meaningless in the security context. All governments have a legitimate interest in protecting against serious threats to national security, and the determination that a threat renders detention necessary is not easily reviewed.<sup>83</sup> Such determinations are based on classified evidence and risk assessments that may not be available to review bodies and on which they have no expertise. The committee deals with that problem simply by neglecting the standard of non-arbitrariness and emphasizing instead the ICCPR's procedural constraints on detention. As a result, the standard of non-arbitrariness remains underdeveloped. There is, in other words, almost no guidance on when security-based administrative detention may be lawful under the ICCPR, and when it is unlawful for arbitrariness.

The problem under the ECHR is slightly different. The substantive constraint under the ECHR is the requirement that any detention fall within one of the categories for which it is specifically permitted. Under the court's jurisprudence, the ECHR permits security-based detention predicated on other proceedings (for example, criminal trial or deportation) irrespective of any showing of actual necessity, but it prohibits pure security-based detention, even if objectively necessary to contain a serious security threat. This framework creates an incentive for states to detain under the false pretense of future criminal or immigration proceedings, even where such proceedings are not forthcoming. Indeed, Part IV demonstrates that a number of states have done just that.

#### A. *Detention Predicated on Criminal or Immigration Proceedings*

The European Court of Human Rights and the Human Rights Committee both review leniently detentions predicated on future criminal or immigration proceedings. In the case of future criminal proceedings, the ECHR specifically permits detention "on reasonable suspicion [that a person has] committed an offense."<sup>84</sup> The European Court of Human Rights has explained that a state may detain persons under that provision where the state intends to pursue criminal charges, even if it never does.<sup>85</sup> Thus, in *Brogan v. United Kingdom*, the court found that the United Kingdom did not violate the ECHR's substantive constraint when it detained terrorism suspects for as long as seven days without filing any criminal charges

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<sup>82</sup> See *supra* note 78 and accompanying text.

<sup>83</sup> Cf. GROSS & ALOAIN, *supra* note 23, at 264-67 (describing the difficulty international bodies have in reviewing official justifications for resorting to emergency measures).

<sup>84</sup> ECHR, *supra* note 51, § I, art. 5(1)(c).

<sup>85</sup> *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) at 16, 29 (1988).

against them.<sup>86</sup> With respect to future immigration proceedings, the ECHR permits detention “with a view to deportation.”<sup>87</sup> In *Chahal v. United Kingdom*, the court explained that a state may detain under that provision so long as deportation proceedings are diligently pursued and the decision to detain is not arbitrary.<sup>88</sup> Notably, however, the court did not adopt the traditional international test of non-arbitrariness that requires a showing of reasonable necessity.<sup>89</sup> Instead, it understood that standard in purely procedural terms. Even though the detainee in *Chahal* contested the determination that he posed a security threat, the court declined to review that determination on the ground that the domestic processes for making it were sufficiently elaborate to protect against arbitrariness.<sup>90</sup> The European Court of Human Rights thus has upheld security-based detentions predicated on future criminal or immigration proceedings without making any independent determination that detention is necessary or justified.<sup>91</sup>

Under the ICCPR, the existence of future criminal or immigration proceedings does not necessarily satisfy the standard of non-arbitrariness because the committee interprets that standard to require that detention in each case be reasonably, or objectively, necessary to satisfy the government interest. Nevertheless, the committee declines to review necessity determinations in cases involving claims of national security. By default, then, the committee declines to find that security-based detentions predicated on

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<sup>86</sup> *Id.* at 16.

<sup>87</sup> ECHR, *supra* note 51, § I, art. 5(1)(f).

<sup>88</sup> App. No. 22414/93, 23 Eur. H.R. Rep. 413, 465-66 (1996).

<sup>89</sup> *Id.* at 464 (asserting that the ECHR “does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary . . . all that is required . . . is that ‘action is being taken with a view to deportation’”); *id.* at 466-67.

<sup>90</sup> *Id.* at 464; *see also* Saadi v. United Kingdom, App. No. 13229/03, 44 Eur. H.R. Rep. 1005, 1015-16 (2007) (rejecting the detainee’s claim of arbitrariness for lack of necessity in part because “domestic law provided a system of safeguards”). *But cf. id.* at 1015 (suggesting that the ECHR standard of non-arbitrariness may have a substantive element to it, to the extent it limits the permissible duration of detention).

<sup>91</sup> *See also, e.g.,* Conka v. Belgium, App. No. 51564/99, 34 Eur. H.R. Rep. 1298, 1299 (2002) (reiterating that detentions predicated on deportation proceedings need not be necessary); Assenov v. Bulgaria, App. No. 24760/94, 28 Eur. H.R. Rep. 652, 656-58 (1999) (focusing on the procedures for pretrial detention without making any independent assessment of necessity). Note that the European Court of Human Rights engages in a somewhat more probing review of pretrial detention than of pre-deportation detention. *See Chahal*, 23 Eur. H.R. Rep. at 464. Nevertheless, that review does not involve an independent determination of necessity or justification. Instead, it consists of an examination of whether domestic bodies have set forth “relevant” and “sufficient” grounds for detention. *See, e.g.,* Lind v. Russia, App. No. 25664/05, ¶ 71 (Dec. 6, 2007), *available at* <http://cmiskp.echr.coe.int/tkp197/sear.ch.asp?skin=hudoc-en> (search for term “Lind,” then follow the link “Case of Lind v. Russia”).

criminal or immigration proceedings are arbitrary. For instance, in *Banda-jevsky v. Belarus*, the committee reviewed a pre-charge detention that lasted twenty-three days.<sup>92</sup> Belarus asserted that the detention was necessary on the ground that the detainee was involved in particularly dangerous criminal conduct. Of course, Belarus had not yet tried the detainee, so it had not yet proven that he was, in fact, involved in conduct necessitating detention. The committee, however, declined to probe Belarus's necessity determination or to otherwise give texture to the standard of non-arbitrariness. It found, simply, that the detainee had failed to make a showing of arbitrariness.<sup>93</sup> The committee likewise avoided that standard in *Ahani v. Canada*, a case involving a nine-year detention pending deportation on national security grounds.<sup>94</sup> In that case, the committee asserted, without further discussion, that "detention on the basis of a security certification by two Ministers on national security grounds does not result *ipso facto* in arbitrary detention."<sup>95</sup> It then shifted its focus to the ICCPR's procedural constraints on detention.<sup>96</sup>

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<sup>92</sup> Human Rights Comm., *Communication No. 1100/2002: Belarus*, ¶ 10.2, U.N. Doc. CCPR/C/86/D/1100/2002 (Apr. 18, 2006). The author of this claim was not suspected of engaging in terrorist activity but was charged under a presidential decree relating to "the fight of terrorism and other particularly dangerous violent crimes." *Id.* According to Belarus, he was the leader of a particularly dangerous organized criminal group. *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Human Rights Comm., *Communication No. 1051/2002: Canada*, ¶ 4.13, U.N. Doc. CCPR/C/80/D/1051/2002 (June 15, 2004) (hereinafter Human Rights Comm., *Ahani v. Canada*).

<sup>95</sup> *Id.* ¶ 10.2.

<sup>96</sup> For a more thorough discussion of this decision, see Gerald Heckman, *International Decisions: Ahani v. Canada*, 99 AM. J. INT'L L. 699 (2006). Note that the Human Rights Committee engages in a significantly more probing review of immigration detention where the asserted justification for detention is related not to national security, but instead to general immigration policy. Even absent a national security claim, the committee recognizes that states may have a legitimate interest in detaining foreign nationals pending deportation. See, e.g., Human Rights Comm., *A. v. Australia*, *supra* note 78, ¶ 9.3 ("[T]here is no basis for the author's claim that it is *per se* arbitrary to detain individuals requesting asylum."); SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 312-19 (2d ed. 2005) (reviewing the committee's jurisprudence acknowledging that administrative detention for immigration control may in some instances be lawful). Yet the committee requires states to justify such detention in terms of individualized assessments of necessity and with periodic reviews. See, e.g., Human Rights Comm., *Shafiq v. Australia*, *supra* note 78, ¶ 7.2 (finding immigration detention arbitrary because it is based only on a general policy goal of not admitting un-cleared immigrants and not on an individualized assessment); Human Rights Comm., *Communication No. 1050/2002: Australia*, ¶ 7.2, U.N. Doc. CCPR/C/87/D/1050/2002, (Aug. 9, 2006) (same); Human Rights Comm., *A. v. Australia*, *supra* note 78, ¶ 9.3 (finding immigration detention arbitrary because there was insufficient justification for extended detention).

B. *Pure Security-Based Detention*

Detentions predicated on criminal or immigration proceedings purport to further two separate government interests: the interest in containing the security threat, and the interest in either trying and punishing or deporting the individual. The second government interest thus serves as a sort of substantive check on detention—explicitly under the ECHR and by default under the ICCPR. In cases involving pure security-based detention, however, no other government interest exists. The purpose of detention is only to contain the security threat. In these cases, the European Court of Human Rights and the Human Rights Committee have reached very different results.

The European Court of Human Rights has suggested that pure security-based detention is unlawful under the ECHR. The ECHR permits detention “for the purpose of bringing [a person] before the competent legal authority . . . when it is reasonably considered necessary to prevent his committing an offense.”<sup>97</sup> The court, however, has interpreted that provision to permit detention only if tied to criminal proceedings, and not if taken to incapacitate a person who otherwise poses a threat or has a general propensity for crime.<sup>98</sup> This jurisprudence reflects the peacetime premise of the ECHR,<sup>99</sup> and may not be entirely appropriate in the fight against terrorism. But unless the ECHR is amended or reinterpreted in the context of that fight, states parties to it must squeeze any security-based detention into one of the other ECHR categories.

By contrast, pure security-based detention is *permitted* under the ICCPR, so long as it is reasonably necessary to contain the security threat. The problem, again, is that the Human Rights Committee has provided almost no guidance on when security-based detention should be considered reasonably necessary. Even when reviewing the detentions by the United States at Guantánamo Bay—which it apparently did under the lens of administrative detention—the committee focused only on the ICCPR’s procedural constraints. It criticized the inadequacy of process at Guantánamo Bay and encouraged the United States to afford all Guantánamo detainees “proceedings before a court to decide, without delay, on the lawfulness of their

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<sup>97</sup> ECHR, *supra* note 51, art. 5(1)(c).

<sup>98</sup> See, e.g., *Lawless v. Ireland* (No. 3), 3 Eur. Ct. H.R. (ser. A), ¶¶ 13-15, 48 (1961); see also *Ciulla v. Italy*, 148 Eur. Ct. H.R. (ser. A) 1, ¶ 38 (1989); *Guzzardi v. Italy*, 3 Eur. Ct. H.R. (ser. A) 333, 367-68, ¶ 102 (1980). *But cf.* *Ericksen v. Norway* (No. 37), 1997-III Eur. Ct. H.R. 839, ¶¶ 85-86 (1997) (finding detention after conviction and sentence justified, in light of the detainee’s “impaired mental state and . . . foreseeable propensity for violence,” because the detention was “closely linked to the original criminal proceedings”).

<sup>99</sup> *Cf.* Gerald L. Neuman, Comment, *Counter-Terrorist Operations and the Rule of Law*, 15 EUR. J. INT’L L. 1019, 1021 (2004) (“The text of the European Convention suggests that it was not designed to regulate the conduct of war.”).

detention or order their release.”<sup>100</sup> But it did not suggest that the requisite process could be afforded only under the criminal law, and it did not address whether the Guantánamo detentions would be unlawful (as arbitrary) even if accompanied by adequate legal process.

The committee’s neglect of the standard of non-arbitrariness is endemic to its jurisprudence on pure security-based detention. Many states that engage in such detention deny their practices or detain in ways that blatantly violate the ICCPR’s procedural constraints. In these instances, the committee condemns only the procedural violation or otherwise ducks the question of arbitrariness.<sup>101</sup> The committee also ducks that question, however, when reviewing the practice of states that admit to administering such detention and that purport to do so in a manner consistent with their ICCPR obligations. For instance, India and Israel each ratified the ICCPR with statements designed to preserve the legality of pure security-based detention.<sup>102</sup> In its 1996 report under the ICCPR, India acknowledged that it employed such detention in response to a “sustained campaign of terrorism” in its territory.<sup>103</sup> India asserted that such detention was permitted if necessary to prevent a person from threatening public order or security, but India did not specify the circumstances in which that might be the case, and it did not

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<sup>100</sup> Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 18, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

<sup>101</sup> See, e.g., Human Rights Comm., *Communication No. 1297/2004: Algeria*, ¶ 8.5, U.N. Doc. CCPR/C/87/D/1297/2004 (Aug. 9, 2006) (finding the detention of a terrorist suspect unlawful “[i]n the absence of adequate explanations from the state party concerning the author’s allegations”); Human Rights Comm., *Communication No. 1044/2002: Tajikistan*, ¶ 8.4, U.N. Doc. CCPR/C/86/D/1044/2002 (Apr. 26, 2002) (finding the detention of a bombing suspect unlawful based on the state’s failure to refute the claim of unlawfulness); Human Rights Comm., *Schweizer v. Uruguay*, *supra* note 72, ¶ 18.1 (finding that it was not “in a position to pronounce itself on the general compatibility of the regime of ‘prompt security measures’ under Uruguayan law with the Covenant”).

<sup>102</sup> India ratified the ICCPR with a reservation clarifying that it would interpret the ICCPR provisions on detentions to permit pure security-based detention taken consistent with the Indian Constitution. See Human Rights Comm., *Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto*, at 25, U.N. Doc. CCPR/C/2/Rev.4 (Aug. 24, 1994) [hereinafter *ICCPR Reservations*]; see also Derek Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311, 351-54 (2001). Notably, other states did not object to this reservation, even though a few did object to India’s reservation on a different ICCPR provision. See *ICCPR Reservations*, *supra*, at 53-56 (objections of France, Germany, and the Netherlands). Israel ratified the ICCPR with a notification that it intended to exercise powers of arrest and detention as required by the exigencies of its situation. Israel hedged on whether the exercise of such powers would be inconsistent with the ICCPR so as to require derogation; it derogated from the detention provisions insofar as was necessary. *Id.* at 27-28.

<sup>103</sup> Human Rights Comm., *Third Periodic Reports of States Parties Due in 1992: India*, ¶ 50, U.N. Doc. CCPR/C/76/Add.6 (June 17, 2006).

attempt to demonstrate that it satisfied that standard.<sup>104</sup> The committee nevertheless was silent on the issue of arbitrariness. It expressed “regrets that the use of special powers of detention remains widespread” in India, and then accepted that India could continue to detain persons administratively for reasons of national security, so long as it satisfied the procedural constraints on detention.<sup>105</sup>

The committee has been slightly more assertive in its observations on Israel. With Israel, the committee has raised two concerns that appear to go to the standard of non-arbitrariness, although even here it has not expressed itself in those terms. First, the committee asserted in 1998 that it had “specific concern” that “at least some of the persons kept in administrative detention for reasons of State security . . . do not personally threaten State security but are kept as ‘bargaining chips’ in order to promote negotiations with other parties.”<sup>106</sup> This concern presumably goes to the requirement of non-arbitrariness, because Israel’s practice of detaining persons as bargaining chips is not prohibited by any of the procedural constraints on detention. The implication is that detention is arbitrary (at least in the committee’s view) if it is based, not on an individualized assessment of necessity, but on a broader state interest unrelated to the particular persons being detained.<sup>107</sup> Israel later seemed to accept that view. In its subsequent report to the committee, Israel acknowledged that international law prohibits (again, presumably as arbitrary) the detention of persons who do not themselves pose a security threat but who may be useful bargaining chips in future negotiations.<sup>108</sup>

Second, the committee has expressed concern with the duration of detention in Israel.<sup>109</sup> This concern highlights but does not resolve a tension inherent in pure security-based detention. In the immigration context, the committee acknowledges that even rather lengthy detentions may be non-arbitrary (recall that the detention in *Ahani* lasted nine years),<sup>110</sup> so long as

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<sup>104</sup> *Id.* ¶ 55.

<sup>105</sup> Human Rights Comm., *Concluding Observations: India*, ¶ 24, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997).

<sup>106</sup> Human Rights Comm., *Concluding Observations: Israel*, ¶ 21, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) [hereinafter Human Rights Comm., *Concluding Observations: Israel 1998*].

<sup>107</sup> *Cf. supra* text accompanying note 96 (discussing requirement for individualized assessment in cases involving immigration detention not based on national security concerns).

<sup>108</sup> See Human Rights Comm., *Second Periodic Report Addendum: Israel*, ¶¶ 125-28, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001).

<sup>109</sup> Human Rights Comm., *Concluding Observations: Israel 1998*, *supra* note 106, ¶ 21; Human Rights Comm., *Concluding Observations: Israel 2003*, *supra* note 76, ¶ 13.

<sup>110</sup> Human Rights Comm., *Ahani v. Canada*, *supra* note 94.



the detaining state periodically reassesses the necessity of detention.<sup>111</sup> Unlike detentions predicated on deportation, however, pure security-based detentions have no intrinsic mechanism for establishing an end-date to detention. Various actors have therefore suggested that such detention must in some way be temporally constrained—i.e., that an otherwise lawful detention may become arbitrary or unlawful if it is exceptionally lengthy or if there is a possibility that it could last indefinitely.<sup>112</sup> Nevertheless, there is no shared understanding as to the point at which a detention becomes arbitrary by virtue of its duration.

The committee's jurisprudence on security-based detention thus fails to give any texture to the standard of non-arbitrariness. The committee repeatedly avoids that standard to emphasize, instead, the procedural constraints on detention. At best, the committee has suggested that detention may be arbitrary and therefore unlawful, if it is not based on an individualized assessment of necessity or if it is unduly lengthy. Some states appear to accept those suggestions, but only in very narrow or unspecified terms.

#### IV. INTERNATIONAL PRACTICE: GROPING FOR ALTERNATIVES

At this point, one might reasonably argue that choosing a suitable detention model for non-battlefield terrorism suspects is essentially a judgment call. An international legal argument may be made for each of the models (except possibly for the pure security-based administrative model under the ECHR), and none is cost-free. The armed-conflict model is consistent with the preventative goals of non-battlefield detention, but its liberty

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<sup>111</sup> See Human Rights Comm., *A. v. Australia*, *supra* note 78, ¶ 9.4 (“[E]very decision to keep a person in detention should be open to review periodically so the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.”); see also Human Rights Comm., *Concluding Observations: Japan*, ¶ 19, U.N. Doc. CCPR/C/79/Add.102 (Nov. 19, 1998) (noting that persons were detained for up to two years pending immigration proceedings but expressing concern only about the conditions of detention).

<sup>112</sup> See Human Rights Comm'n, *Letter Dated 19 March 2002 from the Permanent Representative of Singapore*, at 3, U.N. Doc. E/CN.4/2002/157 (Mar. 25, 2002) [hereinafter Human Rights Comm'n Letter] (underscoring that the duration of pure security-based detention in Singapore is time-limited); Human Rights Comm., *Concluding Observations: Cameroon*, ¶ 19, U.N. Doc. CCPR/C/79/Add.116 (Nov. 3, 1999) (expressing concern that “a person held in administrative detention . . . may have his detention extended indefinitely”); ICJ MEMO, *supra* note 72, at 12; Drew R. Atkins, *Customary International Humanitarian Law and Multinational Military Operations in Malaysia*, 16 PAC. RIM. L. & POL'Y J. 79, 97 n.124 (2007) (noting the two-year limit to pure security-based detention in Malaysia); Pejic, *supra* note 52, at 382 (“[H]uman rights jurisprudence rejects the notion of indefinite detention.”); Sangeeta Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish*, 5 HUM. RTS. L. REV. 403, 404-05 (2005) (describing the United Kingdom's derogation from the ECHR and the ICCPR to accommodate post-9/11 legislation permitting indefinite detention).

costs are prohibitive: innocents easily could be detained, for extended periods if not for life, based only on a reasonable suspicion of threat and without any judicial guarantees. The criminal model is substantially more protective of individual liberties, but if used exclusively in the fight against terrorism, it too carries with it potentially significant costs. States that have no choice but to charge, prosecute, and convict terrorism suspects will inevitably adjust the criminal law to enhance its preventative capacity. They therefore risk eroding the safeguards of their criminal justice systems and contaminating the law as it applies in more ordinary cases. These states also risk that some terrorism suspects identified by law enforcement and intelligence services will go uncontained—either because they live in states that lack effective tools of law enforcement or because the tools used and information available are incompatible with the process of criminal trial and conviction. Administrative detention is a potentially appealing in-between system. Human rights actors regularly acknowledge that security-based administrative detention may be lawful, but as Part III demonstrated, they have failed to establish adequate substantive controls on such detention.

This Part looks to international practice for guidance on the current status of the law, and on the direction in which it is moving. It demonstrates that international actors—and particularly western democracies that take seriously their human rights obligations, but also face a serious threat from transnational jihadi terrorism—are dissatisfied with both the armed-conflict model and exclusive reliance on the criminal model. Most states have declined to apply the law of armed conflict to detain non-battlefield suspects because the liberty and public relations costs are too high. Yet several states have also demonstrated that they perceive an occasional but serious need to contain the threat from non-battlefield suspects outside the criminal process. In the absence of any international guidance for satisfying that need, these states have been willing to resort to a variety of ad hoc or uncontrolled measures.

Some of these measures have been taken discreetly or have encountered strong condemnation; they therefore cannot be understood to reflect collective expectations on what the law does or should permit.<sup>113</sup> But other measures—and specifically measures of administrative detention—have been pursued overtly, and with legislative and judicial participation. These latter measures have not all been upright, but they indicate that states are groping for an alternative *legal* framework within which to satisfy their perceived security needs.

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<sup>113</sup> With respect to identifying state expectations, see Andrew R. Willard, *Incidents: An Essay on Method*, in INTERNATIONAL INCIDENTS 25 (W. Michael Reisman & Andrew R. Willard eds., 1988).

A. *Rejecting the Armed-Conflict Approach*

The United States has almost singularly<sup>114</sup> asserted the authority to detain non-battlefield terrorism suspects based on the law of armed conflict.<sup>115</sup> U.S. detention practices—under the CIA program and at Guantánamo Bay—have therefore been at the center of the international conversation on applying the law of armed conflict to non-battlefield suspects. The international reaction to these practices has been intensely negative. From a systemic perspective, that reaction is strong evidence that the current law of armed conflict does not properly govern non-battlefield detentions.

The United States has invoked the law of armed conflict to justify various forms of non-battlefield detention. Some non-battlefield suspects have been detained in secret CIA “dark sites” without any legal process at all.<sup>116</sup> Others have been detained at Guantánamo Bay.<sup>117</sup> Still others have been detained at secure facilities on U.S. soil.<sup>118</sup> The common feature among all such detentions is their armed-conflict premise.

The reaction to those detention practices from actors outside the United States has been extraordinarily negative. The facility at Guantánamo Bay, in particular, has become a symbol of injustice around the world,<sup>119</sup>

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<sup>114</sup> *But cf.* Lynn Welchman, *Rocks, Hard Places and Human Rights: Anti-Terrorism Law and Policy in Arab States*, in GLOBAL ANTI-TERRORISM LAW AND POLICY, *supra* note 57, at 581, 582 (“[T]housands have been arrested in Arab states, many held for prolonged periods without trial.”); Michael Slackman, *Saudis Round Up 172, Citing A Plot Against Oil Rigs*, N.Y. TIMES, Apr. 28, 2007, at A1 (reporting on the arrest and detention of 172 persons connected to a terrorist ring, and quoting a Saudi official as asserting that there is “still a war going on” against terrorism).

<sup>115</sup> *See supra* note 6; *infra* notes 116-118 and accompanying text.

<sup>116</sup> *See* President’s Speech on Military Commissions, *supra* note 9 (asserting that the CIA detention program holds “a small number of suspected terrorist leaders and operatives *captured during the war*”) (emphasis added); Monica Hakimi, *The Council of Europe Addresses CIA Rendition and Detention Program*, 101 AM. J. INT’L L. 442, 442 (2007) (discussing and collecting sources on the CIA program).

<sup>117</sup> For recent government arguments that premise Guantánamo detentions on an armed conflict, see Brief for Respondent at 2, *Boumediene v. Bush*, No. 06-1195 (U.S. Oct. 9, 2007); Brief for Respondent at 2, 7-8, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

<sup>118</sup> *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh’g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007) (non-citizen captured and detained as an enemy combatant in the United States); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (U.S. citizen captured and detained as an enemy combatant in the United States).

<sup>119</sup> *See, e.g.*, Alan Cowell, *Briton Wants Guantánamo Closed*, N.Y. TIMES, May 11, 2006, at A24 (quoting the British attorney general as asserting that “[t]he existence of Guantánamo remains unacceptable” and that it has become “a symbol to many—right or wrong—of injustice”); Mark Mazzetti, *General Rejects Call to Penalize Ex-Guantanamo Prison Chief*, L.A. TIMES, July 13, 2005, at A11 (“The U.S. prison at Guantanamo Bay has been the source of intense anger throughout the Arab world.”); Thom Shanker & David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantánamo*, N.Y. TIMES, Mar. 23, 2007, at A1 (quoting

such that even close European allies of the United States demand that it be closed.<sup>120</sup> International human rights bodies have been even more outspoken. These bodies have focused on the deficiencies of legal process available to terrorism detainees in U.S. custody.<sup>121</sup> The Human Rights Committee and the Committee Against Torture have each criticized the insufficiency of legal process at Guantánamo Bay,<sup>122</sup> and the Council of Europe has condemned the absence of any legal process under the CIA program.<sup>123</sup> Finally, the heads of five mechanisms under the U.N. Human Rights Commission have concluded that non-battlefield detainees at Guantánamo should be either subjected to criminal process or released.<sup>124</sup> The U.N. Secretary-General publicly supported that conclusion, asserting that “the basic point that one cannot detain individuals in perpetuity and that charges have to be brought against them and their being given a chance to explain themselves and be prosecuted, charged or released . . . is something that is common under any legal system.”<sup>125</sup>

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Defense Secretary Gates as acknowledging that the detention facility at Guantánamo Bay has “become so tainted abroad”).

<sup>120</sup> See, e.g., John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Human Rights*, 100 AM. J. INT'L L. 214, 232-36 (2006) (noting the positions of the United Kingdom, France, and Germany); *Hunger Strike at Guantanamo Prison Grows to 89 Inmates*, L.A. TIMES, June 2, 2006, at A23 (Germany, Denmark, and United Kingdom); Dafna Linzer & Glenn Kessler, *Decision to Move Detainees Resolved Two-Year Debate Among Bush Advisers*, WASH. POST, Sept. 8, 2006, at A1 (Europe generally); Elaine Sciolino, *Spanish Judge Calls for Closing U.S. Prison at Guantánamo*, N.Y. TIMES, June 4, 2006, at A6 (Spain and United Kingdom); Craig Whitlock, *Europeans Cheer Ruling on Guantanamo Trials*, WASH. POST, June 30, 2006, at A8 (Europe generally).

<sup>121</sup> See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Situation of Detainees at Guantánamo Bay*, ¶¶ 21, 25, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) [hereinafter Comm. on Human Rights, *Situation of Detainees*]; Eur. Comm. for Democracy Through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, ¶¶ 78-85, Doc. No. CDL-AD(2006)009 (Mar. 2006); Int'l Comm. of the Red Cross, *The Relevance of IHL in the Context of Terrorism* (July 21, 2005), <http://www.cicr.org/web/eng/site/eng0.nsf/html/terrorism-ihl-210705> (rejecting the notion of a global armed conflict and then asserting that “when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply”).

<sup>122</sup> See Comm. Against Torture, *Conclusions and Recommendations: United States of America*, ¶ 22, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); Human Rights Comm., *Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant*, ¶ 18, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

<sup>123</sup> See Hakimi, *supra* note 116, at 446.

<sup>124</sup> Comm. on Human Rights, *Situation of Detainees*, *supra* note 121, ¶ 95.

<sup>125</sup> See Warren Hoge, *Investigators for UN Urge U.S. to Close Guantánamo*, N.Y. TIMES, Feb. 17, 2006, at A6 (internal quotation marks omitted).

*B. . . . But Evading the Criminal Process Discreetly*

Most international actors have therefore declined to apply the law of armed conflict to detain non-battlefield suspects. But the fact that other actors have rejected the U.S. approach—and the overt use of the legal tools under the law of armed conflict—does not mean that they fail to appreciate the threat from transnational jihadi groups, or the armed-conflict attributes of the fight against them. Even states that publicly criticize the U.S. approach have demonstrated that (at least in certain cases) they also perceive advantages to it, or that they otherwise share the goal of responding to the threat from non-battlefield suspects without resort to the criminal process.<sup>126</sup>

Several states have participated covertly in the very U.S. detention practices that they publicly condemn.<sup>127</sup> The extent of such participation has varied. A few states have held and interrogated non-battlefield detainees in coordination with the United States.<sup>128</sup> But these states have notoriously poor human rights records, so their practice is not necessarily reflective of the direction of international law in this area. The participation of other states— including those that take their human rights obligations seriously—

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<sup>126</sup> That other states share that goal is also evident from various public statements they have made. For instance, the former Defense Minister of the United Kingdom has suggested revising the law of armed conflict to address terrorism-related detentions. See David Ignatius, Editorial, *A Way Out of Guantanamo Bay*, WASH. POST, July 7, 2006, at A17. Austrian officials have acknowledged that Guantánamo Bay occupies a legal “gray area,” *id.*, and have proposed that Europe and the United States work together to establish a new “framework” for terrorism-related renditions. Temporary Comm. on the Alleged Use of European Countries by the CIA for the Transp. & Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, ¶ 25, EUR. PARL. Doc. A6-0020/2007 (Jan. 30, 2007) (prepared by Giovanni Claudio Fava) [hereinafter EU Report on CIA]. Australian and Italian officials have publicly supported detentions under the CIA program. See John Ward Anderson, *Confirmation of CIA Prisons Leaves Europeans Mistrustful*, WASH. POST, Sept. 8, 2006, at A8 (reporting on statement by the Australian foreign minister supporting the CIA program); Tracy Wilkens, *Court Widens Net for 22 CIA Agents to EU*, L.A. TIMES, Dec. 24, 2005, at A3 (reporting on statement by then Italian Prime Minister Berlusconi that the CIA operation against Abu Omar was “justifiable”). Finally, German officials are now advocating the establishment of a system of extracriminal detention in that country. See Mark Landler, *Debate on Terror Threat Stirs Germany*, N.Y. TIMES, July 11, 2007, at A1.

<sup>127</sup> See generally EU Report on CIA, *supra* note 126 (finding that European States acquiesced or participated in U.S. detentions); COE Report, *supra* note 13 (same); see also Jimmy Burns, et al., *Comment & Analysis, Render unto Washington: US Tactics on Terror Are Making Europe Examine its Complicity*, FIN. TIMES (U.K.), Dec. 14, 2005, at 17 (reporting on the “uneasy arrangements by which European governments have appeared to collude with the U.S. in practices that they have rarely been willing to defend, criticise or even acknowledge”).

<sup>128</sup> See COE Report, *supra* note 13, ¶¶ 202-03 (naming Morocco); Jane Mayer, *Outsourcing Torture: Annals of Justice*, NEW YORKER MAG., Feb. 14, 2005, at 106, 107 (naming Egypt, Jordan, Morocco, and Syria).

has been more subtle. For instance, there is some evidence that, under NATO auspices, European states permitted the United States to use their airspace to transport non-battlefield detainees into custody.<sup>129</sup> There also is strong evidence that European and other states shared intelligence giving rise to detentions;<sup>130</sup> interrogated detainees already in custody;<sup>131</sup> declined to accept their nationals or residents back into their territories, cognizant that the alternative would be continued detention;<sup>132</sup> and hosted CIA detention facilities in their territories.<sup>133</sup> Finally, the evidence indicates that several states have themselves captured non-battlefield terrorism suspects and then transferred them into U.S. or another state's custody for extended, extra-criminal detention.<sup>134</sup>

States have also evaded the criminal process by deporting non-battlefield suspects despite the risk that the suspects would be mistreated in

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<sup>129</sup> See Council of Eur., Comm. on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, ¶¶ 72-83, EUR. PARL. Doc. 11302 rev. (June 11, 2007) (prepared by Dick Marty) [hereinafter COE Second Report].

<sup>130</sup> See COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARER, REPORT OF THE EVENTS RELATING TO MAHER ARER: ANALYSIS AND RECOMMENDATIONS 13-14 (2006), available at [http://www.ararcommission.ca/eng/AR\\_English.pdf](http://www.ararcommission.ca/eng/AR_English.pdf) (Canada); COE Report, *supra* note 13, ¶¶ 163-76 (United Kingdom).

<sup>131</sup> See COE Report, *supra* note 13, ¶ 201 (United Kingdom); *id.* ¶¶ 187, 191 (Germany); Mark Landler & Souad Mekhennet, *Freed German Detainee Questions His Country's Role*, N.Y. TIMES, Nov. 4, 2006, at A8; Craig Smith, *Leak Disrupts French Terror Trial*, N.Y. TIMES, July 6, 2006, at A8.

<sup>132</sup> See, e.g., Landler & Mekhennet, *supra* note 131, at A8 (Germany); Whitlock, *supra* note 120, at A8 (Europe); Craig Whitlock, *U.S. Faces Obstacles to Freeing Detainees*, WASH. POST, Oct. 17, 2006, at A1 (United Kingdom, Germany, and "other European States").

<sup>133</sup> See COE Second Report, *supra* note 129, ¶¶ 70, 117 (Thailand, Romania, and Poland).

<sup>134</sup> See, e.g., Comm. Against Torture, *Communication No. 233/2003*, U.N. Doc. CAT/C/34/D/233/2003 (May 24, 2005) [hereinafter Comm. Against Torture, *Agiza v. Sweden*] (Sweden); COE Report, *supra* note 13, ¶¶ 133-49 (Bosnia & Herzegovina); *id.* ¶¶ 94-132 (Macedonia); EU Report on CIA, *supra* note 126, ¶¶ 49-53 (Italy); Stockman, *supra* note 64 (Indonesia); Raymond Bonner, *Indonesia Brings New Case Against Cleric Tied to Terror*, N.Y. TIMES, Oct. 29, 2004, at A7 (Thailand); Mark Denbeaux & Joshua W. Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* 14 (Seton Hall Pub. Law, Working Paper No. 46, 2006), available at <http://ssrn.com/abstract=885659> (Pakistan). The evidence suggests that, in some cases, governments acquiesced in extra-criminal detentions after it became apparent that they had no other option for incapacitating the terrorism suspect. See, e.g., John Crewdson, *Italy Says CIA May Have Had Distorted View of Cleric*, CHI. TRIB., Jan. 8, 2007, at CN12 (reporting evidence that some Italian officials considered Abu Omar to be a threat in Italy but that they could not deport him because of a prior grant of political asylum); Craig Whitlock, *At Guantanamo, Caught in a Legal Trap*, WASH. POST, Aug. 21, 2006, at A1 (reporting that the United States detained the "Algerian six" at Guantánamo Bay after Bosnian-Herzegovinian courts ordered the local government to release them from criminal detention and prohibited it from deporting them).

their home countries. In the counterterrorism context, deportation is frequently from a western democracy to a country that is ambivalent about human rights and that has an independent interest in containing the jihadi threat. Deportation thus may result in arbitrary detention, detainee mistreatment, or execution in the detainee's home country. Human rights law generally prohibits *refoulement* where there is a real risk of such mistreatment, but states increasingly cope with that prohibition by obtaining from the receiving state diplomatic assurances that deported suspects will not be mistreated.<sup>135</sup> These assurances are often unreliable.<sup>136</sup> Western democracies nevertheless use them to deport terrorism suspects because the alternative may be an uncontained threat in their own territories.<sup>137</sup> The diplomatic assurances thus provide a cover for potentially unlawful *refoulements*.

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<sup>135</sup> HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE (2005), <http://hrw.org/reports/2005/eca0405/index.htm> (reviewing practices of the United States, Canada, Sweden, the United Kingdom, Netherlands, Austria, and Turkey); Katrin Bennhold, *Europe, Too, Takes Harder Line in Handling Terrorism Suspects*, N.Y. TIMES, Apr. 17, 2006, at A1 (citing Sweden, Germany, the Netherlands, Austria, and the United Kingdom).

<sup>136</sup> See Comm. Against Torture, *Agiza v. Sweden*, *supra* note 134, ¶ 13.4 (“The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk [of torture upon deportation].”); Comm. On Human Rights, *Civil and Political Rights, Including the Questions of Torture and Detention*, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005) (prepared by Manfred Nowak); HUMAN RIGHTS WATCH, *supra* note 135.

<sup>137</sup> Three cases recently decided or now pending before the European Court of Human Rights consider whether, when deporting a terrorism suspect, a state may balance the risk of home-country mistreatment against the national security threat of having the suspect uncontained in its own territory: *Saadi v. Italy*, App. 37201/06 Eur. Ct. H.R. (2008); *A. v. Netherlands*, App. 4900/06 Eur. Ct. H.R. (2006); and *Ramzy v. Netherlands*, App. 25424/05 Eur. Ct. H.R. (2005). See Press Release, European Court of Human Rights, Application Lodged with the Court *Ramzy v. The Netherlands* (Oct. 20, 2005), available at <http://www.echr.coe.int/eng/press/2005/oct/applicationlodgedramzyvthenetherlands.htm>; EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL ACTIVITY REPORT 2006, § 3, 9 (2007), available at <http://www.echr.coe.int/NR/rdonlyres/D8BFD30E-EB6B-4FB9-86398990064DB046/0/CompilationofSectionreports.pdf> (providing information regarding *A. v. Netherlands*). The United Kingdom intervened in the *Saadi* case, and it and a few other states intervened in the other two cases, arguing that, where the security threat posed by the terrorism suspect is grave, the state should be permitted to deport him even if there is a real risk that he will be mistreated in his home country. See Observations of the Governments of Lithuania, Portugal, Slovakia, and the United Kingdom, *Ramzy v. Netherlands*, App. 4900/06 Eur. Ct. H.R., available at <http://www.redress.org/publications/GovernmentinterventorsobservationsinRamzy%20case22November.pdf>; Press Release, Amnesty Int'l, European Court of Human Rights: Ban on Torture is Absolute and Universal (July 11, 2007), available at <http://news.amnesty.org/index/ENGIOR300162007>. In the *Saadi* case, however, the European Court of Human Rights rejected that argument, concluding that the ECHR's implicit prohibition against *refoulement* is absolute. *Saadi*, *supra* ¶ 139. Separately, Canada acknowledges that in unspecified “exceptional circumstances” it may lawfully deport a terrorism suspect irrespective of the risk of home-country mistreatment. See *Suresh v. Canada*, [2002] S.C.R. 3, 46.

These measures demonstrate that states perceive an occasional but serious need to evade the criminal process in order to contain the threat from non-battlefield suspects. Thus, although many states have publicly condemned U.S. detention practices, several have also participated in those practices. Likewise, several states have sought to deport terrorism suspects despite the risk of home-country mistreatment. Yet the fact that these measures were or are employed covertly (or under inaccurate pretenses) signals that states consider them legally suspect and are generally unwilling to push for a change in the law to permit them.<sup>138</sup>

C. . . . *And Through Administrative Detention*

In addition to evading the criminal process discreetly, several states have sought to contain the threat posed by non-battlefield suspects by experimenting with administrative detention. Most of these experiments have been public and subject to legislative and judicial oversight. The broad use of such detention indicates that, although states perceive an occasional need to contain the threat posed by non-battlefield suspects without resort to the criminal process, and although they sometimes are willing to satisfy that need in legally suspect ways, they also appreciate the benefits to working within a prescribed legal framework.

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<sup>138</sup> Indeed, most of the participation by other states in U.S. detention practices was denied or investigated when it became public. Canada established a commission to review its role in the detention and mistreatment of Maher Arar. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, <http://www.ararcommission.ca> (last visited Mar. 31, 2008). In Germany, arrest warrants were issued relating to the abduction of Khaled el-Masri. See Mark Landler, *German Court Confronts U.S. on Abduction*, N.Y. TIMES, Feb. 1, 2007, at A1; Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Feb. 1, 2007, at A1. Italian prosecutors have indicted twenty-six Americans and five Italians in the Abu Omar case. See Richard Owen, *CIA Agents Must Be Charged over "Kidnap and Torture," Says Judge*, TIMES (London), Feb. 17, 2007, at 39. Sweden has initiated an internal investigation into its deportation of an Egyptian imam to Egypt. See Craig Whitlock, *A Secret Deportation of Terror Suspects*, WASH. POST, July 25, 2004, at A1. And Spain and Portugal are each investigating whether CIA aircraft carrying detainees transited their airspace or stopped for refueling in their territories. See *Spain Probes "Secret CIA Flights,"* BBC NEWS, Nov. 15, 2005, <http://news.bbc.co.uk/2/hi/europe/4439036.stm>; Associated Press, *Report: Portugal Opens Criminal Investigation into Alleged CIA Flights*, INT'L HERALD TRIB., Feb. 5, 2007, <http://www.ih.com/articles/ap/2007/02/05/europe/EU-GEN-Portugal-CIA-Flights.php>. Notably, two European states (Germany and Italy) have obstructed judicial investigations into non-battlefield detentions by invoking "state secrets" protections. See COE Second Report, *supra* note 129, ¶ 5. For one exception, where a few states have pushed for a change in the law, see the discussion *supra* note 137 regarding the *Saadi* case.



## 1. Detention Predicated on Criminal or Immigration Proceedings

In most instances, western democracies predicate security-based administrative detention on future criminal or immigration proceedings. By predicating detention on those other proceedings, these states contain the scope of application of the administrative detention regime and purport to avoid the form of detention that is more suspect under international law. This Subsection demonstrates, however, that security-based detention predicated on other proceedings may easily but informally convert into pure security-based detention, but without adequate controls.

With respect to future criminal proceedings, a number of states now permit extended pre-charge detention in terrorism cases. Under legislation passed in 2006, the U.K. government may detain terrorism suspects without charge for up to twenty-eight days,<sup>139</sup> in contrast to the four days permitted for non-terrorism-related suspects.<sup>140</sup> In Spain, the government may now detain terrorism suspects without charge for up to thirteen days, as opposed to the usual three.<sup>141</sup> And in France, that period is now six days instead of two.<sup>142</sup> The purported purpose of extending the permissible period of pre-charge detention is to give the authorities more time to investigate terrorism-related offenses, which may be more difficult to investigate than other crimes. Yet extended detention may be permitted without any rigorous showing that it is necessary or justified in a particular case, and future criminal charges are not always forthcoming. States that extend the permissible period of pre-charge detention in terrorism cases, and that ultimately release

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<sup>139</sup> Terrorism Act, 2006, c.11, § 23 (U.K.); Alan Cowell, *Britain Arrests 9 Suspects in Terrorist Kidnapping Plot*, N.Y. TIMES, Feb. 1, 2007, at A3. U.K. security officials now consider the twenty-eight-day period of pre-charge detention to be insufficient and have been advocating for extending it still further. See Alan Cowell, *7 Men Sentenced in Qaeda Bomb Plot in the U.S. and Britain*, N.Y. TIMES, June 15, 2007, at A3; Jane Perlez, *British Leader Seeks New Terrorism Laws*, N.Y. TIMES, July 26, 2007, at A12.

<sup>140</sup> See JAGO RUSSELL, LIBERTY, TERRORISM PRE-CHARGE DETENTION COMPARATIVE LAW STUDY 17 (2007) [hereinafter LIBERTY STUDY], available at <http://www.liberty-humanrights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>.

<sup>141</sup> There is some disagreement in the literature on whether the thirteen-day detention must be predicated on future criminal charges or is pure security-based detention. In either event, this period of detention is longer than was ordinarily permissible. See HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN 1-2, 24-26 (2005) available at <http://hrw.org/reports/2005/spain0105/spain0105.pdf>; LIBERTY STUDY, *supra* note 140, at 48; JACK STRAW, FOREIGN AND COMMONWEALTH OFFICE, COUNTER-TERRORISM LEGISLATION AND PRACTICE: A SURVEY OF SELECTED COUNTRIES 26 (2005).

<sup>142</sup> Code de procédure pénale [C. Proc. Pén.] [Code of Criminal Procedure] [2007] arts. 63, 706-88; LIBERTY STUDY, *supra* note 140, at 38; Bennhold, *supra* note 135; AFX News, *French Parliament Adopts Tough Anti-Terrorism Law*, FORBES.COM, Dec. 22, 2005, <http://www.forbes.com/work/feeds/afx/2005/12/22/afx2410169.html>.

a large percentage of detainees without filing any charges, thus employ systems of short-term, pure security-based detention.<sup>143</sup>

France also predicates more long-term detentions on future criminal proceedings. Under French law, terrorism suspects may be detained for up to four years while they are criminally investigated and before any trial, so long as they are charged with a terrorism-related offense.<sup>144</sup> This technically is not administrative detention because the suspect has actually been charged with an offense. But terrorism offenses in France are often vaguely defined, and charges may be based only on suspicion, with the understanding that the special magistrate judge assigned to the case will conduct most of the investigation after the defendant is charged.<sup>145</sup> This system thus overtly permits long-term detention without any rigorous demonstration of necessity or prior wrongdoing.<sup>146</sup> Moreover, such detention frequently is, for all intents and purposes, pure security-based detention. Many suspects have been detained for years and then released without trial or conviction.<sup>147</sup>

With respect to future immigration proceedings, several western democracies now detain terrorism suspects pending deportation.<sup>148</sup> For instance, in Canada the government may detain a foreign national pending deportation where there are “reasonable grounds to believe that [he poses] a

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<sup>143</sup> See U.K. Home Office Terrorism and the Law, <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/> (last visited Mar. 31, 2008) (reporting that of the 1166 terrorism suspects arrested in the United Kingdom between September 11, 2001 and March 31, 2007, 669 were released without charge).

<sup>144</sup> See Bennhold, *supra* note 135.

<sup>145</sup> French law categorizes as a terrorism-related offense a wide variety of conduct committed with the purpose of seriously disrupting public order through intimidation. That category includes the broad offense of “participation in any group . . . established with a view” to committing acts of terrorism (evinced by at least one material act). Code pénal [C. Pén.] [Penal Code] [2007] art. 421-2-1; see also *id.* art. 421-1 (setting forth most terrorism-related offenses).

<sup>146</sup> See Jeffrey Fleishman et al., *Outraged Europeans Take Dimmer View of Diversity*, L.A. TIMES, Sept. 5, 2005, at A4 (“Anti-terrorism magistrates [in France] have extensive powers enabling them to jail suspects for up to four years pending trial on minimal evidence.”).

<sup>147</sup> See Sandro Contenta, “*Sheriff*” Keeping Eye on Canada, TORONTO STAR, Nov. 10, 2002, at B3, available at LEXIS; Michael Dobbs, *In France, Judge Fights Terrorism and Critics*, WASH. POST, Nov. 23, 2001, at A34; Craig Whitlock, *French Push Limits in Fight on Terrorism*, WASH. POST, Nov. 2, 2004, at A1.

<sup>148</sup> See, e.g., Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 89-91 (2005) (United States); *Austrian Minister Defends Jail-for-Refugees Initiative*, DEUTSCHE PRESSE-AGENTUR, Nov. 2, 2004 (Austria); *Roundup: Yemini Imam in German Jail May Face Long Legal Hearings*, DEUTSCHE PRESSE-AGENTUR, Jan. 13, 2003 (Germany); *infra* notes 149-158 and accompanying text (Canada and United Kingdom); cf. Fleishman et al., *supra* note 146 (“From Rome to Paris to Berlin, governments are rethinking the balance between civil rights and national security, proposing tighter immigration and asylum laws . . .”).

danger to national security or to the safety of any person.”<sup>149</sup> In its 2007 decision in *Charkaoui v. Canada*, the Canadian Supreme Court reviewed Canada’s practice of detaining persons *for several years* “pending deportation,” based on that reasonable belief standard.<sup>150</sup> The Court held that such lengthy and indeterminate periods of detention are lawful, so long as the judicial review afforded to detainees is made more meaningful, and specifically so long as detainees are given the information based on which detention was ordered or, if that information is classified, a substantial substitute for it.<sup>151</sup> The Court did not consider the legality of detentions “pending deportation” where deportation has become practically infeasible (for example, because of the risk of home-country mistreatment),<sup>152</sup> even though Canada has engaged in such detentions.<sup>153</sup> Thus, because the deportation of terrorism suspects is frequently either protracted or infeasible, security-based immigration detention in Canada may be only loosely tied to, or even completely unhinged from, deportation proceedings. These detentions have essentially converted into pure security-based detentions, permitted under a low, reasonable belief standard.

Whereas the *Charkaoui* Court avoided the question of indefinite immigration detention, the House of Lords of the United Kingdom was confronted with exactly that question in *A. v. Home Secretary*, a 2004 case challenging post-9/11 legislation that permitted the government to detain indefinitely any alien who was reasonably believed to pose a security threat but who would not leave the United Kingdom voluntarily and could not be returned to his home country because of a real risk of mistreatment.<sup>154</sup> Because the legislation permitted detention in the absence of pending deportation proceedings, it explicitly permitted pure security-based detention, but only of foreign nationals. In the government’s view, such detention was preferable to the available alternatives: leaving the suspect uncontained in the United Kingdom or returning him to his home country, where he faced

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<sup>149</sup> Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 82 (Can.).

<sup>150</sup> See *Charkaoui v. Canada* (Citizenship and Immigration), [2007] S.C.R. 350.

<sup>151</sup> *Id.* at 387-90. As originally drafted, the legislation required the government to afford a detainee the opportunity for judicial review within forty-eight hours if he was a permanent resident, or after 120 days if he was not. However, the Canadian Supreme Court found that the 120-day “grace period,” during which a non-national, non-resident could be detained without judicial review, was impermissibly long. *Id.* at 403.

<sup>152</sup> *Charkaoui*, [2007] S.C.R. at 417.

<sup>153</sup> See Kent Roach, *Must We Trade Rights For Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2194 (2006).

<sup>154</sup> *A. v. Home Secretary*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.) (U.K.).

the real risk of extended detention plus mistreatment.<sup>155</sup> The Law Lords determined, however, that the indefinite detention of foreign nationals was disproportionate to the exigencies of the situation.<sup>156</sup> Since that decision, the United Kingdom has continued to employ security-based immigration detention, but not on the understanding that immigration detainees may be held indefinitely.<sup>157</sup> The government sometimes avoids the perception of indefinite detention by seeking or obtaining from the suspect's home country diplomatic assurances that he will not be mistreated if deported.<sup>158</sup>

## 2. Pure Security-Based Detention

In rarer instances, western democracies have candidly developed systems of pure security-based detention. India and Israel—two states with long histories of trying to combat transnational terrorism—consistently have used such detention for that purpose.<sup>159</sup> So too have more authoritarian

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<sup>155</sup> The international prohibition of *refoulement* made it unlawful for the United Kingdom to return these suspects to their home countries, but, because indefinite security-based detention is also presumably unlawful under the ECHR, and dubious under the ICCPR, the United Kingdom derogated from the detention provisions of both instruments to accommodate its new legislation. Shah, *supra* note 112, at 404-05.

<sup>156</sup> *A. v. Home Secretary*, 2 A.C. 68. For a more thorough discussion of *A. v. Home Secretary*, see Shah, *supra* note 112, at 406; and Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT'L CRIM. JUST. 1137 (2006).

<sup>157</sup> See LORD ALEX CARLILE, FIRST REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005, at 6-8 (2006) [hereinafter FIRST CARLILE REPORT], available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-againstterror.pdf?view=Binary>.

<sup>158</sup> See *id.*; Matthew Hickley, *Judges Let Two Libyan Terror Suspects Back on Our Streets*, DAILY MAIL (U.K.), Apr. 28, 2007, at 13 ("The Home Office has signed memoranda of understanding with Libya, Jordan and Lebanon and reached a similar deal with Algeria in the hope of deporting foreign terror suspects to countries with questionable human rights records where there is not enough evidence to prosecute them in Britain."). U.K. courts have found that deportation proceedings could not proceed, despite the diplomatic assurances obtained, in at least two cases. See Joshua Rozenburg, *Terror Suspects Cannot Be Deported to Libya, Says Court*, DAILY TELEGRAPH (U.K.), Apr. 28, 2007, at 6 ("Two Libyans found to pose a danger to national security are likely to be released on bail next week after a court ruled that they could not be sent back to their own country.").

<sup>159</sup> See *supra* notes 102-109 and accompanying text. For more current information on the systems of administrative detention in India and Israel, see Christopher Gagné, Note, *POTA: Lessons Learned From India's Anti-Terror Act*, 25 B.C. THIRD WORLD L.J. 261 (2005); and Joanne Mariner, *Indefinite Detention of Terrorist Suspects*, FINDLAW, June 10, 2002, <http://writ.news.findlaw.com/mariner/20020610.html> (Israel).

states, like Singapore and Malaysia.<sup>160</sup> This Subsection looks at the more recent practice of the United Kingdom and the United States.<sup>161</sup>

The United Kingdom responded to the *A. v. Home Secretary* case by passing new legislation in 2005 permitting it to impose on persons of any nationality various liberty-restricting orders, including in serious cases pure security-based detention.<sup>162</sup> Liberty-restricting orders short of detention have included restrictions on movement and prohibitions on access to specific items or services.<sup>163</sup> Detention is contemplated as an extreme measure taken with judicial oversight and where the alternatives have been exhausted or rejected as insufficient. Moreover, for anyone subject to detention or other liberty-restricting orders, the government must consider the possibility of a criminal prosecution.<sup>164</sup> Pure security-based detention thus is permitted in the United Kingdom only if necessary, in that the security threat cannot be contained by less restrictive measures or by the criminal process. In prac-

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<sup>160</sup> See Human Rights Comm'n Letter, *supra* note 112 (Singapore); Atkins, *supra* note 112, at 97 n.124 (Malaysia).

<sup>161</sup> Australia also seems to permit pure security-based detention in the event that there are "reasonable grounds to suspect" that a person is participating in or possesses something in connection with an "imminent" attack. See Katherine Nesbitt, Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis 45-48 (Mar. 22, 2007) (unpublished manuscript available at <http://ssrn.com/abstract=975792>).

<sup>162</sup> See Prevention of Terrorism Act, 2005, c.2 (U.K.); see also FIRST CARLILE REPORT, *supra* note 157; LORD ALEX CARLILE, SECOND REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2007) [hereinafter SECOND CARLILE REPORT], available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/Lord-Carlile-pta-report-2006.pdf?view=Binary>.

<sup>163</sup> See FIRST CARLILE REPORT, *supra* note 157, at 1.

<sup>164</sup> Prevention of Terrorism Act of 2005, c.2, §§ 8(2), 8(4) (U.K.). To date, criminal prosecutions of persons restricted under the 2005 legislation have been rare. See FIRST CARLILE REPORT, *supra* note 157, at 18-19; SECOND CARLILE REPORT, *supra* note 162, at 24-26; LORD CARLILE, THIRD REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT OF 2005, at 27-28 (2008) [hereinafter THIRD CARLILE REPORT], available at <http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders2008?view=Binary>. Law enforcement officials attribute that failure to "there [not being] evidence available that could realistically be used for the purposes of a terrorism prosecution." SECOND CARLILE REPORT, *supra* note 162, at 25. Despite the unavailability of such evidence, however, the decision to impose liberty-restricting measures has, in every case, been supported by the independent reviewer charged with overseeing implementation of the 2005 legislation. See THIRD CARLILE REPORT, *supra* at 13; SECOND CARLILE REPORT, *supra* note 162, at 13; FIRST CARLILE REPORT, *supra* note 157, at 12. This suggests that the measures respond to a threat that the British government has not been able to address through the ordinary criminal process. Notably, however, some liberty-restricting measures have also been ineffective in containing the threat; a few suspects subject to such measures have subsequently disappeared and thus can no longer be monitored. See Philip Johnston, *DNA Loophole Is Hindering Terror Police, Says Reid*, DAILY TELEGRAPH (U.K.), June 8, 2007, at 12.

tice, this system has been more constrained than the systems of detention discussed above that are predicated on future criminal and immigration proceedings. As of February 2008, the United Kingdom had not detained anyone under the 2005 legislation.<sup>165</sup>

For its part, the United States now employs a system of pure security-based administrative detention at Guantánamo Bay. Even though the United States continues to assert the authority to detain both battlefield and non-battlefield terrorism suspects at Guantánamo Bay on the basis of the law of armed conflict,<sup>166</sup> ongoing litigation has compelled the United States to better regulate that detention scheme so that it increasingly resembles a system of pure security-based administrative detention. The litigation in the United States has focused on whether Guantánamo detainees may challenge the legality of their detentions in U.S. federal court. The availability of federal court review is, of course, not required under the law of armed conflict, but the U.S. Supreme Court has declined to apply that law, in its pure form, to Guantánamo detainees. In its 2004 decision in *Rasul v. Bush*, the Court determined that federal courts had (statutory) habeas jurisdiction to review the legality of detentions at Guantánamo Bay,<sup>167</sup> and it justified that determination in part by distinguishing the Guantánamo Bay detainees from detainees in more conventional armed conflicts.<sup>168</sup>

The *Rasul* Court did not answer whether its jurisdictional ruling applied to all non-battlefield detainees held outside the United States, or only to those at Guantánamo Bay. It also did not identify the substantive law under which the Guantánamo detentions should be reviewed. It thus did not answer whether the law of armed conflict governs.<sup>169</sup> Nevertheless, the

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<sup>165</sup> See THIRD CARLILE REPORT, *supra* note 164, at 19.

<sup>166</sup> Brief for Respondent at 2, 7-8, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

<sup>167</sup> 542 U.S. 466, 485 (2004).

<sup>168</sup> *Id.* at 476.

<sup>169</sup> The U.S. Supreme Court has issued three other detainee decisions, but none is clear on whether, in the Court's view, the law of armed conflict properly governs non-battlefield detentions. Some of its jurisprudence suggests that it believes the law of armed conflict does govern. For instance, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court reviewed the detention of a U.S. national captured on the Afghan battlefield. The Court determined that the authority to detain that person was inherent in the congressional grant of authority to use force "against those nations, organizations, or persons" connected to the September 11 attacks. *Id.* at 510 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001))). That grant of authority is certainly expansive enough to also authorize the use of force in a global fight against al Qaeda. If, as *Hamdi* asserts, the authority to detain is inherent in the grant of authority to use force, then one logical extension of *Hamdi* is to understand the Congress to have authorized armed-conflict detentions of all Qaeda members, irrespective of whether they are captured on a conventional battlefield. The Court seemed to endorse that under-

Court did afford Guantánamo detainees a legal process without any basis in that law.<sup>170</sup>

*Rasul* has since been legislatively reversed (twice),<sup>171</sup> and the debate in the United States continues on the extent to which the law of armed conflict governs non-battlefield detentions, and on the legal process due to detainees.<sup>172</sup> After *Rasul*, the United States established administrative bodies—termed Combatant Status Review Tribunals (CSRTs)—to determine whether detention at Guantánamo Bay is in each case justified.<sup>173</sup> Congress-

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standing in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2795 (2006), when it applied only Common Article 3 to detainees captured in the “conflict with al Qaeda.”

When addressing the specific issue of detention, however, the Court has indicated that the law of armed conflict may *not* govern, or at least that it may not govern alone. In *Hamdi*, the Court emphasized the narrowness of its holding and concluded that the citizen-detainee must be given the opportunity to contest before a neutral decision-maker the factual basis for detention. See *Hamdi*, 542 U.S. at 509. As in *Rasul*, the Court afforded the detainee more process than is required under the law of armed conflict (but less than is afforded in a criminal trial). Moreover, the *Hamdi* Court questioned whether the law of armed conflict properly governs detentions in situations where “the practical circumstances . . . are entirely unlike those of the conflicts that informed [its] development.” *Id.* at 521. Recall that the *Rasul* Court itself underscored that the Guantánamo detentions were unlike detentions in more conventional conflicts. See *supra* note 168 and accompanying text.

The Court’s fourth detainee decision, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), presented the question of whether the government could detain a non-battlefield, U.S. citizen-detainee captured in the United States. The Court, however, did not reach that question, and instead dismissed the petition for having been filed in the wrong jurisdiction. *Id.* at 451. For a comprehensive discussion of the Court’s detainee decisions, see Richard H. Fallon, Jr. & David J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

<sup>170</sup> For a more extensive discussion on the failure of the U.S. Supreme Court even to look to the law of armed conflict for guidance, see W. Michael Reisman, *Rasul v. Bush: A Failure to Apply International Law*, 2 J. INT’L CRIM. JUST. 973 (2004).

<sup>171</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, § 1005(e)(1), 119 Stat. 2739, 2742 (to be codified as amended at 10 U.S.C. 801 (e)(1)); Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7(a), 120 Stat. 2600, 2636 (to be codified at 28 U.S.C. § 2241(e)(1)).

<sup>172</sup> See *infra* notes 176-177 and accompanying text; *Al-Marri v. Wright*, 487 F.3d 160, 183 (4th Cir. 2007), *petition for reh’g en banc granted*, No. 06-7427 (4th Cir. Aug. 22, 2007) (concluding that the law of armed conflict does not govern the detention of a (foreign national) non-battlefield terrorism suspect captured in the United States and distinguishing *Hamdi* on the ground that, unlike in that case, the detainee at issue had no connection to a recognizable battlefield).

<sup>173</sup> See Memorandum from Deputy Sec’y Def. to Sec’y Navy on Order Establishing Combatant Status Review Tribunals (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. A separate process, the Administrative Review Boards, has been established to determine whether, once detained, persons may be released. See Order of Deputy Sec’y Def., *Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba* (May 11, 2004), *available at* <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

sional legislation subjects CSRT determinations to limited review by the Court of Appeals for the District of Columbia Circuit.<sup>174</sup> In a July 2007 decision in *Bismullah v. Gates*, a panel of that court found that, in order for its review of the CSRT determinations to be meaningful, counsel for the detainees must have access to the information based on which their clients are detained, including in most cases classified information.<sup>175</sup> At the time of this Article's publication, the U.S. government has filed a petition for certiorari from the D.C. Circuit's decision in *Bismullah*,<sup>176</sup> and the U.S. Supreme Court is separately considering whether, now that the statutory basis for habeas jurisdiction has been overturned, federal courts have jurisdiction under the U.S. Constitution to review the legality of Guantánamo detentions.<sup>177</sup> However those cases are resolved, the legal process available to Guantánamo detainees has become significantly more elaborate than any process formally required under the law of armed conflict.

Nevertheless, that process continues to be flawed and fails to ensure that detention in each case is necessary. Under the CSRTs, detention is permitted if a suspect "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."<sup>178</sup> Detention thus is permitted based on a suspect's potential affiliation and irrespective of whether detention is necessary to contain the security threat. For instance, by the government's own account, detention would be permitted where a person unknowingly sent funds to a Qaeda-linked organization or where she taught a Qaeda member's son.<sup>179</sup> Moreover, the finding that the suspect was part of or supporting a transnational jihadi group may be made based on a low, preponderance of evidence standard with a rebuttable presumption in favor of the government's evidence.<sup>180</sup> In practice, this low standard has enabled the government to maintain detentions without any rigorous determination of necessity.<sup>181</sup> Deten-

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<sup>174</sup> Detainee Treatment Act of 2005 § 1005(e)(2)(A), 119 Stat. at 2742.

<sup>175</sup> *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007); see also *Hamdi*, 542 U.S. at 533 ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

<sup>176</sup> Reply Brief for Petitioners-Appellants, *Gates v. Bismullah*, No. 07-1054 (U.S. Mar. 2008), available at <http://www.usdoj.gov/osg/briefs/2007/2pet/7pet/2007-1054.pet.rep.html>.

<sup>177</sup> *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

<sup>178</sup> See Memorandum from Deputy Sec'y Def., *supra* note 173.

<sup>179</sup> See *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 475 (D.D.C. 2005).

<sup>180</sup> See *Bismullah*, 501 F.3d at 181.

<sup>181</sup> See *Denbeaux & Denbeaux*, *supra* note 134, at 15-20 (reporting on evidence used in CSRTs and Administrative Review Boards). *But cf.* COMBATING TERRORISM CENTER, AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED



tions have also continued long after detainees have been deemed eligible for release—and thus presumably after the government determined that detention was not (or was no longer) necessary.<sup>182</sup>

## V. DEVELOPING COHERENT STANDARDS

State practice thus illustrates that states reject detaining non-battlefield terrorism suspects based on the law of armed conflict, but that they perceive a real need to contain the threat from at least some suspects outside the criminal process. States have employed a variety of extracriminal measures to satisfy that need. Some such measures were ad hoc and intended to circumvent (rather than to work within or to try to change) the law. But other measures—and specifically the measures of administrative detention—were taken deliberately and with legislative and judicial participation. The use of these measures indicates that, although states have been willing to evade the law, they are groping to operate within it—that is, to develop alternative *legal* frameworks that satisfy their security needs.

An alternative legal framework already exists under human rights law in the form of administrative detention. Yet in order for administrative detention to fill the void for a sustainable detention regime in the fight against terrorism, the law in this area must be further developed. Developing that law would serve two functions. It would inhibit states from exploiting the current legal ambiguity to detain persons in ways that are unnecessary or insufficiently protective of individual liberties. And it would enable states—and particularly states that take seriously their human rights obligations, but also face a real threat from transnational jihadi terrorism—to detain terrorism suspects outside the criminal process but based on a legal framework that establishes meaningful controls. It thus would curb the incentive to resort to ad hoc or uncontrolled measures.

This Part outlines four policy goals to inform the development of law on security-based administrative detention as it applies in the fight against terrorism. First, detainees must be afforded prompt legal process, in which they have (at the very least) a meaningful opportunity to challenge, before a neutral arbiter, the facts giving rise to detention and to offer evidence in rebuttal. Second, the standard of non-arbitrariness must be made more robust. Extended security-based detention should be considered non-arbitrary only in narrowly defined circumstances: where the detainee him-

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SUMMARIES (2007) (arguing that the Denbeaux and Denbeaux study has methodological flaws).

<sup>182</sup> See, e.g., *3 Detainees at Guantanamo Are Released to Albania*, WASH. POST, Nov. 18, 2006, at A13; Josh White & Julie Tate, *4 Men Cleared of Terrorism Links but Still Detained*, WASH. POST, May 20, 2006, at A18; Craig Whitlock, *82 Inmates Cleared but Still Held at Guantanamo*, WASH. POST, Apr. 29, 2007, at A1 (reporting that about eighty-five Guantánamo detainees have been deemed eligible for release).

self poses a serious security threat, where detention is necessary to contain that threat, and where it is designed to last no longer than necessary. Third, with that enhanced standard of non-arbitrariness, pure security-based detention should be permitted. And finally, any state that employs a system of administrative detention must define the boundaries between it and the criminal process.

*A. Prompt and Meaningful Legal Process*

States must afford detainees prompt, fair, and meaningful legal process on the lawfulness of detention. The comprehensive human rights instruments all establish the requirement of judicial review,<sup>183</sup> and oversight bodies consistently underscore the importance of such review to check against capricious or unjustified detention.<sup>184</sup> Moreover, the absence or inadequacy of judicial review has been the primary concern expressed by various human rights bodies with respect to U.S. detention practices.<sup>185</sup> Those same concerns have animated the debate within the United States, and ultimately have compelled the U.S. government to make the legal process at Guantánamo Bay more rigorous.<sup>186</sup> The availability of meaningful legal process is critical because, unlike traditional combatants, terrorists operate by blending into the general population, and any counterterrorism detention regime thus is likely to target a relatively high number of innocents—persons who are suspected of posing a threat but in fact do not.

Legal process may be fair and meaningful even if detainees are not afforded the full panoply of safeguards that a state ordinarily affords criminal defendants. Many such safeguards reflect a state's own legal and normative traditions and are not required by international law. Indeed, domestic criminal justice systems vary significantly across jurisdictions. Some states employ a standard of proof of beyond a reasonable doubt, but others use something closer to a preponderance of the evidence standard.<sup>187</sup> Some categorically exclude certain forms of evidence (such as hearsay or evidence obtained unlawfully), while others admit such evidence on the understand-

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<sup>183</sup> See *supra* note 76 and accompanying text.

<sup>184</sup> See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Question of Torture and Detention*, ¶¶ 77-78, U.N. Doc. E/CN.4/2005/6 (Dec. 1, 2005); *General Comment No. 29, supra* note 51, ¶ 16; *General Comment 8, supra* note 72.

<sup>185</sup> See *supra* notes 122-125 and accompanying text.

<sup>186</sup> See *supra* notes 167-175 and accompanying text.

<sup>187</sup> See Thomas V. Mulrine, *Reasonable Doubt: How in The World Is It Defined?*, 12 AM. U. J. INT'L L. & POL'Y 195, 214-23 (1997) (comparing the standards of proof in criminal cases across jurisdictions); Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 665-69 (2003) (asserting that many civil code countries do not employ a criminal standard of proof of beyond a reasonable doubt).

ing that the adjudicator will take into account its potential unreliability.<sup>188</sup> Given this variance, no one system can be said to embody the best or only way to ensure criminal defendants fair legal process. Thus, the legal process afforded to administrative detainees might reasonably deviate from a state's own rules of criminal procedure while still being fundamentally fair and consistent with international law.

That said, it is extraordinarily difficult to identify with specificity the minimum legal process that should be permitted under a system of administrative detention, and human rights law currently gives us little guidance. Broadly speaking, terrorism suspects must have the prompt and meaningful opportunity to challenge, before a neutral arbiter, the facts giving rise to detention and to offer evidence in rebuttal. The promptness requirement means that detainees must have at least a preliminary opportunity to contest their detentions within a matter of days, not months.<sup>189</sup> This requirement renders a system of administrative detention potentially *more* liberty-protecting than the criminal process because innocent terrorism suspects may demonstrate within days that they do not pose a threat and that detention is therefore unwarranted—an option that may not exist to escape extended pretrial detention under the criminal process.<sup>190</sup>

The requirement that judicial review be meaningful entails at least three things. First, the reviewing body must have the authority to order the detainee's release if it determines that detention is unjustified.<sup>191</sup> Without

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<sup>188</sup> ANDREW L.-T. CHOO, *HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS* 34 (1996). Indeed, international criminal tribunals themselves admit evidence that would be inadmissible under the common law tradition. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion of Prosecution for Admissibility of Evidence, ¶ 16 (Jan. 19, 1998); Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion on Hearsay, ¶¶ 14, 19 (Aug. 5, 1996); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 745-53 (1999).

<sup>189</sup> *See General Comment 8, supra* note 72, ¶ 2 (asserting that delays in bringing a detainee before a judge “must not exceed a few days”); *see also* NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 40608 (2002).

<sup>190</sup> With respect to pretrial detention in the United States, see 18 U.S.C. § 3142(e) (2000) (permitting pretrial detention upon a judicial finding that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community”). *See also* Kuckes, *supra* note 56, at 23 (“[R]outine pretrial criminal hearings . . . are not designed to test the issue that is most fundamental from a due process perspective—whether sufficient evidence of criminal wrongdoing exists to justify depriving the defendant of liberty and property interests pending trial.”).

<sup>191</sup> *See* ICCPR, *supra* note 51, art. 9(4) (providing for the court to decide on the lawfulness of detention “and order [the detainee's] release if the detention is not lawful”); *see also* American Convention, *supra* note 51, art. 7(6); ECHR, *supra* note 51, art. 5(4). The requirement that the reviewing body have the authority to order a detainee's release if it determines that detention is unjustified may present practical complications for the detaining state (for

that authority, judicial review is vacuous. Second, the detainee must be equipped to participate in that process and to pursue her rights within it. This almost certainly requires legal counsel or some other form of independent representation.<sup>192</sup> Finally, the detainee must be informed of the factual basis for detention and be given a genuine opportunity to respond. The D.C. Circuit in *Bismullah* and the Canadian Supreme Court in *Charkaoui* both underscored this point: a detainee cannot reasonably challenge the justification for detention if it is not made available to her.<sup>193</sup> States that rely on classified evidence to detain terrorism suspects thus must share either that evidence or a substantial substitute with the detainee (or with her representative). This is a compromise approach. States may not invoke the existence of classified intelligence to obstruct a detainee's opportunity for rebuttal, but they may protect intelligence information, sources, or methods in ways that may be impermissible under the criminal process. For instance, a state may design a system of administrative detention that permits it to keep classified some of the intelligence on which it relies; to share intelligence only with the detainee's security-cleared representative, and not with the detainee herself; or to present statements from an intelligence source without affording the detainee an opportunity to confront that source in person on the veracity of his statements.

#### B. *Non-Arbitrariness*

Judicial review and the other procedural constraints on detention are critical, but they are only as protective as the underlying substantive standards based on which detention is permitted. Thus, the procedural constraints are not sufficient on their own to prevent abuse. Part III demonstrated, however, that the current substantive constraints on administrative detention are insufficient in the security context. These constraints must be adjusted with non-battlefield detentions in mind. Specifically, such detention should be lawful only where the detainee himself poses a serious security threat, where detention is necessary to contain that threat, and where detention is calibrated to last no longer than necessary.

First, in order for security-based detention to be non-arbitrary, the detainee himself must pose a serious security threat. This proposition is supported by the jurisprudence of the Human Rights Committee on deten-

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example, if the detainee is not a national or resident of the detaining state, and return to his home country would create a substantial risk of mistreatment). That requirement nevertheless is essential for judicial review to be meaningful. States that engage in security-based detention thus should develop in advance plans for releasing detainees for whom detention is deemed unjustified.

<sup>192</sup> See *supra* note 76.

<sup>193</sup> See *supra* notes 151, 175 and accompanying text.

tions outside the security context, and by its conversation with Israel on the detention of “bargaining chips.”<sup>194</sup> Moreover, one of the criticisms voiced against the CSRT process at Guantánamo Bay is that it permits detention for anyone who has supported al Qaeda or associated forces without requiring any individualized assessment of threat.<sup>195</sup> Not everyone who supports al Qaeda or other transnational jihadi groups poses the state targets of those groups a sufficiently serious threat to warrant security-based detention. For instance, a Pakistani villager who attends a Qaeda training camp may technically be a member of al Qaeda, but if he does nothing more, he poses western governments no real security threat, and his detention by those governments would therefore be unjustifiable.<sup>196</sup> Indeed, his detention would probably be unjustifiable even if he had intelligence information that those governments would consider useful. International law and practice do not appear to condone administrative detention for the purpose of obtaining intelligence where the detainee himself poses no security threat.<sup>197</sup> And, in any event, a system of detention designed primarily to obtain intelligence would require a different balance between liberty and security than the balance achieved in a system designed to contain persons who themselves pose a threat.

International law must, therefore, establish standards for identifying when a non-battlefield terrorism suspect poses a sufficiently serious security threat to render his detention non-arbitrary. For guidance, international lawyers might look to the treatment by the law of armed conflict of civilians who participate in the fighting.<sup>198</sup> Under the law of armed conflict, civilians may not be the object of military attack, but they lose that immunity from attack “for such time as they take a direct part in hostilities.”<sup>199</sup> There con-

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<sup>194</sup> See *supra* notes 106-108 and accompanying text.

<sup>195</sup> See *supra* note 178 and accompanying text; see also James G. Stewart, *Rethinking Guantánamo: Unlawful Confinement as Applied in International Criminal Law*, 4 J. INT'L CRIM. JUST. 12, 23-25 (2006).

<sup>196</sup> The law of armed conflict contains no similar requirement for an individualized assessment of threat and instead permits detention based on association. Under that law, membership in the armed forces of a party, or even in a civilian-run organization aimed at causing disturbances, is a sufficient basis for detention. See Geneva Convention III, *supra* note 34, art. 4(A); COMMENTARY: IV GENEVA CONVENTION, *supra* note 43, at 258.

<sup>197</sup> See Pejic, *supra* note 52, at 380 (“[I]nternment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.”).

<sup>198</sup> Cf. Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2655-58 (2005) (discussing the direct participation standard in the context of U.S. detentions based on the Congressional authorization to use military force in response to the September 11 attacks).

<sup>199</sup> Additional Protocol I, *supra* note 34, art. 51(3) (applicable in international armed conflicts); Additional Protocol II, *supra* note 34, art. 13(3) (applicable in certain non-

tinues to be some ambiguity as to what constitutes “direct participation” for purposes of the loss of civilian immunity.<sup>200</sup> But civilians generally are understood to lose their immunity when preparing for or returning from combat and when providing logistical support or target information for immediate use.<sup>201</sup> By contrast, civilians maintain their immunity when involved in the war effort without themselves posing any threat—for example when working in a manufacturing plant that produces materiel for use in the war.<sup>202</sup> If the law on the loss of civilian immunity is adjusted for non-battlefield detentions, persons who organize or direct attacks, or who are preparing to commit an attack, might be candidates for detention by the state—targets of those activities. By contrast, persons who provide only financial support to a terrorist organization, or who express a passing commitment to jihad (without doing anything more), might not. The reason for the distinction is that the latter suspects—those who do not or who only indirectly participate in attacks—do not themselves pose a security threat warranting detention, although their activities may warrant criminal sanction<sup>203</sup> or liberty-restricting measures short of detention.

The determination that someone poses a serious security threat is not easily reviewed by international human rights bodies. As was demonstrated in Part III, neither the Human Rights Committee nor the European Court of Human Rights seriously examines such determinations. These bodies are not equipped or authorized to make those determinations *de novo*, but their review nevertheless may be made more probing. For example, in *Ahani* and *Chahal*, the two bodies could have—and should have—examined more carefully the domestic standards under which the detentions were authorized. The same is true of the Human Rights Committee’s review of the systems for pure security-based detention in India and Israel, and at Guantánamo Bay. In this context, the reasonable belief standard may justify short- but not long-term detention. A state looking to engage in extended detention should be required to demonstrate more than simply a reasonable belief or suspicion that the suspect poses a threat—a substantive standard

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international armed conflicts); see also HENCKAERTS & DOSWALD-BECK, *supra* note 49, at 19-24 (applicable as a matter of customary international law).

<sup>200</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2115-16 n.306 (2005).

<sup>201</sup> See BOTHE, PARTSCH & SOLF, *supra* note 28, at 301-04; COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 39, at 618-19.

<sup>202</sup> See BOTHE, PARTSCH & SOLF, *supra* note 28, at 301-04; COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 39, at 618-19.

<sup>203</sup> See, e.g., International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (requiring states to criminalize the financing of acts of terrorism); S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (same).

akin to the one under the law of armed conflict and insufficiently protective of the detainees' liberty interests in the fight against terrorism.

Second, for security-based detention to be non-arbitrary, it must be necessary to contain the threat or to meet the other government interests being pursued. Detention presumably is unnecessary if those interests may be satisfied by less restrictive alternatives. States therefore should be required to consider the availability of such alternatives before they engage in administrative detention, and particularly in extended such detention. Where detention serves more than one interest—for instance, where pre-charge detention serves both a preventative interest in containing the threat and a criminal justice interest in preventing flight or investigating the offense—then it is reasonable for a state to consider both of those interests in assessing the availability of alternatives. But if those interests may be satisfied by less restrictive alternatives, states should be required to employ them. Such alternatives may include, for example, restrictions on movement or on access to particular services, as under the 2005 British legislation.<sup>204</sup>

Finally, the standard of non-arbitrariness should be interpreted to prohibit detentions from lasting any longer than necessary. The procedural mechanism for this is periodic judicial review.<sup>205</sup> As a substantive matter, however, it may be extraordinarily difficult to identify the point at which detention is no longer necessary, i.e., to determine whether a person who has been detained for some time would again pose a threat if released. Nevertheless, the duration of detention must be contained.<sup>206</sup> Detention enables a state to disrupt ongoing terrorist activity and, if appropriate, to develop a more considered criminal case. It may also remove a suspect from the “game” by putting him and others on notice that he is of interest to the authorities and thus rendering him unattractive as a future operative.<sup>207</sup> Over time, those interests that justify detention become less paramount and give way to the liberty interests against detention. The detaining state therefore should be required to satisfy increasingly stringent evidentiary standards to

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<sup>204</sup> See *supra* notes 162-164 and accompanying text.

<sup>205</sup> See, e.g., Human Rights Comm., *Communication No. 1090/2002: New Zealand*, ¶ 7.3, U.N. Doc. CCPR/C/79/D/1090/2002 (Nov. 6, 2003) (underscoring the importance of “regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public”); Human Rights Comm., *Concluding Observations: Republic of Moldova*, ¶ 11, U.N. Doc. CCPR/CO/75/MD A (2002) (asserting that “the detention of persons awaiting trial should also be reviewed periodically”); *Assenov v. Bulgaria*, 28 Eur. H.R. Rep. 652, 690 (1998) (“[A] detained person must be able to take proceedings at reasonable intervals before a court to challenge the lawfulness of his detention where the nature of the deprivation of liberty under consideration would require it.”); cf. Geneva Convention IV, *supra* note 34, art. 43 (requiring periodic review of the detention of protected persons in armed conflicts).

<sup>206</sup> Cf. *supra* note 112 and accompanying text.

<sup>207</sup> See THIRD CARLILE REPORT, *supra* note 165, at 17.

hold a suspect beyond incrementally set periods. For instance, short-term detention might be permitted on a reasonable belief standard, but to continue the detention in the medium- and long-term, the state would have to demonstrate by a preponderance of the evidence or by clear and convincing evidence that detention continues to be warranted.<sup>208</sup> Moreover, after a certain point (for example, two years), all or almost all detainees must be released, deported, or criminally prosecuted. To the extent that detention beyond that point is ever justifiable, it is justifiable only in truly exceptional cases—for instance, where a state has demonstrated by clear and convincing evidence that a suspect would pose a particularly serious security threat if released.

### C. *Form of Administrative Detention*

With that enhanced standard of non-arbitrariness in place, pure security-based detention should be permitted.<sup>209</sup> States gravitate toward predicated detention on criminal or immigration proceedings because those forms of detention satisfy a variety of interests (i.e., punishment or deportation, in addition to containing the security threat) and are relatively well

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<sup>208</sup> For purposes of comparison, the (indefinite) civil commitment of persons who are mentally ill is constitutionally permitted in the United States so long as both mental illness and dangerousness are established by at least clear and convincing evidence. See *Addington v. Texas*, 441 U.S. 418 (1979); see also *Jones v. United States*, 463 U.S. 354 (1983) (upholding indefinite civil commitment of a mentally ill person where it was established beyond a reasonable doubt that he committed a criminal act and by a preponderance of the evidence that he had a mental illness).

<sup>209</sup> For instance, detention is already permitted in the United States to protect the public from other hazards, including the spread of infectious diseases and dangerous acts committed by the mentally ill or by sex offenders. For a review of such non-criminal, preventative detention in the United States, see Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 183-88 (2005). The purpose of such detention, like that of security-based administrative detention, is not to punish for past acts, but to protect the public from some prospective danger (and sometimes also to rehabilitate the detainee). Notably, the U.S. Supreme Court has suggested that the preventative detention of terrorism suspects may sometimes be lawful. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court construed a statute on immigration detention not to permit indefinite detention because it was not sufficiently narrowly tailored. The Court explained that “[t]he provision authorizing detention does not apply narrowly to ‘a small segment of particularly dangerous individuals,’ say, *suspected terrorists*, but broadly to aliens ordered removed for many and various reasons . . . .” *Id.* at 691 (internal citation omitted) (emphasis added). This language suggests that indefinite immigration detention might be lawful in the United States if it is narrowly tailored, for example, to apply only to certain terrorism suspects. More recently, during the oral argument in *Boumediene v. Bush*, Justice Breyer suggested that Congress might have the authority to design a narrowly tailored system of preventative detention to contain terrorism suspects outside the immigration context. See Transcript of Oral Argument at 39, 47, 54, *Boumediene v. Bush*, (2007) No. 06-1195.



accepted in international law and practice. Yet detention predicated on future criminal or immigration proceedings may convert informally into pure security-based detention, without adequate controls.<sup>210</sup> Moreover, such detention may fail to satisfy the security and liberty interests at stake in the fight against terrorism.

For instance, security-based immigration detention responds only to a fraction of the state's security needs because it permits detention only of foreign nationals and only until the date of deportation. It therefore does not address the threat posed by a state's own nationals or by foreign nationals outside its jurisdiction, even though the security threat from both groups may be considerable.<sup>211</sup> Such detention may also fail to protect the relevant liberty interests. Detention pending deportation is generally designed as a short-term measure, so the standard for detention is often quite low.<sup>212</sup> In the counterterrorism context, however, deportation proceedings may become protracted or infeasible because of the risk of home-country mistreatment. States that hinge security-based detention on deportation proceedings thus may engage in extended detention without any rigorous demonstration of necessity. If states were instead permitted to develop systems of pure security-based detention, they could make detention decisions on the basis of the severity of the threat (and not only on the nationality of the suspect), but such decisions would be subject to controls that are unnecessary where the goal of deportation is immediately realizable. In other words, pure security-based detention would enable states to better satisfy the liberty and security interests at stake in this context.

#### D. *Relationship to the Criminal Law*

Finally, states that employ security-based administrative detention must define the boundaries between it and the criminal process so that legal standards govern who is processed through which system and when.<sup>213</sup> International law and practice currently provide almost no guidance on this

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<sup>210</sup> See *supra* Part III.

<sup>211</sup> *A v. Home Secretary* [2004] UKHL 56, [2005] 2 A.C. 68, ¶¶ 33-35 (questioning the extent to which immigration detention responds to the alleged threat, especially given the potential threat posed by a state's own nationals).

<sup>212</sup> The U.K. legislation at issue in *A. v. Home Secretary* and the Canadian legislation sustained in *Charkaoui* both permit extended detention under a reasonable belief standard. *Id.* ¶ 2; see Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 82 (Can.).

<sup>213</sup> For example, the U.S. government has been criticized for transferring detainees between the criminal and the armed-conflict systems without clear standards or controls. See John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 773, 811 (2007); Jesselyn A. Raddack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 *N.Y.U. REV. L. & SOC. CHANGE* 525, 526-28 (2005).

issue, and the questions posed are not easily answered. One question is whether administrative detention should be a last resort that is available only when the criminal law is not, or whether the availability of the criminal law should be irrelevant. The United Kingdom's 2005 legislation leans toward the former approach. Because the government must consider filing criminal charges against anyone subject to pure security-based detention, extended detention is permitted in the United Kingdom only when the criminal process is deemed unavailable.<sup>214</sup> A second question relates to the procedures for prosecuting persons who have previously been detained administratively. Should these persons be tried under the state's ordinary rules of criminal procedure, or should states develop different rules to facilitate terrorism-related prosecutions? For instance, where an administrative detainee is interrogated without the procedural safeguards afforded to criminal defendants, should the information obtained be admissible in a subsequent criminal trial, even if it would not be admissible in the trial of a more ordinary criminal defendant? Section II.C argued that states that deviate in the counterterrorism context from their ordinary rules of criminal law or procedure risk contaminating their criminal justice systems more generally. Yet a number of states have already developed special rules of criminal procedure applicable in terrorism cases.<sup>215</sup>

## VI. CONCLUSION

International practice demonstrates that, although most states have declined to detain non-battlefield terrorism suspects based on the law of armed conflict, many are looking for options for incapacitating these suspects outside the criminal process. The bipolar paradigm for thinking about non-battlefield detentions—as armed-conflict or criminal—is out of step with that practice and is mistaken as a matter of law. Human rights law permits administrative detention for reasons of national security, subject to important constraints. Those constraints are not now sufficient in the counterterrorism context. But if the law in this area is developed, administrative detention may strike the most appropriate balance between liberty and security for certain categories of terrorism detainees.

This Article articulates four broad policy goals for developing the law on security-based administrative detention in the fight against terrorism. First, detainees must be afforded prompt and meaningful legal process.

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<sup>214</sup> See *supra* notes 162-164 and accompanying text.

<sup>215</sup> For examples of states that employ special rules of criminal law or procedure in terrorism cases, see, for example, *supra* notes 144-147 and accompanying text (France); STRAW, *supra* note 141, ¶ 93 (noting Spain's "adaptations of normal procedures" in "terrorist and organized crime cases"); and C.H. Powell, *Terrorism and Governance in South Africa and Eastern Africa*, in GLOBAL ANTITERRORISM LAW & POLICY, *supra* note 57, at 555, 574-75 (noting relaxed rules of evidence in terrorism cases in Tanzania, Uganda, and Kenya).

Second, extended administrative detention is permissible only in specified circumstances—i.e., where the detainee himself poses a serious security threat, where detention is necessary to contain that threat, and where detention lasts no longer than necessary. Third, in those circumstances, security-based detention need not be tied to other legal proceedings, such as future criminal trial or deportation. And finally, any state that employs a system of administrative detention must carefully define the boundaries between it and the ordinary criminal process.

In articulating these policy goals, this Article does not purport to offer a comprehensive legislative scheme. Much still must be done to refine the international legal rules and to implement them domestically. This Article does, however, argue for shifting the debate to those questions and away from the stale armed-conflict-or-criminal divide. This shift is imperative. Transnational jihadi terrorism is here to stay, and it will increasingly be fought away from any conventional battlefield. In the absence of any legal template for dealing with non-battlefield suspects, states must choose between exposing themselves to devastating attacks and pursuing uncontrolled or ill-suited measures to contain the threat. Neither path is sustainable.