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# Detention Status Review Process in Transnational Armed Conflict: *Al Maquleh v. Gates*, and the Parwan Detention Facility

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# DETENTION STATUS REVIEW PROCESS IN TRANSNATIONAL ARMED CONFLICT: *AL MAQALEH V. GATES* AND THE PARWAN DETENTION FACILITY

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JODY M. PRESCOTT\*

## I. INTRODUCTION

From the beginning of the U.S. response to the September 2001 al Qaeda attacks upon New York and Washington, D.C., one issue which has continuously drawn the world's attention is the long-term detention by the U.S. of individuals whom it claims represent a threat to the U.S. because of their actions and links with al Qaeda or affiliated terrorist organizations. Among the questions raised in both the U.S. and the international community are whether and how long these individuals could be lawfully held, and what sort of process should be provided to determine whether they should be released from detention. Arguments as to the legal status of the detainees and the legal characterization of their respective detention sites undergird these questions. In the case of *Fadi al Maqaleh v. Gates*,<sup>1</sup> four non-U.S. detainees held by the U.S. in a military detention facility on Bagram Airfield, Afghanistan,<sup>2</sup> brought habeas corpus petitions

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<sup>1</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009).

<sup>2</sup> Formerly known as the Bagram Theater Internment Facility (hereinafter "BTIF"). As of late 2009, detention operations are now

before the D.C. District Court. In ruling on the government's motion to dismiss for lack of jurisdiction, the D.C. District Court decided that non-Afghan detainees captured outside of Afghanistan and held at the detention facility have the right to have their habeas corpus petitions heard by U.S. courts, under the U.S. Supreme Court's earlier decision regarding a Bosnian detainee held at Guantanamo Naval Station, *Boumediene v. Bush*.<sup>3</sup> On an interlocutory appeal, the D.C. Circuit Court of Appeals reversed the district court, and granted the government's motion to dismiss.<sup>4</sup> The circuit court's ruling, however, because it was on a motion to dismiss, substituted its evaluation of the factors set out in *Boumediene* for that of the district court.<sup>5</sup> Most importantly for this article, although the circuit court found in the government's favor, it specifically rejected an argument put forth by the government that the determinative factor in deciding whether habeas corpus protection extended to the detainees at the detention facility was whether the facility was subject to the *de facto* sovereignty of the U.S.<sup>6</sup>

Despite the circuit court's decision, and in light of the district court's decision to allow the petitioners to amend their habeas corpus petitions, the evolving nature of detainee

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conducted in a new, modern detention complex known as the Parwan Detention Facility.

<sup>3</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>4</sup> *Al Maqaleh v. Gates*, 605 F.3d 84 (C.A.D.C. 2010). Petitioners' joint motion for panel rehearing on grounds that the U.S. plan "to transfer the Bagram prison facility to Afghan control" undermined the Circuit Court's rationale in its decision was denied, but the Circuit Court stated that its denial did not prejudice "petitioners' ability to present this evidence to the district court in the first instance." *Al Maqaleh v. Gates*, No. 095265 (D.C. Cir. July 23, 2010). In February 2011, the District Court granted petitioners' joint motion to present this evidence. *Al Maqaleh v. Gates*, No. 06-1669 (D.D.C Feb. 15, 2011). The U.S. plan to transfer the Parwan Detention Facility to Afghan control is described in a filed declaration of the Department of Defense Deputy Assistant Secretary for Detainee Policy. Declaration of William K. Lietzau, Civil Action No. 06-CV-1669 (JDB), Dec. 17, 2010 (*hereinafter* "Lietzau Declaration"), available at <http://www.lawfare.blog.com/wp-content/uploads/2011/02/maqaleh-lietzau-declaration.pdf>.

<sup>5</sup> *Id.* at 94.

<sup>6</sup> *Id.*

operations and the importance of these issues to individual detainees suggest that there will be continuing litigation in this area. Recently, however, Afghanistan and the U.S. have agreed upon a process by which responsibility for the Parwan Detention Facility will be transferred eventually to Afghan control, possibly as early as January 2011.<sup>7</sup> Although such a transfer could moot the specific issues raised in *al Maqaleh*,<sup>8</sup> the question as to the proper standards to be applied in determining whether individuals detained by the U.S. military in the conflict with al Qaeda and affiliated groups should remain in detention would likely still be unresolved. This article is critical of both the district court and circuit court opinions, and argues that the extension of the right of habeas corpus to individuals who were apprehended outside the U.S. and who have always been held in detention outside the U.S., or in areas not so effectively under its complete control such that they are tantamount to being U.S. territory, is unwarranted under *Boumediene* and international law, and ignores the operational realities of the conflict in which the U.S. is currently engaged against al Qaeda and affiliated groups. The need for the executive to be given appropriate latitude to promulgate measures to deal with these realities, although reflected in the judicial deference traditionally

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<sup>7</sup> See Lietzau Declaration, *supra* note 4; see also Allan Cullison, *U.S. Set to Open New Afghan Prison*, WALL ST. J., Nov. 17, 2009, at A6, available at

<http://online.wsj.com/article/SB125832165575649413.html?KEYWORD=US+Set+to+Open+New+Afghan+Prison#printMode>. The task force which operates the facility has an Afghan National Army deputy commander, and has begun integrating Afghan legal processes into its operation. Over 200 detainees had been released under the new detention status review procedure as of mid-June 2010. LuCella Ball, *Update on Detainee Operations in Parwan*, ISAF, June 16, 2010, available at <http://www.isaf.nato.int/article/news/update-on-detainee-operations-in-parwan.html>.

<sup>8</sup> Once the facility is under Afghan control, detainees will be allowed to challenge their continued detention in Afghan courts using Afghan judicial procedures. *Afghan inmates can challenge detention*, SYDNEY MORNING HERALD, Jan. 12, 2010, available at <http://news.smh.com.au/breaking-news-world/afghan-inmates-can-challenge-detention-20100112-m2y3.html>.

accorded to the executive in foreign affairs,<sup>9</sup> does not mean, however, that detainees in this fight should be held indefinitely without meaningful review of their status to determine whether and when they should be released. Rather, this article argues that the new procedures set in place by the Department of Defense (hereinafter, “DOD”) to provide an enhanced review process of detainee status at the Parwan Detention Facility<sup>10</sup> are in keeping with both domestic and international law. Further, the process afforded also addresses the functional need to effectively manage the detainee population in a way that minimizes the potential for radicalization and despair among the detainees,<sup>11</sup> reduction in the logistical costs of maintaining a detention facility in an active combat area, and promotion of the efficient collection of intelligence and the safety of military personnel in the field. Even if circumstances regarding the Parwan Detention Facility evolve to the point where the detention status review mechanism is no longer an issue of U.S. law because detainees are no longer in U.S. custody, the new Parwan Detention Facility procedures provide a level of process, transparency and regularity that make them a model for future U.S. military detention operations in the continuing fight against al Qaeda and its affiliates.

This article will first set out a brief history and description of the airfield at Bagram and the detention facilities there.

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<sup>9</sup> See *Regan v. Wald*, 104 S.Ct. 3026, 3038 (1984).

<sup>10</sup> Enclosure to Letter from Phillip Carter, Deputy Assistant Secretary of Defense for Detainee Policy, to Senator Carl Levin, (July 14, 2009), in “Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan” [hereinafter “Detainee Review Procedures”] at 1, available at <http://www.scotusblog.com/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf>. The circuit court based its decision on the procedures that were in place at the time of the government’s appeal, not the new Detainee Review Procedures. *Al Maqaleh v. Gates*, 605 F.3d 84, 96 n.4 (C.A.D.C. 2010).

<sup>11</sup> Once it became apparent to Iraqi detainees that there was a transparent process that resulted in releases from detention, the degree of misconduct by the detainees decreased markedly, and there was a noticeable increase in morale amongst them. Interview with Lieutenant Colonel Mark Wellman, former Rule of Law and Political/Military Advisor to Task Force 134 (Iraq Detention Operations) (Mar. 23, 2010).

Second, it will explore the standards under international law and the implementation of national regulations by which the detention status of individuals detained by U.S. military forces is determined, when such individuals may be released from detention, and the significance of the evolving concept of transnational armed conflict to these determinations. Third, it will review the U.S. Supreme Court's decision in *Boumediene*, explore the Court's analysis in reaching its decision, and identify what the Court found to be the most important factors in terms of applying its analysis to these types of detainee cases. The fourth part of the article will do the same for the D.C. District Court's decision in *al Maqaleh*, and will specifically note where the decision appears to misapply the *Boumediene* analysis and to find facts not in keeping with the actual situation of the Parwan Detention Facility. Fifth, this article will review the D.C. Circuit Court's formulation of the *Boumediene* analysis in the same fashion. Sixth, this article will describe the new status determination procedures in detail and explain why they are sufficient to obviate the need for the extension of the Suspension Clause<sup>12</sup> to the Parwan Detention Facility. Finally, were the Suspension Clause deemed applicable to the Parwan Detention Facility, this article will explain why these procedures would be an adequate substitute for habeas corpus proceedings, and why they could serve as an adequate model for current and future U.S. military detention operations outside the U.S. in cases of transnational armed conflict between the U.S. and non-state actors.

## II. THE PARWAN DETENTION FACILITY

The Parwan Detention Facility is located on Bagram Airfield, which is approximately 40 miles northeast of Kabul, Afghanistan. The airfield was a major staging area for Soviet

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<sup>12</sup> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require it." U.S. CONST., art. I, §9. The writ was suspended, for example, during Shays Rebellion in Massachusetts in 1786 and during the Civil War in 1863. WILLIAM WINTHROP, WINTHROP'S MILITARY LAW AND PRECEDENTS, 2D ED., 1291-94 (1896).

forces following the Soviet invasion in 1979.<sup>13</sup> During the Soviet occupation significant environmental damage occurred, and during the course of the Soviet war against the *mujahedeen* and the subsequent conflict between the *mujahedeen* themselves, the airfield suffered significant physical damage including large amounts of unexploded ordnance and uncleared minefields.<sup>14</sup> U.S. and allied troops began using the airfield in November 2001,<sup>15</sup> and in early 2002, began using an aircraft machine shop as a detention facility, which in time became the BTIF.<sup>16</sup> A new set of buildings, the Parwan Detention Facility, was completed in 2009 and significantly improved the living standards for the detainees held there.<sup>17</sup> The International Committee of the Red Cross (ICRC) regularly visits the Bagram Airfield detention operations, and has been doing so since 2002.<sup>18</sup> Apparently at the suggestion of the ICRC, visitations and

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<sup>13</sup> *Afghanistan – Airfields*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/afghanistan/airfield.htm> (last visited Feb. 10, 2010).

<sup>14</sup> *Environmental Conditions at Bagram Airfield – Information for Health Care Providers (HCPs)*, CHPPM (June 2004), [http://chppm-www.apgea.army.mil/news/BagramAirfield\\_ServiceMembers.pdf](http://chppm-www.apgea.army.mil/news/BagramAirfield_ServiceMembers.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>.

<sup>17</sup> *Bagram Detention Center (Afghanistan)*, *Times Topics*, N.Y. TIMES, Nov. 16, 2009, available at [http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram\\_air\\_base\\_afghanistan/index.html?scp=1-spot&sq=bagram%20detention%20center&st=cse](http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html?scp=1-spot&sq=bagram%20detention%20center&st=cse).

<sup>18</sup> International Committee of the Red Cross, *Persons detained by the US in relation to armed conflict and the fight against terrorism – the role of the ICRC, U.S., Operational update*, ICRC, Oct. 26, 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-states-detention> (last visited Feb. 10, 2010). *See also* Golden, *supra* note 16; Declaration of Colonel James W. Gray, *Al Maqaleh v. Robert Gates, et al.*, Civil Action No. 06-CV-01669 (JDB), Mar. 3, 2007, at 4, ¶ 10 [hereinafter “Gray Declaration”], available at <http://graphics8.nytimes.com/packages/pdf/topics/bagram/Affidavit.pdf>. “Additionally, representatives of the Government of Afghanistan have access to Afghan detainees at the BTIF.” Gray Declaration, at 4, ¶ 10.

video teleconferences have been set up to allow detainees to meet or at least converse with their family members.<sup>19</sup>

Serious cases of detainee mistreatment occurred early in the BTIF's existence, and two detainees died from brutal maltreatment while in custody in 2002.<sup>20</sup> The investigations into these deaths resulted in a number of courts-martial, some of which ended in convictions.<sup>21</sup> Since 2005, detainees have been treated in accordance with the Detainee Treatment Act (DTA), which, *inter alia*, restricts interrogation methods to those found in approved U.S. Army doctrine and sets out prohibited practices in terms of detainee treatment.<sup>22</sup> More recent allegations have been made in the accounts of former detainees, who claim they were subjected to harsh treatment while being held in an interrogation facility not part of the Parwan Detention Facility and not open to ICRC inspection.<sup>23</sup> Currently, the Parwan Detention Facility holds approximately 750 detainees, the majority of whom are apparently Afghan nationals captured within Afghanistan.<sup>24</sup> A small number,

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<sup>19</sup> Persons detained by the US in relation to armed conflict and the fight against terrorism – the role of the ICRC, *supra* note 18.

<sup>20</sup> Golden, *supra* note 16.

<sup>21</sup> Holly Manges Jones, *New charges filed in Afghan prisoner abuse investigation*, JURIST, Sept. 22, 2005, available at <http://jurist.law.pitt.edu/paperchase/2005/09/new-charges-filed-in-afghan-prisoner.php>.

<sup>22</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006 (2005) [hereinafter “DTA”], available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&.”>, referencing Field Manual 34-52: *Intelligence Interrogation*, Department of the Army (1992) [hereinafter “FM 34-52”], available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>. The treatment standards are set out in FM 34-52, at 1-7 through 1-8, *id.*

<sup>23</sup> Joshua Partlow and Julie Tate, *2 Afghans allege abuse at U.S. site*, WASH. POST, Nov. 28, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/27/AR2009112703438.html>.

<sup>24</sup> Alissa J. Rubin and Sangar Rahmi, *Bagram Detainees Named by U.S.*, N.Y. TIMES, Jan. 17, 2010, at A6, available at <http://www.nytimes.com/2010/01/17/world/asia/17afghan.html?scp=1&q=bagram%20detainees%20named%20by%20us&st=cse>.



including Mr. al Maqaleh, are non-Afghan nationals who may have been brought there from third countries.<sup>25</sup>

The presence of U.S. forces in Afghanistan occurs under one of two different legal regimes, or status of forces agreements (SOFAs). The status of military personnel who are part of Operation Enduring Freedom (OEF), the original U.S. mission in Afghanistan,<sup>26</sup> is set out in an exchange of diplomatic notes between the U.S. and Afghanistan.<sup>27</sup> Under this arrangement, Afghanistan agrees to waive criminal jurisdiction over these personnel, and to allow U.S. personnel and equipment freedom of movement into and within Afghanistan to conduct operations without the need to pay taxes and duties or to obtain visas.<sup>28</sup> Specifically, U.S. personnel are “accorded a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy, and are immune to Afghan criminal jurisdiction.<sup>29</sup> The Parwan Detention Facility is considered an OEF mission. The other legal regime governing the presence of U.S. personnel is found in the Military Technical Agreement (MTA) between the International Security Assistance Force (ISAF) and Afghanistan.<sup>30</sup> The majority of U.S. forces in Afghanistan, and almost all of the international forces, are covered by the MTA.<sup>31</sup> Under its terms, Afghanistan has

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<sup>25</sup> See *Gray Declaration*, *supra* note 18, at 6-7, ¶¶ 18-20. According to Colonel Gray, Mr. al Maqaleh was captured in Zabul Province, Afghanistan. *Id.* at 7, ¶ 20.

<sup>26</sup> Richard W. Stewart, *The United States Army in Afghanistan – Operation Enduring Freedom*, Oct. 2001-Mar. 2002, CENTER FOR MILITARY HISTORY, CHM PUB. 70-83-1 (2003).

<sup>27</sup> Embassy of the United States of America, Diplomatic Note No. 202, entered into force May 28, 2003, 2002 U.S.T. LEXIS 100 [hereinafter “Diplomatic Note No. 202”].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (Interim Administration), Jan. 4, 2002, MINISTRY OF DEFENCE, *available at* <http://www.operations.mod.uk/fingal/isafmta.pdf>. [hereinafter “MTA”].

<sup>31</sup> International Security Assistance Force, Troop numbers and contributions, <http://www.isaf.nato.int/en/troop-contributing-nations/index.php> (last visited Feb. 10, 2010). [hereinafter “Troop Numbers”].

waived criminal, tax and customs jurisdiction over ISAF forces and has afforded them complete freedom of movement across its borders and within the country.<sup>32</sup> The U.S. occupies Bagram Airfield under a lease with the Afghan government, which allows its use until the completion of the U.S. mission.<sup>33</sup> The lease allows the U.S. to essentially sublet portions of the airfield for use by others, including ISAF,<sup>34</sup> and the ISAF Regional Command East headquarters and other subordinate ISAF units are located on the airfield.<sup>35</sup>

Bagram Airfield is an austere location, and its concentration of military personnel and equipment make it a frequent target for Al Qaeda and Taliban attacks.<sup>36</sup> Accordingly, the U.S. maintains a very strong security posture in guarding the airfield. As U.S. forces have steadily increased in number during the course of the conflict, Bagram Airfield has grown in size and importance to the allied effort.<sup>37</sup> Many civilian workers from Afghanistan are employed on the airfield, and Afghanistan retains jurisdiction over these individuals and other non-OEF and non-ISAF personnel.<sup>38</sup> As noted *supra*, an effort has begun to transfer the responsibility for the Parwan Detention Facility to Afghan

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<sup>32</sup> MTA, *supra* note 30, Art. 4, ¶ 3; Annex A, Section 1, (1)-(3).

ISAF personnel have the status of experts on mission. *Id.*

<sup>33</sup> *Gray Declaration*, *supra* note 18, Exhibit 1, Lease Agreement, ¶ 4.

<sup>34</sup> *Id.* at ¶ 3.

<sup>35</sup> Troop numbers, *supra* note 31. “Each nation separately controls access to its respective compound on the Airfield.” *Gray Declaration*, *supra* note 16, at 3, ¶ 7.

<sup>36</sup> FoxNews.com, *Bagram in Afghanistan Turning Into ‘Boom Town,’* ASSOCIATED PRESS, Nov. 2, 2009, <http://www.foxnews.com/story/0,2933,570994,00.html> (last visited Feb. 10, 2010); Sami Yousafzai, *2 U.S. Soldiers Killed in Bagram Attack*, CBS NEWS, June 21, 2009, <http://www.cbsnews.com/stories/2009/06/21/terror/main5101364.shtml?tag=mncol;lst;1>; Joseph Giordano, *Bagram attacks highlight security concerns*, STARS AND STRIPES, Mar. 7, 2009, <http://www.stripes.com/news/bagram-attacks-highlight-security-concerns-1.88970> (mortar round hits detention facility).

<sup>37</sup> Chuck Crumbo, *Bagram Airfield keeps growing*, THE STATE, Oct. 19, 2009, <http://www.thestate.com/2009/10/19/989515/bagram-airfield-keeps-growing.html>.

<sup>38</sup> See *Gray Declaration*, *supra* note 18, at 3, ¶¶ 7, 8.

control, but the timing of the eventual turnover will likely depend not only on the politics of the Afghan-U.S. alliance but also on the need to properly train and equip Afghan personnel to perform their duties.<sup>39</sup>

### III. DETENTION REVIEW STANDARDS AND PROCESSES

The transnational conflict involving al Qaeda and its affiliates spans the globe, and has resulted in the continuing deployment of U.S. armed forces on a commensurate scale. Many commentators believe, however, that the proper way to deal with such non-state actors is through law enforcement methods and techniques rather than the use of military armed force.<sup>40</sup> For example, some commentators and scholars question the use of Predator drones by the U.S. to launch missiles against members of al Qaeda or the Taliban outside Afghanistan, such as in Pakistan<sup>41</sup> and particularly in Yemen<sup>42</sup> as unlawful uses of force. This position is not without merit under widely accepted perspectives of international law.<sup>43</sup>

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<sup>39</sup> Peter Graff, *Afghans agree to take over U.S. prison at Bagram*, REUTERS, Jan. 9, 2010, available at <http://www.reuters.com/article/idUSTRE60811N20100109>. The Afghan National Army Military Police School recently graduated its first class of over 200 corrections officers, who are to work with U.S. soldiers at the Parwan Detention Facility. Bob Everdeen, *First Afghan Corrections Officers Graduate in Parwan*, ISAF, May 7, 2010, available at <http://www.isaf.nato.int/en/article/news/first-afghan-corrections-officers-graduate-in-parwan.html>.

<sup>40</sup> See Ved. P. Nanda, *International Law Implications of the United States' 'War on Terror,'* 37 DENV. J. INT'L L. & POL'Y, 513, 513-14 (2009).

<sup>41</sup> *Alston says drone attacks on Pakistan-Afghanistan border may violate international law*, N.Y.U. SCHOOL OF LAW NEWS, available at [http://www.law.nyu.edu/news/ALSTON\\_UN\\_GENERALASSEMBLY](http://www.law.nyu.edu/news/ALSTON_UN_GENERALASSEMBLY).

<sup>42</sup> Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 326 (Spring 2003).

<sup>43</sup> Arguably, if such killings are not conducted by armed forces operating under international humanitarian law, they are extrajudicial killings, and possibly represent a resurrection of the practice of outlawry in an international context. The drones in question apparently belong to the CIA, are operated by CIA employees, engage targets based upon a CIA conducted targeting process, and are authorized by a Presidential

As shown by al Qaeda attacks even before September 2001,<sup>44</sup> however, the effects<sup>45</sup> generated by al Qaeda and associated organizations can be equivalent to those ordinarily resulting from the use of a state military force conducting an armed attack. Further, al Qaeda's operations are decentralized on an international scale, and rely a great deal upon the internet for coordination, training, recruitment, and operations.<sup>46</sup> These operations can all occur and effects can be created and facilitated at great distances beyond areas in which opposing forces are actually exchanging small arms fire within a certain set of national borders. Concerns about the effects that could be created through the use of cyber-terrorism in particular highlight how vastly different the

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legal finding that the individuals are a continuing threat to U.S. persons or interests. Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. TIMES, Jan. 31, 2010, available at <http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31>. As noted *infra* note 48, a U.S. justification for these actions could be national self-defense, although they are not conducted by combatants as required by Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43, June 8, 1977, 1125 U.N.T.S 609 [hereinafter "AP I"]. This does not mean that the CIA employees would be war criminals under AP I, rather, they would be unprivileged combatants subject to possible domestic criminal jurisdiction for these killings. If the common law of war were to be applied instead, they could possibly be tried as war criminals for these unprivileged killings. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 693-95 (Thomas, J., dissenting). See also note 49 *infra*.

<sup>44</sup> See Josh White, *Al-Qaeda Suspect Says He Planned Cole Attack*, WASH. POST, Mar. 20, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/19/AR2007031900653.html>.

<sup>45</sup> In the context of the developing military operational concept of Effects Based Approaches to Operations, an "effect" is a change in the perception, behavior or capability of a target. Effects can be generated either "kinetically," such as through a missile strike, or "non-kinetically," through the use of information operations, for example. Jody M. Prescott, *The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations*, 27 PENN STATE INT'L L. REV. 125, 127-35 (2008).

<sup>46</sup> See Dorothy E. Denning, *Terror's Web: How the Internet is Transforming Terrorism*, 3-5, to be published in HANDBOOK ON INTERNET CRIME, (Y. Jewkes and M. Yar, eds. 2009), available at <http://faculty.nps.edu/dedennin/publications/Denning-TerrorsWeb.pdf>.

modern international security environment is, in an operational sense, from the one in which the 1949 Geneva Conventions were negotiated.<sup>47</sup> In many instances, only the resources available to armed forces may have the capability to effectively engage these non-state actors who often find haven in troubled or failed states. Given the speed and stealth with which modern terrorists can generate catastrophic armed force-like effects, states might claim the use of armed force against non-state actors in areas beyond any kinetic battlefield to be valid measures in self-defense.<sup>48</sup>

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<sup>47</sup> See, e.g., Clay Wilson, *Botnets, Cybercrime, and Cyberterrorism: Vulnerabilities and Policy Issues for Congress*, CRS REPORT FOR CONGRESS, Jan. 29, 2009, CRS-2-26.; Victoria Baranelsky, *What is cyberterrorism? Even experts can't agree*, THE HARVARD LAW RECORD, Nov. 6, 2009, available at <http://www.hlrecord.org/news/what-is-cyberterrorism-even-experts-can-t-agree-1.861186>, See also Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1095 (2008).

<sup>48</sup> The CIA's apparent use of drones to conduct such attacks is reported to be "based on a legal finding signed after the Sept. 11 attacks by then-President George W. Bush," and the standard used to decide whether to target an individual is whether that person is "deemed to be a continuing threat to U.S. persons or interests." Miller, *supra* note 43. The issue of whether national self defense is available as a legal basis for conducting such attacks against non-state actors within the territory of a third country when the non-state actors are not in effective control of third state territory is unsettled. The U.S. position, as set out by U.S. State Department Legal Advisor Harold Koh, however, is that ". . . [I]t is the considered view of this administration . . . that targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles (UAVs), comply with all applicable law, including the laws of war . . . As recent events have shown, Al Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself . . . In U.S. operations against Al Qaeda and its associated forces – including lethal operations conducted with the use of unmanned aerial vehicles – great care is taken to adhere to these principles [distinction and proportionality] in planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum." Sheila Ward, *U.S. State Dept. Legal Adviser [sic] Lays Out Obama Administration Position on engagement, "Law of 9/11,"* AMERICAN SOCIETY OF INTERNATIONAL

Justifying such measures on this basis, however, does not settle questions regarding the applicable standards governing kinetic and non-kinetic uses of force, including detention, in these situations.<sup>49</sup> From an empirical perspective, certain commentators have noted that over the course of this lengthy conflict there has been a convergence between the international humanitarian law detention review standards and processes that one would find in international armed conflict, and the human rights-oriented detention review standards and processes that one would find in domestic or even international criminal law proceedings.<sup>50</sup> This convergence has been incremental, and responsive in large part to international politics and litigation in U.S. courts.<sup>51</sup> This convergence is more than just a question of politics and judicial decisions on the reach of executive power – treaty and customary international humanitarian law provide little detail as to what the standards and processes for detention review are, and therefore allow states a significant degree of latitude in fashioning their own measures.<sup>52</sup>

Traditionally, the degree to which detainees were entitled to have the status of their detentions reviewed (if at all) depended in large part upon the classification of the armed conflict during which they were being held. In certain cases, however, classification itself is controversial. For purposes of determining the applicability of Common Articles 2<sup>53</sup> and 3<sup>54</sup>

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LAW, Mar. 25, 2010, *available at*

<http://www.asil.org/files/KohatAnMtg100325.pdf>.

<sup>49</sup> The CIA drone attacks are apparently conducted using the same international humanitarian law principles that military forces would use, such as necessity and proportionality. *Id.* However, non-military operatives conducting such operations would appear to be unprivileged combatants, and the killing of another in armed conflict without having privileged status would appear to be a war crime under U.S. law. *See* Charlie Savage, "Deal Averts Trial in Disputed Guantanamo Case," *NYTimes.com*, Oct.25, 2010, available at <http://www.nytimes.com/2010/10/26/us/26gitmo.html>.

<sup>50</sup> Chesney & Goldsmith, *supra* note 47, at 1080-82.

<sup>51</sup> *Id.* at 1112-22.

<sup>52</sup> *Id.* at 1090.

<sup>53</sup> "Art 2. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war

of the 1949 Geneva Conventions<sup>55</sup> respectively, international armed conflicts are defined as those occurring between

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or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” International Committee of the Red Cross, International Humanitarian Law - Treaties, Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (last visited Mar. 20, 2010).

<sup>54</sup> “Art 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

*Id.*

<sup>55</sup> 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 the Armed Forces at Sea, Aug. 12, 1949, 6

states.<sup>56</sup> Non-international armed conflicts are defined as all others occurring within the boundaries of a state.<sup>57</sup> For certain state actors and commentators, the modern phenomenon of transnational armed groups like al Qaeda, capable of applying armed force on the scale of state armed forces, challenges the usefulness of this distinction, and leaves the applicable standards governing the use of armed force and treatment of detainees captured during such conflicts in question.<sup>58</sup>

Others believe that the existence of groups such as al Qaeda does not mean that the current structure of international humanitarian law requires revision to provide an appropriate legal regime regulating the use of force and ensuring the protection of civilians in today's security environment. Rather, customary international humanitarian law applies when terrorists engage in international or non-international armed conflict.<sup>59</sup> This view, however, appears premised on the use of an unrealistically high threshold of what constitutes armed force, and the view that unless a transnational armed group is actually directly participating in hostilities within the borders of a country suffering a non-

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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"]; and 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"].

<sup>56</sup> International Committee of the Red Cross, International Humanitarian Law – Treaties and Documents, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 Aug. 1949, Commentary, Part I: General Provisions, Article 3 – Conflicts Not of an International Character, at 30, <http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument> (last visited Feb. 10, 2010) [hereinafter "ICRC Art. 3 Commentary"].

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., *An interview with John Yoo, author of 'The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11,'* U. CHI. PRESS, <http://www.press.uchicago.edu/Misc/Chicago/960315in.html> (last visited Mar. 22, 2010).

<sup>59</sup> See Gabor Rona, *Interesting Times For International Humanitarian Law: Challenges from the 'War on Terror,'* 27 FLETCHER F. WORLD AFF. 55, 57-63 (Summer/Fall 2003).



international armed conflict, the group and its members are not lawful targets of armed force.<sup>60</sup> The idea that customary international humanitarian law should apply in circumstances other than international or non-international armed conflict is seen as “either wittingly or unwittingly calling for expansion of the concept of armed conflict, or the expansion of the scope of application of humanitarian law beyond armed conflict.”<sup>61</sup> This perspective presumably would then turn to human rights law to fill in the gaps between the two kinds of armed conflict recognized in the 1949 Geneva Conventions.<sup>62</sup>

Review of the negotiation history of the 1949 Geneva Conventions, however, shows that the scope of armed conflict was understood to be greater than the eventual definitions of international and non-international armed conflict, and that the focus on these two types of armed conflict was not the result of a deliberate decision to define armed conflict. Rather, they represent the types of armed conflict to which the party-states were willing to apply the provisions of the conventions. The commentaries show that the original position of the International Committee of the Red Cross (ICRC) going into the diplomatic conference preceding the negotiations on the 1949 Geneva Conventions would have applied Common Article 3 across national borders, in “all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion.”<sup>63</sup>

This position was based in part upon the ICRC’s successful efforts to achieve recognition of international humanitarian principles in Upper Silesia by the parties to the

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<sup>60</sup> See *id.* at 63-64. State actors might be inclined to reject this approach because it complicates the application of armed force which might be the most effective way they have to deal with the threat of a modern transnational armed group like al Qaeda.

<sup>61</sup> *Id.* at 63.

<sup>62</sup> See Chesney & Goldsmith, *supra* note 47, at 1093; see also *Undue Process, An Examination of Detention and Trials of Bagram Detainees in April 2009*, HUMAN RIGHTS FIRST (Nov. 2009), <http://www.humanrightsfirst.info/pdf/HRF-Undue-Process-Afghanistan-web.pdf>.

<sup>63</sup> ICRC Art. 3 Commentary, *supra* note 56, at 30.

ethnic conflict in that area after the First World War.<sup>64</sup> Upper Silesia, a part of Germany prior to the First World War, was to become part of Poland under the Treaty of Versailles.<sup>65</sup> Strong German protests and open armed violence between the German and Polish paramilitary groups and ethnic populations across the respective national borders and throughout the region scuttled this plan,<sup>66</sup> and a plebiscite was held in 1921 to determine the new German-Polish frontier.<sup>67</sup> A final border was negotiated between the two countries, but the sovereignty of each within its portion of Upper Silesia was restricted by a complex League of Nations minority rights protection regime designed to ease the transition to full state sovereignty over a 15 year period.<sup>68</sup> Before it was finally resolved, the conflict in Upper Silesia seems to have met all of the conditions of conflict for which the ICRC was seeking Common Article 3 coverage. It involved non-regular German and Polish forces, often committing terrorist acts across international borders; primarily Protestant Germans versus primarily Catholic Poles, in an area in which the Germans had purposefully sought to increase the numbers of German inhabitants; German inhabitants who themselves occupied most positions of authority and prestige in the area and owned most of the more valuable economic infrastructure.<sup>69</sup>

In sum, prior to the 1949 Geneva Conventions, it can be argued that the ICRC and the party-states were fully aware both in practice and in negotiation that forms of transnational armed conflict (and armed conflict resolution) existed that were consistent with neither the final Common Article 2

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<sup>64</sup> *Id.* at 26. The ICRC description of the conflict as a “civil war” does not really capture the transnational character of this conflict in terms of support provided by Germany to the ethnic German forces and the lack of effective Polish control over many parts of the area. *See* note 66, *infra*.

<sup>65</sup> *See* GEORGES KAECKENBEECK, *THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA: A STUDY IN THE WORKING OF THE UPPER SILESIAN SETTLEMENT 1922-1937*, at 25 (1942).

<sup>66</sup> RICHARD M. WATT, *BITTER GLORY, POLAND AND ITS FATE 1918-1939*, at 153-60 (1998).

<sup>67</sup> KAECKENBEECK, *supra* note 65, at 5-7.

<sup>68</sup> *Id.* at 11-12, 25.

<sup>69</sup> *See* WATT, *supra* note 66, at 153-60.

definition of international armed conflict nor the Common Article 3 definition of non-international armed conflict. The view that there are other forms of transnational conflict outside those covered by the 1949 conventions is bolstered by the fact that in Additional Protocol I to the 1949 Geneva Conventions, the parties agreed to expand the armed conflicts to which Common Article 2 would apply to “include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”<sup>70</sup> This was not a legal decision -- it was a question of international politics in creating new law, and practical recognition on the part of the international community that such armed conflicts were already occurring. Expanding the coverage of Common Article 2 did not fuel an increase in the number of such conflicts being fought, but it did create a legal regime which encouraged more humane treatment for the combatants and civilians involved in these conflicts. The current conflict between the U.S. and its state actor allies against al Qaeda and its affiliated groups has led certain writers to propose the concept of “transnational armed conflict,” that is, non-international armed conflict not restricted to the borders of a particular country, as a means to bring accepted customary international humanitarian legal norms regarding the treatment of individuals and the use of force to bear on all parties involved.<sup>71</sup>

If a conflict can be classified as international armed conflict, questions as to detainee status and what detention review procedures should be used may be resolved easily in many cases. For example, deciding whether a detainee should receive prisoner of war status under Geneva Convention III is

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<sup>70</sup> International Committee of the Red Cross, International Humanitarian Law – Treaties & Documents, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Part I, Article 1, *available at* <http://www.icrc.org/ihl.nsf/WebART/470-750004?OpenDocument>.

<sup>71</sup> GEOFFREY S. CORN, VICTOR M. HANSEN, DICK JACKSON, ERIC TALBOT JENSEN, MICHAEL W. LEWIS, JAMES A. SCHOETTLER, JR., *THE WAR ON TERROR AND THE LAWS OF WAR* 1-36 (2009).

often fairly easy to determine, using fairly simple procedures. A status determination hearing is required only when there is a question as to whether an individual is a prisoner of war.<sup>72</sup> Historically, since those engaged in international armed conflict were ordinarily fighting for a state actor while in uniform and carrying military identification and because of the treatment incentives attaching to prisoner of war status, the need for such hearings in international armed conflicts was expected to be the exception rather than the rule.<sup>73</sup> Additionally, one would expect the error rate in making such determinations to be low given the objective criteria against which most detainees would be judged, such as the wearing of a uniform or possession of military identification.<sup>74</sup> Less formal proceedings in this context have the added benefit of not requiring classified information being made available to the detainee, thereby reducing potential compromises to the security and integrity of intelligence.<sup>75</sup> Further, because prisoners of war could be held until the conflict was finished, there wasn't really a need for any sort of periodic review to determine whether individuals should be released.

Implementation of an appropriate procedure to make these determinations is a national matter, and varies to some degree between different nations.<sup>76</sup> If, for example, during the course of an international or non-international armed conflict, U.S. forces captured an individual who had engaged in a belligerent act and there were a question as to whether the person was a prisoner of war, the individual would be initially treated as a prisoner of war and then afforded a status

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<sup>72</sup> Art. 5, Geneva Convention III, *supra* note 55.

<sup>73</sup> Chesney & Goldsmith, *supra* note 47, at 1088-89.

<sup>74</sup> *Id.* at 1088. During the First Gulf War, U.S. forces held 1,196 art. 5, Geneva Convention III, hearings for individuals whose prisoner of war status was uncertain. Of these, 886 individuals were found not be eligible for prisoner of war status. FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR, at 578 (Apr. 1992), *available at* <http://www.ndu.edu/library/epubs/cpgw.pdf>. When factored into the approximately 64,000 Iraqi prisoners of war taken by the coalition forces, the error rate in detaining civilians as prisoners of war was about .01 percent. *Id.* at 294.

<sup>75</sup> Chesney & Goldsmith, *supra* note 47, at 1088-89.

<sup>76</sup> *Id.* at 1091.

determination hearing before a tribunal as required by article 5, Geneva Convention III, (held in accordance with AR 190-8, a joint military regulation governing status determination procedures).<sup>77</sup> The expected minimum standard of treatment is specified in the regulation: all detainees receive humane treatment; no detainee shall suffer “murder, torture, corporal punishment, mutilation, [being made a hostage], sensory deprivation, collective punishments, execution without trial by proper authority, [or any] cruel and degrading treatment.”<sup>78</sup> Further, all detainees are to “be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind.”<sup>79</sup> The detainee’s case would be heard by a three member tribunal composed of three commissioned officers, at least one of whom is in the rank of major or above.<sup>80</sup> The senior officer serves as the president of the tribunal, and a military attorney is ordinarily appointed as the recorder.<sup>81</sup>

The procedures afford detainees significant process rights. A written record is made of the proceedings, the proceedings are open unless security would be compromised, and detainees are advised of their rights beforehand, including the right to an interpreter.<sup>82</sup> Detainees may attend all open sessions, call reasonably available witnesses, question witnesses, submit documentary evidence, address the tribunal, or chose to remain silent.<sup>83</sup> Once the tribunal votes on the case, using a standard of preponderance of the evidence, its determination is forwarded to the primary legal advisor of the officer exercising general court-martial

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<sup>77</sup> ARMY REGULATION 190-8, MILITARY POLICE – ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, Headquarters, Departments of the Army, the Navy, the Air Force, and the Marine Corps, Oct. 1, 1997, at ¶ 1-6a, b [hereinafter “AR 190-8”]. The regulation is joint and therefore applicable to all of the services.

<sup>78</sup> *Id.* at ¶ 1-5b.

<sup>79</sup> *Id.* at ¶ 1-5c.

<sup>80</sup> *Id.* at ¶ 1-6c.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at ¶ 1-6e(2)-(5).

<sup>83</sup> AR 190-8, *supra* note 77, at ¶ 1-6e(6)-(10).

convening authority, so that the record can be reviewed for legal sufficiency if prisoner of war status is not granted.<sup>84</sup> If determined to be a prisoner of war, and therefore under Common Article 2, Geneva Convention III, the individual could be held until the international armed conflict had finished.<sup>85</sup> If not found to be a prisoner of war, but instead a civilian who should be interned for reasons of operational security, the person will be detained by U.S. forces under Geneva Convention IV, and afforded Common Article 3 treatment.<sup>86</sup> The individual could be held only as long as necessary, that is, for as long as the individual posed a threat to the U.S. forces.<sup>87</sup> Otherwise, the individual would be released or transferred to a domestic authority. Innocent civilians are to be returned to their homes immediately.<sup>88</sup> In dealing with members of transnational armed groups like al Qaeda, however, even a prisoner of war determination is potentially controversial, because nations such as the U.S. which have not ratified Additional Protocol I to the 1949 Geneva Conventions may be more likely to apply the stricter standard under Geneva Convention III to determine whether an individual is entitled to prisoner of war status.<sup>89</sup>

For detainees held in non-international armed conflicts, Common Article 3 of the 1949 Geneva Conventions sets the baseline for physical treatment but does not specify how detainee status should be determined or reviewed. As a

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<sup>84</sup> *Id.* at ¶ 1-6*f*, *g*. A General Court-Martial Convening Authority is an individual authorized by Art. 22a, Uniform Code of Military Justice, 10 U.S.C. §822a (2008), to convene a general court-martial. These individuals include the President, the Secretary of Defense, commanders of divisions or separate brigades, and “any other commanding officer in any of the armed forces when empowered by the President.” *Id.*

<sup>85</sup> *Id.* at ¶ 1-6*e*(10)(*a*).

<sup>86</sup> *Id.* at ¶ 1-6*e*(10)(*d*).

<sup>87</sup> Accordingly, a periodic review is required in the context of the foreign force acting as an occupying power. Art. 78, Geneva Convention IV, *supra* note 55.

<sup>88</sup> AR 190-8, *supra* note 77, at ¶ 1-6*e*(10)(*c*).

<sup>89</sup> See Chesney & Goldsmith, *supra* note 47, at 1093-94 n.70 (explaining the different standards under Geneva Convention IV and Additional Protocol I, and the U.S. position on the applicable standard); see also FM 34-22, *supra* note 20, at 1-10.

matter of implementing U.S. policy, the decision to apply AR 190-8<sup>90</sup> to all detainees regardless of the nature of the conflict provides for an expansion in the humanitarian treatment afforded by Common Article 3. Practically, this is consistent with the aim of the theory of transnational armed conflict, but some might argue that this expands the scope of armed conflict beyond what international humanitarian treaty law, and possibly customary law, allows.<sup>91</sup> Accordingly, some might argue that the process afforded under AR 190-8, although greater than that expected under international law in cases of international armed conflict, is not sufficient from an international human rights law perspective for the detention of individuals who are believed to be a part of al Qaeda.

The fight against al Qaeda and its affiliates has gone on since September 2001 and shows no sign of ending soon.<sup>92</sup> Arguments for detaining individuals who are part of or who provide support to such organizations for extended periods of time find strong justification in the number of released Guantanamo detainees who have made their way back to the battlefield.<sup>93</sup> The Bush Administration's decision to create the detention facility at Guantanamo to hold individuals believed to be part of or to have supported al Qaeda in its attacks against the U.S. was based in large part on the assessment that non-U.S. national detainees would not have access to U.S. courts to challenge their continued detention or potential trials before military commissions, because rights under the U.S. Constitution would not extend to them on the territory of a foreign state.<sup>94</sup> In 2004, the U.S. Supreme

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<sup>90</sup> AR 190-8, *supra* note 77.

<sup>91</sup> *See* Rona, *supra* note 59, at 57-63.

<sup>92</sup> *See* Chesney & Goldsmith, *supra* note 47, at 1100.

<sup>93</sup> *See* Amanda Scott, *Pentagon: More Former Guantanamo Detainees Returning to Battlefield*, VOANEWS, Jan. 14, 2009, available at <http://www.voanews.com/english/news/a-13-2009-01-14-voa12-68809502.html>. Many released detainees have not returned to the battlefield. *See* Gavin Lee, *Guantanamo Guards Reunited with Ex-Inmates*, BBC NEWS MAG., Jan. 12, 2010, available at <http://news.bbc.co.uk/2/hi/8452937.stm>.

<sup>94</sup> *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (quoting a memorandum written by Deputy Assistant Attorneys General Patrick F. Philbin and John C. Yoo which indicated

Court found otherwise in *Rasul v. Bush*, in which it held that because the habeas corpus statute did not distinguish between U.S. citizens and non-citizens, and because of the special degree of control exercised by the U.S. over Guantanamo, federal courts had jurisdiction to hear habeas petitions from non-citizen Guantanamo detainees.<sup>95</sup> This right, albeit on constitutional grounds, was later reaffirmed in *Boumediene*, which cleared the path for Guantanamo detainees to challenge their detention in federal courts using the right of habeas corpus, despite statutory amendments to the contrary in the Military Commission Act (MCA).<sup>96</sup>

#### IV. *BOUMEDIENE V. BUSH*

Mr. Lakhdar Boumediene, a native of Algeria, immigrated to Bosnia during the time of the Wars of Yugoslavian Succession. In the fall of 2001, on suspicion that he and five other former Algerian nationals were plotting to bomb the U.S. and British embassies in Sarajevo, the six were detained and investigated by Bosnian law enforcement and judicial authorities. They were released for lack of evidence, but subsequently detained by U.S. personnel and brought to Guantanamo Naval Station.<sup>97</sup> After a complex appellate history involving the six men's petitions for writs of habeas corpus, the U.S. Supreme Court granted certiorari in 2007 after it had originally denied review only three months earlier.<sup>98</sup> There were four primary issues before the court:

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Guantanamo Naval Station was outside U.S. federal court jurisdiction); see also CBSNews.com, *Obama Upends Bush, Will Close Guantanamo*, Jan. 22, 2009, <http://cbsnews.com/stories/2009/01/22/politics/100days/main4746421.shtml> (last visited Feb. 24, 2010).

<sup>95</sup> *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

<sup>96</sup> *Boumediene*, 553 U.S. at 771.

<sup>97</sup> *Lakhdar Boumediene – The Guantanamo Docket*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/detainees/10005-lakhdar-boumediene/documents/2/pages/661#4>.

<sup>98</sup> See *Boumediene*, 553 U.S. at 733-34.



1. Did the MCA's<sup>99</sup> amendment of 28 U.S.C. §2241 to remove habeas corpus jurisdiction from the federal courts for detainee cases like Boumediene's actually effect this change in the statute?<sup>100</sup>
2. If the MCA did effect this change, was it in conformance with the Suspension Clause of the Constitution?<sup>101</sup>
3. If this change was unconstitutional, did the Combatant Status Review Tribunal (CSRT) procedures set out in the DTA<sup>102</sup> provide an otherwise adequate substitute for habeas corpus proceedings?<sup>103</sup>
4. If these procedures were inadequate, could Boumediene and his fellow petitioners challenge these procedures without having first gone through them?<sup>104</sup>

The Court found that the language of §7 of the MCA amended the statutory right of habeas corpus under 28 U.S.C. §2241 to prevent the hearing of even pending habeas corpus petitions from detainees held at Guantanamo, and that this was confirmed by the legislative history.<sup>105</sup> This amendment, however, was unconstitutional. In reviewing the history of Guantanamo, the Court found that the base was a remnant of the U.S. occupation of Cuba after the Spanish-American War in 1898.<sup>106</sup> Through a lease executed between the U.S. and the newly independent Cuba in 1903, the U.S. disclaimed formal sovereignty over the base, but was allowed to exercise

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<sup>99</sup> 28 U.S.C.A. § 2241(e) (Supp. 2007).

<sup>100</sup> Boumediene v. Bush, 553 U.S. 723, 735-39 (2008).

<sup>101</sup> *Id.* at 739-40.

<sup>102</sup> DTA, *supra* note 22, at §§ 1001–1006.

<sup>103</sup> *Boumediene*, 553 U.S. at 770-73.

<sup>104</sup> *Id.* at 768.

<sup>105</sup> *Id.* at 736, 760.

<sup>106</sup> Boumediene v. Bush, 553 U.S. 723, 752-53 (2008).

“complete jurisdiction and control.”<sup>107</sup> In 1934, the two countries entered into a treaty which effectively gave Cuba “no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.”<sup>108</sup> In keeping with the holding in *Eisentrager v. Johnson*,<sup>109</sup> a detainee case from post-World War II Occupation Germany, the Court looked to the objective degree of control exercised by the U.S. over the naval station, and found that the U.S. “continued to maintain the same plenary control it had enjoyed since 1898.”<sup>110</sup> In the Court’s view, therefore, “Guantanamo Bay . . . is no transient possession. In every practical sense, Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”<sup>111</sup> Looking again to *Eisentrager* to help analyze a situation in which non-citizens are claiming the right of habeas corpus and the U.S. did not have *de jure* sovereignty over the detention site, the Court found that

at least three factors are relevant in determining the reach of the Suspension Clause: (1) The citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.<sup>112</sup>

Unlike the petitioners in *Eisentrager*, Boumediene and his fellow petitioners contested their status, which had not been determined through the rigorous adversarial proceedings

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<sup>107</sup> *Id.* at 745-46 (citing Lease of Lands for Coaling and Naval Stations, art III, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418).

<sup>108</sup> *Id.* at 746 (citing Treaty Defining Relations with Cuba, art III, May 29, 1934, 48 Stat. 1683, T.S. No. 866).

<sup>109</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 769-79 (1950); *see also Boumediene*, 553 U.S. at 762-64 (2008).

<sup>110</sup> *Boumediene*, 553 U.S. at 752.

<sup>111</sup> *Id.* at 755.

<sup>112</sup> *Boumediene v. Bush*, 553 U.S. 723, 753 (2008).

affording significant due process.<sup>113</sup> The Court noted that “the procedural protections afforded the detainees in the CSRT hearings [were] far more limited, and we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”<sup>114</sup> Interestingly, the adequacy of the status determination process was also used later in the Court’s analysis once it had found that the Suspension Clause applied to Guantanamo,<sup>115</sup> but at that point adequacy was addressed to determine whether the CSRT process including the review of its findings by the Circuit Court provided an adequate substitute for habeas corpus proceedings.<sup>116</sup> At this initial stage of the Court’s analysis, however, the analytical function of evaluating process adequacy was geared toward determining whether the existing processes obviated the need for habeas corpus review.<sup>117</sup> As to the nature of the detention site, the Court found Guantanamo was very different from Occupation Germany.<sup>118</sup> The U.S. shared control of Occupation Germany with the other Allies, with the intent to return it to civilian German control; its control was “neither absolute nor indefinite,” as compared to U.S. control of Guantanamo.<sup>119</sup> Further, the Court found no significant negative impacts in allowing the Guantanamo petitioners the writ. Unlike Occupation Germany, with the continuing threat of irregular enemy military action and the need for massive reconstruction and aid, the Court noted that

[t]he United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 754 (the CSRT process potentially provided less process than that required by AR 190-8, in appearing to allow greater use of coerced statements, for example); *see also* Chesney & Goldsmith, *supra* note 47, at 1112 n.156 (2008).

<sup>115</sup> *Boumediene*, 553 U.S. at 766-68 (2008).

<sup>116</sup> *Id.* at 753.

<sup>117</sup> *Id.* at 753, 756.

<sup>118</sup> *Boumediene v. Bush*, 553 U.S. 723, 754-55 (2008).

<sup>119</sup> *Id.* at 754.

various points, to house migrants and refugees temporarily. At present, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. [citation omitted]. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.<sup>120</sup>

Finally, the Court noted that there was “no indication . . . that adjudicating a habeas corpus petition would cause friction with the host government.”<sup>121</sup> Cuban courts were without jurisdiction over the U.S. military personnel or the detainees, and the U.S. was not accountable to another “sovereign for its acts on the base” so long as it met the terms of the lease.<sup>122</sup> The Court noted that “[w]ere that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”<sup>123</sup> The constitutional right to habeas corpus was therefore available to those detained at Guantanamo unless appropriately suspended – something the MCA “[did] not purport” to effect.<sup>124</sup>

The Court then turned to the issue of whether the DTA provided an adequate substitute for habeas corpus procedures. Without deciding the merits of petitioners’ argument that the CSRT mechanism was deficient in providing sufficient due process under the DTA, the Court found that the limitations placed upon the Circuit Court of Appeal’s review of CSRT

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<sup>120</sup> *Id.* at 755.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 755-57.

<sup>123</sup> *Id.*

<sup>124</sup> *Boumediene v. Bush*, 553 U.S. 723, 756 (2008).

determinations rendered such reviews inadequate.<sup>125</sup> In particular, the Court noted

[f]or the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. . . . Here that opportunity is constitutionally required.<sup>126</sup>

Because the DTA limited the Court of Appeals' review to determining whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense..."<sup>127</sup> and the legislative history showed that this limited degree of judicial review was precisely what the Congress intended, the Court found this standard of error correction authority had not been met.<sup>128</sup> Further, because of the circumstances of the case, including the length of time that the petitioners had already spent in detention, the Court found that they need not challenge these procedures in the D.C. Circuit Court before pursuing their habeas corpus actions in the District Court.<sup>129</sup> Accordingly, the decision of the D.C. Circuit Court was reversed and remanded. Since the Court's decision, Guantanamo detainees have in general been very successful in their habeas corpus litigation, in large part because the government has been unable to show by a preponderance of the evidence that they were part of al Qaeda or associated

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<sup>125</sup> *Id.* at 767-268.

<sup>126</sup> *Id.* at 764.

<sup>127</sup> *Id.* at 768.

<sup>128</sup> *Id.* at 768.

<sup>129</sup> *Id.* at 769.

groups.<sup>130</sup> This includes Boumediene, who at present has found a home in France, where he has been joined by his family.<sup>131</sup> Likely encouraged by these results, detainees at the Parwan Detention Facility are seeking to use habeas corpus proceedings to challenge their detention in Afghanistan, arguing that the Parwan Detention Facility is equivalent to Guantanamo under the holding in *Boumediene*.<sup>132</sup>

#### V. *AL MAQALEH V. GATES*, DISTRICT COURT OPINION

In 2009, the U.S. District Court for the District of Columbia applied the *Boumediene* analysis to habeas corpus petitions brought by four detainees now presumably at the Parwan Detention Facility. Each detainee was a foreign national apparently captured outside Afghanistan and brought to the BTIF, where they had been held for at least six years at the time of the court's hearing of the case.<sup>133</sup> Two of the

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<sup>130</sup> Del Quentin Wilber, *2008 habeas ruling may pose snag as U.S. weighs indefinite Guantanamo detentions*, WASH. POST, Feb. 13, 2010, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/12?AR2010021204911.html?hpid=moreheadlines>. For example, in its decision in *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009), the D.C. District Court rejected “substantial support” or “direct support” of al Qaeda or the Taliban as proper bases for continued detention, although the court found evidence of this could be relevant to determining whether an individual belonged to those organizations or directly participated in hostilities. *Id.* at 70. Interestingly, the government position before the district court on authority to detain was that the rules applicable to international armed conflict should apply by analog. *Id.* at 67. The district court noted that the AUMF as interpreted in caselaw includes the power to detain, and that this was “consistent with the law of war principles governing non-international conflicts.” *Id.* at 70. Arguably, the district court implicitly recognizes the concept of transnational armed conflict as an analytical tool to help it find the rules that should apply in what is strictly neither an international nor a non-international armed conflict.

<sup>131</sup> *France accepts Boumediene in action to expedite closure of Guantanamo*, <http://www.wilmerhale.com/about/news/newsDetail.aspx?news=1586> (last visited Feb. 24, 2010).

<sup>132</sup> Joint Brief for the Petitioners-Appellees, at 26-31, *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783 (C.A.D.C. 2010).

<sup>133</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 207 (D.D.C. 2009).

detainees, including Mr. al Maqaleh, claimed to be Yemeni, one claimed he was Tunisian, and one claimed to be an Afghan.<sup>134</sup> The district court first noted that *Boumediene* had invalidated the MCA's elimination of habeas corpus jurisdiction for petitions by detainees only with regard to Guantanamo.<sup>135</sup> Accordingly, the issue for the court was "whether the statute withdrawing habeas corpus jurisdiction is constitutional as applied to the[ ] detainees held at Bagram," given the degree of U.S. control over the airfield (essentially the same issue that confronted the Court in *Boumediene*).<sup>136</sup> For purposes of analysis, the district court separated the three factors that the U.S. Supreme Court had looked at in evaluating whether the Suspension Clause was applicable to Guantanamo into six factors: detainee citizenship, detainee status, nature of the apprehension site, nature of the detention site, adequacy of the status determination process and "practical obstacles inherent in resolving the petitioner's entitlement to the writ."<sup>137</sup> It then added a seventh factor to be considered in evaluating the others: the reasonableness of "the length of a petitioner's detention without adequate review."<sup>138</sup> As to the first three factors, the district court found that the Parwan Detention Facility petitioners were the same as the Guantanamo petitioners.<sup>139</sup> None were U.S. citizens, all had been determined to be enemy combatants, and all had been apprehended outside the U.S.<sup>140</sup> The district court found that the U.S. Supreme Court had not really analyzed these factors to any great depth in *Boumediene*, and therefore found only the issue of the apprehension site to be important. Unlike the situation in Guantanamo, where all the detainees had been apprehended outside the base but then brought there, the Parwan Detention Facility contained both detainees like the

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<sup>134</sup> *Id.* at 209.

<sup>135</sup> *Id.* at 214.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 215.

<sup>138</sup> *Id.* at 216.

<sup>139</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 218 (D.D.C. 2009).

<sup>140</sup> *Id.*

petitioners and individuals taken in Afghanistan itself. The district court found this weighed in the petitioners' favor.<sup>141</sup>

#### A *Site of Detention*

The district court then focused on the three remaining, and in its opinion, dispositive factors. Regarding the nature of the detention site, the district court examined the legal status of the U.S. presence in Afghanistan, and found that the nature of U.S. control at Bagram was essentially the same as at Guantanamo – that is, “near-total operational control.”<sup>142</sup> The district court based this finding on the terms of the lease for Bagram, which provided the U.S. with exclusive use during its occupancy, as well as assignment and reversion authority, and on the freedom from Afghan control afforded by the exchange of diplomatic notes defining the status of U.S. forces in Afghanistan.<sup>143</sup> Although the district court noted that U.S. control over Bagram was less plenary than that found at Guantanamo,<sup>144</sup> and that Bagram could not be considered “not abroad,”<sup>145</sup> it found the freedom of movement and the immunity from host nation criminal jurisdiction manifested the very high “objective degree of control” enjoyed by the U.S. at Bagram, in the district court’s words, “practically absolute.”<sup>146</sup> This factor, in the district

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<sup>141</sup> *Id.* at 221.

<sup>142</sup> *Id.* at 222.

<sup>143</sup> *Id.* at 222-23.

<sup>144</sup> *Id.*

<sup>145</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 231 (D.D.C. 2009).

<sup>146</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 223 (D.D.C. 2009).

Often, the district court focuses on the degree of control exercised at the detention facility itself to substantiate its finding of U.S. control sufficient to trigger application of the Suspension Clause, rather than that exercise over the airfield as a whole. *See, e.g., id.* at 223-24. In *Boumediene*, the U.S. Supreme Court did not focus on the control exercised at the Guantanamo detention facility in assessing whether U.S. control was of a degree to make it part of U.S. territory – rather the court looked to the installation as a whole. *See* note 115, *supra*. It is illogical to suggest that a nation responsible for running a detention facility in active theater of combat would accept anything less than total operational control for security and safety purposes – but that does not necessarily make it part of the United States for purposes of the Suspension Clause. Further, the



court's view, did "not weigh strongly against extension" of the Suspension Clause<sup>147</sup>

This finding appears to be based on two mistaken premises. First, the district court appears to have confused operational control, which may be quite extensive but is ordinarily temporary and mission-related, with objective control in a continuing *de facto* sovereign sense. The status of forces arrangement grants a limited waiver of Afghan authority over OEF forces for mission purposes, as these agreements typically do. This waiver is based on the Afghan-U.S. alliance, and although it gives great latitude to OEF forces conducting their missions, it does not for example waive continuing Afghan jurisdiction over local workers or even U.S. contractors at the airfield.<sup>148</sup> Further, the U.S. occupancy of Bagram is not intended to be permanent,<sup>149</sup> and at time of the district court's decision had existed for less than a decade. A status of forces arrangement between two countries is a very real manifestation of the host nation's sovereignty, and the mission focus of the limited waiver of jurisdiction. Given the ongoing conflict with al Qaeda and the Taliban, the latitude afforded OEF forces is necessarily greater for example than that accorded to NATO allies who maintain military establishments within the U.S. under the

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district court appears to have misread the factual record when it states that "it is the United States, not U.S. allies, that detains people at the Bagram Theater Internment Facility and that operates (and hence fully controls) that prison facility and its occupants, which was not the case at Landsberg." *Al Maqaleh*, 604 F. Supp. 2d at 224. Landsberg Prison was designated as War Criminal Prison No. 1 by the U.S. Army commander in Germany in 1946, it housed individuals convicted by various U.S. tribunals, and it was operated by the U.S. until it was returned to German control in 1958. *See also Case Closed*, TIME, June 18, 1951, (execution of SS officers convicted by U.S. tribunals at the direction of Landsberg's U.S. commandant) available at <http://www.time.com/time/printout/0,8816,814963.html> (last visited Mar. 23, 2010).

<sup>147</sup> *Al Maqaleh*, 604 F. Supp. 2d at 231.

<sup>148</sup> *Id.* at 223.

<sup>149</sup> *Id.* at 224-25; *see* Brief for Respondent-Appellants at 18-21, *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783 (C.A.D.C. 2010).

NATO Status of Forces Agreement,<sup>150</sup> but very similar in many of the covered subject areas, such as taxation, importation of equipment, and the leasing of host nation facilities..<sup>151</sup>

This confusion is also shown by the district court's rejection of the government's argument that extending the reach of the Suspension Clause to Bagram was tantamount to holding that the Constitution applied world-wide,<sup>152</sup> despite having earlier noted the government's argument that the degree of control exercised by the U.S. over Bagram was consistent with that found at any overseas U.S. base.<sup>153</sup> According to the district court, in keeping with *Boumediene*, "[t]he Suspension Clause only applies where the United States has the degree of control over a site that would permit meaningful review of an individual's detention following a 'reasonable amount of time.'"<sup>154</sup> Not only does the language in *Boumediene* not support such a standard, but given the world-wide dispersal of U.S. bases overseas, this standard in effect realizes the government's concern regarding the breadth of the Suspension Clause's potential application under such a holding. The second mistaken premise appears to be the district court's determination that setting out a spectrum of control using the conditions at Guantanamo and

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<sup>150</sup> Compare Diplomatic Note 202, ¶2, *supra* note 27 ("The Embassy proposes, without prejudice to the conduct of ongoing military operations by the United States, that such personnel be accorded a status equivalent to that" given to the embassy's administrative and technical staff under the Vienna Convention on Diplomatic Relations), with Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, London, June 19, 1951 (hereinafter "NATO SOFA"), art. VIIIb ("The authorities of the receiving state will have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.").

<sup>151</sup> Compare Diplomatic Note 202, ¶¶ 2-6, 7-8, *supra* note 27, with NATO SOFA, arts. III-VI, IIX-XIV, *supra* note 150.

<sup>152</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 231 (D.D.C. 2009).

<sup>153</sup> *Id.* at 222. Again, the district court appears to have confused "near-total operational control," which would ordinarily apply to any U.S. overseas base, with the very special degree of practically sovereign control exercised by the U.S. over Guantanamo.

<sup>154</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 231 (D.D.C. 2009).

the Landsberg Prison in Occupied Germany in which the *Eisentrager* petitioners were held as its terminus points was useful in evaluating conditions at Bagram. In sum, the district court found the control exercised by the U.S. at the Parwan Detention Facility to be much more like that at Guantanamo than in Germany.<sup>155</sup> The question that should have been addressed is not where the Parwan Detention Facility falls on such a spectrum, but whether the degree of control exercised by the U.S. is such that the Parwan Detention Facility essentially becomes U.S. territory to which the Suspension Clause would apply.

### B. Adequacy of Process

The district court noted a number of features of the Bagram status review process that made it less rigorous than even the Guantanamo CSRT process found insufficient by the Supreme Court, and found it therefore inadequate.<sup>156</sup> These deficiencies included ‘no recourse to a neutral decision-maker’ on status determinations; no access to even a personal representative before the hearing board for the petitioners; only an opportunity to submit a written statement to the board rather than to speak; no right for the petitioners to see the evidence which inculpated them; and uncertain evidentiary standards.<sup>157</sup> The district court found this factor “strongly favors petitioners’ claim for habeas protection.”<sup>158</sup> The district court rejected the government’s argument that adequacy of the status determination process was only relevant once it was determined that the degree of U.S.

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<sup>155</sup> *Id.* at 224.

<sup>156</sup> *Id.* at 227.

<sup>157</sup> *Id.* at 226-27. Under the Enemy Combatant Review Board process, status reviews were ordinarily conducted within 75 days of capture and every six months thereafter. The Board was composed of five commissioned officers who evaluated each case and made a majority vote recommendation to the general court-martial convening authority. Decisions were “based on information derived from a variety of sources, including classified intelligence and testimony from individuals involved in the capture and interrogation of the detainee.” *Gray Declaration, supra* note 18, at 4-5.

<sup>158</sup> *Al Maqaleh*, 604 F. Supp. 2d at 226-27.

control over the detention site was so great that it became U.S. territory to which the Suspension Clause would apply.<sup>159</sup> The district noted that the *Boumediene* opinion specifically “enumerated ‘adequacy of the process’ as one of the factors that determine whether the Suspension Clause applies.”<sup>160</sup>

Although the district court was correct that status determination process adequacy was a specific factor considered by the *Boumediene* Court in assessing whether the Suspension Clause should apply, it would appear that the district court erred in appreciating the limited function that analysis of this factor had in the initial part of the *Boumediene* analysis. The *Boumediene* Court looked at it first only to see whether there was no need for habeas corpus review, not to determine whether in fact the Suspension Clause should apply.<sup>161</sup> That deeper analysis of the sufficiency of the process occurred only after the special nature of the U.S. jurisdiction over Guantanamo had been established.<sup>162</sup>

### C. Practical Obstacles

With regard to the practical obstacles that would militate against extending the Suspension Clause to the Parwan Detention Facility, the district court noted that Bagram was in an active war zone and often the subject of insurgent attack.<sup>163</sup> However, the high degree of control exercised by the U.S. over the base meant that it would be able to conduct rigorous status determination procedures as it had traditionally done in areas of operations, and that modern video teleconferencing capabilities reduced the need for moving detainees to habeas corpus hearings.<sup>164</sup> Further, the

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<sup>159</sup> *Id.* at 226.

<sup>160</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 226 (D.D.C. 2009).

<sup>161</sup> *Boumediene v. Bush*, 128 S.Ct. 2229, 765-67 (2008). Although the U.S. Supreme Court had noted deficiencies in the Guantanamo CSRT process, it had based its finding of the entire process’s inadequacy on the nature of the review afforded to the Circuit Court in its review of the CSRT’s status determination rather than the CSRT process itself.

<sup>162</sup> *Id.* at 764-68.

<sup>163</sup> *Al Maqaleh*, 604 F. Supp. 2d at 228.

<sup>164</sup> *Id.*

extra burden of dealing with the logistical challenges would fall primarily upon the “lawyers and administrative personnel involved, not on those who would otherwise be on the battlefield.”<sup>165</sup> Any witnesses, for example, would have information dating back six years to the time of the petitioners’ apprehensions, and therefore would not involve personnel currently involved in operations.<sup>166</sup> Further, potential friction between the U.S. and the host government would be avoided by not affording the one Afghan petitioner, Wazir, the ability to contest his detention through a habeas corpus proceeding.<sup>167</sup> The district court also noted the length of time which the petitioners had been held, and that if the Government was “truly concerned about the logistical obstacles and burdens associated with affording habeas review to these few petitioners at Bagram, transfer to a non-battlefield location remains an option.”<sup>168</sup>

The district court appears to underestimate the logistical difficulties that would flow from holding habeas corpus hearings in a war zone. Even if lawyers and administrative personnel are primarily the ones directly involved in such hearings, and the number of potential petitioners is small because the holding in *al Maqaleh* only applies to non-Afghan nationals apprehended outside Afghanistan, these additional personnel will require logistical and life support, and additional security. Setting up lengthy video teleconferences impacts bandwidth required for actual combat operations. Further, potential petitioners would have little to lose were they to falsely claim that they had been apprehended outside Afghanistan – under *al Maqaleh* they would appear to at least get a habeas hearing. The district court’s decision also appears to unrealistically downplay the possibility of friction between the U.S. and Afghanistan regarding the use of a U.S. civilian judicial hearing concerning detainees of mutual security concern. The flow of foreign fighters into Afghanistan from across the Muslim

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<sup>165</sup> *Id.*

<sup>166</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 229 (D.D.C. 2009).

<sup>167</sup> *Id.* at 230.

<sup>168</sup> *Id.* at 230, n.21.

world is well documented,<sup>169</sup> as is the attendant flow of financial and materiel resources to al Qaeda and the Taliban insurgents.<sup>170</sup> The foreign fighters in particular are viewed as particularly brutal in their tactics against Afghan civilians, a perception which is quite telling given the demonstrated disregard for civilian casualties by the Taliban.<sup>171</sup> Regardless of their nationalities and sites of apprehension, Afghanistan could in fact have a pronounced security interest in the Bagram petitioners, as well as a perception of Afghan sovereignty being disrespected through the use of habeas corpus hearings involving petitioners detained in Afghanistan.<sup>172</sup>

#### D. District Court's Conclusion

After evaluating and balancing all of these factors, the district court found “that the Bagram detainees in these cases are virtually identical to the Guantanamo detainees in *Boumediene*, and the circumstances of their detention are quite similar as well.”<sup>173</sup> The district court included its seventh factor, the length of time the detainees had been held without an adequate detention status hearing, in its

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<sup>169</sup> Tom Coghlan, *Foreign Fighters flood in to Join Afghanistan's Arab Insurgents*, TIMESONLINE, June 17, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article6514933.ece>; David Rohde, *Rising Violence in Afghanistan: Foreign Fighters of Harsher Bent Bolster Taliban*, SPIEGEL ONLINE INT'L, Oct. 30, 2007, <http://www.spiegel.de/international/0,1518,514352,00.html>.

<sup>170</sup> Camile Tawil, *Taliban Funding Traced to Gulf Countries*, CENTRAL ASIA ONLINE, Feb. 12, 2010, [http://centralasiaonline.com/cocoon/caii/xhtml/en\\_GB/features/caii/features/pakistan/2010/02/12/feature-03](http://centralasiaonline.com/cocoon/caii/xhtml/en_GB/features/caii/features/pakistan/2010/02/12/feature-03).

<sup>171</sup> Rohde, *supra* note 169.

<sup>172</sup> See, e.g., *Karzai admits government is corrupt*, METRO. CO.U.K., Nov. 9, 2009, <http://www.metro.co.uk/news/world/765287-karzai-admits-government-is-corrupt> (last visited Feb. 24, 2010); *Afghanistan: Miliband visit to Kabul with Condoleeza Rice*, FOREIGN AND COMMONWEALTH OFFICE (Feb. 8, 2008), available at [http://www.fco.gov.uk/resources/en/news/2008/02/fco\\_hp\\_not\\_070208\\_milibandkabul](http://www.fco.gov.uk/resources/en/news/2008/02/fco_hp_not_070208_milibandkabul).

<sup>173</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 232 (D.D.C. 2009).

analysis.<sup>174</sup> The district court noted that in keeping with “the kind of practical, functional analysis the Supreme Court has mandated in *Boumediene*,” if potential friction with Afghanistan were too great, or the government decided to “provide greater process in determining the status of the detainees, the balance of factors could shift against extension of the Suspension Clause.”<sup>175</sup> The existing status determination procedures, however, gave less process than even that afforded to Guantanamo detainees, and therefore were not an adequate substitute for habeas corpus proceedings. In view of its balancing of the *Boumediene* factors, the district court held “that the Suspension Clause extends to three of the four petitioners at Bagram,” and the MCA’s elimination of habeas corpus jurisdiction in their cases was unconstitutional.<sup>176</sup>

#### *E. Assessment of the District Court’s Holding*

Although the district court used the factors set out in *Boumediene* to determine whether the Suspension Clause reached the Parwan Detention Facility, its methodology in assessing these factors appears inconsistent with that used by the U.S. Supreme Court. First, although the district court properly assessed the first three factors in the *Boumediene* analysis to not be of great significance, it did appear to substantially value these factors in its determination that the Guantanamo detainees and the Parwan Detention Facility detainees were practically identical. This high degree of identity appears to have been important in the district court’s decision to allow the extension of the Suspension Clause to the non-Afghan petitioners. Second, the district court appears to have improperly weighted the adequacy-of-process factor in the threshold determination as to whether the Suspension Clause applied in this case. Third, the district court did not assess the nature of the detention site properly. The *Boumediene* opinion relied upon the *Eisentrager* example of Landsberg Prison in an illustrative fashion, not as a definitive

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<sup>174</sup> *Id.* at 235.

<sup>175</sup> *Id.* at 231-32.

<sup>176</sup> *Id.* at 232.

terminus on a spectrum against which to compare detention sites. In having done so, the district court misread the importance the U.S. Supreme Court placed on the very special nature of *de facto* sovereign control maintained by the U.S. over Guantanamo in finding that the Suspension Clause extended there. Fourth, the district court appears to have glossed over the significance of the practical obstacles in holding habeas corpus hearings for detainees located in a war zone, both in terms of the logistical burdens on the deployed units who are already strained to provide adequate life support services for personnel and fight Al Qaeda at the same time, and the potential friction between the U.S. and Afghanistan that could result from granting even non-Afghan detainees the right to present habeas corpus petitions to U.S. civilian courts. For these reasons, the district court's decision should be overturned on appeal.<sup>177</sup>

Obscured in part perhaps through its inclusion as an evaluation factor among several, the U.S. Supreme Court's concern that individuals could be detained by executive order indefinitely without the benefit of an impartial hearing to determine their status should not be overlooked. Extending habeas protection to just a small class of detainees within the larger detainee population at the Parwan Detention Facility on the basis of non-Afghan nationality, while allowing those who are of Afghan nationality to be subject to indefinite detention would not seem to meet this concern.<sup>178</sup> As

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<sup>177</sup> See Brief for Respondent, *supra* note 149, at 30-52. In its brief to the D.C. Circuit Court of Appeals, the U.S. noted that an additional factor that weighed against extending habeas corpus to detainees at the Parwan Detention Facility was the potential for invocation of federal courts' habeas corpus jurisdiction simply by falsely claiming that they had been captured outside of Afghanistan. *Id.* at 21-22.

<sup>178</sup> The district court noted that although "such a result would be anomalous," it would be even more anomalous to "permit the Executive 'to switch the Constitution on or off at will' merely by deciding who will be held where," that is, to purposefully hold detainees in particular locations to avoid application of the Suspension Clause. *Al Maqaleh*, 604 F. Supp. 2d at 216. It is arguably within the government's discretion in combat operations abroad to determine where it will hold detainees. See *Munaf v. Geren*, 128 S.Ct. 2207, 2218 (2008); whether particular constitutional rights accrue to such detainees is a separate question.



*Boumediene* suggests through its weighing of the adequacy-of-process factor, and as the district court noted in its conclusion in *al Maqaleh*, the executive has both the ability and the flexibility to devise a process which meets the Court's concerns as to the substance of what is required process-wise to detain individuals in the current, transnational armed conflict. Perhaps acting on these implicit invitations, the Obama Administration has recently put into effect a revised status determination process for detainees held at the Parwan Detention Facility.<sup>179</sup>

#### VI. *AL MAQALEH V. GATES*, CIRCUIT COURT OPINION

The D.C. Circuit Court began its analysis by reviewing the legislative and litigative history of the issue of habeas corpus for detainees held as a result of the conflict with al Qaeda and its affiliates up to the U.S. Supreme Court's decision in *Boumediene*.<sup>180</sup> Rather than apply the six or seven factors that the district court had used in its analysis, the circuit court instead focused on the three factors stated by the U.S. Supreme Court: detainee citizenship and status, and the adequacy of the process by which status was determined; nature of the apprehension and detention sites; and what practical obstacles complicated the resolution of whether the detainee was entitled to the writ.<sup>181</sup> Before applying *Boumediene* to the petitioners' case, however, the circuit court first disposed of what it viewed as the untenable extreme positions advocated by each party as to whether jurisdiction existed. As to the government's position that *Boumediene* only applied to areas of *de facto* sovereignty such as Guantanamo, the circuit court noted that the U.S. Supreme Court had not decided *Eisentrager* solely on the basis of sovereignty, but also upon the practicalities of the situation in Occupied Germany – a method of analysis continued in *Boumediene*.<sup>182</sup> Further, the U.S. Supreme Court

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<sup>179</sup> See Detainee Review Procedures, *supra* note 10.

<sup>180</sup> *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783, at \*2-8 (C.A.D.C. 2010).

<sup>181</sup> *Id.* at \*8.

<sup>182</sup> *Id.*

in *Boumediene* had “rejected the Government’s reading of *Eisentrager* because the meaning of the word ‘sovereignty’ in the *Eisentrager* opinion was not limited to the ‘narrow technical sense’ of the word and could be read ‘to connote the degree of control the military asserted over the facility.’”<sup>183</sup> Finally in *Boumediene*, the U.S. Supreme Court had concluded that such a limited interpretation of *Eisentrager* would be inconsistent with the “functional approach to questions of territoriality” it had taken in cases both before and after *Eisentrager*.<sup>184</sup> The D.C. Circuit Court likewise rejected petitioners’ argument that leasing a military base would be “sufficient to trigger the extraterritorial application of the Suspension Clause” or at least the apprehension and detention situs factor.<sup>185</sup> The circuit court noted that counsel for the petitioners had been unable at oral argument to distinguish Bagram Airfield from other military installations in this regard, and that adopting this position would potentially extend the Suspension Clause not just to military facilities but other Government leased facilities around the world as well.<sup>186</sup>

In applying the first *Boumediene* factor, the circuit court found that as to citizenship, status, and status determination, the petitioners were no different than the detainees at Guantanamo – that is, they had been labeled as enemy aliens through a process that afforded even less process than the inadequate Guantanamo status determination procedures had.<sup>187</sup> This factor therefore weighed in petitioners’ favor.<sup>188</sup> As to the second factor, the nature of the detention situs, the circuit court found the degree of *de facto* U.S. control over Bagram Airfield to be much less than that which exists over Guantanamo, given the U.S. relationship with Afghanistan and the lack of intent to make permanent use of the

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at \*9.

<sup>186</sup> *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783, at \*9 (C.A.D.C. 2010).

<sup>187</sup> *Id.* at \*10.

<sup>188</sup> *Id.*

airfield.<sup>189</sup> Although not determinative in the circuit court's view, this factor weighed in favor of the Government.<sup>190</sup> The third and final *Boumediene* factor, "the practical obstacles inherent in resolving the prisoner's entitlement to the writ," also weighed in the Government's favor. The circuit court noted that unlike Occupied Germany in *Eisentrager*, Afghanistan was an active combat theater, and therefore "all of the attributes of a facility exposed to the vagaries of war are present in Bagram."<sup>191</sup> The circuit court also found that conducting habeas hearings for Bagram detainees would have significant negative operational impacts,<sup>192</sup> and could also tend to aggravate relations with Afghanistan.<sup>193</sup> Weighing all three factors, and especially the third factor,<sup>194</sup> the circuit court concluded that "the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."<sup>195</sup>

Although the circuit court's application of the *Boumediene* factors appears less complex than the district court's approach, in essence the district court focused on the same points as being important: adequacy of status determination, nature of detention situs, and practical obstacles to holding habeas hearings. The circuit court's approach in applying the factors takes a more holistic approach to the facts, however, and is more in keeping with the functional approach set out by the U.S. Supreme Court in *Eisentrager* and *Boumediene*. For example, where the district court looked only to the degree of operational control the U.S. exercises over Bagram Airfield to determine that it was basically the same as Guantanamo, the circuit court looked at the broader picture of the relationship between the U.S. and

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<sup>189</sup> *Id.* at \*11.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at \*11-12.

<sup>192</sup> *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783, at \*12-13 (C.A.D.C. 2010).

<sup>193</sup> *Id.* at \*13.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*12.

Afghanistan to determine the situations were actually quite different. Further, whereas the district court evaluated obstacles from the narrow perspective of actually conducting habeas hearings themselves, the circuit court looked to the significant negative operational impact of such hearings and their potential for damage to the alliance between the U.S. and Afghanistan.

Certain aspects of the opinion are troubling, however. First, the circuit court, like the district court, does not appear to appreciate the threshold role played in the initial part of the *Boumediene* analysis by the adequacy of the status determination process. Second, its emphasis on the third factor, the practical obstacles, in effect makes it the most significant of the three in conducting the *Boumediene* analysis. This would seem to be a question of typical common-law justiciability, rather than one of constitutional justiciability or jurisdiction.<sup>196</sup> Third, the circuit court held out the possibility that another factor could be added to the three *Boumediene* factors it had applied: whether the Government had detained an individual at a location specifically to avoid any judicial review of Government detention decisions.<sup>197</sup> The circuit court found that petitioners' arguments in this regard were not substantiated in the present case, and it therefore made "no determination of the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation."<sup>198</sup> Avoiding judicial review was one reason Guantanamo was initially selected by the Bush Administration,<sup>199</sup> but avoiding the application of U.S. domestic law to an individual already protected under

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<sup>196</sup> See *El-Shifa Pharmaceutical Industries Company and Salah el Din Ahmed Mohammed Idris v. U.S.*, No. 07-5174, 2010 LEXIS 11585 \*10-12 (C.A.D.C. 2010) (discussion of justiciability related to the constitutional scheme of separation of powers, such as with political questions, versus ordinary justiciability concepts such as ripeness and mootness).

<sup>197</sup> *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783, at \*13 (C.A.D.C. 2010).

<sup>198</sup> *Id.*

<sup>199</sup> See *supra* note 94.

international law is an operationally sound reason for bringing a detainee to Bagram. All provisions of the Constitution are not automatically applicable to all Government actions everywhere in the world<sup>200</sup> – and courts should therefore very cautiously deal with issues of Government intent when its actions are in furtherance of its authority and goals in the area of foreign policy and armed conflict, and if measures are in place to provide meaningful administrative review of continued detention, as will be discussed next.

## VII. THE NEW PARWAN DETENTION FACILITY DETAINEE REVIEW PROCEDURE

Because the circuit court decided *al Maqaleh* without examining the new procedure that has been put in place at the Parwan Detention Facility, the issue of how much process Parwan detainees should be afforded in their status determinations remains to be seen. This is not merely of legal interest – it is very significant operationally, politically and from a human rights perspective as the U.S. seeks to maintain international and particularly NATO support for the ISAF mission. The new detainee review procedure is based in large part upon the provisions of Army Regulation 190-8 (AR 190-8), and provides a significant increase in the process afforded detainees both in terms of initial determinations as to their status and frequent periodic reviews of those determinations.<sup>201</sup> The first ground for detention is that an individual must either have been involved in the September 2001 attacks or “harbored those responsible for those attacks.”<sup>202</sup> An alternate ground is that an individual was either part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities

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<sup>200</sup> See *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

<sup>201</sup> Letter from Phillip Carter, Assistant Secretary of Defense for Detainee Policy, to Carl Levin, U.S. Senator (July 14, 2009), [hereinafter “Carter Letter”], available at <http://www.scotusblog.com/wp-content/uploads/2009/09/addendum.pdf>.

<sup>202</sup> Detainee Review Procedures, *supra* note 10, at 1.

against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.”<sup>203</sup> “The fact that a detainee may have intelligence value, by itself, is not a basis for internment,” and once “a person detained by OEF forces is determined not to meet the criteria detailed above or no longer to require internment to mitigate their threat, the person shall be released from DOD custody as soon as practicable.”<sup>204</sup> In terms of process, the first status review occurs at the level of the capturing unit, generally within 72 hours, with the advice of a military lawyer.<sup>205</sup> Detainees cannot be brought into the Parwan Detention Facility from the capturing unit unless the Parwan Detention Facility commander, with the advice of a military attorney, conducts an entrance status review.<sup>206</sup> Within 14 days of a detainee’s transfer into the Parwan Detention Facility, the individual is advised of his rights under the detainee review procedure, and given an “unclassified summary of the specific facts that support the basis for their internment.”<sup>207</sup>

Within 60 days of internment, and every six months afterwards, review boards composed of three commissioned officers of the rank of major or above will review “all reasonably available information to determine whether each person transferred to the [Parwan Detention Facility] meets the criteria for internment and, if so, whether the person’s continued internment is necessary.”<sup>208</sup> The hearings are conducted in conformance with AR 190-8, but include additional process protections for detainees, including the use of personal representatives to assist detainees in the preparation of their cases, the investigation of exculpatory information provided by detainees, a written procedural script

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<sup>203</sup> *Id.* This definition is consistent with the Obama Administration’s criteria for those who may be held at Guantanamo. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 67 (2009).

<sup>204</sup> Detainee Review Procedures, *supra* note 10, at 1.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 2.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* None of the board members may have been “directly involved in the detainee’s capture or transfer” to the Parwan Detention Facility. *Id.*

to allow the detainee to better follow the proceedings, and access to all reasonably available relevant evidence.<sup>209</sup> If the board determines that the detainee does not meet the requirements for continued internment, then release is to be made “as soon as practicable.”<sup>210</sup> If the board finds that the detainee should be held, it can make one of the following recommendations to the general officer who convened the board: “[c]ontinued internment at the [Parwan Detention Facility,] . . . transfer to Afghan authorities for criminal prosecution” or “for participation in a reconciliation program,” “[r]elease without conditions,” or [i]n the case of a non-Afghan and non-U.S. third country national,” either “transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.”<sup>211</sup> Each recommendation for continued internment must be reviewed for legal sufficiency, and detainees are to receive notice of review process results within seven days of the legal review.<sup>212</sup>

The position of the personal representative is a significant departure from the process afforded under AR 190-8. The personal representative must be a commissioned officer familiar with the detainee review procedures, and have access to all “reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee’s continued internment is necessary.”<sup>213</sup> Personal representatives are given at least 30 days to prepare for the hearing. Their appointments may be waived by detainees if they are 18 years or older, but not if they suffer from a mental illness, or the general officer convening the hearing determines that they are “otherwise incapable of understanding and participating in the review process.”<sup>214</sup> Although they do not function as advocates before the status determination board, the personal representatives are required

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<sup>209</sup> *Id.* at 3-4.

<sup>210</sup> Detainee Review Procedures, *supra* note 10, at 4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 5.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 64.

to “assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee.”<sup>215</sup> Finally, serving as a personal representative in good faith will not adversely affect that officer’s standing with regard to “evaluations, promotions, [or] future assignments.”<sup>216</sup>

The new detainee status review procedures differ from habeas corpus proceedings in significant ways, but not all of these differences mean that detainees would be afforded only insufficient process before the detainee review boards. In keeping with the latitude given the district courts under *Boumediene* to devise functional and pragmatic approaches to hearing detainee habeas corpus petitions,<sup>217</sup> at a minimum detainees are to have notice and an opportunity to be heard,<sup>218</sup> to have the right to present documentary evidence and affidavits,<sup>219</sup> the right to present exculpatory evidence,<sup>220</sup> and to have some limited form of discovery consistent with safeguarding national security concerns.<sup>221</sup> Hearsay may be admitted if its credibility can be properly assessed by the court,<sup>222</sup> and unlike in a more traditional habeas corpus hearing, the burden is on the government to prove by a preponderance of evidence<sup>223</sup> that the petitioner meets the standard under the Authorization for the Use of Military Force as an enemy combatant against whom “all necessary

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<sup>215</sup> *Id.*

<sup>216</sup> Detainee Review Procedures, *supra* note 10, at 4.

<sup>217</sup> *Boumediene v. Bush*, 553 U.S. 723, 770 (2008).

<sup>218</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

<sup>219</sup> *See id.*; Mark D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 1007-08 (2009).

<sup>220</sup> *Id.* at 1011-012.

<sup>221</sup> *See Boumediene v. Bush*, 579 F. Supp. 2d 191, 193, 195 (2008) (discovery motions filed, followed by closed door sessions out of presence of petitioners to review classified evidence).

<sup>222</sup> *See id.* at 197 (district court’s assessment of credibility of particular hearsay evidence).

<sup>223</sup> *See id.* at 195 (citing the Case Management Order promulgated to assist the district courts in standardizing their approaches to these detainee cases).



and appropriate force” may be used.<sup>224</sup> The two procedures are similar then in using the same standard of proof (preponderance of the evidence), but because the detainee review board hearing is not truly an adversarial proceeding, the government does not have the burden of persuasion. Detainee access to classified information is limited in both,<sup>225</sup> both consider evidence potentially inadmissible at a criminal trial, and both have open hearings unless closed for classification reasons. Neither requires defense counsel, and neither determines guilt of any criminal offense.<sup>226</sup> In terms of differences, defense counsel is allowed at habeas corpus hearings, but not before review boards, although detainees are afforded personal representatives if they wish. Additionally, an independent judge makes the final determination as to whether the detainee should be held or released, as compared to the review board’s ability to order release. Further, the general officer convening the board makes the final decision whether to continue detention upon review board recommendation, with legal advice. The net result of this difference is similar to that under the Uniform Code of Military Justice, in which acquittals at the trial level are not reviewed by the convening authority, but all convictions must undergo convening authority review and determination, because findings of guilt and adjudged punishments are recommendations in effect only.<sup>227</sup>

The impartiality of the board is enhanced, however, by not allowing those officers who might have been involved in the case to sit on the board. A further significant difference is that the government is required to investigate exculpatory information offered by the detainee, which presumably includes classified information available to the personal representative. A final important difference is the precise

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<sup>224</sup> Authorization for the Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 stat. 224 (Sept. 18, 2001) [hereinafter “AUMF”].

<sup>225</sup> See *Boumediene*, 579 F. Supp. 2d at 193.

<sup>226</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (no constitutional right to counsel in habeas corpus hearing because it is a civil, rather than criminal, proceeding).

<sup>227</sup> Rule for Courts-Martial, 1107(a), (b), Manual for Courts-Martial, II-149-50 (2008).

standard of proof the evidence must meet by a preponderance of the evidence. The definition used by the district court in the *Boumediene* habeas corpus hearing addresses:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>228</sup>

As applied by the district court to the petitioners in the *Boumediene* habeas corpus hearing, the term “support” meant “direct support,” such as “facilitating the travel of others to join the fight against the United States in Afghanistan. . . .”<sup>229</sup> Significantly, as of March 13, 2009, the Obama Administration defined those at Guantanamo who may be detained as

[p]ersons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks [and] [p]ersons who were part of, or *substantially supported*, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.<sup>230</sup>

This definition was adopted for the detainees at the Parwan Detention Facility on July 2, 2009. The Obama Administration’s definition appears to set a lower standard

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<sup>228</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 196 (2008).

<sup>229</sup> *Id.* at 198.

<sup>230</sup> Detainee Review Procedures, *supra* note 10, at 1 (emphasis added).

than that used in habeas hearings before the *Boumediene* district court and other district courts.<sup>231</sup> Although the administration's standard may not suffice for domestic legal proceedings, it is consistent with international humanitarian law, for example, in terms of holding security detainees under Geneva Convention IV.<sup>232</sup> As previously noted, some commentators and scholars take the position that human rights law should provide the applicable rules and guidance in these cases when a conflict is neither a strict international nor non-international armed conflict.<sup>233</sup> This perspective, however, ignores the positions of the states which created our current understanding of what these two terms mean. If the states did not even want the basic provisions of Common Article 3 to apply to these other kinds of armed conflict, it does not follow that they would want the robust protections of human rights law applied to these conflicts.<sup>234</sup> Instead, whether one takes the view that authority to detain on this basis outlined by the Obama Administration is already part of applicable customary international law regardless of the nature of the conflict,<sup>235</sup> or that it should be applied by way of analogy under the concept of transnational armed conflict, this standard is functionally appropriate in a conflict such as

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<sup>231</sup> See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 70 (2009).

<sup>232</sup> See Jean-Marie Henckaerts & Louise Doswald-Beck, *Volume I: Rules*, Customary International Humanitarian Law, International Comm. of the Red Cross, at 344 (2005) (“[t]he Fourth Geneva Convention . . . specifies that a civilian may only be interned or placed in assigned residence if ‘the security of the Detaining Power makes it absolutely necessary’ (Article 42) or, in occupied territory, for ‘imperative reasons of security’ (Article 78).”).

<sup>233</sup> See note 62, *supra*.

<sup>234</sup> It is important to note that later developments in international law do suggest that in certain circumstances states have agreed that human rights law might in fact be applicable. For example, the European Court of Human Rights has issued a number of judgments against Russia for violations of human rights arising out of the conflict in Chechnya. See, e.g., *Case of Batayev and Others v. Russia*, Applications nos. 11354/05 and 32952/06 (June 17, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=batayev&sessionid=55736243&skin=hudoc-en>.

<sup>235</sup> Robert E. Barnsby, *Yes, We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 53, 89 (Winter 2009).

the one the U.S. is fighting with al Qaeda and associated groups – a fight which transcends the accepted definitions of armed conflict covered by the 1949 Geneva Conventions.

In sum, the impartiality of the board, the use of the personal representative, the frequency of review, the tests for legal sufficiency at different stages of the process, access to information justifying the detention, the investigation of exculpatory evidence, presence at the proceedings, the opportunity to address the board, and the use of written scripts and interpreters add substantive process to the Detainee Review Procedures. Although this is less process than that afforded in habeas corpus proceedings, the Detainee Review Procedures provide sufficient process to address what appears to be the U.S. Supreme Court's underlying concern in *Boumediene* – the possibility of executive detention of individuals indefinitely without providing a fair mechanism to have the reasons for their continued detention reviewed periodically and meaningfully. To date, little in the way of independent assessments of the Detainee Review Boards using the new procedures has been published. One reporter, however, based upon his observation of five board hearings in March 2010, noted that detainees made use of their right to call witnesses in their behalf, and that the personal representatives “felt free to advocate on behalf of a detainee, challenge the factual record, and ensure that the detainee understood the procedures.”<sup>236</sup> The same reporter, however, suggested areas for improvement: avoiding the over-classification of classified material so that detainees can actually review more of it rather than limiting review to just the personal representative, purging unreliable intelligence sources, and increasing staffing of the boards, to include additional and better qualified translators and more personal representatives.<sup>237</sup>

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<sup>236</sup> Jonathon Horowitz, *New Detention Rules Show Promise and Problems*, THE HUFFINGTON POST, Apr. 20, 2010, [http://www.huffingtonpost.com/jonathan-horowitz/new-detention-rules-show\\_b\\_544509.html](http://www.huffingtonpost.com/jonathan-horowitz/new-detention-rules-show_b_544509.html).

<sup>237</sup> *Id.* Although the Detainee Review Procedures provide the personal representative “shall act in the best interests of the detainee” and

### VIII. CONCLUSION

As noted previously, either because of the Circuit Court's decision on the *Al Maqaleh* case, or even if the issue is mooted at some point along the appeals path through transfer of the Parwan Detention Facility to the control of the Afghan government, the overarching question as to the appropriate detention status review mechanism to be used in the cases of detainees captured in an on-going transnational conflict such as the one between the U.S. and its allies and al Qaeda and its affiliates will still remain. Were the U.S. Supreme Court to hear the case, proper application of the analysis from its decision in *Boumediene* should result in a holding that the Suspension Clause is not applicable to the Parwan Detention Facility regardless of the nationality of the petitioner. The limited nature of the leased U.S. occupancy of Bagram; the permission granted under the status of forces arrangement for the lawful presence of U.S. forces within the sovereign territory of Afghanistan; the presence of international forces under international command on the base; and the lack of U.S. jurisdiction over non-U.S. personnel, both military and civilian, serve to make Bagram much like any other overseas U.S. military base, but not part of the United States as Guantanamo is under *Boumediene*. The location of the Parwan Detention Facility in an active combat zone which is also the focus of transnational terrorist's armed and logistical activities further distinguishes it from the detention situation at Guantanamo. Additionally, the new Detainee Review Procedures provide sufficient process to non-U.S. national detainees to prevent the possibility of erroneous and indefinite executive detention, although their efficacy could possibly be improved through different information classification procedures and increased Detention Review Board personnel quantity and language capability. Importantly, individuals may not be held merely for their

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“shall assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee,” an issue which remains to be clarified is the degree of confidentiality that exists between the personal representative and the detainee. Detainee Review Procedures, *supra* note 10, at 6.

intelligence value; rather, they must be shown by a preponderance of the evidence to have either been involved in the September 2001 attacks or to have directly supported al Qaeda or the Taliban in hostilities against U.S. or allied forces since then.

Certain commentators have suggested that setting the standard for continued detention too high leads to an unpleasant paradox. For example, the standard for deciding whether to engage an individual with up to lethal force is reasonable certainty, based upon the entire intelligence picture known at that time that the individual is taking a direct part in hostilities. Reasonable certainty in a combat environment could be equated with probable cause. As noted by D.C. District Court Judge Richard Leon in his memorandum order documenting his decision on Mr. Boumediene's habeas petition, the standard for continued detention of an alleged al Qaeda fighter is preponderance of the evidence that the individual meets the definition of one who may be detained under the AUMF.<sup>238</sup> This requires the court itself to independently assess the credibility of the government's evidence proffered to justify continued detention. Judge Leon further noted with regard to the government's evidence regarding Boumediene,

[s]uffice it to say, however, that while the information in the classified intelligence report, relating to the credibility and reliability of the source, was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is *not* sufficient for the purposes for which a habeas court must now evaluate it. To allow enemy combatancy to rest on so *thin* a reed would be inconsistent with the Court's obligation under the Supreme Court's decision

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<sup>238</sup> Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (2008). In a separate case, the Government has taken the position that although the authority to detain is not limited by the law of armed conflict, it is "informed by the laws of war." Response to Petition for Rehearing and Rehearing En Banc, Al Bihani v. Obama, 590 F.3d 873 (C.A.D.C. 2010) Document 1244617, filed May 13, 2010.

in *Hamdi* to protect petitioners from the risk of erroneous detention.<sup>239</sup>

Requiring a higher standard for security detention than that required for lethal action could lead to an incentive to kill rather than capture.<sup>240</sup> This incentive would not necessarily be equally applicable to all targets – the incentive to capture leaders or particularly well-known fighters because of their intelligence or psychological value could be greater than for targets assessed to be mere foot soldiers. Realistically, however, targeted terrorists and insurgents are perhaps more likely to be killed simply because missions to capture them would entail greater risk of collateral damage to civilians and civilian property, or unacceptable risk to friendly personnel and equipment, rather than an assessment that the legal case against them at some detention review procedure in the future is weak compared to their potential intelligence value.

The new Parwan Detention Facility procedures are defended better on less speculative grounds. Although the standard for continued detention is not as rigorous as that which has been applied in habeas corpus hearings in the D.C. District Court,<sup>241</sup> it is appropriate in a transnational armed conflict in which non-U.S. nationals are being held outside the U.S. by U.S. forces in an area of active combat. Fortunately, the detainee review boards are not conducted in the heat of battle, but they are held in an austere setting within danger's reach. In light of the significant process given to detainees under the new Detainee Review Procedures, process which actually moves the standard for determining whether an individual should continue to be detained in the direction of international human rights law principles, judicial deference should also be accorded to the military decisions that flow from the effective implementation of these procedures.<sup>242</sup> These procedures will strike a practical

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<sup>239</sup> *Boumediene*, 579 F. Supp. 2d at 197.

<sup>240</sup> See Robert E. Barnsby, *Yes, We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 53, 75 (Winter 2009).

<sup>241</sup> See *supra* notes 228-29, Detainee Review Procedures, *supra* note 10, at 2.

<sup>242</sup> See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

balance between the deployed forces' needs for intelligence and security,<sup>243</sup> the need to minimize the logistical burden placed upon deployed resources by housing, feeding and protecting a detention facility population,<sup>244</sup> the need to minimize opportunities for radicalization among detainees,<sup>245</sup> and importantly, the detainees' and their families' need to know there is a predictable and logical process that supports their hope of regaining their freedom at a more definite point in the future.<sup>246</sup> The process and transparency the procedures provide for detainees taken in the course of transnational armed conflict should be seen as a model for status determination in future detention operations, and importantly, in keeping with the concept of transnational armed conflict, they have the potential to flesh out a new area of substantive customary international humanitarian law protections for detainees in conflicts other than those considered international or non-international under the 1949 Geneva Conventions.

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<sup>243</sup> See COMISAF Initial Assessment (Unclassified), Annex F, Detainee Operations, Rule of Law, and Afghan Corrections, WASHINGTONPOST.COM, Sept. 21, 2009, [hereinafter "COMISAF Initial Assessment"], available at [http://media.washingtonpost.com/wp-srv/politics/documents/Assessment\\_Redacted\\_092109.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf).

<sup>244</sup> See Beverly D. Patton, *Detainee Healthcare as Part of Information Operations*, MILITARY REVIEW, 52-57 (July-Aug. 2009).

<sup>245</sup> See Max Boot, *U.S. and allies must detain Afghan Prisoners*, WASHINGTONPOST.COM (Dec. 29, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/28/AR2009122802014.html> (Islamic radicalization in Afghan prisons; *COMISAF Initial Assessment*, *supra* note 237).

<sup>246</sup> Robert von Dienes-Oehm, *Open Society Institute Recommendations for U.S. Detention Policy in Afghanistan*, OPEN SOCIETY INSTITUTE, Dec. 15, 2009, <http://www.soros.org/newsroom/news/afghanistan-detention-20091215>. Potentially, this process would enhance the appeal of rehabilitation opportunities for the less committed fighters.