BRIDGING THE LEGAL GAP IN GREY ZONE DETENTION OPERATIONS

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INTRODUCTION

The world today is not the same world that existed at the end of the Second World War. Not only has technology advanced at an unprecedented pace,[1] leading to new theaters and domains of conflict,[2] but the traditional framework of conflict between nation states is also rapidly evolving. The era of well-defined and acknowledged *armed conflict* between two Westphalian nation states is no longer the

[1] As Max Roser notes, it took humans 2.4 million years to control fire but only 66 years to go from the Wright brothers' first flight to putting a man on the moon. Max Roser, *This Timeline Charts the Fast Pace of Tech Transformation Across Centuries,* WORLD ECON. F. (Feb. 27, 2023), https://www.weforum.org/agenda/2023/02/this-timeline-charts-the-fast-pace-of-tech-transformation-across-centuries/.

[2] While traditionally, domains of warfare have revolved around land, sea, and air, this is no longer the case. For example, the U.S. Department of Defense now considers not only space as a warfighting domain but also the cyber, informational, and electromagnetic spectrums. *See generally* Thomas A. Walsh & Alexandra L. Huber, *A Symphony of Capabilities: How the Joint Warfighting Concept Guides Service Force Design and Development*, JOINT FORCE Q., Oct. 30, 2023, at 5-6. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS ¶ 4 (October 2022).

primary means of conducting warfare, and the vast majority of recognized armed conflicts globally are either internal or cross-border non-international armed conflicts.[3] The specter of peer-to-peer conflicts still exists—as can be seen in the simmering tensions in the South China Sea and the Korean Peninsula and in the ongoing (if officially undeclared) war in Ukraine. But now, nation states are keen to avoid being labeled as the aggressor that threatens or breaches the peace.[4]

What is emerging in the place of such conflicts is instead a form of conflict called grey zone conflict. This conflict occurs at a level that is both below the threshold of what historically has been known simply as *war* and below the level of armed conflict commonly accepted by organizations such as the International Committee for the Red Cross ("ICRC").[5] Grey zone conflict involves "ambiguous use of unconventional force."[6] It is a concept academics debate, with both many proponents and many detractors arguing not only how grey zone conflict should be defined but also whether the term itself should

[3] *See* Shawn Davies et al., *Organized Violence 1989-2022, and the Return of Conflict Between States*, 60(4) J. PEACE RSCH. 691, 695 (2023).
[4] *See* Alberto L. Zuppi, *Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil,* PA. STATE UNIV. INT'L L. REV., July 1, 2007, at 17 (describing the crime of aggression as triggering "prompt united action" due to being considered "the gravest of all crimes against peace and security" by the U.N.); *see also* U.N. Charter, art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").
[5] *Compare* Int'l Comm. of the Red Cross [ICRC], *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (Mar. 2008) [hereinafter *"Armed Conflict" Defined*] https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/opinion-paper-armed-conflict.pdf, *with Competing in the Grey Zone: Countering Competition in the Space Between War and Peace*, CTR. FOR STRAT. AND INT'L STUD. (Dec. 7, 2018), https://www.csis.org/analysis/competing-gray-zone-countering-competition-space-between-war-and-peace#:~:text=Countries%20like%20China%20and%20Russia%20increasingly%20use%20non-military,challenge%20to%20U.S.%20efforts%20to%20pursue%20its%20interests [hereinafter *Competing in the Grey Zone*].
[6] *Competing in the Grey Zone*, *supra* note 5.

even be used to denote a separate domain of conflict.[7] Enough academic and strategic work analyzing grey zone conflict (and other similar non-kinetic conflict) exists, however, that legal practitioners are now being faced with how, when, and which legal paradigms should be applied to grey zone conflicts and the military operations that occur within them.[8]

Despite this evolving conflict landscape and the use of grey zone conflicts by nation states, the legal frameworks used to define conflict boundaries and provide the positive laws to govern conduct within them are the same historical paradigms that have traditionally been split into two distinct bodies: the laws applicable during peacetime and the law of armed conflict. Because of this, and particularly when examining detention operations in conflicts occurring below the level of armed conflict and outside of traditional national jurisdiction paradigms, there appears to be a growing gap between the normative legal frameworks that nation states have traditionally applied.

While detention operations are not the only place in which this apparent gap in the law appears,[9] it is particularly pronounced when examining both a nation state's right to detain and the rights of the detainees who are subject to this action, especially given the lack of positivist law in this arena. It is through this lens of detention

[7] *See 50 Shades of Gray: Why the Gray Wars Concept Lacks Strategic Sense*, WAR ON THE ROCKS (Dec. 15, 2015), https://warontherocks.com/2015/12/50-shades-of-gray-why-the-gray-wars-concept-lacks-strategic-sense/; *see also* Adam Elkus, *Abandon All Hope, Ye Who Enter Here: You Cannot Save the Gray Zone Concept*, WAR ON THE ROCKS (Dec. 30, 2015), https://warontherocks.com/2015/12/abandon-all-hope-ye-who-enter-here-you-cannot-save-the-gray-zone-concept/.

[8] *See generally* David Carment & Dani Belo, *Gray-Zone Conflict Management: Theory, Evidence, and Challenges,* 2020 AIR FORCE J. EUR., MIDDLE E., AND AFR. AFFAIRS 21, 22-23, 38-39.

[9] *See*, *e.g.*, MARCO SASSÒLI, *The Role of Human Rights and International Law in New Types of Armed Conflicts, in* INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW 34, 94 (Orna Ben-Naftali ed., 2011) (arguing that the complex and controversial rules applied to all military operations from hostilities to law enforcement activity may be supplemented with IHL to give clearer direction). *See generally The Complex Relationship Between the Geneva Conventions and International Human Rights Law*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY, 701, 701-35 (Andrew Clapham et al. eds., 2015).

operations that this article examines not only the growing gap between the legal frameworks but also how nations states may proactively address this issue through the adoption of a legal policy-based approach designed to provide both predictability in the application of existing paradigms and a more consistent adherence to the current underlying international legal obligations.

Part I of this article identifies the existing legal paradigms under which nation states operate when conducting detention operations against opposing forces of another nation state. These paradigms are International Human Rights Law ("IHRL") and the Law of Armed Conflict ("LOAC"). It explores these paradigms by examining the substantive authorities, procedures, and requirements incumbent in each and through an examination of the differences inherent in the two bodies of law. Part I also examines international and domestic courts' interpretations, highlighting competing interpretations and the growing disagreement between States as to when, where, and how these legal paradigms apply. Analysis of these competing interpretations by nation states and the courts to which they are affiliated is important because the conflicting legal interpretations disclose an ongoing debate amongst both States and legal scholars about the significance of the *lex lata* and the *lex feranda* ("the law as it is" and "the law as it should be") in the post 9/11 security environment which the world now faces.[10]

While States and academics disagree on both the scope and level of conflict which triggers IHRL obligations, the right to be free from arbitrary and unlawful detention remains a matter of customary international law.[11] As a practical matter, however, there is not a clean distinction between the legal frameworks of IHRL and LOAC when faced with military and security operations in grey zone conflicts.

[10] *See generally* Kenneth Watkin, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT (2016) (discussing how military practitioners are struggling with applications of force in modern conflict settings).

[11] *See* International Covenant on Civil and Political Rights, art. 9 *opened for signature* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 Hum. Rts. Comm. General Cmt. 35, ¶¶ 8, 10-11 [hereinafter ICCPR]; *see also* Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights,"* 16 IND. J. OF GLOB. LEGAL STUD. 437, 470 (2009).

Therefore, this article will explore the apparent legal gap—a legal grey zone—where a State's military, operating outside of an armed conflict, may need to detain an opposing force for a period of time outside of its national territorial boundaries and for reasons which are not covered under typical criminal and judicial practices. Analysis of this legal grey zone requires interpretation from States, legal opinions from both State military legal practitioners and governmental officials, and potentially binding jurisprudence from regional and domestic courts. Such disparate interpretations by both nation states and academics have the potential to continue to cause confusion for practitioners about which legal paradigms should be applied when conducting detention operations in settings outside of clear national jurisdictional boundaries and outside of accepted armed conflict.

Part II discusses the concept of grey zone operations and provides a broad overview of what constitutes grey zone operations. It then explores what current legal paradigms, if any, govern military actions in grey zone conflict and addresses the question of why nation states are choosing to conduct military operations outside the historically well-defined boundaries of armed conflict.[12]

Part III applies IHRL and LOAC detention authorities and requirements to real-world and hypothetical fact patterns, highlighting the pragmatic faults inherent in the existing legal frameworks and exploring the legal gaps that currently exist when the frameworks are applied to grey zone conflicts.

Finally, Part IV provides a policy-based approach for grey zone detention operations for nation states to adopt based, in part, on existing State practices in detention operations in both international and non-international armed conflicts. Through implementing domestically binding policy determinations, nation states can provide a normative legal framework that makes use of both the inherent detention principles present in LOAC and the customary international law practices codified in agreements like the Geneva

[12] *See* Terri Moon Cronk, *Adversaries Pose Unconventional Threats in 'Gray Zone,' DOD Official Says*, U.S DEFENSE OF DEFENSE (Oct. 16, 2019), https://www.defense.gov/News/News-Stories/Article/Article/1990408/adversaries-pose-unconventional-threats-in-gray-zone-dod-official-says/.

Conventions. By combining the application of these existing international law frameworks and the adoption of recommended international policies such as those laid out in the Copenhagen Principles,[13] nation states and their militaries will be better able to provide defensible legal justifications for detention operations conducted within grey zone conflicts, while also providing valuable procedural safeguards and rights for any persons who find themselves detained during such actions.

I. EXISTING LEGAL PARADIGMS

LOAC and IHRL set the legal boundaries in war (in both its international and non-international settings) and peace, respectively, and are the two bodies of international law that govern military detention operations. Neither, however, truly defines the concept of detention. According to the Copenhagen Principles, the term *detention* refers to deprivation of a person's liberty "for reasons related to an international military operation."[14] This is the meaning the term shall have in this article. While this definition is useful for bounding the scope of the discussion and providing a shared understanding of what it means to be detained, it does not necessarily entirely align with what IHRL and LOAC contemplate the actual purpose of detention to be.

For even if we accept the notion that "th[e] law is not static, but by continual adaptation follows the needs of a changing world,"[15] it appears that the adaptation of these bodies of law—when dealing with detention operations in grey zone conflicts—reveals a gap between them when deciding who may be detained, for what purposes

[13] *See* The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process, Principles and Guidelines, ¶ 4, Oct. 2012, https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/Copenhagen-Process-Principles-and-Guidelines-EN.pdf
("Detention of persons must be conducted in accordance with applicable international law. When circumstances justifying detention have ceased to exist a detainee will be released.").

[14] *Id.* ¶ 1.

[15] INT'L MIL. TRIBUNAL, Judgment of the Nuremberg International Military Tribunal (Oct. 1, 1946), *in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 40 (1947).

they may be detained, and for how long such detention can last.[16] This gap also leaves both nation states and individual actors potentially unsure of the legal norms which they are required to operate under. However, before exploring this legal gap between IHRL and LOAC in grey zone detention operations, it is worth taking time to identify the limits and overlaps inherent within each body of law to better understand where the issue might lie and why States are engaged in differing practices as to their relative application.

A. *Detention Under Intentional Human Rights Law*

When acting within a space governed exclusively by IHRL, such as in police actions occurring entirely within a nation state's borders, every individual has the right to liberty of person, the deprivation of which must be justifiable and subject to oversight by a judicial or similar process.[17] IHRL establishes other complementary rights and protections for detainees and requirements upon the detaining party based on circumstances.[18]

1. IHRL is Focused on Protecting the Individual and Not the State

When a nation is at peace, the requirements for detaining people found within its borders are typically premised on the concept

[16] *See* Waseem Ahmad Qureshi, *Modern War, Nonstate Actors and the Geneva Conventions: No Longer Fit for Purpose?*, 22 SAN DIEGO INT'L L.J. 219, 222 (2021) ("The international community has a profound understanding of the principles of the [Geneva Conventions], yet the world is oblivious to, or has seemingly divided opinions on, the effectiveness of their reach."). *See generally* NINA TANNENWALD, *Assessing the Effects and Effectiveness of the Geneva Conventions*, *in* DO THE GENEVA CONVENTIONS MATTER?, 137, 152-59 (Matthew Evangelista & Nina Tannenwald eds., 2017).

[17] *See* G.A. Res. 217(III) A, Universal Declaration of Human Rights, art. 3, 9-10 (Dec. 10, 1948) [hereinafter UDHR].

[18] *See, e.g.*, ICCPR, *supra* note 11, art. 4, 6 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.").

that a State is addressing criminal actions or emergent threats to its internal security.[19] While there are historical and contemporary examples of both democratic and authoritarian regimes utilizing confinement and administrative detention,[20] the global trend has been to expand rather than curtail human rights. For example, since the adoption of the proclamation of the Universal Declaration of Human Rights ("UDHR") in 1948,[21] the concept of freedom from arbitrary detention has been held up as a fundamental human right.[22] And while the UDHR is not itself a legally binding treaty, the concepts it embodies have been developed by subsequent treaties such as the International Covenant on Civil and Political Rights ("ICCPR") and other similar regional human rights treaties.[23]

While these subsequent treaties all offer their own unique approach to the concept of human rights[24] and provide different levels of protection, nearly all of them include the right to be free from

[19] For example, in *Terry v. Ohio*, the United States Supreme Court allowed for the detention of individuals temporarily if there is reasonable suspicion by law enforcement that the individual is armed, engaged in, or about to be engaged in criminal conduct. Terry v. Ohio, 392 U.S. 1, 27 (1968). Longer periods of detention require that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." ICCPR, *supra* note 11, art. 9(3).

[20] *See, e.g.,* Amy Nethery, *Incarceration, Classification, and Control: Administrative Detention in Settler Colonial Australia*, POL. GEOGRAPHY (2021) at 1, 1-2; *see also Urgent Action: NGO Director in Administrative Detention* (Israel/OPT: UA 161.19), AMNESTY INT'L (Nov. 22, 2019), https://www.amnestyusa.org/urgent-actions/urgent-action-ngo-director-in-administrative-detention-israel-opt-ua-161-19/.

[21] UDHR, *supra* note 17, Preamble.

[22] *Id.* art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile.").

[23] *See, e.g.*, Council of Eur. Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 4, 1950, C.E.T.S. No. 213 [hereinafter Protection of Human Rights]; Org. Am. States Pact No. 17955, American Convention on Human Rights: "Pact of San Jose, Costa Rica" (Nov. 22, 1969) [hereinafter Convention on Human Rights]; Org. Afr. Unity OAU Doc. CAB/LEG/67/3 rev. 5 21 I.L.M. 59, African [Banjul] Charter on Human and Peoples' Rights (June 27, 1981) [hereinafter African Charter].

[24] For example, comparing the African (Banjul) Charter on Human and People's Rights to the American Convention l shows a stronger focus within the African convention on the concept of duties as well as rights. Unlike the American Convention, there is no derogation clause in the African Charter on human rights.

arbitrary arrest and detention.[25] As an example, Article 9 of the ICCPR states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[26] The very construct of the language used here, in a treaty with 174 parties and an additional six non-ratified signatories,[27] shows that IHRL is focused on the individual and their rights, and that "these rights derive from the inherent dignity of the human person."[28] As a further indicator of who is envisioned as the primary beneficiary of IHRL, of the fifty-one articles within the ICCPR, only Article 4 lays out what may be considered as a right belonging to the State.[29] The remaining fifty provide for fundamental protections and freedoms for individuals.[30]

However, while individuals are the beneficiaries of the protections under human rights law, they are not the signatories to the human rights instruments. The nation states that sign and agree to these human rights instruments also have an interest in how those rights are understood and applied. In *Brogan v. the United Kingdom,* the European Court for Human Rights ("ECHR") examined this issue of balancing the harms felt by a detainee and the desire of the nation state to execute its own laws.[31] The court found that the United Kingdom violated Article 5(3) of the European Convention on

[25] *See* Yu-Jie Chen & Jerome A. Cohen, *Freedom from Arbitrary Detention in Asia: Lessons from China, Taiwan, and Hong Kong in Oxford Handbook of Constitutional Law in Asia*, *in* OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA 1, 1-2 (David Law et al. eds. 2020) (discussing how the interplay between adoption of different treaties, such as the ICCPR and the ASEAN Human Rights Declaration, provides different levels of protection but includes many overlaps, such as the inherent right to life).

[26] ICCPR, *supra* note 11, art. 9.

[27] *See generally* ICCPR, *supra* note 11; *Status of Treaties: International Convention on Civil and Political Rights,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf (last updated Oct. 11, 2024) (listing signatories and their declarations and reservations).

[28] *See* ICCPR, *supra* note 11, Preamble.

[29] *See id.* art. 4.

[30] *Compare id.* Preamble, *with id.* art. 4.

[31] *See* Brogan et al. v. United Kingdom, App. No. 11209/84, 11 Eur. H.R. Rep. 117, ¶ 62 (1988).

Human Rights both for detaining the applicants under the premise of a security detention for between four and six days without charge and for failing to conduct a judicial review of their detention.[32] Such prompt and regular review by a court, or other tribunal which possesses the same attributes of independence and impartiality as a regular judiciary, is a necessary guarantee for adherence to the right to be free from arbitrary detention.[33] Even in situations where a State is claiming that it is acting for its own security, an arguably limited duration of detention, such as one week or less, can be considered as constituting an arbitrary length of time.[34]

2. IHRL has Strict Limitations on When, Why, and How Individuals May be Detained

The requirement of a prompt and impartial judicial review means that pragmatically, while a nation state may deprive a person of their liberty for a violation of national laws,[35] they must do so in a manner that is just, fair, predictable, and subject to periodic re-evaluation of the justification for continued detention.[36] In addition to placing such strict limitations on the purpose of detention, IHRL also sets out due process requirements for detained persons, including the right to timely access to legal counsel and notice and filing of specified charges before a regularly constituted and independent court without

[32] *Id.* ¶ 62.
[33] *See* ICCPR, *supra* note 11, art. 9, ¶¶ 1, 3-4.
[34] *See Brogan,* 11 Eur. H.R. Rep. at ¶¶ 60-62. Finding that this short amount of time under the auspices of security detention is a violation of an individual right also serves to highlight national and regional differences when compared to a case such as *Hamdi v Rumsfeld,* discussed below, where seemingly indefinite detention is authorized.
[35] States may also be limited by regional human rights treaties to which they are a party. *See, e.g.,* African Charter, *supra* note 23; Convention on Human Rights, *supra* note 23; Protection of Human Rights, *supra* note 23.
[36] *See* Hum. Rts. Comm., Danyal Shafiq v. Australia, Communication No. 1324/2004 ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (2006); *see also* ICCPR, *supra* note 11, art. 9 Hum. Rts. Comm. General Cmt. 35, ¶ 10 ("The right to liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws . . . and that deprivation of liberty must not be arbitrary and must be carried out with respect for the rule of law").

undue delay.[37] It is not enough for a nation state to claim that an individual is being held for violation of the law. The State must also provide a timely and realistic opportunity for the detained individual to challenge the detention predicate and be provided with access to the legal aid to do so.[38]

IHRL, however, does not limit nation states to only detaining individuals for violation of their national laws. Under exceptional circumstances, States may invoke the claim of a present and direct threat to their security as a basis for detention during either peacetime or armed conflict.[39] Commonly referred to as "security" or "administrative" detention, this unique form of detention has previously been employed carte blanche by nation states under the guise of national security. Somewhat infamously, security detention was used as a justification by the Swiss, British, and U.S. governments during World War II as a means of interning noncombatants and various portions of the civilian population to address possible security risks by foreign nationals and dissidents proactively and in the case of Switzerland, as a means of maintaining Swiss neutrality.[40] These types of security detentions are exempt from some of the requirements under IHRL.[41] However, they must still last no longer than necessary, the burden of proof rests with the nation state to prove that the detained individuals pose a threat, and the State must show that measures other than security detention cannot sufficiently address the threat.[42] Notably however, the protections afforded to individuals

[37] *See generally* LAWRENCE HILL CAWTHORNE, *Procedural Rules Under Conventional IHL, in* DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 76-107 (2016) (for a more detailed outline of the exact requirements required by IHRL).
[38] *Id.* at 181.
[39] *See* Zelalem Mogessie Teferra, *National Security and the Right to Liberty in Armed Conflict: The Legality and Limits of Security Detention in International Humanitarian Law*, 98 INT'L REV. RED CROSS 961, 965, 973 (2016).
[40] *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 674 (3d. ed. 2022); *see also* Koremastu v. United States, 323 U.S. 214, 217-219 (1944) (in which the United States Supreme Court upheld the internment of Japanese Americans during World War II solely on national security grounds and ethnic origin).
[41] ICCPR, *supra* note 11, art. 4, ¶ 1.
[42] *See, e.g.,* Hum. Rts. Comm., David Alberto Cámpora Schweizer v. Uruguay, Communication No. 66/1980 ¶ 18.1 U.N. Doc. CCPR/C/OP/2, ¶ 18.1 (1990); Hum. Rts. Comm., Mansour Ahani v. Canada, Communication No. 1051/2002 ¶ 10.2,

under security detention are not as stringent or as well enumerated as the protections for Prisoners of War under the Geneva Conventions,[43] as will be discussed below in greater detail.

3. When and Where IHRL Applies is the Subject of Debate

That IHRL law applies to interactions between a nation state and persons who are in its territory during peacetime is not subject to any real debate;[44] this can clearly be seen in the plain language used in the various treaties which govern IHRL.[45] However, there is a discussion as to whether IHRL applies at all times and in all places[46] or whether it may be displaced by the *lex specialis* of LOAC (laws governing specific subjects in place of laws of general application) in armed conflict settings. This latter approach is supported by countries such as the U.S., Canada, and New Zealand, who have long held that

U.N. Doc. CCPR/C/80/D/1051/2002, (2004) (noting that "detention on the basis of a security certification on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1."); *see also* ICCPR, *supra* note 11, art. 9 Hum. Rts. Comm. General Cmt. 35, ¶ 18; African Charter, *supra* note 23 (It should be noted, however, that the Human Rights Commission has repeatedly emphasized that security detention presents a severe risk of arbitrariness.).

[43] *See* Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 376 (2005) ("[T]he protection of the rights of the persons affected by [security detention are] insufficiently elaborated.").

[44] ICCPR, *supra* note 11, art. 2, ¶ 1 ("Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction . . . ."); Protection of Human Rights., *supra* note 23, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction . . . ."); Convention on Human Rights, *supra* note 23, art. 1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . ."). *But see* African Charter, *supra* note 23 (lacking a jurisdictional clause).

[45] *See* UDHR, *supra* note 17, Preamble (stating that the Universal Declaration of Human Rights is "a common standard of achievement" and should have effective recognition and observance, both among the peoples of Member States and of territories under their jurisdiction).

[46] ICRC, *International Humanitarian Law: Answers to Your Questions,* at 41 (Aug. 27, 2015) ; *see also* Legality of the Threat or Use of Nuclear Weapons*,* Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,* Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106–13 (July 9); Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 216 (Dec. 19).

LOAC governs armed conflict and that IHRL rules do not necessarily apply as a matter of course, but rather apply only on a highly situationally dependent basis.[47]

In addition to nation states' competing legal and policy interpretations, some domestic courts and international courts have also addressed the question of when and how the authority to detain may be imposed in diverse conflict settings. In 2014, the Queen's Bench Division (now King's Bench Division) of the High Court of the United Kingdom faced the question in *Mohammed v. Ministry of Defence* of "whether the UK government ha[d] any right in law to imprison people in Afghanistan[] and, if so, what [] the scope of that right [was]."[48] The case concerned Sedar Mohammed, captured by British forces in Helmand Provence, Afghanistan, in 2010 during a planned International Security Assistance Force ("ISAF") mission following suspicion that he was a Taliban commander.[49] While ISAF procedures and guidelines authorized detention of individuals for 96 hours, "the UK government had adopted its own national policy," which allowed for continued detention beyond 96 hours if it were believed that, through interrogation, the detainee "could provide significant new intelligence."[50] The court ultimately held (among other

[47] *See, e.g.*, Mary McLeod, Acting Legal Adviser, U.S. Dep't of State, Opening Statement at 53rd Session of the U.N. Committee Against Torture, (Nov. 3, 2014) (noting that "the law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims."); U.N. Gen. Assemb. Third Comm., 2004 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 6, § F(1) at 331 ("Third, with respect to preambular paragraph ('PP') 4 and PP6, references to human rights law during armed conflict by necessity refer only to those provisions, if any, that may be applicable. As may be well known, it is the position of the United States Government that the Law of War is the *lex specialis* governing armed conflict."); CAN. DEP'T OF NAT'L DEFENCE, OFF. OF THE JUDGE ADVOC. GEN. B-GG-005-027/AF-023, CODE OF CONDUCT FOR CANADIAN FORCES PERSONNEL ch. 1, para. 10 (implying LOAC is less applicable in times of peace and therefore displaced); N.Z. DEFENCE FORCE, DM 69, MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT, vol. 4, sec. 1.3.2 (2 Aug. 2021) ("This manual applies to all armed conflicts in which a New Zealand force or a member of the [New Zealand Defence Force] is participating).

[48] *See* Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB) 1 (Feb. 2014), available at http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf.

[49] *See id.* ¶¶ 1, 5.

[50] *See id.* ¶¶ 4, 45.

things) that the detention was unlawful because it was not authorized by a U.N. Security Council resolution and was impermissible under both LOAC and Article 5 of the European Convention on Human Rights.[51] Of particular note here is that the court specifically stated that LOAC does not provide any form of legal basis for the detention of personnel within a Non-International Armed Conflict ("NIAC").[52]

It is not just Britain's domestic courts that have been dealing with the issues of detention by British forces. In 2014, the ECHR in *Hassan v. the United Kingdom* held that the European Convention's safeguards against arbitrary detention apply during armed conflict (in this case a NIAC) *and* in an extraterritorial capacity.[53] In *Hassan*, the Grand Chamber of the ECHR considered the detention of an individual by British forces during a period of active hostilities in Iraq, who had been detained as a possible combatant after being found on the roof of a building with an AK-47 rifle.[54] The court found that the common effective control test, which considers a State's physical control of land, may also apply when there is total and exclusive control over an individual.[55] Here, as British forces had effective control of the area, the court held that Hassan was within Britain's jurisdiction and, as such, was entitled to the same protections as if he were physically located in Britain's sovereign territory.[56]

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[51] *See id.* ¶¶ 257, 418; *see also* Protection of Human Rights, *supra* note 23, art. 5 ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . .").

[52] *See* Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB) 1 ¶ 257 (Feb. 2014), available at http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf; *see* Ryan Goodman, *Authorization Versus Regulation of Detention in Non-International Armed Conflicts*, 91 INT'L L. STUD. 155, 158 (2015).

[53] *See* Hassan v. United Kingdom, App. No. 29750/09, ¶¶ 104 (Sept. 16, 2014), https://hudoc.echr.coe.int/eng?i=001-146501; *see* also Protection of Human Rights, *supra* note 23, art. 5 (stating that except in certain limited and enumerated exceptions "[e]veryone has the right to liberty and security of person").

[54] *See* Hassan,¶¶ 9, 11. https://hudoc.echr.coe.int/eng?i=001-146501.

[55] *Id.*; *see also* Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 133 (1975); Bankovic v. Belgium, App. No. 52207/99, 7 Eur. Ct. H.R. 2, ¶ 70-71 (2001).

[56] *Hassan*, ¶ 80.

The court held that both LOAC and human rights law should be applied, as far as possible, concomitantly.[57] But the ruling's requirement of "sufficient guarantees of impartiality and fair procedure to protect against arbitrariness" [58] has also had the practical effect of tightly limiting the ability of countries subject to the ECHR to conduct security detentions in NIAC settings given the requirement to show that lesser means of detention are insufficient.[59] The *Hassan* court did note, however, that based on State practice, the IHRL requirements for ECHR countries were not necessarily violated if individuals were detained as prisoners of war (or civilians who pose a security risk) under the Third and Fourth Geneva Conventions because these bodies of law contain sufficient procedural safeguards of their own.[60]

However, while countries such as the UK, courts like the ECHR, and other international organizations believe that LOAC provides a complementary approach[61] and does not wholly displace the requirements of IHRL, there are other countries that believe the opposite. These countries and their courts hold that, during times of armed conflict, the *lex specialis* of LOAC govern "because special rules are designed for and targeted at the situation at hand, they are likely to regulate it better and more effectively than more general rules."[62]

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[57] *Id.* ¶ 102.
[58] *Id.* ¶ 106.
[59] *See id;* Diane Webber, *Hassan v. United Kingdom: A New Approach to Security Detention in Armed Conflict?*, ASIL INSIGHTS (Apr. 2, 2015), https://www.asil.org/insights/volume/19/issue/7/hassan-v-united-kingdom-new-approach-security-detention-armed-conflict.
[60] *Hassan*, ¶ 5.
[61] In addition to State practice, there are many examples of courts holding that IHRL applies in times of armed conflict. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9).
[62] *See* Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB) 1, 270 (Feb. 2014), available at http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf (as observed by Justice Leggatt).

B. *Detention Under the Laws of Armed Conflict*

It is a long-understood principle in customary international law that during armed conflict, a nation may detain, until the end of the conflict, members of an opposing armed force who pose a threat to the nation state's security.[63] This practice may also, in some circumstances, extend to civilians without a requirement that the detained individual be accused of some violation of domestic law.[64] The deprivation of liberty during armed conflict has no requirement for any type of judicial review of the reason or length of the detention, despite the urging of parties such as the ICRC.[65] Still, numerous other treaty and international law protections provide humanitarian safeguards for detained individuals.[66] The following sections will first identify the requirements for application of LOAC rules and principles under existing international and domestic law and then provide a closer examination of the LOAC framework as it applies to detention operations.

1. When and Where IHRL Applies is the Subject of Debate

When one or more militaries of a High Contracting Party is engaged in armed conflict with another, it is considered an International Armed Conflict ("IAC") and is governed by Common Article 2 of the Geneva Conventions[67] and by the provisions of

[63] *See* Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RSRV. J. INT'L L. 403, 403 (2009). Not only have prisoners been taken in conflicts since time immemorial, but it is very telling that when drafting the Geneva Conventions, all of the High Contracting Parties felt the need to draft an entire convention on the treatment of POWs but not to draft any form of rules for *how* and *why* POWS may be taken.

[64] *Id*. at 404 (discussing the principle that nations may detain individual civilians who pose a threat to the nation's security).

[65] *See* Pejic, *supra* note 43, 375-76 (2005).

[66] *See, e.g.,* 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].

[67] *Id.* art. 2 ("In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war 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.").

Additional Protocol I to the Geneva Conventions.[68] When the conflict is entirely contained within a nation state's borders (either as a result of civil war or some other form of insurgency) it is considered a NIAC and subject to the provisions in the Common Article 3 of the Geneva Conventions and by Additional Protocol II.[69] Under this framework, lawful combatants in an international armed conflict are entitled upon capture to the additional Prisoner of War ("POW") status along with all the rights, duties, and protections that are afforded to a POW as laid out in the Third Geneva Convention.[70]

Both customary international law and various treaties, like the Geneva Conventions and their Additional Protocols, have identified that nation states possess additional detention powers and obligations under LOAC, as a law governing under special circumstances. The special circumstances that trigger LOAC protections require heightened violence and force beyond that of internal disturbances or isolated acts of violence.[71] So, whether LOAC detention protections are triggered is not simply a question of whether there is an ongoing conflict. It is whether the conflict is between two High Contracting Parties and has met the threshold level of violence and force required

[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. It should be noted, however, that while the U.S. considers the majority of API to be customary international law, it is not a signatory to the Convention and remains a persistent objector to the language in Article 44 of API, *see* Off. of Gen. Couns., U.S. Dep't of Def., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 120 (12 June 2015) (Updated July 2023) [hereinafter DOD LOW MANUAL].

[69] Geneva Convention I, *supra* note 66, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, S. TREATY DOC. NO. 100-2 (1987), 1125 U.N.T.S. 609 [hereinafter APII]. As with API, the U.S. considers much of APII to be customary international law, *see* DOD LOW MANUAL, *supra* note 68, at 1193.

[70] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

[71] APII, *supra* note 69, art 1, ¶ 2 ("This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature . . . ."); *see* OSCAR M. UHLER ET AL., THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 17 (Jean Pictet ed., Ronald Griffin & C.W. Dumbleton trans.) (1958).

to be governed under Common Article 2 of the Geneva Conventions,[72] or whether the localized level of violence involving a nation state and some other form of armed group is a NIAC controlled by Common Article 3 of the Geneva Conventions.[73] Put succinctly, LOAC detention protections may apply only when a nation state is involved in a conflict with another recognized party and the conflict is of sufficient scope, violence, and force to be considered either an IAC or a NIAC; it does not apply to internal disturbances or isolated acts of violence.[74]

There is no clear black letter law that defines what exactly armed conflict or a "resort to armed force" entails, and while the definitions of the two traditional types of armed conflict appear to be well settled, what constitutes a use of armed force appears to exist in the same realm as U.S. Supreme Court Justice Potter's understanding of certain obscene materials: parties will undoubtedly know it when they see it.[75] Despite this lack of an agreed upon definition for whether or not there is an armed conflict, some efforts have been made to provide a legal answer to this question, such as the test laid out in the International Criminal Tribunal for the Former Yugoslavia *Prosecutor*

[72] Geneva Convention I, *supra* note 66, art. 2 (". . . . the present Convention shall apply to all cases of declared war 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. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.").

[73] Geneva Convention III, *supra* note 70, art 3. ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . .").

[74] *See "Armed Conflict" Defined*, *supra* note 5 (proposing definitions for international armed conflict, which occurs "whenever there is resort to armed force between two or more states" and non-international armed conflict, which occurs when there are "protracted armed confrontations occurring between governmental armed forces and the forces of one or more-armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.").

[75] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

v. Tadić case.[76] When attempting to determine the bounds of what constituted an armed conflict, the *Tadić* trial chamber judgement issued the following:

> The test applied [for] the existence of an armed conflict for the purpose of the rules contained in common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, at a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrection, or terrorist activities, which are not subject to humanitarian law.[77]

Two issues exist with this description, however. First, this test has been interpreted to apply only to non-international armed conflicts rather than conflicts between nation states.[78] Second, even within this detailed test, there appears to be a presupposition that there is, or has been, a resort to some form of kinetic warfare.

There is also no discussion by the *Tadić* court as to what actually constitutes the *armed* portion of a conflict. Does it require only that the parties be carrying weapons openly as a threat? Or is there some requirement that these arms be used? Mere carrying of arms is almost certainly not sufficient, as even those troops charged by the U.N. to conduct peacekeeping operations are typically carrying weapons as they go about their missions.[79] Indeed, the three basic principles of peacekeeping operations that the U.N. outlines envisage there may be some use of force by those troops charged with a peacekeeping mandate but does not further define what that force is.[80]

One possible explanation of what constitutes *armed force* in an IAC setting may be found in the description of belligerent intent

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[76] Prosecutor v Tadić, IT-94-1-T, Trial Chamber Judgement (May 7, 1997), ¶ 562 (footnotes omitted).
[77] *Id.* ¶ 562.
[78] *See "Armed Conflict" Defined*, *supra* note 5.
[79] U.N. Dep't of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles & Guidelines* 34 (Jan. 2008), https://peacekeeping.un.org/sites/default/files/capstoneeng0.pdf.
[80] *Id.* at 31. (The three principles are (1) "Consent of the parties;" (2) Impartiality; and (3) "Non-use of force except in self-defence and defence of the mandate").

mentioned in a footnote of the ICRC paper discussing international humanitarian law and the challenges of contemporary armed conflicts. The ICRC suggests that the IAC threshold is actually quite low and that even minor skirmishes may constitute an IAC if there is sufficient *belligerent* intent:

> Belligerent intent may be identified when a situation objectively shows that a State is effectively involved in *military operations or other hostile action* against another State. This involvement is aimed at *neutralizing enemy military personnel and assets*, hampering its military operations, or using/controlling its territory, be it *to subdue or defeat* the adversary, *to induce it to change its behaviour, or to gain a military advantage*.[81]

2. LOAC does not Provide Positivist Law to Detain

Even if, under any of the above analyses, the conflict rises to the level of an armed conflict, the legal practitioner is still faced with the issue that LOAC fails to provide for the authority to conduct detention operations in much the same way that it fails to provide black letter law for what constitutes an armed conflict. Indeed, there is no positivist international law which directly deals with the right to detain individuals during armed conflict. Unlike the inherent authority relied upon by nation states to detain individuals found within their territorial jurisdiction, which are usually codified in domestic law, nation states conducting detention operations under LOAC are typically detaining individuals *outside* of their national boundaries.

As such, while "the strongly positivist basis of international law . . . has focused on the State as the source of legal obligation,"[82] there are no clear answers as to where this authority to extraterritorially detain individuals during armed conflict actually comes from. After all, traditional sources of LOAC authority are silent on the authority to detain individuals and focus instead on detailing

[81] In'l Comm. of the Red Cross [ICRC], *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11, at 8, n.3 (Oct. 2015) [hereinafter *Challenges of Armed Conflicts*] (emphasis added).
[82] Kenneth Watkin, 21st Century Conflict and International Humanitarian Law: Status Quo or Change?, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 265, 272 (Michael Schmitt and Jelena Pejic eds., 2007).

the protections to be afforded to POWs during IAC and NIAC. There is also no general consensus amongst nation states as to what the correct legal justification should be.

While addressing the issue of authority to detain during a NIAC, a British court found that LOAC contains no positivist legal basis for detention operation authority in either IAC or NIAC.[83] In his opinion in the *Mohammed* case, Mr. Justice Leggat stated that the language contained in Article 21 of the third Geneva Convention provides the legal basis for detention in international armed conflict.[84] However, a plain reading of the Geneva Conventions shows that the conventions are, in fact, prohibitive in their language; they require a certain level of treatment and government of conduct but do not provide any affirmative right to detain.[85]

While LOAC may not confer detention authority to nation states during armed conflict, it conversely does not prohibit detention by nation states.[86] Indeed, in international armed conflicts, the norms contained in LOAC for detention have often taken precedence over IHRL requirements.[87] In *Hamdi v. Rumsfeld*, the Supreme Court held that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war,"[88] thus solidifying the U.S. view

[83] Mohammed v. Ministry of Defence [2014] EWHC 1369 (QB) 1 ¶¶ 283-284 (Feb. 2014), available at http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf.
[84] *Id.*; *see also* Geneva Convention III, *supra* note 70, art. 21 ("The Detaining Power may subject prisoners of war to internment.").
[85] *See* Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 656, 666-69 (Andrew Clapham & Paola Gaeta eds., 2014).
[86] *See generally* Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL TALK (May 7, 2014), http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/.
[87] *See Challenges of Armed Conflicts*, *supra* note 81, at 13-22.
[88] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004); *see also Ex parte Quirin*, 317 U.S. 1, 31 (1942) (stating that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.").

that detention is a necessity of war. The U.S. Department of Defense's ("DOD") Law of War Manual reiterates this: "The authority to detain is often understood as an incident to more general authorities because detention is fundamental to waging war or conducting other military operations (e.g., noncombatant evacuation operations, peacekeeping operations)."[89]

Similar language concerning the need to prevent a combatant's return to the battlefield also appears in the LOAC manuals of Australia, Canada, and Norway.[90] Interestingly, the LOAC manuals of Denmark and Germany do not contain any language concerning the justification or rationale for detention but focus entirely on military members' conduct during *any* detention operations.[91] While at first this may seem to be a drafting oversight, this approach aligns with the ECHR's view that IHRL applies at all times, even during the periods of armed conflict.[92] That this approach is featured in two separate LOAC manuals of nation states under the jurisdiction of the ECHR further highlights how nation states interpret and apply IHRL and LOAC differently.

[89] DoD LoW Manual, *supra* note 68, at 519-20.
[90] *See* Austl. Defence Force, ADDP 06.4, Law of Armed Conflict sec. 9.87 (11 May 2006); *see also* Can. Dep't of Nat'l Defence, Off. of the Judge Advoc. Gen., B-GJ-005-104/FP-021, Law of Armed Conflict: At the Operational and Tactical Level (13 Aug. 2001); Norwegian Ministry of Defence, Norwegian Chief of Defence, ZDv 15/2, Manual of the Law of Armed Conflict para. 596.
[91] *See generally* Danish Ministry of Defence, Military Manual: on international law relevant to Danish armed forces in international operations (Sep. 2016); German Federal Ministry of Defence, ZDv 15/2, Law of Armed Conflict Manual Joint Service Regulation ¶ 596, (1 May 2013) (stating that "No one may be subjected to arbitrary arrest or detention" and that "[a]ll persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.").
[92] Protection of Human Rights, *supra* note 23, art. 15 ("In time of war or other public emergency threatening the life of the nation any High Contracting Party can take measures *derogating* from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.") (emphasis added).

3. Detention under LOAC is premised on State security concerns

Examining the plain language of the Geneva Conventions quickly highlights that the purpose of confining POWs is typically not to try them as criminals,[93] but rather to prevent them from returning to the fight.[94] This is why, under LOAC, the detaining party may only detain individuals for as long as the armed conflict with another High Contracting Party or other acknowledged adversary continues.[95] The detaining power remains responsible for the POWs' safety and well-being for the detention's duration,[96] which could hypothetically end earlier than the armed conflict does. However, as those released individuals "may use force [], i.e. target and kill or injure other persons taking a direct part in hostilities and attack military objectives [and] such activity is obviously prejudicial to the security of the adverse party," it is unlikely that a detaining State would choose to do so absent some bargained for exchange such as a prisoner swap or agreed upon cease fire.[97]

In NIAC settings, the Geneva Conventions' Common Article 3 traditionally does not provide POW status or protections to non-state parties because they are not considered lawful combatants, unlike in Common Article 2 IAC conflicts where both parties enjoy combatant status.[98] NIAC protections are generally more lenient than

[93] However, POWs may be tried for crimes they commit while POWs or for violations of the laws of war. *See* Geneva Convention III, *supra* note 70, art. 85.
[94] *See generally id.*
[95] *See id.* art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"); API, *supra* note 68, art. 3; APII, *supra* note 69, art. 2.
[96] *See id.* art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"); API, *supra* note 68, art. 3; APII, *supra* note 69, art. 2
[97] *See* Int'l Comm. of the Red Cross [ICRC], *Internment in Armed Conflict: Basic Rules and Challenges* 4 (Nov. 2014).
[98] *See* Geneva Convention I, *supra* note 66, art. 2; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217; 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention III, *supra* note 70, art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention IV].

IAC protections—they only protect those outside of active hostilities from inhumane and discriminatory treatment.[99] The lack of lawful combatant status in NIAC settings is a valued distinction. The U.S. and other States, in fact, chose not to ratify Additional Protocol I ("API") or Additional Protocol II ("APII") because API contemplates providing non-state actors lawful combatant privileges, which includes POW-equivalent treatment in detention, and APII excluded conflicts where belligerent non-state actors did not control territory but still conducted sporadic guerilla warfare.[100] States' persistent objection to the provisions on combatants contained within API and APII mean that these two additional protocols likely are not customary international law in their entirety.[101]

4. LOAC Imposes Minimum Humanitarian Requirements, but States Choose to Add More

The requirements laid out in the Geneva Conventions are, in broad terms, that POWs be treated humanely, have their dietary and

[99] *See* Geneva Convention III, *supra* note 70, art. 3 ("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."); *see also* APII, *supra* note 69, arts. 4-5 (detailing protocols with respect to "[f]undamental guarantees" and "[p]ersons whose liberty has been restricted").

[100] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. TREATY DOC. NO. 100-2, 100th Cong. (1987).

[101] The U.S. has not categorically stated which parts of the Additional Protocol it considers to be customary international law. However, comments by Michael J. Matheson in 1977 note that the U.S. applies many (if not most) of the provisions of API as a matter of policy. *See* Michael J. Matheson, Remarks at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM U. INT'L L. REV. 419 (1987), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1660&context=auilr.

shelter needs provided for, be afforded medical care, and be promptly released upon the cessation of active hostilities.[102]

While there are no binding international legal norms that require it, many nation states chose, as a matter of policy, to treat detainees captured in a NIAC setting in accordance with the norms and values inherent in Geneva Convention protections for POWs.[103] Notably, the LOAC manuals of Germany, Denmark, and Australia do not distinguish between detainees captured in an IAC versus NIAC settings.[104] Such policy-based decisions may not yet be customary international law, nor may they ever be, but they may still be seen as beginning to set out the constraints and boundaries which international law is imposing on States and their decision-making process in assessing national detention operations and guidelines within armed conflict settings.[105] Not only do the potential differing views of the constraints imposed by non-binding but informative international law norms prevent the formation of customary international law, it is also particularly poignant in military operations involving coalitions of countries. For example, in multi-nation military operations in NIAC settings, such as the conflict against ISIS in Syria, there are numerous countries operating under a single unified command chain, but who have their own nation state interpretations of LOAC to adhere to.[106]

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[102] *See generally* Geneva Convention III, *supra* note 70.

[103] *See* Laura Dickinson, *National Security Policymaking in the Shadow of International Law*, 21 UTAH L. REV. 629, 629 (2021) (discussing how IHRL norms and values are being adopted as a matter of policy and practice in U.S. national security policymaking).

[104] *See* AUSTL. DEFENCE FORCE, *supra* note 90; German Federal Ministry of Defence, *supra* note 91; Danish Ministry of Defence, *supra* note 91.

[105] *See* AUSTL. DEFENCE FORCE, *supra* note 90; German Federal Ministry of Defence, *supra* note 91; Danish Ministry of Defence, *supra* note 91.

[106] *See Jennifer Maddocks, Large-Scale Combat Operations Symposium – Detention in Non-International Armed Conflict*, ARTICLES OF WAR (May 15, 2023), https://lieber.westpoint.edu/detention-non-international-armed-conflict/, (noting that support by a third country in a NIAC setting raises questions regarding the assisting States' international responsibility related to LOAC and detention related breaches).

Even with nation states' policy-based choices expanding or limiting their understanding of existing international law, and potentially expanding the protections found within the LOAC paradigm for detainees in NIACs, there is still the normative question of primacy. Specifically, the ongoing discussion about whether the two bodies of law that frame detention operations in conflict settings, IHRL and LOAC, are complementary as put forward by the European courts, or if LOAC, as *lex specialis*, displaces other law.

5. LOAC may be Seen as Displacing IHRL Requirements

The ECHR's view that IHRL norms apply at all times, including during armed conflict, is not ubiquitous. There is also the belief that during times of armed conflict, LOAC, as *lex specialis*, as the more specialized rule will prevail over the general IHRL requirements.[107] One such nation state that believes LOAC displaces IHRL during armed conflict is the U.S..[108] The U.S. has a longstanding position that in times of armed conflict LOAC, as *lex specialis,* overrides the general law and controls when in conflict with other bodies of law like IHRL.[109] This is not to say, however, that the U.S. believes that no other bodies of law are applicable in a conflict setting. The U.S. simply prioritizes "the rule that is more specifically directed towards the action because it takes better account of the particular features of the context in which the law is to be applied."[110] For the legal authority to detain, the DOD Law of War Manual prioritizes "the [d]etaining [p]ower's sovereign rights under international law rather than, or in addition to, authorities arising from an international legal instrument."[111]

[107] Juliet Chevalier-Watts, *Has Human Rights Law Become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?*, 14 INT'L. J. OF HUM. RTS. 584, 586 (2010).
[108] *See* DOD LOW MANUAL, *supra* note 68, at 9; *see also* McLeod, *supra* note 47 ("[T]he law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims . . . .").
[109] *See* DOD LOW MANUAL, *supra* note 68, at 9; *see also* McLeod, *supra* note 47 ("[T]he law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims . . . .").
[110] *Id.* at 10.
[111] *Id*. at 520.

U.S. courts, however, have imposed some limitations on the authority of their military forces to detain people in conflict settings. Most notably, in the U.S. Supreme Court case of *Hamdi v. Rumsfeld*, the plurality decision stated that while the 2001 Authorization for the Use of Military Force allows for seemingly indefinite detention of enemy combatants,[112] it cannot authorize the detention of an American citizen without providing recourse to meaningfully challenge the presumption of enemy combatant status.[113]

This U.S. due process requirement is somewhat reminiscent of the European courts' application of IHRL.[114] However, it should be noted that U.S. due process requirements only apply to American citizens accused of being enemy combatants.[115] Additionally, if found to be an enemy combatant during ongoing hostilities, then even as a U.S. citizen, they may be held indefinitely under the LOAC principle that an enemy combatant may be held for the duration of hostilities, under the legal premise that they are being detained only so that they do not rejoin the fight.[116]

Because the U.S. is at peace unless it has declared war or is actively conducting military operations against a foreign nation,[117] the designation of ongoing hostilities is an important factor. After all, the U.S. last declared formal war during World War II and since then has relied on congressional resolutions to authorize the use of force.[118] Under this type of domestic authority, the U.S. and many other

[112] Hamdi , 542 U.S. at 521; *see also* Authorization for Use of Mil. Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); *see generally* Al-Alwi v. Trump, 901 F.3d 294 (D.C. Cir. 2018).
[113] *Hamdi*, 542 U.S. at 533; *see also* Authorization for Use of Mil. Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).
[114] *See* Lakhdar Boumediene et al. v. Bosnia and Herzegovina, App. Nos. 38703/06 et al., Eur. Ct. H.R. (2008).
[115] *Hamdi,* 542 U.S. at 509.
[116] *See id.* at 521.
[117] United States v. Yasith Chhun, 513 F. Supp. 2d 1179, 1184 (C.D. Cal. 2007), *aff'd*, 744 F.3d 1110, 1184 (9th Cir. 2014); *see also* United States v. Jack, 257 F.R.D. 221, 231 (2009) (active military operations may be open and notorious or covert and undisclosed).
[118] *See, e.g.*, The Gulf of Tonkin Resolution, Pub. L. 88-408; The Authorization for Use of Military Force, Pub. L. 107-40; The Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243.

countries have engaged in multiple military led and controlled detention operations since World War II.[119]

The question as to whether LOAC and its detention protections displace IHRL in both IAC and NIAC conflict settings has been analyzed extensively with no clear consensus.[120] What is clear is that detention operations conducted by military units currently exist in a legal paradigm for armed conflict *or* peace.[121] The application of the law of war is, after all, dependent upon the categorization of the conflict,[122] and the factual circumstances that surround the actual conflict determine whether an armed conflict exists. [123]

These determinations of factual circumstances also highlight an additional concern. When placed alongside research that highlights that the traditional Westphalian based approach to formally declared war between States is on the decline,[124] the question of whether IHRL and LOAC are complementary or binary takes on far greater importance. Because while, under the traditional legal framework of *jus ad bellum*, there is a clear demarcation point between the paradigms of war and peace (or armed conflict and peacetime), nowhere within the body of *jus ad bellum* do we find any reference to the power to detain. Detention operations conducted by military units

[119] *See, e.g.*, Northern Ireland (Emergency Provisions) Act 1973, c. 53 (UK).
[120] *See* Watkin, *supra* note 10; *see also*, Dickinson, *supra* note 103.
[121] Even within this dichotomy, however, there is an ongoing debate surrounding what, if any, bodies of law apply in non-international armed conflicts. *See generally* Knut Dörmann, *Detention in Non-International Armed Conflicts*, INT'L L. STUD., 88, 347 (2012).
[122] *See* Kenneth Watkin, C*ontrolling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 AM. J. INT'L L., 1, 2-5 (Jan. 2004) (discussing how different conflict settings create a complex series of circumstances when LOAC may or may not be applied).
[123] The ICRC notes that the phrase "armed conflict" evolved as a direct response to the concept that the laws of war, or as they term it, "international humanitarian law," should not be dependent upon formalities associated with war. *See* Int'l Comm. Red Cross [ICRC], COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean S. Pictet ed. 1958).
[124] *See* Tanisha M. Fazal, *The Decline in Declarations of War: An Exchange*, 30 SEC. STUD. 893, 893 (2021).

currently exist in a paradigm of war *or* peace.[125] As the use of actual *armed* conflict as a tool of national power is on the decline,[126] and is likely to continue on this path, we must look to the types of conflict which *are* occurring and consider how States should apply IHRL and LOAC in these conflicts that exist below the level of traditional armed conflict.

II. THE "GREY ZONE" PROBLEM

The Charter of the United Nations creates a *de jure* prohibition on use, or threat, of force absent a U.N. Security Council ("UNSC") authorization or a self-defense justification.[127] Accordingly, nation states are resorting to situations in which, for either political or legal reasons, they choose not to identify their actions as being armed conflict.[128] However, as a matter of strategic, military, or political necessity, nation states may still find it necessary to detain opposing military or quasi-military personnel during these conflict settings.[129]

This section will first describe why definitions of grey zone conflicts, and the actions leading to them, are problematic and subject to academic debate. It will then explore the concept of grey zone operations specifically within the physical domain of warfare and examine how the absence of "armed conflict" poses a challenge for legal professionals when considering military operations within grey zone conflict settings.

A. *Grey Zone Conflicts are not Easily Defined*

The exact definition of grey zone conflict is open to interpretation and debate, but nevertheless, it has become somewhat ubiquitous in military circles over the past decade, though not without

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[125] *See* John B. Bellinger III, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 202 (2011).
[126] Thomas S. Szayna et. al., *What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?*, RAND CORP. (Sept. 12, 2017), https://www.rand.org/pubs/research_reports/RR1904.html.
[127] U.N. Charter arts. 2, ¶ 4, 51.
[128] *See* Michael Howard, *War and the Nation-State,* 108 DAEDALUS 101, 106 (1979).
[129] *See generally* Pejic, *supra* note 43, at 375.

detractors.[130] It is not necessarily the methods and means employed by military forces that cause a conflict to be defined as a grey zone operation. Rather, it is the liminal space in which the operations are being conducted that allows for the identification of when a conflict may be considered as being in the grey zone.[131] One suggested definition is that grey zone conflicts are those in which parties to a conflict engage in a gradualist form of warfare that seeks to modify some component of the international system, using "hard" and "soft" forms of power in an unconventional manner, making it difficult to respond adequately.[132]

This ability to respond to problems becomes particularly poignant when we consider the U.N. Charter and its prohibition on the threat or use of force. For if, as Mazar points out, one goal of grey zone strategies is to remain below the threshold of force outlined in the charter, defending nation states will be left without any rationale for legal retaliation under international law.[133] This also highlights the problem that aggrieved nation states would be unable to engage in either self-defense under Article 51 of the Charter, or even lesser forms of defensive coercion, such as countermeasures.[134]

The ambiguous nature of grey zone conflict means that it exists, in so much as it does exist, in neither a state of peace nor of armed conflict.[135] An aggressor may engage in "political actions that circumvent traditional norms and laws of war in the pursuit of narrow political strategic objectives"[136] or conduct "competitive interactions

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[130] *See* Ben Scott, *We Need to Stop Talking About the Grey Zone*, THE INTERPRETER (Mar. 17, 2022) https://www.lowyinstitute.org/the-interpreter/we-need-stop-talking-about-grey-zone.

[131] *See* Matt Petersen, *Competition and Decision in the Gray Zone: A New National Security Strategy*, THE STRATEGY BRIDGE (Apr. 20, 2021), https://thestrategybridge.org/the-bridge/2021/4/20/competition-and-decision-in-the-gray-zone-a-new-national-security-strategy.

[132] *See generally* Michael J. Mazarr, *Mastering the Gray Zone: Understanding a Changing Era of Conflict*, MONOGRAPHS, BOOKS, AND PUBL'N, Dec. 1, 2015, at 1, 33-34.

[133] *See id.* at 102.

[134] *See* U.N. Charter art. 51; *see also* G.A. Res. 56/83(A), art. 22 (Jan. 28, 2002).

[135] *See* Mazarr, *supra* note 132, at 64.

[136] Jahara W. Matisek, *Shades of Gray Deterrence: Issues of Fighting in the Gray Zone*, J. STRAT. SEC. 1 (Fall 2017) at 1, 5.

among and within State and non-state actors that fall between the traditional war and peace duality."[137] Both would be equally in the grey zone. Furthermore, the methods and means employed by military forces in grey zone conflict are myriad—they can include operations within the electromagnetic spectrum,[138] cyber effect operations and information campaigns,[139] and even Hollywood style *special operations*.[140] The throughline is that grey zone conflict is neither peace nor armed conflict.[141] And it is that quality of operating in the liminal space[142] of traditional legal concepts of conflict that makes it challenging for nation states to identify the applicable legal paradigms.

B. *The Absence of "Armed" Conflict is Problematic for Legal Analysis in Grey Zone Conflicts*

One common requirement amongst all interpretations concerning detention under LOAC is the requirement that the parties be involved in *armed conflict*. Additionally, to avail themselves of the arguably less stringent detention requirements found within LOAC, a nation state must be specifically engaged in either international or non-international *armed conflict*.[143]

The mere fact that the military forces conducting the operation are carrying arms and of an organized military character is not sufficient to trigger the application of LOAC.[144] If it were, then this very low threshold would certainly push actions, such as the Kerch

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[137] Carvent L. Webb II, *Understanding the Gray Zone: How Federal Law Enforcement Agencies Can Support SOF Operations Related to Counterterrorism Strategy*, 37 AM. INTEL. J. 183, 183 (2020).
[138] *See generally* Ignacio Nieto, *Electromagnetic Operations in 'Grey Zone' Conflicts*, J. JOINT AIR POWER COMPETENCE CTR. (Winter/Spring 2021) at 74, 77-78.
[139] *See generally* Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 YALE J. INT'L L. 1, 1-3 (2017).
[140] *See generally* Tahir Mahmood Azad et. al., *Understanding Gray Zone Warfare from Multiple Perspectives*, 186 WORLD AFFAIRS 81, 89 (2023).
[141] *See* Javier Jordan, *International Competition Below the Threshold of War: Toward a Theory of Gray Zone Conflict*, 14 J. STRAT. SEC. 1, 1 (2021).
[142] *See* Aurel Sari, *Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats* 13-14 (Exeter Ctr. for Int'l L., Working Paper No. 2019/1).
[143] *See generally* Geneva Convention III, *supra* note 70.
[144] *Id.*

Strait Incident, Chinese and Indian border skirmishes,[145] and the ongoing interactions between Chinese and Philippine sea vessels,[146] into the realm of an IAC, a political reality that nations seem to be taking great pains to avoid due to the UN Charter's prohibition on the use of force.

In addition, even if we were to accept a broad characterization of the mere use of military forces as being a sufficient trigger for identifying armed conflict, this test would become somewhat unworkable when both parties to the conflict claim that they are not, in fact, engaged in an armed conflict. If two States are disputing the existence of an armed conflict or if we are without the protracted and minimum level of intensity put forth by the *Tadić* court, "[w]e are confronted with ambiguity on the nature of the conflict, the parties involved, and the validity of the legal and political claims at stake."[147] This situation recently played out in the Kerch Strait Incident between Russia and Ukraine. As neither party to the incident claimed that the detentions were the result of armed conflict, the scenario fell outside the *lex specialis* of LOAC.[148] Accordingly, Russia did not have the inherent authority for the detention of an opposing armed force, inherent within customary international law and codified in LOAC, and it was without justification for the internment of a civilian population posing a direct threat to its security, as recognized under customary international law.[149] Outside of conflicts governed by

[145] *See generally* Snehesh Alex Philip, *Chinese Troops Challenge India at Multiple Locations in Eastern Ladakh, Standoff Continues*, THE PRINT (May 24, 2020, 1:36 PM), https://theprint.in/defence/chinese-troops-challenge-india-at-multiple-locations-in-eastern-ladakh-standoff-continues/428304/.

[146] *See* Hannah Beech & Jes Aznar, Blasting Bullhorns and Water Cannons, Chinese Ships Wall Off the Sea, N.Y. TIMES (Sept. 23, 2023), https://www.nytimes.com/2023/09/23/world/asia/china-sea-philippines-us.html?action=click&module=RelatedLinks&pgtype=Article.

[147] U.S. Army Special Operations Command [USSOCOM], White Paper on Perceiving Grey Zone Indications, USASOC (Mar. 15, 2016) (quoting remarks made by Gen. Joseph L. Votel, USSOCOM Commander, in March 2015 before the House Armed Services Subcommittee on Emerging Threats and Capabilities).

[148] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ 31, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.

[149] *See generally* Deeks, *supra* note 63.

LOAC, however, the generally acknowledged standard is that IHRL applies at all times and everywhere.

So, what legal paradigm applies? If, as the ICRC states, there are legally only two types of armed conflicts,[150] then how do we account for the interactions between the parties that are taking place below the threshold of traditional armed conflict but which involve sporadic episodes involving limited violence?[151] As it stands now, if a nation is not in an armed conflict governed by LOAC, then is it only governed by the laws of a peacetime setting?

When looking at incidents like those outlined in detail in the following section, we can see examples of exactly why operations in these areas are problematic with regard to legal frameworks for detention and why nation states must take steps to put their own policy frameworks in place to account for the lack of legal maneuver space.[152] In one well-publicized example of such down-playing of hostilities, the Russian Navy in 2018 detained twenty-four Ukrainian sailors and three Ukrainian warships.[153] The detainment was ostensibly without any form of legal justification under established legal norms surrounding armed conflict as might be expected when one nation's military detains another's; it relied instead on somewhat dubious border control claims.[154] The Government of Ukraine brought the case before the International Tribunal for the Law of the Sea ("ITLOS"), arguing that the detention of its sailors was illegal under the international law of the sea.[155] Interestingly, neither party claimed a state of armed conflict existed between their two nations and instead claimed that their respective actions were on the Ukrainian

[150] *See generally* ICRC, *supra* note 46
[151] *See generally* Hal Brands, *Paradoxes of the Gray Zone*, FOREIGN POL'Y RSCH. INST. (Feb. 5, 2016) https://www.fpri.org/article/2016/02/paradoxes-gray-zone.
[152] *See generally* Charles Pede & Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MILITARY REVIEW, March-April 2021, at 6, 7-9.
[153] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ 31, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf
[154] *Id.* ¶ 32 .
[155] *Id.* ¶ 1, 57.

side "non-military," and from the military in nature, but relating to Russian sovereign rights per the Russian Federation.[156]

While the Kerch Strait Incident is a real-world example, one can also envisage similar situations in the South China Sea, given the current state of affairs between the Philippines and China.[157] Similarly, one can envisage a scenario involving the military of a great power State conducting operations within the territory of a failed or failing State that is unable to exercise its fundamental sovereign power.[158] In situations like these, existing legal frameworks like IHRL would potentially impose unworkable limitations on detention by imposing requirements such as the timely access to legal counsel, notice, and filing of specified charges discussed above.[159] Such limitations would be unworkable in a conflict scenario on a remote island, for instance, and could drive actors to either ignore their obligations under international law or to claim legitimacy through sophistry.

Either outcome arguably brings the validity of the international legal order into question through malicious misuse of international law to bolster illegal actions.[160] Security Detention, the practice of temporarily removing personal liberties to ensure the safety of the State in a crisis scenario, would also not cover such detention,[161] as its requirement for judicial oversight[162] would be impractical in an

[156] *Id.* ¶ 57, 51.
[157] *See China Conducts Patrols in South China Sea Amid Ongoing Run-Ins*, REUTERS (Jan. 3, 2024, 10:02 PM), https://www.reuters.com/world/china/china-conducts-patrols-south-china-sea-amid-ongoing-run-ins-2024-01-03/.
[158] *Compare id.* with Samer Bakkour & Rama Sahtout, *The Dimensions and Attributes of State Failure in Syria*, 25 J. OF BALKAN AND NEAR E. STUD. 1020, 1020-36 (2023) (using Syria as an example of a failed State).
[159] CAWTHORNE, *supra* note 37 (noting the requirements imposed by IHRL).
[160] *See* Filipe dos Reis & Janis Grzybowski, *Moving 'Red Lines': The Russian–Ukrainian War and the Pragmatic (Mis-)use of International Law*, GLOBAL CONSTITUTIONALISM, 2023, at 1, 3 (Aug. 10, 2023) (explaining that Russia uses semantic legal infrastructure to justify their actions through lawfare).
[161] *See* ICCPR, *supra* note 11, art. 9 Hum. Rts. Comm. General Cmt. 35, ¶ 15.
[162] *Id.* ("States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of

evolving military operation, particularly those operations conducted in international territory or those being conducted in a failing State where there is no access to a functioning governmental body to provide such security detention authorization.

III. CASE STUDIES AND APPLICATIONS OF IHRL RULES VS LOAC RULES

This section discusses why reliance upon the existing IHRL framework in military operations in the grey zone does not offer sufficient operational flexibility for States' militaries operating outside of traditional norms of armed conflict given the strict due process requirements inherent in IHRL. Through an examination of the Kerch Strait Incident and recent Chinese and Philippine interactions in the South China Sea, both examples of recent grey zone conflicts, it will discuss the gap that exists between the two normative frameworks of IHRL and LOAC.

A. *The Kerch Strait Incident*

This first example demonstrates that even in instances where two nations are on a path to eventual traditional armed conflict, the current legal paradigms are insufficient to deal with military detention requirements in a situation involving armed force but not armed conflict under traditional LOAC analysis.

Following Russia's annexation of Crimea in 2014,[163] the Russian government made claims of additional maritime territorial waters surrounding the Crimean Peninsula and began to interdict and harass ships entering and exiting the Kerch Strait.[164] Russia ultimately built a bridge across the strait, effectively preventing access to the Sea

independence and impartiality as the judiciary is a necessary guarantee for those conditions.").

[163] For a detailed discussion of the illegality of Russia's actions concerning the annexation of Ukraine see Lauri Mälksoo, *Ukraine Symposium – Illegality of Russia's Annexations in Ukraine*, ARTICLES OF WAR (Oct. 3, 2022), https://lieber.westpoint.edu/illegality-russias-annexation-ukraine/.

[164] Heather Nauert, Spokesperson, U.S. Dep't of State, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov (Aug, 30, 2018).

of Azov from the Black Sea without Russian approval.[165] Subsequent to this, Russian FSB state security patrol boats seized three Ukrainian naval vessels while the Ukrainian vessels were attempting to transit the Kerch Strait, having left their home port of Odesa on the coast of the Sea of Azov, and while on route to the Ukrainian port of Mariupol.[166] Following the seizure, Russia detained the twenty-four Ukrainian crewmembers who were aboard the naval vessels and instituted criminal proceedings against the crewmen for allegedly violating a Russian border control statute.[167]

While this particular action predates Russia's 2022 invasion of Ukraine,[168] it is certainly fair to say that there was at least some level of ongoing conflict between Russia and Ukraine at that time. Most of the world, including Ukraine, considered Russia's annexation of Crimea illegitimate,[169] and as such, the Crimean Peninsula was (and continues to be) an area that under international law could be considered as being under near or total occupation.[170] If this is the case, then under international law, any further related actions would be an IAC under Common Article 2 of the Geneva Conventions.[171]

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[165] *See* Andrew Roth, *Putin Opens 12-Mile Bridge Between Crimea and Russian Mainland*, THE GUARDIAN (May 15, 2018, 11:09 AM), https://www.theguardian.com/world/2018/may/15/putin-opens-bridge-between-crimea-and-russian-mainland.

[166] *See* Kristian Atland, *Redrawing Borders, Reshaping Orders: Russia's Quest for Dominance in the Black Sea Region*, 30 EUR. SEC. 305, 305-06 (2021).

[167] *See Ukraine-Russia Sea Clash: Captured Sailors Shown on Russia TV*, BBC NEWS (Nov. 27, 2018), https://www.bbc.com/news/world-europe-46356111.

[168] *See Ukraine Crisis: Russia Orders Troops into Rebel-Held Regions*, BBC NEWS (Feb. 22, 2022), https://www.bbc.com/news/world-europe-60468237.

[169] *Crimean Authorities Work Under Barrel of a Gun - Ukraine Leader*, REUTERS (Mar. 6, 2014, 7:36 AM), https://www.reuters.com/article/ukraine-crisis-crimea-gun-idUSL6N0M32QY20140306/ (Then-acting President of Ukraine Oleksander Turchinov stated: "The authorities in Crimea are totally illegitimate, both the parliament and the government. They are forced to work under the barrel of a gun and all their decisions are dictated by fear and are illegal.").

[170] *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, 36 Stat. 2277, ("Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.").

[171] Geneva Convention I, *supra* note 66, art. 2 ("The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.").

However, in their respective filings with ITLOS, neither Russia nor Ukraine claimed that there existed an armed conflict and, in fact, even disagreed as to whether the actions taken by each side were military or nonmilitary in nature, for seemingly political reasons.[172] Russia argued they were acting to protect Russian citizens who were engaged in some form of self-determination effort.[173] This characterization would make the conflict a transnational NIAC, with Russia playing a supporting role to the non-state group. But the later control Russia exerted suggests this is still an IAC. Ukraine and the U.N. General Assembly declared that the occupation and subsequent referendum were illegal acts by Russia and called upon all nation states to "desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means."[174]

So the question is, what legal paradigm should the respective forces operate under—Russian troops detaining Ukrainian servicemembers and Ukrainians detaining Russian troops? And what protections should detainees expect? Because the incident involves two State militaries, the seemingly obvious first question is "[w]hether an armed conflict exists, and whether by extension IHL is applicable, [which] is assessed based on the fulfilment of the criteria for armed conflict found in the relevant provisions of IHL."[175] As noted above, a plain reading of the text of Common Article 2 concerning occupation would seemingly answer this question in the affirmative.

But when neither party acknowledges a state of armed conflict or war, as is the case here arguably, should LOAC apply? If neither party acknowledges an armed conflict or war between themselves, then application of the norms required during an international armed

[172] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ ¶ 31-32 https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf.
[173] *See* David Brennan, *The Russian Case for Crimea*, NEWSWEEK (May 10, 2023, 12:24 PM), https://www.newsweek.com/russian-case-crimea-ukraine-counteroffensive-putin-nuclear-1796772.
[174] G.A. Res. 68/262, ¶ 2 (Mar. 27, 2014).
[175] *Challenges of Armed Conflicts*, *supra* note 81, at 7.

conflict may be inappropriate given the purpose of international law. While the nonrecognition of armed conflict may seem like sophistry by the respective nation states, it should be remembered that "international law governs relations between independent States, [with] the rules of law binding upon States therefore [emanating] from their own free will."[176] So while commentators such as the ICRC note that "it is the resort to force against the territory, infrastructure or persons in the State that determines the existence of an IAC and therefore triggers the applicability of [LOAC],"[177] this is not always the case. When both parties to an armed conflict claim that no armed conflict exists and their conduct (in the limited sense of the Kerch Strait Incident, not the wider conflict) is limited and no civilians suffer or face danger, is there arguably an enforceable and normative requirement that the two countries should be bound by LOAC?

From a purely academic perspective, the answer here should be a resounding yes; LOAC applies regardless of what reality the involved parties claim. Part of the purpose of LOAC is not just the protection of civilians and civilian objects but also those involved in the party as combatants, participants, or both.[178] This is especially true when combatants under the Geneva Conventions, who are rendered *hors de combat* or detained by an opposing force, are provided enumerated protections.[179] As this incident played out in the real world, however, their actions stayed below the accepted level of armed conflict, and there was no automatic recourse under LOAC. Accordingly, with no armed conflict, the governing legal paradigm should be that of IHRL, and an argument can be made that the de facto

[176] *S.S. "Lotus"* (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).
[177] *Challenges of Armed Conflicts*, *supra* note 81, at 8.
[178] *See generally* Geneva Convention I, *supra* note 66, art. 1-3, 12-16; Geneva Convention III, *supra* note 70, art. 1-4; Geneva Convention IV, *supra* note 98, art. 13-26; Geneva Convention II, *supra* note 98, art. 1-3.
[179] Common Article 3 of the Geneva Conventions prohibits "violence to life and person, in particular murder of all kinds" against persons placed *hors de combat* or in detention, and the entire third Geneva Convention is written for the protection of Prisoners of War. *See* Geneva Convention I, *supra* note 66, art. 3; Geneva Convention II, *supra* note 98, art. 3; Geneva Convention III, supra note 70, art. 3; Geneva Convention IV, supra note 98, art. 3.

application of extraterritoriality as put forward by the European Court would be appropriate.

But according to the Russian statement of facts presented to ITLOS, the Russian navy engaged with the three Ukrainian naval vessels with their weapons systems and subsequently captured the three vessels and their crew, holding them in detention for violation of *Russian criminal laws*.[180] The exact location of where the Ukrainian vessels were engaged and detained is disputed by the two sides.[181] It appears, however, that at least one of the vessels was in international waters,[182] and the other two were approximately twelve nautical miles from Russian territory. Arguably, then, all three vessels were outside Russia's territorial legal jurisdiction.[183]

[180] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ 19, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf ("[T]arget weapons were subsequently used against the "Berdyansf", and the "Berdyans" and the "Yany Kapu" were detained by the Russian Coast Guard vessels "Izumrud" and "Don" respectively. The "Nikopol" was stopped by the Ka-52 combat helicopter of the Russian Ministry of Defence and subsequently detained by the Russian Coast Guard vessel "Don". In addition to that, corvette ASW "Suzdalets" of the Black Sea Fleet of the Russian Federation was monitoring the Ukrainian Navy actions.").

[181] *Compare* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Memorandum of the Government of the Russian Federation, May 7, 2019, https://itlos.org/fileadmin/itlos/documents/cases/26/published/C26_Memorandum_RF.pdf, *with* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russia), Case No. 26, Request of Ukraine for the Prescription of Provisional Measures Under Article 290, Paragraph 5 of the United Nations Convention of the Law of the Sea, Apr. 16, 2019, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Request_of_Ukraine_for_Provisional_Measures.pdf.

[182] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russia), Case No. 26, Request of Ukraine for the Prescription of Provisional Measures Under Article 290, Paragraph 5 of the United Nations Convention of the Law of the Sea, Apr. 16, 2019, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Request_of_Ukraine_for_Provisional_Measures.pdf..

[183] *See* U.N. Convention on the Law of the Sea, art. 3, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] ("Every State has the right to

Moreover, military vessels, regardless of location, typically enjoy sovereign immunity under customary international law[184] and the U.N. Convention on the Law of the Sea ("UNCLOS"), to which both Russia and Ukraine are parties.[185] Despite these international legal norms, Russia still relied on purported State criminal jurisdiction to detain Ukrainian sailors.[186] This claim lends additional credence to the argument that in this situation, the detention of the Ukrainian sailors should be governed by IHRL norms rather than those of LOAC because Russia is relying on domestic statutes and Russia has ratified the ICCPR.[187]

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establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles.").

[184] *See* Schooner Exch. v. McFaddon, 11 U.S. 116, 145-46 (1812) ("It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.").

[185] *See* UNCLOS, *supra* note 183, art. 29 (defining a warship as "[A] ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew who are under regular naval discipline."); *see also id.* art. 25, 30, 32, (Stating that "nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes." However, a coastal State may require a warship to leave its territorial sea if the warship does not comply with the laws and regulations of the coastal State (when consistent with international law) concerning innocent passage and disregards any request for compliance made to it); *see also United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (last visited Dec. 21, 2024) (indicating that Russia and Ukraine are parties to UNCLOS).

[186] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ 32, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf ("On 26 and 27 November 2018, 24 Ukrainians (the Military Servicemen) on board the vessels were formally apprehended under Article 91 of the Code of Criminal Procedure of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the State border of the Russian Federation . . . ").

[187] U.N. Div. for Ocean Affairs and the L. of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements (July 23, 2024) (Russia signed the convention on March 18 1968 and ratified it on October 16 1973.).

As a party to the ICCPR, Russia is bound by the prohibition on arbitrary detention.[188] While Russia, in this particular instance, claims compliance with the plain language of the text through its adherence to its own national criminal procedures, the U.N.'s Working Group on Arbitrary Detention offers a broader interpretation that doesn't simply rely on prima facia readings of the covenant.[189] The working group has stated that "'arbitrariness' is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[190]

Here, Russia has, through the use of its military, inappropriately used the moniker of domestic criminal code to deprive Ukrainian sailors of their liberty. The detained sailors should be the beneficiaries of sovereign immunity under both customary international law and the provisions of UNCLOS. The question of the location of the vessels is not something that should have any bearing because of that same sovereign immunity. The Ukrainian sailors serving aboard Ukrainian warships could not at any point have predicted that they would be subject to Russian criminal statutes and detention, suggesting that their detention, making use of the broader interpretation put forth by the UN working group, is arbitrary.[191]

Had this been an internal Russian matter, then there could have been some claim of derogation under Article 4 of the ICCPR to account for security detention.[192] Or, if Russia and Ukraine

[188] ICCPR, *supra* note 11, art. 9, ¶ 1 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").
[189] U.N. Human Rights Office of the High Commissioner, Working Group on Arbitrary Detention: About Arbitrary Detention, (Feb. 14, 2024).
[190] *Id.*
[191] *See* Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Case No. 26, Order of May 25, 2019, ¶ 118, https://itlos.org/fileadmin/itlos/documents/cases/26/C26_Order_25.05.pdf ("the Tribunal considers it appropriate under the circumstances of the present case to prescribe provisional measures requiring the Russian Federation to release the three Ukrainian naval vessels and the 24 detained Ukrainian servicemen and to allow them to return to Ukraine in order to preserve the rights claimed by Ukraine.").
[192] *See* ICCPR, *supra* note 11, art. 4.

acknowledged an armed conflict between them, then the legal norms governing security detention and POW detention under the Geneva Conventions could also have applied.[193] What appears to have occurred, however, is that the Kerch Strait Incident was a conflict conducted in the liminal space of the grey zone—ahead of an actual armed conflict, making use of a military force to apply political pressure or gain without recourse to actual armed conflict.

This is an example of grey zone conflict where the current dualist legal paradigms of IHRL and LOAC lack the legal maneuver space to achieve their objective of imposing State security detention against opposing military forces when acting under the restraints of IHRL. After all, Russia and Ukraine cannot both claim a lack of armed conflict and still say that LOAC principles automatically apply. That being the case, both parties' desire to stay below the threshold of armed conflict means two things. First, Russia does not enjoy the freedom of detention authority that it might otherwise have under LOAC. Second, Ukraine does not benefit from the assurances that their detained sailors are being treated in accordance with the protections afforded to enemy combatants under the Geneva Conventions, including that they will be returned at the cessation of active hostilities.[194]

B. *Ongoing Clashes in the South China Sea*

This vignette examines an example where the ongoing relations between two nations are less strained, and the actual use of kinetic armed force is not employed, but which still involves military and military-like organizations of one State being used in what are arguably grey zone operations. Such operations could very readily lead to the need for one country's military force to detain the others for a limited period of active and ongoing *conflict* between the two of them. As the DOD Law of War Manual notes: "Detention operations may be militarily necessary to achieve the object of [military] operations."[195]

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[193] *See generally* Geneva Convention III, *supra* note 70.
[194] *Id.* art. 132.
[195] DoD LoW Manual, *supra* note 68, at 520.

In May 2009, the countries of Malaysia and Vietnam jointly submitted to the U.N. Commission on the Limits of the Continental Shelf claims for an extended continental shelf in the South China Sea.[196] Following these claims, the People's Republic of China ("PRC") sent two Notes Verbales to the U.N. Secretary requesting that they be circulated to all member states.[197] These Notes claimed the PRC had "indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."[198] Included with the Notes was the now infamous map showing a Nine-Dash line delineating sovereignty over almost the entirety of the South China Sea, including the Spratley, Paracel, and Senkaku Islands.[199]

In 2013, the Republic of the Philippines ("Philippines") instituted arbitral proceedings against the PRC under UNCLOS at the Permanent Court of Arbitration ("PCA").[200] The Philippines challenged the PRC's assertion that they had historic rights to the entirety of the South China Sea and claimed that the PRC had unlawfully interfered with the Philippines' exercise of its sovereign rights in the same.[201] The PCA found, amongst other things, that the

[196] Joint Submission by Malaysia and the Socialist Republic of Viet Nam, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF, https://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm (last updated June 28, 2024); *see* UNCLOS, *supra* note 183, art. 76 (Claims for an extended continental shelf may be made by parties to UNCLOS under Art. 76 on the convention. If successful, a State would be able to make exclusive claims on the economic resources on or below the seabed beyond the traditional 200 nautical mile economic exclusion zone.).

[197] *See* Note Verbale CML/17/2009 from the Permanent Mission of the People's Republic of China to the U.N. Secretary General (May 7, 2009) [hereinafter CML/17/2009], *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; *see also* Note Verbale CML/18/2009 from the Permanent Mission of the People's Republic of China to the U.N. Secretary General (May 7, 2009) [hereinafter CML/18/2009], *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

[198] CML/17/2009, *supra* note 197; CML/18/2009, *supra* note 197.

[199] CML/17/2009, *supra* note 197; CML/18/2009, *supra* note 197.

[200] The South China Sea Arbitration (Phil. v. China), PCA Case Repository No. 2013-19, Award of July 12, 2016.

[201] *Id.*

PRC's historical claim over the entirety of the South China Sea was prohibited by UNCLOS and that the PRC had interfered with the Philippines sovereignty with regard to fishing rights and other economic activities in the South China Sea.[202] The PRC was theoretically bound by its obligations under UNCLOS[203] to respect the PCA's findings and to refrain from exploiting any natural resources in the territorial seas of other nation states.[204] However, the PRC's President Xi Jinping stated that the nation state of China's behavior and claims would remain unchanged.[205]

Since this ruling and President Xi Jinping's statement, there have been numerous clashes between Chinese and Filipino vessels in the South China Sea,[206] and a number of them have involved quarrels surrounding the garrisoning and supply of troops on shoals and "islands." These altercations have, to date, only involved interventions by Chinese Coast Guard ("CCG") vessels and Chinese fishing vessels[207] and seem to have deliberately avoided the use of the Peoples Liberation Army Navy, possibly in an attempt to avoid further

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[202] *Id.* at 473.

[203] *See* UNCLOS, *supra* note 183, art. 296 ("Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.").

[204] *Id.* at art. 73, Annex VII, art. 11.

[205] *See South China Sea: Tribunal Backs Case Against China Brought by Philippines*, BBC NEWS (July 12, 2016), https://www.bbc.com/news/world-asia-china-36771749 ("'China's territorial sovereignty and marine rights in the South China Sea will not be affected by the so-called Philippines South China Sea ruling in any way,' said Chinese President Xi Jinping.").

[206] *See generally* Dean Cheng, *Rising Tensions Between China and the Philippines in the South China Sea* U. S. INST. OF PEACE (Dec. 14, 2023), https://www.usip.org/publications/2023/12/rising-tensions-between-china-and-philippines-south-china-sea; *see also* Jim Gomez, *Philippine and Chinese Vessels Collide in Disputed South China Sea and 4 Filipino Crew Are Injured*, AP NEWS (Mar. 5, 2024, 2:33 PM), https://apnews.com/article/philippines-china-south-china-sea-collision-e69d9506e85d1d23685db4f220b50d71.

[207] These fishing vessels are overtly civilian fishing vessels. *But see* Shuxian Luo & Jonathan Panter, *China's Maritime Militia and Fishing Fleets: A Primer for Operational Staffs and Tactical Leaders*, 101 MIL. REV. 7, 7-12 (2021) ("The maritime militia, a separate organization from both the PLAN and China Coast Guard, consists of citizens working in the marine economy who receive training from the PLA and CCG to perform tasks including but not limited to border patrol . . . and auxiliary tasks in support of naval operations in wartime.").

escalation or intervention by the U.S. and other actors.[208] Interestingly, a 2021 PRC law redesignated the CCG as a quasi-military force, stating it was an "important maritime armed forces"[209] and "operated in maritime areas subject to Chinese jurisdiction."[210]

To date, there have been no incidents of detention by either the Chinese or the Filipino militaries. An examination of the ongoing activities around Second Thomas Shoal[211] and its Filipino garrison, however, highlights a potential situation where, for security purposes, one of the parties may choose to detain the other party for the period of active hostilities or conflict.

The Second Thomas Shoal lies roughly 100 nautical miles from the nearest point of the Philippine coastline; it does not reside within any territorial waters, and as a low tide elevation, it has no claim to any territorial waters of its own and consequently no territorial jurisdiction for criminal matters.[212] The Philippines considers the shoal to be on its continental shelf, and it claims sovereign rights to explore the shoal and exploit its natural resources.[213]

When nation states conduct operations, such as security patrols, in waters where they exercise only "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources,"[214] these rights are limited to securing property interests in their exclusive economic zone. They may do so through such measures as "boarding, inspection, arrest, and judicial

[208] *See* Cheng, *supra* note 206.
[209] Coast Guard Law of the People's Republic of China (promulgated at 25th Meeting of the Standing Committee of the 13th National People's Congress, Jan. 22, 2021, effective Feb. 1, 2021), art. 2.
[210] *Id*. art. 3.
[211] Second Thomas Shoal is a low tide elevation, approximately 100 nautical miles from the coast of the Philippines, and 600 nautical miles from the coast of China. It currently has a garrison of less than a dozen Filipino Marines stationed on it. *See* U.S. INDO-PACIFIC COMMAND, TOPIC: *Sierra Madre*, Second Thomas Shoal, and the U.S. Commitment to Defense of the Philippines USINDOPACOM J06/SJA TACAID SERIES 1-2 (2024) [hereinafter Second Thomas Shoal].
[212] *Id.; see* UNCLOS, *supra* note 183, art. 13.
[213] *See* Second Thomas Shoal, *supra* note 211, at 1-5; *see also* UNCLOS, *supra* note 183.
[214] UNCLOS, *supra* note 183, art. 56.

proceedings" in order to ensure compliance with domestic laws concerning the exploitation of resources.[215] Under existing legal frameworks, there are no detention authorities for national security purposes or even for criminal acts conducted by individuals in those waters.[216] Accordingly, were the conflict between the Philippines and the PRC to continue escalating,[217] and CCG sailors landed on the Second Scarborough Shoal, the Filipino marines stationed there would be faced with a tough question as to whether they could detain these opposing troops.

The first question the on-scene commander should ask is if they can extend their application of domestic criminal laws, subject to all IHRL requirements, to conduct detention operations against these foreign military forces. These forces, after all, are by their very presence alone (and preceding interactions) arguably engaged in some degree of conflict with them. The answer, however, is probably not. While the shoal is arguably the exclusive economic domain of the Philippines, absent some attempt by the CCG sailors to extract some form of economic benefit, they enjoy all other high seas freedoms and are not subject to Filipino jurisdiction.[218] So, while the presence of probably armed PRC sailors might constitute a threat to the Filipino marines, the limitations imposed by IHRL against arbitrary detention will prevent the Filipino military from conducting any form of detention operations outside of an armed attack and an escalation to armed conflict.

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[215] *Id.* art. 73(1) ("The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.").

[216] There are certain crimes of universal jurisdiction which a State could address, such as piracy and slavery, and States maintain jurisdiction over their own flagged vessels under Article 94 of UNCLOS. *Id.* art. 94.

[217] In addition to the sea-based altercations, China appears to be using other avenues of grey zone operations, such as in the cyber domain, to attempt to coerce the Philippines. *See* Neil Morales, *Philippines Wards Off Cyber-Attacks from China-Based Hackers*, REUTERS (Feb. 5, 2024, 3:56 PM), https://www.reuters.com/world/asia-pacific/philippines-wards-off-cyber-attacks-china-based-hackers-2024-02-05/.

[218] *See* UNCLOS, *supra* note 183, art. 87.

The normative requirements of IHRL would not allow for detention, as there is no basis for an Article 4 derogation under the ICCPR outside of an instance that threatens the life of the nation; even the broad language of Article 8 of the ASEAN Human Rights Declaration is unlikely to provide an *ex-post* justification under its national security language.[219] If, however, the Chinese made use of their militia-associated fishing vessels, then perhaps an argument could be made that there was some form of economic nexus, and detention could be possible under traditional sovereign powers subject to the judicial requirements imposed by IHRL.

Without examining too closely the political ramifications of such a situation, it is highly unlikely a military commander would allow a hostile force to remain in a location that threatens their own position and the security of their troops. The commander may well ask their legal advisor if, given the surrounding circumstances, they are engaged in armed conflict and thus able to detain the CCG sailors until the security situation has been resolved in an attempt to prevent them from returning to the fight, so to speak.

If either side unilaterally declared that a Common Article 2 of the Geneva Conventions state of hostilities existed between them, the detention requirements of LOAC would apply, and either party could rely on a security detention justification. As the ICRC notes: "There is no requirement that the use of armed force between the parties reach a certain level of intensity before it can be said that an armed conflict exists."[220] The likelihood is that much like Russia and Ukraine, both the PRC and the Philippines would attempt to remain on the legally justifiable side of Article 2(4) of the U.N. Charter and refrain from any actual use of armed attack sufficient to rise to the level of a use of force. As such, under a traditional analysis of what constitutes armed

[219] *See* Nicholas Doyle, *The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting*, 63 INT'L AND COMPAR. L. Q. 67, 84-85 (2014) (discussing the comparatively broad language allowing for derogation under the ASEAN human rights treaty compared to the ICCPR).

[220] Int'l Comm. Red Cross [ICRC], COMMENTARY: GENEVA CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 236 (Jean Marie Henckaerts, Head of Project, 2016).

conflict, it is unlikely that detention would be authorized absent actual kinetic exchanges of weapons fire.

There may, of course, be a claim that the PRC has occupied part of the territory of the Philippines by landing forces on the shoal, which would then trigger a Common Article 2 claim under the Geneva Conventions. But as the PCA, in its arbitration award, categorizes the shoal as a low tide elevation without any claim to territorial sea, this argument would likely not hold water.[221] Accordingly, the situation would remain as two opposing military forces who, while armed with traditional weapons of war, are refraining from any actual use of armed attack but may be under orders or acting under inherent self-defense authorities to subdue the other party and prevent them from achieving their military objectives.

While Sun Tzu's teachings state that "the supreme art of war is to subdue the enemy without fighting,"[222] it is unlikely either side will be content with a standoff. Filipino marines would likely attempt to take the CCG into some form of custody to ensure the continued security of their operation. However, because there is currently no legal basis for them to do so under domestic law, they would be subject to the PRC's claims of arbitrary and unlawful detention. They are firmly within the grey zone in terms of both operations and legal options.

IV. A PROPOSED WAY FORWARD

As grey zone conflicts are not likely to disappear from the global stage, the gap in the law will continue to grow as conflicting LOAC and IHRL interpretations and applications increase. This Article proposes that nation states enshrine the normative purposes of LOAC and IHRL through a policy-based approach in order to remedy

[221] *See* UNCLOS, *supra* note 183, art. 13(2)(noting that when a low-tide elevation is located at a distance exceeding the breadth or the territorial sea from the mainland, as these islands are, it has no territorial sea of its own).

[222] SUNZI, THE ART OF STRATEGY: A NEW TRANSLATION OF SUN TZU'S CLASSIC, THE ART OF WAR, at 64 (R.L. Wing trans., 2000) (Sun Tzu was in fact referring to the fact that there are many possible alternatives to actually fighting, such as diplomacy and intelligence gathering, which could defeat an enemy without resorting to actual combat.).

this gap. By drawing upon the knowledge and practices adopted since the drafting of both the Geneva Conventions and the ICCPR, nation states could craft a policy-based legal framework by implementing these norms as a matter of national policy. This would allow detention operations to be conducted in a manner that achieves the underlying goals of both LOAC and IHRL paradigms while providing the operational flexibility required by military members operating at a tactical and operational level.[223]

A. *Nation States Should Adopt the Underlying Protections and Rationales from both the IHRL and LOAC Normative Frameworks Through a Policy-based Approach*

Given the existing debate surrounding IHRL's potential extraterritorial applications and the unanswered question of whether LOAC complements or displaces IHRL, nation states are faced with the need to provide adequate levels of protection for all parties and a lack of internationally accepted guidance on when the authority to detain in emerging security situations begins.

For example, LOAC is at once a set of rules designed to protect civilians and those who are no longer able to participate in hostilities, and at the same time, it governs "the means and methods of warfare."[224] It is a legal structure that not only provides protections but also sets the playing field for nation state actors, providing them with at least the color of legal authority for detention, if not the legal justification. IHRL, however, is a system of laws that exists to recognize the inherent dignity and the equal and inalienable rights of all members of the human family.[225] While there is certainly the legal

[223] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at I-12, I-14 (17 Jan. 2017) (C1, 22 Oct. 18) (noting that while there are no fixed limits on what constitutes a tactical or operational level engagement, tactical level engagements typically involve the immediate employment of forces, and operational actions link those tactical engagements with national strategic objectives).

[224] *See* Int'l Comm. of the Red Cross [ICRC], *What is International Humanitarian Law?* (2004).

[225] These principles are laid down in the U.N. charter as well as in subsequent human rights treaties such as the ICCPR and IESCR. *See generally* U.N. Charter.

argument discussed above that IHRL should be applicable during armed conflict, it is not concerned with the conduct of armed conflict.

The differences are probably most stark when considering Article 6 of the ICCPR, which recognizes the deprivation of life only as a sentence under law without derogation according to Article 4.[226] In contrast, LOAC affords lawful combatants with what is commonly referred to as *combatants' privilege* or *combatant immunity*.[227] This privilege shields combatants from prosecution for their lawful warlike acts, such as the killing and wounding of enemy troops.[228] Military members operating under lawful commands typically rely on this protection as part of their training and adherence to domestic military regulations.[229] The combatant's privilege is a key distinguishing feature between members of a State's military and armed opposition groups in NIAC settings.[230] It is a legal basis for the deprivation of life without recourse to the judicial sentencing requirements found in IHRL.

Accordingly, the purpose of detention is different under each set of legal norms. A nation state conducting operations in a LOAC setting does not typically seek to detain enemy combatants for any breach of law or for a punitive purpose but as a means of preventing the adversary from rejoining the fight.[231] The temporal scope of such an action is usually defined by the detaining party.[232]

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[226] *See* ICCPR, *supra* note 11, arts. 4, 6.

[227] See Laurie R. Blank, *Combatant Privileges and Protections*, ARTICLES OF WAR (Mar. 4, 2022), https://lieber.westpoint.edu/combatant-privileges-and-protections.

[228] *See* SOLIS, *supra* note 40, at 52-54. This reference provides a thorough explanation of the combatant's privilege.

[229] For example, the DoD Law of War Manual specifically states that "members of the armed forces of a State that is a party to a conflict, aside from certain categories of medical and religious personnel" qualify as lawful or privileged combatants. DOD LOW MANUAL, *supra* note 68, at 105.

[230] Members of Organized Armed Groups, while legitimate targets under a theory of continuous participation in combat functions, do not enjoy the combatant's privilege. *See* Geneva Convention III, *supra* note 70, art. 4.

[231] *See* Geneva Convention III, *supra* note 70, art. 4.

[232] *See* Laura A. Dickinson, *Administrative Law Values and National Security Functions: Military Detention in the United States and the United Kingdom*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 635 (Peter Cane, et al.

B. *Ongoing Clashes in the South China Sea*

As grey zone conflicts are an amorphous construct with many possible iterations along the competition spectrum,[233] the likelihood of achieving global consensus on the creation and adoption of a new body of laws to govern conflicts within them is highly unlikely given the division that already exists in bodies of law such as the additional protocols to the Geneva Conventions[234] and the applicability of IHRL as discussed above. Instead, adoption of LOAC principles through a policy-based approach for detention operations in grey zone conflicts would provide parties to the conflict with clearer legal boundaries for when they could conduct detention operations and help to delineate the limitations on their conduct and the responsibilities expected of them when actually performing detention operations. It would also assure both sides of the conflict that, absent otherwise unlawful battlefield acts, they would not be prosecuted for detaining the opposing party or for the acts during detention. Such an approach is also not without current precedent. The U.S. has implemented such an approach for its detention operations in NIACs and IACs.[235] The DOD Detainee Program specifically mandates that "all detainees will be treated humanely and with respect in accordance with applicable U.S. law and policy and the law of war."[236] This adoption by the U.S. of a policy-based approach in commonly accepted LOAC settings provides a promising example of a nation state imposing additional rules and standards upon itself that are in excess of the legal

eds., 2020) (noting that LOAC typically permits detention for the duration of hostilities and does not necessarily require that detainees be charged with any form of a crime.); *see also* Geneva Convention III, *supra* note 70, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

[233] Brands, *supra* note 151.

[234] API, *supra* note 68; APII, *supra* note 69.

[235] *See generally* Department of Defense, DoD Directive 2310.01E, DoD DETAINEE PROGRAM (2022), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf?ver=6y1Oz3QqY1slOmu_p9g9Fw%3d%3d.

[236] *Id.* ¶ 1.2.b.

minimums by requiring the higher level of IAC detention safeguards, even in NIAC settings.[237]

Adopting LOAC principles into policies would not bypass the fundamental freedoms and personal protections IHRL affords. Rather, it would ensure that detention of forces is only for the legitimate purpose of security detention as outlined under the Geneva Conventions and accordingly also limited in scope by those same principles.[238] Were nation states obligated to operate exclusively under IHRL standards within grey zone engagements, as has been suggested by some European courts,[239] the range of limitations and requirements imposed upon the detaining actors would not only draw questions about whether their actions were per se illegal; it would fail to provide combatant immunity protections to either side. While proponents of the approach that IHRL applies in all circumstances may argue that this is not an issue for the detained party, Russia's attempt to prosecute the Ukrainian sailors captured in the Kerch Strait Incident highlights the very real danger that military members may face criminal charges from a detaining State, attempting to legally justify its detention operations.

In addition to potentially undermining the protections for detainees and detaining parties, the IHRL legal structure is at odds with the very premise of why militaries typically detain individuals in a grey zone conflict with peer or near-peer competitors.[240] Many military law of war manuals require that captured enemy combatants are to be held only until the end of hostilities or when they no longer pose a threat to the security of the detaining force.[241] Detainees are

[237] *See generally* Laura Dickinson, *supra* note 103. This reference gives a more through discussion of States implementing legalistic type national security policies to implement IHRL safeguards in LOAC settings.
[238] *See generally* Teferra, *supra* note 39, at 965, 973-74.
[239] *See supra* text accompanying notes 53-57.
[240] Acknowledging that since the terrorist attacks of 9/11 the military has been used extensively in a quasi-police function with regards to the apprehension of terrorists and other non-state actor members of International Armed Groups.
[241] *See* AUSTL. DEFENCE FORCE, *supra* note 90, ¶ 9.47 ("Unless the arrest or detention is for penal offences, they must be released 'with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist"); Danish Ministry of Defence, *supra* note 91, ¶ 14.1 (stating that

typically not being held because they have violated a law and are being held to face trial but because they pose a security threat to the military force who are detaining them. Conversely, in IHRL, there is not only an obligation that the detainee be informed of the reason for their detention, which is likely to occur in a LOAC setting as well, but that they also be promptly provided with a meaningful opportunity to challenge the lawfulness of their detention and, if necessary, be brought before a judge to answer for criminal charges.[242] Assuming that nation states are not attempting to act contrary to the principle of State sovereignty and are not exerting their domestic laws extraterritorially,[243] it is unlikely that a small-scale detention operation conducted as a matter of security in a grey zone conflict setting would be able to meet the legal due process demands of IHRL. Accordingly, given the impracticable standards imposed by IHRL in such grey zone operations, nation states should look to apply the LOAC principles to bridge this gap in operational abilities to avoid any potential by States or military commanders to escalate the situation to an armed conflict to displace the more rigid requirements of IHRL.

C. *Ongoing Clashes in the South China Sea*

The first question in attempting to analyze the application of LOAC as a policy-based solution to the lack of normative framework for detention in grey zone operations should necessarily be one of identifying the boundaries of the conflict that will serve as the basis of the detention. If countries are utilizing grey zone operations as a means of exerting pressure against an adversary in a larger conflict[244]

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persons deprived of liberty must be released after the cessation of hostilities (for prisoners of war) or when they are no longer deemed to pose a qualified security risk or after the cessation of hostilities, whichever is earlier (for civilian internees)); DOD LOW MANUAL, *supra* note 68, at 107 ("POWs shall be released and repatriated without delay after the cessation of active hostilities.").

[242] *See* Douglass Cassel, *International Human Rights Law and Security Detention*, 40 CASE W. RES. J. INT'L L. 383, 383 (2009).

[243] Stephen D. Krasner, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 1999) ("Westphalian sovereignty is violated when external actors influence or determine domestic authority structures.").

[244] *See generally* James Derleth, *Great Power Competition, Irregular Warfare, and the Gray Zone*, IRREGULAR WARFARE CTR. (Jan. 13, 2023)

then, unlike historical examples of warfare, there is unlikely to be a well-defined start or end to the overall hostilities, as the two nations will continue to engage in low-level conflicts across a variety of conflict spectrums until one party achieves some form of hegemonic status.[245] So, to successfully draft a policy-based approach, there must be some form of immediate temporal bounding to the detention operation.

To avoid arbitrary detention, detention activities in the grey zone should be limited to addressing immediate localized threats to forces, utilizing similar guidelines as those used in the LOAC principles of self-defense.[246] While this requirement may raise questions of the various *ratione temporis* elements which plague academic discourse, such as the question of when the start of self-defense is legally justifiable,[247] it would have the benefit of providing a quantifiable endpoint for detention using the cessation of the immediate perceived threat or use of military force as the end of hostilities. Applying LOAC principles for the temporal basis is further supported by both the Geneva Conventions and IHRL.[248] Article 132

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https://irregularwarfarecenter.org/publications/great-power-competition-irregular-warfare-and-the-gray-zone/.

[245] *See generally* Jim Garamone, *Dunford Describes U.S. Great Power Competition with Russia, China*, U.S. DEP'T OF DEF. (Mar. 21, 2019)), https://www.defense.gov/News/News-Stories/Article/Article/1791811/dunford-describes-us-great-power-competition-with-russia-china/ (explaining that the U.S. is still engaged in global competition with Russia even after the end of the Cold War); *see generally* Mark Landler, *20 Years on, the War on Terror Grinds Along, with No End in Sight*, N.Y. TIMES (last updated Sept. 10, 2021) https://www.nytimes.com/2021/09/10/world/europe/war-on-terror-bush-biden-qaeda.html (describing how the conflict described as the war on terror has no foreseeable end to its operations).

[246] While there is no widely accepted set of parameters concerning the right to individual self-defense under LOAC, a number of scholars have attempted to clarify it. *See, e.g.*, Elvina Pothelet & Kevin Heller, *Symposium on Soldier Self-Defense and International Law: Highlighting and Framing the Issue*, OPINIO JURIS (Apr. 29, 2019) https://opiniojuris.org/2019/04/29/symposium-on-soldier-self-defense-and-international-law-highlighting-and-framing-the-issue%EF%BB%BF/; *see, e.g.,* Randall Bagwell & Molly Kovite, *It is Not Self-Defense: Direct Participation in Hostilities Authority at the Tactical Level*, 224 MIL. L. REV. 1 (2016).

[247] *See generally* James Green, *The Ratione Temporis Elements of Self-Defence,* 2 J. ON USE FORCE AND INT'L L. 97, 97-118 (June 2015).

[248] *See* Geneva Convention IV, *supra* note 98, art. 132; ; *see also* ICCPR, *supra* note 11, art. 9.

of the Fourth Geneva Convention states that "each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."[249] Similarly, IHRL typically requires an element of predictability concerning both the justification for the deprivation of liberty and a reasonable and expected endpoint for the detention.[250]

Applying these policy-based LOAC principles, such as the protections for POWs afforded under the Geneva Conventions,[251] the temporal requirements to limit duration,[252] and the inherent ability to conduct temporary detention for security purposes in the real-world scenarios discussed above, further supports this notion of temporal bounding. In the Kerch Strait Incident, for example, Russia would have been able to detain the Ukrainian sailors. However, it would also have been required to adhere to stricter requirements for the humane treatment of the detainees and would have limited the detention only to the time required to ensure that there was no continuing threat to their maritime security operations. This stricter temporal bounding would have reduced the allowable detention period to hours or days compared to the months of internment that the Ukrainian sailors faced in Russian jail.

Similarly, applying the LOAC detention principles to a clash between PRC and Philippine security forces in the South China Sea would provide the legal justification for the Filipino marines to detain members of the Chinse Navy or CCG who were threatening the security of their military operations on a disputed reef or shoal or within the Philippines Exclusive Economic Zone. The scope of the detention, however, must be confined by the limited security circumstances in which it is being conducted. The detention would have to be shown to be reasonably limited to only such detention as was necessary to ensure the immediate security of the Filipino forces. Additionally, given the lack of any national jurisdiction, the Filipino commander would have to believe that there was an immediate and

[249] *See* Geneva Convention IV, *supra* note 98, art. 132.
[250] *See generally* CAWTHORNE, *supra* note 37.
[251] *See generally* Geneva Convention III, *supra* note 70.
[252] *Id.*

quantifiable risk to their troops and may not engage in some form of preventative detention.[253]

Altering the above facts a little, if the skirmish between the two parties resulted in the PRC troops gaining control of the low tide elevations without escalating the conflict to that of an armed conflict, then the closest parallel under LOAC principles would be that of an occupying power. Under such circumstances, the occupying power could look to Article 78 of the Fourth Geneva Convention to provide guidance concerning their detention scope and requirements.[254] The detention duration should still be limited to the time it takes to address any immediate security concerns—such as taking the necessary steps to repatriate the Filipino marines to the mainland—or resolving the skirmish through other diplomatic means.[255]

The second question that should be addressed when analyzing detention in the grey zone under a LOAC framework is whether the policy decision to apply LOAC principles would, as *lex specialis*, displace IHRL norms. The U.S. follows the displacement approach.[256] At first glance, such a statement would be at odds with the state practice of a number of nations in the world, particularly those in Europe that are bound by the ECHR's decision in *Hassan*.[257] But when dealing with grey zone conflicts, the questions presented are not located within the traditional realm of armed conflict and its subsequent analysis. As such, when applying the principle of *lex specialis derogat legi generali* to LOAC, nation states should be wary of

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[253] *See generally* Dvir Saar & Ben Wahlhaus, *Preventive Detention for National Security Purposes in Israel*, 9 J. NAT'L SECURITY L. & POL'Y 413(2018) (noting that in confronting terrorism within their borders, some States, such as Israel, have turned to preventative detention to prevent persons suspected of engaging in terrorism from committing future acts of hostility. This form of detention, however, requires both some form of national jurisdictional nexus as well as judicial review of any detention.).

[254] *See* Geneva Convention IV, *supra* note 98, art. 78 ("[I]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.").

[255] *See* Deeks, *supra* note 63, at 408.

[256] *See* McLeod, *supra* note 47.

[257] *See* Hassan v. United Kingdom, App. No. 29750/09, ¶ 9, 11 (Sept. 16, 2014), https://hudoc.echr.coe.int/eng?i=001-146501.

treating it as a standalone body of law with no interaction whatsoever with IHRL.

Instead, a narrow application of the principles and legal norms inherent within LOAC should be used "to resolve a genuine conflict between two norms."[258] While IHRL's requirements of quantifiable criminal charges and judicial review are too restrictive to allow for effective detention operations, they do provide needed protections for individuals. As such, the underlying premise of individual protections in IHRL need not, and arguably should not, be entirely displaced by LOAC principles. Instead, a nation state's military may adopt the inherent detention authorities and protections offered under LOAC and the Geneva Conventions to dispel any arguments of arbitrary detention while still providing the required flexibility in their authority to detain individuals under a premise of emergent threats to their security.

This approach has already enjoyed some manner of success, for as previously noted in paragraph B of this section, the U.S. has already taken some steps in this regard. Requiring, as a matter of policy, that all detainees in the power of DOD forces be treated humanely and in accordance with the customary laws of war, this additional policy approach would merely expand upon the current practice in order to help bridge the gap between the competing paradigms of LOAC and IHRL.[259]

D. *A Policy-Based Approach can Bridge the Growing Gap Between the Legal Norms*

Adoption of LOAC principles to detention in grey zone operations is, of course, not without potential pitfalls. To begin with, there are potential issues with the approach when considering militaries from nation states who have signed up to the European Convention on Human Rights. For example, if the facts of the above South China hypothetical involved not the Filipino marines but rather

[258] *See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 385 (2003).
[259] *See generally* Department of Defense, *supra* note 235, at 234.

British Royal Marines, *Hassan* would apply.[260] Because British troops would be exercising at least sufficient control over the area to conduct any form of detention operation, they would be bound to apply sufficient guarantees of impartiality and fair procedure to the detention operations in an attempt to protect against arbitrariness.[261]

But, as the court noted in *Hassan*, the procedural safeguards the Geneva Conventions afford detainees are typically sufficient in an armed conflict setting to address any concerns that there are violations of IHRL norms.[262] As such, by adopting as policy the procedural safeguards inherent in LOAC for detention operations within the grey zone, nation states can achieve the flexibility of maneuver and decision inherent in the right to detain under LOAC while ensuring that the fundamental protections against arbitrary detention are adhered to. This is true even for countries subject to extraterritorial application of IHRL norms, either based on treaty obligations or their own domestic laws. Of course, were the European Court to hold that the due process rights inherent in the Geneva Conventions were insufficient to address concerns of arbitrary detention without the presence of actual armed conflict, this would then figuratively bind the hands of European States. This, in turn, might then affect multi-lateral operations conducted in partnership with countries such as the U.S. or Australia, which are not bound by such requirements.

The alternative to the adoption of LOAC principles as a matter of policy is, of course, for nation states to maintain the status quo. But, because grey zone operations are inherently ambiguous in terms of the nature of the conflict and the legal status of the parties, the current international law paradigms offer no certainty about what the applicable law is.[263] With no clear rule of law, there can be no fundamental guarantee of the protections that detainees should be entitled to under either legal paradigm.

[260] *See generally Hassan*, ¶¶ 9, 11.
[261] *Id.*
[262] *Id.* ¶ 104.
[263] *See* Sari, *supra* note 142.

CONCLUSION

The current trend of keeping conflicts in the grey zone, below the level of armed conflict, presents legal challenges for States and military forces. In particular, grey zone conflict detention operations fall into the gap between the current legal paradigms of IHRL and LOAC. This is because the normative legal frameworks have remained largely focused on a dualist approach to a war *or* peace paradigm while the conflict landscape has continued to alter and shift. Pragmatically speaking, this has led to a lack of clear limitations and legal expectations, with less overall procedural and legal safeguards for those involved in certain grey zone conflict detention operations. Those detainees who would otherwise have strong POW protections under the Geneva Conventions or true judicial review and safeguards under IHRL fall into the gap between the two paradigms.[264]

A policy-based application of LOAC principles to detention operations in grey zone conflict could enable nation states and their militaries to bridge this gap and adopt both the inherent flexibility of detention rules under LOAC and the most important procedural safeguards of IHRL while ensuring that their actions do not render them susceptible to claims of arbitrary detention given the lack of actual armed conflict. The benefits of the policy-based approach outlined above may also help bridge the divide between nation states that have conflicting views on the extraterritorial applicability of IHRL, provide greater predictability in terms of detainee treatment, and provide States with a framework under which to conduct detention operations.

[264] *See* Rosa Brooks, *Rule of Law in the Grey Zone*, MOD. WAR INST. (July 1, 2018), https://mwi.westpoint.edu/rule-law-gray-zone/ (noting that "beyond a certain point, however, vagueness and ambiguity are crippling. When key international law concepts and categories lose all fixed meaning, consensus breaks down about how to evaluate state behavior . . . ").