Executive Branch Policy Meets International Law in the Evolution of the Domestic Law of Detention

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This paper considers the role that the executive branch can play in modifying international law through a specific case: the March, 2011 issuance of Executive Order 13567: Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force. As its title suggests, the Order establishes a system of periodic review for detainees held at Guantanamo Bay, but the release of the Order suggests much more than merely the adoption of new procedures for reviewing detention determinations. In a “Fact Sheet” issued with the Order, the Obama administration suggested some concrete changes to how the United States views the international law of detention, specifically with regard to Additional Protocols I and II of the Geneva Conventions. Those changes, when combined with the content of the Order itself, may signal an even more profound shift in the role of international law in the shaping of the domestic law of detention and in the role of the executive branch in shaping both international and domestic law.

The paper proceeds by describing the Order in detail and comparing the procedures adopted in the Order with those that preceded it, namely Combatant Status Review Tribunals and detainee Administrative Review Boards. The paper next analyzes the Order’s procedures under Article 75 of Additional Protocol I and Articles 4–6 of Additional Protocol II, as suggested by the Fact

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Finally, the paper considers the broader questions raised by the Order and Fact Sheet's stated approach to the international law of detention. By recognizing an increased role for Additional Protocols I and II, the Order and Fact Sheet go some distance toward providing an avenue for incorporating international human rights norms into the U.S. domestic law of detention, an approach that sharply diverges with previous U.S. positions on the law of armed conflict, and does so through the executive branch operating alone.

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INTRODUCTION

On March 7, 2011, President Obama issued Executive Order 13567
(the Order),1 which established revised detention review procedures for
the detainees currently being held at the U.S. Naval Station Guantánamo
Bay. The press-release “Fact Sheet”2 that accompanied the Order
expanded upon the topic of the Order, not only touching upon the
detention regulated by the Order itself, but also stating the Obama
administration’s position that it would apply Article 75 of Additional
Protocol I of the Geneva Conventions of 1949 (respectively Article 75 and
AP I)3 “out of a sense of legal obligation” and that the United States
“expects all other nations to adhere to these principles as well.”4
Additionally, the President urged the Senate to ratify Additional Protocol
II of the Geneva Conventions of 1949 (AP II).5

In this paper, I consider both the immediate and subsidiary effects of
this combined revision of binding detention procedures and potentially
binding statements of administration policy regarding both Article 75 and
AP II in the Order and the accompanying Fact Sheet. Although Article 75
and AP II contain provisions potentially impacting the full range of
detainee-related issues (such as conditions of confinement and the trial and
punishment of detainees for criminal offenses), the Order itself applies
only to detention determinations, and so my detailed analysis of the Order

1. Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the
   [hereinafter EO 13567].
2. Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy
   Fact Sheet are not numbered in the original; the numbering is my own.
3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the
   Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].
4. Fact Sheet, supra note 2, ¶ 17.
5. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the
   Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609
   [hereinafter AP II].
is correspondingly limited. The broader impact of the policy shift that the Order and Fact Sheet represent, though, reaches far beyond questions of detention determinations, and the topics covered by my analysis expands accordingly.

In the short term, neither the Order nor the President's statement of adherence to Article 75 (which amounts to opinio juris under international law)6 are likely to affect most detention operations conducted by the U.S. Armed Forces. The Order applies to a very small number of detainees — only those held at Guantanamo Bay — all of whom have already undergone similar reviews pursuant to Executive Order 13492.7 Moreover, many of the procedures outlined in the Order have direct antecedents in previous executive branch detention determination procedures, such as Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs). However, the Order is of a piece with the Obama administration's other longstanding policies on detainee procedures, and the Fact Sheet suggests an increased role for international law in the current conflict. The first-order effects of recognizing Article 75 as having legal force (and even ratifying AP II) are likely to be mild for a variety of reasons, but both Article 75 and AP II are closely tied to international human rights law, especially the International Covenant on Civil and Political Rights (ICCPR). At the same time, the international law applicable to armed conflict has become a major point of litigation in U.S. civilian courts. Adopting substantive positions that implicate the ICCPR and international human rights law generally is likely to provide greater opportunity for courts to read human rights restrictions into the U.S. domestic law of armed conflict. Moreover, the Obama administration's willingness to embrace international law will likely be reflected in the litigation position it takes in cases related to the law of armed conflict in U.S. courts. Conversely, the closer embrace of international law may increase the legitimacy of certain legal positions the United States has taken with regard to international law, both in litigation within U.S. courts and in international legal circles.

This paper begins with a brief discussion in Part I of the context of the Order and its claim of "Support" for Article 75 and AP II. In order to set the context for the discussion that follows, the paper provides in Part II an

6. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). The connection of a practice to a "sense of legal obligation" is frequently called "opinio juris." See id. cmt. c ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (opinio juris sive necessitatis); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.").

overview of the Order, including a comparison of the procedures required by the Order with those required by previous executive detention procedures, specifically CSRTs and ARBs and in Part III an Overview of the Provisions of Article 75 and AP II Relevant to Detention. Next, in Part IV, the article considers the specific limits imposed by Article 75 and AP II implicated by the Order. After outlining the first-order effects of the Order on U.S. detention policy, the paper considers in Part V the second- and third-order implications of Article 75 and Additional Protocol II as markers of change in the U.S. approach to the law of armed conflict, followed by a Conclusion.

I. THE QUESTION OF “SUPPORT”

Executive Order 13567 itself does not mention AP I, Article 75, or AP II. Rather, those provisions are mentioned only in the Fact Sheet, released by the Office of the Press Secretary, that accompanied the release of the Order. Article 75 and AP II are mentioned collectively as the object of “support”:

Support for a Strong International Legal Framework

Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions.8

But the form of support for the two distinct provisions is itself quite different. The Administration proposes to support Article 75 by recognizing its applicability:

The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.9

In using the language of “a sense of legal obligation,” the Administration’s recognition takes on the status of opinio juris, which, combined with state practice, would make compliance with Article 75 not only U.S. policy but customary international law,10 binding on the United States as well as other

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8. Fact Sheet, supra note 2, ¶ 14.
9. Id. ¶ 17.
states.¹¹ The statement in the Fact Sheet raises an interesting issue regarding the distinction between opinio juris and customary international law. While the Fact Sheet states that the United States will comply with Article 75 out of a sense of legal obligation, it does not actually state that Article 75 is customary international law. Although these statements might be in tension, they are far from paradoxical. It is entirely possible, for instance, for the United States to comply with Article 75 out of a sense of legal obligation without believing that state practice is wide or consistent enough within the international community to raise Article 75 to the status of customary international law.¹² While logical, that position could place the United States in the interesting litigation position in a case in which a litigant seeks to have a court read the rules contained in Article 75 as binding on U.S. action; the executive could find itself arguing that a rule it is following “out of a sense of legal obligation” should not itself be legally binding. That is an argument more appealing for its sophistication than its intuitive appeal (why, after all, would the executive follow a rule out of “a sense of legal obligation” if it is not law) and relies quite heavily on a seemingly formal distinction (the failure of other states to follow the rule) in an area of law that itself exists as a way around formal limits on making international law. If the executive concedes that it is following Article 75 “out of a sense of legal obligation,” it is easy to imagine a U.S. court assisting it in doing so by enforcing its provisions. Given the place the Fact Sheet gives to Article 75, it may very well be applied to U.S. conduct by U.S. courts even if the executive does not think it has risen to the level of customary international law.

¹¹ But see John B. Bellinger III & Vijay M. Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, 105 AM. J. INT’L L. 201, 207 (2011) (concluding that the administration did not state that Article 75 is customary international law in the Fact Sheet). The recognition of Article 75 as customary international law is hardly novel, even among U.S. officials. The position was advanced by William H. Taft IV when he was the Legal Advisor in the Bush administration State Department:

More broadly, this customary law notion of fundamental guarantees found more expansive expression in Article 75 of Additional Protocol I to the Geneva Conventions. While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.


¹² See Bellinger & Padmanabhan, supra note 11, at 207, n.30 (describing the problems that various administrations have faced in finding “general and consistent state practice” applying Article 75 as customary international law).
The Fact Sheet’s handling of AP II and the new detention procedures outlined in the Order, however, is quite different from its treatment of Article 75. The Order describes the motivation for the processes contained in the Order as a “discretionary matter” in furtherance of its “discretionary exercise” of detention authority under the Constitution and the Authorization to Use Military Force. The support of AP II, “which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts,” is explicitly political and therefore implicitly non-legal; it is simply an announcement that the Obama administration urges the Senate to reconsider ratification of AP II. There is no statement that the Obama administration either plans to adhere to the principles of AP II or that they amount to customary international law.

The Obama administration’s disparate treatment of Article 75 and AP II is particularly quizzical given the subject matter of the Order. The Order applies to detention of individuals in the context of non-international armed conflict (NIAC) (it only applies to detainees currently held at Guantanamo Bay, none of whom are apparently being held pursuant to international armed conflict (IAC)). But, Article 75 (the provision the Fact Sheet cites as customary international law) applies only to IAC, as expressly acknowledged in the Fact Sheet itself. AP II might, if it were binding on the United States, apply to the current conflict, but

13. EO 13567, supra note 1, § 1(b).
14. id., pmbl.
15. Fact Sheet, supra note 2, ¶ 15.
16. Despite the announcement in the Fact Sheet, AP II was listed among those treaties “on which the Administration does not seek Senate action at this time,” on the last treaty priority list, issued in May of 2009. See Letter from Richard R. Verma, Assistant Sec’y for Legislative Affairs to Sen. John F. Kerry, Chairman on Foreign Relations, United States Senate (May 11, 2009), available at http://tinyurl.com/6cafrl5.
17. See generally Bellinger & Padmanabhan, supra note 11, at 207 (noting that nowhere in the statement did the administration state it would apply Article 75 to NIAC). Of course, many believe that Article 75 is customary international law applicable to NIAC, including a plurality of the Supreme Court in Hamdan v. Rumsfeld, 548 U.S. 557, 633–34 (2006) (plurality opinion). See Bellinger & Padmanabhan, supra note 11, at 207, n.29 (collecting sources on the aforementioned position). There are instances when Article 75 can apply in NIAC, such as through Article 1(4), but it is unlikely that such an interpretation was intended by the Administration. The Fact Sheet did not cite Article 1(4), a provision specifically cited as prompting the United States’s refusal to ratify AP I. See AP II Transmittal Letter, supra note 11. It would be surprising for the Obama administration to argue that a provision of AP I that prompted the United States to refuse to ratify it has risen to the status of customary international law, and no one has suggested such a meaning was intended.
18. Fact Sheet, supra note 2, ¶ 17. (“The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict . . . .” (emphasis added)).
19. Although AP II’s scope is restricted to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this
the Administration, by advocating a policy of ratification in a document that situates U.S. compliance with Article 75 as a matter of legal obligation, seems to be eliding a similar place for AP II. Similarly, § 10(b) of the Order directs that it shall be implemented consistent with applicable law, including Common Article 3 and the Convention Against Torture, but without mentioning AP II. Viewed in context, the Order and the Fact Sheet do not alter the legal obligations of U.S. forces in any way, since the Order is limited to detainees at Guantanamo, and Article 75 does not apply to those detainees. Rather, the Fact Sheet’s announcement of compliance with Article 75 appears to be a more general statement of U.S. policy rather than one directly connected to the issuance of the Order.

That is not to say that the announcement of the Order and the statement of “support” for both Article 75 and AP II are completely unconnected. Even if it is not perfectly stated as a legal matter, the Fact Sheet’s reliance on Article 75 and statement of support for AP II do suggest an increased role for both measures in the formation of U.S. detention policy. Even without ratification or formal recognition of either Article 75 or AP II as customary international law, it is possible that the protections of either could be incorporated through courts’ interpretation of Common Article 3,\(^\text{20}\) which the Supreme Court held in \textit{Hamdan}\(^\text{21}\) — and the Order itself maintains\(^\text{22}\) — applies to the current conflict. That possibility is all the more likely if the executive branch — the party most likely to make arguments restricting the reach of Article 75 or AP II in detention litigation — supports both provisions, not only as a matter of policy, but, in the case of Article 75, out of a sense of legal obligation.

II. OVERVIEW OF THE ORDER

Given the scope of the current conflict, perhaps the most relevant portion of the Order is its title: \textit{Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force}. That title describes a key limit: the Order applies only at Guantanamo Bay, so it does not apply to the detainees being held by the United States in other locations. Section 1 limits the application of the Order to those currently being held, which means that it applies neither to those who have previously been transferred to other detention facilities

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\(^{21}\) \textit{Hamdan}, 548 U.S. at 629.

\(^{22}\) EO 13567, supra note 1, § 1.
nor would it automatically apply to anyone brought to Guantanamo Bay in the future, as it has occasionally been speculated might occur with other high-ranking Taliban or al Qaeda leaders, although it is certainly possible the President would choose to do so. The Order would continue to apply to those who are currently held at Guantanamo Bay but are later transferred to another U.S. facility for law-of-war detention.

Section 2 provides the strongest substantive guidance in the Order: a standard of detention applicable to those being held at Guantanamo Bay. A detainee should continue to be detained if continued detention “is necessary to protect against a significant threat to the security of the United States.” The standard is self-avowedly not a legal standard. The Order does not address the legality of continued detention, only the President’s discretionary decision to detain.

The Order, as augmented by a Directive-Type Memorandum issued by the Department of Defense (DoD) in May of 2012, is more concerned with procedure than substance though, and the core of the Order is the establishment of two review bodies: The first is a Periodic Review Board (PRB) to (re)consider whether to retain individual detainees in law-of-war detention. The second is a Review Committee which is to serve as a quasi-appellate body for the PRBs, evaluate the implementation of the measures established by the Order every year, and revisit U.S. detention policy every four years.

Section 3 establishes the PRB procedure. The Secretary of Defense is tasked with coordinating the periodic review process and preparing, in

23. See, e.g., Peter Finn & Greg Miller, Panetta Suggests Guantanamo Future, WASH. POST, Feb. 17, 2011, at A4. That policy may have changed, but there has been no official announcement of a policy absolutely prohibiting additional transfers to Guantanamo Bay. See Josh Gerstein, John Brennan: No New Prisoners to Guantanamo Bay, POLITICO, (Sept. 8, 2011), http://tinyurl.com/bu6g55m. Notably, Panetta’s original statement that Guantanamo would be used for top-level detainees was never itself officially endorsed by the Obama Administration. Id.
24. EO 13567, supra note 1, § 1(c).
25. Id. § 2. The application of this standard, and its place relative to other standards currently being used, is considered below. In May of 2012, the Department of Defense (DoD) issued a directive to implement the Order. See Directive-Type Memorandum, Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567 (May 9, 2012, updated Oct. 31, 2012) available at http://tinyurl.com/bqospra [hereinafter DTM 12-005]. DTM 12-005 modifies slightly the detention standard to be “if such detention is necessary to protect against a continuing significant threat to the security of the United States,” id. Attachment 3 § 3 (emphasis added), but given the generally forward-looking nature of the review, the change does not appear to have substantive consequences.
26. See EO 13567, supra note 1, § 8. The process established under this order does not address the legality of any detainee’s law of war detention. If, at any time during the periodic review process established in this order, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.
27. See DTM 12-005, supra note 25.
28. Id. § 3(a)(8).
consultation with the Attorney General, guidelines for PRBs, subject to requirements laid out in the Order.29 Periodic Review Boards are six-member interagency panels of “senior officials,” one each from the Departments of State, Defense, Justice, and Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff.30

Each detainee is to receive a full, “preliminary review.”31 Of course, this “initial” review will not be initial for any of these detainees. In addition to various CSRTs32 and ARBs,33 all of these detainees have previously been reviewed by the interagency task force established by Executive Order 13492. The Executive Order 13492 reviews did not commence until March of 2009, and that process did not conclude until January of 2010;34 so this initial review will be the second one that many of these detainees have received in the last three years. In addition to making the “initial” review something of a periodic review, the previous Executive Order 13492 reviews are important because of how the information collected during those reviews will be used in these initial PRB reviews.35

The detainee is to be provided (in a language he understands) notice of both the PRB review itself and “an unclassified summary of the factors and information the PRB will consider in evaluating whether the detainee meets” the detention standard.36 The summary is to “be sufficiently comprehensive to provide adequate notice to the detainee of the reasons for continued detention.”37

Detainees receive the assistance of a “Government-provided personal representative” — a military officer who is specifically not a military lawyer38 — who is to advocate on behalf of the detainee, “challenging the Government’s information and introducing information on behalf of the

29. Id. § 3.
30. Id. § 5(a)(1).
31. Id. § 6.
32. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter CSRT Order].
34. GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 9 (2010).
35. See DTM 12-005, supra note 25, § 3. (“Application of this standard is specifically not intended to require a re-examination of the underlying materials that supported the work products of either [the 13492 reviews] or a prior PRB and is not intended to create a requirement that each PRB conduct a zero-based review of all original source materials concerning a detainee.”).
36. EO 13567, supra note 1, § 3(a)(1).
37. Id. § 3(a)(2).
38. See DTM 12-005, supra note 25, Attachment 3, at 10 ("The personal representative shall be a military officer of the DoD (other than a judge advocate, chaplain, or public affairs officer) ...."). The personal representatives are detailed to the Periodic Review Secretariat, which performs “all administrative functions for the PRB,” including scheduling cases and, through a PRS Legal Advisor, ensuring that PRBs comply with both legal and procedural requirements. See id. at 9–10.
detainee.” Detainees may also receive the assistance of privately retained counsel, who, conversely to the personal representative provided by the government, must be a lawyer.

The bulk of the PRB procedural requirements concern classified information, and perhaps it is in this area that the Order makes the greatest strides. The Order includes a requirement for the government to compile and produce:

all information in the detainee disposition recommendations produced by the Task Force established under Executive Order 13492 that is relevant to the determination whether the standard in section 2 of this order has been met and on which the Government seeks to rely for that determination ... and ... any additional information relevant to that determination, and on which the Government seeks to rely for that determination, that has become available since the conclusion of the Executive Order 13492 review.

In addition to this production obligation, the government is also required to produce “all mitigating information relevant to that determination,” mirroring the production obligation the government has in criminal cases.

It is in the handling of this information that the personal representative is most important. The government’s production obligation is to both the PRB and the personal representative, unless the PRB decides that, because “it is necessary to protect national security, including intelligence sources and methods,” the personal representative be provided with a summary of the information. Not quite similarly, the detainee’s privately retained counsel will be provided the information unless the government concludes that a summary is necessary because of “the need to protect national security, including intelligence sources and methods, or law enforcement or privilege concerns.” In the implementing directive, the decision about whether information can be disclosed to either the personal representative or private counsel is made by an “Analytic Task Force,” in

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39. EO 13567, supra note 1, § 3(a)(2).
40. Id.
41. See DTM 12-005, supra note 25, Attachment 3, at 11.
42. EO 13567, supra note 1, § 3(a)(4).
43. Id.
44. See Brady v. Maryland, 373 U.S. 83, 87 (1968) (requiring disclosure of “evidence favorable to an accused ... where the evidence is material either to guilt or to punishment”).
45. In the implementing directive, this function of the PRB is largely delegated to an “Analytic Task Force” that both collects information from various agencies and screens that information prior to presenting it to the PRB. See DTM 12-005, supra note 25, Attachment 3, at 12–13.
46. EO 13567, supra note 1, § 3(a)(5).
47. Id.
conjunction with the agencies who produce the information.\textsuperscript{48} Information can be withheld (and substituted by a summary) from a personal representative "only in exceptional circumstances when it is necessary to protect national security, including intelligence sources and methods"\textsuperscript{49} and from a detainee's private counsel "when necessary to protect national security including intelligence sources and methods or to protect law enforcement sensitive or legally privileged information."\textsuperscript{50} Any summary "must provide a meaningful opportunity to assist the detainee during the review process."\textsuperscript{51} If no such summary can be developed, then the PRB may not consider the information.\textsuperscript{52}

Other than in the handling of information, the Order is spare on procedural requirements. The PRB is required to conduct a hearing and consider all relevant information.\textsuperscript{53} There are no rules regarding hearsay or other formal questions of admissibility, only the admonition that the "PRB shall consider the reliability of any information provided to it in making its determination."\textsuperscript{54} PRB decisions are to be made by consensus, and in writing, with an unclassified version of the final determination provided to the detainee within 30 days "when practicable."\textsuperscript{55} The Review Committee reviews PRB determinations on both a discretionary basis (when a member of the Review Committee seeks review within 30 days of a PRB determination) and if the PRB cannot reach consensus.\textsuperscript{56}

If a PRB determines that the detention standard is not met, it shall include any recommendations on conditions of transfer in its decision,\textsuperscript{57} and the Secretaries of State and Defense shall undertake "vigorous efforts" to find a suitable transfer location, including obtaining both security and humane treatment assurances.\textsuperscript{58} One of the major roles of the Review Committee is to monitor the transfer process. The Review Committee reviews annually the status of any detainee that is to be transferred, not only under the old Executive Order 13492 process\textsuperscript{59} and the new PRB process\textsuperscript{60} but also for the broader community of detainees whose release has been ordered by issuance of a writ of habeas corpus by a federal

\textsuperscript{48} DTM 12-005, \textit{supra} note 25, Attachment 3, at 9–10.
\textsuperscript{49} \textit{Id.} Attachment 3, at 13 (emphasis added).
\textsuperscript{50} \textit{Id.} (emphasis added).
\textsuperscript{51} EO 13567, \textit{supra} note 1, § 3(a)(5).
\textsuperscript{52} DTM 12-005, \textit{supra} note 25, Attachment 3, at 13.
\textsuperscript{53} EO 13567, \textit{supra} note 1, § 3(a)(6).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} § 3(a)(7).
\textsuperscript{56} \textit{Id.} § 3(d).
\textsuperscript{57} \textit{Id.} § 3(a)(7).
\textsuperscript{58} \textit{Id.} § 4.
\textsuperscript{59} \textit{Id.} § 5(a)(3).
\textsuperscript{60} \textit{Id.} § 5(a)(1).
The Review Committee is also charged with generally monitoring the “security and other conditions in the countries to which detainees might be transferred.” The Review Committee has the authority to “review the suspension of transfers to a particular country,” although it is not clear if the Review Committee can actually suspend or lift the suspension of transfers to any country, or if its power is limited to making recommendations to the President.

In addition to the initial review, full reviews will be conducted for each detainee every three years. Every six months, detainees will receive a “file review,” in which the PRB will review both the previous decisions and any relevant new information compiled by the Secretary of Defense since the last review. The detainee may make a written submission. If the file review raises “a significant question . . . whether the detainee’s continued detention is warranted” under the detention standard, the PRB will convene a full review.

A. The Place of the Order within the Larger Framework of U.S. Detention Policy

One way to look at the Order is through its place in the evolution of U.S. national security detention policy. Although limited in its application, the Order comes from the highest levels of an administration that has made detention a major issue since the second day of President Obama’s presidency. The Order provides some insight into the Obama administration’s views on at least three major areas of dispute over the last decade: the nature of periodic review; the standard for determining whether someone should be detained; and the procedures to be used for making detention determinations, including the handling of classified information.

1. Periodic Review

The seemingly major innovation of the PRB — that it is “periodic” — is an innovation only if the review it replaces, the review ordered by the President on the second day of his presidency in Executive Order 13492, is taken as the baseline. This is not the first set of review procedures for detainees at Guantanamo Bay, nor even the first set of periodic review procedures. In 2004, the Bush administration established the CSRTs

61. Id. § 5(a)(2).
62. Id. § 5(a)(4).
63. Id.
64. Id. § 3(b).
65. Id. § 3(c).
66. Id.
(which were designed to make initial determinations of whether a detainee was an “enemy combatant”)\(^67\) and ARBs (which conducted annual reviews of continued detention),\(^68\) both of which included many of the procedures included in the Order.

2. **The Detention Standard**

A major issue running throughout America’s recent history of national security detention has been the standard used to determine whether to detain. The review process contained in the Order is styled as an exercise of discretion rather than a claim of authority, but it nevertheless includes a standard for making release determinations and, therefore, necessarily includes a standard for making continued detention determinations.\(^69\) On this front, the Order does not break any perceivable ground. The standard — whether continued detention “is necessary to protect against a significant threat to the security of the United States”?\(^70\) — is too vague to provide any real guidance on how it will be applied in any particular case. The previous Executive Order 13492 review similarly contained no discernible detention standard; the only guidance in that order was that the disposition of each individual should be “consistent with the national security and foreign policy interests of the United States and the interests of justice.”\(^71\)

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67. CSRT Order, *infra* note 32.
68. ARB Order, *infra* note 33.
69. Moreover, even if it is an exercise of discretion, release of detainees pursuant to the Order’s release standard could render U.S. detention practices consistent with legal requirements. See *infra* notes 161–168 and accompanying text.
70. EO 13567, *infra* note 1, § 2.
71. EO 13492, *infra* note 7, § 4(c)(4). The Guidelines adopted for use by the Guantanamo Review Task Force established a three-part test for continued detention: “(1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful.” GUANTANAMO TASK FORCE, FINAL REPORT, *infra* note 34, at 8. Only the first of the three goes to the substance of the detention determination. The Implementation Guidelines issued for EO 13567 reiterate the same detention standard (“if such detention is necessary to protect against a continuing significant threat to the security of the United States”), while allowing the Review Committee to consider “baseline threat information” about the detainee (the extent of the detainee’s involvement in terrorist activities, the detainee’s conduct in acting as part of or substantially supporting “Taliban or al-Qa’ida forces or associated forces,” the detainee’s level of knowledge or skill, the detainee’s ties with terrorists or terrorist organizations, “information related to the detainee’s potential threat if transferred or released” (such as the likelihood the detainee will engage in terrorist activities and the likelihood the detainee will reestablish ties with the organizations described above), the “potential destination country for the detainee” (and specifically the presence of terrorist groups, the availability of governmental or informal support and rehabilitation opportunities, the receiving government’s ability and willingness to mitigate the threat posed by the detainee), “the likelihood the detainee may be subject to trial by military commission, or any other law enforcement interest in the detainee,” “the detainee’s conduct in custody,” “the detainee’s physical and psychological condition,” “any other relevant factors” bearing on the likely threat from releasing the detainee, and “any other relevant
Of course, the years since the beginning of the Executive Order 13492 review process have seen significant developments regarding detention standards, which place in stark relief the lack of any discernible standard in the new Order. In the wake of *Boumediene v. Bush*, a series of cases have made their way through the district courts and into the D.C. Circuit, many of which have elaborated on the appropriate detention standard. As early as March of 2009, the Obama administration had articulated a detention standard in those cases:

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

The first set of criteria, by tying detention to the September 11 attacks, is quite specific (even if it casts a broad net in relation to those attacks). The second set of criteria — part of or substantial support of Taliban, al Qaeda, or associated forces — is hardly a picture of clarity, but they have proven amenable to argument in the cases that have followed, and the D.C. Circuit has largely adopted the government’s “part of” or “substantial support” definition for detainability in those cases. Further, Congress recently adopted a statutory “affirmation” of the President’s ability to detain under the already-widely accepted “part of or substantially supported” standard. The “part of” standard — advanced by the administration, adopted by the D.C. Circuit, and affirmed by Congress — is also much narrower than the standard adopted in the Order, which arguably could be used to detain virtually anyone the government identified as a security risk. Indeed, the detention standards adopted for CSRTs and ARBs in 2004 are comparatively restrictive, respectively “any

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information.” DTM 12-005, supra note 25, Attachment 3, at 6–8.


73. *See*, e.g., Al Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010); Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

74. Respondents’ Memorandum at 2, In re Guantanamo Bay Detainee Litigation (No. 08-442) (emphasis added).

75. The government itself made this argument at the time. *See id.* (“[T]he contours of the ‘substantial support’ and ‘associated forces’ bases of detention will need to be further developed in their application to concrete facts in individual cases.”).

76. *See* Al-Bihani, 590 F.3d at 872.

person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces and “a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters” (with the possibility that “release would otherwise be appropriate”). There is, of course, a major difference between the context for the CSRTs and ARBs and for the PRBs: the overhanging possibility of release by a court exercising habeas corpus jurisdiction, which was confirmed only in 2008 in Boumediene v. Bush. Only a detainee that is detenable under both the court-imposed and executive detention standards will continue to be detained, so it may very well be that the Obama administration is relying on pending habeas corpus cases in the federal courts as a backstop against adopting an overly permissive detention standard in the Order. Regardless of the reason, there is little to be learned from examination of the standard adopted in the Order, especially in light of the more specific standard being applied by courts in the pending habeas cases.

B. Detention Procedures and Classified Information

The Order does advance the ball considerably with regard to review procedures, at least compared to the Executive Order 13492 review, which specified virtually no procedures whatsoever, lacking, among other things, a right for the detainee to even receive notice of the review. But when compared with the procedures used for the combination of CSRTs and ARBs that Executive Order 13492 itself replaced, the differences are comparatively minor, with two exceptions: the CSRT provision establishing a rebuttable presumption in favor of the government’s evidence — replaced in the DoD implementing procedures for PRBs in the form of a rebuttable presumption of validity of a final assessment produced by the Executive Order 13492 process — and the composition of the tribunal. The CSRTs and ARBs were each composed of three military officers, while the PRB is a six-member interagency panel (likely including, at most, one military officer, the representative of the Joint Chiefs of Staff). All three procedures include: notice to the detainee of the proceedings, an unclassified summary of the factual basis for

78. CSRT Order, supra note 32, ¶ a.
79. See ARB Order, supra note 33, § 1.
81. See CSRT Order, supra note 32, ¶ g(12).
82. See DTM 12-005, supra note 25, Attachment 3, at 16.
83. ARB Order, supra note 33, at ¶ 2(B); CSRT Order, supra note 32, at ¶ e.
84. EO 13567, supra note 1, ¶ 9(b).
85. Id. ¶ 3(a)(1); ARB Order, supra note 33, ¶ 3(A)(ii)(a); CSRT Order, supra note 32, ¶ b.
detention;\textsuperscript{86} the right of the detainee to present information to the board;\textsuperscript{87} a personal representative for the detainee\textsuperscript{88} (although the new process also allows for additional, privately retained counsel)\textsuperscript{89} access by the detainee to unclassified information presented to the board;\textsuperscript{90} and access by that personal representative to the rest of the information (potentially in the form of a summary) presented to the board.\textsuperscript{91} None of the procedures specified formal evidentiary rules, with the Order and the Order Establishing the CSRT (CSRT Order) both focusing on "reliability" and the CSRT Order explicitly providing for the use of hearsay.\textsuperscript{92}

In this final regard, the earlier procedures actually seem more protective of the detainee than the new ones, providing no "national security" exception to the detainee's representative having access to all the information used by the tribunal (as opposed to the summary information provided for in the Order, which more closely mirrors the Classified Information Procedures Act-like provisions of the Military Commissions Acts of 2006 and 2009 than it does the earlier detention-related procedures),\textsuperscript{93} although it does add a duty for the government to disclose any mitigating information.\textsuperscript{94}

In the ways that CSRT and ARB procedures differ from those required by the Order (other than the CSRTs' presumption in favor of the government's evidence), it is not clear which procedures are more protective of detainee rights. The CSRTs and the PRBs both allow

\begin{itemize}
\item \textsuperscript{86} EO 13567, supra note 1, § 3(a)(1); ARB Order, supra note 33, § 3(A)(iii)(a); CSRT Order, supra note 32, ¶ 1(g(1)).
\item \textsuperscript{87} EO 13567, supra note 1, § 3(a)(3); ARB Order, supra note 33, § 3(A)(iii)(b); CSRT Order, supra note 32, ¶ 1(g(10).
\item \textsuperscript{88} EO 13567, supra note 1, § 3(a)(2) ("personal representative"); ARB Order, supra note 33, § 3(b) ("Assisting Military Officer"); CSRT Order, supra note 32, ¶ c ("Personal Representative").
\item \textsuperscript{89} EO 13567, supra note 1, § 3(a)(2).
\item \textsuperscript{90} Although the ARBs do not specifically authorize disclosure to the detainee, such disclosure is anticipated by the ARB rules that limit disclosure of information provided by other agencies. See ARB Order, supra note 33, at § 3(C)(ii) (requiring permission from other agencies that provide information to the Board before sharing that information with the detainee); CSRT Order, supra note 32, ¶ c; EO 13567, supra note 1, § 3(a)(1), (5).
\item \textsuperscript{91} ARB Order, supra note 33, § 3(B)(ii); CSRT Order, supra note 32, at ¶ c; EO 13567, supra note 1, § 3(a)(5). The CSRT process encompassed information only in the possession of the DoD (CSRT Order, supra note 32, ¶ c) while the ARB process anticipated that some information might come from other agencies and imposed an obligation on them to provide it (ARB Order, supra note 33, § 3(C)), as does the current Order (EO 13567, supra note 1, § 7).
\item \textsuperscript{92} EO 13567, supra note 1, § 3(a)(6); CSRT Order, supra note 32, ¶ g(9).
\item \textsuperscript{94} EO 13567, supra note 1, § 4. The CSRT procedures allow other agencies to refuse to provide classified information for use in the CSRT proceedings, but such information is unavailable to government, tribunal, and personal representative alike, and summary was to be provided for use by all. See CSRT Order, supra note 32, ¶ d(2), e(3)(a).
\end{itemize}
detainees to call “reasonably available” witnesses (although, in the PRBs, the witnesses must additionally be willing).95 The CSRT procedures explicitly provided for the detainee to question witnesses called by the board.96 The ability of the detainee to question witnesses called by the PRB is not directly addressed in the Order, and the implementing procedures do not expressly provide for witness testimony by anyone other than witnesses called by the detainee himself.97 However, since most of the information considered by the board will be developed outside of the hearing,98 the opportunity for in-hearing confrontation seems minimal.

Both the CSRTs and the ARBs were subject to majority voting99 rather than the consensus rules of the current Order, but it’s neither clear the consensus requirement will be more favorable to detainee interests nor that it is intended to be. Rather, the consensus rule is far more likely an accommodation necessitated by the interagency nature of the current PRBs than a rule of decision adopted because of its superiority for making detention determinations. One way in which the PRBs differ from CSRTs and ARBs is that both CSRTs and ARBs were advisory (with the ultimate decision ostensibly reserved to higher authorities),100 but the discretionary review afforded the Review Committee similarly reserves ultimate decisionmaking from the PRBs (albeit vesting it in another committee rather than an individual).101 Regardless of the Order, however, statutory restrictions limit release discretion to the Secretary of Defense.102 One way in which the PRBs might be more favorable to detainees is in conveying their results: the PRBs are required to provide detainees with unclassified summaries of the reasons for their decisions,103 while ARBs were only required to provide notice of their determination.104 No mention of notice to the detainee of the determination is made in the CSRT Order. That procedural enhancement is likely of slight comfort to detainees whose detention the PRBs continue. Oddly, this notice of outcome is — at least with regard to Article 75 and AP II — perhaps the Order’s greatest advance for detainee rights.105

95. EO 13567, supra note 1, § 3(a)(3)(iv); CSRT Order, supra note 32, ¶ g(8).
96. CSRT Order, supra note 32, ¶ g(8).
98. Id. at 12 (describing the information to be provided to the PRB).
99. ARB Order, supra note 33, at § 3(E)(iii); CSRT Order, supra note 32, ¶ g(12).
100. See CSRT Order, supra note 32, ¶ h (allowing the Convening Authority to either accept a report from a CSRT or send it back for further proceedings); ARB Order, supra note 33, § 3(E)(v) (stating the process of providing the recommendation to the “Designated Civilian Official”).
101. EO 13567, supra note 1, § 3(d).
103. EO 13567, supra note 1, § 3(a)(7).
104. ARB Order, supra note 33, § 3(E)(iv).
105. See infra notes 120–121 and accompanying text.
Of course, the Order, when combined with the Fact Sheet, does seem to break new ground with regard to the applicability of Article 75 and AP II to the detention procedures contained in the Order. The Fact Sheet evinces an intent to apply Article 75 in IAC and contains the claim that detention review procedures already comply with AP II,106 which at least one Obama administration official claims signifies compliance with Article 75 as well.107 Consequently, it is to the detention standards established in those instruments, and the Order's purported compliance with them, to which I now turn.

III. PROVISIONS OF ARTICLE 75 AND ADDITIONAL PROTOCOL II RELEVANT TO DETENTION

A. Article 75

1. Scope of Coverage

Article 75 has particularly broad application. Like Common Article 3, Article 75 applies to those who do not easily fit into other categories — namely "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol."108 Thus, unprivileged belligerents qualify for protection under Article 75 even if they do not qualify as PoWs under the Third Geneva Convention (GC III) or as protected persons under the Fourth Geneva Convention (GC IV).109 Indeed, according to the Commentary, Article 75 applies to nationals of states not party to the convention,110 stateless persons,111 or potentially even to a state's own nationals — a question left uncertain in order to reach a consensus among

106. Fact Sheet, supra note 2, ¶ 15.
107. See Julian E. Barnes, Geneva Protections for al Qaeda Suspects? Read the Fine Print, WALL ST. J. WIRE BLOG (Mar. 14, 2011), http://tinyurl.com/boxfacf ("We are definitely not concerned that the reformed military commissions do not comply with Article 75's rules,' the official said. 'The interagency review process could never have concluded that the US military practice is consistent with the Protocol's provisions if that had been the case.'). See also Ashley Deeks, Administrative Detention in Armed Conflict, 40 CASE W. RES. J. INT'L L. 403, 434 (2009) (arguing for the application of identical detention standards in IAC and NIAC partly to avoid having to categorize conflicts).
108. AP I, supra note 3, art. 75(1).
110. Of course, to the extent AP II applies to conflict between High Contracting Parties and non-state combatants, it too applies to persons whose allegiance is to an entity that is not a party to either the Conventions or AP II.
111. COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 3028.
the members of the convention. 112 Again, like Common Article 3, Article 75 protection is a floor for those who do not receive better protection under some other provision. 113

Not only are the classes of persons protected by Article 75 broad and inclusive, the period of protection is similarly extensive. Protection under Article 75 continues until the time of release, even if the conflict has already ended. 114 Article 75 applies to a variety of different forms of deprivation of liberty: arrest, detention, and internment:

“Arrested”: this means the period that a person is in the hands of the police, preceding the trial stage which is dealt with in paragraph 4, or prior to internment.

“Detained”: in general this expression refers to deprivation of liberty, usually suffered in prison or other penitentiary institutions; here the term refers to detention prior to sentence or prior to a decision on internment.

“Interned”: this term generally means deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned. 115

All three are distinct from imprisonment resulting from a finding of guilt in a criminal trial.

2. Substantive Protections Contained in Article 75

Most of the substantive protections are stated quite generally. Article 75 prohibits “violence to the life, health, or physical or mental well-being of persons;” 116 “outrages upon personal dignity;” 117 “the taking of hostages;” “collective punishments;” and “threats to commit any of the foregoing acts.” 118 Some of these prohibitions are restatements of prohibitions contained elsewhere in the Conventions or in human rights treaties, such as the prohibition against torture, which is covered by a variety of

112. Id. ¶ 3017.
113. AP I, supra note 3, art. 75(8) (“No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.”).
114. Id. at art. 75(6) (“Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.”).
115. COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶¶ 3061–63.
116. AP I, supra note 3, art. 75(2)(a) In particular, AP I forbids murder, torture of all kinds, whether physical or mental, corporal punishment, and mutilation. Id.
117. Id. art. 75(2)(b) In particular, AP I forbids humiliating and degrading treatment, enforced prostitution, and any form of indecent assault. Id.
118. See id. art. 75(2)(c)–(e).
instruments.119 Some of the prohibitions were added to correct limitations in other Conventions. Some omissions notable for a treaty adopted in the 1970s are attributable to AP I’s limited role as a supplement to the Conventions. For instance, the Commentary suggests that the prohibition against coercion not arising to torture is likely missing because such mistreatment was considered to be covered elsewhere in the Conventions.120

Perhaps the most important substantive protection provided by Article 75 regarding detention not pursuant to punishment is in paragraph 3 regarding the time of release:

Except in cases of arrest or detention for penal offences, such persons shall 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.121

3. Procedural Protections Contained in Article 75

Article 75 contains many procedural protections, but the most specific treatment of procedural protections pertain to the imposition of criminal punishments in paragraph 4. The only procedural protection regarding detention generally is the requirement of notice, which is contained in section 3:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.122

Notice itself is undefined; the only substantive requirement for notice appears to be that it be given “promptly,” to which the Commentary somewhat unsatisfactorily explains “it is difficult to determine a precise time limit, but ten days would seem the maximum period.”123 Many of the procedural protections provided by Article 75 apply not to detention but rather to criminal trials, a topic beyond the scope of this paper.

B. Additional Protocol II

Although the Order and the Fact Sheet juxtapose Article 75 and AP II, AP II is understandably much more than just a counterpoint in NIAC to

120. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 3067.
121. AP I, supra note 3, art. 75(3).
122. Id. art. 75(3).
123. COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 3072. See also id. ¶ 3079. Although Article 75 itself is limited to IAC, some claim that notice is state practice in NIAC as well. See Deeks, supra note 107, at 432.
Article 75's role in IAC. Additional Protocol I augmented the four Conventions applicable in IAC; for NIAC, there was no established body of treaty law to supplement, so AP II provides many substantive protections parallel to those in the four Conventions. The provisions of AP II most relevant to the subject of the Order are Articles 4–6.

1. Scope of Coverage

AP II applies very broadly within NIAC. The application of AP II is stated in terms of both “material” and “personal” fields of application. The material field of application is limited to armed conflicts within the territory of the relevant High Contracting Party, a limitation previously discussed, but the personal field of application is quite broad. The personal field of application applies to “all persons affected by an armed conflict as defined in Article 1.” For those detained or interned, Articles 5 and 6 apply “until the end of such deprivation or restriction of liberty,” even if that is beyond the end of the conflict. Indeed, the coverage of Article 5 is arguably even broader than Article 75; it applies not only to those who have been detained or interned, but to those “whose liberty has been restricted in any way.”

In many ways, Articles 4–6 parallel the approach of Article 75, with some adjustment for context. Article 4 (like Article 75(1)–(2),(5)–(6)) provides fundamental guarantees applicable to all hors de combat; Article 5 (like Article 75(3)) provides substantive protections for those whose liberty has been restricted; and Article 6 (like Article 75(4) and (7)) provides protections for those charged with criminal offenses related to the conflict.

2. Substantive Protections Contained in Additional Protocol II

The substantive protections of Article 4 mirror those of Article 75 with some additions. Article 4 requires humane treatment and prohibits

124. See supra note 19.
125. AP II, supra note 5, art. 2(1).
126. Id. art. 2(2).
127. Id. art. 5(3).
128. According to AP I:
2. A person is hors de combat if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

See AP I, supra note 3, art. 41(2).
129. Id. art. 4(1).
“violence to the life, health, and physical or mental well-being of persons,”130 “outrages upon personal dignity,”131 as well as collective punishments, the taking of hostages, terrorism, slavery and any form of slave trade, pillage, or threats to commit any of those acts.132 Among other things, AP II prohibits the death penalty for any act committed when the defendant was under 18 years old.133

Additional Protocol II does not contain a substantive standard for detention or internment. The closest is a standard contained in Article 17, which applies not to detention but to “displacement” of civilians: that civilians should not be displaced “unless the security of the civilians involved or imperative military reasons so demand.”134

3. Procedural Protections Contained in Additional Protocol II

Unlike Article 75(3), Article 5 does not contain any procedural protections for those subject to detention. Article 6 provides certain protections for “prosecution and punishment of criminal offenses related to the armed conflict,”135 in parallel to Article 75(4), the closest analogy in the current conflict being military commissions rather than detention review panels. Among other things, Article 6 requires that any prosecution take place in a “court offering the essential guarantees of independence and impartiality.”136

IV. Limits Imposed by Article 75 and Additional Protocol II Implicated by the Order

Article 75 and AP II contain a variety of limits (many of them overlapping) on detention, including procedural and substantive limits and controls over the conditions of confinement. The Order itself does not address conditions of confinement (except to reiterate that Common Article 3 of the four Geneva Conventions and the Detainee Treatment Act of 2005, which both include requirements of humane treatment, are “applicable law” ),137 so my analysis will be limited to the procedural and substantive limits on detention contained in Article 75 and AP II. Similarly, much of the Order pertains to subjects (including many of the

130. Id. art. 4(2)a. In particular, AP I, Article 4 forbids murder, cruel treatment such as torture, mutilation, or any form of corporal punishment. Id.
131. Id. art. 4(2)e. In particular, AP I, Article 4 forbids humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. Id.
132. Id. art. 4(2)b–d, (f)–(h).
133. Id. art. 6(4).
134. Id. art. 17(1).
135. Id. art. 6(1).
136. Id. art. 6(2).
137. EO 13567, supra note 1, § 10(b).
provisions applicable to the Review Committee) not implicated by either Article 75 or AP II, and so my analysis will be correspondingly limited.

A. Procedural Limits Applicable to Detention

1. Notice and the Scope of Notice

Neither Article 75 nor AP II provide extensive procedural protections in the detention setting; most of their procedural protections apply to punitive measures. The most important Article 75 procedural requirement is that of notice: “Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.”138 AP II makes no mention of the notice requirement. The Order expressly requires notice to the detainee, of the proceeding, the information the PRB will consider, and the reasons for the PRB’s decision.139 In this regard, the Order does improve upon the CSRTs and ARBs with regard to compliance with Article 75 by requiring that the reasons for continued detention—“why these measures have been taken”—be conveyed to the detainee.140

The Order does, like all of the other provisions adopted in the last ten years with regard to detaining or trying enemies of the United States in the current conflict, address the detainee’s access to classified information related to his detention.141 If the purpose of Article 75 notice is to allow the detainee to participate in his own hearing, it imposes a substantive standard on the quality of the information provided to the detainee. Article 75, however, provides virtually no guidance about the scope of the executive’s duty to disclose information, much less classified information, to the detainee.142 The Order is at least sensitive to the only standard Article 75 does contain: the ability of the detainee to have access adequate to mount a challenge. Adequacy for the purpose of challenging one’s detention is the standard the Order applies both to the unclassified summary to be provided to the detainee143 and for the summary report provided to counsel in cases in which the detainee’s counsel is denied access to the information itself.144

138. AP I, supra note 3, art. 75(3).
139. EO 13567, supra note 1, § 3(a)(5), (7).
140. Id.
142. See Deeks, supra note 107, at 435 (describing how Article 75 handles the use of classified information as an “open question”).
143. EO 13567, supra note 1, § 3(a)(1).
144. Id. § 3(a)(3). See also DTM 12-005, supra note 25, Attachment 3, at 13 (stating that the
2. **Parallels to Third Geneva Convention Article 5 Tribunals**

Article 75 was written in the context of IAC, to which the four Geneva Conventions apply, so one way to view the notice requirement of Article 75 is as part of a broader detention procedure that includes the Article 5 tribunals provided for in GC III, which are mirrored in Article 45 of AP I.\(^{145}\) That is, that the notice requirement of Article 75 was intended to allow detainees to take active part in their own Article 5 (or Article 45) tribunals.\(^{146}\) That interpretation probably fits American practice more than it does Article 5 itself. Strictly speaking, Article 5 tribunals determine status, not the question of whether to detain; although, under U.S. practice, the two questions are combined in the tribunals provided for under Army Regulation 190-8. Those tribunals are authorized to determine not only status but, for those who are not classified as PoWs, detainability as well.\(^{147}\)

Even if one could infer the quality of the notice required from the need to conduct Article 5 tribunals, there is no reason to think that Article 5 applies in NIAC; there is no analogous provision for status tribunals in either Common Article 3 or AP II.\(^{148}\) Not even applying Article 75 in NIAC or through some other mechanism is enough to find Article 5 applicable to PRBs, since Article 5 tribunals are intended to make initial, not periodic, determinations. Incorporating the periodic review requirements of the Conventions to the detainees subject to the Order would essentially require applying the detention rules of GC III or GC IV to NIAC,\(^{149}\) which would seem to be excluded by the terms of the Order itself and the Fact Sheet's explicit recognition of the limited role of Article

\(^{145}\) AP I, *supra* note 3, art. 45 ("Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."). Because the Order does not suggest Article 45 is customary international law, and I can find no substantive difference between the tribunal requirement of Article 45 of AP I and that of Article 5 of GC III, *see* *COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra* note 109, ¶ 1745, I will conduct my analysis under Article 5.

\(^{146}\) *See also* Deeks, *supra* note 107, at 433 (arguing that the notice requirement of Article 75(3) requires notice sufficiently detailed to allow the detainee to challenge the basis for their detention); Jelena Pejc, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 INT’L REV. RED CROSS 375, 384 (2005) (same).

\(^{147}\) *See* U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONER OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES ¶¶ 1–6(e)(10) (Oct. 1, 1997).

\(^{148}\) Indeed, the use of tribunals by the United States with regard to Guantanamo Bay detainees appears to be a matter of U.S. constitutional law, not the international law of armed conflict. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

\(^{149}\) As several have proposed, although others have articulated a hybrid system in which the procedural protections of GC IV could be applied to substantive detention standards from GC III. *See infra*, note 187.
75 and, with it, the rest of the Conventions. Consequently, it is hard to see how Article 5 could plausibly be applied to the current conflict as a way of determining what procedures the executive should use in reviewing the detention of the Guantanamo Bay detainees.

Not that Article 5 contains a wealth of procedures; it requires only that status determinations be made by a "competent tribunal." It is, however, not clear what makes a tribunal "competent." The Commentaries explain only that "tribunal" was chosen because of concern that the decision would be made by a low-ranked individual (the original proposal by the ICRC was for the determination to be made by an amorphous "responsible authority") and "competent" was chosen over the alternative of "military" because of concern that invocation of a military tribunal might result in more serious consequences than were intended by Article 5 should the individual be determined not to deserve PoW status. Thus, the only concrete restriction imposed by Article 5 appears to be that the determination be made by more than one person. It is tempting to argue that "tribunals" must be impartial and basically fair — since it is hard to make a good argument for a biased or unfair tribunal. Indeed, if the PRBs are problematic in light of Article 75, it is in this regard, since they are not only appointed solely by the executive, but their decisions are directly reviewable largely by political appointees, a requirement reinforced in U.S. statutory law. As it happens, Article 75 and AP II both undermine the argument for impartiality and enforceable protections of fairness by including both as requirements elsewhere (for criminal trials), but omitting any mention of either impartiality or fairness with regard to detention. Expressio unius est exclusio alterius. Not only is Article 5 itself inapplicable to the detainees covered by the Order, even its application by analogy would do little to define the procedures necessary for periodic review bodies like the PRBs.

150. GC III, supra note 20, art. 5.
152. See EO 13567, supra note 1, § 3(d) (describing the discretionary review by Review Committee); id. § 9(d) (describing the composition of the Review Committee).
154. See AP I, supra note 3, art. 75(4) (stating the need for "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure" for criminal proceedings); AP II, supra note 5, art. 6 § 2 (stating the need for "a court [to] offer[] the essential guarantees of independence and impartiality" when hearing criminal matters).
3. Additional Protocol II, Detention Standards, and the Possibility of a Periodic Review Requirement Arising from Article 75

The failure of AP II to include even notice as a procedural requirement means that ratification of AP II would likely be irrelevant to detention determinations in the current conflict, much less the periodic review procedures outlined in the Order. Indeed, the lack of any procedural requirements for detention in AP II places considerable strain on the argument for any particular detention standard. Although procedure and substance are distinct concepts, the lack of any procedural protections hardly suggests the presence of robust substantive rights to protect. But the existence of any detention standard suggests that the one thing detention cannot be is arbitrary; there must be some basis for detention, and in this regard, the United States has set its own substantive limits on detention through constitutional law and statutes, as well as executive orders. Even if the United States could avail itself of a more permissive detention standard than it has, it must have some standard lest there be no meaningful determination at all. Consequently, I will assume that U.S. domestic detention standards must be effectuated as a matter of international law.

Periodic review itself could be viewed as a procedural requirement embodied in Article 75’s seemingly substantive requirement that detention continue for no longer than necessary.155 In a sense, the requirement of timely release is a substantive requirement that necessitates the procedural measure of periodic review, and the Order itself is an implementation of that periodic review. It is impossible, after all, for detention to end without some process. In the context of the Order, anything short of a declaration to the end of hostilities between the United States and al Qaeda and the Taliban will require individual determinations; the terms of the Order assume that detention decisions in the current conflict are to be made on an individual basis.156 Federal courts have been applying both collective and individual bases for detention in the current conflict; determining if the detainee is “part of” the Taliban or al Qaeda (a collective standard) or “purposefully and materially supported hostilities against the United States or its coalition partners” (an individual one). But the standard provided for in the Order — whether detention “is necessary to protect against a

155. AP I, supra note 3, art. 75(3) (“Such persons shall 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”). AP II does not contain a detention standard, much less one that could be used as a basis for inferring a requirement of periodic review.

156. EO 13567, supra note 1, § 1(b) (“This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases.” (emphasis added)).
significant threat to the security of the United States" — is necessarily
individual, even if it might allow for the use of collective criteria (such as
membership in al Qaeda or the Taliban) to serve as a presumption of
dangerousness. Having settled on an individual standard of
"dangerousness" as the quality justifying detention, it follows that some
form of periodic review is necessary to determine whether detainees
continue to satisfy that criterion. Here, the regime for detaining civilians
under GC IV may provide some guidance, not for its standards, but for
the way it implements the difference between collective and individual
detention standards. Under GC IV, in which the only detention standard is
individual — alternatively "absolutely necessary" and "for imperative
reasons of security" — periodic review is required, at least twice yearly
by a court or administrative board.

Having identified a periodic review requirement based on the individual
standard of detention, though, does not tell us what the procedural
requirements are for that review. The periodic review itself being an
implicit rather than an explicit requirement of Article 75, it is difficult to
identify any enforceable procedural requirements for that review in Article
75, much less AP II.

B. Substantive Limits on Detention

In addition to procedural protections, Article 75 also contains a
substantive limit on detention. That limit may not be substantially more
definite than other competing definitions considered in a variety of fora,
but Article 75 includes not only a substantive limit on detention but also a
substantive conception of detention (and release) that may provide more
traction on detention should the Obama administration decide to
wholeheartedly apply Article 75 in the current conflict (or at the very least
to those detained at Guantanamo Bay).

1. The Detention Standard

Article 75's substantive standard for detention is stated in the form of a
requirement of timely release, "with the minimum delay possible and in
any event as soon as the circumstances justifying the arrest, detention or
internment have ceased to exist;" AP II contains no detention standard at all. The Order's (explicitly non-legal) standard is "necessary to protect

157. EO 13567, supra note 1, § 2.
158. GC IV, supra note 109, art. 42.
159. Id. art. 78.
160. Id. (stating that such a review must be done by a "competent body set up by" the detaining
power); id. art. 43 (stating that the review must be undertaken by "an appropriate court or
administrative board designated by the Detaining Power for that purpose").
161. AP I, supra note 3, art. 75(3).
against a significant threat to the security of the United States." 162 The Fact Sheet advances yet another standard: those who “in effect remain at war with the United States.” 163

Applicable only in IAC, in which the vast majority of detainees would be subject either as prisoners of war to the collective detention and release standards of GC III or as civilians to the “imperative reasons of security” standard of GC IV, 164 Article 75’s detention standard has not received a great deal of attention. It is, however, somewhat more specific than the GC IV standard, suggesting a direct correlation between the reasons for the beginning of internment and the detainee’s release. It is conceivable, for instance, that an individual al Qaeda or Taliban operative could present a continued threat against the United States even after the conflict with al Qaeda or the Taliban itself ends (an event that is more than merely conceivable with regard to the Taliban, with whom there are reports of negotiations). 165 Of course, given that the U.S. claim to detention is based on the existence of an armed conflict between the United States and al Qaeda and the Taliban, the end of that armed conflict would terminate wholesale the U.S. claim to hold members of either group under the law of armed conflict.

Even if it does suggest a more direct connection between past circumstances and future dangerousness, it is difficult to articulate how Article 75’s detention standard would limit the United States’s ability to detain those currently detained at Guantanamo Bay under the standard contained in Section 2 of the Order. The requirement to tie continued detention to a specific circumstance might bolster the argument for individual as opposed to collective detention determinations, 166 but even that extension would be weak; one could easily describe the collective standard of membership in an enemy armed force as a circumstance warranting continued detention during an armed conflict even though the nature of the circumstance is a collective rather than an individual judgment. Even if one were to accept the argument for exclusively individual detention determinations, the Order embraces individual

162. EO 13567, supra note 1, § 2.
163. Fact Sheet, supra note 2, ¶ 5; see also id. ¶ 7 (stating that this category of detainee will only be held while it is "lawful and necessary to protect against a significant threat to the security of the United States," and that release is possible when "a detainee no longer constitutes a significant threat to our security").
164. See GC IV, supra note 109, art. 78. See generally the text accompanying notes 108–110.
166. See Peic, supra note 146, at 380–81 (arguing that detention in NIAC must be on an individual rather than a collective basis, citing GC IV, human rights law, and the prohibition on “collective punishments” in Article 75(2) as a basis for extending the requirement to NIAC).
determinations, and so, Article 75 is not implicated as a limit. As for those individual determinations, the executive branch would no doubt argue that Article 75's "circumstances justifying the arrest, detention or internment" are satisfied by the Order's standard that detention is "necessary to protect against a significant threat to the security of the United States." So long as that condition continues for any particular detainee, continued detention would be lawful under Article 75.

2. The Question of Release

As mentioned above, the Article 75 substantive detention standard is stated not as a requirement for detention but rather as a requirement of release. The Order addresses release separately from the detention standard, namely as a restriction on release by preventing release into the United States:

If a final determination is made that a detainee does not meet the standard in section 2 of this order, the Secretaries of State and Defense shall be responsible for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States.

All transfers of Guantanamo Bay detainees to the United States are prohibited by statute, and, although the President has objected to restrictions on his ability to transfer detainees to the United States for detention or trial, the Fact Sheet states that the Obama administration will not release Guantanamo Bay detainees into the United States: "As the President has stated before, no Guantanamo detainee will be released into the United States."

That, of course, raises a question for those detainees whose detention is no longer deemed "necessary to protect against a significant threat to the security of the United States." I take this to be the United States's implementation of the Article 75 limitation on detention ("with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist"), but

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167. AP 1, supra note 3, art. 75(3).
168. EO 13567, supra note 1, § 2.
169. Id. § 4(a).
172. Fact Sheet, supra note 2, ¶ 7.
173. EO 13567, supra note 1, § 2.
174. AP 1, supra note 3, art. 75(3). See also Pejic, supra note 146, at 382.
for whom no destination other than the United States can be identified. That possibility is expressly provided for in the Order: the Secretaries of State and Defense are required to undertake “vigorous efforts” to find a suitable transfer location (so long as it is outside the United States)\(^{175}\) and the Review Committee is to review the status of such detainees every six months until a suitable transfer location is identified.\(^{176}\) Otherwise, there is no provision for such an internee to leave the Guantanamo Bay facility. The executive’s refusal to release detainees into the United States not only when release is a matter of executive discretion but subject to a writ of habeas corpus has been upheld by the United States Court of Appeals for the D.C. Circuit.\(^{177}\) Under domestic law, as implemented by the Order, Guantanamo Bay detainees that no longer satisfy the detention standard can (and will) continue to be held at Guantanamo Bay.

Beyond release itself, the process of release is regulated, both by Article 75 and AP II, Article 5. Article 75 does so only implicitly, though the application of its terms apply so long as someone is held, regardless of their underlying legal status: “Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.”\(^{178}\) Article 5 of Additional Protocol II is more specific: “If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.”\(^{179}\)

The text of AP II, Article 5 is unclear — does it require detaining authorities to consider safety or that detainees who cannot be protected cannot be released? According to the Commentaries:

This paragraph provides that if it is decided to release persons deprived of their liberty, necessary measures to ensure their safety must be taken by those who decide to release them. There was some controversy about this rule and it was necessary to choose between the two possibilities proposed by the Sub-Group of the Working Group. In fact, a distinction should be made between two elements: on the one hand, the decision to release, and on the other hand, the conditions of safety. For some the prime consideration

\(^{175}\) EO 13567, supra note 1, § 4.

\(^{176}\) Id. § 5(1); id. § 5(3) (describing the status of detainees designated for release or “conditional detention” by the Executive Order 13492 review); see also id. § 5(2) (describing the status of detainees whose release has been ordered by issuance of a writ of habeas corpus).

\(^{177}\) Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir 2009). That judgment was vacated by the Supreme Court in light of factual developments (the revelation that the detainees were offered release in other countries), 130 S. Ct. 1235 (2010), reinstated as modified on remand, 605 F.3d 1046 (D.C. Cir. 2010), and the Supreme Court denied certiorari, 131 S. Ct. 1631 (2011).

\(^{178}\) AP II, supra note 3, art. 75(6).

\(^{179}\) AP II, supra note 5, art. 5(4).
should be the question of decision-making, while others recommended that no release should be possible in the absence of conditions of safety to do so, i.e., that the element of safety should be foremost. The text as adopted takes into account both aspects of the problem, which are in fact interdependent. Release should not take place if it proves impossible to take the necessary measures to ensure the safety of the persons concerned. It is not indicated for how long such conditions of safety should be envisaged. It seems reasonable to suppose that this should be until the released persons have reached an area where they are no longer considered as enemies, or otherwise until they are back home, as the case may be.\textsuperscript{180}

Thus, the inability to release an internnee because of practical difficulties is expressly accounted for in Article 5 of AP II. In IAC, the Geneva Conventions provide that release should generally be to the internnee’s home country,\textsuperscript{181} but there is no equivalent provision for NIAC in AP II.

On the one hand, resort to AP II may actually strengthen the Obama administration’s position against releasing detainees, such as the Uighurs, who may face some risk short of persecution or torture in their home countries. AP II arguably prohibits release when doing so would threaten the “safety” of detainees, a standard that may very well be lower than the requirements of either persecution or torture. On the other hand, excluding the alternative of release into the United States would seem in tension with the AP II focus on safety. AP II’s limitation on release, whether one interprets it as a matter of consideration in decisionmaking or a requirement of continued (protective) detention, is predicated on a threat to the safety of the internnee, not the political climate or even the domestic law of the detaining power, which is the current basis of the executive’s refusal to release detainees if no country other than the United States can be identified.\textsuperscript{182}

In context, the Order does not represent a major shift in U.S. detention policy or practice. Many of the procedures provided for in the Order already exist, and it is not clear that the periodic reviews called for by the Order will result in markedly different outcomes for detainees than would the continuation of past procedures. Moreover, the recognition of a role for Article 75 and AP II signified in the Fact Sheet also likely has little practical impact on U.S. detention policy as it relates to those detained at Guantanamo Bay, since neither Article 75 nor AP II provide robust

\textsuperscript{180} Commentary on the Additional Protocols, supra note 109, ¶ 4596.
\textsuperscript{181} See GC III, supra note 20, art. 122; GC IV, supra note 109, art. 134.
\textsuperscript{182} See also Pejic, supra note 146, at 387 (describing the refusal to effectuate the release of a detainee deemed no longer a security risk “a clear case of arbitrary detention”).
protections for detainees beyond those already provided under U.S. domestic law.

Rather, the significance of the Order and Fact Sheet are that they represent something of a departure in the United States’s approach to the law of armed conflict. Such policy changes are common, and this one is not particularly pronounced. But, coming as it is in the context of an issue — detention — that both calls upon highly contested law and is the subject of active litigation in federal courts, it is a policy change in U.S. understandings of international law that could lead to tangible changes in the U.S domestic law of armed conflict, and it is to that possibility that I now turn.

V. ARTICLE 75 AND ADDITIONAL PROTOCOL II AS MARKERS OF CHANGE IN THE U.S. APPROACH TO THE LAW OF ARMED CONFLICT

Considering the amount of attention Article 75 and AP II have received, it is not clear how many questions either would answer if adopted by the United States, whether through ratification or by recognition of them as customary international law. Article 75, as a single provision of a protocol that was itself intended to be supplementary, is hardly detailed. “As a detailed examination of the text will show, Article 75 contains imprecise and obscure points.”183 The parallels to Common Article 3 are easy to recognize:

Article 75, even more than Common Article 3 of the 1949 Conventions, which was called a “mini Convention,” constitutes a sort of “summary of the law” particularly in the very complex field of judicial guarantees, which will certainly facilitate the dissemination of humanitarian law and the promulgation of its fundamental principles.184

To the extent that Article 75 and AP II add detail to the humane treatment provisions of Common Article 3, they do so primarily with regard to treatment and criminal prosecution, not detention determinations themselves. Article 75 provides only the barest of procedural and substantive limits on detention. AP II provides even fewer limits, touching not on procedure at all. Consequently, it is hard to detect much change in the Obama administration’s policy regarding detention determinations from that of the Bush administration vis-à-vis the law of armed conflict, not only because the policy itself is similar but because the additional law-of-armed-conflict principles the Obama administration would recognize as

183. COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 3006.
184. Id ¶ 3007.
binding (Article 75 and potentially AP II if it were ratified) provide scant additional legal protection over those provided by the law of armed conflict recognized as applicable during the previous administration (Common Article 3).

There are some important ways, though, in which recognizing Article 75 as applicable international law may affect the U.S. approach to the law of armed conflict, both for its effect on a broader analytical problem in NIAC (the role of “civilians” in NIAC) and how recognizing Article 75 as applicable international law may increase the impact of international law (both the law of armed conflict itself and other forms of international law) on the United States’s conduct of armed conflict, including the content of the domestic U.S. law of armed conflict.

A. The “Civilian” Question

One of the major points of analytical disagreement in the current conflict is how to conceptualize al Qaeda and Taliban detainees. Because the current conflict is not (for most purposes) IAC, fitting the detainees into the Geneva Convention framework has always been a matter of analogy. The vast majority of al Qaeda and Taliban fighters would not qualify as PoWs under GC III (even if the current conflict were an IAC). The gap between PoW status and the non-status that will likely apply to many combatants in NIAC has led many to argue that detention in NIAC should be more closely analogized to the detention of civilians covered by GC IV.

Although GC IV is part of the lex specialis of the law of armed conflict, its emphasis on civilians reduces the conceptual barriers to incorporating generally applicable human rights law and norms into the law of armed conflict, while the United States has generally been

185. It is possible that some who fought for the Taliban in the early campaign in Afghanistan could have been detained as part of an international armed conflict. See Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (postulating that Yasser Hamdi was taken prisoner as part of an international armed conflict with the Taliban in Afghanistan).

186. The only relevant distinctions that AP II draws between civilians and combatants is that civilians are generally protected from “displacement” (save for “imperative military reasons”), AP II, supra note 5, art. 17, which is a more general term than the specific form of detention at issue with regard to detainees, and that civilians may not be targeted or threatened “unless and for such time as they take direct part in hostilities.” Id. art. 13. Unlike the Geneva Conventions applicable to IAC, there is no separate detention regime for civilians under AP II.


188. See, e.g., Pejic, supra note 146, at 377–78. Cf. Deeks, supra note 107, at 434 (arguing that synchronizing detention standards outside of the armed conflict paradigm may lead states to consider...
adamant in maintaining the distinction. Indeed, the recognition of the potentially overlapping roles of civilians and combatants in NIAC has led to confusion and debate in areas of the law of armed conflict beyond detention.

The broad coverage of API — and specifically Article 75 — may actually provide one argument for avoiding the “civilian” debate — and the unfathomable implications of that debate — entirely. Serving as a floor for those who do not qualify for better treatment under other provisions of the Geneva Conventions, Article 75 provides a specific space between the GC III “prisoner of war” and the GC IV “protected person” for unlawful combatants to occupy: “The phrase ‘any person’ [in paragraph 3] almost certainly means any person complying with the definition of paragraph 1 of [Article 75].” As interpreted in the Commentary,

[T]his refers primarily to civilians, as combatants are not covered by Article 75, and, in particular, not by its paragraph 3, unless prisoner-of-war status is refused them in case of capture. In this case, provided for in Article 45 “(Protection of persons who have taken part in hostilities),” paragraph 3, if they do not have the benefit of the fourth Convention, they have at least the right to the protection of Article 75.

Article 75 elsewhere accounts for the possibility that combatants may also be civilians, but separates the identification of “civilian” with coverage by GC IV, providing a floor for those who might be civilians but are nevertheless not protected by GC IV by reason of their participation in extending administrative detention to more generalized “states of emergency”).


191. COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 3060. Elucidating this point, AP I, supra note 3, art. 75(1), states that persons are covered, “[i]n so far as they are affected by a situation referred to in Article 1 of this Protocol, [and] are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions” or under AP I.

192. COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 3060 (emphasis added). Similarly,

If in such a situation there were nevertheless cases in which the status of prisoner of war or of protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum. The protections which follow from Article 75 apply above all to those who cannot lay claim to application of the Conventions or to their application in full, taking into account the derogations provided for in Article 5 of the fourth Convention. As we have seen with regard to the title of this Section, it covers civilians, and therefore it is the fourth Convention and the status of persons protected by that Convention with which we are concerned here. However, cases may occur of civilians who have committed hostile acts claiming prisoner-of-war status and treatment in accordance with Article 4A and Article 5 of the Third Convention.

Id. ¶ 3014–15.
hostilities. The response to those who argue for analogy to the Geneva Conventions may be not to resist the analogy but simply point to a more relevant one than the analogy to civilian/protected persons under GC IV: "any person" under Article 75 of AP I.

Resort to the explicit space provided by Article 75 as a closer analogy from the Geneva Conventions may serve to legitimize U.S. detention policy (assuming that policy is otherwise in compliance with Article 75) by providing a middle ground between the privileges of PoW status, the low-security internment envisioned by GC IV, and the law-of-armed-conflict black hole of "unlawful enemy combatant."

B. An Expansive Approach to International Law Applicable to Armed Conflict

Rather than in their role as stand-alone restrictions, it is the connection of Article 75 and AP II to other instruments that makes the decision to either apply Article 75 as customary international law or seek ratification of AP II so significant. The United States has steadfastly maintained a lex specialis approach to the law of armed conflict, refusing to apply, for instance, the ICCPR extraterritorially while simultaneously taking a restrictive view of the application of existing law-of-armed-conflict treaty law, for instance by originally arguing that Common Article 3 did not apply to the current conflict. Indeed, the United States's refusal to ratify AP I in the first place — which consequently necessitated the current move to apply Article 75 as outside of treaty law — was prompted by the concern

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193. See generally GC IV, supra note 109, art. 5 (denying the protection to persons "engaged in activities hostile to the security of the State"); COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, at ¶ 3082 (stating that in regard to war crimes trials, "[s]ome combatants who are denied prisoner-of-war status in case of capture are also covered [such as those listed in GC IV Article 5], if they are not already covered by the fourth Convention").

194. See John B. Bellinger, III, Legal Adviser, U.S. Department of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006). See also Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) ("[W]e have interpreted the scope of detention authority authorized by Congress in the AUMF as informed by the laws of war."). Koh did not mention international human rights law, perhaps suggesting that it is inapplicable. Others have pointed out that, although Koh did not actually mention international human rights law, he did not explicitly adopt the lex specialis approach, leaving open the possibility that the U.S. position would be that both the law of armed conflict and human rights law apply. See Hathaway et al., Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law, 96 MINN. L. REV. 1883 (2012).


196. See Hamdan v. Rumsfeld, 548 U.S. 577, 630 (2006) (plurality opinion) ("[T]he Government asserts that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.'").
that it applies too broadly,\textsuperscript{197} a sentiment the Obama administration apparently shares.

The move to recognize Article 75 and AP II may signal a shift in the United States's doubly restrictive view of the law of armed conflict. The four Geneva Conventions, written when they were, could be viewed as a self-contained and comprehensive code governing certain aspects of armed conflict, but such a restrictive approach does not sit so easily with regard to Article 75 or AP II, which were drafted in a very different context and which were written explicitly to incorporate protections from other treaties and fields of law. Mirroring AP I's approach to expanding the rules generally applicable to IAC into conflicts more closely resembling civil disturbance or civil war, AP II was specifically intended to expand the applicability of several rules previously applicable only to IAC into NIAC;\textsuperscript{198} a number of its provisions are modeled on aspects of the Geneva Conventions, especially GC IV. For instance, AP II's language of general protection, embodied in Article 4 (which covers both civilians and combatants placed \textit{hors de combat}) comes not from Common Article 3, but rather from Article 27 of GC IV;\textsuperscript{199} the prohibition against corporal punishment also comes from GC IV;\textsuperscript{200} and the requirement of ample food, water, hygiene, and shelter is taken from both GC III and GC IV.\textsuperscript{201} It may be that many of these standards would already be covered under the humane treatment standard of Common Article 3, but Common Article 3's coverage was not obvious enough to deter their inclusion in AP II.\textsuperscript{202}

Perhaps more surprising, and of greater moment for U.S. positions on international human rights law, is the close relationship both Article 75 and AP II have to the ICCPR. The Geneva Conventions pre-date the ICCPR, but the Additional Protocols followed it and were specifically modeled on it. As the Commentary explains, "Articles 4 '(Fundamental guarantees)' and 6 '(Penal prosecutions)' of Protocol II reproduce, in some cases word for word, the corresponding provisions of the Covenant on Civil and Political Rights."\textsuperscript{203} The approach embodied in the Additional Protocols explicitly signifies a transition away from the broad, flexible

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\textsuperscript{197} See AP II Transmittal Letter, supra note 11.

\textsuperscript{198} The context in which AP I and AP II were drafted suggests a further conflation between IAC and NIAC: much of Article 75 (applicable in IAC) was drafted from provisions originally drafted as part of Articles 4 and 6 of AP II (applicable in NIAC). See COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra 109, ¶ 3005.

\textsuperscript{199} \textit{Id.} ¶ 4521.

\textsuperscript{200} \textit{Id.} ¶ 4535.

\textsuperscript{201} \textit{Id.} ¶ 4573.

\textsuperscript{202} See \textit{id.} ¶ 4530 ("The list of prohibited acts is fuller than that of common Article 3."); \textit{id.} ¶ 4534 (describing the addition of the prohibition against corporal punishment in AP II Article 4).

\textsuperscript{203} \textit{Id.} ¶ 3005.
provisions of Common Article 3 toward the more specific restrictions of the ICCPR. It would be hard to overstate the role of the ICCPR in the formation of AP I and AP II; the importance of maintaining a close connection between the two was itself a matter of concern to the members of the committees drafting the protocols.

Just as one cannot overstate the impact the ICCPR had on the drafting of AP I and AP II, it is important not to overstate the impact of subjecting the U.S. conduct of military operations to Article 75 and AP II, and even by incorporation, portions of the ICCPR. U.S. policy is already consistent with both Article 75 and AP II, and the inclusion of portions of the ICCPR into Article 75 and AP II does not generally undermine the U.S. position that the ICCPR does not apply extraterritorially, both because the incorporation is specific rather than wholesale and because the law of armed conflict (even the customary law of armed conflict) applies only to a sub-set of U.S. extraterritorial activity (engagement in armed conflict — presumably none of this would affect U.S. foreign operations that do not rise to the level of armed conflict). The point of including portions of the ICCPR in Article 75 and AP II was not to push extraterritorial application (since most nations view the ICCPR as applying extraterritorially) but rather to avoid derogation from the incorporated rights during armed conflict, since derogation is permitted for certain provisions of the ICCPR in armed conflict but it is axiomatic that derogation from the law of armed conflict is not.

C. The Role of International Law in the U.S. Domestic Law of Armed Conflict

While it may not be prejudicial to U.S. foreign policy interests to incorporate aspects of international human rights law into the law of armed conflict, doing so may have second- and third-order effects. The

204. See, e.g., id. ¶ 4515 ("Article 4, paragraphs 1 and 2, reinforces the essence of common Article 3, in particular paragraph 1, sub-paragraph (1)(a), (b) and (c) thereof. These rules were supplemented and reinforced by new provisions inspired by the Conventions and the International Covenant on Civil and Political Rights.").

205. See, e.g., id. ¶ 4607 (regarding the non-retroactivity provisions of AP II Article 6)

The reference to international law is mainly intended to cover crimes against humanity. A breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed. Some delegations suggested replacing the term "under national or international law" by "under the applicable law" or even by "under applicable domestic or international law", but the majority finally considered that it was best to retain the wording of the Covenant "in order to avoid being out of line."

Id. (emphasis added).

206. See id. ¶ 3092 (regarding Article 75(4)); cf AP II, supra note 5, art. 6(2). Note, however, that several provisions of AP II were modeled on portions of the ICCPR from which derogation was already prohibited under that instrument. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 4429–30.
connection of Article 75 and AP II to the ICCPR is not simply a matter of text. There is considerable precedent interpreting the ICCPR from both foreign national and international tribunals, which is potentially in tension with the U.S. reticence to be bound by decisions of foreign courts. That risk here might be minimal because it is a risk of judicial interpretations counter to U.S. interests, rather than judicial mandates counter to U.S. interests; nothing about expanding the reach of customary international law or the treaty law in the U.S. view of the law of armed conflict necessarily implies that the United States would subject itself to mandates issued by courts (particularly international courts) interpreting those (expanded) legal sources. But the risk from interpretation is hardly non-existent. There is every reason to believe that an expanded form of the law of armed conflict that includes human rights principles will be used to judge the conduct of U.S. forces — otherwise, why bother either recognizing it as customary international law or ratifying it? The risk though, remains hypothetical.

The more tangible risk presented by international interpretations of human rights law is an even more attenuated, but immediately enforceable, effect on the domestic U.S. law of armed conflict. The appropriate role of international law in the interpretation of U.S. domestic law is a highly contested matter. Some scholars are quick to point out that the framers themselves frequently relied on foreign and international precedents, a practice continued in many cases throughout the history of the United States by the Supreme Court. Few seem to contest the practice of looking to foreign or international sources writ large, but rather tend to focus on specific uses of foreign and international law. For instance, while Justice Scalia considers himself to be a rather heavy user of foreign and international precedents (second only to Justice Thomas) for their value in illuminating the original meaning of the Constitution, he rejects the use of modern foreign and international legal precedents in interpreting the Constitution as inconsistent with originalism. Similarly, some object not

207. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005). Although the role of international law in interpreting the Eighth Amendment has been controversial (as in Roper), the rule against executing war criminals who committed their crimes before the age of 18 would not be if the United States ratified AP II, which explicitly prohibits such executions “in order to harmonize with the Conventions and the Covenant, which also contain this age limit.” See AP II, supra note 5, art. 6(4); COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 4614. Of course, the United States could ratify with a reservation to this portion of AP II, as it did with a similar provision when it ratified the ICCPR itself. See Roper, 543 U.S. at 622 (Scalia, J., dissenting).


209. Antonin Scalia, Foreign Legal Authority in the Federal Courts, 98 AM. SOC'Y INT'L L. PROC. 305,
to the citation of foreign and international law generally, but rather to specific uses, for example, as Roger Alford puts it, on “countermajoritarian uses of international sources”—“when the ‘global opinions of humankind’ are ascribed constitutional value to thwart the domestic opinions of Americans.”

That debate affects no area of law more directly than the U.S. law applicable to detention in armed conflict. The legal authority to continue to detain individuals at Guantanamo Bay is explicitly premised in the law of armed conflict—indeed the Executive Order itself refers to such detention as “law of war detention.” That body of law is largely international, leading to the question of whether the domestic authority to detain is itself conditioned on the international legality of detention. The D.C. Circuit confronted the issue in Al-Bihani v. Obama, in which a panel of the D.C. Circuit agreed that Al-Bihani’s habeas corpus petition should be denied, but split over whether the domestic Authorization for the Use of Military Force should be read as limited by the international law of armed conflict. The full court was similarly unanimous on the outcome of the case (agreeing without dissent to deny Al-Bihani’s petition for rehearing en banc), but split four ways on the question of how the domestic AUMF relates to the international law of armed conflict; not only over whether the law of armed conflict should be read as limiting the AUMF, but also whether the panel decision should have reached the question in the first place.

Continued detention of individuals at Guantanamo Bay presents a singular opportunity for courts to engage in the most problematic forms of inference from international sources. The applicable domestic statute law (the AUMF) provides only vague standards, and domestic constitutional limits seem to provide even less guidance. This leaves courts in search of rules to apply, while the connection between the domestic legal authority to detain and international law provides an obvious source of additional rules. The Obama administration’s application of Article 75 in combination with its claim that U.S. detention policy complies with AP II is likely to only increase the appeal that international sources present to U.S. courts. The Supreme Court has already been shown to be willing to

211. EO 13567, supra note 1, § 2.
213. See Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), reh’g denied, 619 F.3d 1 (D.C. Cir. 2010).
214. Id.
215. Cf. Jenks & Jensen, supra note 190, at 53–54 (arguing that a strong embrace of a combined
incorporate international legal concepts when interpreting U.S. law related to the conflict, with a plurality in *Hamdan* suggesting, for instance, that despite the broad U.S. conception of conspiracy, its limited conception in civil law nations suggests that conspiracy is not a war crime. In *Sosa v. Alvarez-Machain*, a detention-related case in the law-enforcement context, the Court resisted an attempt to incorporate customary international law into U.S. law while acknowledging a role for applying customary international law as U.S. law.

A concession by the executive to apply provisions of the law of armed conflict that have a direct connection to human rights law may tend to overpower the general reticence the Court displayed in *Sosa* by identifying a more specific body of international law on which to draw. The resistance to incorporating customary international law into U.S. law is of a piece with the federal courts’ rejection of “general common law” and of the decline of natural law more generally in favor of positivism. But the specific nature of references to Article 75 and AP II, and those provisions’ direct connection to the ICCPR, could allow courts to incorporate the human rights principles codified in the ICCPR without running afoul of the fear of wholesale importation of foreign law underlying the conservative approach in *Sosa*. Even a positivist can justify incorporating into U.S. detention law provisions codified in the ICCPR or other human rights treaties through other treaty provisions whose application the executive endorses.

In addition to the broad invitation to apply international or foreign human rights precedent to U.S. cases, there is also a narrower invitation to U.S. courts implicit in the Obama administration’s stance toward Article 75 and AP II: the use of Article 75 and AP II (neither of which strictly apply to the current conflict, Article 75 because it is an instrument of IAC and AP II because it has not been ratified) to interpret provisions that do apply by their own terms, specifically Common Article 3. Here, the primary concern is not with regard to detention (the government contends U.S. detention practices are already in compliance with both Article 75 and AP II), but rather for criminal trials, either by civilian courts or military commissions. If an unattributed source in a blog post is to be believed, the government intends to conduct military commission trials in accordance with Article 75, but it is different for the government to say that it will

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219. See id. at 876–77.
220. See generally Barnes, supra note 107.
apply its understanding of Article 75’s safeguards as a matter of policy than it is for the government to accept Article 75 as binding for military commissions conducted in NIAC. Invoking Article 75 out of a sense of legal obligation is an invitation to apply its full and detailed terms in NIAC, either directly or by using Article 75 to fill in the detail of the vague provisions of Common Article 3, as the Hamdan plurality did.\(^{221}\) If a court can apply Article 75, it can interpret it as well. For instance, it is certainly plausible that a court would interpret the requirement that “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him” as subject to the U.S. constitutional confrontation requirement of Crawford v. Washington,\(^{222}\) which the Hamdan plurality also did,\(^{223}\) while relying on a law-of-armed-conflict framework governed only by the vague protections of Common Article 3, which might provide more flexibility for the admission of things such as battlefield or detainee statements. I am not arguing that the United States should avoid all legal restraints, just that there is substantial room for interpretation in the ones to which the administration is pointing.

This particular method for incorporating international law into domestic law is all too familiar; it is the mechanism by which the Supreme Court in Hamdi effectively read into the Constitution a requirement for Article 5 tribunals as an expression of due process.\(^{224}\) Article 75 and AP II, though, present even more likely avenues for the introduction of international law, both the international law of armed conflict and international human rights law, into the U.S. domestic law of armed conflict. Like Common Article 3, Article 75 (and to some extent AP II) provides broad protections amenable to either restrictive or expansive readings. However, unlike other provisions of the Geneva Conventions likely to be imported through interpretations of Common Article 3, many of the provisions of Article 75 and AP II have parallels in international human rights instruments. Consequently, recognizing the applicability of identical provisions in Article 75 and AP II is an open invitation to U.S. courts to rely on international human rights law in interpreting the provisions of Article 75 and AP II as domestic legal restrictions on the United States’s conduct of armed conflict. The current conflict is one in which the lines between armed-conflict and law-enforcement models are hotly contested, one many

\(^{221}\) See Hamdan, 548 U.S. at 633–34 (2006) (plurality opinion) (interpreting the phrase “all the judicial guarantees which are recognized as indispensable by civilized peoples” of Common Article 3(d) through Article 75’s right to confront one’s witnesses).


\(^{223}\) Hamdan, 548 U.S. 634 n.67.

\(^{224}\) See Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality opinion) (citing the panels provided for in Army Regulation 190-8, §§ 1–6); id. at 549–50 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing as authority both Army Regulation 190-8 and Article 5 itself).
have already described as a “hybrid.”225 That dispute over how to characterize the conflict — and the dependent question of what body of law should apply to it — is only likely to become more heated as the United States moves to more of a counter-terrorism strategy, as many have speculated is likely.226 In the context of that conflict, the close relationship Article 75 and AP II have to international human rights law provides even more temptation to import human rights law normally applicable to law enforcement operations into this current conflict. It is one thing to say, as the government contends, that the U.S. complies with the most rigorous understandings of the law of armed conflict; it is quite another for the United States to be held to human rights standards in detaining, much less targeting, terrorists.

The likelihood of litigation over questions of detention and due process in the foreseeable future — through the ongoing application of these rules by courts — means that that the Order and the Fact Sheet will likely have the greatest legal impact on the U.S. detention operations through the incorporation of treaty law into domestic law, which is likely to follow from the administration’s acquiescence to applying Article 75 and AP II to the detention and trial of unprivileged belligerents. As a practical matter, if the executive branch does not argue against interpretations of U.S. law that incorporate Article 75 and AP II, Article III courts are likely to include those rules in their decisions, thereby incorporating them into domestic (possibly constitutional) law. For instance, it is certain that, in the next military commission case to reach the federal courts, the defendant will argue that the military commissions are not the “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure” required by Article 75.227 If the executive branch does not argue that that standard is inapplicable (either because the United States has not ratified Article 75 and it is not customary international law or because it does not apply in NIAC — arguments that could be precluded by the Fact Sheet under a reasonable interpretation), then a court is likely to agree with the defendant that the Article 75 standard applies.228 Once it does, it is hard to imagine that court not relying on foreign or international interpretations of that provision, or even of fair

227. AP I, supra note 3, art. 75(4).
228. Of course, ratification of AP II would have a similar effect, although AP II does not include the requirement that a court be “regularly constituted,” which Common Article 3 (the applicability of which is commonplace in the U.S. domestic law of war) does, albeit without enumerated characteristics of fairness.
trial provisions in other human rights instruments. Petitioners in habeas corpus cases regarding detention and defendants in trials for war crimes will seek the broadest application of human rights law to cases ostensibly about the law of armed conflict; if the executive branch agrees with that approach, federal courts are unlikely to stand in the way.

That is not to say that recognizing the reach of international law is a one-way street; it never is. A more inclusive stance toward international law may actually strengthen the claim to domestic legal exceptionalism in cases relating to the law of armed conflict. AP II, for instance, explicitly assumes that its protections will apply because domestic protections are likely to be suspended during an armed conflict, providing an argument that it is the AP II rights, and not conceptions of due process applicable in domestic criminal cases (Miranda, anyone?) that should apply to detention hearings and military commissions. Moreover, the claim that it is the law of armed conflict and not domestic law that should apply to certain cases carries greater credibility when the version of the law of armed conflict the executive is seeking to apply is widely accepted, which, given the number of nations ratifying both AP I and AP II, one could say is the case today.

CONCLUSION

Neither the Order nor the accompanying Fact Sheet will have a major impact on U.S. detention operations. The Order applies only to a small group of detainees, all of whom have been subjected to similar procedures in the recent past. The Fact Sheet’s signaling of compliance with Article 75 is not technically applicable to the current conflict, and ratification of AP II is still beyond the horizon. Moreover, the procedures contained in the Order (which do not differ drastically from the procedures they replace) arguably conform with Article 75 and AP II, neither of which contain robust procedures with regard to detention, except perhaps with regard to the use of classified information (an area in which states are likely to receive considerable leeway given the vague requirements of Article 75) and the continued detention of detainees identified for release but for whom the United States is unable to locate an acceptable non-U.S. destination.

229. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 109, ¶ 4597 (regarding war crimes trials states that “such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect.”).

The procedures and substantive standards contained in the Order do not dramatically change the landscape of U.S. detention policy and practice, but that does not mean that the Order and the Fact Sheet are of no moment. The United States has previously been careful to maintain a strong approach to the *lex specialis* conception of the law of armed conflict, but Article 75 and AP II represent an approach to the law of armed conflict that more closely tracks human rights protections than earlier instruments, like the Geneva Conventions themselves. It is often the executive branch that argues most strongly for the U.S.-exceptionalist view of international law. If the Fact Sheet signals a shift by the executive branch, it is likely to be followed by a shift by courts as well. In many times, the content of the international law of armed conflict has been mostly a matter of academic interest in the United States. Today, however, many cases applying domestic law turn directly on the content of the law of armed conflict, which means that the content of international human rights law as implicated by a shifting approach to the law of armed conflict may soon find itself in domestic law, made binding by Article III courts on the conduct of the current armed conflict. Even those changes are, for the moment, hypothetical. The policy announced by the Fact Sheet — the administration’s willingness to embrace aspects of the law of armed conflict closely tied with international human rights law — has the potential for substantially altering the evolution of U.S. detention law and policy by providing even more space to incorporate international legal norms into U.S. domestic law.

Of course, the most important implication of the Fact Sheet’s embrace of Article 75 and AP II is one for diplomats, not lawyers — at least for now. By finally saying in a public forum that the United States will apply Article 75 in IAC out of a sense of legal obligation and that the administration will pursue ratification of AP II, the Obama administration is signaling future engagement with the international community on matters relating to armed conflict. Doing so likely changes the diplomatic landscape more than it does the legal landscape in the near term, although the impact over the long term may be more profound than the recognition of any particular rule or the ratification of any particular treaty. I leave it to the diplomats to debate whether that change should be welcomed.231

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231. See Bellinger & Padmanabhan, supra note 11, at 208.