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Jonathan Horowitz

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TRANSFERRING WARTIME DETAINEES AND A STATE'S RESPONSIBILITY TO PREVENT TORTURE

JONATHAN HOROWITZ*

I. INTRODUCTION

States forcibly transfer detainees to the custody and control of other States for a variety of reasons. This Article assesses the obligations that States incur under international law if they seek to make such a transfer during a time of war. As this Article demonstrates, the law of armed conflict (LOAC), which regulates State action during war, provides broad, substantive transfer protections, but those protections have a relatively limited scope of application in *international* armed conflicts; explicit protections in the law of *non-international* armed conflicts (NIAC) are almost non-existent. The reasons for these protection gaps are largely due to several outdated and State-centric considerations that shaped the LOAC. Remedying these protection gaps would therefore benefit from either 1) the codification of new international wartime law and/or 2) the stronger interpretation that the LOAC applies conjunctively with international human rights law.

To explore these options, this Article begins by analyzing detainee transfer protections under the LOAC. Part III discusses detainee transfer protections under international human rights law and assesses whether those protections are applicable in an armed conflict. Finally, Part IV evaluates diplomatic assurances and post-transfer monitoring systems, both of which, according to some States, mitigate the risk of post-transfer torture and fulfill States' transfer obligations under international law.

II. PREVENTING POST-TRANSFER TORTURE UNDER THE LAW OF ARMED CONFLICT: FAR REACHING PROTECTIONS OR LIMITED OBLIGATIONS?

The LOAC is the primary body of international law that regulates how States can wage war. The bulk of this law, which is both prescriptive and proscriptive, is found in the four Geneva Con-

* Jonathan Horowitz is an Associate Legal Officer at the Open Society Justice Initiative. In 2011, he worked at the U.S. Embassy in Kabul, Afghanistan as a Rule of Law Officer focused on detainee affairs; from 2009 to 2010 he worked for the Open Society Foundations on conflict-related detentions in Afghanistan and Pakistan. He has also worked for the International Criminal Court, Human Rights Watch, and as a United Nations human rights officer in Sudan from 2005 to 2007. Mr. Horowitz obtained an LL.M. in international human rights law from the University of Essex, U.K. Mr. Horowitz would like to thank Kristen Schubert, Gabor Rona, Christopher Corpora, and Jamie Williamson for their useful comments and insights. The views expressed in this article are those of the author and do not necessarily reflect those of the U.S. Department of State, the U.S. Government, or the Open Society Justice Initiative.

ventions and their two Additional Protocols of 1977.¹ The LOAC is not, however, uniform in its rules or application. Most importantly, the LOAC establishes different rules for international armed conflicts (conflicts primarily between two or more States) and non-international armed conflicts (conflicts between non-state armed groups or between a non-state group and a State).²

The primary reason for distinguishing between international and non-international armed conflicts is that international law traditionally regulated behavior between States and, conversely, was reluctant to place obligations on how States should treat their own nationals, which is the dynamic that States envisaged when drafting laws pertaining to NIAC. The most striking display of this difference can be found in the protections that the LOAC provides to detainees. Whereas there are extensive rights protecting fighters from one State who have fallen into the hands of the enemy State, the LOAC provides far fewer protections for people whose liberty is restricted by their home country.³ At the same time, however, the differences in protections afforded during these two types of conflicts have softened over the years with the expansion of laws pertaining to NIAC, the emergence of customary international humanitarian law, and an increase in international human rights treaty law.

A. International Armed Conflicts

Article 12 of the Third Geneva Convention Relative to the Treatment of Prisoners of War in International Armed Conflicts (GC III) and Article 45 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), both of which apply to international armed conflicts but not to NIAC, provide the greatest elaboration of detainee transfer protections in the LOAC. GC III Article 12 reads, in part:

1 See Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.T.S. 3114, 75 U.N.T.S. 31 (providing protection for the wounded and sick, for medical and religious personnel, and medical units and vehicles); Geneva Convention [II] for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.T.S. 3217, 75 U.N.T.S. 85 (following structure of Geneva Convention [I] but specifically tailored to war at sea); Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (defining categories of persons entitled to prisoner of war status as well as setting forth conditions and places for their captivity) [hereinafter GC III]; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (setting forth obligations of governments regarding civilian population and detailing humanitarian relief and treatment of civilian internees) [hereinafter GC IV]; Protocol Additional to the Geneva Convention of 12 Aug. 1949 and relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I], Jun. 8, 1977, 16 I.L.M. 1391 (1977) (strengthening protections for victims of international armed conflict as well as placing limits on the way such wars are fought); Protocol Additional to the Geneva Convention of 12 Aug. 1949 and relating to the Protection of Victims on Non-International Armed Conflicts [hereinafter Protocol II], Jun. 8, 1977, 16, I.L.M. 1442 (1977) (aiming to extend essential rules of the law of armed conflict to internal wars).

2 For the definition of international armed conflict, see GC III, *supra* note 1, at art. 2; Protocol I, *supra* note 1, at art. 1. For the definition of non-international armed conflict, see GC III, *supra* note 1, at art. 3; Protocol II, *supra* note 1, at art. 1.

3 INT'L COMM. OF THE RED CROSS, STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICTS (REPORT) 9 (2011) (“While international humanitarian law contains detailed rules on conditions of detention in international armed conflicts, this is not the case in conflicts not of an international character . . .”).

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.⁴

GC III Article 12 applies from the point an individual falls “into the power of the enemy,” up through the time a formal POW status determination is made, and, if the individual receives the protections of GC III, until the individual’s “final release and repatriation.”⁵

If the individual is not a POW or if he or she is covered by other GC III protections (i.e., captured spies, saboteurs, and irregular combatants), then GC III Article 12 protections cease.⁶ Still, those individuals do not fall into a protection vacuum. GC IV Article 45 provides almost identical substantive protections to “protected persons,” a distinct legal category from POWs.⁷ The International Committee of the Red Cross Commentary (ICRC Commentary), which is considered one of the most authoritative interpretations of the Geneva Conventions, explains that GC IV Article 45 applies to “all protected persons in the hands of a belligerent, whatever their status may be (protected persons who are not subject to restrictions on their liberty, internees, or refugees)”⁸ In other words, detainees who fall outside the protections of GC III are covered by GC IV Article 45, with a few important caveats as discussed below.

1. Substantive Protections

GC III Article 12 and GC IV Article 45 instruct that if a detaining State wishes to transfer a POW or protected person to another State, the transferring State must “satisfy itself” that the receiving power is willing and able to apply the rules of the respective Convention.⁹ The ICRC Commentary to GC III Article 12 interprets this pre-transfer responsibility in detail, explaining that “The Power wishing to transfer prisoners can only satisfy itself of the ability of the receiving Power to accept the prisoners *through prior investigation*”¹⁰

While the ICRC Commentary to GC IV Article 45 does not similarly call for “prior investiga-

4 GC III, *supra* note 1, at art. 12.

5 *Id.* at art. 5.

6 INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 53 (Jean Pictet ed. 1958) [hereinafter GC IV COMMENTARY].

7 *Id.* at 266.

8 *Id.*

9 GC III, *supra* note 1, at art. 12; GC IV, *supra* note 1, at art. 45.

10 INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTIONS RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 136 (Jean Pictet ed. 1960) (emphasis added) [hereinafter GC III COMMENTARY].

tion,” the fourth paragraph of Article 45 employs forceful language with respect to the prohibition on persecution of transfers, stating that, “[i]n no circumstance shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”¹¹ The ICRC Commentary interprets Article 45(4) to mean that the transferring States must be “*absolutely certain* that [the protected person] will not be subject to discriminatory treatment or, worse still, persecution.”¹² The ICRC Commentary provides no specific elaboration, however, on how a State should “satisfy itself,” “investigate,” or be “absolutely certain” that an individual will not be subjected to discriminatory treatment or persecution upon transfer. As discussed below, international human rights law, the practice of United Nations forces during the Korean War, and the ICRC Commentary’s interpretations of GC III Article 118 provide some guidance.

GC III Article 12 and GC IV Article 45 also require that if the receiving State fails to carry out the provisions of the Conventions in “any important respect,” the transferring State must take “effective measures to correct the situation” or request the return of the detained individual.¹³ In regards to “important,” the ICRC Commentary interprets GC III Article 12 to apply to grave breaches outlined in GC III Article 130, which includes willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the GC III.¹⁴

The ICRC Commentary also explains that intervention by the transferring State is required even when grave breaches are not necessarily committed willfully, explaining “The transferring Power may and indeed must intervene if these acts have been committed and if the receiving Power is unable or unwilling to rectify the situation immediately.”¹⁵ The ICRC Commentary to GC III Article 12, which is similar to the ICRC Commentary to GC IV Article 45, describes a broad array of possible ways in which the transferring State could intervene, including providing “food supplies, the sending of teams of doctors and nurses, equipment, etc. . . .”¹⁶

Not only is the transferring State required to provide this post-transfer assistance, but the receiving State is required to accept and even return the detainee upon request if the corrective solutions are insufficient.¹⁷ The ICRC Commentary explains:

[I]f the poor treatment given to prisoners is not caused merely by temporary difficulties but by ill-will on the part of the receiving Power, or if for any other reason the situation cannot

11 GC IV, *supra* note 1, at art. 45.

12 GC IV COMMENTARY, *supra* note 6, at 269 (emphasis added).

13 GC III, *supra* note 1, at art. 12; GC IV, *supra* note 1, at art. 45.

14 GC III COMMENTARY, *supra* note 10, at 137-38 (citing GC III, *supra* note 1, at art. 130).

15 *Id.* at 138.

16 *Id.* The Commentary to GC IV Article 45 equates the phrase “any important respect” with “essential” and “all the serious failures to fulfill obligations.” The Commentary lists, but not exhaustively, the obligations of food, clothing, hygiene, medical attention, religious and intellectual activities, correspondence, and relief. A risk of persecution and grave breaches would also obviously be included in this consideration. GC IV COMMENTARY, *supra* note 6, at 269.

17 GC III COMMENTARY, *supra* note 10, at 139.

be remedied, the Power which originally transferred the prisoners must request that they be returned to it. In no case may the receiving Power refuse to comply with this request, to which it must respond as rapidly as possible.¹⁸

In summation, GC III Article 12 and GC IV Article 45 provide strong protections against transferring protected persons and prisoners of war to be subject to torture and other mistreatment. This includes the receiving State being willing and able to apply the Geneva Conventions and the sending State making an evaluation of that willingness and ability prior to the transfer. Secondly, the sending State retains post-transfer responsibilities to assist the receiving State in remedying any shortcomings in its treatment of detainees and, moreover, the sending State has an obligation to request the return of detainees if those remedies are refused or inadequate. Importantly, the receiving State, which has the primary responsibility for the care of the transferred detainees, is required to meet that request as rapidly as possible.

2. *Scope of Application*

Despite their broad substantive protections in international armed conflicts, GC III Article 12 and GC IV Article 45 have limited scopes of application.¹⁹ As previously noted, GC III Article 12 applies only to those who attain POW status, while GC IV Article 45 only applies to “protected persons,” which by definition precludes applicability to detained nationals of a neutral State or detained nationals of a co-belligerent that retains normal diplomatic representation with the detaining State.²⁰ Most significantly, in international armed conflicts, GC III Article 12 and GC IV Article 45 deal with the transfer of persons amongst allies (i.e., co-belligerents), as frequently occurred during World War II, but the articles do *not* deal with repatriation from one belligerent to another.²¹ If they did, this would significantly expand the scope of transfer protections under international law.²² However, GC III and GC IV move in the opposite direction when it comes to repatriation. GC III Article 118 *requires* POWs to be repatriated “without delay” at the cessation of active hostilities.²³ GC IV similarly states that Article 45 “shall in no way constitute an obstacle to the repatriation of

18 *Id.*

19 GC III, *supra* note 1, at art. 12; GC IV, *supra* note 1, at art. 45.

20 GC III, *supra* note 1, at art. 4. Article 45 may be further restricted by GC IV Article 5, which allows a State to strip certain protected persons of their rights. But, the restrictions are not automatic; the State must make the case for such restrictions and grant, as Article 5 states, “the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.” GC IV, *supra* note 1, at art. 5. While it may be true that national security interests would require the curtailment of some of the rights afforded to detained protected persons, it is hard to imagine how a State could legitimately and regularly curtail GC IV Article 45 obligations due to national security concerns.

21 GC III COMMENTARY, *supra* note 10, at 132.

22 Cordula Droege, *Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges*, 90 INT’L REV. RED CROSS, 669, 674-75 (2008) [hereinafter *Transfers of Detainees*] (“[T]he Geneva Conventions contain a much broader restriction on the transfer of prisoners of war or civilian internees between allied powers in international armed conflicts.”).

23 GC III, *supra* note 1, at art. 118.

protected persons, or to their return to their country of residence after the cessation of hostilities.”²⁴

The Geneva Convention drafters had plenty of examples to see the need for repatriation protections, such as when, in World War II, the United States and United Kingdom repatriated Russian citizens who were executed or sent to forced labor camps in Siberia.²⁵ Nevertheless, State self-interests prevailed as a matter of treaty law. The drafters knew that detention operations could incur tremendous and burdensome resources.²⁶ Detaining States did not desire to hold prisoners indefinitely or set out new quasi-asylum obligations should the prisoners not want to be repatriated.²⁷ Moreover, the drafters wanted to require States to release the nationals of enemy States at the cessation of hostilities—something that did not occur at the end of World War II, to the detriment of the dignity and humanity of POWs.²⁸

For the law of international armed conflict to have provided repatriation protections would have gone against a core assumption of the LOAC. The LOAC provides protections to POWs and protected persons to ensure the rights of persons who found themselves in the hands of an enemy State, as opposed to the home State that would have no intention of subjecting its own nationals to abuse. Under this assumption, the LOAC dictates that if a POW or protected person is sent back to his or her home State for further detention, that individual would cease being a POW or protected person in the full sense of those terms. Furthermore, the post-transfer responsibilities in GC III Article 12 and GC IV Article 45 (i.e., requiring the return of a mistreated detainee) would simply not make sense. The ICRC Commentary explains the discontinuation of GC IV Article 45 accordingly: “Repatriation or transfer to a Power which is the country of origin of the people who are transferred has the effect of placing the transferees in the position of nationals. They thus lose their status as protected persons and cease to be protected under the Convention. The prohibition in the first paragraph there loses its ‘raison d’être’ so far as they are concerned.”²⁹

While the personal jurisdiction of GC III Article 12 and GC IV Article 45 is narrow, what about their temporal scope? One may ask, do the post-transfer responsibilities of GC III Article 12 and GC IV Article 45—such as providing assistance and requesting the return of a tortured detainee—cease (1) when a transferred detainee remains in the custody of a foreign State after the armed conflict has ended?; (2) when a conflict transitions from an international armed conflict to a NIAC?; (3) when a co-belligerent with detainees switches sides and becomes a belligerent?; or (4) when State A transfers a POW or protected person to a co-belligerent (State B) and then State A ends its participa-

24 GC IV, *supra* note 1, art. 45. However, there are exceptions such as wounded prisoners who refuse to be repatriated and prisoners awaiting criminal proceedings. *Id.* at arts. 109, 119.

25 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, 234 (2011) [hereinafter *Detention Operations in Contemporary Conflicts*] (explaining that the detainees who were forcibly repatriated against their wills were treated brutally, including being sentenced to forced labor camp where some of them were executed by their home government).

26 *Id.*

27 *Id.*

28 Jan P. Charmatz and Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391, 401-05 (1953) [hereinafter *Repatriation of Prisoners of War*]; see *Detention Operations in Contemporary Conflicts*, *supra* note 25, at 234.

29 GC IV COMMENTARY, *supra* note 6, at 267.

tion in the conflict but State B does not?

The post-transfer responsibilities in GC III Article 12 and GC IV Article 45 are linked first and foremost to whether the transferred person remains in captivity, not to whether the transferring State is engaged in an international armed conflict.³⁰ Indeed, the two articles would become hollow if they allowed a State to transfer all of its POWs and protected persons to a co-belligerent and then skirt its transfer obligations by ending its participation in the conflict. GC III Article 5 and GC IV Article 6 state that the protections for POWs and detained protected persons continue until their final release and repatriation.³¹ GC III Article 85, which adds additional weight to this interpretation, specifies that when a person is detained for a crime that he or she committed prior to capture and a conviction results, GC III's protections do not disappear.³² The protections afforded to people deprived of liberty under Article 75(6) of Protocol I also clearly apply post-conflict. "Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided in this Article until their final release, repatriation or re-establishment, *even after the end of the armed conflict.*"³³

3. Filling in Protection Gaps in the Law of International Armed Conflicts

a. Article 118 of the Third Geneva Convention

The Geneva Conventions' failure to provide express repatriation protections against torture in international armed conflicts is one of its biggest weaknesses. This weakness is magnified by GC III Article 118 and GC IV Article 134, which generally *require* the repatriation of POWs and protected persons.³⁴

The question of repatriation came under the spotlight in 1952 when the United Nations Command refused to repatriate Chinese and North Korean prisoners under the reasoning that, upon repatriation, China and North Korea would deprive the prisoners of their human rights.³⁵ In 1950, the General Assembly had similarly given primacy to the humanitarian spirit of the Geneva Conventions and interpreted GC III Article 118 to allow for an "unrestricted opportunity of repatriation," but noted that repatriation should not be interpreted as an absolute obligation.³⁶ A timely 1952 article by Charmatz and Wit and another in 1953 by Mayda, both of which looked at the drafting

30 GC III, *supra* note 1, at art. 12; GC IV, *supra* note 1, at art. 45; *see also* Yunus Rahmatullah v. Sec'y of State for Foreign & Commonwealth Affairs, 1540 EWCA Civ. ¶¶ 33–35 (U.K. 2011) (noting that there is a substantial case to be made that GC III Article 12 or GC IV Article 45 applies to a detainee currently held by the United States in Afghanistan after the United Kingdom captured him in Iraq during the war, transferred him to U.S. custody in Iraq, and the United States transferred him to U.S. custody in Afghanistan).

31 GC III, *supra* note 1, at art. 5; GC IV, *supra* note 1, at art. 6.

32 See R.R. Baxter, *The Geneva Conventions of 1949 Before the United States Senate*, 49 AM. J. INT'L L. 550, 553 (1955).

33 Protocol I, *supra* note 1 (emphasis added).

34 GC III, *supra* note 1, at arts. 109, 119. Exceptions include wounded prisoners who refuse to be repatriated and prisoners awaiting criminal proceedings.

35 *Repatriation of Prisoners of War*, *supra* note 28, at 392.

36 G.A. Res. 427(V), 1950 U.N.Y.B. 568 (Dec. 14, 1950).

history of the Geneva Conventions and the United Nations Command's policy in the Korean War, pointed out that the main purpose of GC III Article 118 was to codify the humanitarian value of ensuring that POWs who wished to be sent home were allowed to do so. They argued that it would be antithetical to the humanitarian spirit of the Convention and the intended purpose of Article 118 if Article 118 required repatriation when POWs were likely to face persecution or other serious human rights abuses.³⁷

The emphasis that the United Nations Command, the United Nations General Assembly, Char-matz, Wit, and Mayda placed on the humanitarian underpinnings of GC III Article 118 was well placed. In 1955, when GC III was up for ratification in the United States, the Senate Foreign Relations Committee, in concurrence with the Executive Branch, reported:

[The Committee] finds nothing in the Geneva Conventions of 1949 which will compel the United States forcibly to repatriate prisoners of war who fear political persecution, personal injury, or death should they return to their homeland. That article, being intended for the benefit and the well-being of prisoners, will permit the United States to continue the policy of nonforceable repatriation, while at the same time leaving it free, where necessary, to refuse requests for asylum. The interpretation which has thus prevailed gives due weight to the word "release" in article 118, is faithful to precedent and legislative history, and is fully consistent with the great humanitarian purposes which underlie all four of the conventions.³⁸

The ICRC Commentary, which was published in 1960, took a similar stance. The Commentary notes that GC III was not legally binding to the parties of the Korean War and that the "Korean War must not in any way be considered as a precedent for the application of Article 118."³⁹ However, the Commentary goes on to state that exceptions to Article 118 are permissible if there are "serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty . . ."⁴⁰

b. Geneva Conventions Obligation to "Ensure Respect"

As set out in Common Article 1, States at war are responsible for "ensuring respect" for the en-

37 *Repatriation of Prisoners of War*, *supra* note 28, at 397-402; *see also* Jaro Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT'L. L. 414, 430-32 (1953) (questioning the linguistic construction of Article 118 to reflect the humanitarian principle against forcible repatriation).

38 *Report of the Committee on Foreign Relations on Execs. D, E, F, and G (Geneva Conventions for the Protection of War Victims)*, S. Exec. Rep. No. 9, 84th Cong. 24 (1955). The 2004 UK Joint Service Manual of the Law of Armed Conflict notes that recent practice of states indicates that prisoners of war should not be repatriated against their will, stating "It is United Kingdom policy that prisoners of war should not be repatriated against their will." U.K. MINISTRY OF DEFENCE, THE MANUAL ON THE LAW OF ARMED CONFLICT 205 (2004).

39 GC III COMMENTARY, *supra* note 10, at 546.

40 *Id.* at 547. As a matter of practice, the International Committee of the Red Cross has, according to Cordula Droegge, "always taken the view that, while the mere wish of prisoners of war could not be a bar to repatriation, they must not be repatriated if it would be 'contrary to the general principles of international law for the protection of the human being.'" *Transfers of Detainees*, *supra* note 22, at 674.

tirety of the Geneva Conventions.⁴¹ This responsibility helps to fill the repatriation protection gaps of GC III Article 12 and GC IV Article 45.⁴² The International Court of Justice (ICJ) took the view in 2004 that “every State party to the Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”⁴³ Rule 144 of the ICRC’s study on customary international humanitarian law similarly held that States “must exert their influence, to the degree possible, to stop violations of international humanitarian law.”⁴⁴ When these rules are applied to the absolute prohibition of torture in the LOAC, as found in Common Article 3 and Article 75 of Additional Protocol I, it would be inconsistent with the Geneva Conventions for a State to knowingly transfer or repatriate a detainee to torture or other prohibited treatment no matter who is the recipient. Implied within that obligation would be an additional obligation on the transferring State to make an assessment of whether torture will occur upon transfer. As discussed below in the section on human rights, this interpretation is not novel to international law.

B. Non-International Armed Conflicts

The State-to-State relationships that made transfer protections necessary in the LOAC were largely absent from NIAC scenarios at the time that States drafted the Geneva Conventions. The reason for this imbalance was that international law had traditionally been reluctant to regulate how States treat their own nationals, and a NIAC was traditionally understood to cover situations where a State was fighting its own nationals, therefore making the analogous transfer protections unnecessary.⁴⁵ For these reasons, the law of NIAC provides no explicit protections to stop the transfer of a detainee when the receiving entity is likely going to torture him or her. Despite the absence of explicit transfer protections in NIAC, Common Article 3, which applies in NIAC, contains an implied prohibition on transfer where there is a likelihood of torture.⁴⁶ Article 5(4) of Additional Protocol II (Protocol II) also states: “If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.”⁴⁷ It would seem appropriate, however, to develop new and more precise protections under NIAC to better prevent transfers to

41 GC III, *supra* note 1, at art. 1.

42 See GC IV, *supra* note 1, at art. 45; GC III, *supra* note 1, at art. 12.

43 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 158 (July 9) [hereinafter Legal Consequences].

44 INT’L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW RULE 144 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

45 The law of non-international armed conflict is limited in scope because States wish to protect their sovereignty and are reluctant to provide “rebels” and “insurgents” with a set of obligations and rights that would elevate them to a level equal to States. For example, in Darfur, Sudan, where the author worked, the government was unwilling even to recognize the violence as rising to the level of an “armed conflict” due to the stature that such nomenclature would provide the non-state warring groups. See also GC IV COMMENTARY, *supra* note 6, at 46 (“The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State’s relations with its own nationals.”).

46 GC III, *supra* note 1, at art. 3.

47 GC IV, *supra* note 1, at art. 3; Protocol II, *supra* note 1, at art. 5.

torture. The cross-border and multi-national character of many of today's NIACs make detailed transfer protections and subsidiary obligations not only appropriate but necessary. Three NIAC scenarios demonstrate this:

- Scenario 1: Rebels from State X cross into State Y and attack State Y. State Y then transfers captured rebels, who are not their own nationals, back to State X. Similar to the protection gaps in the law of international armed conflicts, State Y would have no explicit responsibilities under the law of NIAC to prevent torture when repatriating rebels to State X.
- Scenario 2: Rebels attack their home government of State Y. State Y then forms a military coalition with States A and B, both of which transfer captured rebels to State Y. In all likelihood State Y would treat the rebels, who are its own nationals, as hostile persons. Similar to scenario 1, however, States A and B would have no explicit repatriation requirements under the law of NIAC to prevent post-transfer abuse by State Y.
- Scenario 3: A coalition of States fight rebels in defense of State Y. The coalition then transfers captured rebels amongst themselves, but does not hand the detainees over to State Y. This scenario is similar to what was occurring during World War II when co-belligerents transferred non-nationals among themselves. Yet there are no NIAC rules analogous to GC IV Article 45 or GC III Article 12.

To fill the gaps in NIAC transfer protections, States could apply all, or parts, of GC IV Article 45 or GC III Article 12 as a matter of policy.⁴⁸ The full application of GC IV Article 45, including all of its pre- and post-transfer responsibilities, would be most appropriate when co-belligerents in an NIAC transfer non-national detainees amongst one another. However, when a State transfers a detainee back to his or her home State, it may be more appropriate for the sending State to have only a responsibility to assess the post-transfer risks and then either refuse transfer if a risk exists or find means to reduce the risk to an acceptable degree.

III. PREVENTING POST-TRANSFER TORTURE UNDER INTERNATIONAL HUMAN RIGHTS LAW

International human rights law, similar to GC IV and GC III, restricts States from sending detainees to the custody of another State where there is a risk of torture. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) states, "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁴⁹ It also demands that "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."⁵⁰

48 See GC IV, *supra* note 1, at art. 45; GC III *supra* note 1, at art. 12. While these protections are usually limited to international armed conflicts, nothing in the text of the Conventions prohibits States from applying those rules to non-international armed conflicts.

49 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3.1, Dec. 10, 1984, 1465 U.N.T.S. 85.

50 *Id.* at art. 3.2.

Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance uses almost identical language but focuses on enforced disappearance instead of torture. The Inter-American human rights treaty system is more expansive in its torture protections and includes provisions against persons being tried by special or ad hoc courts and for the right to life or personal freedom if violated because of race, nationality, religion, social status, or political opinions.⁵¹ Refugee law grants certain rights to people who qualify as refugees and prohibits States from *refouling* (forcibly returning or expelling) refugees or asylum seekers “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵²

Some human rights treaties do not include a specific prohibition on transfers to torture or arbitrary deprivation of life but their adjudicating bodies have interpreted the rule to exist within the general prohibitions against torture and the right to life.⁵³ Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁵⁴ Though there is no mention of transfers, the Human Rights Committee, which assesses allegations of ICCPR violations and provides authoritative interpretations of the Covenant’s provisions has explained that “State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁵⁵ The European Convention on Human Rights (ECHR), while prohibiting torture, also makes no mention of prohibitions on transfers.⁵⁶ Nonetheless, in *Chahal v. The United Kingdom*,⁵⁷ the European Court on Human Rights (ECtHR) noted:

It is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3)

51 See Inter-American Convention to Prevent and Punish Torture, art. 13(4), Feb. 28, 1987, O.A.S. Treaty Series No. 67; American Convention on Human Rights, art. 22(8), Nov. 22, 1969, 1144 U.N.T.S. 123.

52 Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 189 U.N.T.S. 150. *But see id.*, at art. 33(2) (noting that the “benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”).

53 See, e.g., International Covenant on Civil and Political Rights, Sept. 8, 1992, 999 U.N.T.S. 171.

54 *Id.* at art. 7.

55 U.N. HUMAN RIGHTS COMM., GENERAL COMMENT NO. 20: CONCERNING PROHIBITION OF TORTURE AND CRUEL TREATMENT OR PUNISHMENT ¶ 9 (1992). For a similar interpretation by the Human Rights Committee with the respect to the right to life, see U.N. HUMAN RIGHTS COMM., GENERAL COMMENT NO. 31: NATURE OF THE GENERAL OBLIGATION IMPOSED ON STATES PARTIES TO THE COVENANT ¶ 12 (2004) (expanding this interpretation to the respect to the right to life).

56 See European Convention on Human Rights, Sept. 3, 1953, 1 E.T.S. 47.

57 *Chahal v. United Kingdom*, App. No. 70/1995/576/662, 30 Eur. Ct. H.R. ¶ 74 (1996).

implies the obligation not to expel the person in question to that country.⁵⁸

A transferring State should also consider whether the transferee will be subsequently transferred onward to other States where a risk of torture exists—a concept referred to as secondary *refoulement*.⁵⁹ The ECtHR and the Committee against Torture have, on occasion, also applied the prohibition when there is a risk of torture by non-State entities, but this has only occurred in instances of transfer to “failed states” or where the State is unable or unwilling to prevent the abuse.⁶⁰

In addition to the rules against transfer to torture, rules regulate what procedures a State must follow to assess whether a transfer can take place.⁶¹ Sir Nigel Rodley and Matt Pollard, experts in this area, note that most questions about the prohibition of transfer to torture focus not on the substantive protection but rather on the issue of how a State must assess the risk of torture in individual cases.⁶² Sir Elihu Lauterpacht and Daniel Bethlehem, in their examination of *non-refoulement*, elaborate that international practice indicates that the “fullest formulation” of the rule requires that there must be substantial grounds that an individual would face a real risk of torture or cruel, inhuman or degrading treatment.⁶³ To make this determination, the Human Rights Committee, the Committee against Torture, and some domestic courts have all held that a transferee must have access to an individualized procedure prior to transfer that allows for an evaluation of the risk of post-transfer mistreatment.⁶⁴ In *Agiza v. Sweden*,⁶⁵ the Committee against Torture held that “the absence of any avenue of judicial or independent administrative review of the Government’s decision to expel the complainant [did] not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.”⁶⁶

In conclusion, detainee transfer protections in international human rights law provide a more general scope of application than the transfer protections in the LOAC. They are keyed to the control that a State has over a person, whereas the LOAC considers control, the person’s status, and the nature of the conflict. Human rights law has also developed in greater detail the procedural requirements for a State to determine, on an individualized basis, whether substantial grounds exist of a real risk of mistreatment upon transfer. In certain cases, human rights law can also offer transfer protections against torture by non-State entities. Courts have not, however, been clear on whether

58 *Id.*

59 See NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 175 (3d ed. 2009) [hereinafter *TREATMENT OF PRISONERS*]; see also *Transfers of Detainees*, *supra* note 22, at 677 (examining the concept of secondary *refoulement*).

60 *Id.* at 174-75.

61 See *Transfers of Detainees*, *supra* note 22, at 679-80 (discussing the threshold of risk); see also *TREATMENT OF PRISONERS*, *supra* note 59, at 173.

62 *TREATMENT OF PRISONERS*, *supra* note 59, at 173-74.

63 See, e.g., Daniel Bethlehem & Sir Elihu Lauterpacht, *The Scope and Content of Non-Refoulement: Opinion* in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 89, 162 (Erika Feler, Volker Turk & Frances Nicholson eds., 2003).

64 See *Transfers of Detainees*, *supra* note 22, at 679; see also *TREATMENT OF PRISONERS*, *supra* note 59, at 173.

65 Comm’n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

66 *Id.* at ¶ 13.8; see also *TREATMENT OF PRISONERS*, *supra* note 59, at 174.

the procedural requirements for making a risk assessment in a non-armed conflict and an armed conflict scenario are the same. Indeed, some States are of the view that human rights treaty law is not legally applicable during armed conflicts or extraterritorially.⁶⁷

It must be recognized, however, that unlike the protections for transfers amongst co-belligerents in the law of international armed conflicts, human rights law places no clearly defined obligations on a sending State to provide assistance to transferees who suffer from inadequate post-transfer care; on the sending State to request the detainee back from the receiving State; or on the receiving State to accept the assistance or return the detainee upon the sending State's request. At best, as Droege explains, some of these shortcomings could be addressed through general principles of international law relating to state responsibility and the commission of an internationally wrongful act. Such principles could require a sending State to provide corrective measures similar to those envisaged by GC III Article 12 and GC IV Article 45.⁶⁸

IV. COMPATIBILITY OF HUMAN RIGHTS LAW AND THE LAW OF ARMED CONFLICT

International human rights law and the LOAC were not constructed in formal consultation with one another. Yet, their ability to co-exist is logical enough. The Four Geneva Conventions and the Universal Declaration of Human Rights (the precursor to human rights treaty law) emerged after World War II with the similar aim of committing governments to protect the most basic notions of humanity.⁶⁹ For this reason, it is not surprising that international and regional courts, the Human Rights Committee, the Committee against Torture, the Committee on Economic, Social and Cultural Rights, and several State courts agree that the existence of an armed conflict does not extinguish a State's human rights treaty obligations.⁷⁰ The marriage of the two legal frameworks is aided by the fact that these adjudicating institutions have been, for the most part, practical when declaring the co-applicability of human rights law and the LOAC. Courts and quasi-judicial bodies have generally agreed that a State's human rights treaty obligations remain in effect extraterritorially when that State

67 See *infra* Part IV.

68 *Transfers of Detainees*, *supra* note 22, at 698-700 (outlining that the legal framework for transferring individuals holds as a baseline that people must not be transferred if there are substantial reasons for believing that they will face torture or cruel and degrading treatment and advocating for better oversight from the international community to ensure these base legal standards).

69 Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501, 501-02 (2008).

70 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (noting that the protections of the International Covenant of Civil and Political Rights do not cease in times of war); see also *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 18, ¶ 164 (2011) (accepting the applicability of the European Convention on Human Rights during armed conflict when a state has custody over an individual and the continued applicability of "procedural obligation[s] under Article 2 . . . in difficult security conditions, including in a context of armed conflict . . ."); GENERAL COMMENT NO. 31, *supra* note 55, at ¶ 11 (explaining that the Covenant applies during times of armed conflict); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, ¶ 12, Aug. 31 2001, E/C.12/1/Add.69; U.N. COMM. AGAINST TORTURE, GENERAL COMMENT NO. 2: IMPLEMENTATION OF ARTICLE 2 BY STATES PARTIES ¶ 5 (2008) (maintaining that the Convention applies during a state of war).

retains “jurisdiction” over a person, such as a prisoner, or a territory, such as an occupied territory.⁷¹

One interesting case study is *Al-Skeini*. While U.K. courts upheld the extraterritorial application of human rights law in situations where the United Kingdom has custody over an individual abroad in an armed conflict, such as a detainee, the courts in the same case held that the U.K.’s human rights obligations were not necessarily applicable extraterritorially even though the United Kingdom was an occupying power. The European Court of Human Rights differed on this point in *Al-Skeini*. The Court held that the United Kingdom had jurisdiction over the death of Iraqis and was capable of conducting effective official and independent investigations in accordance with the requirements of the European Convention on Human Rights. The Court held that the U.K.’s failure to do so is what constituted a violation of its obligations.⁷²

What remains in question is how human rights law and the LOAC interact when they are co-applicable. To more smoothly meld the two, the ICJ explained in its 1996 Advisory Opinion on the use of nuclear weapons that, with respect to the right to life, there is a *lex specialis—lex generalis* relationship between the two legal frameworks.⁷³ The ICJ held that the prohibition on the arbitrary deprivation of life under human rights law should be interpreted through the rules relating to proportionality, indiscriminate use of force, and precautionary measures found in the LOAC.⁷⁴ The Court reasoned that the LOAC was more appropriately tailored to the situation before the Court, which mainly concerned armed conflict.⁷⁵

Since the 1996 Advisory Opinion the ICJ, while holding that the LOAC and human rights law are co-applicable, has not clarified how other provisions of each body of law can co-exist when they are in apparent conflict.⁷⁶ For transfers to torture, however, full-fledged conflicts in the law are rare. For example, in an international armed conflict, both human rights law and the LOAC similarly prohibit transfers in the face of grave breaches, mistreatment, and persecution. A conflict also does not exist when the Geneva Conventions provide greater substantive protections for transfers than human rights law, such as the right to request the return of an abused detainee, or when human rights law contains provisions about transfers in the absence of any competing LOAC rules. In the latter situation, human rights law would apply in a non-international armed conflict. As Bellinger and Padmanabhan observe with respect to NIAC, “given the shared interest in both bodies of law against transfers that would subject persons to mistreatment, application of human rights transfer restric-

71 For a summary of the legal history of the extraterritorial application of human rights law, see Droege, *Elective Affinities?*, *supra* note 69 and R (on the application of al Skeini & Others) v. Sec’y of State for Defence & Redress Trust, [2004] EWHC 2911, ¶¶ 127-243 (QB). For a case against the extraterritorial application of human rights law, see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119 (2005).

72 See *Al-Skeini*, 53 Eur. Ct. H.R. at ¶¶ 149, 168–77 (reflecting the opinions of the lower courts in this case); see also Danio Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law*, 90 INT’L REV. RED CROSS 653, 665 (2008).

73 Legality of the Threat or Use of Nuclear Weapons, *supra* note 70.

74 *Id.* at ¶ 25.

75 *Id.*

76 Legal Consequences, *supra* note 43; Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

tions to conflicts with non-state actors is in accordance with the principle of complementarity.⁷⁷

“Shared interest” may be an understatement. Additional Protocol II to the Geneva Conventions recognizes, and was inspired by, the “international instruments relating to human rights.”⁷⁸ This relationship, as well as the drafters’ intent for Protocol II to track many human rights standards, supports the co-applicability of the LOAC and human rights law. Operationalizing their compatibility is therefore, not unworkable as demonstrated by international military forces involved in the armed conflict in Afghanistan.⁷⁹

The United Kingdom, for example, put in place a detention monitoring program and suspended transfers to various Afghan detention facilities due to allegations of mistreatment.⁸⁰ The United Kingdom did this to comply with its obligations under the European Convention on Human Rights.⁸¹ Similarly, in 2011 and 2012, the Commander of International Security Assistance Forces (ISAF) also suspended all ISAF transfers to various Afghan detention facilities for analogous reasons.⁸² At this time, ISAF put in place a program to monitor the facilities tainted by abuse and committed itself to work with the Afghan government to improve the treatment of transferred detainees.⁸³ Given that these instructions came from the ISAF Commander and not from individual States, the suspension and remediation measures were technically a policy choice and not a reflection of a hard obligation under international law. Nevertheless, the suspension closely tracks the principles of the law of international armed conflict and international human rights law, which prohibit transferring detainees to torture and require a mechanism to assess the appropriateness of resuming transfers.⁸⁴

With all the similarities between the LOAC and human rights law, even apparent conflicts in the two bodies of law can often be easily mediated. One might ask if a State at war is truly expected to put in place the same peace-time human rights procedures necessary for making an individualized risk assessment for post-transfer mistreatment. Human rights law does not necessarily require identical wartime and peacetime risk-assessment procedures. While human rights law requires something more substantive than a “prior investigation,”⁸⁵ the Committee against Torture has interpreted the Convention’s procedural guarantees to contain considerable latitude. The Committee has indicated

77 *Detention Operations in Contemporary Conflicts*, *supra* note 25, at 236.

78 Protocol II, *supra* note 1, at Preamble.

79 See Dion Nissenbaum, *U.S. Probes Afghan Abuse*, WALL ST. J., Aug. 19, 2011, available at <http://online.wsj.com/article/SB10001424053111904070604576516300602585270.html> (noting that the ISAF suspended detainee transfers to several Afghan detention facilities following torture allegations); Quentin Sommerville, *NATO Halts Afghan Prisoner Transfer After Torture Fears*, BBC NEWS, Sep. 6, 2011, available at <http://www.bbc.co.uk/news/world-south-asia-14809579>.

80 Sommerville, *supra* note 79; Queen in re: Maya Evans v. Sec’y of State for Defence, [2010] EWHC 1445 (Q.B.).

81 *Maya Evans*, [2010] EWHC at ¶ 237.

82 Int’l Sec. Assistance Force-Afghanistan, *ISAF Outlines Proactive Detainee Safeguards*, Oct. 10, 2011, available at <http://www.isaf.nato.int/article/isaf-releases/isaf-outlines-proactive-detainee-safeguards.html>.

83 *Id.*

84 See *supra* Part II.A (explaining how GC III Article 12 and GC IV Article 45 both apply to international armed conflicts and the detainee transfer protections in the LOAC); *supra* Part III (maintaining that international human rights law restricts States from sending detainees to the custody of another State posing risk of torture).

85 See *supra* Part II.A.1.

that it will tolerate an independent administrative procedure, rather than a full judicial proceeding, that provides for an effective review.⁸⁶ This latitude likely reflects the Committee's awareness that its procedural framework had to be practical due to the non-derogable nature of the prohibition against torture.⁸⁷

The ECtHR's decision in *Al-Skeini v. United Kingdom*⁸⁸ looked at the requirements of investigating allegations of unlawful killings. Although the court did not discuss detainee transfer issues, its decision suggested that generally the court is willing to take into account the practical limitations that an armed conflict puts on a State and will allow a State to vary its conduct depending on the circumstances.⁸⁹ In other words, the court may give considerable deference to a State that explains how and why it is doing all that it can to make a proper risk assessment even if the procedures are not the same as what the court would expect from a State in a non-conflict scenario. Such an assessment, however, is extremely context specific.

The latitude that human rights law permits with respect to risk of return assessments and the mechanisms that the LOAC envisages in terms of administrative boards and tribunals to deal with detention and internment match up well in many respects. The ICRC Commentary to GC III Article 118 specifically envisages the need for the detaining authority to make repatriation exceptions on an individual basis, that no propaganda or pressure should be used to persuade the POW not to return, and that the detaining authority should convene "supervisory bodies" to determine the authenticity of the detainee's decision.⁹⁰

Charmatz and Wit's article provides a detailed account of how the United Nations Command operationalized its repatriation policy and assessed the risk of return during the Korean War.⁹¹ Today, it would be unsatisfactory to conduct 90-second interviews—the average length conducted during the Korean War—that rely on a detainee's willingness to inflict pain and suffering on himself as proof that he does not want to be repatriated. However, the individualized and in-person nature of those interviews demonstrates how a transferring State might "satisfy itself," "investigate," or be "absolutely certain" that transfers to torture will not take place, while at the same time fulfilling what

86 *Agiza v. Sweden*, Comm'n No. 233/2003, ¶ 13.8, U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture 2005); see GENERAL COMMENT NO. 31, *supra* note 55, at ¶ 12.

87 See U.N. General Assembly, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General*, ¶¶ 33, 41 UN Doc A/60/316 (Aug. 30, 2005) [hereinafter *Note by the Secretary-General*].

88 App. No. 55721/07, 53 Eur. Ct. H.R. 18 (2011).

89 *Id.* at ¶¶ 161-67.

90 GC III COMMENTARY, *supra* note 10, at 546-50.

91 *Repatriation of Prisoners of War*, *supra* note 28, at 413.

human rights law considers to be key parts of an effective risk of return assessment.⁹² Charmatz and Wit's account is worth reprinting, as it demonstrates how the United Nations Command operationalized its policy of conducting individualized risk assessments:

The United Nations attempted to obtain such a response in April, 1952, when it interrogated most Chinese and Korean captives Written notices appeared in the camps, and announcements were made over public address systems that all persons were to be interrogated by impartial United Nations Command personnel to decide who would want to be repatriated and who had "compelling reasons" for refusing repatriations. These announcements emphasized the importance of the decision about to be made by the prisoner and its possible adverse effects on his family at home. Full publicity was given to communist assurances of amnesty to all prisoners regardless of their conduct while captives of the United Nations. An interviewer questioned each person separately. Koreans were interrogated by South Korean civilians under the general supervision of United States personnel, while the Chinese were screened by Chinese speaking United States servicemen. On the basis of a prisoner's answer to specific questions, the United Nations predicted whether or not force would be necessary to effect his return. Unless answers indicated the person would commit suicide, escape, fight to the death, or take other desperate measures to avoid repatriation, the individual was placed on the list of those who were to be sent home.⁹³

V. DIPLOMATIC ASSURANCES: WINDOW DRESSING OR REAL PROTECTION?

That international law prohibits transfers to torture and other ill-treatment does not mean that States have not tried to carry out such transfers while claiming abidance to the law. The practical benefits of doing so are appealing: it can reduce a State's detainee population and all the responsibilities along with it while allowing a State to transfer politically sensitive and unsavory people off its territory or out of its control. This have-your-cake-and-eat-it-too approach has developed most notably through what are often referred to as diplomatic assurances. These are sometimes binding and sometimes not; sometimes in the form of a memorandum of understanding, an exchange of letters, or a *note verbale*; and may or may not include post-transfer detainee monitoring mechanisms.⁹⁴

92 Another potential conflict is between GC III and GC IV *requirements* to release and repatriate POWs and protected persons versus the prohibition in human rights law to repatriate people to a place where there is a real risk of torture or other ill-treatment. As discussed above, several States have resolved this tension through a principled interpretation of GC III Article 118 and GC IV Article 45 that favors the humanitarian purpose of the conventions. If the right not to be transferred to torture is *jus cogens*, the conflict would also be resolved in favor of the human rights rules, as a *jus cogens* norm would have authority over international humanitarian treaty law. As Droege explains, "while not all aspects of the *non-refoulement* principle can be considered *jus cogens*, an argument can be made that at least insofar as *non-refoulement* is inherent in the prohibition of torture, it falls under the *jus cogens* prohibition of torture." *Transfers of Detainees, supra* note 22, at 687-89; *see also* Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); UNHCR, NOTE ON DIPLOMATIC ASSURANCES AND INTERNATIONAL REFUGEE PROTECTION, GENEVA ¶ 16 (Aug. 2006), <http://www.unhcr.org/refworld/pdfid/44dc81164.pdf>.

93 *Repatriation of Prisoners, supra* note 28, at 412-13.

94 Council of Europe's Steering Committee for Human Rights, Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Report: 2nd Meeting, Strasbourg, Appendix III, ¶¶ 3, 13(iv), 29-31 Mar. 2006, DH-S-TER(2006)005 [hereinafter Appendix III].

The purpose of a diplomatic assurance is generally for the sending State to acquire the receiving State's commitment to respect the fundamental rights of the transferred detainee, thereby fulfilling the sending State's *non-refoulement* obligations.⁹⁵

Over the years, skepticism over diplomatic assurances has mounted, with the most critical opponents arguing that assurances are merely window dressings, providing no protection to the transferee while shielding the transferring State from any legal responsibility for post-transfer torture.⁹⁶ The criticism is most sharply directed at diplomatic assurances without post-transfer detainee monitoring mechanisms,⁹⁷ even though the Special Rapporteur on Torture, Manfred Nowak, argued in his 2005 report that “post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”⁹⁸ Those who support post-transfer monitoring mechanisms argue that they can deter mistreatment and provide States with regularized and valuable information that can better inform their future post-transfer risk assessments. An Afghan detainee held at a facility where Canada conducted post-transfer monitoring substantiated this claim to United Nations officials when he stated that, while he was beaten, “those arrested by Canadians . . . never complained about ill-treatment by [Afghan] officials.”⁹⁹

In 2006, under the auspices of the Council of Europe, State representatives and human rights groups met to list their concerns about diplomatic assurances.¹⁰⁰ The list included, *inter alia*, the notion that countries that torture are precisely the ones with whom diplomatic assurances are convened; that diplomatic assurances, if they do work, create double standards for those covered by the assurances and other detainees not covered; that diplomatic assurances are not necessarily legally binding; and that the sending and receiving State may have a common interest in the monitoring body finding no evidence of torture.¹⁰¹ An additional, inescapable problem is that once a transfer takes place and the monitoring system does not effectively deter mistreatment then the sending State can at best cease future transfers but it can do very little for the actual victim(s).

Despite these criticisms, treaty bodies and international courts have not deemed diplomatic

95 See *id.* at ¶¶ 7-12; *Othman (Abu Qatada) v. United Kingdom*, 2012 Eur. Ct. H.R. 56, ¶ 21 (noting that the Foreign Secretary agreed that assurances from foreign governments might be a way to mitigate the risk of torture and enable deportation from the United Kingdom).

96 Appendix III, *supra* note 94, at ¶ 13.

97 *Agiza v. Sweden*, Comm'n No. 233/2003, ¶ 13.4 U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture 2005).

98 *Note by the Secretary-General*, *supra* note 87, at ¶ 46.

99 UNITED NATIONS ASSISTANCE MISSION TO AFGHANISTAN & UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, TREATMENT OF CONFLICT-RELATED DETAINEES IN AFGHAN CUSTODY 38 (2011).

100 See generally Appendix III, *supra* note 94.

101 *Id.* at ¶ 13(i)-(xii).

assurances to be *per se* prohibited, totally inconsequential, or absolutely required.¹⁰² It remains, as a matter of international law, that diplomatic assurances, especially those with monitoring mechanisms, can conceivably assess and mitigate the risk of return to such a degree that transfer is made permissible. Still, diplomatic assurances should be viewed with considerable skepticism, making it necessary for a transferring State to conduct case-by-case evaluations of each assurance and monitoring system.

In the case of *Othman (Abu Qatada) v. United Kingdom*, the European Court of Human Rights took this cautious approach and ruled that assurances, which were executed in the form of a Memorandum of Understanding and included provisions for a post-transfer monitoring program, were adequate for mitigating the risk of torture of a detainee that the United Kingdom wanted to repatriate to Jordan.¹⁰³ Although this case did not pertain to a situation of armed conflict, the Court looked at eleven factors that seem perfectly acceptable to consider in times of armed conflict as well. Those factors included, *inter alia*, the specificity of the terms of the assurances; who gave the assurances and if they are binding; the length and strength of bilateral relations between the sending and receiving State, including the receiving State's record in abiding by similar assurances; whether compliance with the assurances can be verified through diplomatic or other monitoring mechanisms; whether there is an effective system to protect against torture in the receiving State, including an openness to detainee monitoring by international organizations; and whether the applicant was previously mistreated in the receiving State.¹⁰⁴

The U.K. Divisional Court in *Maya Evans v. Secretary of State for Defence*, which focused on the question of whether the United Kingdom's post-transfer monitoring program in Afghanistan sufficiently mitigated the risk of post-transfer ill-treatment, took a similarly cautious approach.¹⁰⁵ In making its ruling, the U.K. Court reviewed evidence of torture by the Afghan National Directorate of Security (NDS), to whom the United Kingdom transferred its detainees, and concluded:

[W]e take the view that, in the absence of specific safeguards governing the position of detainees transferred by U.K. forces into NDS custody, the scale of torture and serious mistreatment evidenced by the background material would be sufficient to justify the conclusion that transferees were at real risk of such ill-treatment.¹⁰⁶

The court then turned to assessing whether the transfer agreement between the United King-

102 Publishing in 2009, Rodley and Pollard summed up the case law on diplomatic assurances as follows: “[W]hile no treaty body or international court has categorically ruled out their use, nor has a particular case yet arisen where such a body found that diplomatic assurances with or without a monitoring mechanism in and of themselves sufficiently reduced the risk of ill-treatment to the individual so as to render lawful a transfer that would otherwise be prohibited.” TREATMENT OF PRISONERS, *supra* note 59, at 179; *see also* Appendix III, *supra* note 94, at ¶¶ 9(v), 14(i)–(iii).

103 *Othman (Abu Qatada) v. United Kingdom*, 2012 Eur. Ct. H.R. 56 (holding that the applicant's return to Jordan would not expose him to a real risk of ill-treatment, but ultimately prohibiting the transfer because of a concern that he would be exposed to an unfair trial).

104 *Id.* at ¶ 189.

105 Queen in re: *Maya Evans v. Sec'y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.).

106 *Id.* at ¶ 292.

dom and Afghanistan was sufficient for obverting the risk of torture or ill-treatment. The court looked at the terms and conditions of the monitoring system, assessed the written and verbal commitments by Afghanistan to abide by the monitoring system, and examined the quality of the system's implementation. It reviewed evidence pointing to deficiencies in a number of areas that were to have been covered by a Memorandum of Understanding between the United Kingdom and the Government of the Islamic Republic of Afghanistan (GIROA).¹⁰⁷ These deficiencies included subsequent transfers to third parties; GIROA obstructing the access of the United Kingdom and the Afghanistan Independent Human Rights Commission to detainees; irregularities in U.K. visits to transferred detainees; the United Kingdom not interviewing detainees in private; and the United Kingdom's inability to know exactly at which Afghan detention facility transferred detainees were being held.¹⁰⁸

The court ruled that it supported the U.K. government's suspension of transfers to some facilities due to access restrictions and allegations of abuse.¹⁰⁹ With hesitation, the court also ruled that transfers to two other Afghan detention facilities were permissible if 1) all transfers were made on the "express basis that the [U.K.] monitoring team [was] to be given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion;" 2) each transferee would "in practice be visited and interviewed in private on a regular basis;" and 3) the U.K. would "consider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot reasonably and rapidly be dismissed as unfounded."¹¹⁰

In addition to setting out these standards, the court indicated that the U.K.'s monitoring system could not rely principally on second hand monitoring sources, such as the AIHRC, ICRC, or Coalition Partners¹¹¹ and that an individual allegation of abuse could trigger ceasing transfers even if the allegation was contested by the United Kingdom or an Afghan investigation. With respect to the latter, the court reasoned that "[a]lthough we make no positive findings that the alleged abuse has occurred, we consider that the only safe way to proceed in the particular circumstances is on the assumption that the allegations are true."¹¹² The court certainly looked favorably on administrative action taken against Afghan officials accused of abuse, but the court did not draw strict causal links between the level of risk and the willingness of Afghanistan to conduct meaningful investigations or hold detaining authorities accountable for post-transfer abuse.¹¹³ The court also accepted the government's view that the court should review receiving facilities independently and not come to a

107 *Id.* at ¶¶ 297-98.

108 *Id.* at ¶¶ 299-307.

109 *Id.* at ¶¶ 315, 318.

110 *Id.* at ¶ 320.

111 *Id.* at ¶ 318 (relying in part on the Canadian material, which concludes that transfers can safely be made, based upon Canada's own experience).

112 *Id.* at ¶ 310.

113 *Id.* at ¶ 284 ("The deficiencies in NDS reports should not lead one to conclude that those who might be transferred . . . would be at real risk.").

blanket conclusion that would apply to all facilities.¹¹⁴

Because the court looked at the specific treatment conditions at each Afghan facility, the conditions it set out for a monitoring system were contextually based and cannot be regarded as a definitive template of safeguards for all transfers either in Afghanistan or in armed conflicts more generally. For example, in a different situation, the court may have given more weight to the problem of the United Kingdom not being able to track the transfer of detainees between Afghan facilities.¹¹⁵ Similarly, it is likely due to the specific facts of the case that the European Court of Human Rights, unlike the U.K. Court, did not object to a non-state third party monitoring mechanism.¹¹⁶ The U.K. Court decision also did not shine light on what, if any, individualized procedural guarantees the United Kingdom needed to put in place prior to transferring detainees. The lack of individual risk assessments and appeal procedures appears out of sync with international human rights standards,¹¹⁷ but perhaps the U.K. Court considered this issue moot since the monitoring program, if successful, would function both as a risk assessment mechanism and as a tool for mitigating post-transfer risks that would otherwise have been determined through an individualized transfer review process.

Despite its contextualized decision, the U.K. Court provided one of the most detailed discussions to date about how a State might ensure that a post-transfer monitoring system can sufficiently assess and reduce the risk of post-transfer mistreatment in armed conflict. In addition to reaffirming that human rights law is applicable in NIACs, the court reaffirmed that diplomatic assurances do not *necessarily* provide a State legal protection from the prohibition on torture.¹¹⁸ The U.K. Court, which emphasized the operational aspects of the monitoring system above written or verbal assurances, reasoned,

[T]here is plainly a *possibility* of torture or serious mistreatment of UK transfers at [specific Afghan] facilities. In our judgment, however, the operation of the monitoring system (reinforced by observance of the conditions we have set out) . . . is sufficient to guard against the occurrence of abuse at those facilities on such a scale as to give rise to a *real risk* of torture or serious mistreatment.¹¹⁹

Given the court's calculations, as well as the decisions of human rights treaty bodies and international courts, it is hard to imagine that international law allows a diplomatic assurance that has no enforcement mechanism (such as a monitoring system) to provide legal justification for transferring a person to a State where it is known that there is a real risk of torture. In other words, if post-transfer torture took place while there was knowledge of a real risk of torture prior to the transfer, and the only protection in place was a written diplomatic assurance, then international and regional human rights adjudicating bodies would almost certainly find the sending State in violation of the

114 *Id.* at ¶ 320.

115 *Id.* at ¶¶ 305, 324.

116 *Othman (Abu Qatada) v. United Kingdom*, 2012 Eur. Ct. H.R. 56, ¶ 204.

117 *See Transfers of Detainees*, *supra* note 22, at 679; *see also* TREATMENT OF PRISONERS, *supra* note 59, at 173.

118 *Maya Evans*, [2010] EWHC at ¶ 323.

119 *Id.*

prohibition against torture.

In sum: at a minimum, a State must first assess if there is a real risk of post-transfer abuse through an individualized process prior to transfer. Outside of an armed conflict, this requires judicial or independent administrative review of the government's decision to transfer through an effective, independent, and impartial review.¹²⁰ In an armed conflict, it is likely that the same standards apply, but a State may have some latitude to adapt the procedures for making a risk assessment to the circumstances of the conflict.

If a State insists on making the transfer where it concedes that there exists a real risk of torture and forgoes the individualized assessment, this would mean the transferee would not have an ability to appeal the decision making process. Lack of individualized procedures appears at odds with existing human rights case law in peacetime, but existing case law has either remained silent or avoided this issue with respect to situations of armed conflict. Either way, if there is or is not individualized risk assessment procedures in place, a State must assess how robust of an assurance is needed to reduce the risk so as to allow the transfer to take place. The transferring State must also assess if the receiving State will live up to the assurance in practice. Importantly, those assessments must go beyond simple guesswork and be grounded in factual analysis. There is no doubt that the stakes are high. If the wrong decision is made, the damage is irreparable.

The sending State must, in good faith, also attempt to implement whatever enforcement mechanism is put in place after the transfer takes place—both through its own actions, such as monitoring activities and providing assistance, and through its engagement with the receiving State, such as issuing reprimands and suspending transfers when necessary. If these actions for remedy are not made in full, or if they are made without due diligence, then the assurance would likely fail to shield the sending State from the liabilities attached to post-transfer mistreatment that took place in the past as well as post-transfer mistreatment that occurs in the future.

VI. CONCLUSION

This Article's review of transfer protections addresses several critical legal gaps and areas of ambiguity. The law of international armed conflict provides broad substantive protections but has a limited scope of application. In contrast, the protections for transferred detainees in the law of NIAC are almost non-existent.

There are several possible solutions. The first is for the international community to codify new LOAC rules. In its strongest form, new laws would protect all war-related detainees from transfer to torture regardless of their status or the type of conflict; establish review procedures for assessing the risk of post-transfer mistreatment for all detainees prior to transfer; and place subsidiary obligations on the sending State to implement post-transfer enforcement mechanisms, provide assistance to ensure humane treatment, and request the return of an individual if that is the only way to ensure that mistreatment ceases. These protections should also require the receiving State to abide by any

120 *Agiza v. Sweden*, Commc'n No. 233/2003, ¶ 13.8, U.N. Doc. CAT/C/34/D/233/2003 (2005); *see also* TREATMENT OF PRISONERS, *supra* note 59, at 174.

post-transfer enforcement mechanisms, accept assistance, and return the detainee upon request. The chance of developing new international humanitarian treaty law anytime soon is, however, remote, and it is therefore necessary to look for other options.

A second option is for States that are engaged in international armed conflicts to follow the lead of the United Nations, United States, United Kingdom, ICRC, and others by refusing to repatriate on humanitarian grounds. Doing so would extend detainee transfer protections to all people in a State's custody, not just individuals transferred amongst co-belligerents. It would also be important for States to regard a refusal to repatriate both as a right *and* as an obligation, which finds a basis both in general principles of international law and through interpretations of Common Article 3 and Additional Protocol I prohibiting all transfers to torture. To bring more clarity to this approach, States could apply GC III Article 12 or GC IV Article 45 by analogy and as a matter of policy. This means a transferring State would institute a risk assessment mechanism, refuse to repatriate to torture, and offer its assistance and remediation measures to the receiving State when necessary to mitigate torture or other forms of mistreatment. However, the post-transfer responsibility of a receiving State to return its own national to the transferring State has no strong support in international law.

Turning to NIAC, States should recognize that transfer protections are implied within the prohibition against torture of Common Article 3 and Article 5(4) of Additional Protocol II. To make the protections more robust, however, States could also decide, as a matter of policy, perhaps through special agreements with co-belligerents, to apply by analogy the transfer protections in international armed conflict when appropriate. It would seem acceptable for GC IV Article 45 to apply in full when co-belligerents are transferring non-nationals between themselves. In cases where a State transfers a non-national to his or her home State, then GC IV Article 45 could also apply in full, with the exception of an obligation on the home State to return the detainee to the sending State if there is no other way to cease mistreatment. This is similar to the approach that ISAF took in Afghanistan when it suspended transfers to various Afghan controlled detention facilities in 2011 and 2012.

Finally, State practice has demonstrated that the protection gaps in both international armed conflicts and NIAC can be filled through extraterritorial application of human rights treaty obligations. With only a handful of exceptions, States are in agreement with this approach, as long as human rights law is applied through a process of harmonizing the two legal regimes when normative conflicts arise. The benefits are clear. Human rights law applies more broadly than LOAC and has answered in detail several questions about transfer protections that LOAC has not, such as questions about risk threshold and post-transfer mistreatment assessment procedures. Under human rights law, individualized procedures for determining post-transfer risk are required, but a full set of robust procedural guarantees may have to be balanced with the exigencies of war. What is most important is that the process is effective. If a State accepts that a real risk of post-transfer torture exists but still wants to carry out the transfer without employing individual risk assessment procedures, it appears that this would be at odds with human rights case law. Either way, the transferring State would have to put in place a mechanism, such as a robust monitoring system, that is able to sufficiently

assess and mitigate the risk of torture. This must be a premeditated calculation with the understanding that diplomatic assurances and a monitoring system are not a guaranteed legal shield if post-transfer abuse nonetheless takes place.