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Detention operations in contemporary conflicts : four challenges for the Geneva Conventions and other existing law / by John B. Bellinger and Vijay M. Padmanabhan

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Author zone:	by John B. Bellinger and Vijay M. Padmanabhan
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Abstract:	<p>Since the 9/11 attacks, States have been scrambling to find answers to difficult questions surrounding the detention of members of non-State groups. Four legal questions in particular have proven vexing to States: (1) who is subject to detention; (2) what process must the State provide to those detained; (3) when does the right of the State to detain terminate; and (4) what legal obligations do States have in connection with repatriating detainees at the end of the conflict? Nearly nine years since 9/11 two factors have prevented development of the law on these questions. First, some States, international organizations, and NGOs continue to insist that existing law adequately answers these questions. Second, where there is agreement that new law is needed, disagreement about how to develop the law has limited progress. This Article, by two former State Department lawyers, crystallizes the existing state of law to create the foundation for development of new law on these important questions. The first objective is to demonstrate that existing law inadequately answers the questions posed. The Article begins by demonstrating why the law of non-international armed conflict, the generally applicable legal regime for armed conflicts between States and non-State groups, does not provide clear answers to these questions. The Article then explains why other legal regimes — international humanitarian law for international armed conflict, municipal law and international human rights law — also fail to provide adequate answers at present. The Article's second objective is to identify areas of convergence on these four questions that may form the basis for future legal development. The resistance of many to admitting further legal development is necessary is the legitimate fear that States will abuse legal uncertainty to engage in policies inconsistent with the spirit of international law. Immediate work on development of new law may ameliorate these fears. While a new treaty regime may be the ideal vehicle for development of new law, the Article recognizes that agreement on a new treaty is unlikely, and proposes an agreement on common principles by like-minded States as an interim step.</p>
Authors:	Bellinger, John Padmanabhan, Vijay M.
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