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I. INTRODUCTION

On October 5, 2013, United States forces captured and detained Abu Anas Al-Libi in Tripoli, Libya. Al-Libi was, at one time, a senior member of Al-Qaeda with close links to Osama Bin Laden and, according to U.S. Secretary of State John Kerry, was a "legal and appropriate target."[1] Following his capture, Al-Libi was delivered to a U.S. warship, the USS *San Antonio* (LPD 17), and reportedly interrogated.[2] He was transferred to the

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1. *US Commando Raids: Kerry Defends al-Liby Capture*, BBC NEWS AFRICA (Oct. 7, 2013), http://www.bbc.co.uk/news/world-africa-24426033 [hereinafter BBC NEWS AFRICA].

2. Ernesto Londoño and Karen DeYoung, *Libyan Terrorism Suspect Held Aboard Warship is Brought to U.S.*, THE WASHINGTON POST (Oct. 14, 2013) http://www. washing-

U.S. within eight days of his capture. On October 14, 2013, Al-Libi entered not-guilty pleas to charges stemming from the 1998 Al Qaeda bombing campaign against U.S. embassies in East Africa.[3]

This article addresses three issues concerning Al-Libi's capture and detention. Part II examines the bases on which the U.S. might lawfully have crossed the Libyan border to conduct the operation, since incursion by one State into another can amount to a breach of international law.[4] Part III assesses the grounds, under international law, on which the U.S. might lawfully have captured Al-Libi. Part IV addresses the circumstances of Al-Libi's subsequent detention. In conclusion, Part V lists several principles that can inform similar operations in the future.

II. CROSSING THE LIBYAN BORDER

An incursion into another State's territory violates the use of force prohibition in Article 2(4) of the UN Charter, "even if it is not intended to deprive that State of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation . . . ."[5] The authors therefore accept as a starting point that when U.S. forces crossed the Libyan border and captured Al-Libi, the operation amounted to a use of force against Libya. Three circumstances, however, may preclude the wrongfulness of a sovereignty violation where it also amounts to a use of force: Security Council authorization; consent from the territorial State; and, self-defense.[6] The latter two are relevant to the facts surrounding Al-Libi's capture, and will be considered in turn.

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tonpost.com/world/national-security/libyan-suspect-held-aboard-warship-is-returned-to-us/2013/10/14/4b199f5e-3501-11e3-be86-6aeaa439845b_story.html.

3. Deborah Feyerick and Lateef Mungin, *Alleged al Qaeda Operative Abu Anas Al Libi Pleads Not Guilty*, CNN (Oct. 15, 2013), http://www.cnn.com/2013/10/15/justice/al-libi-case/.

4. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7). *See also* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Preamble, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. DOC. A/RES/8082 (Oct. 24, 1970) (asserting that "[t]he principle of sovereign equality of States," and in particular that "[t]he territorial integrity and political independence of the State are inviolable.").

5. Albrect Randelzhofer & Georg Nolte, *Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 216 (Bruno Simma et al. eds., 3d ed. 2012).

6. *See* Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (forthcoming 2013), *available at* SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226359&download

A. Libyan Consent

It is not clear, as a matter of fact, whether Libya consented to the entry and presence of U.S. forces on its territory. The Libyan Government has stated publicly that it did not consent to the U.S. operation, while U.S. officials have said that Libya knew of the operation in advance, and did not object to it.[7] Assuming that the Libyan Government did consent to the presence of U.S. forces on its territory, there are two subsidiary issues: the scope and quality of Libya's consent.[8]

As to scope, the activities undertaken by the actor State's forces must be within the limits of the consent granted by the territorial State.[9] Libyan consent, tacit or otherwise, would need specifically to have authorized the capture operation. Given the conflicting positions of the protagonist governments, it is presently impossible to conclude whether the U.S. action was within the scope of any consent granted by Libya.

With regard to the quality of consent, must the actor-State ensure that the individual giving consent carries his government's authority? The International Court of Justice (I.C.J.) has frequently held that the consent of a State official, even if *ultra vires* under that State's constitutional arrangements, is still sufficient to bind the State.[10] The only exception to this rule is where the domestic incapacity of the State official is known to the other State, or is "manifest."[11] Accordingly, international law permits the U.S. to

=yes [hereinafter Schmitt, *Extraterritorial Lethal Targeting*]. The circumstances that might preclude the wrongfulness of a State breaching the territorial sovereignty of another State in cases which do not rise to the level of a "use of force" contrary to the United Nations Charter, Article 2(4) (including necessity, *force majeure*, distress or countermeasures) are not applicable. *See* International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, arts. 20–25, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter ILC Draft Articles].

7. Michael S. Schmidt, *U.S. Officials Say Libya Approved Commando Raids*, THE NEW YORK TIMES (Oct. 9, 2013), http://www.nytimes.com/2013/10/09/world/africa/us-officials-say-libya-approved-commando-raids.html?_r=0.

8. *See generally* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARVARD INTERNATIONAL LAW JOURNAL 1 (2013) [hereinafter Deeks, *Consent to the Use of Force*].

9. ILC Draft Articles, *supra* note 6, art. 20.

10. *See, e.g.*, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, ¶ 265–66 (Oct. 10).

11. *See, e.g.*, Vienna Convention on the Law of Treaties art. 46, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

rely upon the consent of a Libyan representative without having to make further inquiry into his competence.

An additional question is whether consent to an activity is valid when the territorial State would be forbidden from undertaking that same activity because of its domestic law. It is a general principle of international law that a State may not invoke a provision of its domestic law to justify a breach of its international obligations.[12] This means that if Libya granted the U.S. consent to enter its territory and capture Al-Libi, Libya may not now renege on its prior consent on the basis that its domestic law prohibited the undertaken activity.

The conflicting positions of the two governments make it impossible to resolve whether Libya consented to the U.S. operation. The Libyan Government's denial of consent may have been intended to address domestic concerns about the presence of U.S. forces in Libya. It is clear, though, that if Libya provided consent, U.S. forces would be permitted to enter Libya in order to execute this operation. If Libya did not consent to the U.S. operation, then the U.S. would have to rely on self-defense as a lawful basis to breach Libyan sovereignty.

B. Self-Defense

This article makes a distinction in its analysis between the crossing of the Libyan border and the capture of Al-Libi. Self-defense raises a complexity, however, because it might be relied upon by the U.S. in two ways. It could be used to justify only the crossing of Libya's border, leaving the capture of Al-Libi to be based upon other grounds—the law of war, for example. Or, since international law does not restrict the *means* by which a State may defend itself, self-defense could also be a justification for the capture operation.[13] This section therefore includes both aspects of the operation in its self-defense analysis.

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12. VCLT, *supra* note 11, art. 27; MALCOM N. SHAW, INTERNATIONAL LAW 941 (6th ed. 2008). For a critique of this position, see Deeks, *Consent to the Use of Force*, *supra* note 8. The ILC Draft Articles similarly forbid a "responsible" State from relying on its internal law as a justification for a failure to comply with its obligations under Part Two of the draft. ILC Draft Articles, *supra* note 6, art. 32.

13. Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 736, n.5 (1992); Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v Alvarez-Machain*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 746, 749 (1992).

Article 51 of the United Nations Charter, states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . ."[14] There are three possibilities as to what armed attack the U.S. might be responding to, if Al-Libi's capture is to be analyzed under a self-defense paradigm. The first is that the 1998 embassy bombings, in which Al-Libi allegedly played a leading role, may continue to provide a basis for U.S. action in self-defense.[15] The second is that Al-Libi's capture was conducted in the face of a single "imminent" attack against the U.S., which Al-Libi was planning. The third is that Al-Libi, as a member of Al-Qaeda, was engaged in a campaign of attacks.[16]

Under all three justifications, the perpetrator of the armed attack is a non-State actor. With regard to the second and third justifications, the U.S. would be in the position of acting in self-defense in anticipation of an expected armed attack, rather than in response to an ongoing or completed attack. This section will address these non-State actor and anticipation issues, followed by the traditional immediacy, necessity and proportionality requirements of self-defense.

There is dispute as to whether the law of self-defense extends to attacks by non-State actors.[17] The I.C.J. has been unwilling to consider claims of self-defense against non-State actors whose acts were not directly attributable to a State.[18] However, the plain text of Article 51 does not limit the right of self-defense to armed attacks by States. Since the terrorist attacks of September 11, 2001, States have recognized the right of self-

14. U.N. Charter art. 51.

15. This position has been recently advanced in Christian Henderson, *The Extra-territorial Seizure of Individuals under International Law—The Case of al-Liby: Part I*, EJIL: *TALK!* (Nov. 6, 2013), http://www.ejiltalk.org/the-extraterritorial-seizure-of-individuals-under-international-law-the-case-of-al-liby-part-one/#more-9728.

16. Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 6, at 13–14 n.59, suggests that terrorist groups may act like the military forces of a State and conduct campaigns that consist of related but separate operations punctuated with pauses to allow for regrouping, resupply, etc.

17. *See, e.g.*, Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 769 (2012); Randelzhofer & Nolte, *supra* note 5, at 1416–19.

18. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9); Armed Activities in the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 146–47 (Dec. 19) [hereinafter Armed Activities].

defense in response to "armed attacks" not attributable to a State.[19] For example, United Nations Security Council Resolutions 1368 (2001) and 1373 (2001) clearly reference "self-defense" and "collective self-defense" measures in response to the 9/11 attacks at a time when the international community knew the attacks were perpetrated by a non-State actor. The present authors join many others who regard this debate as largely settled in favor of this latter view. The U.S. also takes this position.[20]

The White House fact sheet on the conduct of extraterritorial operations against non-State actors balances the victim State's right to defend itself and the territorial State's right to sovereignty.[21] Under the concept of sovereignty, a State has the right to protect its borders from incursions, but also has the duty to prevent its territory from being used by others as the launching point for an armed attack against another State. This balanced approach requires the territorial State to be given a reasonable opportunity to suppress the threat originating from its territory before the victim State exercises self-defense, although the notice requirement is not necessary in every case.[22] If the territorial State fails (or would fail) to act, because it is unwilling or unable to meet its external obligations, the victim State may lawfully exercise its right of self-defense, even without notice.[23] There is

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19. *See* Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 6, at 9; Armed Activities, *supra* note 18, Separate Opinion Judge Simma, ¶ 11.

20. U.S. Department of Justice Draft White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force*, 2 (Nov. 8, 2011), http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf. *See also* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at Annual Meeting of the American Society of International Law: The Obama Administration and International Law, (Mar. 25, 2010), http://www.state.gov/s/l/ releases/remarks/139119.htm [hereinafter Koh speech].

21. White House Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, May 23, 2013, http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism [hereinafter White House Fact Sheet].

22. *See* Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 6, at 10.

23. White House Fact Sheet, *supra* note 21 (requiring "[a]n assessment that the relevant governmental authorities in the country where the action is contemplated cannot or will not effectively address the threat to U.S. persons."); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MILITARY LAW REVIEW 89, 108 (1989); Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012) [hereinafter Deeks, *Unwilling or Unable*]. *See also* Philip Alston, U.N. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 35, U.N. Doc.

more than a century of State practice that supports this approach.[24] If the U.S. concluded that an armed attack was being (or was about to be) perpetrated by Al-Libi from Libyan territory, then the U.S. would be obliged to notify Libya in order for Libya to halt the attack. However, if the U.S. also concluded that Libya was unwilling or unable to prevent the attack from occurring, or that Al-Libi would be tipped off, then the U.S. could proceed to act in self-defense without notification.

Most States and scholars accept the general concept of anticipatory self-defense, when an armed attack is imminent.[25] However, there is no consensus as to when an armed attack can be said to be imminent.[26] The *Caroline* doctrine permit[s] anticipatory self-defense when the "necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation."[27] While some view this standard as limiting self-defense temporally to immediately before an armed attack,[28] such an approach makes little sense in an era when catastrophic terrorist attacks can occur without warning.[29] Accordingly, an alternative approach is the "last feasible window of opportunity" standard.[30] Under this interpretation, a State, instead, may act in self-defense when the attacker is clearly committed to launching an attack, and the victim State would otherwise lose its opportunity to defend itself unless it acted immediately.

A/HRC/14/24/Add. 6 (May 28, 2010) ("A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to use force in self-defence under Article 51 of the UN Charter, because . . . the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.").

24. Deeks, *Unwilling or Unable*, *supra* note 8 at 486.

25. Randelzhofer & Nolte, *supra* note 5, at 1423.

26. *Id.*, at 1421.

27. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *reprinted in* 2 INTERNATIONAL LAW DIGEST 412 (John Bassett Moore ed., 1906).

28. *See*, DEREK W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187–92 (1958).

29. Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 6, at 12.

30. Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 53, 110 (2002); U.S. Attorney General Eric Holder, Remarks as prepared for delivery at Northwestern University School of Law, Mar. 5, 2012, *available at* http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/ (stating that the criteria for evaluating imminence include "considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future attacks against the United States.").

In the context of a campaign of attacks, anticipatory self-defense raises the following question. Does a State have to make an independent imminence determination for each potential future attack or is the fact of a campaign of attacks sufficient? Arguably, if a group is clearly mounting a campaign of attacks, self-defense would be permitted and would not independently need to meet the imminence criterion for each individual potential attack.[31] This is certainly the view of the U.S.,[32] and the authors are broadly supportive of this approach.

In the Al-Libi case, the U.S. has not provided any information about whether it expected (or expects) any particular attack from Al Qaeda, or whether Al-Libi's capture averted an attack. Many news agencies report Al Qaeda's involvement in the 2012 attack on the U.S. embassy in Benghazi. On the other hand, President Obama has repeatedly asserted that core Al Qaeda is "on the way to defeat" and that affiliates, such as Al Qaeda in the Arabian Peninsula, lack the capacity for a major strike.[33] Somewhat contrary to these statements, in order for the U.S. operation to be justified under "anticipatory" self-defense, the U.S. would have to believe that Al-Libi's capture was conducted in anticipation of an imminent attack by him against the U.S., or that Al Qaeda is still perpetrating a campaign of attacks in which Al-Libi is involved.

If, however, the U.S. exercised self-defense, not in anticipation of an imminent attack or in response to an ongoing attack(s), but instead in response to an attack which has already occurred, then the U.S.'s use of force must be within a period of time not too remote from the initial armed attack. This immediacy requirement is based on a reasonableness standard in light of the circumstances at the time. In this case, Al-Libi's participation in the U.S. embassy attacks in east Africa occurred in 1998, 15 years prior to his capture. In the authors' view the use of force to effectuate his cap-

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31. *Schmitt*, *supra* note 6, at 13–14.

32. *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; White House Fact Sheet, *supra* note 21.

33. Fred Lucas, *Obama Has Touted Al Qaeda's Demise 32 Times since Benghazi Attack,* CNS NEWS (Nov. 1, 2012), http://cnsnews.com/news/article/obama-touts-al-qaeda-s-demise-32-times-benghazi-attack-0; Carlo Muños, *President: Al Qaeda is "on the way to defeat",* THE HILL (Aug. 7, 2013), http://thehill.com/video/administration/316057-obama-says-al-qaeda-on-way-to-defeat.

ture in 2013, if exclusively based on his participation in the embassy bombings, fails the immediacy criterion of self-defense.

The use of force in every instance of self-defense must be limited to what is necessary and proportionate.[34] Necessity "requires that there be no alternative to the use of force effectively to defeat an attack that is either imminent or underway."[35] Accordingly, an assessment must be undertaken of the prospects of success for alternative courses of action which do not amount to a use of force. Thus, the use of force to capture Al-Libi could satisfy the necessity principle if, for example, cooperative law enforcement measures to arrest and extradite Al-Libi were expected to fail.

Proportionality addresses the quantity of force that a State can use in self-defense, restricting it to only that force required to eliminate the threat or end the attack.[36] Since Al-Libi's capture was a limited incursion into Libyan territory, a use of minimum, non-deadly force, the authors propound that Al-Libi's capture was a proportionate means of eliminating the threat of an armed attack.

In conclusion, the U.S. has not yet sought to use self-defense as a public justification for the operation, and has instead relied upon the assertion of Libyan consent. The consent justification, if factually accurate, is in compliance with international law. No information provided publicly thus far supports the exercise of self-defense.

III. THE CAPTURE OF AL-LIBI

Part II considered the U.S. operation from the perspective of Libyan sovereignty. This Part addresses what grounds in law the U.S. might have had for capturing Al-Libi, irrespective of the sovereignty (or border crossing) issue. International law norms applicable to the capture and subsequent detention of an individual differ dependent upon whether the capturing State is a party to an armed conflict or not. Because the U.S. has repeatedly asserted that it is engaged in a non-international armed conflict (NIAC) with Al Qaeda and affiliated groups, this paradigm will be considered first,

34. *See* Randelzhofer & Nolte, *supra* note 5, at 1425; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 176, 194 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); Oil Platforms (Iran v U.S.), 2003 I.C.J. 161, ¶¶ 43, 73–74, 76 (Nov. 6).

35. *See* Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 6, at 11.

36. *Id.*, at 12.

followed by an examination of whether there is any other lawful basis for Al-Libi's capture in the absence of an armed conflict.

A. Capture during a non-international armed conflict

Al-Libi allegedly is or has been a leading and influential member of core Al Qaeda. If true, the existence of a lawful basis for his capture turns on the following: (1) whether the U.S. is in a NIAC with al-Qaeda; (2) the geographical limits to the NIAC, if any; and, (3) the circumstances under which the law of armed conflict permits capture.

The U.S. has justified Al-Libi's capture under the laws of war.[37] The viability of this justification depends in the first place upon the existence of a NIAC between the U.S. and Al Qaeda, which is determined though the broadly accepted test set out in *Prosecutor* v. *Tadić*: "[A] [non-international] armed conflict exists whenever there is . . . protracted armed violence between government authorities and organized armed groups, or between such groups within a State."[38] Since the U.S. Supreme Court's *Hamdan* v. *Rumsfeld* decision, the U.S. has stated that it is a party to a NIAC with Al Qaeda.[39] However, the U.S. position is not universally accepted. Under strict application of the *Tadić* test, some scholars have queried whether or not the U.S. remains in a *de jure* NIAC with Al Qaeda.[40] Indeed, even among the present authors, opinion is divided on this question of fact.

If one accepts that there is a NIAC, then the second issue is the geographic limitations, if any, of the NIAC. Common Article 3 to the 1949 Geneva Conventions, which is applicable to conflicts "not of an international character," anticipated that such conflicts would occur within the confines of a single State.[41] Notwithstanding this intention, today, the

37. *See* BBC NEWS AFRICA, *supra* note 1.

38. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

39. Koh speech, *supra* note 20.

40. *See, e.g.*, Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 535 (2005); Kenneth Roth, *The War Against al-Qaeda is Over*, THE WASHINGTON POST (Aug. 2, 2013), http://articles.washingtonpost.com/2013-08-02/opinions/41000898_1_war-powers-perpetual-war-human-rights-watch.

41. Article 3 Common to the Geneva Conventions (Common Article 3) refers to "armed conflict not of an international character occurring *in the territory of one of* the High Contracting Parties." (emphasis added). Geneva Convention (I) for the Amelioration of

Hamdan decision interpretation is widely-accepted by other States and numerous scholars, indicating that a NIAC *need not* be geographically limited to the territory of a single State. This, then, raises the question of whether there are any geographical limitations when a NIAC is not restricted to the territory of a single State.[42]

The U.S. subscribes to a view that a NIAC occurs where the parties are located, even if the parties are located in more than one State.[43] Accordingly, the mere presence of the enemy in a State is sufficient to say that the NIAC is taking place there.[44] Despite this broad interpretation of the geography question, restrictions on action still exist. The presence of the enemy in another State does not provide sufficient grounds, alone, for the actor State to breach the territorial State's sovereignty. Instead, the actor State must still justify the violation of sovereignty on one of the grounds discussed in Part II. While the authors agree that the clarity of the U.S. approach has much to commend it as *lex ferenda*, it does not appear to be reflected in other State responses to U.S. drone strikes against Al Qaeda members beyond the borders of Afghanistan, which is often characterized by vehement opposition to U.S. practice.[45]

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the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

42. For discussion, see Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 157 (2009); Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflict*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245 (2010); Sasha Radin, *Global Armed Conflict? The Threshold of Extra-Territorial Non-International Armed Conflicts* 89 INTERNATIONAL LAW STUDIES 696 (2013).

43. White House Fact Sheet, *supra* note 21; SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 250–52 (2012).

44. Although Sivakumaran argues the more remote from the scene of the conflict, the specificities of the law may change, requiring a higher threshold for lethal targeting, for example. SIVAKUMARAN, *supra* note 43, at 251.

45. E.g., a U.K. cabinet minister has recently condemned the U.S. use of drones in Pakistan and Yemen as a means of prosecuting the conflict with Al-Qaeda. *See* Paul Vale, *Barack Obama Lambasted by Cabinet Minister Ed Davey Over Drone Strikes in Pakistan*, THE HUFFINGTON POST (Dec. 2, 2013), http://www.huffingtonpost.co.uk/2013/11/14/ed-davey-barack-obama-drones_n_4277940.html. The new German Government has also stated it considers extraterritorial drone strikes "illegal." *Germany Stops Buying Armed Drones*,

The third question addresses the legal basis for detention in a NIAC. The International Committee of the Red Cross (ICRC) has said that the power to capture and detain "flows from the practice of armed conflict and the logic of international humanitarian law that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat."[46] This ground for detention is forward looking, in that it seeks to prevent the detainee from committing some future act harmful to the detaining State. While the U.S. has not provided a specific factual basis for Al-Libi's detention beyond the criminal indictment, as long as he retains his status as a high ranking member of Al Qaeda, then arguably, he continues to pose a potentially serious threat to the security of the U.S. and is detainable on this basis. However, this justification would likely have to reconcile other U.S. statements that suggest Al Qaeda, as a whole, is now a spent force on its way to defeat.

Nothing prohibits the U.S. from transferring Al-Libi to the federal criminal justice system, presuming that he was lawfully captured under the law of war. Indeed, international law plainly anticipates that members of organized armed groups in a NIAC may be subjected to the domestic criminal jurisdiction of the State party to the conflict.[47]

B. Alternative Bases for Capture

While many still view the conflict with Al Qaeda as a NIAC, if the situation no longer crosses this threshold, then Al-Libi's capture must be examined

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THE HUFFINGTON POST (Nov. 14, 2013), http://live.huffingtonpost.com/r/ archive/segment/germany-stops-buying-armed-drones/528520e3fe34444eb1000407.

46. *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 859, 863 (2009). This ground was also implicitly accepted by the group of States that participated in the Copenhagen Process, resulting in a set of non-legally binding principles and guidelines on the handling of detainees in "internationalised internal armed conflict and in peace operations." Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines, ¶ 12 (2012), *available at* http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf [hereinafter Copenhagen Principles]. Another author has said detention is a corollary of the power to target individuals during an armed conflict. SIVAKUMARAN *supra* note 43, at 301–02.

47. Common Article 3(1)(d); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 6, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

under general international law, and not the *lex specialis* of the law of armed conflict. Without reliance on the law of armed conflict, Al-Libi's capture and subsequent detention then would be governed by international law norms regulating the extraterritorial enforcement of a State's domestic jurisdiction and human rights law.[48]

As Part II showed, in the absence of consent of the territorial State, or any other lawful basis in self-defense, Al-Libi's capture would amount to an unlawful infringement of Libyan sovereignty, and an improper extraterritorial enforcement of U.S. domestic criminal jurisdiction. Historically though, an unlawful capture has not provided the criminal defendant with a basis for challenging the State's criminal jurisdiction over him. The principle *male captus bene detentus* provides that "a person improperly seized may nevertheless properly be detained (and brought to trial)."[49]

In *U.S.* v. *Alvarez Machain*,[50] the Supreme Court of the United States held that the seizure of Alvarez-Machain by U.S. agents in Mexico was "shocking" and likely to be "in violation of general international law principles," but did not vitiate the jurisdiction of a U.S. federal court to try him.[51] A similar position was reached by the English Divisional Court in *R* v. *Plymouth Justices, ex parte Driver*.[52] In probably the most famous extraterritorial seizure case of all, the Supreme Court of Israel adopted the same approach in the *Eichmann* case.[53] Contemporary commentators agreed that *male captus bene detentus* is a rule of international law, although many have been critical of it.[54] It must be noted though, that *male captus bene detentus* pre-dates substantial developments in international human rights law.

The European Court of Human Rights (ECtHR), in *Öcalan* v. *Turkey*,[55] recently considered the issue of extraterritorial enforcement from a human rights perspective. Öcalan was wanted in Turkey for offenses related to terrorism. He managed to escape to Kenya, but was later detained by the

48. *See generally* SHAW, *supra* note 12, at 688.

49. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 305 (1989).

50. U.S. v. Alvarez Machain 504 U.S. 655 (1992).

51 Alvarez, *supra* note 50, at 669.

52. R v. Plymouth Justices, ex parte Driver [1986] QB 1, at 95 (Eng.).

53. Attorney General of Israel v. Eichmann**,** 36 I.L.R. 5 **(**Dist. Ct. 1962) (Isr); Attorney General of Israel v**.** Eichmann**,** 36 I.L.R. 277 (Sup. Ct. 1962).

54. *See generally*, Halberstam, *supra* note 13; Glennon, *supra* note 13. *See also*, Beth van Schaack, *Al-Liby: Male Captus, Bene Detentus?*, JUST SECURITY (Oct. 7, 2013), http://justsecurity.org/2013/10/07/Al-Libi-male-captus-bene-detentus/.

55. Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R. (2005).

Kenyan authorities in order to return him to Turkey to face trial. The ECtHR held that his transfer to Turkish jurisdiction was conducted with the consent and co-operation of the Kenyan government such that it did not breach Öcalan's human right to freedom from arbitrary detention. However, the ECtHR opined that without Kenyan consent, Turkey would not have had criminal jurisdiction over Öcalan,[56] because an extraterritorial capture would not have been in accordance with a "procedure prescribed by law" within the meaning of Article 5(1) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (or EHCR).[57]

The *Öcalan* decision focused on the interpretation of Article 5 of the ECHR, and so it is plainly not binding on the U.S. But Article 5 of the ECHR and Article 9 of the 1966 International Covenant on Civil and Political Rights (ICCPR)[58] are united in forbidding arrest and detention which is not "in accordance with a procedure prescribed by law." The U.S. has ratified the latter instrument.[59] Although the U.S. does not accept the extraterritorial application of the ICCPR, it does acknowledge that it is globally bound by customary human rights law.[60] Of relevance to the Al-Libi case, the U.S. recognizes that customary human rights law contains a prohibition against arbitrary detention.[61] It is not clear, however, that a U.S. tribunal would interpret the word "arbitrary" to include unlawful extraterritorial arrest as the ECtHR has done.

While many jurisdictions continue to recognize the "*male captus bene detentus*" doctrine, there are contradictory decisions from the same courts which have indicated that in some instances, jurisdiction ought to be de-

56. *Id.*, ¶ 99. Öcalan's argument that there could be no jurisdiction is summarized at *id.*, ¶ 79.

57. *Id.*, ¶¶ 90–97. Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

58. International Covenant on Civil and Political Rights art. 9, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

59. The ratification date (June 8, 1992) is available on the UN Treaty Collection database, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en (last visited Dec. 4, 2013).

60. For a summary of the history of the U.S. position regarding the extraterritorial application of human rights law (treaty and customary), see Beth Van Schaack, *United States Report to the UN Human Rights Committee: Lex Specialis and Extraterritoriality*, JUST SECURITY (Oct. 16, 2013), http://justsecurity.org/2013/10/16/united-states-5th-periodic-review/.

61. Restatement of the Law Third: The Foreign Relations Law of the United States § 702 (1987).

clined.[62] It is therefore possible that since the *Alvarez-Machain* decision customary international law has been developing beyond the *male captus bene detentus* principle. Consequently, Al-Libi conceivably could contest U.S. criminal jurisdiction using this potential customary human rights norm as the basis for his challenge.[63] If he did, the likelihood of success would be remote since a court would need to conclude that Al-Libi was not lawfully captured under the law of armed conflict, and that a customary norm has developed beyond *Alvarez-Machain*. The court also would have to grapple with the U.S. Supreme Court's precedence.

IV. AL-LIBI'S SUBSEQUENT DETENTION

This part begins by presuming there is a subsisting NIAC between the U.S. and Al Qaeda and will assess whether Al-Libi's detention is lawful under the law of armed conflict. In a NIAC, once an individual is captured, the law of armed conflict provides the detainee with certain protections. Protections relevant to Al-Libi's case will be explored in the first section of this part, and will address whether the law of armed conflict permits the U.S to detain Al-Libi on board a warship. The *lex specialis* of the law of armed conflict may be relied upon in a NIAC by the detaining State, instead of the narrower constrains on detention found in human rights law.[64] This Part will also consider Al-Libi's case exclusively under human rights norms, in the alternative to a NIAC.

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62. In the U.S., see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); in the U.K., see R v. Horseferry Road Magistrates' Court, ex parte Bennett [1993] 3 WLR 90 (Eng.). For other examples see Glennon, *supra* note 13, at 750, n.22.

63. The concurring opinion of Breyer, J. in Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659 (2013) indicates a willingness in the U.S. Supreme Court to allow allegations of extraterritorial breaches of customary human rights law against the U.S. government to be litigated in U.S. federal courts. Although this case was in the context of civil litigation under the Alien Tort Statute, the general principle has obvious potential to read across to questions of criminal jurisdiction.

64. *See, e.g.*, ICCPR, *supra* note 58, art. 9 and ECHR, *supra* note 57, art. 5(2). The former contemplates arrest or detention on the basis of criminal charges only, and the latter sets out a finite list of circumstances in which it is lawful to detain an individual. Both articles require that detention will be "promptly" considered by a judge and subject to periodic judicial review thereafter, whereas the law of armed conflict requires only administrative, rather than judicial, oversight of detention.

A. Detention in a NIAC

The rules governing detention in a NIAC are not as well developed as those in international armed conflict (IAC). Only some of the detention norms designed for IACs are applicable in NIACs.[65] In particular, NIAC treaty law contains a limited set of norms on treatment and an absence of rules governing the procedural guarantees for security detention.

It would not be appropriate to import the full panoply of the IAC rules for detention into a NIAC. As noted by the International Criminal Tribunal for the Former Yugoslavia in the *Tadi*ć case:

> [t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[66]

Instead, Common Article 3 of the 1949 Geneva Conventions serves as a baseline standard for treatment upon capture in a NIAC.

Common Article 3 prohibits the murder, mutilation, cruel treatment, torture, and outrages upon personal dignity of all persons taking no active part in hostilities.[67] It also protects those detained from criminal sentencing without due process, affording "all the judicial guarantees which are recognized as indispensable by civilized peoples."[68] Additional Protocol II to the 1949 Geneva Conventions elaborates further upon the safeguards provided for in Common Article 3.[69] U.S. policy regarding the treatment

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65. *See, e.g.*, Copenhagen Principles, *supra* note 46. For the ICRC position on what rules should govern detention in NIACs, see Jelena Pejic, *Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and other Situations of Violence,* 87 INTERNATIONAL REVIEW OF THE RED CROSS 375 (2005).

66. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶ 126 (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999). The reference to "internal conflicts" is general accepted to refer to NIACs.

67. Common Article 3(1).

68. Common Article 3(1)(d).

69. AP II, *supra* note 47, arts. 4–6.

of detainees in a NIAC accounts for basic humanitarian protections provided for in both Common Article 3 and Additional Protocol II.[70]

There has been no allegation that the conditions of Al-Libi's detention have failed to comply with the standards set out above. However, some have claimed that the mere detention on a warship, *per se,* is unlawful. Those who have made this allegation point to Geneva Convention III, (GC III), Article 22, which provides that "[p]risoners-of-war may be interned only in premises located *on land* and affording every guarantee of hygiene and healthfulness."[71] However, it is important to highlight that GC III, Article 22, is applicable only in IACs, and cannot automatically be imported to a NIAC. Furthermore, even in an IAC, Article 22's applicability only extends to those who have satisfied the criteria for prisoners of war status. Specifically, in order to achieve prisoner of war status, an individual must come within one of the categories contemplated in GC III, Article 4A. Al-Libi does not fall into any of these categories; nor is the conflict in question an IAC. Article 22 therefore does not apply to his detention.

Others may argue that while Article 22 *per se* does not apply in a NIAC, "the general essence" of the article should be applicable during a NIAC on the basis of *Tadić*.[72] This position is difficult to maintain, however. The most comprehensive legal instrument governing NIACs, which is Additional Protocol II, does not contain a rule equivalent to Article 22.[73] Moreover, the rule is hardly all-encompassing during an IAC; for example, there

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70. As a non-Party to Additional Protocol II, the United States is not bound by its provisions, but the U.S. Secretary of State has said specifically that the Protocol is reflective of U.S. practice and signaled its intent to seek Senate advice and consent for ratification. Hillary Clinton, Secretary of State, Press Statement: Reaffirming America's Commitment to Humane Treatment of Detainees (Mar. 7, 2011), *available at* http://www.state.gov/secretary/rm/2011/03/157827.htm. *See also* Department of Defense Directive 2310.01E, The Department of Defense Detainee Program ¶ 4.1 (Sept. 5, 2006) (providing that "[a] detainee shall be treated humanely and in accordance with U.S. law, the law of war and applicable U.S. policy.").

71. Emphasis added. *See, e.g.*, Spencer Ackerman, *Libyan al-Qaida Suspect's Detention-at-Sea Raises Geneva Convention Concerns*, THE GUARDIAN (Oct. 8, 2013), http://www.theguardian .com/world/2013/oct/08/us-detention-libya-al-liby-ship.

72. *Tadić* Appeals Judgment, *supra* note 66, ¶ 126.

73. AP II, *supra* note 47, art. 5. Moreover, the AP II Commentary on Article 5 makes no mention that such a rule was even discussed in the drafting of AP II. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*,* ¶¶ 4564–96 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

is no equivalent provision for those detained under Geneva Convention IV (GC IV).

The absolutism of Article 22's prohibition against at-sea detention for prisoners of war has been questioned, even in the context of GC III.[74] For example, the ICRC calls for the "sensible interpretation" of Article 22.[75] This is because historically the article had two motivations. First, during the Second World War prisoners of war had been held in ships in unsanitary and unsafe conditions, in particular by Japan.[76] Second, belligerent ships (*a fortiori* warships) were at significant risk of enemy attack, potentially placing any prisoners in danger. These factors are now of less concern than they were at the time of Article 22's drafting.

In contrast to Second World War shipboard detention, modern ships (particularly an advanced amphibious command platform such as the *USS San Antonio*), which are equipped with more than adequate protections from the extremes of temperature and weather, are able to provide sanitary, hygienic conditions and sufficient food and water. In addition, a U.S. warship at sea provides safe conditions for detention without significant risk of enemy attack in the context of the NIAC between the U.S. and Al Qaeda.

More recently, other States have detained prisoners of war aboard warships in keeping with the ICRC's invitation to read Article 22 sensibly. In some circumstances, detention at sea might even be more humane than detention ashore. During the 1982 Falklands Conflict, Argentina, after bilateral discussions with the U.K., agreed that its prisoners of war could be held at sea aboard British warships.[77] This decision was no doubt reached on the basis that a U.K. warship afforded better protection during the South Atlantic winter than make-shift accommodations ashore on the wind-swept Falkland Islands.

The final objection to shipboard detention may include concern over a detainee's access to impartial humanitarian bodies, such as the ICRC. Common Article 3 expressly provides that such groups may "offer their services." The U.S., as a matter of policy, notifies the ICRC of any deten-

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74. Gregory P. Noone et. al., *Prisoners of War in the 21st Century: Issues in Modern Warfare* 50 NAVAL LAW REVIEW 1 (2004). For a concise discussion of the basis for Article 22 and flexibility in its application during modern conflicts, see also Peter Margulies, *Al-Libi and Detention at Sea*, LAWFARE (Oct. 10, 2013), http://www.lawfareblog.com/2013/10/Al-Libi-and-detention-at-sea/.

75. Margulies, *supra* note 74.

76. A.J. BARKER, PRISONERS OF WAR (1975).

77. Noone et. al., *supra* note 74.

tions and grants access to detainees in all but exceptional situations.[78] Indeed, Ahmed Abdulkadir Warsame, who was held aboard a warship by the U.S., was visited by the ICRC.[79] Critics of Warsame's detention have posited that shipboard detention risks the perception that the ship represents a "black site" in which unlawful interrogation techniques might be used.[80] However, that has not proven to be the case, either with Warsame or, as far as can be known, Al-Libi. There have been no complaints that either of the shipboard detentions was inhumane, or conducted in violation of the Common Article 3 standards.

It remains to be seen whether prolonged detention at sea may, as a matter of fact, become inhumane and therefore unlawful. Factors which could jeopardize the legitimacy of detention at sea might include duration and the adequacy of medical care (whether generally or in relation to a detainee's specific condition). In addition, extreme weather or sea state for an extended period might also risk rendering conditions inhumane. These matters must be determined by the facts as they exist. Furthermore, there is no indication that detention at sea would present procedural ambiguities (such as length of detention, periodic reviews) beyond those that already pertain to detention on land. There is no *per se* prohibition against detention on a warship in a NIAC.

B. Detention under Human Rights Law

If Al-Libi's detention was not based on the *lex specialis* of the law of armed conflict, it must be examined under the general principles of international law, i.e., human rights law. While human rights law does not prohibit detention at sea as a matter of course,[81] there are several other factors that must be considered.

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78. U.S. Dep't of Army, Reg. 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, ¶ 5.1(5) (Oct. 1, 1997).

79. Charles Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, THE NEW YORK TIMES (July 6, 2011), http://www.nytimes.com/2011/07/07/world/ africa/07detain.html. One of the authors of this paper was present onboard when Ahmed Abdulkadir Warsame was detained.

80. Tom Parker, *A Dangerous Somali Fudge*, AMNESTY INTERNATIONAL (July 8, 2011) http://blog.amnestyusa.org/us/a-dangerous-somali-fudge/; Spenser Ackerman, *Drift: How this Ship Became a Floating Gitmo*, WIRED (July 6, 2011) http://www.wired.com /dangerroom/2011/07/ floating-gitmo/.

81. The ECtHR has dealt with several cases concerning the detention of pirates and others at sea and has never found that detention at sea is *per se* a breach of any human

The ECHR and ICCPR both state that persons arrested or detained must be brought "promptly" before a judge.[82] This is a requirement that is broadly reflected in human rights instruments and State practice, which could mean it is now reflective of customary human rights law, and therefore, may apply to Al-Libi's detention. In *Öcalan*, the ECtHR held that Turkey breached this rule, as reflected in ECHR, Article 5(3), when Öcalan was not brought before a judge until seven days after his detention.[83] In *Brogan* v. *UK*, a case concerning individuals suspected of terrorism, the court found that a period of four days and six hours without review by a judge amounted to a breach of Article 5(3).[84] However, in *Medvedyev* v. *France*, the court found that 13 days' detention at sea, without judicial oversight, did not breach Article 5(3) because it was not "materially possible" to bring the detainees before a judge any sooner.[85] In this case the circumstances were of pirates captured at sea whose transfer to the territory of the detaining State, France, took 13 days. On arrival, the detainees were put before a judge within a few hours, so that as soon as it was "materially possible" the detaining State had complied with Article 5(3). The flexibility in *Medvedev* is also reflected in several similar U.S. domestic cases.[86]

Human rights law, therefore, does not provide a strict time limit. Instead, circumstances, such as the location of detention and the possibility of judicial oversight, are taken into account in determining when an indi-

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rights norm. *See, e.g.*, Medvedyev and others v. France, App. No. 3394/03, Eur. Ct. H.R. (2010); Jamaa v. Italy, App. No. 27765/09, Eur. Ct. H.R. (2012).

82. ECHR, *supra* note 57, art. 5(3); ICCPR, *supra* note 58, art. 9(3).

83. *Öcalan*, *supra* note 55, ¶¶ 100–05.

84. Brogan and others v. United Kingdom, ¶ 62, App. No. 11209/84, Eur. Ct. H.R. (1988).

85. *Medvedyev*, *supra* note 81, ¶¶ 127–34,

86. *See*, United States v. Purvis, 768 F.2d 1237 (11th Cir. 1985) (holding that five days between arrest at sea and presentation before a magistrate was not "unreasonable delay" even though, after arrest, the Coast Guard cutter continued its normal law enforcement activities, did not proceed to nearest U.S. port, and stopped for 8 hours to attempt to sink an abandoned vessel); United States v. Greyshock, 719 F. Supp. 927, 932–33 (D. Haw. 1989) (deciding that nine days between arrest at sea and presentation before a magistrate was not "unreasonable delay," and rejecting contention that government should have airlifted defendants to a magistrate or have permitted defendants access to Coast Guard communication equipment to contact a magistrate); United States v. Savchenko, 201 F.R.D. 503 (S.D. Cal. 2001) (whereas 16 days might be deemed unreasonable for the delay in first appearance concerning an arrest at the International Border with Mexico, some 16 miles south of the courthouse, the 16 days is more than reasonable for the transport of the fishing vessel from the high seas approximately 500 nautical miles from Mexico to this district under these facts and circumstances).

vidual must be brought before a judge. None of these cases suggest a special exception for situations of terrorism.[87] If the U.S. can show that Al-Libi was put before a judge in New York as soon as it was "materially possible" this rule will not have been breached.

V. CONCLUSION

The extraterritorial capture of Abu Anas Al-Libi raises questions in international law ranging from the circumstances in which it is legitimate for a State to infringe another State's sovereignty to the specific conditions of detention under both the law of armed conflict and general international law. This article has not been able to draw conclusions on every issue raised due to gaps in the known factual narrative. However, the foregoing analysis does allow for the statement of certain principles which may inform the conduct of future similar operations.

(1) Consent of the territorial State will always be the most straightforward legal basis for what would otherwise be an unlawful infringement of the territorial State's sovereignty. Obtaining consent will not always be possible, however, and so alternative legal bases may need to be considered.

(2) Where the sovereignty infringement rises to the level of a "use of force," as it did in the Al-Libi case, the only other legal basis for crossing the border will be self-defense. As this article has shown, self-defense might be used as a circumstance precluding the wrongfulness of the whole capture operation. However it might also be limited to justifying the infringement of sovereignty, with an alternative legal basis (such as in the law of armed conflict) justifying the capture. In either case, the actor State will need to show that action in self-defense is in response to an "armed attack," imminent or actual. In an operation such as this, conducted against a non-State actor, the actor State needs to be satisfied that the territorial State is either unwilling or unable to prevent the armed attack about to be perpetrated from its soil before it may act in self-defense.

87. This is apparent in the ECtHR's reasoning in *Brogan*, *supra* note 84, ¶¶ 56–61.

(3) The capture part of the operation may be grounded in the law armed conflict applicable in a NIAC where the individual(s) to be captured represent a threat to the security of the actor State. Before a capture is affected under the law of NIAC, the actor State needs to be satisfied that the individual(s) to be captured is within the geographic bounds of that NIAC. If the view that the law follows the parties is representative of international law, then the mere presence of the enemy in the territorial State is sufficient to conclude the NIAC is taking place in that State. Following a capture grounded in the law of armed conflict applicable in a NIAC, a capturing State is entitled to transfer the captured individual into its domestic criminal jurisdiction.

(4) If there is no NIAC ground for capture, then the capture operation must be compliant with general international law norms governing extraterritorial enforcement of domestic criminal law. Historically, where such norms were breached during capture, this did not prevent the capturing State from subjecting the individual in custody to criminal trial. Whether customary human rights law has developed to eclipse or alter this rule is unclear, but in the U.S. the principle *male captus bene detentus* remains, for now, enshrined in the Supreme Court *Alvarez-Machain* decision.

(5) Whether the capture is affected under NIAC law or general international law, there is no norm which prevents *per se* the detention of captured persons at sea, in a warship. NIAC law does require detainees be treated humanely and that international organizations such as the ICRC be granted access in all but extraordinary circumstances. Detention at sea is perfectly able to meet these requirements. Where the capture is governed by general international law, customary human rights law may provide that captured individuals are required to be put "promptly" before a judge as soon as it is "materially possible."