# REFLECTIONS ON INCONSISTENCIES IN REMEDIAL RELIEF FOR HUMAN RIGHTS TRANSGRESSIONS RELATIVE TO SECURITY RISK AVERSION

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## I. INTRODUCTION

Following 9/11 and as part of what was termed a "global war on terror," the Bush Administration applied detention and interrogation operations across three jurisdictional locations—inside the United States, within war and occupation zones, and inside other foreign countries. This article considers interactions of applicable law across these three locales within the context of assertions of presidential power, the severity of human rights violations, and the alleged necessity based on pragmatic assessments of imminent threat, to interpret how these variables are

related to punishment and remedial relief. Despite calls from experts and human rights organizations for compensation and punishment,[1] the settlement of $5.28 million that L-3 Services offered to 71 Iraqi detainee-plaintiffs in January 2013 was the only glimmer of precedent for remedial relief, and even then the private military contractor emphasized to the federal court that "[n]o court in the United States has allowed aliens—detained on the battlefield or in the course of postwar occupations by the U.S. military—to seek damages for detention."[2]

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1. *See, e.g.*, *Demand Accountability for Torture and Abuse*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/issues/torture/accountability-for-torture (recommending that Obama investigate and hold responsible U.S. officials who "unlawfully detained, unlawfully rendered to torture, and those tortured and abused in U.S. custody"); *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, HUMAN RIGHTS WATCH 1 (July 12, 2011), http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf (supporting a criminal investigation of "the CIA secret detention program, and the rendition of detainees to torture."); Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359, 359 (2009) (noting the 2001 to 2009 sanctions to use secret detention, forced disappearances, and coercive interrogations involved "serial criminality," war crimes, torture, and cruel, inhumane, and degrading treatment that "implicat[es] universal jurisdiction and a universal responsibility."); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. L. COMM. 503, 624-28, 641-43 (2008) (listing nearly fifty top officials at the White House, Pentagon, CIA, and Justice Department who abetted potential offenses, including Common Article 3 War Crimes; non-Common Article 3 war crimes; conspiracy or solicitation to commit crimes of violence; conspiracy to kill, kidnap, maim, or injure others in a foreign country; torture; conspiracy to torture, assault, and maim; deprivation of rights under color of law; conspiracy to deprive of rights; cover-up of crimes; and state law crimes); *'Countdown with Keith Olberman' for Thursday, April 10*, MSNBC (Apr. 10, 2008), http://www.msnbc.msn.com/id/24068197/ns/msnbc_tv-countdown_with_keith_olbermann (Professor Jonathan Turley remarked: "It was a torture program . . . approved at the very highest level . . . And it goes right to the President's desk. . . . It's always been a war crimes tribunal ready to happen.").

2. Pete Yost, *Iraqis Held at Abu Ghraib, Other Sites Get $5M*, ASSOC. PRESS (Jan. 9, 2013), http://www.theguardian.com/world/feedarticle/10602673.

Perhaps even more unsettling is the retrospective lack of justification for interrogation on utilitarian grounds. In 2014, a CIA investigation acknowledged that the use of harsh interrogation methods, secret prisons, and extraordinary renditions to abusive foreign security services, "did not produce any significant counter-terrorism breakthrough in the years after the 2001 attacks and the CIA officials misstated or exaggerated the results to other agencies and to Congress."[3]

Part II provides an analytic framework and specifies the President's assertion of authority within locales of interrogation and Part III particularizes the relative harm from the unilateralism. From this foundation, Part IV addresses the three high-profile general outcomes of detention—suspected terrorists were convicted of crimes; those carrying out detention and interrogation were convicted for exceeding laws of war, criminal law, and human rights rules; and whether victims of human rights abuse were granted remedies.

## II. A CONTINUUM OF POWER AND HUMAN RIGHTS ABUSE

After 9/11, a primal risk-aversion infixed the assumption that detention and severe psychological interrogation methods were essential for ferreting out details of terror plots from an al-Qaeda network with thousands of members inside sixty countries.[4] Four years after 9/11, 70,000 detainees had been held for varying durations.[5] Status of detainees in various locations determine applicable law and detainee rights, but the sweeping Commander in Chief authority commingled detainees who should have had distinct classifications and averted

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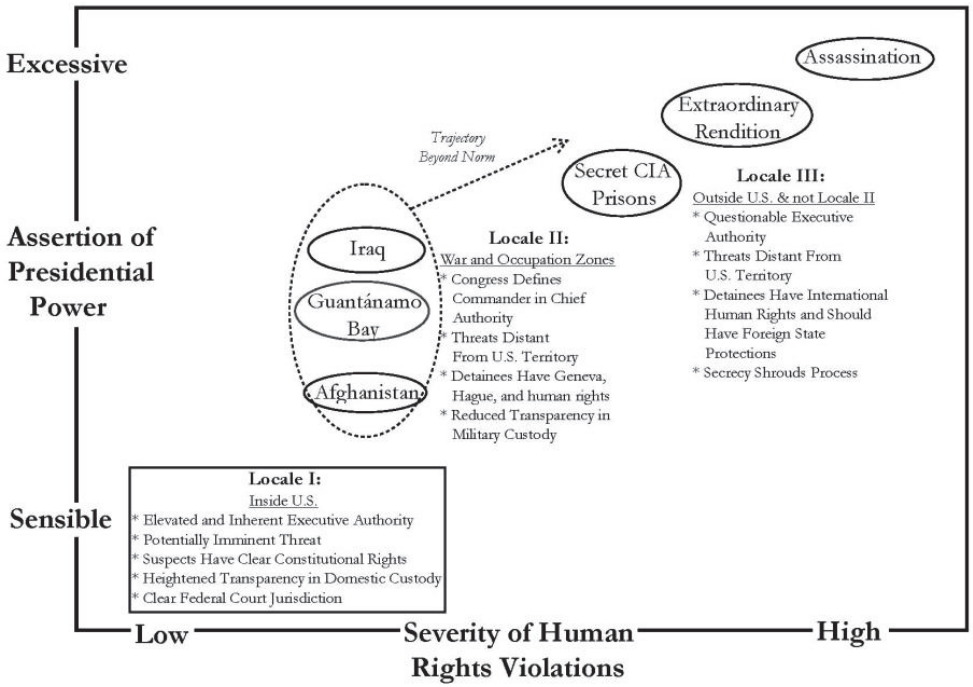
3. *CIA Concedes It Spied on Senate Investigations*, THE DAILY HERALD (July 31, 2014), http://www.thedailyherald.com/index.php?option=com_content&view=article&id=49285:cia-concedes-it-spied-on-senate-investigators&catid=3:news&Itemid=7.

4. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (Sept. 2002) ("thousands of trained terrorists remained at large"); *The Power of Nightmares, Part III: The Shadows in the* Cave, BBC 2 TELEVISION (Nov. 4, 2002), http://www.informationclearinghouse.info/video1040.htm (shortly after 9/11, Undersecretary of Defense Paul Wolfowitz explained: "This is a network that has penetrated into some 60 countries . . .").

5. AMNESTY INT'L, UNITED STATES OF AMERICA, AMR 51/063/2005, GUANTANAMO AND BEYOND: THE CONTINUING PURSUIT OF UNCHECKED EXECUTIVE POWER (2005).

applicable legal restrictions. The following analytic depicts the assertion of presidential power and the severity of human rights violations:

**Figure 1: Relative Executive Authority & Human Rights Violations**




In Locale 1, inside the U.S., assertions of Executive power are the most justifiable to the extent that actions are reasonable to thwart a potential peril because it is the President's core, preclusive, and inherent constitutional obligation to protect Americans on U.S. sovereign territory.[6] Congress also passed the Patriot Act,[7] which the Executive

6. President Thomas Jefferson, who spoke from the context of negotiating and consummating the Louisiana Purchase without treaty approval procedures, stated that the "law of necessity, of self-preservation, . . . [requires] saving our country when in danger." U.S. HOUSE OF REPRESENTATIVES HOUSE OF REPRESENTATIVES SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & U.S. SENATE

interpreted to extend authority to wiretap, detain suspects, and deport non-citizens[8] pursuant to an expansive definition of "domestic terrorism" that included "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; [or] . . . appear to be intended . . . to influence the policy of a government by intimidation or coercion."[9]

For the war and occupation zones of locale II, Congress activates and specifies the conditions for the Commander in Chief authority for all but those operations in imminent defense of the nation and possibly when there is minor military conflict or distant missile strikes.[10] On September 18, 2001, Congress adopted the Authorization for Use of Military Force (AUMF) and empowered the President to use force against individuals, groups, and states involved with the 9/11 attacks and to prevent abettors to the attacks from committing future acts of terrorism.[11] Based on the AUMF, President Bush issued *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* on November 13, 2001, which permitted the Secretary of Defense to detain any individual who the Administration believed was a member of al-Qaeda, engaged in

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SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR WITH SUPPLEMENTARY, MINORITY, AND ADDITIONAL VIEWS 465, H. REPT. NO. 100-433, S. REPT. NO. 100-216 (1987); R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938) (citing Secretary of State Daniel Webster's position in the *Caroline* case and expressing that "acts of self-defense must occur only during the last feasible window of opportunity in the face of an attack that is almost certainly going to occur").

7. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

8. 8 U.S.C. § 1226(a) (2013) (interpreting exceptions for extended detainment of foreigners inside the US as constitutional under the Patriot Act); JAMES CARROLL, CRUSADE: CHRONICLES OF AN UNJUST WAR 47 (2004).

9. 18 U.S.C. § 2331 (2013).

10. Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight"*, 44 ST. MARY'S L.J. 1, 28-36 (2012); Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 29-30 (2012).

11. Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L.J. 1, 8-15 (2012) [hereinafter Bejesky, *CFP*].

terrorism against the U.S., or harbored individuals involved in terrorism.[12]

Presuming that the culprits of 9/11 were located in Afghanistan, the U.S. and allies attacked Afghanistan, captured the Bagram airfield, and began to detain suspected members of al-Qaeda, the Taliban, and combatants.[13] Also, in early January 2002, Bush Administration orders labeled a few hundred detainees from Bagram prison in Afghanistan "unlawful combatants" and the U.S. military transported them to Guantánamo Bay, Cuba,[14] which, for several years, was a location with an unresolved legal status because it is "beyond the territorial jurisdiction of any court of the United States"[15] and not part of a war zone.

Based on urgings from the Bush Administration, Congress adopted an Authorization for the Use of Military Force against Iraq on October 10, 2002, which required that Iraq possess chemical, biological, or nuclear weapons or programs, or be in violation of Security Council Resolutions for maintaining prohibited weapons or programs.[16] The Bush Administration orated threats from Iraq for over six months[17] and ordered an invasion of Iraq against the will of most of the international community and without Security Council authorization.[18] There were no

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12. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833, 57, 834 (Nov. 13, 2001).

13. Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 159 (2005) (noting that after the invasion of Afghanistan, approximately 10,000 alleged al-Qaeda or Taliban fighters were quickly captured, but most were either detained in Afghanistan or released).

14. *Secretary Rumsfeld Media Availability After Visiting Camp X-Ray*, U.S. DEP'T OF DEFENSE (Jan. 27, 2002), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2348 (Rumsfeld noting that "Bagram and Kandahar" are locations where the military "sort[s] through these people" to decide whether to transfer to Guantanamo).

15. Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (recognizing that there is no habeas jurisdiction when an enemy's capture occurred "beyond the territorial jurisdiction of any court of the United States.").

16. H.R.J. Res. 114, 107th Cong. § 3 (2002) (enacted).

17. Bejesky, *CFP*, *supra* note 11, at 5-7; Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348-50 (2012). *See generally* Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. 967 (2012).

18. Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 344-56

prohibited weapons or relations with al-Qaeda,[19] but an eight-year occupation remained.

In locale III, outside the U.S. and outside of war and occupation zones, the Executive assumed deeper authority and engaged in more controversial and abusive operations. Shortly after 9/11, Bush proclaimed that the CIA was authorized to kill leading terrorist operatives around the world because the targets were "enemy combatants" in a "global war."[20] The CIA also held terror suspects in small and secretive CIA-sponsored detention facilities in various countries[21] and covertly transferred detainees to other states with Extraordinary Rendition.

With respect to locales II and III, scholars complained that the Bush Administration approved interrogation methods that threatened and coerced detainees, imposed prolonged detention without explanation and proof of guilt,[22] denied individual liberty and human rights protections to foreigners that would have been afforded to nationals, downplayed torture and Geneva Convention violations as unintended but necessary to preempt security threats,[23] and exploited rhetorical discourse of fear to

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(2011); Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 2, 20-30, 41-42 (2012).

19. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 811-13, 875-82 (2011) [hereinafter Bejesky, *Intelligence Information*].

20. Mary Ellen O'Connell, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5127, 5133 (2010). *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War arts. 42, 111, Aug. 12, 1949, *6 U.S.T. 3316,* 75 U.N.T.S. 135 [hereinafter Geneva I].

21. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 128 (2006); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html.

22. The Comm. on Fed. Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, 59 THE REC. 41, 104-05 (2004).

23. Manfred Nowak, Moritz Birk & Tiphanie Crittin, *The Obama Administration and Obligations Under the Convention Against Torture*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 33, 34, 38 (2011) (remarking that Bush's "notorious 'war on terror' . . . undermined the absolute prohibition of torture more than any previous U.S. administration" and citing the "flawed 'torture memos.'"); Katherine Gallagher, *Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for*

consolidate an abusive system while avoiding responsibility.[24] Moreover, the Bush Administration was cognizant[25] that military personnel, interrogators, and private contractors committed acts amounting to torture or inhuman treatment on detainees for several years[26] even though prohibitions on abusive interrogations are applicable during periods of armed combat and occupation[27] and for law enforcement.[28]

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*Torture*, 7 J. INT'L CRIM. JUST. 1087, 1091 (2009) (stating that abuses "were the outgrowth, if not the direct and intended result, of US policies [for] . . . detention, interrogation and torture.").

24. Irene Zubaida Khan, *The 2007-2008 Mitchell Lecture: The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 3 (2008).

25. Sen. Patrick Leahy, *There is No Justification for Torture*, BOS. GLOBE, June 28, 2004, at A11 ("U.S. officials knew the law was being violated [during interrogations] and for months, possibly years, [and] did virtually nothing about it."); Khan, *supra* note 24, at 5 (stating that the Bush Administration "condoned torture").

26. *See generally* Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 BUFF. PUB. INT. L.J. 103 (2014); Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 823-28, 852 (2012).

27. Geneva I, *supra* note 20, art. 3 (grave breaches of the laws of war include "murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular, humiliating and degrading treatment; [and] the passing of sentences and the carrying out of executions without previous judgment."); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 835 (2005) (noting that during an occupation, the Geneva Convention and human rights law prohibit torture, "'violence,' threat of violence, 'cruel' treatment, 'physical and moral coercion . . . to obtain information,' 'physical suffering,' 'inhuman' treatment, 'degrading' treatment, 'humiliating' treatment, and 'intimidation' during interrogation.").

28. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, art. 1 (Dec. 10, 1984) (Adopted and opened for signature, ratification and accession by General Assembly prohibiting "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for reasons of inflicting severe physical or mental pain or punishment, intimidating, inflicting punishment, or extracting information); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES217(III), art. 5 (Dec. 10, 1948) [hereinafter UDHR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49, princ. 6 (Dec. 9, 1988) [hereinafter U.N. Body of Principles] (providing that "no person under any form of detention or imprisonment shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."); MICHAEL JOHN GARCIA, CONGR. RESEARCH SERV.,

In summary, locale I involved heightened constitutional authority for the Executive due to potentially imminent national security danger, but the exigency is reduced for locales II and III due to distance from American shores.[29] Operations in locale II derived from specific congressional authorizations to use military force, but the Commander in Chief executed controversial carte blanche detention and interrogation operations to obtain intelligence. The next part considers the legal controversies inherent in issuing sweeping detention and interrogation directives across the three venues.

## III. LEGAL RESTRICTIONS ON EXECUTIVE AUTHORITY

### A. Locale I

In locale I, the possibility of a terror threat is the highest, but the President must act reasonably within the law. The U.S. Constitution protects life and liberty[30] for "all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent"[31] and ensures arrestees with a right to question whether the government's detention complies with the law[32] via a writ of habeas

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RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 1 (2004), *available at* http://fpc.state.gov/documents/organization/31351.pdf (noting that "torture is defined as an *extreme* form of cruel and unusual punishment committed under the color of law" and that the U.S. enacted statutes to enforce Article 3 of the CAT).

29. Bejesky, CFP, *supra* note 11, at 8-15 (noting that the more that individuals and groups are separated from 9/11, it becomes less reasonable to assume that the President has authority under the September 2001 AUMF).

30. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

31. Zadvydas v. Davis, 533 U.S. 678, 679 (2001).

32. *See* 18 U.S.C. § 4001(a) (2013) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."); Boumediene v. Bush, 128 S. Ct. 2229, 2247 (2008); Fay v. Noia, 372 U.S. 391, 401 (1963), *overruled in part by* Wainwright v. Sykes, 97 S. Ct. 2497 (1977); International Covenant on Civil and Political Rights art. 9(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"] (Human rights law treats personal liberty as a fundamental right.); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 221; UDHR, *supra* note 28, art. 3; U.N. Body of Principles, *supra* note 28, princ. 10.

corpus that "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[33]

Shortly after 9/11, Attorney General Ashcroft presented wide-ranging estimates of up to five thousand terror suspects inside the United States,[34] but of the more than one thousand individuals detained in the two months following the 9/11 attacks, only three non-citizens were held and charged with terror-related crimes, one of the three was convicted, and all the rest were cleared of any wrongdoing.[35] The Bush Administration annually issued an ongoing public emergency inside the U.S. for several years,[36] and there were markedly puissant[37] discussions of a need to use torturous

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33. U.S. CONST. art. I, § 9, cl. 2; *see also* 28 U.S.C. § 2241(a) (2013) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

34. ROBERT DREYFUSS, DEVIL'S GAME: HOW THE UNITED STATES HELPED UNLEASH FUNDAMENTALIST ISLAM 13, 305 (2005).

35. DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE 'WAR ON TERROR' 112 (2008).

36. *See* Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from a Historical Perspective*, 58 WAYNE L. REV. 327, 330-32, 340-41 (2012) [hereinafter "Bejesky, *Utilitarian Rational Choice*"]; Robert Bejesky, *A Rational Choice Reflection on the Balance Among Individual Rights, Collective Security, and Threat Portrayals Between 9/11 and the Invasion of Iraq*, 18 BARRY L. REV. 31, 36-44, 51 (2012) [hereinafter "Bejesky, *Rational Choice Reflection*"]; A v. Secretary of State (No. 1), [2005] 2 A.C. [96]-[97] (deciding that laws adopted after 9/11 to thwart threats from terrorism did not meet the definition of a public emergency under the ECHR because "[t]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.").

37. *See* Palash R. Ghosh, *Boston Marathon Bombing: A Timeline Of Terrorist Attacks on US Targets Since 9/11*, INT'L BUS. TIMES, Apr. 15, 2013, *available at* http://www.ibtimes.com/boston-marathon-bombing-timeline-terrorist-attacks-us-targets-911-1193485?ft=k82h2 (noting that the Boston Marathon bombing was the first terrorist attack since 9/11); Bejesky, *Rational Choice Reflection*, *supra* note 36, at 38-48 (addressing the overreaction and hyping of threats after 9/11); The Editorial Board, *Indisputable Torture*, N.Y. TIMES, Apr. 16, 2013, *available at* http://www.nytimes.com/2013/04/17/opinion/indisputable-torture-of-prisoners.html?ref=extraordinaryrendition&_r=0 (stating that a recent "independent, nonpartisan panel's examination of the interrogation and detention programs" found them in violation of international law and stating that there was "'no firm or persuasive evidence' that they produced valuable information that could not have been obtained by other means"); David Cole & Jules Lobel, *Are We Safer?*, L.A. TIMES, Nov. 18, 2007, at M4 (noting that the Justice Department claimed that there were 261 "terrorism and

interrogation methods to thwart potential "ticking time bomb" plots on U.S. soil.[38] The Patriot Act and other legislative enactments emphasized collective security and aggressive tactics that led to prolonged detention and distressing conditions and compromised due process protections and habeas corpus,[39] but detention violations were not as egregious as those perpetrated in locales II and III.

### B. Locale II Detention

#### *1. General Rules*

For locale II detentions, the Hague Convention[40] and Geneva Conventions applied by ratification or as a matter of customary international law.[41] The Geneva Convention requires that detainees be promptly given notice of the reason for a detention and a right to challenge detentions before an administrative tribunal or court.[42]

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terrorism-related" convictions, but only two cases "actually involve[ed] attempted terrorist activity").

38. *See* Bejesky, *Utilitarian Rational Choice*, *supra* note 36, at 330-32, 336.

39. *See* Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 422-25, 442-45 (2005); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609, 658 (2005) (stating that secrecy regularly violated the Bill of Rights and "[t]he post-9/11 [arrest and detention] procedures violated virtually every aspect essential to procedural due process: notice of charges, the right to be informed of one's rights, access to a fair and meaningful hearing, and a fair opportunity for review of charges and grounds for detention.").

40. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 688-89 (2006) (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); United States v. Yunis, 924 F.2d 1086, 1092 (D.C. Cir. 1991).

41. Scott L. Glabe, *Conflict Classification and Detainee Treatment in the War Against Al Qaeda*, 2010-Jun. ARMY LAW. 112, 116; *See, e.g.*, International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 AM. J. INT'L L. 172, 248-49 (1947) (holding Germans responsible for violations of customary international law without ratifying the 1907 Hague Convention).

42. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 43, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; *see also* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other*

However, particular rights depend on detainee status. Combatants captured during a military conflict can be classified as a privileged combatant (POWs), an unprivileged belligerent, or a civilian.[43] Combatants can be detained to prevent them from fighting again, but they can only be tried if they have engaged in violations of war.[44] If there is no validated evidence of guilt to justify a security detention, such as if individuals pose a threat to government authorities during an occupation,[45] individuals can be detained only as an exceptional measure[46] and the detention must cease when reasons for detention cease.[47]

Also, potentially applicable in locale II (but certainly applicable in locale III), is the International Covenant on Civil and Political Rights (ICCPR),[48] which requires that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present

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*Existing Law*, 105 AM. J. INT'L L. 201, 210 (2011) (noting that the Fourth Geneva Convention requires at least an administrative review of the justification for detention).

43. *See* Kenneth Anderson, *Unprivileged Belligerents (or Illegal Combatants)*, OPINIO JURIS, (Jan. 17, 2007, 8:51 PM), http://opiniojuris.org/2007/01/17/unprivileged-belligerents-or-illegal-combatants/; *but also see* Benjamin Davis, Comment to *Unprivileged Belligerents (or Illegal Combatants)*, OPINIO JURIS, (Jan. 17, 2007, 10:29 PM), http://opiniojuris.org/2007/01/17/unprivileged-belligerents-or-illegal-combatants/ (arguing that the Taliban and al-Qaeda are covered by Geneva).

44. *See* Geneva I, *supra* note 20, arts. 4, 118 (describing prisoner of war categories and stating that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities"); ROY GUTMAN, DAVID RIEFF, ANTHONY GARY DWORKIN, CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 332 (2nd ed. 2007) (stating that "POWs are immune from prosecution for lawful acts of war").

45. Geneva I, *supra* note 20, at art. 4.

46. Geneva IV, *supra* note 42, art. 42 (permitting deprivation of civilian liberties if "the security of the Detaining Power makes it absolutely necessary.").

47. *E.g.*, Jelena Pejic, Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence, 87 INT'L REV. RED CROSS 375, 382-83 (2005).

48. U.N. Secretary-General, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 131-32, 140, U.N. Doc. HRI/GEN/1/Rev. 9 (Vol. 1) (May 27, 2008) (noting that no one can be deprived of liberty irrespective of nationality, statelessness, or status); Johannes van Aggelen, *The Bush Administration's War on Terror: The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims*, 42 CASE W. RES. J. INT'L L. 21, 56 (2009) (noting that the ICCPR is not automatically suspended during combat).

Covenant." [49] The ICCPR mandates that the legitimacy of a security detention or guilt for criminal offenses be determined by an impartial tribunal,[50] which may call into question sweeping, collective detainment orders that do not substantiate reasons for detention and deny challenges.[51]

### *2. Guilt and Detention*

Thousands of militants were detained for indefinite durations inside Afghanistan, with some detainees held as war prisoners, suspected members of al-Qaeda, and security detainees, but detentions inside war zones were not nearly as vexing as those at Guantánamo Bay.[52] Soon

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49. ICCPR, *supra* note 32, at art. 2(1).

50. *Id.* at art. 9(4) (stating that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide . . . on the lawfulness of his detention and order his release if the detention is not lawful."); *see also* UDHR, *supra* note 28, at art. 11(1) (stating that "[e]veryone charged with a [criminal] offence . . . [shall have] the right to be presumed innocent until prove[n] guilty according to law.").

51. Tyler Davidson & Kathleen Gibson, *Security Detention: Experts Meeting on Security Detention Report,* 40 CASE W. RES. J. INT'L L. 323, 338 (2009); Pejic, *supra* note 47, at 381.

52. GEOFFREY S. CORN, JAMES A. SCHOETTLER, JR., DRU BRENNER-BECK, VICTOR M. HANSEN, DICK JACKSON, ERIC TALBOT JENSEN & MICHAEL W. LEWIS, THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 138 (2nd ed. 2015) (noting that "[d]etentions of terrorist belligerent operatives under the combatant paradigm have lasted for years" and remarking that states have permitted detention because of "an ongoing conflict in Afghanistan in which al-Qaeda and the Taliban continue to be active"); Anisseh Van Engeland Nourai, *Terrorism: A New Challenge for International Humanitarian Law?*, *in* GUANTANAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER 73 (Clark Butler, ed., 2007) (stating that the "Geneva Conventions grant protection to terrorists" and under "Article 5 of the Third Geneva Convention, a competent court should decide whether or not to grant the status of prisoner of war to the combatant seized. Until such decision is made, the detainee is considered as a prisoner of war and entitled to the rights secured by the Conventions"); JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES 284 n.72 (2007) (accentuating that the elevated controversy over Gitmo derives from the fact that "Guantanamo Bay is clearly outside the war zone in Afghanistan and outside the reach of relevant presidential war powers, especially since the offenses were not committed in Guantanamo."); PANKAJ MISHRA, TEMPTATIONS OF THE WEST 280 (2006) (stating that "[n]o one among the thousands of Afghans detained by the thousands of Afghans

after prisoners began arriving at Guantánamo Bay and continuing for at least two years,[53] top Bush administration officials called them "very tough, hard-core, well-trained terrorists"[54] and the "'most dangerous, best-trained, vicious killers on the face of the earth.'"[55] The Bush Administration asserted that detainees from Afghanistan were unlawful enemy combatants instead of POWs,[56] which was a determination predominantly based on detainee admissions,[57] and presupposed that basal protection and rights were required.[58]

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detained by the U.S. military at mostly unknown locations across Afghanistan since 2001 has been given prisoner of war status").

53. *US Defends Guantanamo Policy*, BBC NEWS, Oct. 10, 2003, http://news.bbc.co.uk/2/hi/americas/3182346.stm (White House Press Secretary McClellan asserted that "[t]hese individuals are terrorists or supporters of terrorism.").

54. Secretary Rumsfeld Media Stakeout at NBC, U.S. DEP'T OF DEF., Jan. 20, 2002, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2243.

55. Andy Worthington, *Seven Years of Guantanamo, Seven Years of Torture and Lies*, HUFFINGTON POST, Jan. 11, 2009, http://www.huffingtonpost.com/andy-worthington/seven-years-of-guantanamo_b_156903.html (quoting Donald Rumsfeld); *Rumsfeld: Afghan Detainees at Gitmo Bay Will Not Be Granted POW Status*, FOX NEWS, Jan. 28, 2002, http://www.foxnews.com/story/2002/01/28/rumsfeld-afghan-detainees-at-gitmo-bay-will-not-be-granted-pow-status/ (stating "'the worst of a very bad lot,'" (quoting Dick Cheney) and "devoted to killing millions of Americans, innocent Americans, if they can.").

56. Reply Brief for the Petitioner at 13, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 871163 (stating that the Bush Administration contended that "[t]he capture and detention of enemy combatants is an inherent part of waging war, and the President's decision whether to detain a person as an enemy combatant is a basic exercise of his discretion to determine the level of force needed to prosecute the conflict.").

57. Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, WASH. POST, Feb. 1, 2005, at A01 (statement by Federal Judge Green).

58. PETER JAN HONIGSBERG, OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR 19 (2009) (remarking that "[w]ith no official notification or explanation, the [Bush] administration substituted the term *enemy combatants* for *unlawful combatants* as a descriptor of the detainees at Guantanamo Bay" and by doing so put these detainees "outside the reach of the GC [Geneva Conventions]," which meant that "any protections the administration gave them would be largesse alone," even though "[a]s unlawful combatants, the Taliban would still have recognized protections under the GC").

Commentary to the Additional Protocols of the Geneva Convention references general justifications for detainment,[59] but some Gitmo managers acknowledged that there was no effective screening process for detention, so detainee identity was not always known,[60] and many detainees were innocent.[61] In February 2006, researchers at Seton Hall Law School analyzed the Pentagon's records and found that 93% of the prisoners brought to Camp X-Ray were not arrested by the United States.[62] Foreigners arrested and delivered up the detainees to the U.S. military and U.S. taxpayers paid between $3,000 and $25,000 for

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59. Int'l Comm. of the Red Cross [ICRC], Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (June 8, 1977), available at http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument.

60. Tim Golden & Don Van Natta Jr., *The Reach of War; U.S. Said to Overstate Value of Guantánamo Detainees,* N.Y. TIMES, June 21, 2004, http://www.nytimes.com/2004/06/21/world/the-reach-of-war-us-said-to-overstate-value-of-guantanamo-detainees.html?pagewanted=all&src=pm;
David Rose, *The Real Truth about Camp Delta*, GUARDIAN, Oct. 2, 2004, http://www.guardian.co.uk/world/2004/oct/03/bookextracts.usa (intelligence officials remarking that "'I'm unaware of any important information in my field that's come from Gitmo.'").

61. Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2088 (2005); SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 2 (2004) (noting that a CIA analyst interviewed dozens of Guantanamo detainees and stated that "'more than half the people there didn't belong there'" and recognized that many were abused); Shafiq Rasul, Asif Iqbal & Rhuhel Ahmed, *Composite Statement: Detention in Afghanistan and Guantanamo Bay*, ¶ 154 (July 26, 2004), *available at* http://ccrjustice.org/files/report_tiptonThree.pdf (released detainees explaining: "'none of us were ever told why we were in Cuba other than we had been detained in Afghanistan . . . [as] 'unlawful combatants.'"); Golden & Van Natta Jr., *supra* note 60 (General Hill explaining: "'We weren't sure in the beginning what we had; we're not sure today what we have.'").

62. ALFRED W. MCCOY, A QUESTION OF TORTURE 214 (2006); Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* at 2, 14 (Feb. 8, 2006), *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf (noting that 55% "are not determined to have committed any hostile acts against the United States or its coalition . . . [and] [o]nly 8% . . . were characterized as al Qaeda fighters."); *The Power of Nightmares*, *supra* note 4 (stating that "[t]he Northern Alliance did produce some prisoners they claimed were Al Qaeda fighters, but there was no proof of this.").

bounties on each captive[63] in a country where the per capita income is several hundred dollars per year.[64]

More than five hundred detainees remained at Guantanamo Bay, sometimes for over three years, without being granted an official legal process or even a hearing.[65] By July 2005, an estimated 234 detainees had been released, with 65 transferred to other governments.[66] More detainees were periodically released and more suspects were transported to Gitmo, leaving the number of detainees in November 2014 at 148.[67] By classifying detainees as "unlawful enemy combatants," the indefinite detentions and characteristics of military tribunals caused controversy over violations of the Geneva Conventions and customary international law.[68]

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63. Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L.J. 82, 82 (2009); Denbeaux, *supra* note 62, at 23 (nearly $5,000 reward for individuals captured). A senior military official remarked that their investigators determined that Pakistanis had been "'sold for bounties to U.S. forces by Afghan warlords who invented links between the men and al-Qaeda.'" Gregory M. Huckabee, *The Politicizing of Military Law – Fruit of the Poisonous Tree*, 45 GONZ. L. REV. 611, 670 (2010). Likewise, on September 27, 2001, the CIA began spreading about $70 million in cash to rival tribes across the country to reopen the Afghan civil war. CHALMERS JOHNSON, THE SORROWS OF EMPIRE 181 (2004).

64. UN Data, *Per capita GDP at current prices—US dollars*, *available at* https://data.un.org/Data.aspx?d=SNAAMA&f=grID%3A101%3BcurrID%3AUSD%3BpcFlag%3A1 (recognizing that GDP per capita in Afghanistan in 2002 was US$193).

65. Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 DRAKE L. REV. 897, 898 (2005).

66. John R. Crook, United States Confronts Issues Related to Detentions of Thousands of Terrorism Suspects, 99 AM. J. INT'L L. 707, 709 (2005).

67. *Guantanamo Bay Naval Station Fast Facts*, CNN, http://www.cnn.com/2013/09/09/world/guantanamo-bay-naval-station-fast-facts/ (last updated Oct. 11, 2014); *see The Guantanamo Files*, N.Y. TIMES, http://www.nytimes.com/interactive/2011/04/24/world/middleeast/took-up-arms-graphic.html?_r=0 (last visited Oct. 30, 2014); *see also* Stephen Graham, *US Said to Seek Fewer Prisoners*, BOSTON GLOBE (Jan. 4, 2005), http://www.boston.com/news/world/middleeast/articles/2005/01/04/us_said_to_seek_fewer_prisoners/?camp=pm (noting that the U.S. military purportedly took fewer prisoners than expected to avoid harsh complaints); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 619 (2010) (reporting that there were 250 prisoners held at Guantanamo when Bush exited office in December 2008 and 215 at the end of Obama's first year).

68. Elizabeth M. Iglesias, *The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 1883 (2008); *see also* Harold Hongju Koh, *Setting the World Right*, 115

During the war and official occupation of Iraq, which authorized security detentions,[69] the U.S. military detained approximately 43,000 individuals for various durations during the first year.[70] In February 2004, U.S. military intelligence officers announced that "between 70 percent and 90 percent of persons deprived of their liberty in Iraq had been arrested by mistake,"[71] and were held without explanation and legal redress.[72]

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YALE L.J. 2350, 2355 (2006) ("[T]he [Bush] Administration opposes judicial efforts to incorporate international and foreign law into domestic legal review so as to insulate the U.S. government from charges that it is violating universal human rights norms in favor of double standards."). Human rights groups and European governments demanded that the Bush Administration either try Guantanamo detainees or release them. Tung Yin, *Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention's Regulation of Interrogation of Captured Combatants Through Positive Inducements*, 26 B.U. INT'L L.J. 227, 233 (2008); Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y. TIMES (Feb. 17, 2006), http://www.nytimes.com/2006/02/17/international/17nations.html?pagewanted=all.

69. Resolutions authorized the U.S. military to detain for essential security reasons. *Coalition Provisional Authority Memorandum Number 3 (Revised)*, REFWORLD (June 27, 2004), *available at* http://www.refworld.org/docid/469cd1b32.html; S.C. Res. 1546, para. 10, U.N. Doc. S/RES/1546 (June 8, 2004) (providing the authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq."). Security detention is an exceptional measure accordant with international human rights law. Pejic, *supra* note 47, at 380.

70. Rajiv Chandrasekaran & Scott Wilson, *Mistreatment of Detainees Went Beyond Guards' Abuse*, WASH. POST (May 11, 2004), http://www.washingtonpost.com/wp-dyn/articles/A15492-2004May10.html; *see also* Isabel Hilton, *The 800lb Gorilla in American Foreign Policy*, THE GUARDIAN (July 27, 2004), http://www.theguardian.com/world/2004/jul/28/usa.comment (estimating that 12,000 prisoners were then held in Iraq).

71. Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), *available at* http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf [hereinafter ICRC Report]; *see also* George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, FINDLAW 34-176, available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited Oct. 30, 2014) (estimating that between 85 to 90 percent of those detained at Abu Ghraib "were of no intelligence value"); MCCOY, supra note 62, at 142 (reporting that Military Police (MP) commander Janis Karpinski was purportedly told by her superior, Major General Walter Wodjakowski, "'I don't care if we're holding 15,000 innocent people. We're winning the war.'"); Seymour M. Hersh, Torture at Abu Ghraib, THE NEW

### C. Locale II Interrogation

#### *1. Government Directives Issued in Violation of Laws of War*

The Bush administration's espoused reason for using harsh interrogation was to gather information[73] and thwart catastrophic terror threats to American citizens, but engaged in a bait-and-switch by extending the same notions of self-defense and necessity inside war zones and other countries where detainees did not pose any immediate hazard to Americans civilians.[74]

U.S. agents interrogated detainees at Guantánamo Bay shortly after they arrived, but because milder interrogation techniques were not yielding sufficient incriminating information,[75] in October 2002, Joint

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YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact (noting that women and teenagers were detained).

72. Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 468-69 (2005); *see also* ICRC Report, *supra* note 71 (explaining that those interned were arrested without cause and "without knowing what they were accused of"); Richard Norton-Taylor, *US Sweep of Arrests After Iraq Invasion Leads to Few Convictions*, THE GUARDIAN (Nov. 14, 2005), http://www.guardian.co.uk/world/2005/nov/15/iraq.usa (noting that, from US Central Command numbers, from the invasion in March 2003, 35,000 Iraqis had been detained, 1,300 had been charged with crimes, and half of those charged had been found guilty).

73. Bejesky, *Utilitarian Rational Choice*, *supra* note 36, at 336-42.

74. *See* Fay, *supra* note 71 (acknowledging that "[i]nterrogating detainees was a massive undertaking" and accentuating that interrogation operations were intended to "gather initial battlefield intelligence"); Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. POL'Y 343, 357 (2010) ("The Bush administration never developed a persuasive argument as to why the United States could use force on the basis of self-defense far from the location of those legally responsible for the 9/11 attacks."); Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST (May 21, 2004), http://www.washingtonpost.com/wp-dyn/articles/A43783-2004May20.html (recalling the abuse at Abu Ghraib and stating that interrogations were being used to obtain intelligence to "thwart the insurgency in Iraq" and "find Saddam Hussein or locate weapons of mass destruction").

75. Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def. on Counter-Resistance Techniques to the Sec'y of Def. (Nov. 27, 2002), *available at* http://www.defense.gov/news/Jun2004/d20040622doc5.pdf; Memorandum from Jerald Phifer, Lieutenant Colonel, Dir. of Intelligence, U.S. Army on Request for Approval of

Task Force 170 imparted the Joint Chiefs of Staff and SOUTHCOM with three categories of progressively intensive interrogation tactics. Category I commissioned interrogators to impose an uncomfortable environment, including yelling and employing deception to inflict stressful conditions on detainees.[76] Category II permitted interrogators to employ stress positions, mislead detainees with falsified documents, quarantine captives in solitary confinement for up to thirty days, constrict breathing, induce sensory deprivation, and invoke phobias.[77] Category III authorized interrogators to threaten to kill members of a captive's family, expose inmates to harshly cold temperatures and water, engage in daylong interrogations, and induce perceptions of drowning and suffocation.[78] In December 2002, Defense Secretary Rumsfeld approved Category I and II, and some methods in Category III.[79] Rumsfeld later approved other methods,[80] all of which were similar to tactics contained in the CIA's Kubark Interrogation Manual (1963) and were arguably more severe in intensity and duration than methods called cruel, degrading, or inhumane punishment by the European Court of Human

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Counter-Resistance Strategies to Commander, Joint Task Force 170, Dep't of Def. (Oct. 11, 2002), *available at* http://www.defense.gov/news/Jun2004/d20040622doc3.pdf.

76. Phifer, *supra* note 75, at 1.

77. *Id.* at 1-2.

78. *Id.* at 2-3.

79. Evan J. Wallach, The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib, 36 CASE W. RES. J. INT'L. L. 541, 583, 593-94 (2004); Paust, supra note 27, at 840. The Bush Administration approved the use of sensory deprivation, stress positions, intimidation using phobias and dogs, psychological trickery, and threat scenarios against the detainee and/or his family. See Haynes, supra note 75.

80. ALFRED W. MCCOY, *Cruel Science: CIA Torture and U.S. Foreign Policy*, *in* STICKS & STONES: LIVING WITH UNCERTAIN WARS 199-200 (Padraig O'Malley, Paul L. Atwood & Patricia Peterson, eds. 2006) (stating that in April 2003 Secretary of Defense Rumsfeld implemented methods that included "'environmental manipulation,' 'reversing sleep cycles from night to day,' and isolation for up to thirty days," and further explaining that General Miller implemented a "'72-point matrix for stress and duress' strikingly similar to the CIA's original torture paradigm, using 'harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days, and . . . 'stress positions' designed to subject detainees to rising levels of pain.").

Rights in 1978.[81] Without these orders, the military would presumably have followed Field Manual 34-52 and provided an exceptionally higher standard of treatment for detainees.[82]

As a categorical prohibition without exceptions[83] and with similar restrictions existing in U.S. military law for 150 years,[84] Article 17 of the 1949 Geneva Convention provides:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. . . .No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.[85]

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81. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. Ct. H.R. 34-35 (1978), (holding psychological interrogation methods illegal); Bejesky, *Utilitarian Rational Choice*, *supra* note 36, at 383-90, 405-11.

82. PHILIP GOUREVITCH & ERROL MORRIS, STANDARD OPERATING PROCEDURE 39 (2008). The Department of Defense remarked about the Interrogation procedures: "[o]ur Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." Haynes, *supra* note 75.

83. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 395 (2006).

84. *See* Department OF THE ARMY, FIELD MANUAL 34-52 INTELLIGENCE INTERROGATION 1-8 (1992), *available at* http://www.fas.org/irp/doddir/army/fm34-52.pdf#search=%22FM%2034-52%20Field%20Manual%22 ("Physical or mental torture and coercion revolve around eliminating the source's free will. . . . Torture is defined as the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure," and "US policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation."); U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 16 (1963), *available at* http://www.icrc.org/ihl.nsf/0/286696dfc21d967ec12563cd00514a91?OpenDocument (noting that the 1863 Instructions for the Government of Armies of the United States (Lieber Code) stated that "[m]ilitary necessity does not admit of cruelty -- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.").

85. Geneva I, *supra* note 20, art. 17.

Based on Article 17, it is patently illegal to strip naked, threaten, constrict breathing, place in stress positions, or punish detainees in any way to attain information, and distinctions between "torture" and "cruel and inhumane punishment" are diversions because both are prohibited.[86] If occupation law applies, the occupier and the local government are both mandated to respect human rights law and humanitarian law for territory under their control.[87] Also, the ICCPR[88] absolutely prohibits torture, but could permit "cruel, inhuman or degrading treatment or punishment,"[89]

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86. *See* Int'l Comm. Of the Red Cross, *Fight it Right: Model Manual on the Law of Armed Conflict for Armed Forces* ¶ 1405.2-.3, *available at* http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence170510/bmi08148.pdf; ICRC, *The Law of Armed Conflict* 14-7, June 2002, http://www.icrc.org/eng/assets/files/other/law7_final.pdf ("[N]o coercion may be used" and that "[i]t is unlawful to give particularly cooperative prisoners of war more favorable treatment, such as better accommodation, rations or pay, since all POWs are to be treated alike"). Jordan J. Paust, *The Importance of Customary International Law During Armed Conflict*, 12 ILSA J. INT'L & COMP. L. 601, 603 (2006); Comm. on Int'l Human Rights & Comm. on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 THE REC. 183, 220 (2005); Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 42-3 (2008); Paust, *supra* note 27, at 863 (noting that the Secretary of Defense, U.S. Generals, and other top Bush administration officials "patently violat[ed] . . . laws of war."); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1239 (2005) (noting that the allegation "that some individuals have no right not to be tortured or abused while in detention is simply wrong.").

87. Bejesky, *Pruning*, *supra* note 26, at 829-36; David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 381 (2008) (noting that using excessive abuse or torture violates customary international law, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Common Article 3, and the ICCPR); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 345 (2007) (noting "that the tactics portrayed in photos from Abu Ghraib Prison, namely the stripping naked and hooding of persons for interrogation purposes and the use of dogs for interrogation and terroristic purposes, are patently illegal interrogation tactics," violate "various treaty based and customary international legal prohibitions of cruel, inhuman, degrading, and humiliating treatment," and are prohibited without exception).

88. Van Aggelen, *supra* note 48, at 56 (noting that the ICCPR is not automatically suspended during a period of armed combat).

89. Comm. on Int'l Human Rights, *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 42 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 235, 240 (1987) (explaining that "most of the obligations

but only "to the extent strictly required by the exigencies of the situation" and when member states officially request exemptions.[90] Moreover, the U.S. Senate made a reservation to the ICCPR based on prohibiting torture as standards equivalent to cruel, unusual, and inhumane treatment as specified in the Fifth, Eight, and Fourteenth Amendments to the Constitution.[91] Consequently, U.S. jurisprudence and law enforcement

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imposed by the Convention apply only to acts of torture, as defined in Article 1."); AMNESTY INTERNATIONAL, DECADE OF DAMAGE TO HUMAN RIGHTS 45 n.10 (Dec. 2011), *available at* http://www.amnesty.ca/sites/default/files/2011-12-16amr511032011enguantanamodecadeofdamage.pdf (stating that the Bush administration advisory "memo entirely ignored the fact that under the ICCPR, even 'in time of public emergency which threatens the life of the nation,' there can be no derogation from the prohibition of cruel, inhuman or degrading treatment or punishment (articles 4 and 7)."). States do in fact repeatedly avoid the no derogation principle to the prohibition on "cruel, inhuman or degrading treatment or punishment" in the name of security threats, while the higher threshold crime of torture is less likely to be rationalized effectively. Richard Perruchoud, *State Sovereignty and Freedom of Movement*, *in* FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 134 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross, eds., 2012) (stating that the "national security motive is increasingly used as an exclusionary ground" for violating human rights protections even though the ICCPR prohibits "torture and cruel, inhuman or degrading treatment or punishment"); SIMON PAYASLIAN, THE POLITICAL ECONOMY OF HUMAN RIGHTS IN ARMENIA: AUTHORITARIANISM AND DEMOCRACY IN A FORMER SOVIET REPUBLIC 160 (2011) (stating that there are nonderogation principles stated in the ICCPR that prohibit human rights abuses, but that the exploitation of the restrictions "for the ostensible purpose of national security are obvious"); Sarah Joseph, *Civil and Political Rights*, *in* INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 99 (Mashood A. Baderin & Manisuli Ssenyonjo, eds. 2010) (opining that despite the ability to derogate on certain provisions of the ICCPR, states often to not file or adequately justify a derogation, and further writing that "many states routinely abuse so-called states of emergency to justify illegitimate oppressive measures").

90. ICCPR, *supra* note 32, art. 4; Human Rights Comm., General Comment 29: States of Emergency (Article 4), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 21, 2001) ("Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.").

91. 136 CONG. REC. 25, 36,192 (1990) (the U.S. is bound to prevent "'cruel, inhuman or degrading treatment or punishment' only insofar as the term . . . means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."); U.S. DEP'T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 6 (Apr. 4, 2003), *available at*

practices in the U.S. are applicable to defining torture and that "the Convention bans conduct that is already unconstitutional."[92]

### *2. Interrogations and Human Rights Abuses*

With respect to results of the Bush Administration's directives, the ACLU obtained over 100,000 government documents via Freedom of Information Act request and noted that at the military detention centers in Afghanistan and Iraq and at Guantánamo Bay:

> Detainees have been beaten; forced into painful stress positions; threatened with death; sexually humiliated; subjected to racial and religious insults; stripped naked; hooded and blindfolded; exposed to extreme heat and cold; denied food and water; deprived of sleep; isolated for prolonged periods; subjected to mock executions; and intimidated by dogs.[93]

The Bush Administration was warned of abuses at all of these locations. Several weeks into the invasion of Afghanistan, the United Nations' Working Group on Arbitrary Detention stated that the Bush Administration should permit inspection of detention sites, provide details of interrogation practices, and grant a fair trial to those captured because prisoners were being held indefinitely, incommunicado, and without charge or determination of guilt or POW status, but the Bush

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http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf (stating that U.S. obligations "under the Torture Convention apply to the interrogation of unlawful combatant detainees," but only to the extent that "cruel, inhuman, and degrading treatment and punishment" was restricted under the U.S. Constitution; and Article 7 of the ICCPR's "cruel, inhuman or degrading treatment or punishment" restriction as equated to cruel and unusual treatment in the Bill of Rights).

92. JOHN T. PARRY, EVIL, LAW AND THE STATE: PERSPECTIVES ON STATE POWER AND VIOLENCE 9 (2006).

93. AMERICAN CIVIL LIBERTIES UNION [ACLU], ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 1 (2006), *available at* http://www.aclu.org/national-security/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive; Fay, *supra* note 71, at 88 (noting that military intelligence employed removal of clothing as an "'ego down' technique" and MPs "as a 'control' mechanism" and this was standard practice); ICRC, *supra* note 71, at 9 (stating that methods of ill-treatment most frequently alleged . . . included "[b]eing stripped naked for several days while held in solitary confinement . . . .").

administration did not respond.[94] Public reports of abuse followed[95] and those carrying out the abuse affirmed that operations were "part of the process."[96]

The ICRC submitted a report contending that the "American military has intentionally used psychological and sometimes physical coercion 'tantamount to torture' on prisoners at Guantanamo Bay."[97] The FBI complained about abuses at Guantánamo Bay and confirmed ICRC criticism as early as late 2002 and again in late 2003,[98] but the Justice Department classified records of objection and misdeeds continued.[99]

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94. Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 321 (2004).

95. Human Rights Watch, *The Road to Abu Ghraib*, 19-23, 26, 30-31 (2004), *available at* http://www.hrw.org/sites/default/files/reports/usa0604.pdf (noting that detainees were shackled in chains, shouted at during interrogations, told their families would be harmed if cooperation was not forthcoming, isolated in pitch-black cells for several days at a time, and beaten and threatened with weapons, and that in May 2003, the ICRC reported over two hundred allegations of prisoner abuse to US authorities, and dozens more reports were issued in the following months); Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html (stating detainees were placed in painful stress positions for prolonged periods, hooded, and deprived of sleep).

96. Human Rights Watch, *supra* note 95, at 31-32 (statement by military intelligence officer to ICRC); Douglas Jehl & Eric Schmitt, *Army Tried to Limit Abu Ghraib Access*, N.Y. TIMES, May 20, 2004, at A1.

97. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1, *available at* http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=all; MG George R. Fay, Executive Summary, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade 64-65, 135 (2004), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (U.S. officers used coercion to extract information in Iraq).

98. Federal Bureau of Investigation, *Detainee Interviews: Abusive Interrogation Issues*, May 6, 2004, *available at* http://www.aclu.org/files/torturefoia/released/FBI_4194.pdf (stating that "[i]n late 2002 and continuing into mid-2003, the Behavioral Analysis Unit raised concerns over interrogation tactics being employed by the U.S. military," and that the FBI objected to the methods approved).

99. ACLU, *ACLU Interested Persons Memo on FBI Document Concerning Detainee Abuse at Guantanamo Bay* (July 12, 2005),

The United Nations,[100] the Bush Administration, and U.S. military commanders acknowledged that the Geneva Conventions clearly applied in Iraq,[101] but Iraqi detainees were subjected to the same incarceration and interrogation practices and many were also called "unlawful combatants."[102] Interrogation directives became so incorporated into the

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http://www.aclu.org/national-security/aclu-interested-persons-memo-fbi-documents-concerning-detainee-abuse-guantanamo-ba. Three commandants were dismissed ostensibly due to disagreement in implementing the controversial detention and interrogation directives. Paust, *supra* note 87, at 348; Robert Bejesky, *Closing Gitmo Due to the Epiphany Approach to Habeas Corpus During the Military Commissions Circus*, 50 WILLAMETTE L. REV. 43, 61-62 (2013) [hereinafter "Bejesky, *Closing Gitmo*"].

100. Security Council Resolution 1483 pertained to the occupation of Iraq and cited the Geneva Conventions of 1949 and the Hague Regulations of 1907 as applicable during the occupation. *See* S.C. Res. 1483, U.N. SCOR, U.N. Doc. S/Res/1483, at 2 (May 22, 2003).

101. *See, e.g.*, U.S. Department of Defense, *Secretary Rumsfeld Media Availability Enroute to Baghdad* (May 13, 2004), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3010 (Rumsfeld stating that "from the beginning" it has been the U.S. government's position "with respect to Iraq that the Geneva Conventions apply" and "anyone who is running around saying that Geneva Convention did not apply in Iraq is either terribly uninformed or mischievous."); Review of Department of Defense Detention and Interrogation Operations: Hearing on S. 868 Before the Comm. on Armed Services United States Senate, 108th Cong. 2 (2004) (statement of Sen. Carl Levin), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-108shrg96600/html/CHRG-108shrg96600.htm (Senator Levin stating that Rumsfeld publicly announced that the Geneva Conventions do not apply precisely to operations in Iraq, but "that prisoners are treated 'consistent with, but not pursuant to….' [the Geneva Conventions]."); General Ricardo Sanchez testimony before Senate Committee on Armed Services. Transcript: Senate Hearing on Iraq Prison Abuse, WASH. POST , May 19, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19.html ("We reviewed the recommendations with the expressed understanding, reinforced in conversations between General Miller and me, that they might have to be modified for use in Iraq where the Geneva Convention was fully applicable.").

102. Transcript: Senate Hearing on Iraq Prison Abuse, *supra* note 101 (Colonel Warren stating that some detainees at Abu Ghraib were being called "unlawful combatants" and that interrogation procedures "are not, in and of themselves, in isolation, violations of the Geneva Conventions [s]pecifically" for "security internees" under the Fourth Convention). Senator Levin itemized interrogation methods approved by Rumsfeld for unlawful combatants in December 2002, and methods included "nudity, exploiting detainees' fears . . . and stress positions," additional interrogation methods were authorized on April 16, 2003, General Miller provided interrogation orders when visiting Iraq, "Policy No. 1—Battlefield Interrogation Team and Facility (BIT/F) Policy" dated 15 July 2003 was produced for Iraq, and queried General Fay, who admitted that

chain of command that Rumsfeld directed Major General Geoffrey D. Miller, who implemented the interrogation directives at Guantánamo Bay, to travel to Iraq and instruct Janis Karpinski, the US Army Reserve officer who managed Abu Ghraib, to "Gitmoize" Abu Ghraib[103] by extending interrogation tactics used at Guantánamo Bay[104] and to involve and "train the MPs to work with the interrogators."[105]

The Taguba Report concluded that Miller considered it essential for MPs to "be actively engaged in setting the conditions for successful exploitation of the internees" and found that MPs were required to "break down prisoners" before interrogation.[106] In October 2003, Lt. Gen. Ricardo Sanchez wrote in a classified memo that interrogators at Abu Ghraib would work with MPs to "manipulate an internee's emotions and weaknesses" and augment the effectiveness of interrogations.[107]

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these authorizations "contribute[d] to the use at Abu Ghraib of aggressive interrogation techniques." *Id.*

103. *See* ANTONIO M. TAGUBA, Article 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 7-8, 15 (2004), http://www.npr.org/iraq/2004/prison_abuse_report.pdf; Sean D. Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L. 820, 828-29 (2004).

104. *See* Frontline, *Interview Janis Karpinski*, PBS (Aug. 5, 2005), http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html. Scholars readily recognized this connection between orders to "Gitmoize" Abu Ghraib and wrongdoing. Nowak, Birk & Crittin, *supra* note 23, at 40; Joseph Pugliese, *Abu Ghraib and its Shadow Archives*, 19 L. & LITERATURE 247, 257 (2007); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 312 (2006).

105. MCCOY, *supra* note 62, at 134; Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 758-59 (2005) (noting the approach of MPs softening up detainees); Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1275 (2005) ("they were responding to orders from higher-ups to 'soften up' the detainees for interrogation").

106. TAGUBA, *supra* note 103, at 8-9, 19 (describing how interrogators complimented MPs for breaking down the prisoners); Fay, *supra* note 71, at 69 (stating that "MI interrogators started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees.").

107. R. Jeffrey Smith, *Memo Gave Intelligence Bigger Role*, WASH. POST, May 21, 2004, at A17, *available at* http://www.washingtonpost.com/wp-dyn/articles/A43708-2004May20.html.

Physicians were also incorporated into the interrogations.[108] In a sworn statement, Colonel Thomas M. Pappas explained that the MP guards were typically given "a copy of the interrogation plan and a written note as to how to execute [it,] . . . [t]he doctor and psychiatrist also look at the files to see what the interrogation plan recommends. . . ."[109]

Human rights groups and international experts declared that interrogation tactics and the detentions violated international human rights law[110] and those prohibitions apply irrespective of any ultimate determination of detainee wrongdoing, but interrogations were also used on innocent people.[111] The Bush administration issued directives to employ abusive interrogation across all of the detention facilities,[112] but

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108. DEP'T OF DEF., ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ 5 (2003), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB140/a20.pdf (noting that Miller also explained to Karpinski during his early-September 2003 visit to Iraq, that "teams, comprised of operational behavioral psychologists and psychiatrists are essential in developing integrated interrogation strategies and assessing interrogation intelligence production.").

109. Pappas Aff., at 3 (Feb. 11, 2004), *available at* http://library.stmarytx.edu/acadlib/edocs/Pappas.pdf.

110. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C.L. REV. 1, 10 (2002); *see also* Amann, *supra* note 94, at 319-48.

111. MATTHEW GUTMANAN & CATHERINE LUTZ, BREAKING RANKS: IRAQ VETERANS SPEAK OUT AGAINST THE WAR 112 (2010) (noting how veterans were dismayed about the infliction of interrogation procedures on people who were in the wrong place at the wrong time); MCCOY, *supra* note 62, at 133 (reporting that a former CIA intelligence officer objected to interrogation operations in Iraq and stated: "'No way. We signed up for the core program in Afghanistan--pre-approved for operations against high-value terrorist targets--and now you want to use it on cabdrivers, brothers-in-law, and people pulled off the streets.'").

112. ACLU, *supra* note 93; *see also* ACLU, *ACLU Announces Publication of Administration of Torture, a Groundbreaking Account of Prisoner Abuse in U.S. Custody Abroad*, Oct. 22, 2007, http://www.aclu.org/organization-news-and-highlights/aclu-announces-publication-iadministration-torturei-groundbreaking ("The fact that the Abu Ghraib photographs depicted abuse at a single prison allowed senior administration officials to claim, as they did repeatedly, that the abuse was confined to that facility. This claim is completely false. . . ."); Seymour M. Hersh, *The General's Report: How Antonio Taguba, Who Investigated the Abu Ghraib Scandal, Became One of its Casualities*, NEW YORKER, June 25, 2007, http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?currentPage=all (noting that Lt. Gen. Randall Schmidt investigated abuses at Guantánamo Bay and stated:

it began with the assumption that captured suspected terrorists possessed information that could avert terror threats to Americans.[113] With respect to the success of interrogations at Gitmo, investigators contended that the Bush Administration made "wildly exaggerated" claims about the value of interrogations[114] and that detainees may have frequently complied with interrogators and admitted guilt to get better treatment.[115] Interrogations were applied to detainees in Iraq where the Geneva Convention clearly prohibited interrogation under Article 17 and where the regime did not have ties to al-Qaeda.[116]

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"For lack of a camera, you could have seen in Guantánamo what was seen at Abu Ghraib."); Higham & Stephens, *supra* note 74; Scott Higham & Joe Stephens, *Punishment and Amusement,* WASH. POST, May 22, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A46523-2004May21.html.

113. JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 63-64 (2004), *available at* http://www.defense.gov/news/aug2004/d20040824finalreport.pdf (stating that interrogation was being used to gather intelligence for the "Global War on Terror"); HUMAN RIGHTS WATCH, *supra* note 95, at 1 (stating that "the Bush administration . . . required that the United States circumvent international law" and administration lawyers counseled that "the new war against terrorism rendered 'obsolete' long-standing legal restrictions on the treatment and interrogation of detainees.").

114. *See,* HERSH, *supra* note 61, at 2 ("[T]he interrogations at Guantanamo were a bust. Very little useful intelligence had been gathered, while prisoners from around the world continued to be flow into the base and the facility constantly expanded."); Bejesky, *Utilitarian Rational Choice*, *supra* note 36, at 342-43 (citing scholars who contend that torture will not provide accurate intelligence and that the Bush Administration's interrogation directives were not successful); Martin Bright, *Guantanamo Has 'Failed to Prevent Terror Attacks'*, GUARDIAN, Oct. 2, 2004, http://www.guardian.co.uk/uk/2004/oct/03/world.guantanamo (stating Lt. Col. Anthony Christino accentuated that Bush and Rumsfeld "wildly exaggerated" the intelligence value of interrogations and remarking that interrogations "have not prevented a single terrorist attack"); Golden & Van Natta Jr., *supra* note 60 (from interviews of dozens of high-level American, European, and Middle Eastern intelligence, law enforcement, and military officials, reporting that "government and military officials have repeatedly exaggerated both the danger the detainees posed and the intelligence they have provided," and concluding "that contrary to the repeated assertions of senior [Bush] administration officials, none of the detainees at . . . Guantanamo Bay ranked as leaders or senior operatives of Al Qaeda.").

115. Rasul, Iqbal & Ahmed, *supra* note 61, at ¶ 156. *See also* Bright, *supra* note 114, at 2 (conclusion drawn by Lt. Col. Anthony Christino, a twenty-year military intelligence officer, spent six months reviewing Guantánamo interrogation records).

116. *See generally* Bejesky, CFP, *supra* note 11. *See* Bejesky, *Intelligence Information*, *supra* note 19, at 858-59, 877.

### D. Locale III

For locale III, outside of the U.S. and outside of war and occupation locations, there were Executive authorizations to perpetrate assassinations, constitute secret CIA prisons, and engage in Extraordinary Rendition operations. Summary execution would presumably be the most severe violation of human rights law[117] because courts have not proven guilt with respectable evidentiary standards but assume guilt and even positive identification based on far from infallible intelligence data,[118] and executions, such as with Predator Drones strikes,[119] violate due process, substantive human rights protections, and the sovereignty of other countries.[120]

Extraordinary Renditions involve a "forced disappearance" under international human rights law[121] and the transport of detainees to secret

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117. *See* Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 889-90 (2005) (stating that assassinations violate "the *audi alteram partem* principle, preventing the target from contesting the determination that he or she is a terrorist, and imposing a unilateral death penalty. In this way, the very purpose of international human rights is defeated"). O'Connell, *supra* note 20, at 5133 (emphasizing illegalities inherent in the assumption that there is a "right to kill [suspects] without warning and detain without trial" in a "global war").

118. RICHARD L. RUSSELL, SHARPENING STRATEGIC INTELLIGENCE 26 (2007) (noting that the CIA provided poor estimates throughout the Cold War). Bejesky, *Intelligence Information*, *supra* note 19, at 857-82 (discussing abysmally wrong intelligence estimates).

119. JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 442 (2012) (listing over a dozen purported al-Qaeda members who were reportedly killed by drone attacks).

120. *See* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to Sep. 1990, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) (restricting law enforcement officers from using firearms except in "self-defence or defence of others against imminent threat of death or serious injury," or in such a way that is reasonable under the circumstances). Weissbrodt, & Berquist, *supra* note 21, at 125, 136-37 (stating international law violations based on the assumption of a broad "war on terror").

121. HENKIN ET AL., HUMAN RIGHTS 505 (1999). *See* Dana Priest, *Long-Term Plan Sought For Terror Suspects*, WASH. POST, Jan. 2, 2005, A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A41475-2005Jan1.html (remarking that the extraordinary rendition program conducted during the Bush Administration was "not rendering to justice, it's kidnapping").

prisons where foreign governments might utilize torture, which is ostensibly more violative of human rights and due process than detention and interrogation operations employed at Pentagon-managed facilities in Iraq, Afghanistan, and Guantánamo Bay.[122] Extraordinary Renditions can violate the ICCPR and the Universal Declaration of Human Rights, and rules, such as the right to personal security and freedom, right to have the lawfulness of detention and guilt determined by courts and tribunals, and the rights to not be arbitrarily arrested, tortured, or subjected to "inhuman or degrading treatment or punishment."[123] Some transferees were innocent people who were wrongfully arrested, detained, and abused.[124]

International law provisions were also negotiated explicitly to curb states from using third-party countries to perpetrate wrongs against individuals. Article 3 of the Convention Against Torture states that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he

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122. *See* Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, 36th Sess., ¶ 16-17, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) (calling renditions and the use of secret prisons a *per se* violation of international law and the CAT); Catherine Powell, *Essay: Scholars' Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 COLUM. J. TRANSNAT'L L. 339, 349 (2009) (remarking that the "Bush Administration's hypocritical practice of disappearing individuals violate[d] the most basic legal norms in the treatment of prisoners."). Khan, *supra* note 24, at 7-8 ("Suspects are kidnapped by or at the instigation of the CIA," secretly detained, and delivered to regimes that practice torture). Sadat, *supra* note 104, at 313. The Comm. on Int'l Human Rights, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, 60 THE REC. 13, 24 (2005) ("The U.S. government is duty bound to cease all acts of Extraordinary Rendition, to investigate Extraordinary Renditions that have already taken place, and to prosecute and punish those found to have engaged in acts that amount[ed] to crimes in connection with Extraordinary Rendition.").

123. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/62/148 (Mar. 4, 2008) (affirming that "prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment"); *see also* Weissbrodt & Bergquist, *supra* note 21, at 136-37.

124. Sadat, *supra* note 104, at 340 (stating that at the U.S. detention facilities, those held "most of whom appear not to be terrorist suspects at all"); Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty*, 34 J.L. MED. & ETHICS 570, 575 (2006) (noting that the ICRC found that there were 107 detainees under 18 across six coalition controlled prisons through June 2005).

would be in danger of being subjected to torture."[125] The ICCPR contains similar prohibitions[126] and U.S. federal law was adopted to prohibit US officials from involuntarily extraditing individuals to third countries when there are "substantial grounds" for believing[127] that the transfer would be "more likely than not" to result in torture.[128] The third country can also violate specific human rights obligations because detainees could be inhumanely treated under the ICCPR or the Convention Against Torture, or if operations are viewed as part of a broad "war on terror," the law of neutrality still mandates humane treatment for combatants held in neutral countries.[129]

Constructive notice of torture through the rendition process should have been aggregated. Former captives emerged periodically to inform that they had been tortured after the CIA delivered them to foreign

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125. CAT, *supra* note 28, art. 3(1).

126. U.N. Human Rights Comm., *General Comment Number 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev. 1/Add.13 (Mar. 26, 2004) (noting that the Covenant "entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial ground for believing that there is a real risk of irreparable harm, such as [torture]"). *See also* the ICC prohibitions calling abductions a crime against humanity; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 7(1)(i).

127. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, 822 (1998) (codified at 8 U.S.C. § 1231) (stating that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 671 (2006) (noting that "substantial grounds" serves as a standard of proof that invokes obligations under Article 3 of the CAT).

128. U.S. Reservations, Understandings, and Declarations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36194 (1990), Senate Understanding II(2); Second Periodic Report of the United States of America to the Committee Against Torture 11, 57, May 6, 2005, *available at* http://www.state.gov/g/drl/rls/45738.htm.

129. Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), art. 12, 36 Stat. 2310, 1 Bevans 654. Third-party states also have obligations under human rights law for what occurs within their jurisdiction. *See id.*

countries.[130] The U.S. Department of State identified that countries such as Egypt, Syria, Saudi Arabia, Jordan, and Pakistan were countries that use torture, but these countries had received up to 100 to 150 prisoners for interrogation,[131] and many U.S. officials blatantly acknowledged the human rights violations.[132] Commentators labeled Extraordinary Rendition "torture by proxy" and "the outsourcing of torture"[133] to attain intelligence.

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130. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1245 (2005); CENTER FOR CONSTITUTIONAL RIGHTS & CANADIAN CENTRE FOR INTERNATIONAL JUSTICE, FACTUAL AND LEGAL BASIS FOR PROSECUTION OF GEORGE W. BUSH PURSUANT TO THE CANADIAN CRIMINAL CASE AND THE CONVENTION AGAINST TORTURE 20, para. 44, *available at* http://www.ccrjustice.org/files/2011.09.29%20Bush%20Canada%20Indictment.pdf (reporting that "BUSH received regular intelligence and FBI briefings, including when Arar was in custody in New York and when he was rendered to Syria.").

131. Louis Fisher, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America: September 20-21, 2007: Article: Extraordinary Rendition: The Price of Secrecy*, 57 AM. U.L. REV. 1405, 1406-07, 1421-22 (2008). *Accord* Powell, *supra* note 122, at 349; Sadat, *supra* note 104, at 320; Margaret L. Satterthwaite, *Symposium on the New Face of Armed Conflict: Enemy Combatants After Hamdan v. Rumsfeld: Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1343 (2007); The Committee on International Human Rights, *supra* note 122, at 71-74.

132. ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 26 (2006) (noting that a CIA official testified before Congress about the CIA's renditions program: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."); Katherine R. Hawkins, Note, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"*, 20 GEO. IMMIGR. L.J. 213, 236 (2006) (in an interview with the BBC, CIA official Michael Scheuer explaining that by using renditions "[i]t wouldn't be us torturing them."); Prof. Marjorie Cohn, *A Double Standard on Torture: The U.S. Should Practice What We Preach*, JURIST, Feb. 6, 2003 (reporting that a U.S. diplomat remarked that a rendition "allows us to get information from terrorists in a way we can't do on U.S. soil."); *Extraordinary Rendition: A Backstory*, GUARDIAN, Aug. 31, 2011, http://www.guardian.co.uk/world/2011/aug/31/extraordinary-rendition-backstory (stating that a former CIA agent remarked: "[i]f you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you sent them to Syria. If you want someone to disappear – never to see them again – you send them to Egypt.").

133. Satterthwaite, *supra* note 131, at 1335.

## IV. REMEDIES, PUNISHMENT, AND CONVICTIONS

### A. Framework

Within this progressively intensifying level of detainee abuse from locale I to III, three major consequences eventuated from detention and interrogation operations: —(1) a terrorist was captured and eventually found guilty of a crime; (2) a suspected terrorist, combatant, or innocent individual was captured and abused and the perpetrator of abuse was punished; and (3) a detainee's human rights were violated and sought a remedy either while being detained or after being released.

### B. Convicting the Terrorist

Since 9/11, dozens were convicted in federal courts and found guilty for an assortment of crimes that included training in terrorist facilities in foreign countries; making general or specific threatening statements involving U.S. interests or citizens; conspiring with others (including FBI informants and undercover agents) when making threats and taking steps toward a terror plot; attaining or attempting to attain weapons in violation of U.S. law that could be used in an act of terrorism; and conspiring in likely, unlikely, or remote terror plots.[134] Likewise, Yaser Hamdi, Jose Padilla, and John Walker Lindh had a significant nexus to locale II because they were associated with the Taliban and had due process rights marginalized during detentions, but because they are Americans, they were ultimately tried and convicted in U.S. courts.[135]

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134. *See* Jessica Zuckerman, Steven P. Bucci & James Jay Carafano, *60 Terrorist Plots Since 9/11: Continued Lessons in Domestic Counterterrorism*, THE HERITAGE FOUNDATION (July 22, 2013), http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism; *See contra* Robert Bejesky, *Sixty Shades of Terror Plots: Locating the Actus Reus and the Hypothetical Line for Entrapment* (submitted Oct. 2014) (manuscript at 56-59).

135. *See* Eric K. Yamamoto, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary: White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for Nat'l Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 313-14 (2005).

Even though federal courts are competent to hear terrorism cases,[136] if individuals or acts do not have a sufficient connection to the U.S., the Executive would be unlikely to transport foreign detainees to domestic soil without a clear violation of federal law because federal courts had previously held that it was unconstitutional to detain individuals indefinitely inside the U.S. based on classified evidence, which may involve unsubstantiated reports derived from rumor, hearsay, and biased sources.[137]

To address the inadequate connection to the U.S. for detainees primarily taken from Afghanistan, a tribunal process was taken outside the federal court system. The novel label of *unlawful enemy combatants* imputed guilt to permit indefinite detentions under the assumption that there would be legitimate Gitmo tribunal processes to determine combatant status and guilt for criminal wrongdoing, but the tribunal process that was eventually instituted left much to be desired.[138] The military commissions system finally heard cases without having proceedings interrupted by constitutional challenges in federal courts, but

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136. Human Rights First assessed over 100 terrorism cases over the past fifteen years and noted that "contrary to the view of some critics, the court system is generally well equipped to handle most terrorism cases." Jules Lobel, *Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT'L SECURITY L. & POL'Y 341, 354 (2009) (quoting Richard B. Zahel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008)).

137. Akram & Karmeley, *supra* note 39, at 618-19; *see* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After Sept. 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 322 (2002) (reporting that under the Antiterrorism and Effective Death Penalty Act of 1996, two dozen Arabs were incarcerated for two to four years).

138. The Bush Administration's tribunal process did not afford exceptional individual right protections. *Hamdan*, 126 S. Ct. at 2771 (noting that the rules departed from the courts-martial proceedings without adequate reason). Military tribunals generally do not always provide excellent right protections. *See* General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 61-66 (1980); *See also* Lobel, *supra* note 136; *See generally* Bejesky, *Closing Gitmo*, *supra* note 99.

only six Guantánamo detainees were convicted through February 2013.[139]

### C. Convicting the Abuser

The fact that the Bush Administration approved interrogation methods and directed interrogations to remain within U.S. law cannot explain how as many as two hundred detainees died, with at least 34 confirmed homicides, while in U.S. custody through the first five years of detentions, or how countless others emerged with indications that they were physically beaten and emotionally abused.[140] Human Rights Watch highlighted that offenses, including death, trauma, and various other human rights violations, routinely occurred at Abu Ghraib and dozens of other U.S. detention facilities worldwide, but the "only wrongdoers being brought to justice [were] those at the bottom of the chain of command."[141] Interrogators were generally not prosecuted[142] and this was likely due to the presumption that interrogation directives were legal, which effectively meant that only those ostensibly acting *ultra vires* to high-level detention and interrogation directives were subject to criminal punishment.

For example, a CIA contract employee and a former Special Forces interrogator, David A. Passaro, beat Abdul Wali to death in Afghanistan in June 2003, and he became the first U.S. civilian to be indicted in U.S. federal court for abusing a detainee.[143] In Iraq, the abuse scandal at Abu

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139. JENNIFER K. ELSEA, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, CRS REPORT FOR CONGRESS 7-5700, 10 (2013), *available at* http://www.fas.org/sgp/crs/natsec/R40932.pdf.

140. HINA SHAMSI, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1 (Deborah Pearlstein ed., 2006), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/06221-etn-hrf-dic-rep-web.pdf; Bassiouni, *supra* note 83, at 389-90, 398-99, 402-03, 406 (placing detainee death toll at two hundred through 2006 and noting that military doctors signed many death certificates with torture as the cause).

141. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 403-04 (2007).

142. Khan, *supra* note 24, at 8 (stating that despite evidence of deaths occurring during interrogation, "not one single CIA personnel has been prosecuted.").

143. MCCOY, *supra* note 62, at 147; Farah Stockman, *CIA Contractor is Charged in Beating of Afghan Detainee*, BOSTON.COM NEWS, June 18, 2004,

Ghraib prison captured attention, and twenty-seven military and intelligence officials were implicated in the abuse,[144] but significant penalties were only imposed on a dozen low-level soldiers.[145] Stanford Professor Philip Zimbardo underscored that the Bush Administration commanded the interrogation system, ordered the policies down the chain of command, and "isolate[d] the problem in order to deflect attention and blame away from those at the top."[146]

With respect to locale III, there were approximately 150 Extraordinary Renditions to various countries, and foreign countries conducted the investigations.[147] On at least three occasions, German prosecutors initiated investigations against U.S. agents, including Americans operating renditions in Germany, the U.S. policymakers who were architects of the interrogation programs in Washington D.C., and the agents committing abuses at Abu Ghraib, but cases were dismissed because the defendants were not present in Germany and the U.S. government pressured Germany to terminate inquiries.[148] After a

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http://www.boston.com/news/nation/articles/2004/06/18/cia_contractor_is_charged_in_beating_of_afghan_detainee?pg=full.

144. JONES & FAY, *supra* note 97, at 4; *see* TAGUBA, *supra* note 103, at 16 (documenting "systemic," "intentionally perpetrated," "sadistic, blatant, and wanton criminal abuses").

145. Simon Chesterman, *Intelligence Services*, *in* PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS 192 (Simon Chesterman & Angelina Fisher, eds. 2009) (remarking that "[t]welve uniformed personnel were convicted of various charges; most were given minor sentences but a handful of soldiers received multiple-year prison terms" and stating that "[o]nly one person above the rank of staff sergeant faced a court-martial and was cleared of any wrongdoing . . .").

146. ZIMBARDO, *supra* note 141, at 10; Tim Berard, *Collective Action, Collective Reaction: Inspecting Bad Apples in Accounts for Organizational Deviance and Discrimination*, *in* INTERACTION AND EVERYDAY LIFE: PHENOMENOLOGICAL AND ETHNOMETHODOLOGICAL ESSAYS IN HONOR OF GEORGE PSATHAS 266 (Hisashi Nasu & Frances Chaput Waksler, eds., 2012) (accentuating the blame being placed on low level troops and stating that "the bad apples argument" has been interpreted as means "to reduce or deny responsibility of the U.S. military or the Bush administration in the Abu Ghraib scandal.").

147. *See* John R. Crook, *Contemporary Practice of the United States*, 101 AM. J. INT'L L. 490, 490 (2007).

148. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 9 (6th ed. 2014) (further noting that "in 2010, the German Administrative Court of Cologne dismissed an action by which Khaled El-Masri, plaintiff, sought to compel the German government to seek the extradition of thirteen CIA agents from the

criminal trial in absentia and three years of appellate processes, in September 2012, Italy's highest criminal court upheld the convictions of 23 CIA agents who were involved in Extraordinary Rendition operations for kidnapping Osama Moustafa Hassan Nasr,[149] a reported radical Egyptian cleric, off the streets of Milan and taking him to Cairo, where he was imprisoned, tortured, and beaten for fourteen months.[150] In December 2012, the European Court of Human Rights (ECHR) held that Macedonia violated its obligations under the European Convention on Human Rights for hosting a covert U.S. interrogation facility and for serving as a transfer point for renditions, and in July 2014, the ECHR held that Poland was responsible for "torture and inhuman or degrading treatment" when transferring two terror suspects to "black sites" in northern Poland.[151] The importance of inquiries and foreign court processes were ostensibly elevated by the severity of abuse and the fact that U.S. operations transgressed international law and were executed inside foreign states. Critics contended that top Bush Administration

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United States for allegedly kidnapping and transporting him to Macedonia for torture and interrogation."); LISA HAJJAR, TORTURE: A SOCIOLOGY OF VIOLENCE AND HUMAN RIGHTS 48 (2013) (providing the example of a criminal case in 2004 being brought in Germany against Defense Secretary Rumsfeld and a dozen military and civilian agents for torture at Abu Ghraib and the case being dismissed because of pressure from the U.S. government, and also referring to a case brought by Germany against Rumsfeld and other policymakers in the Bush Administration who were architects of the interrogation program and prosecutors dismissing the case because the defendants were not present in Germany).

149. Andrea Vogt, *Italy Upholds Rendition Convictions for 23 Americans*, GUARDIAN, Sept. 19, 2012, http://www.guardian.co.uk/world/2012/sep/20/italy-rendition-convictions-americans.

150. Craig Whitlock, *In Letter, Radical Cleric Details CIA Abduction, Egyptian Torture*, WASH. POST, Nov. 10, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/09/AR2006110901686.html.

151. Rick Lyman, *Poland Appeals European Court of Human Rights Ruling on C.I.A. 'Black Site'*, N.Y. TIMES, Oct. 24, 2014, http://www.nytimes.com/2014/10/25/world/europe/extraordinary-rendition-ruling-appealed-by-poland.html?_r=0; European Court of Human Rights, Press Release, *Macedonian Government Responsible for Torture, Ill-Treatment and Secret Rendition of a Man Suspected of Terrorist Ties*, Dec. 13, 2012, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/703_echrjudgment_/703_echrjudgment_en.pdf.

officials who approved Extraordinary Rendition should have been brought to justice.[152]

### D. Remedying Human Rights Violations

#### *1. Challenging Detention with Habeas Corpus*

Two foremost issues regarding remedying detention and abuse were whether habeas corpus petitions could challenge detention and whether victims alleging human rights violations in locales II and III could attain a civil remedy. International law requires a competent and equitable tribunal, fair procedures to protect innocence, and appeal processes to justly assess guilt for a detention.[153] Detentions inside the U.S. could be challenged in federal court, but habeas challenges were inconceivable in locale III because the abduction, incarceration, and Extraordinary Renditions were conducted secretly and occurred in foreign jurisdictions.[154] Detentions in war or occupation zones were also not challengeable within the U.S. court system because operations occurred

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152. *See* JOHN CONYERS JR., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 271-72 (Jan. 13, 2009), *available at* http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf; *see also US/Italy: Italian Court Challenges CIA Rendition Program*, HUM. RTS. WATCH (Apr. 16, 2008), http://www.hrw.org/en/news/2008/04/15/usitaly-italian-court-challenges-cia-rendition-program; *see also* Evan Wilson et. al., *International Legal Updates*, 17(2) HUM. RTS. BRIEF 40, 47 (2010) (reporting that Sabrina De Sousa, one of the convicted CIA agents, stated: "Clearly, we broke a law, and we're paying for the mistakes right now of whoever authorized and approved this.").

153. The U.S. is a party to the ICCPR. *See* ICCPR, *supra* note 32; *see also United States: Guantanamo Two Years On*, HUM. RTS. WATCH (Jan. 9, 2004), http://www.hrw.org/legacy/english/docs/2004/01/09/usdom6917.htm.

154. Secrecy can pose enormous challenges for oversight in democracy. *See generally* David Cole, Federico Fabbrini & Arianna Vedaschi, *Introduction*, *in* SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 1 (David Cole, Federico Fabbrini & Arianna Vedaschi, eds., 2013) (remarking that "[n]o issue more profoundly challenges the commitments of constitutional democracy than secrecy in government"); LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE (2006) (noting that the state secrets doctrine can be employed illegitimately); *see* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1959 (2007) (stating that the state secret doctrine diminishes congressional and judicial oversight of the Executive).

in foreign countries and more clearly fell within the prerogative of the Commander in Chief[155] (or the foreign court system under a continuing occupation). However, U.S. military detentions at Guantánamo Bay did not embody these characteristics.

Congress has the constitutional authority to establish judicial organs, institute right protections, and enact court procedures, and the American judiciary has dominion as the guarantor of rights and adjudicator of guilt,[156] but detainees at Guantánamo Bay were held for several years based on President Bush issuing himself and Secretary of Defense Rumsfeld with judicial and legislative powers[157] and with the authority to decide which defendants would be tried by a military commission.[158] The Tribunal also operated outside of evidentiary rules established in the Uniform Code of Military Justice[159] and incorporated secret trial procedures and denied the right to an attorney and to an adequate defense, which are violations of human rights law.[160] In a succession of

155. Irota v. MacArthur, 338 U.S. 197, 198 (1948) (per curiam) (denying habeas relief under the Supreme Court's original jurisdiction to Japanese officials who were convicted by the U.S. military tribunal in Japan, despite that the U.S. occupied and effectively controlled Japan); *see also Eisentrager*, 339 U.S. at 765-66, 778 (holding that nineteen alien petitioners, convicted by a U.S. military commission for taking hostile actions against the U.S. in China and were currently being held in a German prison, were not protected under the U.S. Constitution).

156. U.S. CONST. art. I sec. 8 (specifying Congress's right "[t]o constitute Tribunals inferior to the supreme Court"); *Id.* art. III sec. 2 (detailing that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . ." and that "[t]he Trial of all Crimes . . . shall be by Jury").

157. Department of Defense Military Commission Order No. 1 (Mar. 21, 2002), at. 6(H)(2)(4); van Aggelen, *supra* note 48, at 37-38; HUMAN RIGHTS WATCH, *supra* note 153 (stating that "[u]nder the rules, the president, through his designees, serves as prosecutor, judge, jury, and potentially, executioner . . . .").

158. van Aggelen, *supra* note 48, at 46-47 (noting that Judge Stephen Henley befittingly indicated that "[t]he government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war . . . [The] case must be based on the nature of the act, not simply on the status of the accused."); Detention, Treatment, and Trial, *supra* note 12; Amann, *supra* note 94, at 269-70 (noting that Rumsfeld was assigned to appoint panels, establish rules and procedures, and determine the level of proof needed to convict a defendant).

159. Detention, Treatment and Trial, *supra* note 12, at 1(e) (affirming that the system changed the normal rules of "law and rules of evidence."); MCCOY, *supra* note 62, at 214.

160. The Secretary-General, *supra* note 48, at 136; U.N. Comm. Against Torture, *Consideration of Reps. Submitted by States Parties Under Article 19 of the Convention*,

cases that became progressively more critical, the U.S. Supreme Court held that detainees were entitled to judicial review,[161] the Bush Administration did not have authority to constitute the tribunals,[162] and that habeas corpus rights under the U.S. Constitution did apply because the U.S. exercised "complete jurisdiction and control" over the Guantanamo Bay facility.[163]

### *2. Civil Remedies for Torture and Other Abuses During Interrogation*

With respect to civil remedies, it is not clear that severe abuses regularly occurred in locale I,[164] but in locale II, the Pentagon did have authority to provide damage remedies because it administratively allocated $26 million for 21,450 claims arising from actions occurring inside Afghanistan and Iraq through 2007.[165] A few of these awardees

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at 6, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) (affirming that incarcerating detainees indefinitely "at Guantanamo, without sufficient legal safeguards and without judicial assessment of the justification for their detention" violates the Convention Against Torture and stated that detainees should be released or granted judicial process and further appalled that the Detainee Treatment Act of 2005 sought to withdraw habeas corpus petitions); PETER JAN HONIGSBERG, OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR 114 (2009) (remarking that when the CSRT hearings did commence, the procedures "allowed unreliable and hearsay evidence, as well as secret or classified information, often from anonymous sources," and "[i]nformation obtained by torture," and defendants could not access classified evidence).

161. Rasul v. Bush, 542 U.S. 466, 466 (2004)

162. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793 (2006).

163. Boumediene v. Bush, 128 S. Ct. 2229, 2252-53 (2008).

164. HUMAN RIGHTS WATCH, FIGHTING TERRORISM FAIRLY AND EFFECTIVELY 6 (2008) (remarking that "[s]ome have suggested that it would be difficult to prosecute terrorism suspects in US federal courts because much of the evidence against them is tainted by coercion, abuse, or torture, and would not be admissible in court"). Consequently, if human rights abuses had been common in the U.S., cases would not have been brought in federal courts. In one compilation of cases involving acts inside the U.S., there are no substantial indications of human rights abuses. Zuckerman, Bucci & Carafano, *supra* note 134; *See also* Federal Bureau of Investigation, *supra* note 98 (disagreeing with abuse at Gitmo, which is the perspective of the FBI, the agency with federal law enforcement authority inside the U.S.).

165. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 50-51 (2007), *available at* http://www.gao.gov/new.items/d07699.pdf.

were abused prisoners and some violations were worse than others, but an average payout of $1,212 may not be significant compensation.

Iraqis were restricted from attaining compensation in their own courts. The U.S.-controlled Coalition Provisional Authority (CPA) enacted Order 17 to strip Iraqi courts from exercising jurisdiction over U.S. military personnel and military contractors,[166] conferring them with consummate immunity for any criminal or civil violation under Iraqi law.[167] Iraqis filed civil suits in U.S. federal courts for abuse occurring in detention facilities in Iraq, but because of the sovereign immunity defense, plaintiffs generally could not name the U.S., U.S. military, or government officials in their official capacity (who could substitute the state) as the defendant.[168] When foreign plaintiff-detainees sued U.S. top officials in their personal capacity, federal courts dismissed the cases on several grounds.[169]

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166. *See War Profiteering and Other Contractor Crimes Committed Overseas: Hearing Before the H. Subcomm. on Crime Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 54-55 (2007) (statement of Scott Horton, Adjunct Professor of Law, Columbia University School of Law).

167. M. Cherif Bassiouni, *Legal Status of US Forces in Iraq from 2003-2008*, 11 CHI. J. INT'L L. 1, 8 (2010); Coalition Provisional Authority Order No. 17 at 1 (June 27, 2004) (stating that "under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory"), *available at* http://psm.du.edu/media/documents/us_regulations/sofas/us_iraq_cpa_order_17.pdf.

168. John F. O'Connor, *Contractor Tort Immunity Under the Law of Military Occupation*, 14 UCLA J. INT'L L. & FOR. AFF. 367, 369-70 (2009).

169. Rasul v. Myers, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009) (barring the claims because the Federal Tort Claims Act required plaintiffs to pursue administrative remedies first); In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d. 85, 87-91, 101 (D.D.C. 2007) (alleging that they were hung from the ceiling by chains, hit until unconscious, deprived of food and sleep, tormented with dogs, forced to remain in stress positions, stripped naked and photographed, subjected to mock executions, and beaten, burned, and stabbed, the plaintiffs sued Secretary of Defense Donald Rumsfeld, Colonel Janet Karpinski, Lieutenant General Ricardo Sanchez, and Army Colonel Thomas Pappas; the court dismissed the personal capacity complaint because foreign citizens "without property or presence in the United States" have no constitutional rights under the Fifth and Eighth Amendments); Lee Ross, *Supreme Court Rejects Appeal of Abu Ghraib Inmates Claiming War Crimes Violations*, FOX NEWS, (June 27, 2011), http://www.militarytimes.com/article/20130109/NEWS/301090313/Iraqis-held-at-Abu-Ghraib-other-sites-get-5M (claiming war crimes violations).

Former detainees sued private contractors in U.S. federal court for abuse in detention facilities in Iraq and after several years of litigation, in January 2013, L-3 Services settled by paying $5.28 million to the plaintiffs, but this was the first federal court litigation to result in remedial relief for any plaintiff-detainees against the U.S. government or private contractors.[170] The settlement made the lawsuit terminate without a court deciding to impose liability under the law, setting precedent, or implicating the top of the chain of command for issuing interrogation orders, leaving immunities for the U.S. government intact.[171]

For remedies involving detainee abuse in locale III, there was a similar protective defense. Consider the case of German Khaled El-Masri, which European Union investigators called indisputably true.[172] The Council of Europe described that El-Masri was taken by the CIA in Macedonia and transported through a "rendition circuit" from Macedonia, to Afghanistan, to Iraq, and to Kabul, Afghanistan, where he was held without criminal charges in a "small, filthy, concrete cell" for four months and in solitary confinement for several more weeks.[173] The ECHR found that El-Masri was "severely beaten, sodomized, shackled and hooded, and subjected to total sensory deprivation" by his CIA captors.[174] El-Masri's case was one of mistaken identity.[175]

After his release, El-Masri sued the U.S. government via Bivens challenge, but his case was dismissed because his claim was

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170. Yost, *supra* note 2.

171. Kissinger v. Schneider, 412 F.3d 190, 196 (D.C. Cir. 2005); Kissinger v. Schneider, 310 F. Supp. 2d 251, 253-59 (D.D.C. 2004); Industria Panificadora, S.A. v. United States 763 F. Supp. 1154, 1159-61 (D.D.C. 1991), *aff'd*, 957 F.2d 886 (D.C. Cir. 1992); Chaser Shipping Corp. v. United States, 649 F. Supp. 736, 737-39 (S.D.N.Y. 1986); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 597-601 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

172. Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 64 (2009) (citing Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Members States: Second Report*, at 271, Doc. F-67075 (June 7, 2007) (noting that it is "undisputed . . . that Mr. El-Masri's account of his ordeal is true")).

173. COUNCIL OF EUROPE, CIA ABOVE THE LAW? SECRET DETENTIONS AND UNLAWFUL INTER-STATE TRANSFERS OF DETAINEES IN EUROPE 218-20 (2008).

174. *Beaten and Sodomized: European Human Rights Court Finds CIA Guilty of Torture*, REUTERS, Dec. 14, 2012, http://rt.com/news/cia-torture-eu-citizen-048/.

175. Fisher, *supra* note 131, at 1443.

subordinated to national security and the state secret privilege prevented El-Masri from accessing the documents needed to determine why he was detained.[176] The result in U.S. federal courts is all the more controversial when the ECHR ordered Macedonia to pay El-Masri €60,000 for permitting the CIA's abuse inside its sovereign jurisdiction.[177] Nonetheless, with respect to the American precedent, *El-Masri* ostensibly affirms that non-citizens may have no remedial recourse in U.S. federal court when abducted by American agents in a foreign country and transported to another territory pursuant to operations conducted in the name of national security, irrespective of the level of abuse or the credibility of the information underlying the arrest and detention.[178] A similar federal court reasoning and dismissal followed for Maher Arar, who was rendered to and abused in Syria,[179] and while the

176. El-Masri v. United States, 479 F.3d 296, 304, 313 (4th Cir. 2007) (holding that El-Masri "suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security."); El-Masri v. Tenet, 437 F. Supp. 2d 530, 530, 539 (E.D. Va 2006); George D. Brown, *"Counter-Counter-Terrorism Via Lawsuit" – The Bivens Impasse*, 82 S. CAL. L. REV. 841, 875 (2009); ACLU, *El-Masri v. Tenet*, (June 1, 2011), http://www.aclu.org/national-security/el-masri-v-tenet (noting that after the Supreme Court refused cert, the ACLU filed a claim with the Inter-American Commission on Human Rights).

177. *See Beaten and Sodomized*, *supra* note 174 (noting the ECHR's €60,000 award); Fisher, *supra* note 131, at 1447 (emphasizing the lack of collective American interest in permitting American executive officials to arrest the wrong people and to evade accountability).

178. *Id.* at 1445 (stating "El-Masri was not merely defending his own interests. He represented every individual, U.S. citizen or alien, who wants to avoid a like fate.").

179. CIA agents used Extraordinary Rendition and delivered Maher Arar to Syria, and after the Canadian government secured his release and confirmed that there was no evidence linking him to terrorism, Arar sued in U.S. federal court and the Bush administration defended by claiming that national security would be undermined if American courts asserted jurisdiction. MCCOY, *supra* note 62, at 173-74. Based on a Bivens action, Arar sued for violations of due process and prohibitions against torture and the court dismissed the case because the state secret doctrine was at issue, the political branches have the prerogative to control national security affairs, and Arar lacked standing for a constitutional claim without meeting the requirements of the Torture Victim Protection Act. Arar v. Ashcroft, 532 F.3d 157, 181-83 (2d Cir. 2008), *aff'g* Arar v. Ashcroft, 414 F. supp. 2d 250, 280, 283-85 (E.D.N.Y. 2006); Laura K. Donohue, *The Shadow of State Secrets,* 159 U. PA. L. REV. 77, 186-87 (2010); David Weissbrodt & Amy Berquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 626 (2006); Hawkins, *supra* note 132, at 213-14. For Arar's Torture Victim

U.S. Supreme Court refused to hear Arar's appeal in 2010, the U.S. government provided an apology and $10.5 million in compensation.[180] Similar to the L-3 Services settlement, compensation was granted without admitting illegalities and losing the case on the merits under binding law.[181]

Implicating private-sector civil defendants in Extraordinary Rendition, three plaintiffs sued Jeppesen Dataplan, Inc., a wholly-owned subsidiary of Boeing, in U.S. District Court for allegedly playing an "integral role" with the CIA in a "willful, intentional, wanton, malicious and oppressive" manner to facilitate Extraordinary Rendition,[182] but CIA Director Michael Hayden intervened in the complaint and submitted state secret declarations.[183] In February 2008 the federal district court dismissed the complaint against Jeppesen on the state secrets privilege[184] and after two years of appeals, the dismissal was affirmed.[185]

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Protection Act of 1992 claim, the court relied on INS Regional Director J. Scott Blackman's opinion that Arar lacked standing because he was "clearly and unequivocally a member of al Qaeda." Arar, 414 F. Supp. 2d at 254, 280-82.

180. Warren Richey, *Supreme Court Refuses Maher Arar Torture Case*, CHRISTIAN SCIENCE MONITOR, (June 14, 2010), http://www.csmonitor.com/USA/Justice/2010/0614/Supreme-Court-refuses-Maher-Arar-torture-case.

181. Arar, 414 F. Supp. 2d at 250 (deciding that federal courts could not hold U.S. government officials liable "in the absence of explicit direction by Congress . . . even if such conduct violates our treaty obligations or customary international law" and that the use of torture in rendition was not subject to judicial review).

182. *See* Lucien J. Dhooge, *The Political Question Doctrine and Corporate Complicity in Extraordinary Rendition*, 21 TEMP. INT'L & COMP. L.J. 311, 311-12, 320-22 (2007); *id.* at 317-19 (noting that Pakistani officials interrogated Binyam Mohamed and Abou Elkassim Britel and they were transferred to Morocco and the CIA captured Ahmed Agiza in Sweden and transferred him to Egypt); *id.* at 321-22 (plaintiffs contending that Jeppesen "knew or reasonably should have known" that their detained passengers would be subject to human rights violations when their flights were used to facilitate Extraordinary Rendition).

183. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 999 (9th Cir. 2009).

184. Mohamed v. Jeppesen Dataplan, Inc., No. 07-02798 (N.D. Cal. dismissed Feb. 13, 2008).

185. Mohamed, 563 F.3d at 997 (reversed and remanded on appeal, with the court holding that "the subject matter . . . is not a state secret."); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, (9th Cir. 2010) (holding that "the government's valid assertion of the state secret privilege warrants dismissal of the litigation").

## V. CONCLUSION

The phrase "global war on terror" served as a heuristic device to instill the perception of broad and unrestricted Executive war powers over military and law enforcement operations occurring in three general locales with three sets of applicable laws. Inside the U.S. (locale I), the inherent Executive law enforcement power is broad but is limited by the Constitution, federal law, and a reasonable factual interpretation of threats. Excessively abusive detentions and interrogations generally did not occur inside the U.S. Had interrogation operations, such as those that the Bush Administration approved for locales II and III, been employed inside the U.S., the American criminal justice system would have confronted insurmountable stress, many federal court criminal convictions might have been suspect, and numerous civil cases for remedial relief would likely have arisen. Relative to domestic arrestees, imminent danger from terrorism is not as elevated with detainees held in foreign countries, but the Bush Administration issued interrogation operations for war and occupation zones (locale II) and for other foreign jurisdictions (locale III).

The interrogation directives likely violated explicit prohibitions in the Geneva Conventions and human rights law, but the primary remedy for abused detainees was the far from generous administrative remedy. Significant civil compensation was paid to some plaintiffs following federal court litigation, including the L-3 Services settlement for $5.28 million to Iraqi plaintiffs for locale II operations and the federal government payment of $10.5 million to Maher Arar for abuse during Extraordinary Rendition, but federal courts did not issue any decision that enforced civil liability for abuses during detention or interrogation under substantive international or federal law.

The result is confounding when low-level individuals were criminally convicted for executing acts that might not have even been *ultra vires* to Executive directives;[186] many Executive directives could be viewed as

186. Davis, *supra* note 1, at 516 (accentuating that higher level officials are not subject to punishment, which is the "'different spanks for different ranks' problem."); Edward T. Pound, *Unequal Justice: Military courts are stack to convict--but not the brass. The Pentagon insists everything's just fine*, U.S. NEWS & WORLD REPORT (Dec. 16, 2002),

unconstitutional and in violation of the laws of war, human rights law, and federal law, and federal courts have imposed civil remedies on foreign government officials for international law violations in Alien Tort Statute cases.[187] Consequently, foreign plaintiffs can successfully sue foreign defendants, including foreign government officials in U.S. federal courts for acts infringing international law occurring outside the U.S., but foreign plaintiffs are unlikely to be successful against American government officials as defendants for acts occurring outside the U.S. that infringe international and (perhaps even) federal law due to the political question doctrine,[188] deference to Executive secrecy prerogatives when national security secrecy is asserted,[189] state and

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http://warchronicle.com/MilitaryJustice/analysis/UnequalJusticeUSNewsWorldReport.htm.

187. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878, 887 (2d Cir. 1980) (Paraguayan citizens successfully suing Americo Norberto Pena-Irala, the Inspector General of Police in Asuncion Paraguay, for the universal jurisdiction crime of torture in U.S. federal court for the torture and murder of the plaintiff's son because of Dr. Filartiga's dissent to the government. Following *Filartiga*, U.S. courts accepted civil jurisdiction over other universal jurisdiction crimes); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 201 (2004); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (noting that the ATS can be used for human rights violations that are "'specific, universal and obligatory.'").

188. Kissinger v. Schneider, 310 F. Supp. 2d 251, 258-59 (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918)) ("'the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . [branches], and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'"); Dhooge, *supra* note 182, at 324-25 (noting that federal courts struggled with the balance between the political question doctrine and addressing claims of environmental degradation, violations to the rights to life, and sustainable development by using the ATS as the jurisdictional means of incorporating substantive international law rules); *e.g.*, Sarei v. Rio Tinto, 487 F.3d 1193 (9th Cir. 2007).

189. Mohamed, 614 F.3d at 1070-71 (noting that only the government can assert the privilege and can do so at the pleading stage or during discovery, which can deprive the plaintiff from obtaining necessary information and thereby lead the court to grant summary judgment for the defendant); Mohamed, 563 F.3d at 1000-01; Donohue, *supra* note 179, at 140 (stating that over four dozen state secret cases arose between 2001 and 2009 based on Bush's NSA Terrorist Surveillance Program and reporting that there were 46 dismissals based on state secrets even though none of the cases involved essential state secrets); *see generally* Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive*, 91 YALE L.J. 570 (1982).

official immunities,[190] and (particularly during the Bush Administration) the questionable advice of appointed legal counsel who opined that detention and interrogation operations were legal due to the Executive authorizing operations.[191]

190. Industria Panificadora, S.A. v. United States, 957 F.2d 886, 886-87 (D.C. Cir. 1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 204-07 (D.C. Cir. 1985); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1091-92 (D.C. Cir. 1980); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating that "[g]overnment officials performing discretionary functions generally are [still] shielded from liability for civil damages insofar as their conduct does not clearly violate established statutory or constitutional rights of which a reasonable person would have known."); Berkovitz v. United States, 486 U.S. 531, 536, 542-43 (1988) (holding that a government employee's action is discretionary when it involves a "choice," but violating a federal law does not involve a choice because the official must adhere to the law).

191. *See generally* Robert Bejesky, *How the Commander in Chief's "Call for Papers" Veils a Path Dependent Result of Torture*, 40 SYRACUSE J. INT'L L. & COM. 1 (2013).