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# Introduction Essay: International Law Implications of the United States War on Terror

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# INTRODUCTORY ESSAY: INTERNATIONAL LAW IMPLICATIONS OF THE UNITED STATES' "WAR ON TERROR"

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## I. INTRODUCTION

The term "war on terror" has undoubtedly entered our common usage, notwithstanding heavy criticism that instead of using it as a metaphor, as in the "war on poverty" or the "war on drugs," terminology which has primarily served a rhetorical purpose, the US views the struggle against al Qaeda and associated terrorist groups and individuals as a real war.[1] Other critics have argued that employing the law of armed conflict is not an effective tool to counter terrorism, urging instead to consider terrorism as primarily a law enforcement problem. Thus, they suggest using the traditional criminal justice system to arrest, prosecute, and punish terrorists if they are found guilty.[2] President George W. Bush directly and unequivocally responded to such critics in his 2004 State of the Union Address to the Congress:

> I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted, and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.[3]

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1. Lord Goldsmith, the UK Attorney General from 2001 to 2007, considers the term "not only misleading but positively dangerous." Lord Goldsmith, *Justice and the Rule of Law*, 43 INT'L LAWYER 27, 29 (2009) [hereafter Goldsmith]. In his words, "saying 'War on Terror' then justifies holding people without trial after the international armed conflict has come to an end until this amorphous 'War on Terror' has come to an end -- and who is going to say when it has? And secondly, it has a powerful impact on legal questions, like whose job it is to deal with. My perception reading U.S. Supreme Court decisions is that calling it 'War on Terror' is designed to give to the Executive powers without the control of Congress because as military action it falls to the President as Commander-in-Chief to make decisions." *Id.*

2. *See, e.g.*, Leila Nadya Sadat, *Terrorism and the Rule of Law,* 3 WASH. UNIV. GLOBAL STUDIES L. REV. 135 (2004).

3. President George W. Bush, State of the Union Address (Jan. 20, 2004) *available at*

Although Secretary of State Hillary Clinton reportedly said in March 2009 that the new Administration had dropped "war on terror" from its lexicon, as she told reporters, "the [Obama] administration has stopped using the phrase and I think that speaks for itself . . .,"[4] President Barack Obama stated in his national security remarks on May 21, 2009, "Now let me be clear. We are indeed at war with al Qaeda and its affiliates."[5]

It seems appropriate to acknowledge that if and when terrorist acts are committed in situations of armed conflict, the laws of war apply to such acts, which may constitute war crimes; and when they are committed outside of situations of armed conflict, individuals suspected of committing such acts are not subject to the laws of war.[6] And along with the application of the laws of war, when they are applicable, human rights norms, some of which are non-derogable, must govern trial and detention of suspected terrorists. Also, suspected terrorists must be entitled to independent judicial review and the application of customary international law principles enshrined in Common Article 3 of the 1949 Geneva Conventions[7] and the pertinent provisions of Additional Protocols I[8] and II[9] of 1977.

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http://www.whitehouse.gov/briefingroom (last visited Aug. 8, 2009).

4. Sue Pleming, *Obama team drops "war on terror" rhetoric,* REUTERS, March 31, 2009 *available at* http://www.reuters.com/article/politicsNews/idUSTRE52T7MH20090330.

5. President Barack Obama, Remarks by the President on National Security (May 21, 2009) *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereafter President's National Security Remarks].

6. *See* International Commission of Jurists, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights, *Assessing Damage, Urging Action: Executive Summary*, at 9 (Feb. 16, 2009) a*vailable at* http://ejp.icj.org/IMG/ExecSumm.pdf [hereafter Eminent Jurists Panel]. The Panel stated:

> The laws of war only apply when there is a situation of armed conflict according to objective criteria recognised under international law. Thus, when terrorist acts are committed outside of such situations, they are not governed by international humanitarian law, but by domestic criminal law and international human rights law and, perhaps, international criminal law. Accordingly, individuals who are suspected of terrorist offences committed outside of situations of armed conflict cannot legally be labelled, tried, and/or targeted as combatants. Where terrorist acts trigger or occur during an armed conflict, such acts may well constitute war crimes, and they are governed by international humanitarian law, together with international human rights law. Persons suspected of having perpetrated such offences during an armed conflict cannot legally be placed beyond the protection of the law. As a minimum, they must be treated in accordance with non-derogable human rights guarantees as well as with the customary law standards embodied in Common Article 3 of the *Geneva Conventions of 1949* and Article 75 of *Additional Protocol I*, or Articles 4 and 6 of *Additional Protocol II*, of 1977.

*Id.*

7. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.. Common Article 3 appears in all four Geneva Conventions. It prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," (Article 3(1)(a)) and "outrages upon personal dignity, in particular humiliating and degrading treatment" (Article 3(1)(c).

8. Protocol Additional (No. I) to the Geneva Convention of August 12, 1949, and Relating to the

The Bush administration's counter-terrorism policies in waging war on terror raised questions about the administration's real—contrasted with its professed—commitment to faithfully adhere to the rule of law. The administration's questionable practices included the following: designating "suspected" terrorists accused of belonging to or associated with the Taliban or al Qaeda terrorist network as "illegal/unlawful enemy combatants"; the initial decision by the administration not to apply the Geneva Conventions to these detainees subjected to indefinite detention without trial and with inadequate review and the establishment of military commissions to try some of them; secret detention of "high value detainees;" harsh interrogation techniques to which several were subjected resulting in systematic infliction of pain and suffering, rising to the level of torture; warrantless electronic wiretapping and searches and invasive surveillance; and the use of extraordinary renditions of prisoners to countries where they were tortured.

As the Bush administration characterized its efforts in combating terrorism as fighting a global war on terror, its claim to use force for targeted killings even beyond the zone of active armed conflict, such as in Yemen, and the US invasion of Iraq, justified, in part, on Saddam Hussein's alleged contacts with al Qaeda and terrorism, also came under scrutiny.

While campaigning for president, then-Senator Barack Obama promised to close the military detention facility at Guantánamo Naval Base if elected, and was critical of several of the Bush administration's counter terrorism practices mentioned above. True to his promise, on his third day in office, President Barack Obama signed several executive orders charting a new direction by reversing most of these questionable policies and practices, some of which will be the subject of review in this essay.

## II. SELECTED COUNTERTERRORISM POLICIES AND PRACTICES OF THE BUSH ADMINISTRATION AFTER 9/11 AND THE NEW DIRECTION TAKEN BY THE OBAMA ADMINISTRATION

The following selected policies and practices will be reviewed here: detention; interrogation techniques; military commissions; extraordinary rendition; and targeted killing.

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Protection of Victims of International Armed Conflicts, concluded at Geneva, 8 June 1977, *entered into force* 7 December 1978, 1977 U.N.J.Y.B. 95, *reprinted in* 16 I.L.M. 1391 (1977), Article 75 prohibits violations mentioned earlier under Common Article 3, including the right to be tried in one's presence (Article 75, sec. 4(e)).

9. Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, 1977 U.N.J.Y.B. 135, 16 I.L.M. 1442 (1977). Article 4 prohibits violations as mentioned earlier under Common Article 3. Article 6 applies to the prosecution and punishment of criminal offenses related to armed conflict, including the right to be tried in one's presence (Article 6(e)).

*A. The Guantánamo Detention Camp and the Issue of Detention*

**1. Trends**

On January 22, 2009, President Barack Obama issued an Executive Order directing that Guantánamo detention facility be closed within one year.[10] This was based on the findings that over the past seven years the Department of Defense had detained at Guantánamo approximately 800 suspected terrorists as "enemy combatants," raising "significant concerns nationally and internationally,"[11] and that "prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice."[12] The Executive Order also stated that the Guantánamo detainees have the constitutional privilege of the writ of habeas corpus.[13]

The President ordered 1) immediate review of the status of each Guantánamo detainee[14] and 2) the detainees' confinement to be in accordance with humane standards, including the application of Common Article 3 of the Geneva Conventions.[15] During the review period, all proceedings before military commissions were halted.[16] The approximately 240 who remained in detention (more than 525 detainees were released before President Obama took office) "shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a matter consistent with law and the national security and foreign policy interests of the United States."[17]

Subsequently, in his May 21, 2009, address, President Obama discussed in detail the detainees' cases at Guantánamo, which he said fell into five distinct categories: 1) to try those who have violated American criminal laws in US federal courts whenever feasible; 2) detainees who have violated the laws of war to be tried through revised and reformed military commissions which are "fair, legitimate, and effective;" 3) detainees who have been ordered released by the courts; 4) detainees who can be transferred safely to another country; and 5) detainees who cannot be prosecuted for past crimes because, for example, evidence may be tainted, but who pose a clear danger to the security of the United States will not be released.[18] As of July 21, 2009, eleven prisoners had been transferred—four to Bermuda, three to Saudi Arabia, and one each to Chad, Iraq, France, and the United Kingdom.[19]

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10. Exec. Order No. 13,492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4,897 (Jan. 27, 2009).

11. *Id.* § 2(a).

12. *Id.* § 2(b).

13. *Id.* § 1(c).

14. *Id.* § 4(a).

15. *Id.* § 6.

16. *Id.* § 7.

17. *Id.* § 3.

18. President's National Security Remarks, *supra* note 5.

19. Amnesty International, USA, *Sounding a Note of Urgency, Judge Loses Patience Over Guantanamo Case; Detention and Interagency Policy Task Forces Delay Reports*, AI Index: AMR

Elaborating on the fifth category, the President stated:

> Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture—like other prisoners of war—must be prevented from attacking us again. Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.[20]

He said that the objective is to construct a legitimate legal framework for the remaining Guantánamo detainees whom the administration cannot transfer and will not release.

Earlier, on March 13, 2009, the Justice Department filed a memorandum in the District of Columbia District Court regarding the administration's detention authority pertaining to Guantánamo detainees.[21] While it abandoned the Bush administration's term "enemy combatant," the Obama administration argued in the memorandum for the continued detention of Guantánamo detainees. This, it said, was pursuant to a valid exercise of the administration's authority to use force against "members of an opposing armed force . . . [including] the irregular forces of an armed group like al-Qaeda" or "members of enemy forces," even if "they have not actually committed or attempted to commit any act of depredation or entered the theater or zone of active military operations."[22]

The Obama administration relied on the principles of the laws of war and on the statutory authority given by Congress in its Authorization for the Use of Military Force (AUMF)[23] to contend that "the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001, and persons who harbored those responsible for these attacks, and also

> to detain in this armed conflict those persons who were part of, or substantially supported Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition

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51/084/2009, July 21, 2009 *available at* http://www.amnestyusa.org/document.php?id=ENGUSA20090721001.

20. *Id.*

21. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, U.S. District Court for the District of Columbia, *In re Guantanamo Bay Detainee Litigation,* Misc. No. 08-442 (TFH) (D.C. 2009) [hereafter Obama Administration's Memorandum].

22. *Id.*, at 5-6.

23. Authorization for the Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001).

> partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[24]

The Memorandum stated that the position the administration was asserting was not "meant to define the contours of authority for military operations generally, or detention in other contexts," but was limited to the Guantánamo detainees, as "[a] forward-looking multi-agency effort is under way to develop a comprehensive detention policy with respect to individuals captured in connection with armed conflicts and counterterrorism operations, and the views of the Executive Branch may evolve as a result."[25] This was a reference to another executive order signed by President Obama on January 22, 2009, for conducting a review of detention policy options.[26] Under this executive order, a Special Task Force on Detainee Disposition was established

> to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.[27]

The Task Force was to submit a report within six months but the Order provided for an extension if necessary and the Task Force did seek an extension.

Finally, the November 20, 2008, Report of the US Senate Committee on Armed Services on the Detainees' Treatment in U.S. Custody[28] is revealing. It indeed is a harsh indictment of those responsible for the abuse, as it states in its Executive Summary:

> The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority. This report is a product of the Committee's inquiry into how those unfortunate results came about.[29]

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24. Obama Administration's Memorandum, *supra* note 21, at 1-2, *quoting Ex parte Quirin*, 317 U.S. 1, 38 (1942).

25. *Id.* at 2.

26. Exec, Order No. 13,493, Review of Detention Policy Options, 74 Fed. Reg. 4,901 (Jan. 27, 2009).

27. *Id.* § 1(e).

28. Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody , 110th Cong., 2nd Sess. (Nov. 20, 2008) *available at* http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf.

29. *Id.* at xii.

The comprehensive report, comprising more than 230 pages, detailed the various memoranda, opinions, recommendations, orders, and discussions and debates of specific aggressive interrogation plans and techniques discussed above.

**2. Appraisal and Recommendation**

While abandoning the "enemy combatant" label, the Memorandum's new definition authorizes detention, adding a requirement that a detainee would have to have "substantially supported," and not merely "supported" al-Qaeda, the Taliban, or forces associated with them in order to justify the detention. This definition would obviously not have satisfied those who were critical of the Bush administration's Guantánamo detention policies—indefinite detention without trial—because it seemed merely a continuation of the prior policies initiated by President Bush. Joanne Mariner, terrorism and counterterrorism director at Human Rights Watch, said, "By bringing the practice of indefinite detention without charge onto US soil, the Obama administration would be closing Guantánamo in name only. President Obama should think hard about whether he wants to institutionalize the discredited practice that made Guantánamo a stain on the reputation of the United States."[30] She added, "Pursuing a policy of indefinite detention without charge would send the Obama administration down the same misguided path as its predecessor. It would be a major break from longstanding principles of American justice."[31]

According to Steven A. Engel, who was a senior lawyer in the Bush administration's Department of Justice Office of Legal Counsel and responsible for detainee issues, the term "enemy combatant" was not the issue. He observed that the Memorandum's definition "seems fundamentally consistent with the positions of the prior administration."[32] He added, "The important point is that they recognize that we can detain members of the enemy" during a war.[33]

The major issue of contention is the US assertion that it is engaged in a global war against al-Qaeda, the Taliban, and their affiliated forces. Consequently, the US claims the authority to capture a person from anywhere in the world and not merely from the theater of an armed conflict, and detain that person indefinitely. This authority it claims on the grounds of the person's support for or association with al-Qaeda or the Taliban. As the Memorandum argued,

> the AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation "would contradict Congress' clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital

30. Human Rights Watch, *US: Drop Plans for Indefinite Detention Without Charge,* June 29, 2009, *available at* http://www.hrw.org/en/news/2009/06/29/us-drop-plans-indefinite-detention-without-charge.

31. *Id.*

32. C. William Glaberson, *U.S. Won't Label Terror Suspects as "Combatants,"* N.Y. TIMES, March 14, 2009, at A1 *available at* http://www.nytimes.com/2009/03/14/us/politics/14gitmo.html?_r=1&partner=msnbcpolitics&emc=rss.

33. *Id.*

> intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary." Under a functional analysis, individuals who provide substantial support to al-Qaeda forces in other parts of the world may properly be deemed part of al-Qaeda itself. Such activities may also constitute the type of substantial support that "in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention."[34]

Relying on Articles 3 and 4 of the Third Geneva Convention and Common Article 3 of the Geneva Conventions and Additional Protocols to the Geneva Conventions and their Commentaries, the Memorandum rejected the Petitioner's contention that the US can detain only those "directly participating in hostilities," and that all detainees must be treated as civilians.[35] Human Rights Watch's Mariner urged the administration to reconsider its views and prosecute "terror suspects in the federal courts, not [look] for ways to circumvent the criminal justice system."[36]

Although the United States claims the power to capture a suspected terrorist anywhere in the world, in reality those captured are primarily in Afghanistan, which is the theater of the armed conflict, or the neighboring Pakistan, which arguably is also part of the armed conflict theater. Thus, above all, the main issue is the form, structure, and content of the preventive detention regime and the nature of the legal protections afforded the detainees. As President Obama has stated, the US detention policies must embody "clear, defensible, and lawful standards" in line with the rule of law, with fair procedures and a thorough process of periodic review to carefully evaluate and justify any prolonged detention.[37] This suggests that there will be adequate safeguards so that detainees' treatment is not subject to an arbitrary decision process.

The President's call for the US detention policies to comply with the rule of law implicitly suggests that the detainees will be treated fairly. Does this mean that they will have the right to an independent hearing? Will an impartial body providing adequate due process hear an appeal from the detainees? Will they be informed of the reasons for which they are being held? Finally, will there be judicial review of their detention? The President's Task Force has yet to provide answers to these questions, and I hope that the Task Force report recommends that detainees be entitled to these rights.[38]

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34. Obama Administration's Memorandum, *supra* note 21, at 7.

35. *Id.* at 8-10.

36. Human Rights Watch, *US: Obama Should Reconsider New Position on Guantanamo Detainees,* March 13, 2009, *available at* http://www.hrw.org/en/news/2009/03/13/us-obama-should-reconsider-new-position-guantanamo-detainees

37. *See supra* text accompanying note 20.

38. For similar suggestions see Anthony Dworkin, *Beyond the "War on Terror: Towards a New Transatlantic Framework for Counterterrorism*, EUR. COUNCIL ON FOREIGN REL. 6-7 (May 27, 2009), *available at* http://ecfr.3cdn.net/1e18727eafdddcceb7_81m6ibwez.pdf.

*B. Coercive Interrogation Techniques*

**1. Trends**

The torture memos written by the Department of Justice in the Bush administration have been the subject of much discussion in the recent past. In his National Security Remarks, President Obama discussed his release of these memos. In his words,

> I did not do this because I disagreed with the enhanced interrogation techniques that those memos authorized, and I didn't release the documents because I rejected their legal rationales—although I do on both counts. I released the memos because the existence of that approach to interrogation was already widely known, the Bush administration had acknowledged its existence, and I had already banned those methods.[39]

The Bush administration's authorization of coercive techniques was based on the Department of Justice's memos and legal opinions. To illustrate, Jay S. Bybee, then-Assistant Attorney General for the Office of Legal Counsel to Alberto Gonzales, Counsel to the President, stated in his memo regarding Standards of Conduct for Interrogation:

> We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture, use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party. The legislative history simply reveals that congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.[40]

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39. President's National Security Remarks, *supra* note 5.

40. Assistant Attorney General Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

In another memo, regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees, Bybee concluded that the Geneva Conventions "do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war."[41]

It was on the basis of this second memo and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, to President Bush, that the President announced his decision that "none of the provisions of Geneva apply to our conflict with al-Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaeda is not a High Contracting Party to Geneva."[42] He further determined that although he had "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan," he declined "to exercise that authority [at the time]" and thus determined "that the provisions of Geneva will apply to [the] present conflict with the Taliban[, reserving] the right to exercise this authority in this or future conflicts."[43] He also determined that Common Article 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees,[44] and that, as unlawful combatants the Taliban detainees do not qualify as prisoners of war under Article 4 of the Geneva Conventions, nor do al Qaeda detainees, because the Conventions do not apply to the US conflict with al Qaeda.[45]

The International Committee of the Red Cross issued a report on the treatment of the "high-value" detainees held by the CIA, concluding that in many cases the detainees had been tortured, a report that was leaked to the press in March 2009.[46] The response of the Foreign Affairs Committee of the British Parliament was telling, as in its 2007 Annual Report it contended that "given the clear differences in definition, the UK can no longer rely on US assurances that it does not use torture, and we recommend that the government . . . not rely on such assurances in the future."[47]

President Obama rejected the Bush administration's interpretations of international law redefining torture and thus allowing the infliction of pain and suffering through coercive interrogation methods, such as "water-boarding," a simulated drowning technique which results in near suffocation of suspected

41. Assistant Attorney General Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002) *available at* www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf.

42. President George W. Bush, Memorandum for: the Vice President; the Secretary of State; the Secretary of Defense; the Attorney General, et al., para. 2(a), at 1 (Feb. 7, 2002) *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

43. *Id.* para. 2(b).

44. *Id.* para. 2(c).

45. *Id.* para. 2(c) and (d).

46. International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High-Value" Detainees" in CIA Custody* 26, February 2007 *available at* www.nybooks.com/icrc-report.pdf.

47. UK FOREIGN AND COMMONWEALTH OFFICE, HUMAN RIGHTS ANNUAL REPORT 2007 25 (2008) *available at* http://www.fco.gov.uk/en/about-the-fco/publications/publications/annual-reports/human-rights-report1/.

terrorists. The reversal came in an executive order he signed on January 22, 2009, entitled *Ensuring Lawful Interrogations*.[48] The executive order revoked the earlier Executive Order of 13440 of July 20, 2007, which had interpreted Geneva Conventions Common Article 3 as applied to a program of detention and interrogation operated by the Central Intelligence Agency. It also revoked all other "executive directives, orders, and regulations inconsistent with this order issued from September 11, 2001 to January 20, 2009, "concerning detention or the interrogation of detained individuals.[49]

Henceforth, detainees are to be treated consistent with the pertinent laws and treaties, including the Convention Against Torture and Common Article 3 of the Geneva Conventions.[50] The CIA's interrogation techniques or treatments related to interrogation must comply with nineteen interrogation methods outlined in the *Army Field Manual* interrogation techniques and treatments.[51] Interpretations of Common Article 3 must also be in conformity with the *Army Field Manual* and not on any interpretations of federal criminal laws, the Convention Against Torture and Common Article 3 issued by the Department of Justice between September 11, 2001, and January 20, 2009.[52]

Furthermore, the CIA's secret prisons are abolished and the CIA is prohibited from operating any such detention facility in the future.[53] The International Committee of the Red Cross is to have access to detained individuals.[54] Finally, a Special Interagency Task Force is established to review interrogation practices allowed by the Army Field Manual, "and, if warranted, to recommend any additional or different guidance for other departments or agencies," and transfer policies of individuals to other nations.[55] The Task Force was to report to the President within six months or seek extension if necessary. It should be noted that the report was delayed as the Task Force sought such extension. However, on August 24, 2009, Attorney General Eric Holder announced that the Task Force on Interrogations and Transfer Policies had proposed the establishment of a "specialized interrogation group" of law enforcement, intelligence, and defense officials "to conduct interrogations in a manner that will strengthen national security consistent with the rule of law."[56]

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48. Exec. Order No. 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (January 27, 2009).

49. *Id.* § 1.

50. *Id.* § 3(a).

51. *Id.* § 3(b).

52. *Id.* § 3(c).

53. *Id.* § 4(a). On August 24, 2009, Attorney General Eric Holder appointed a federal prosecutor to investigate CIA interrogation practices "after the Justice Department released a long-secret report showing interrogators choked a prisoner repeatedly and threatened to kill another detainee's children." Mark Mazzetti & Scott Shane, *Investigation Is Ordered Into C.I.A. Abuse Charges*, N.Y. TIMES, Aug. 25, 2009, at A1.

54. *Id.* § 4(b).

55. *Id.* § 5.

56. Press Release, U.S. Department of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009) *available at* http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html.

### 2. Appraisal and Recommendation

The Obama administration's unequivocal rejection of the coercive interrogation techniques used against detainees under the Bush administration has given a powerful message to the world community that the United States is setting a new course, that it is renewing its commitment to strictly comply with international human rights standards, and that its interrogation policies are now in synch with the accepted international law norms on torture.

Along with issuing the executive order prohibiting torture, President Obama has strongly expressed his opposition to torture, including the "core principle that torture is never justified." On the 25th anniversary of the Torture Convention, June 26, 2009, the President stated:

> Torture violates United States and international law as well as human dignity. Torture is contrary to the founding documents of our country, and the fundamental values of our people. It diminishes the security of those who carry it out, and surrenders the moral authority that must form the basis for just leadership. That is why the United States must never engage in torture, and must stand against torture wherever it takes place.[57]

However, as the United States would rely upon the Eighth Amendment to the Constitution's prohibition against "cruel and unusual punishments," its interpretation may vary from an interpretation under the Convention Against Torture mandate prohibiting "cruel, inhuman and degrading treatment." These varying interpretations notwithstanding, the outcomes resulting from the application of these standards may not be that different. Consequently, this is not likely to create any major problem. But there still remains an outstanding issue regarding the questioning of detainees held overseas by other countries and the use of information received from such questioning. There is a need to formulate common standards on this critical point, on which the US and its allies can agree.[58]

## *C. Trial by Military Commissions*

### 1. Trends

President Obama's reversal of the Bush administration's counterterrorism policies did not include the rejection of military commissions, which he supported as having "a history in the United States dating back to George Washington and the Revolutionary War.[59] He said they provide an appropriate venue to try detainees accused of violating the laws of war, because they "allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence

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57. Press Release, The White House, Statement by President Barack Obama on United Nations International Day in Support of Torture Victims (June 26, 2009) http://www.whitehouse.gov/the_press_office/Statement-by-President-Barack-Obama-on-United-Nations-International-Day-in-Support-of-Torture-Victims/.

58. For a similar recommendation, see Dworkin, *supra* note 38, at 7.

59. President's National Security Remarks, *supra* note 5.

gathered from the battlefield that cannot always be effectively presented in federal courts."[60]

In 2006 the US Supreme Court held in *Hamdan v. Rumsfeld*,[61] that the military commission procedure violated the Uniform Code of Military Justice, as well as the Geneva Conventions.[62] The Court observed that the military commission's procedures must include the protections of Common Article 3, including the right of the accused to be present at trial and to have access to evidence of guilt.[63]

In response to *Hamdan*, where the Court had also ruled that the military commission to try the suspected terrorist was not properly authorized by any Congressional act, Congress passed the Military Commissions Act of 2006,[64] under which detained aliens determined to be enemy combatants were denied jurisdiction with respect to habeas actions.[65] In a challenge on this issue before the Supreme Court, *Boumediene v. Bush*,[66] the Court ruled five-to-four that "the privilege of habeas corpus entitled the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[67] It held that the Detainee Treatment Act (DTA)[68] procedures under which the accused was being tried, and pursuant to which the court reviews the legality of standards and procedures of Combatant Status Review Tribunal determinations, was "an inadequate substitute for habeas corpus."[69] In dissent, Chief Justice Roberts stressed that habeas may be suspended only under the Suspension Clause and thus only when public safety requires it in times of rebellion or invasion.[70]

It is also worth noting that the US Human Rights Council's Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Sheinin, criticized the use of military commissions to try terrorist suspects.[71] In his report following his mission to the United States of America in May 2007, Sheinin noted "issues surrounding the independence of the commissions, their potential use to try civilians, and their lack

60. *Id.*

61. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). It was a five-to-three decision, with Chief Justice Roberts recusing himself as he had voted in favor of the government when the case was heard by the Court of Appeals for the District of Columbia as *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

62. *Id.* at 615-625.

63. *Id.* at 635.

64. Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

65. *Id.* § 7.

66. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

67. *Id.* at 2266, *citing I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001).

68. Detainee Treatment Act (DTA), Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005), (codified at 42 U.S.C. § 2000dd(a) (2006)).

69. *Id.* at 2274.

70. 128 S.Ct. at 2296.

71. U.N. Human Rights Council, Martin Sheinin, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism*, U.N. Doc. A/HRC/6/17/Add.3, at 2-3 (Nov. 22, 2007).

of appearance of impartiality," and also addressed various issues concerning evidentiary proceedings before these commissions and the consequences of acquittal or completion of sentence following conviction.[72]

As mentioned earlier, President Obama did not reject the use of military commissions to try detainees, although he considered them as constituted under the Bush administration "flawed" and needing reform. He stated his proposed plan of reform:

> We will no longer permit the use of evidence—as evidence statements that have been obtained using cruel, inhuman or degrading interrogation methods. We will not longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay, and we will give detainees greater latitude in selecting their own counsel, and more protections if they refuse to testify [, thus making] our military commissions a more credible and effective means of administering justice . . ."[73]

The President said that he would work with Congress to reform the military commissions system. The legislation backed by his administration for revising the military commissions was included in section 1031 of the National Defense Authorization Act for fiscal year 2010.[74] Under the proposed Act, alien individuals previously labeled "unlawful enemy combatants" are now called "unprivileged enemy belligerents," who, having engaged in hostilities or supported hostilities against the United States can be tried before the commissions for violation of the laws of war and other offenses. The Act would establish procedures governing the use of these commissions.

### 2. Appraisal and recommendations

The military commissions system came under criticism both nationally and internationally. For example, Lord Goldsmith, then Attorney General of the United Kingdom, said in May 2006 that he was "unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offered sufficient guarantees of a fair trial in accordance with international standards."[75]

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72. *Id.*, ch. III.

73. President's National Security Remarks, *supra* note 5.

74. National Defense Authorization Act for Fiscal Year 2010, S. 1390, H.R. 2647, 111th Cong. Ch. 47A, Subch. I, § 948(b)-(d) (2009).

75. *UK calls for Guantanamo closure*, BBC NEWS, May 10, 2006, *available at* http://news.bbc.co.uk/2/hi/uk_news/politics/4759317.stm. More recently, Lord Goldsmith has shared his reflections:

> [M]y view of the original Military Commissions for those detained at Guantanamo Bay are well known. When British nations were slated for trial I went to Washington to negotiate. My position was simple: put them on trial, a fair trial in accordance with international standards or release them. I considered the rules and regulations in detail over a period of months in the summer and fall of 2003. My clear conclusion was that the Military Commissions did not provide such guarantees. I advised that we should not allow our citizens to stand trial in such circumstances and insisted that they be returned to the UK -- which ultimately they were.

Goldsmith, *supra* note 1, at 30.

That was before the Congress adopted the Military Commissions Act of 2006. However, even after the new legislation was adopted, the system was not acceptable to many critics, especially since it did not prohibit the use of evidence obtained through coercion, it treated aliens and US citizens differently, and it excluded the application of habeas corpus.[76]

Now that President Obama has prohibited the use of evidence obtained through "cruel, inhuman, or degrading" interrogation methods, a major stumbling block is lifted. Also, he has indicated that US proceedings will comply with generally accepted international standards of due process. The reformed military commissions must be seen as impartial, capable of providing fair trials, and they should offer essential procedural guarantees, such as those embodied in the International Covenant on Civil and Political Rights.[77] These include the presumption of innocence,[78] the right to have the judgment pronounced publicly,[79] the right to be informed promptly of the charges,[80] the right to have counsel of one's choosing,[81] the right to be tried without delay,[82] the right to be tried in one's presence,[83] the right to call witnesses and to cross-examine the prosecution's witnesses,[84] and the right not to be compelled to testify against oneself, or to confess guilt.[85]

*D. Extraordinary Rendition*[86]

**1. Trends**

The policy of rendition means "the return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime."[87] Such a transfer is outside the official process of extradition to return the fugitive to the receiving country to face legal process. Renditions undertaken by the Bush administration are termed "extraordinary" because after September 11, 2001, the CIA was authorized to engage in transporting outside any judicial process suspected terrorists to undisclosed locations around the world where they were kept

76. Goldsmith, *supra* note 1, at 30. Lord Goldsmith considered these provisions to be the major problems, along with the provision which "allows evidence that would not be admitted normally to be relied on." *Id.*

77. International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

78. *Id.* art. 14(2).

79. *Id.* art. 14(1).

80. *Id.* art. 14(3)(a).

81. *Id.* art. 14(3)(b).

82. *Id.* art. 14(3)(c).

83. *Id.* art. 14(3)(d).

84. *Id.* art. 14(3)(e).

85. *Id.* art. 14(3)(g).

86. *See generally* Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. UNIV. L. REV. 1405 (2008); Robert Johnson, Note: *Extraordinary Rendition: A Wrong Without a Right*, 43 UNIV. RICH. L. REV. 1135 (2009); Mario Silva, *Extraordinary Rendition: A Challenge to Canadian and United States Legal Obligations Under the Convention Against Torture*, 39 CAL. W. INT'L L. J. 313 (2009).

87. BLACK'S LAW DICTIONARY 1322 (8th ed. 2004).

incommunicado and hidden from the Red Cross. The objective was to seek intelligence through harsh and abusive interrogation.

Those transferred included detainees at Abu Ghraib where they were initially abused. Subsequently, the CIA employed private contractors to transfer suspected terrorists in private jets to selected destinations where they faced real risk of torture or other ill treatment. Investigations have revealed that those rendered were subjected to brutal, harsh techniques and many were treated in violation of the Convention Against Torture.[88] Several countries were reportedly involved in allegedly facilitating extraordinary renditions or assisting in the rendition process. These included Afghanistan, Bosnia, Canada, Egypt, Germany, Indonesia, Italy, Japan, Jordan, Macedonia, Morocco, Pakistan, Poland, Romania, Spain, Sweden, Syria, and the United Kingdom.[89]

The veil of secrecy was eventually lifted after investigative reporting by journalists,[90] reports by human rights organizations,[91] studies conducted by the

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88. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, G.A. Res. 39/46 (Annex), U.N. GAOR, 39th Sess., Supp. No.51, at 197, U.N. Doc. A/39/51 (1985), *reprinted in* 23 I.L.M 1027 (1984).

89. *See* STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM, at app. B (2006) [hereafter Ghost Plane]; Eminent Jurists Panel, *supra* note 6, at 81.

90. *See, e.g.*, Ghost Plane, *supra* note 89; Comm. on Int'l Human Rights of the Ass'n of the Bar of the City of N.Y. & Ctr. for Human Rights and Global Justice, N.Y. Univ. Sch. of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 15 (2004) *available at* http://www.chrgj.org/docs/TortureByProxy.pdf; Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005 *available at* www.newyorker.com; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, March 6, 2005, at A1; Dana Priest, *CIA's Assurances on Transferred Suspects Doubted*, WASH. POST, March 17, 2005, at A1; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1; Dana Priest, *CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1; Dan Bilefsky, *European Inquiry Says C.I.A. Flew 1,000 Flights in Secret*, N.Y. TIMES, April 27, 2006, at A12; Craig Whitlock, *European Probe Finds Signs of CIA-Run Secret Prisons*, WASH. POST, June 8, 2006, at A16; Craig Whitlock, *European Report Details Flights by CIA Aircraft*, WASH. POST, Nov. 29, 2006, at A14; Stephen Grey & Doreen Carvajal, *Secret Prisons in 2 Countries Held Qaeda Suspects, Report Says*, N.Y. TIMES, June 8, 2007, at A12; Molly Moore, *Report Gives Details on CIA Prisons*, WASH. POST, June 9, 2007, at A1.

91. *See, e.g.*, Amnesty International, USA, *Below the Radar: Front Companies Used in Secret Flights to Torture and "Disappearance,"* AI Index No. AMR 51/054/2006, April 4, 2006; Human Rights Watch, *Sweden Violated Torture Ban in CIA Rendition: Diplomatic Assurances Against Torture Offer No Protection From Abuse* (Nov. 9, 2006) *available at* www.hrw.org. A 2008 report by Amnesty International details several European states' role in rendition and secret detention, Amnesty International, *State of Denial: Europe's Role in Rendition and Secret Detention*, AI Index No. Eur. 01/003/2008 (2008). The organization reports

> European states concealed their role in renditions and secret detention until 2004. Today, after painstaking research by Amnesty International, other NGOs, journalists, lawyers, prosecutors in a few European states, and two bodies of the Council of Europe and the European Parliament, some of the facts are now known -- as is the suffering of the victims of rendition and enforced disappearance and their families. But much remains concealed, due largely to the failure of states to co-operate with investigations or to carry their own

Council of Europe[92] and the United Kingdom,[93] and hearings before the US Congress.[94] Congress subsequently enacted the Detainee Treatment Act[95] to ban cruel, inhuman, and degrading treatment.

In a news conference on June 9, 2006, President Bush eventually confirmed the existence of the CIA's rendition program.[96] Subsequently, on September 6, 2006, he revealed further information on the CIA rendition program.[97] He said that, in addition to the suspected terrorists held at Guantánamo,

> a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. This group includes individuals believed to be the key architects of the September the 11th attacks and attacks on the USS Cole, an operative involved in the bombings of our Embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians across the world. These are dangerous men with unparalleled knowledge about terrorist networks and their plans of new attacks. The security of our Nation and the lives of our citizens depend on our ability to learn what these terrorists know.[98]

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independent and impartial investigations.

*Id.* at 2.

92. *See, e.g.*, Report, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Dick Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States,* Doc. 10957, June 12, 2006 *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm (revealing a global "spider's web" of CIA detentions and transfers and alleged collusion by 14 Council of Europe Member States); Report, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report, Explanatory Memorandum*, Rapporteur Dick Marty, Doc. 11302 rev., June 11, 2007 (reporting that secret agreements developed around NATO authorization agreed on October 4, 2001, led to grant of blanket overflight rights and access to ports and military bases by European countries for covert CIA operations, including secret detentions and rendition); Comm. on the Alleged use of Eur. Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007 (2007) *available at* www.europarl.europa.eu.

93. *See, e.g.*, All Party Parliamentary Group on Extraordinary Rendition, *Briefing: Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (Dec. 2005), *available at* http://www.chrgj.org/docs/APPG-NYU%20Briefing%20Paper.pdf.

94. *See, e.g., Rendition to Torture: The Case of Maher: Hearing before the Subcomm. on International Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary*, 110th Cong. (2007).

95. DTA, *supra* note 68.

96. President's news conference with Prime Minister Anders Fogh Rasmussen of Denmark, 42 WEEKLY COMP. PRES. DOC. 1105, 1111 (June 9, 2006).

97. President George W. Bush, *Remarks on the War on Terror,* 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006). President Bush said, "[W]hat I'll tell the Prime Minister, is that in cases where we're not able to extradite somebody who is dangerous, sometimes renditions take place. It's been a part of our Government for quite a period of time . . . in order to protect people. And as we do so, we protect the sovereign rights of nations that we're involved with." *Id.*

98. *Id.*

President Bush also disclosed that fourteen suspected terrorists, who were then held in CIA custody, were to be transferred to Guantánamo and their questioning there would comply with the new Army Field Manual.[99]

As mentioned above, early in his administration President Obama ordered the closure of CIA secret prisons and prohibited the Agency from operating any such detention facility in the future.[100] However, he did not ban the transfer of suspected terrorists to other countries, but instead appointed a Task Force to review transfer policies of individuals to other countries. On August 24, 2009, Attorney General Eric Holder announced the Task Force's proposal of new policies under which the practice of transferring terrorism suspects to third countries for detention and interrogation will continue but will "ensure that U.S. practices in such transfers comply with U.S. law, policy and international obligations and do not result in the transfer of individuals to face torture."[101]

**2. Appraisal and Recommendations**

Extraordinary renditions conducted by the CIA came under heavy criticism, both domestically and internationally. The US policy and its practices were seen as violations of the basic human rights norms, as prisoners were reportedly tortured and ill-treated. The case of Maher Arar[102] brought home the abuses associated with such renditions. Arar, who holds dual citizenship of Canada and Syria and lives and works in Canada, was detained at Kennedy Airport in New York while in transit to Canada in September 2002 under suspicion of association with al Qaeda. He was arrested and held for thirteen days by the US authorities and interrogated without access to counsel, and was then transferred to Syria, notwithstanding his objection that he risked torture there. Held in Syria for nearly a year, he was repeatedly tortured there. Eventually Syria concluded that Arar had no terrorist links and released him.

The Canadian government came under heavy criticism as it was considered complicit in this rendition. A commission of inquiry established by the Canadian government found Arar to have no association with al Qaeda and also confirmed that he had been tortured.[103] He received financial compensation from Canada,[104] since Canada had likely supplied the US with information that was "inaccurate." The Commission concluded that both the Canadian and US officials violated their

99. *Id.* at 1573-74.

100. Exec. Order No. 13,491, *supra* note 53.

101. Press Release, U.S. Department of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009) *available at* http://www.usdoj.gov/opa/pr/2009/August/09-ag0835.html.

102. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar*, Vol. I Factual Background, Vol. II Analysis & Recommendations, Canada, Sept. 18, 2006 [Arar Commission].

103. *Id.*

104. Ian Austen, *Canada Will Pay $9.75 Million to Man Sent to Syria and Tortured,* N.Y. TIMES, Jan. 27, 2007, at A5.

obligations under Article 3 of the Convention Against Torture and violated the principle of *non refoulement* by carrying out the extraordinary rendition.[105]

Arar brought suit in a US federal district court seeking money damages and declaratory relief from the government and several officials, including Attorney General John Ashcroft,[106] but he was denied a remedy. The Bush administration claimed that the lawsuit implicated national security and foreign policy considerations. The district court's response was that

> the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched—perhaps deliberately—by the Legislative and Executive branches. To do otherwise would threaten "our customary policy of deference to the President in matters of foreign affairs." . . . [citations omitted.] In sum, whether the policy be seeking to undermine or overthrow foreign governments, or rendition, judges should not, in the absence of explicit direction by Congress, hold officials who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law.[107]

On Arar's appeal, the Second Circuit characterized the case as an immigration case, thus denying Arar any remedy[108] on his claim invoking alleged violations under the Torture Victim Prevention Act and the Fifth Amendment of the US Constitution.[109]

It is worth noting that the Convention Against Torture's ban on torture is absolute. In *Saadi v. Italy*,[110] the European Court of Human Rights unequivocally stated that a state's obligation not to expel or extradite an individual to the receiving state where s/he would face a real risk of torture was subject to no exceptions whatsoever, no matter how "undesirable or dangerous" the involved person's conduct may be.[111] This is the existing standard and it is the one the US must follow.

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105. Arar Commission, *supra* note 102, Vol. II, at 13-16.

106. *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D. N.Y. 2006).

107. *Arar*, 414 F.Supp.2d at 283.

108. *Arar v. Ashcroft*, 537 F.3d 157, 184 (2d. Cir. 2008) (denying private right of action for a victim claiming alleged rendition to a receiving state where there was a likelihood that torture would occur).

109. *Arar*, 537 F.3d at 163.

110. Saadi v. Italy, Eur. Ct. H.R. App. No. 37201/06 (2008). *See also* U.N. Human Rights Comm., *Views of 6 November 2006, Alzery v. Sweden*, Communication No. 1416/2005; U.N. Comm. against Torture, *Views of 20 May 2005, Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

111. Saadi, *supra* note 110.

The Eminent Jurists Panel has aptly described extraordinary rendition as violating "numerous human rights, including the rights protecting individuals against arbitrary arrest, enforced disappearance, forcible transfer, or subjection to torture and other cruel, inhuman or degrading treatment."[112] The Panel further noted:

> When a rendered person is held in secret detention, or held for interrogation by authorities of other States, with no information supplied to family members or others regarding the detention, this constitutes an enforced disappearance, a crime under international law. Where renditions are part of a widespread and systematic government policy, they may also amount to crimes against humanity. A raft of international human rights and international criminal law standards apply to such situations.[113]

If the United States continues to use the practice of rendition, it must ensure that it scrupulously abides by its obligations under international law. If there are substantial grounds to believe, based on past practices, that the receiving country is likely to subject the transferred individual to torture or cruel and inhuman treatment, no transfer should take place. Diplomatic assurances from the receiving country that it will not torture must not suffice.[114]

*E. Targeted Killing*

**1. Trends**

The United States, along with Israel, has faced world-wide criticism for the policy of targeted killing.[115] Those who distinguish targeted killing from extra-judicial executions rely upon the invocation of international humanitarian law instead of human rights law. They also would distinguish targeted killing from assassination, which they would argue involves treachery or perfidy and is the killing of a political leader.[116] The US has continued its use of unmanned Predator drones in the aftermath of 9/11 for launching missiles and targeting suspected terrorists. The case of the US targeting an associate of Osama Bin Laden in Yemen, along with several other suspected terrorists, in November 2002, received wide attention, especially as there was no armed conflict in the area where the attack took place.[117]

As the US pursues its global "war on terror," accounts of such attacks are reported every day. While the critics consider these attacks a violation of

112. Eminent Jurists Panel, *supra* note 6, at 80.

113. *Id.* at 81 (citation omitted).

114. *See, e.g.*, JULIA HALL, NOT THE WAY FORWARD: THE UK'S DANGEROUS RELIANCE ON DIPLOMATIC ASSURANCES (Human Rights Watch Oct. 22, 2008) *available at* http://www.hrw.org/en/node/75603/section/9 (asserting that diplomatic assurances cannot be trusted) .

115. *See generally* W. Jason Fisher, *Targeted Killing, Norms, and International Law,* 45 COLUM. J. TRANSNAT'L L. 711 (2007); Amos Guiora, *Targeted Killing as Active Self-Defense*, 37 CASE W. RES. J. INT'L L. 319 (2005).

116. *See* Guiora, *supra* note 115, at 330.

117. *See* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?,* 16 EUR. J. INT'L L. 171, 171-173 (2005).

international law,[118] others consider them legal and effective,[119] as they satisfy the international humanitarian law requirement of "proportionality." It is also argued that the norm permitting targeted killing as a counter-terrorism tactic is emerging and evolving,[120] and that international lawyers should respond to the likely emergence of this norm by defining "the limits of targeted killing's legitimate use and distinguish[ing] it from assassination and extra-judicial execution so as to protect the strength of those legal rules and norms."[121]

One could justify the targeted strikes by the US in Pakistan on the ground that the geographical region of conflict stretches from Afghanistan to Pakistan, that suspected al Qaeda and Taliban terrorists and their associates often cross that porous frontier, and that Pakistan has implicitly consented to such attacks.

While the Obama administration has prohibited the Central Intelligence Agency's plans to assassinate al Qaeda leaders, the practice of targeted killings is likely to continue.[122]

### 2. Appraisal and Recommendation

Critics are likely to consider the attempt to distinguish targeted killings from either extra-judicial killings or assassinations as nothing more than playing with semantics. The key debatable issue remains the United States' claim of conducting a global war on terror and hence its justification for targeted killing of suspected terrorists anywhere in the world instead of its being limited to the area of hostilities. It is recommended that the Obama administration review its policy authorizing the killing of suspected terrorists outside the geographical region of armed conflict. However, as the Obama administration continues to follow the global "war on terror" paradigm, it is likely to consider suspected terrorists all over the world as valid targets. It is recommended that the administration review this policy with respect to its geographical aspects; and if killings are sought outside the area of hostilities the "proportionality" element be strictly adhered to, and that if terrorists can be apprehended killings should be a last resort.

## III. OTHER PERSPECTIVES

The contributions in this Symposium issue of the *Denver Journal of International Law & Policy* analyze the Bush administration's claim that it was at war against the terrorists, that the war was global, and that, pursuant to the nature of the conflict, the administration followed reasonable policies and practices to

118. *See, e.g.*, Orna Ben-Naftali & Keren R. Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L. J. 233 (2003); Kretzmer, *supra* note 117; 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 (2005)

119. *See, e.g.*, Daniel Byman, *Do Targeted Killings Work?*, 85 FOREIGN AFF. 95 (2006); Asa Kasher & Amos Yadlin, *Assassination and Preventive Killing*, 25 SAIS REV. 41 (2005); Guiora, *supra* note 115.

120. Fisher, *supra* note 115.

121. *Id.* at 751.

122. *See* Mark Mazzetti & Scott Shane, *CIA Had Plan to Assassinate Qaeda Leaders*, N.Y. TIMES, July 14, 2009.

protect the US and its interests. As this symposium took place in October 2008, even in their revised submissions the participants had little opportunity to address the incoming administration's approach.

Based on the Henry and Mary Bryan Distinguished Lecture delivered by Professor Leila Sadat, the lead essay is *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror.* Sadat is highly critical of the Bush administration's labeling of suspected terrorists as "unlawful enemy combatants," which she calls a "euphemistic and novel term." This classification, she argues, has led to the deprivation of "normal" legal protections, such as the presumption of innocence, to those so classified. She asserts that the US violated both international human rights law and international humanitarian law in continuing this practice, and concludes with recommendations for the new administration, several of which the Obama administration has already followed. These include the closing of the Guantánamo facility, the establishment of a task force to evaluate detention policies, mandating humane treatment for all detainees in US custody, recommitment to the adherence to the domestic and international rule of law, and to give serious consideration to ratifying the American Convention on Human Rights.

In *Immigration and Immigration Law After 9/11: Getting it Straight,* Professor James A.R. Nafziger rigorously analyzes the US immigration policy in the wake of the 9/11 tragedy. He studies in detail the contemporary trends in the US among migrants, law enforcement, and public opinion, which he rightly considers are essential to understand before one explores options to shape the future US immigration law and policy. Nafziger suggests that since 9/11, the public agenda in the United States has been primarily concerned with issues related to border security, guest workers, more rigorous sanctions for employing undocumented persons, and expanding the opportunities for legal residency and citizenship. However, he notes that unfortunately Congress has not been able to pass a single comprehensive bill addressing all these concerns. He finds that after 9/11 terrorist threats and the presence of undocumented workers in the US were seen as closely associated and he recommends that the issues of migration be de-coupled from terrorist threats to homeland security.

Professor David Aronofsky and Matthew Cooper, Esq., ask in their essay, *The War on Terror and International Human Rights: Does Europe Get it Right?* After an in-depth study of what they consider to be intractable problems in US litigation regarding the war on terror, they answer that Europe does indeed get it right as it wages its "war on terror" without violating fundamental legal rights. And, if violations occur, European courts provide meaningful redress to the victims of ill treatment by their governments.

The authors study several selected cases in US courts in which suspected terrorists detained were denied fundamental due process rights at trial. They meticulously analyze the case law addressing extraordinary renditions, "enemy combatant" status, warrantless wiretapping and searches, US collaboration with human rights violators in other countries, habeas corpus violations, and military tribunals. They highlight what they consider to be some of the fundamental legal policy problems with the results of US litigation on these issues as they find them

to be inconsistent with both human rights principles and sound national security law principles.

The authors next study pertinent cases before European courts, which are similar to those addressed by US courts. The difference is that European courts, contrasted with their US counterparts, have scrupulously adhered to guaranteeing human rights to the accused. These rights include full investigations, fair trials, no *refoulement* of suspected terrorists to a receiving state where there is a substantial likelihood of torture and other ill treatment, effective investigations of allegations of government abuses, adjudication of allegations of mistreatment, inadmissibility of evidence obtained by coercive interrogations, prohibition of judicially unsupervised electronic surveillance, and finally, adequate legal remedies to victims of abuses. They recommend that the US examine and learn from the European practice.

Professor David Akerson and Natalie Knowlton, Esq., raise a difficult issue in their article *President Obama and the International Criminal Law of Successor Liability.* The question relates to the doctrine of command responsibility, which is codified in international humanitarian law and applied as a form of individual criminal liability by all the international tribunals created since the establishment of the International Criminal Tribunal for Former Yugoslavia. Under the command responsibility theory, a commander could face criminal liability for failing to punish his subordinates who committed the crimes. But what if the commander in question has assumed command after the commission of the crime? That is precisely the issue regarding successor liability—does one who has had no involvement in the crimes, or opposed the policies of her/his predecessor have a duty to punish and face criminal liability for failure to discharge that duty?

The authors analyze the recent developments regarding the current status of successor liability under international law and then review the allegations of torture and unlawful detainment committed by the Bush administration. Under the US Constitution the President as Commander-in-Chief has the superior-subordinate relationship as he has effective control over subordinates. The question is: is President Obama, as Commander-in-Chief, who also has the knowledge that under the Bush administration these alleged criminal acts occurred, criminally liable if he does not punish these subordinates? The authors provide policy arguments both in favor of and against successor liability. They conclude that, while the law is unclear, the call on President Obama to appoint a special prosecutor to investigate crimes allegedly committed during his predecessor's term raises the relevance of this topic.

Professor Upendra D. Acharya addresses the perennial intractable problem of defining terrorism in *War On Terror or Terror Wars: The Problem in Defining Terrorism.* He traces the history of myriad attempts by the international community to find a definition on which there can be consensus and how the failure to do so resulted in a patchwork of substitutes rather than a comprehensive approach. The outcome was the negotiation of thirteen international treaties relating to terrorism in specific contexts—civil aviation, internationally protected persons, maritime issues, nuclear material, plastic explosives, taking of hostages, suppression of the financing of terrorism and of terrorist bombings, safety of the

continental shelf, and violence at airports. These treaties established international standards designating specific criminal acts as terrorism.

Acharya studies in depth these treaties related to terrorism and then reviews the UN General Assembly and Security Council pronouncements of terrorism as a crime in the various resolutions these bodies have adopted. This is followed by a detailed look at how in the post-9/11 era terrorism was transformed into an act of war from an act of crime and what the implications of this change are. He is critical of the war on terror paradigm and concludes that the failure internationally to define terrorism has led to international "lawlessness" and "unilateral vigilantism." He makes a plea to the international community to agree on a broader definition of terrorism which includes the terrorist activities conducted by all states—failed, non failed, and powerful states, as well.

In the final paper, Krishma C. Parsad, Esq., examines the interpretation and application of international law by the United States in its practice of extraordinary renditions in *Illegal Renditions and Improper Treatment: An Obligation to Provide Refugee Remedies Pursuant to the Convention Against Torture.* Her focus is on the principle of *non-refoulement* embodied in the 1951 Refugee Convention and subsequently it is made non-derogable in the Convention Against Torture.

After assessing the pertinent law applicable to renditions—the Convention Against Torture, cases by the Committee Against Torture and other international tribunals, and domestic US legislation, especially US refugee law—Parsad stresses the importance of judicial review for asylum-seekers and strict scrutiny surrounding diplomatic assurances. She calls for the application of human rights treaties by states when they act outside of their respective territories, and specifically for extraterritorial application of refugee law and policy, which provides remedies for people in of being sent to countries that engage in torture and other unlawful treatment.

## IV. CONCLUSION

There is broad consensus that the Bush administration's war on terror led to violations of international human rights law as well as international humanitarian law. There is equally wide consensus that the Obama administration is endeavoring to change the prior policies so as to conform its practices to what the international community would perceive as adherence to the rule of law, both domestically and internationally.

Notwithstanding this shift under the Obama administration, the global "war on terror" nomenclature has serious implications. How far can the US reach in its use of force against suspected terrorists? How long can it detain them? Can or should it render individuals to other countries for interrogation and intelligence-gathering? Can or should it try suspected terrorists in special security courts or military tribunals? How to balance the law enforcement model and the laws of war in order to accomplish the goal of ensuring national security remains as yet unresolved. Similarly, how to ensure both national security and personal liberty (which includes fundamental human rights and basic due process guarantees) has yet to be decided. Given that international terrorism is likely to endure at least for some time in the future, the Obama administration and its successors, as well as

other liberal democratic states, will have to struggle with these questions. The work in progress must not lose sight of the need to strengthen international human rights law and not even inadvertently dilute it.